

This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive record.

Case No: 1291/5/7/18 (T); 1294/5/7/18 (T); 1295/5/7/18 (T)

**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

19 September 2019

Before:

**The Honourable Mr Justice Roth, Hodge Malek QC**

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Trucks Proceedings (Disclosure Hearing)

---

*Transcribed by Opus 2 International Ltd.  
(Incorporating Beverley F. Nunnery & Co.)  
Official Court Reporters and Audio Transcribers  
5 New Street Square, London EC4A 3BF  
Tel: 020 7831 5627 Fax: 020 7831 7737  
civil@opus2.digital*

---

**Day 1**

Thursday, 19 September 2019

(10.30 am)

(Proceedings delayed)

(10.37 am)

Case Management Conference

THE PRESIDENT: I should say at the outset that we have with us two judges of the Spanish Supreme Court, Judge Ignacio Sancho and Judge Rafael Savaza who are on a judicial visit to the United Kingdom. These Spanish judges have been in our Supreme Court hearing how we deal with certain issues of high constitutional importance and they're now with us to see how we handle the perhaps rather less elevated question of disclosure in competition damages cases which I gather is also an issue in Spain.

The visiting judges have been provided with some, I think not all, of the documents but not any passages that are confidential.

Can I say also that the hearing is being live-streamed as before into court 2 so I see the people at the back with no seats, they can go into court 2 and will see what is happening.

We would like to thank all the parties and their advisers for the Redfern schedules and the very hard work that's obviously gone into preparing and completing

1 those and we see there is significant agreement on many  
2 points. Insofar as matters are agreed, then of course  
3 they will be incorporated into orders to that extent by  
4 consent that in due course we'll ask the parties to draw  
5 up.

6 Insofar as the outstanding issues are concerned --  
7 you can sit down, Mr Brealey, for the moment if you  
8 like -- we would like to stress what should be obvious,  
9 namely that there is no right answer in these damages  
10 claims. No one can ever know what prices, both for new  
11 trucks and resale of used trucks, would have been  
12 charged in the absence of the cartel since that is  
13 a hypothetical world that never was. So in the light of  
14 that, the initial burden is on the claimants to satisfy  
15 the Tribunal on the balance of probabilities that the  
16 cartel had an effect on prices and if that hurdle is  
17 passed, then the Tribunal seeks to arrive at  
18 a reasonable estimate of what the effect might have been  
19 and what any pass-on, within the legal principles for  
20 pass-on, might have been, again on the balance of  
21 probabilities but it is just an estimate.

22 A reasonable estimate means, in our judgment, an  
23 estimate that is arrived at in a proportionate manner.  
24 We recognise of course that these are very large claims  
25 but still any estimate will be reached through averages,

1           extrapolations and aggregates, so it does not mean that  
2           every logical avenue that might be relevant can be  
3           explored, or that all data which is arguably relevant  
4           must be provided. The decision as to what is  
5           proportionate is informed by the views of the economic  
6           experts but it's not determined by what data they'd like  
7           to have or what method they would like to use. It is  
8           for the Tribunal to decide.

9           In reaching that decision, we have regard to the  
10          principles of effectiveness, that cases should not be  
11          unreasonably difficult to bring, and proportionality as  
12          set out in Rule 60, sub-rule (2) of the CAT Rules, with  
13          the governing principle in Rule 4 and also the 2017  
14          practice direction on disclosure which reflects the EU  
15          Damages Directive.

16          So it's not just a question of relevance, as some of  
17          the skeletons we've received seem to suggest. That's to  
18          say disclosure will only be ordered in relation to  
19          a specific category of documents if the Tribunal is  
20          satisfied the documents sought are relevant and that  
21          disclosure would be necessary and proportionate. We  
22          will not make an order simply because we think the  
23          documents are relevant to the issues.

24          When a party has stated that it has no documents in  
25          a particular category which we consider is relevant and

1 in principle proportionate to the issues in the case,  
2 then that party should, where appropriate, specify what  
3 searches have been done or are possible. If we are  
4 satisfied that there are no such documents, then at this  
5 stage the request will be refused. If we are not  
6 satisfied there are no such documents, then we will  
7 order disclosure and the disclosing party will need to  
8 state in its disclosure statement what searches have  
9 been made and why it would be unreasonable and  
10 disproportionate to conduct any further searches. That  
11 principle will inform the way we proceed today and  
12 tomorrow.

13 We are also, as you know, seeking to manage these  
14 various cases together to achieve fairness and  
15 consistency. That is consistency between the various  
16 actions and also to avoid an unfair burden on defendants  
17 having to search for documents or databases several  
18 times again before different actions. But consistency  
19 will also reflect any relevant differences between the  
20 actions; some claims are different in scope, the nature  
21 as to the alleged pass-on differs between some of the  
22 actions and so on.

23 We've also made it clear at a previous CMC that  
24 disclosure will proceed by stages and not all at once.  
25 That means not that we just set stages now and order

1           what will be in stage 2, what will be in stage 3; it  
2           means that after the first stage or then the second  
3           stage, the party receiving disclosure can assess those  
4           documents and data and then frame subsequent requests in  
5           the light of and informed by the analysis of those  
6           documents.

7           On that basis it's appropriate for a party, an  
8           expert to assess the information they have received  
9           before making the request for stage 2 and not just get  
10          a huge mass of documents and then decide which it finds  
11          most useful.

12          Further, it was our understanding that this hearing  
13          with the time allowed of two days was on the basis that  
14          we are essentially addressing quantum disclosure, what  
15          I think has been referred to by some witnesses as  
16          quantitative evidence. We are not inclined, as things  
17          stand now, to consider also what's been described as  
18          qualitative disclosure, that is to say contemporary  
19          documents which require searches of a potential whole  
20          host of individual custodians. Some overriding  
21          management and strategic documents which can readily be  
22          obtained may be susceptible to an order at this hearing  
23          but we doubt that it would be appropriate to address all  
24          the requested categories in some of the applications  
25          before us.

1           As we understand it, that was the approach that was  
2           adopted first in the *Royal Mail and*  
3           *British Telecom* claims and also in the consent orders in  
4           the VSW actions which all the defendants to those  
5           claims, apart from Daimler, have agreed to. If someone  
6           wishes to argue otherwise, we shall of course hear that  
7           argument.

8           It also seems to us, subject to argument, that  
9           certain issues can sensibly and proportionately be held  
10          over until after the main judgments and that may apply  
11          to tax and interest. We do appreciate what's said about  
12          tax and its importance and the role of capital  
13          allowances which several of the witness statements have  
14          addressed. But nonetheless it only begins to be  
15          significant once the Tribunal has established whether  
16          there was any overcharge at all and, if so, how much.  
17          That doesn't mean, however, that some basic and readily  
18          accessible documents concerning tax might not be  
19          disclosed now but some of the requests we've seen under  
20          the tax category seem quite far-reaching.

21          We also do appreciate that there is concern among  
22          I think in particular claimants if there is no  
23          opportunity to come and seek further disclosure for  
24          potentially six months. So what we have in mind is that  
25          either Mr Malek or I will be available in principle on

1 one Friday each month to hear further applications,  
2 either matters that are held over or new matters that  
3 may arise for disclosure and any party wishing to make  
4 such an application can do so with an updated Redfern  
5 schedule, extract from a Redfern schedule and no more  
6 than two witness statements, which I think has been the  
7 approach adopted for this hearing, to allow one from an  
8 expert and an exhibit of no more than 25 pages. We can  
9 then have a hearing with a single judge of, we would  
10 hope, no more than half a day to address it.

11 We hope that will enable further requests for, for  
12 example, qualitative disclosure as I've described it to  
13 be pursued. We hope that by instituting that  
14 arrangement, that will give some comfort to those who  
15 are seeking vast categories of disclosure today, which  
16 various categories within that we doubt we'll reach or  
17 some of the receiving parties of those applications say  
18 they haven't really had time to address.

19 On that basis, we shall proceed. We have indicated  
20 that we think it's sensible first to address the  
21 temporal scope of disclosure which is in issue I think  
22 across all actions, then to consider what we should do  
23 about tax, then to turn to the Wolseley and Daimler  
24 applications as against Wolseley because they are,  
25 I think, subject to the temporal issue, more confined.



1 We hope that will enable the legal representatives of  
2 Wolseley then to depart if they wish and we'll then turn  
3 to the other two actions. So that's the course we  
4 intend to follow.

5 We start with temporal disclosure. We've seen  
6 everything that has been said, we've had an updated,  
7 Mr Brealey, skeleton argument from you this morning.  
8 This is the provisional view, and I stress provisional  
9 because we haven't heard, that that we think may be  
10 appropriate.

11 Dealing first with overcharge disclosure from  
12 defendants, we've seen all the argument about  
13 31 December 2016 or 31 December 2018 as the end date.  
14 In *Royal Mail and BT*, for reasons that just  
15 related I think to the timing of the hearing but the end  
16 date determined was 30 September 2017, we think that is  
17 a reasonable post-cartel period, allowing for all that  
18 is said about run-off, Euro emissions, et cetera, we've  
19 seen all that, but the additional nine months in 2017  
20 should not be particularly difficult to access because  
21 it's fairly recent.

22 We would have thought that for the present that  
23 should be sufficient, subject to two qualifications.  
24 Daimler in the Wolseley action, given that the consent  
25 orders in the Wolseley action provide for disclosure to

1 31 December 2016, we think if Daimler wants to restrict  
2 its disclosure in that action to 31 December 2016 for  
3 present purposes, that's reasonable because that's what  
4 all the other defendants have agreed with Wolseley's  
5 solicitors and legal representatives to do, but we do  
6 not preclude a further disclosure order in all VSW  
7 actions up to 31 December 2017 in due course to be  
8 consistent across the board.

9 We should say that allowing a later end date than  
10 many of the defendants, other than DAF, have argued for  
11 will also inform our approach in due course to Ryder's  
12 requests for wider geographical product scope disclosure  
13 because we think that gives quite a long post-cartel  
14 period. So that's the end date on overcharge.

15 The start date is much more difficult. This was, as  
16 all the claimants stress, a very long-lasting cartel and  
17 the period 2015/16/17 is very far away from 1997 when  
18 the decision states the cartel began.

19 I'm sorry, I omitted to say on the end date that we  
20 noted that there is a particular problem faced by  
21 Volvo/Renault of the change in its database which it  
22 says makes post-31 December 2016 data not comparable  
23 with the previous years. Again, at this stage, we would  
24 accept in principle that Volvo/Renault can have  
25 a 31 December 2016 end date but that does not preclude

1 the claimants coming back, if they notice that the  
2 further nine months in the other actions materially  
3 changes the picture, saying, well then, Volvo/Renault,  
4 you've got to provide those nine months too. But we  
5 think as a sensible way to proceed they should have that  
6 special exception.

7 So I resume what I started to say about the start  
8 date. We also note that DAF has agreed in *Royal*  
9 *Mail and BT* to give an earlier start date of  
10 1 January 1994, in other words three years pre-cartel.  
11 Of course getting before as well as after data is in  
12 principle relevant and can be useful. That is quite  
13 well established and obvious. One doesn't need to read  
14 the Commission's guidelines to appreciate that. But  
15 there are particular problems when the period has been  
16 so long and the data is therefore so much harder to  
17 access and it's likely to be in a state that's not very  
18 easy to analyse or very incomplete.

19 So we go back to what I said about taking it in  
20 stages. What we're minded to do, subject to any  
21 submissions we hear, is to say that DAF is providing it  
22 from 1 January 1994. The other defendants or  
23 contribution parties, the other OEMs, can for now  
24 provide it from 1 January 1997. If analysis of DAF's  
25 data suggests to the claimants' experts that actually,

1 looking at three years pre-cartel really produces  
2 a significantly higher overcharge, then every other  
3 defendant should be aware that we will be open to  
4 applications saying, "You must now go back and, despite  
5 the cost and despite the practical problems, also  
6 provide the best data you can from those three years".

7 At the end of the day one has to recognise these  
8 defendants have engaged in this long cartel and are not  
9 to be excused from the burden of disclosure just because  
10 their conduct lasted so long. But there are particular  
11 problems in this case and that's why we think that may  
12 be a sensible way forward.

13 It is also possible of course that DAF's data is so  
14 incomplete it can't be properly analysed and the experts  
15 say that's a reason why we want to look at somebody  
16 else's. But then we can focus on more detail on what  
17 are the actual difficulties and costs of the earlier  
18 period. Some defendants have gone into some detail  
19 about that; others have given rather broad-brush  
20 assertions about difficulty without really explaining  
21 what it is. At that point it would have to be  
22 substantiated.

23 So that's, at the moment, subject to what any party  
24 wants to say, the approach we thought we would take on  
25 temporal scope of the defendants' disclosure. Again

1           there is a particular problem put forward by  
2           Volvo/Renault to do with its change of databases. That  
3           I think is Mr Hoskins, isn't it? Is that right?

4       MR HOSKINS: Yes.

5       THE PRESIDENT: You have a TRITON database that goes pre --  
6           for the earlier period. Subject to what the parties say  
7           who are claiming against you, which I think is both  
8           Dawsongroup and Ryder, we would for now be prepared to  
9           say that the Volvo disclosure starts in is it 2003 and  
10          the Renault disclosure in 2009 but you will be required  
11          to complete the process that you say is under way of  
12          interrogating what I think is referred to as the TRITON  
13          database to explain what data you could provide for the  
14          earlier years. So that's not as it were a get out of  
15          jail free card for the period going back to the start of  
16          the cartel.

17       MR HOSKINS: Not looking for a get out of jail card, that's  
18          absolutely fine.

19       THE PRESIDENT: I think on that, then we'll come to pass-on,  
20          which is a different issue, but it may be sensible if we  
21          ask all the parties, starting with the claimants, to --  
22          and if you wish us to rise so you can take instructions  
23          we are ready to do that. There's a lot of nodding.

24                Let's do it both at once. What we're minded to do  
25          with pass-through or pass-on, we think the same start

1 date, that's to say 1 January 1997, a later end date  
2 because trucks bought in the cartel period would be  
3 resold after the cartel period, but we don't see at the  
4 moment why it's necessary to go on to the point where  
5 every last truck that was bought in the cartel period  
6 was resold.

7 This case is not going to be -- involve  
8 a determination of damages each individual truck by  
9 truck or we would be here for 20 years. It's going to  
10 be across the purchasing and if it becomes clear that  
11 the average resale price has gone up by 3%, then that  
12 will be applied even though some of the trucks have not  
13 yet been resold. So on that basis we think an end date  
14 of 31 December 2018 should be sufficient. We're not  
15 attracted to the idea of ongoing disclosure, I think  
16 every six months was being suggested by some party. So  
17 that's what we propose for pass-on on sale of trucks.

18 There was a lot of nodding. Would it be helpful if  
19 we rose for ten minutes and you can take instructions?

20 (11.01 am)

21 (A short break)

22 (11.20 am)

23 THE PRESIDENT: Yes, Mr Brealey.

24 MR BREALEY: Sir, if I can kick off.

25 THE PRESIDENT: Could you for the transcript, as in previous

1           hearings, just identify, each counsel, your name and  
2           whom you represent.

3       MR BREALEY: Of course. My name is Mark Brealey, I am the  
4           counsel for Ryder.

5           Sir, there's lots to digest in that introduction for  
6           the next two days. On the temporal side, we are  
7           prepared to accept the proposal and we won't push back  
8           but can I make two points by way of clarification?

9       THE PRESIDENT: Yes.

10       MR BREALEY: The first is we would urge the defendants that  
11           today is not a get out of jail card and they should  
12           actually continue their investigations. You'll have  
13           seen what we said in the note.

14       THE PRESIDENT: Yes.

15       MR BREALEY: Rather like Volvo and TRITON, they should at  
16           least continue to see what they've got.

17       THE PRESIDENT: Yes.

18       MR BREALEY: The second point is, and I think we'll do this  
19           as we go along this afternoon and tomorrow, we would  
20           like a little bit more help from the Tribunal if  
21           possible to assist NERA contesting the DAF data. In  
22           particular we would like sight of the defendants'  
23           management accounts and documents relating to Euro II.  
24           Those two categories would assist NERA and I can make  
25           those submissions as we go along on the relevant

1 categories.

2 THE PRESIDENT: Just for my note, the two were -- can you  
3 repeat them?

4 MR BREALEY: Management accounts and documents relating to  
5 Euro II. It may well be that once I've taken further  
6 instructions we would like some documents relating to  
7 price-setting but the priority for us is management  
8 accounts and Euro II costs.

9 THE PRESIDENT: Yes. Well, we'll come to that on your  
10 application.

11 MR BREALEY: Management accounts should be there. Clearly  
12 that will have a lot of data that will assist Mira when  
13 it is just looking at the Excel spreadsheets.

14 THE PRESIDENT: Yes. We will hear you further on that; we  
15 won't deal with that now.

16 MR BREALEY: No, that's what I thought but in principle --

17 THE PRESIDENT: In principle, subject to the qualification  
18 that the defendants should recognise that you may seek  
19 the earlier years and they should continue to  
20 investigate what they've got and how readily it can be  
21 obtained.

22 MR BREALEY: It may well be likely but if we do come back,  
23 we don't want just to be faced with the same "It would  
24 be costly but we haven't completed our search".

25 MR MALEK QC: One of the things I've noticed is that there



1           are a lot of assertions both ways saying things are  
2           costly but we haven't got any cost calculations for  
3           anything --

4       MR BREALEY: That's the point I made in the note.

5           Also there are vague assertions about the utility.  
6           We don't know about that at all and that goes to the  
7           point we make in the note about, well, it may not be in  
8           the ideal regression model but you can do an averaging  
9           of prices before and after. That will assist NERA when  
10          it's trying to number-crunch the raw data in the Excel  
11          spreadsheets that has been given to us by DAF.

12       THE PRESIDENT: Yes, thank you.

13       MR MALEK QC: I think for these ongoing hearings, I think it  
14          would be helpful that, if a party is going to say it is  
15          going to be very expensive, that somehow they try to  
16          quantify that and say "If we have to do search X, it's  
17          going to cost us X to search and produce the documents",  
18          that would be very helpful.

19       MR BREALEY: Yes.

20       THE PRESIDENT: Yes, Mr Ward.

21       MR WARD: Tim Ward for Dawsongroup.

22          Sir, we gratefully accept your Lordship's proposals  
23          save in respect of Volvo/Renault. We are very concerned  
24          about the slow progress that Volvo/Renault are making in  
25          identifying the relevant repositories of documents.

1 Just to remind the Tribunal, this claim was issued in  
2 December 2017. We know they're facing many, many other  
3 claims so examining this data will be very important not  
4 just for us and, as the Tribunal knows, this hearing is  
5 actually our third time of asking for economic  
6 disclosure from Volvo/Renault. If we go back in time to  
7 the first witness statement served by Mr Frey in  
8 November 2018, that witness statement explained what  
9 were then described as "initial scoping exercises"  
10 including identifying that the two databases they are  
11 still offering had the serious temporal limitations,  
12 because Partner which is the Renault database only goes  
13 back to 2009, so that's two years of the cartel, the BNA  
14 database, which is Volvo, only goes back to 2003. But  
15 the point that I'm pressing upon you is that these  
16 limitations have been known for a really long time by  
17 Volvo.

18 Then this new database, TRITON, that is mentioned  
19 was alluded to in correspondence but the first time  
20 there was an offer to actually search it was  
21 October 2015 -- sorry, August 2019, I'm so sorry. That  
22 was placed in language of, "Well, at some future second  
23 stage we might be able to search it".

24 Then Mr Frey's witness statement for this hearing  
25 which talks about progress on the Volvo side of the

1           business, I'll just read it to save you looking it up,  
2           it's very short, it's paragraph 85 of Frey 3 and, anyone  
3           who is looking for it, it is in common bundle C, tab 9,  
4           page 24.

5           THE PRESIDENT: Just a moment. We've got a lot of bundles.

6           MR WARD: C, tab 9, page 24 {COM-C/9/24}.

7           THE PRESIDENT: Page?

8           MR WARD: Internal 24 and bundle 24.

9           MR PICKFORD: Sorry, we don't have a working Magnum system  
10           at the moment, at least I don't. I have prepared for  
11           this hearing on the basis that I would be using Magnum,  
12           not hard copy bundles, so I for one need Magnum to work.

13          THE PRESIDENT: Yes, does someone know? What is the  
14          position? (Pause)

15                 I'm told it crashed while we adjourned. I wonder --  
16                 obviously that's quite unsatisfactory. Mr Pickford, as  
17                 this point concerns only Volvo, are you content --

18          MR PICKFORD: For the moment I'm certainly content but it  
19                 may be that we run into some trouble.

20          THE PRESIDENT: Obviously we will need to rise when we get  
21                 on to other things.

22                 Mr Hoskins, are you disadvantaged by that?

23          MR HOSKINS: No, because I'm a dinosaur.

24          THE PRESIDENT: No comment.

25          MR WARD: For everybody's benefit anyway, I was going to

1 just read out the two sentences of paragraph 85 where  
2 Mr Frey says:

3 "For completeness, I confirm that Volvo/Renault have  
4 also attempted to identify a predecessor system to BNA  
5 recording details of VT UK transactions prior to 2003.  
6 These investigations are at an earlier stage than the  
7 investigations of the TRITON system."

8 That's a witness statement filed almost two years  
9 after the commencement of these proceedings, so our  
10 concern is, with respect, that this is just too slow and  
11 what the Tribunal has proposed today does not provide  
12 any procedural discipline to encourage Freshfields to  
13 take a slightly more proactive approach to this  
14 question.

15 Of course, as the Tribunal will have seen, our  
16 primary submission is they should just make  
17 proportionate and reasonable searches in the usual way  
18 against all of the disclosure categories. If their  
19 disclosure is limited in this sense, this is a radical  
20 reduction in the temporal scope of what we will receive  
21 against a 15-year cartel. Of course the Tribunal's  
22 observations this morning has recognised the force and  
23 the need for a long period of information, given the  
24 nature of this cartel, so our primary submission would  
25 be that Volvo/Renault should not get special

1 dispensation, but our secondary submission would be, at  
2 the very least, what the Tribunal should do is impose  
3 a procedural deadline to bring these researches to  
4 a resolution so that we can have detailed witness  
5 statements and interrogate in the usual way what would  
6 be appropriate searches given the material that they  
7 have available.

8 Our second point about Volvo/Renault but it is  
9 distinct so I'll pause there --

10 THE PRESIDENT: Yes. You're talking about the TRITON  
11 database which, as I understand it, was Renault but  
12 there's also, paragraph 85, there's another database  
13 I think, which is Volvo.

14 MR WARD: Yes.

15 THE PRESIDENT: Presumably the same observations apply.

16 MR WARD: Absolutely but it's really disturbing that what's  
17 put in paragraph 85 is so equivocal. "These  
18 investigations are at an early stage." Why are they at  
19 an early stage? We're nearly two years into this  
20 litigation.

21 THE PRESIDENT: Yes, just a moment. (Pause)

22 As I understand it, Mr Ward, your observations are  
23 directed to the start date. You're not pushing -- not  
24 seeking to dissent from the end date at the moment --

25 MR WARD: Actually we're content with the overall end date

1           that you've indicated, sir, with all of the caveats that  
2           you built into it but what we're not content with again  
3           is special dispensation --

4       THE PRESIDENT:  No, that point you've made.  I just want to  
5           make clear it's the start date --

6       MR WARD:  Yes.

7       THE PRESIDENT:  Well, Mr Hoskins, what do you have to say?

8       MR HOSKINS:  I think that was more of a complaint than  
9           a submission that the Tribunal's proposed dates for  
10          Volvo/Renault should be changed, because I can assure  
11          Mr Ward and the Tribunal that those behind me are  
12          working very hard on this matter and there's a lot of  
13          people -- there's a human aspect to this -- not getting  
14          much sleep.

15                 But in relation to Volvo/Renault we do have what I  
16                 think is a very particular position because, as you have  
17                 seen from the evidence, Volvo/Renault have identified as  
18                 potentially relevant over 3,500 various central and/or  
19                 local systems, databases, software programs and/or  
20                 applications across the networks.

21                 Remember, when you're trying to identify what's  
22                 relevant, you have to find people in the business to  
23                 tell you what there is and what it might contain.  In  
24                 order to see what's in them you have to find someone  
25                 who, particularly if it's an old archive system, can

1 actually get it working for you.

2 Now, it's not the case, and I don't want you to have  
3 the impression, that Volvo and Renault have identified  
4 BNA and Partner and now TRITON and are doing nothing  
5 else. The work to investigate what other sources are  
6 potentially relevant and accessible is ongoing round the  
7 clock. I can absolutely assure you of that. It's not  
8 a get out of jail card where we're just sitting, "Good,  
9 we've got away with these three databases", but you'll  
10 understand, I hope, the scale of the difficulty that's  
11 involved in that.

12 Now, let me make this suggestion because  
13 Volvo/Renault is where it is, to be perfectly honest.  
14 There's no magic wand. If the Tribunal was to make  
15 an order saying go back to 1994, it doesn't solve the  
16 problem. The problem is what it is. You've indicated  
17 that we should give an update on where we are with  
18 TRITON and it seems that it would be sensible for us at  
19 the same time to give an update on where we are  
20 generally with the work we're doing. That will satisfy  
21 Mr Ward, hopefully, at least he'll see that the work is  
22 being done and what's being done, will satisfy the  
23 Tribunal and insofar as there are any disputes that need  
24 to be crystallised, sir, you've said that you've put  
25 aside these monthly meetings. We're perfectly happy to

1 show that we are doing work and what we're doing but  
2 that doesn't alter the irreducible problem of 3,500  
3 potentially relevant databases, some of which are  
4 historic.

5 THE PRESIDENT: I think the thrust of Mr Ward's submission  
6 is that sometimes having a deadline set by the court can  
7 speed up the work. Clearly you can't disclose it now  
8 but given the time you've been working on it, it might  
9 be appropriate either to fix a date and certainly, it  
10 seems to us, we could fix a date relatively soon where  
11 either a deponent from, if it's Frontier Economics,  
12 Frontier, or potentially an IT expert you've engaged can  
13 actually specify where they've got to with these two  
14 databases and when the work can be completed because at  
15 the moment it's rather open-ended, and that's not  
16 satisfactory.

17 MR HOSKINS: I completely understand that. Part of the  
18 problem is we've given dates for Partner and BNA because  
19 that's contained in the VSW consent order, and that's  
20 29 November off the top of my head, to actually provide  
21 the disclosure from BNA and Partner. That will include  
22 a significant number of data points in relation to  
23 I think it's 85,000 individual truck sales.

24 THE PRESIDENT: Yes, but it won't cover a long period of the  
25 truck sales.



1 MR HOSKINS: That's right. So that will cover that period,  
2 so that is coming soon and that will give DG's experts  
3 a lot of information to digest.

4 TRITON, it seems sensible that we should report as  
5 to where we've got to and give a date of what we think  
6 is going to be available from it and when by. We need  
7 some time to do that. Obviously we're very happy to do  
8 that.

9 If there's a more general concern, it seems to me  
10 sensible -- I haven't taken instructions on this so  
11 I hope nobody shoots me -- it seems sensible that we can  
12 and should give a report on generally what work has been  
13 done in terms of trying to narrow down the scope, in  
14 particular these 3,500 other potential sources which --  
15 it's not our fault. That's just the way the business is  
16 organised.

17 I understand the concern. I understand a certain  
18 desire to hold our feet to the fire but it seems to me  
19 reporting is the way to do that.

20 THE PRESIDENT: Yes, just a moment. (Pause)

21 Well, having heard that, Mr Ward, what we have in  
22 mind is to order -- we take your point about  
23 paragraphs 84 and 85, to make an order that  
24 Volvo/Renault provide a statement from an IT expert or  
25 equivalent, either in-house or external, by a certain

1           date saying what has been achieved regarding TRITON and  
2           when that work will be completed and what's been  
3           achieved regarding identifying an earlier pre-BNA  
4           database for Volvo and again by what date, and that they  
5           provide a witness statement specifying what's been done  
6           and when it will be completed.

7           MR WARD: That would be very welcome, sir. We would  
8           respectfully suggest that date should be a date soon  
9           because things have dragged on a long way without much  
10          progress in the last year.

11          THE PRESIDENT: On the basis that there can be hearings on a  
12          Friday morning a month, if that's done by a date  
13          in October, then it can be pursued at a November  
14          hearing.

15          MR WARD: We would welcome that.

16          MR HOSKINS: Sir, I would ask for two months, partly because  
17          there's work to be done on cleansing the BNA and Partner  
18          information and TRITON is an archive system. There is  
19          a problem, if you make this report too early, you may  
20          get less in the report and for the sake of a month  
21          I think you'll get a better report with more information  
22          if it's two months' time. The date I'd suggest is  
23          providing the BNA disclosure is 29 November, my  
24          suggestion is we do a report then as well.

25          THE PRESIDENT: Well, we think we will take two months and

1           take it from today, or tomorrow, 15 November.

2       MR HOSKINS: Can I say as well, I doubt it will be from an  
3           IT expert, it will probably be from the solicitors  
4           and/or Frontier but we'll possibly be consulting through  
5           them but the actual report --

6       THE PRESIDENT: Yes. Well, it's not part of the order that  
7           it should be but it would be informed by and with  
8           details of where you're at and when it will be  
9           completed.

10       MR HOSKINS: Absolutely.

11       THE PRESIDENT: Then Mr Ward, in a December hearing,  
12           a Friday hearing, can push back against that if it's  
13           unsatisfactory.

14       MR HOSKINS: That's completely in our interests as well, so  
15           I'm grateful.

16       MR WARD: May I move to my other point which was also on  
17           Volvo/Renault and this was about the dispensation you  
18           were minded to grant as against the end date for  
19           overcharge disclosure. You rightly observed that  
20           Volvo/Renault had made a point about a changing cost  
21           accounting, and they say that -- I'm reading from the  
22           Redfern schedule -- they changed their cost accounting  
23           methodology in January 2017 and what they say to quote:  
24           "[...] there is currently uncertainty as to whether  
25           it will be possible to compare post-2017 data in a clear

1 or reliable way with pre-2017 data [...]"

2 Again the Tribunal is faced with an unresolved  
3 picture because they don't say that they have tried,  
4 they don't say what the limitations would be. Mr Biro,  
5 their expert, says adjustments would be needed but he  
6 doesn't say it would be particularly difficult.

7 But there are two overriding further points that  
8 I want to emphasise. Firstly, cost accounting is  
9 irrelevant to large amounts of the overcharge schedule.  
10 It certainly bears on some of it but quite a lot of it  
11 is really about the trucks themselves so it has no  
12 bearing on that.

13 Secondly, in distinction from the earlier issue,  
14 there is no suggestion at all that this is either  
15 difficult or expensive to extract. So if it could at  
16 least be extracted, we could see what we were able to  
17 make of it, what adjustments might be needed and we  
18 might even be able to engage in a dialogue with  
19 Volvo/Renault and see if between us we can resolve how  
20 these adjustments could be made.

21 But we've come to the Tribunal today without any  
22 real evidence at all about whether this poses any  
23 genuine difficulty or the scope to which it affects  
24 categories within the schedule. So, in my respectful  
25 submission, again the appropriate thing to do is to

1 order disclosure of the same time period as the other  
2 defendants and then, once we have the material, we can  
3 work out what best use can be made of it.

4 MR HOSKINS: I don't accept that's a fair characterisation  
5 of the evidence that we have provided on this. Can  
6 I ask you to look at Mr Biro's report, please, bundle  
7 {COM-C/10/21}. Can I ask you to read paragraph 62 and  
8 I ask you to note that there's not a speculation that  
9 there may be a problem. Mr Biro is saying there is  
10 a problem.

11 MR WARD: To quote, "[...] there may also be difficulties  
12 [...]"

13 MR HOSKINS: If you read on you'll see what he says --

14 THE PRESIDENT: Well, let us just read it, please.

15 MR HOSKINS: Thank you.

16 MR MALEK QC: When you say from 2017, are you saying from  
17 1 January 2017?

18 MR HOSKINS: Yes, it's at the start of 2017.

19 One thing to note is that the second sentence is  
20 unequivocal:

21 "Accounting changes that were applied from 2017 mean  
22 that data from this year onwards which appears in the  
23 sales and accounting systems is not directly comparable  
24 with earlier data, particularly with respect to how cost  
25 information is recorded."

1 MR MALEK QC: Do you have any difficulty in Mr Ward's client  
2 seeing examples of what goes on and what happens in  
3 2017, not see all the data but see samples of data let's  
4 say to January, so they can see whether, is this stuff  
5 that we can actually make use of or is it really a waste  
6 of time?

7 MR HOSKINS: That's why I come to the next paragraph  
8 I wanted to show you if I may which is at page 25,  
9 paragraph 80 {COM-C/10/25}. It's in particular the last  
10 few sentences.

11 The problem that Mr Biro is explaining is if you do  
12 what Mr Ward says and say "Here's the information" and  
13 their experts start plugging that information into the  
14 beginnings of regression models, you're likely to go up  
15 the wrong alleyway because you'll be using data that's  
16 not comparable. In order to understand the post-2017  
17 data there's a whole other exercise to be done which is  
18 to explain what the differences are and to analyse what  
19 the effect of those changes is and then to make  
20 adjustments in order to render it comparable.

21 So with all due respect to Mr Ward, what he's asking  
22 for is actually detrimental to them because they will  
23 get information without any context, without any ability  
24 to judge to what extent it's comparable and, if they  
25 start using that data, they'll go up a blind alley.

1           That's the problem.

2       THE PRESIDENT: Mr Ward, isn't the reality this: your  
3           clients have sued not just Volvo/Renault but also  
4           Daimler and DAF. You will get data from Daimler and DAF  
5           up until the end of September 2017 and you'll conduct  
6           your analysis that way. If through the cut-off, if it  
7           is a cut-off, of 31 December 2016 applied to Volvo,  
8           Volvo Trucks end up with a lower overcharge, you can  
9           legitimately submit, well, that's because they have  
10          failed to provide later data.

11                 The same trend of increase, you can submit, should  
12          be read across so that whatever was happening on an  
13          analysis of DAF Trucks in 2017, it's to be assumed that  
14          you'll extend the Volvo prices in the same way. Volvo  
15          will be in no position to say, no, that's unfair because  
16          they haven't provided any data. The only thing you're  
17          precluded from doing is saying well, Volvo would have  
18          been even worse than the other two.

19       MR WARD: Sir, with the greatest respect, that is of course  
20           a possibility but what we are concerned about here is  
21           the fragmenting of the data set. We know, for example,  
22           we will not have -- at least initially -- all of the  
23           pre-cartel data from all of the different parties and if  
24           we lack pre-cartel data from all the parties, the  
25           post-cartel data becomes particularly important. The

1 concern we have is simply to have the best available  
2 evidence in order to demonstrate the overcharge.

3 Inevitably the Tribunal will end up looking across  
4 the defendants who no doubt will, to some extent, make  
5 common cause in their arguments. What we're asking for,  
6 in my respectful submission, is simple to be delivered  
7 and would enable the claimants to evaluate its  
8 usefulness, not Volvo/Renault to evaluate its  
9 usefulness.

10 It has not said it's difficult to provide.  
11 Mr Hoskins said, well, you won't really know what to  
12 make of it. Why cannot Volvo/Renault be directed also  
13 to provide a brief explanation of what these changes  
14 are? It is not anywhere in this evidence.

15 If at the end of the day it is of no use to my  
16 clients and it cannot be read across, then they can of  
17 course take the course that my Lord has suggested would  
18 be appropriate, but it should, in my respectful  
19 submission, be for my clients to decide if that's the  
20 case.

21 MR HOSKINS: Sir, there's a new --

22 THE PRESIDENT: Just a moment. (Pause)

23 Can I ask you, Mr Ward, what proportion of the  
24 Dawsongroup trucks are Volvo/Renault?

25 MR WARD: May I just take instructions? I don't know.



1 MR HOSKINS: I can give you the figure for Renault if that  
2 helps.

3 THE PRESIDENT: Just a minute.

4 MR HOSKINS: Sorry, I was going to give you the figure.

5 THE PRESIDENT: I know but Mr Ward is taking instructions.

6 MR WARD: 40-50% of the claim is Volvo/Renault, of which the  
7 Renault part is by far the smallest. It is  
8 predominantly Volvo, so I'm told.

9 THE PRESIDENT: Yes, but 40-50% of the total claim.

10 MR HOSKINS: The Renault claim is for 226 trucks, it's de  
11 minimis.

12 THE PRESIDENT: Yes but this new database covers both,  
13 doesn't it? The 2017?

14 MR WARD: Yes, it's post-merger.

15 THE PRESIDENT: Post-merger.

16 MR HOSKINS: No, there are still two databases. BNA and  
17 Partner are separate still.

18 THE PRESIDENT: The changes that you're talking about, it's  
19 not that there's a new database but both the Partner and  
20 the BNA database have both been changed, is that  
21 what's --

22 MR HOSKINS: Well, the reporting of costs has changed.

23 THE PRESIDENT: Yes.

24 MR HOSKINS: So there are still two separate databases: BNA,  
25 for Volvo, the predominant part of the claim against us;

1           there's Partner which is de minimis so I suggest we  
2           focus on Volvo, and the question we're faced with is,  
3           should we provide disclosure of the post-2017  
4           information and the new application that's been made and  
5           an explanation of the cost change or the accountancy  
6           changes. That's the new application.

7           THE PRESIDENT: Post-2016, yes? For the first nine months  
8           of 2017? Yes. Can you provide -- because it's not very  
9           clear what the changes are and how significantly that  
10          impedes any use of the data and what exactly are the  
11          adjustments that need to be made. It's described at  
12          a high level of generality and given the significance of  
13          Volvo trucks to Dawsongroup's claim and that there's no  
14          pre-cartel period disclosure and at the moment you are  
15          not giving any pre-2003 disclosure, it seems reasonable  
16          to us that Dawsongroup should have a much clearer  
17          understanding really of what is the problem and how  
18          difficult is it.

19          MR HOSKINS: I'm happy to do that, sir, because it  
20          progresses matters.

21          THE PRESIDENT: Yes, so I think we'll require you to do that  
22          and you can do that fairly quickly I would have thought.  
23          You can do that within two weeks.

24          MR HOSKINS: I think we would ask for four weeks, sir,  
25          partly because --

1 THE PRESIDENT: Very well, four weeks.

2 MR HOSKINS: Thank you.

3 THE PRESIDENT: To explain what are the changes, what  
4 adjustments do you say would need to be made.

5 MR HOSKINS: I think it may not be possible to do definitive  
6 adjustments but we will express an opinion on it.

7 THE PRESIDENT: Yes, and it may be that -- and that's not  
8 part of our order but we throw that out, as it were --  
9 that Mr Biro and the Dawsongroup --

10 MR WARD: Mr Harvey, sir.

11 THE PRESIDENT: Mr Harvey, thank you -- might, if there is  
12 then still concern in Dawsongroup, should have a without  
13 prejudice meeting to discuss how that data might  
14 sensibly be interrogated.

15 MR WARD: Sir, thank you. Would it be possible also to  
16 order that at least a sample of the data is provided  
17 because that will make it much easier for my clients to  
18 understand the validity of the concerns?

19 THE PRESIDENT: This is -- yes, I mean that probably is  
20 sensible.

21 MR HOSKINS: Can I take instructions on that, please, sir?

22 THE PRESIDENT: Yes. (Pause)

23 MR HOSKINS: Sir, it's not as easy as it sounds, I'm told,  
24 because there has to be a bespoke computer program  
25 written to obtain extracts from the systems. I suggest

1           that something -- I understand what Mr Ward has asked  
2           for, I understand why the Tribunal wants it to happen,  
3           would you just give us a bit more time to investigate  
4           how we might do that? We will liaise with Dawsongroup  
5           and we will try to work out a way in which we can  
6           provide a sample for a scope they're happy with and  
7           a timeframe they're happy with.

8           THE PRESIDENT: I think if we say best endeavours to provide  
9           a sample and we will see how you get on.

10          MR HOSKINS: Thank you, sir.

11          THE PRESIDENT: By 17 October. It's a month.

12          MR HOSKINS: I think we will struggle from what I've just  
13                been told.

14          THE PRESIDENT: I don't quite understand why and you can  
15                explain that best -- if your best endeavours means you  
16                can't do it --

17          MR HOSKINS: I was only going to make the point that we make  
18                that report at the same time as the other one because if  
19                you make this report too early, you will get less; if  
20                you ask for this report in two months you will get more  
21                and it will be more useful.

22                It might not look like it, I'm actually trying to  
23                make sure things move along. I'm not trying to delay  
24                matters, I'm trying to make sure we do things at times  
25                that give you a better explanation rather than simply

1           buying time. You will get more in two months than you  
2           will in one month.

3           THE PRESIDENT: If we were to give you until 15 November,  
4           then we would expect a sample to be provided.

5           MR HOSKINS: I understand that and if we can't we'll have to  
6           have a very good reason why not.

7           THE PRESIDENT: Yes.

8           MR HOSKINS: I understand that. As long as you understand  
9           that if we do come up with a difficulty we'll explain  
10          why.

11          THE PRESIDENT: Yes, we'll say best endeavours to include an  
12          appropriate sample and we'll give the same date then,  
13          15 November.

14                 Yes, who is next?

15          MR JONES: Sir, Tristan Jones for the Wolseley claimants.  
16          Sir, I have two short points. The first one concerns  
17          the end date for the overcharge disclosure to be given  
18          by Daimler to Wolseley. Sir, as you are aware, in the  
19          VSW consent orders, the other defendants have all agreed  
20          to whatever is pragmatic, readily available to them.  
21          For three of them that has meant the end of 2016. For  
22          DAF the agreed date is the end of September 2017. For  
23          Iveco, they said that what would be pragmatic would be  
24          to give us whatever they are ordered to give Ryder  
25          today, so that would also now be the end of

1           September 2017. One can see that that makes sense  
2           because they're producing information anyway. Sir, you  
3           will see that the same logic, in my submission, applies  
4           to Daimler because they will be providing to the end  
5           of September 2017 and it would be helpful to us, given  
6           that we're having it with two others, to have that --

7           THE PRESIDENT: Yes.

8           Mr Harris, Daimler? I had missed, and my apologies,  
9           that DAF had agreed that in the consent order and I did  
10          see that Iveco would follow today so that in fact -- and  
11          indeed Daimler, in the other actions it goes to  
12          30 September 2017, so there's no extra burden in you  
13          providing the same information to Wolseley.

14         MR HARRIS: Good afternoon. Paul Harris for Daimler. Well,  
15         with respect, sir, my task is to persuade you or to seek  
16         to persuade you that we shouldn't be giving disclosure  
17         to 31 December 2017 not just in Wolseley --

18         THE PRESIDENT: Sorry, it's -- yes.

19         MR HARRIS: 2017, but in any of the actions and that will  
20         take care of Mr Jones'. I'm happy to do that now if  
21         that's a convenient moment.

22                 So there were essentially three reasons, members of  
23                 the Tribunal, why that shouldn't happen. So I'm talking  
24                 now about the end date 30 September 2017. The first is  
25                 as follows, that on the question of start date it was

1           said that the way forward was for the claimants to have  
2           regard to the data already disclosed by DAF in  
3           *Royal Mail and BT*, since that's already been  
4           disclosed, and then to take a look at that and to decide  
5           whether, on the basis of that, it needed to come back  
6           and ask for earlier start date information from the  
7           other defendants who, in the meantime, wouldn't be  
8           ordered to provide any.

9           By parity of approach, we say that as it happens DAF  
10          has already given additional disclosure beyond that  
11          which is principally sought to be provided by the  
12          defendants for the end date because they're involved in  
13          the *Royal Mail and BT* actions and by parity of  
14          approach, what the claimants should do is have regard to  
15          that disclosure which is, obviously, all readily  
16          available because it has already been disclosed in some  
17          other action and then see whether, having had regard to  
18          that data, they actually need it to go beyond the date  
19          for which most of the other defendants contend, namely  
20          December 2016.

21          We say that if it's a proportionate approach to deal  
22          with it like that for start date, which is what the  
23          Tribunal has indicated, then it's the same for the end  
24          date. It ought to be proportionate to proceed in that  
25          manner as well and it also gives rise to consistency of

1 approach between start date and end date. So that's the  
2 first point.

3 The second point is that, as matters stand on the  
4 provisional indication of the Tribunal, there would be  
5 in the actions, there would be differential disclosure  
6 of dates given by different defendants for the end date.  
7 In particular, as we've just heard in the debate between  
8 Mr Ward and Mr Hoskins, Volvo/Renault won't be providing  
9 disclosure beyond the end of 2016 whereas the current  
10 proposal, the provisional view of the Tribunal is that  
11 it should go beyond that date for the other OEMs.

12 Yet what we've consistently heard in the submissions  
13 of all of the claimants, and indeed mounted again  
14 eloquently by Mr Ward this morning, is that we  
15 essentially need, they say, the claimants, a consistency  
16 of data across the defendants for it to be useful. That  
17 was his submission just a few moments ago about  
18 fragmenting the data set as between different  
19 defendants. He was trying to urge upon you that Volvo  
20 shouldn't be allowed the 2016 end date, they should also  
21 have the September 2017 end date.

22 My second submission is this. What we've got on the  
23 face of it is a situation where already the claimants  
24 won't be obtaining what they've said they need in order  
25 to make meaningful econometric progress with their



1 experts, namely consistency of end date --

2 THE PRESIDENT: Can I interrupt you just to ask, is there  
3 any particular difficulty faced by Daimler in providing  
4 those additional nine months? Obviously it's more work  
5 but is there any particular difficulty?

6 MR HARRIS: We don't have evidence to the same effect as  
7 Mr Hoskins that Mr Biro and the IT providers have looked  
8 at a certain database and there's been a change of --

9 THE PRESIDENT: Just a longer period?

10 MR HARRIS: Yes, it's a longer period, but it is fair to say  
11 though in this context that, in line with indications in  
12 earlier hearings to which we refer in our skeleton  
13 argument, that the scoping exercise to date has been by  
14 reference to the December 2016 date and so I can't tell  
15 you now today whether we have a particular additional  
16 problem a la Volvo, but it's fair to say I don't have  
17 discrete evidence on the topic.

18 Reverting to where I was a moment ago, what I say is  
19 that it's on the claimants' own case not of great  
20 utility to have additional evidence from Daimler for  
21 this nine-month period when they are on I think what's  
22 being essentially ordered but not drawn up yet, they  
23 won't be getting that from Volvo.

24 So that adds weight, in my respectful submission, to  
25 the first point that I made which is that there's no

1 reason to have a different approach for start date  
2 versus end date when they're already going to get the  
3 extra nine months from DAF and what they should be doing  
4 on a proportionate approach is assessing that and seeing  
5 if they then need any more.

6 Of course they would be doing that -- take  
7 Dawsongroup where there are only three defendants.  
8 There's me and there's Mr Hoskins and there's  
9 Mr Pickford for DAF. What they can do is take -- have  
10 regard to the disclosure from DAF for that nine-month  
11 period that's already been produced in these other  
12 actions and then they can come back, if their experts  
13 say they really need it, and say to me, to Daimler,  
14 "Well, we want the extra nine months from you because  
15 look at what's happened with the DAF data, it's not  
16 enough", or whatever they say. Likewise, they can say,  
17 "We've interrogated the extra evidence Mr Hoskins has  
18 now produced on all those discrete difficulties in his  
19 case" --

20 THE PRESIDENT: Yes, we've got the point.

21 MR HARRIS: The third point then, sir, is this. We see  
22 there as being an inconsistency across the actions  
23 because the current proposal is that there be disclosure  
24 until the end of 2016 for the defendants in the Wolseley  
25 action, subject to the point that my learned friend

1 Mr Jones just made, and yet there will be a difference  
2 of disclosure end date for the other actions on the  
3 Tribunal's provisional view. Yet we have been  
4 proceeding and we have taken to heart comments from  
5 earlier case management conferences and indeed what the  
6 Tribunal said in entering the room today.

7 It's a key consideration that there be essentially  
8 consistency of approach and what we respectfully contend  
9 is that in those circumstances the better course is for  
10 us to have a consistency of end date of December 2016,  
11 subject only to if upon perusal of the DAF data they say  
12 there's some specific reason for needing more, then they  
13 can come back and ask for more but ask for more  
14 consistently across the actions.

15 What Mr Jones' submission a moment ago doesn't take  
16 account of is that there will be inconsistency of end  
17 date even in light of what he just said. Some of the  
18 OEMs won't be providing beyond December 2016.

19 So members of the Tribunal, for those three reasons,  
20 I resist what Mr Jones has just said about extending the  
21 end date for Daimler and in any event I resist the  
22 suggestion that any of the OEMs, beyond DAF who are  
23 quite happy to do it, should provide end date data until  
24 30 September 2017.

25 THE PRESIDENT: Well, you're only concerned with Daimler?

1 MR HARRIS: I'm only concerned with Daimler, yes.

2 THE PRESIDENT: Anyone else? I think we've heard from you,  
3 Mr Ward; is there anyone for the other OEMs who are  
4 seeking to argue, as Mr Harris has, that it should be  
5 31 December 2016 instead of 30 September?

6 Mr Jowell.

7 MR JOWELL: Daniel Jowell for MAN Group. Just to confirm  
8 that MAN Group have already offered to provide the data  
9 to the end of September 2017 to Ryder and are content to  
10 extend that also, naturally enough, to VSW, beyond the  
11 terms of the consent order.

12 THE PRESIDENT: Yes.

13 MR JOWELL: Other than that, MAN respectfully accepts and  
14 agrees with the Tribunal's provisional views both in  
15 relation to disclosure of the pre-cartel data and more  
16 generally.

17 THE PRESIDENT: Thank you.

18 Mr Singla, for Iveco.

19 MR SINGLA: Sir, our position was that we intended to argue  
20 for December 2016 but in light of the Tribunal's  
21 indication this morning we are content to proceed on the  
22 basis of September 2017.

23 THE PRESIDENT: Thank you.

24 Mr Pickford, I think DAF is giving to  
25 30 September 2017, isn't it?

1 MR PICKFORD: We are. I don't know whether you want to hear  
2 me on other points of scope now or simply in relation to  
3 the point that you were being addressed on by Mr Harris.  
4 We do have some points to make on scope.

5 THE PRESIDENT: Why don't you then deal with that, on  
6 temporal scope?

7 MR PICKFORD: On temporal scope, indeed.

8 THE PRESIDENT: Yes, so Mr Pickford for DAF, yes.

9 MR PICKFORD: Thank you. We obviously agree with the  
10 Tribunal's proposals because they reflect those  
11 essentially that we were advancing ourselves, but there  
12 are some important points of clarification that I do  
13 need to make. The first of those is in relation to the  
14 pre-infringement data. It's currently DAF alone that's  
15 providing the earlier three years and, as I understand  
16 it, the reasoning for that is that we've already  
17 provided such data. It's off the shelf and it can be  
18 provided easily enough again and we're content with  
19 that.

20 What we wouldn't be content with is for DAF to be  
21 providing that earlier data set in relation to issues  
22 where, as yet, it hasn't provided such data but are  
23 requested by the claimants such as in relation to used  
24 trucks and going beyond the scope of the UK. The off  
25 the shelf data set involves new trucks in the UK and

1           that's what we can provide. I hope it's a relatively  
2           straightforward point of clarification but the Tribunal  
3           is not expecting us to go beyond that simply because we  
4           were the people that provided something that was wider  
5           first time and generally provide a wider data set  
6           because that has relative implications.

7       THE PRESIDENT: I think you haven't yet provided, nor in the  
8           consent order or orders in VSW are you providing used  
9           trucks earlier, beyond --

10       MR PICKFORD: No, indeed. I just wanted to make clear that  
11           whatever order the Tribunal makes --

12       THE PRESIDENT: No, we understand that. We haven't at the  
13           moment decided whether any -- or non-UK data should be  
14           ordered.

15       MR PICKFORD: Indeed.

16           The other point is on the scope of the pass-on data  
17           for the pre-infringement period and again we're content  
18           with what the Tribunal has proposed in view of the fact  
19           that Ryder has agreed to provide us with a data set from  
20           1994 onwards. That's the mirror image of what we are  
21           providing in the proceedings so that in each case there  
22           is effectively a control. The Tribunal suggested that  
23           we are the control from the defendants. Equally we are  
24           content with the proposals made by the Tribunal, as long  
25           as Ryder is the control in relation to the claimants,

1 and it's agreed to do that.

2 The Tribunal indicated obviously that those orders  
3 that have already been agreed will be made and I wanted  
4 to make clear that that's the basis on which we accept  
5 that aspect of the scope.

6 THE PRESIDENT: Yes.

7 MR PICKFORD: Sir, I did have two further observations on  
8 the observations that the Tribunal made at the outset on  
9 nil returns, the point in relation to when data is not  
10 available, and also in relation to the monthly hearings.  
11 I don't know whether you want to hear me on those now or  
12 at another point?

13 THE PRESIDENT: I think we'll deal with that later. Thank  
14 you.

15 MR SINGLA: Sir, I'm sorry, can I just make one point which  
16 I didn't make in relation to the end date? We're  
17 content with what the Tribunal has outlined but there is  
18 a point about mirror image which Mr Pickford has just  
19 mentioned. One of the things that we said in our  
20 skeleton was that whatever the Tribunal decides in  
21 relation to the end date for Iveco should apply to Ryder  
22 the other way. I don't believe that in any of their  
23 documents, evidence or skeleton or even the Redfern  
24 schedule they've actually accepted that mirror image  
25 principle. So I would ask --

1 THE PRESIDENT: Well, when you say Ryder the other way, you  
2 mean on pass-on?

3 MR SINGLA: These are VoC2 and O1, sir. Insofar as we are  
4 providing VoC2 and O1 data, we say the same time period  
5 should apply to the data that's coming from Ryder.

6 THE PRESIDENT: Yes.

7 MR SINGLA: I'm not sure they've made their position clear  
8 as to whether they accept the same date range should  
9 apply to them.

10 THE PRESIDENT: Is that an issue?

11 MR BREALEY: I don't know whether it is. I've just asked  
12 behind me and as I understand it they've never asked for  
13 it. That's why we didn't think it was an issue. I'll  
14 have to check whether they've actually ever asked for  
15 it.

16 THE PRESIDENT: Yes. We can do that when we look at the  
17 schedule. In principle, without getting into detail, I  
18 would have thought that makes sense that it should be  
19 the same, yes.

20 MR BREALEY: Could I make three points on the Daimler --

21 THE PRESIDENT: No, just a moment.

22 MR BREALEY: Sorry. (Pause)

23 Decision

24 THE PRESIDENT: We've had submissions from Daimler that it  
25 should have a cut-off date of 31 December 2016 and not,



1 as the Tribunal has proposed, 30 September 2017. Three  
2 arguments were advanced in favour of that. First, it  
3 was said that this is a parity of approach with that  
4 being used for the pre-infringement period in that there  
5 disclosure has been given by DAF and the parties will  
6 look at it and then decide whether they wish to pursue  
7 the pre-infringement period years as against other  
8 defendants and that the same approach therefore should  
9 be applied for the end date.

10 We think that overlooks a fundamental difference  
11 that applies to the start date. The reason that the  
12 other defendants are not being ordered presently to  
13 provide disclosure for the years 1994 to 1996 is the  
14 huge difficulty and cost and therefore burden of  
15 accessing the data for that period. It is for that  
16 reason, not simply because it is convenient to start  
17 with one and then proceed to the others after analysing  
18 the one, that we've made that particular exception for  
19 the pre-infringement years. That reasoning does not  
20 apply to the post-infringement years which are in fact  
21 the easiest years for which to provide disclosure  
22 because they are the most recent.

23 The second ground put forward by Daimler is that, on  
24 the approach that's proposed by the CAT, there will be  
25 differential disclosure end dates for different

1 defendants and that disclosure should be on a consistent  
2 basis. In particular, Mr Harris pointed to the ruling  
3 that we just made regarding Volvo/Renault.

4 However, as we made clear, the ruling as regards  
5 Volvo/Renault was by way of provisional exception  
6 because of what are said to be difficulties in analysing  
7 their database. It's a provisional exception because  
8 we've also ordered Volvo/Renault to provide further  
9 evidence explaining what it is about the new method of  
10 inserting costs into their database from 1 January 2017  
11 that means that it's not appropriate for them to make  
12 disclosure after 31 December 2016. Had it not been for  
13 evidence of that particular difficulty, Volvo/Renault  
14 would have been ordered to provide disclosure up to  
15 30 September 2017.

16 It is not only DAF that is providing it to that  
17 point, Iveco has confirmed that as regards all actions  
18 in which it is involved and as already agreed in the  
19 consent order in the VSW action, it will abide by our  
20 ruling for the other parties and therefore is ready to  
21 accept 30 September 2017. MAN has also offered  
22 30 September 2017 with regard to the Ryder action and  
23 therefore is content to provide the same end date to its  
24 disclosure in the other actions in which it's involved.

25

1           It follows that, as things stand, most of the OEMs  
2 will be providing disclosure to 30 September 2017.  
3 There is no particular difficulty urged by Daimler  
4 comparable to the position of Volvo/Renault for those  
5 nine months of 2017. Far from this creating  
6 inconsistency across the actions, as Mr Harris urged in  
7 his third point, we think to cut off the obligation on  
8 Daimler at 31 December 2016 would further the  
9 inconsistency and would not be consistent with the  
10 approach that we've taken as regards the other  
11 defendants. Accordingly, Daimler will be ordered to  
12 provide disclosure to 30 September 2017 as has been  
13 agreed by DAF, as has been offered by MAN and has now  
14 been accepted by Iveco.

15           Case Management Conference (continued)

16 MR JONES: Sir, I'm grateful. I said I had two short points  
17 and I slightly lost the ball but could I pick up the  
18 second one which I think, I hope, is not controversial,  
19 but really just to clarify one point which arises in the  
20 Wolseley claim.

21           Sir, you set out your thinking as regards the  
22 overcharge period. You didn't touch on VoC. I think  
23 Wolseley may be the only claimant to have drawn  
24 a distinction between the time periods for VoC  
25 disclosure and overcharge. What we've agreed with the

1 other defendants is the end of 2013 for VoC. Of course  
2 that's really relevant to identifying which trucks we  
3 bought and who from, and the reason end of 2013 we are  
4 happy with is because, as presently advised, we think it  
5 is unlikely there would have been overhang effects  
6 beyond then. Of course we'll come back, if necessary,  
7 at a later stage. That, as I understand it, has also  
8 been agreed with Daimler which is why I think this won't  
9 be controversial.

10 THE PRESIDENT: Just to interrupt you, sorry, in the consent  
11 order, that's what's provided?

12 MR JONES: That's what's provided in the consent orders and  
13 it's broadly accepted in the Redferns with Daimler, the  
14 2013 date. Sir, of course the reason I raise this is  
15 that it's very important that we're not inadvertently  
16 required to order more VoC disclosure to Daimler. The  
17 VoC disclosure exercise is a huge exercise in its own  
18 right and it's particularly burdensome for Wolseley  
19 because we've done that in all countries whereas we're  
20 only dealing with overcharge disclosure in the core  
21 markets at the moment. It's a clarificatory point but  
22 I wanted to have it on the record.

23 THE PRESIDENT: You say that's in the Redfern schedules  
24 already as regards the Wolseley action?

25 MR JONES: Yes. I was using the schedule attached to

1           Mr Bolster's witness statement --

2           THE PRESIDENT: I think we have them separately but this is

3           the schedule of your disclosure, is it?

4           MR JONES: Well, one would need to --

5           THE PRESIDENT: There are two schedules.

6           MR JONES: One would need to jump around a little bit. If

7           we start in that bundle, tab 3 is the claimants'

8           disclosure requests and you will see on what is internal

9           page 3, scope VoC2, and the temporal scope is said to be

10          January 1997 to 31 December 2013. In the Daimler

11          column, you'll see Daimler agrees with that.

12          THE PRESIDENT: Yes, I see.

13          MR JONES: But then one would need to go also to the next

14          schedule which is in the next tab.

15          THE PRESIDENT: That's disclosure from you.

16          MR JONES: Yes and then again internal page 4, "Scope", and

17          you will see that there what is requested is disclosure

18          to end of 2016. The claimants in their column explain

19          that, on VoC, they have gathered to end of 2013. Then

20          one bounces back to the Daimler column and it's the

21          penultimate paragraph there, where it says:

22                 "The claimants haven't responded to the request to

23          temporal scope. The temporal scope of this category

24          should mirror the temporal scope of the claimants'

25          volume of commerce and overcharge requests."

1           But you'll see -- partly why I'm standing up is  
2           you'll see there's then a slightly ambiguous next  
3           sentence:

4           "In response to those requests, for the reasons set  
5           out Daimler considers the appropriate temporal scope  
6           would be 1997 to 2016."

7           But of course that isn't mirroring our requests, our  
8           requests would be to 2013 on volume of commerce. So  
9           there is a slight ambiguity but we think that that  
10          mirroring has been agreed.

11         THE PRESIDENT: Yes. Mr Harris, is that right?

12         MR HARRIS: Sir, can I revert on that after lunch?

13         THE PRESIDENT: Yes.

14         MR HARRIS: It may be right but I need to --

15         THE PRESIDENT: Yes, it's a slightly technical point. We'll  
16          come back to that after lunch.

17         MR HARRIS: Sir, just for the sake of good order, whilst I'm  
18          on my feet, I did have some submissions when you have  
19          the opportunity to hear them about the start date and  
20          the pass-on comments as well as some of the overarching  
21          comments that the Tribunal made in opening. I'm  
22          obviously in your hands.

23         THE PRESIDENT: Yes, well, the start date -- we've said what  
24          we're minded to do on the start date which is for you  
25          the start date is therefore 1 January.

1 MR HARRIS: That's right. This is a very, very short  
2 submission. We don't oppose that, of course; it's  
3 simply this, that Volvo/Renault has gone to the trouble  
4 of adducing evidence of specific difficulties in the  
5 earlier period by reference to specific databases in its  
6 evidence. As you know, we took a slightly different  
7 approach to this hearing about what we were capable of  
8 doing by way of specific proportionality considerations  
9 and I've heard what my friend has said.

10 I simply want to put down this marker if I may, that  
11 because we haven't gone into that, it is of course  
12 possible that when we go back into our databases we will  
13 find that in the earlier period there may be some  
14 specific discrete points of difficulty. That's all  
15 I wanted to say. You have got evidence from us already  
16 that we have over 20 databases, that's in my solicitors'  
17 statement at 64, and I wouldn't want it to be thought  
18 that because I hadn't said anything today and we're  
19 going back to 1997, it follows that we've got perfect  
20 data sets all the way back to 1997.

21 MR MALEK QC: Your obligation is to do a reasonable and  
22 proportionate search. If you have any difficulties, in  
23 your disclosure statement you set out what those  
24 difficulties are and why you say it's not possible --

25 MR HARRIS: Precisely, Mr Malek. That, it seemed to us,

1           accorded very closely with the Tribunal's opening  
2           remarks about if there is evidence here today that says  
3           proportionality, technical difficulty X, Y and Z, then  
4           you will take account of it. But if and insofar as  
5           there isn't, then people have to come back with that in  
6           their disclosure statement if they want to make that  
7           point. That's what we --

8           MR MALEK QC: We're not going to make orders for disclosure  
9           unless we're satisfied in the first place it would be  
10          reasonable and proportionate. So proportionality comes  
11          in at two stages. The first stage is do we make the  
12          order in the first place, the second stage is when you  
13          give a disclosure statement.

14          MR HARRIS: Understood.

15          THE PRESIDENT: You've agreed to the start date in the  
16          Redfern schedule?

17          MR HARRIS: Yes, absolutely. We need not spend any more  
18          time --

19          THE PRESIDENT: So we needn't hear more about it because we  
20          have a lot else to do.

21                 You had another point?

22          MR HARRIS: I had a point about the pass-on remarks. So  
23          there were three remarks, provisional views of the  
24          Tribunal. One was end date, one was start date. We've  
25          dealt with both of them. Then there was a remark about



1 the provisional view on pass-on and that going up to the  
2 date of 31 December 2018.

3 The concern that I've got on behalf of Daimler is  
4 that there were -- our expert has been informing us that  
5 there was a spike in the provision of trucks towards the  
6 end of the cartel period after the end of the financial  
7 crisis. Plainly truck sales went down during it, that's  
8 in plenty of people's evidence, and then it went up  
9 after that. Of course trucks bought towards the end of  
10 the cartel period are more likely to be held -- continue  
11 to be held by the claimants and therefore have not been  
12 sold on and critically, something we'll learn about more  
13 this afternoon, held up on the balance sheet as  
14 capitalised assets. In other words they're still  
15 relevant on a yearly basis for accounting purposes and,  
16 as I shall be submitting later, for tax purposes.

17 So our concern with providing now a cut-off date of  
18 31 December 2018 on pass-on is that it may not take  
19 sufficient account of what's likely to be a larger  
20 relative proportion of trucks in the later period, and  
21 of course if there's a larger relative proportion of  
22 trucks in the later period for which we then don't have  
23 the actual data, that potentially skews, potentially  
24 materially, the sort of averaging approach that the  
25 Tribunal is referring to on this topic of pass-on.

1           My respectful contention is as follows. For that  
2           reason, and because we can't know and yet it looks prima  
3           facie likely that that skewing effect may be significant  
4           but we can't know until we see some other data, it would  
5           be premature now to constrain that date to  
6           December 2018. It should be a later date, even if the  
7           Tribunal weren't minded to make it ongoing; it should at  
8           least be until a later date.

9           What we respectfully contend is unsatisfactory is  
10          essentially to pick an arbitrary date of  
11          31 December 2018, without having seen the sort of scope  
12          of the later period acquisitions of trucks and the scope  
13          of those that are still capitalised on the balance sheet  
14          and therefore relevant for accountancy and tax  
15          purposes --

16       MR MALEK QC: But you don't have a complete picture on that  
17          and nor do we at this stage. But when you get the  
18          further data that's being ordered as part of this  
19          process, you'll know what's really in issue post  
20          December 2018, won't you?

21       MR HARRIS: That, Mr Malek, I accept. So it may be that the  
22          compromise and the sensible approach today is to just  
23          make it clear that that date is, if you like,  
24          a provisional date, a little bit like some of these  
25          other dates are potentially provisional. But that if

1           and when we get the data, up until that date, it looks  
2           to us with good reason that that's not sufficient, then  
3           we have liberty to come back and say, look, this is more  
4           material than might have been thought at this hearing  
5           today.

6           THE PRESIDENT: Well, it's not a provisional date. That's  
7           the date we order. It's not provisional like  
8           Volvo/Renault is provisional. It's the date we order  
9           but there's liberty to apply and if, for good reason,  
10          you think actually it's right to seek a further year,  
11          whatever, you can come back and explain why and ask us  
12          to vary the date. But that's the date we will order and  
13          we're not -- we will need some persuasion actually that  
14          you need a period when trucks bought in the cartel were  
15          sold. It seems to me what you are trying to work out is  
16          what's the effect on the resale price on the market.  
17          That's for a later argument.

18                 At the moment the date is 31 December 2018 but  
19                 you're not precluded from applying for a later period.  
20                 As it's recent, there will be no problem about the  
21                 claimants accessing the data.

22          MR HARRIS: Precisely. Shall we leave it like that then,  
23                 sir, on that point?

24          THE PRESIDENT: Well, we will.

25          MR HARRIS: I'm grateful. Then that only leaves, but as I

1           say I'm in your hands and I'm conscious of the time,  
2           that we did have some remarks to make by reference to  
3           the setting of the scene commentary at the opening of  
4           this hearing.

5       THE PRESIDENT: I think they will come into play when we  
6           look at your application as against Wolseley. That will  
7           come fairly soon I hope.

8           We wanted to move on before the short adjournment --  
9           just a moment. (Pause)

10          We wanted to address the other matter that we raised  
11          in general which is tax, whether in fact it is  
12          appropriate and sensible to order tax disclosure now or  
13          whether it should be kept to after judgment. As  
14          I understand the position, in the consent orders,  
15          Mr Jones, in the VSW cases tax is not being provided at  
16          the moment.

17       MR JONES: That's right.

18       THE PRESIDENT: I don't think -- it's been agreed that it  
19          will be post-judgment, it's just not covered by the  
20          orders, is that right?

21       MR JONES: That's right.

22       THE PRESIDENT: In Ryder, Mr Brealey, I think also is that  
23          right, that tax is -- disclosure is not being pursued  
24          now against you?

25       MR HARRIS: It is being pursued.

1 THE PRESIDENT: It is being pursued, ah.

2 MR PICKFORD: I think the point is, sir, it's not, at least  
3 as far as what we're pursuing, not contested and Ryder  
4 never agreed to it.

5 MR HARRIS: Yes, that's an important distinction, sir,  
6 that's agreed with Ryder.

7 THE PRESIDENT: Yes, so Ryder is providing it, that's right?  
8 That's the position, is it, Mr Brealey?

9 MR BREALEY: You can see it in the Redfern schedule, sir,  
10 that was provided. What has not been agreed and what  
11 obviously can be done in correspondence is by when.

12 THE PRESIDENT: Yes. Why I'm a little bit confused, if I'm  
13 looking at your Redfern schedule, this is disclosure  
14 from you I think, by the defendants on page 25, T2.  
15 "In any event the claimants consider scope of  
16 disclosure ought to be considered as a consequential  
17 matter following trial. Without prejudice, the  
18 claimants agree to the amended scope of this request."  
19 But the current position is what?

20 MR BREALEY: We have agreed to provide disclosure to assist  
21 Daimler and the other parties on tax issues but the  
22 issue of taxation would be dealt with after the trial.

23 THE PRESIDENT: But the disclosure --

24 MR BREALEY: But we have agreed to give disclosure.

25 THE PRESIDENT: Now?

1 MR BREALEY: Now.

2 THE PRESIDENT: Yes.

3 MR BREALEY: As I say, the only thing that's not agreed is  
4 the date and obviously we're reasonable and that can be  
5 done in correspondence. If Mr Harris wants to say by  
6 a certain date, I can take instructions.

7 THE PRESIDENT: Yes.

8 MR BREALEY: They have always asked for disclosure on tax.  
9 We are giving it, it doesn't mean to say it will be  
10 dealt with at the trial.

11 THE PRESIDENT: No. Well, that's a separate matter indeed  
12 which we're not addressing at the moment.

13 In that case, while you are on your feet, what is  
14 the date that you would suggest is reasonable?

15 MR BREALEY: I'm told end of March which is a date which is  
16 fairly common in these Redfern schedules.

17 THE PRESIDENT: Yes. While we have got that point alive, do  
18 any of the defendants in the Ryder case want to resist  
19 the end of March and seek an earlier date?

20 MR JOWELL: No, sir.

21 MR HARRIS: Sir, may we have an opportunity to consider  
22 that? It's the first time that the date has been  
23 offered to us. We're conscious there's quite a lot of  
24 tax categories, it may be that some could come sooner  
25 than others. We're also conscious that there has to be

1 a degree of reciprocity here insofar as tax disclosure,  
2 so can I take some instructions over the short  
3 adjournment and revert on that?

4 THE PRESIDENT: Yes. Perhaps we'll leave you all to  
5 consider data over the short adjournment. If you want  
6 to engage with Mr Brealey about any one category coming  
7 sooner, you can try and do that. So we won't get into  
8 the date. So that's the Ryder tax disclosure.

9 The Dawsongroup tax disclosure, Mr Ward, if one  
10 looks at your pleading and the way you've approached tax  
11 in that, in your amended particulars of claim, in the  
12 schedules where you have tables setting out your  
13 calculation on an assumption of I think a 26%  
14 overcharge, you then have a note on table 2 which is  
15 I think page 100 in the bundle where you explain how  
16 you've got to a post-tax position --

17 MR WARD: Yes.

18 THE PRESIDENT: -- and you say the overcharge includes tax  
19 adjustment calculated as follows, have those adjustments  
20 on the capital allowances, are you just looking at  
21 ordinary capital allowance rates or are you looking at  
22 it in the context of your accounts and tax return for  
23 that each year, because it wasn't clear to me how this  
24 was done.

25 MR WARD: It's not clear to me either, sir. Shall I try to

1 take instructions now?

2 THE PRESIDENT: It seems to me, in the first instance, it  
3 would be helpful to defendants if someone actually  
4 explains how this was done and what tax information was  
5 used to do it. That is something that you can provide  
6 particulars of fairly quickly because it's all been  
7 done.

8 MR WARD: Yes. I just don't know the answer, sir.

9 THE PRESIDENT: That will get the process started, and what  
10 tax adjustments you've made. I think also, and I may  
11 have got this wrong but it applies to you, an issue that  
12 there's a clarification sought about the VAT position.  
13 Is that in the Dawsongroup schedules?

14 MR WARD: I thought that had gone away.

15 THE PRESIDENT: Well, if it has, that's excellent.

16 MR WARD: I'll double-check over the short adjournment.

17 THE PRESIDENT: But that is something you can clearly  
18 provide so that everyone knows.

19 MR WARD: Yes, I thought it has resolved itself.

20 THE PRESIDENT: Yes. So if one then looks at the tax  
21 disclosure that's sought from you, which is in the  
22 Redfern schedule, it's essentially one category, T2,  
23 isn't that right?

24 MR WARD: Yes.

25 THE PRESIDENT: Which is in the Redfern schedule at tab 2 of



1           our COM-C bundle at page 19 {COM-C/2/19}. If one wanted  
2           to break this down, you could supply, could you not,  
3           your annual tax returns, which I think -- although T2  
4           says from 1996, the scope seems to have been amended to  
5           be 1997 so I assume it's from the start of the cartel  
6           period?

7           MR WARD: That's what we understand as well.

8           THE PRESIDENT: So it's actually from 1997. In fact your  
9           annual tax returns, given that I think the second and  
10          third claimants ceased trading at the end of 1999, there  
11          will be a few years' tax returns from those two, then no  
12          more and the tax returns of is it the fourth claimant  
13          will be from the year 2000 on when it started trading.

14                 That shouldn't be an onerous obligation because  
15                 obviously the finance department would keep those tax  
16                 returns.

17          MR WARD: I'll check. I see why you say that, sir.

18          THE PRESIDENT: Yes. What we're thinking is whether there  
19          may be an element of tax disclosure that can be provided  
20          easily, even if it's not necessarily the full amount  
21          being sought.

22          MR WARD: Yes. Again I can take instructions on that, sir,  
23          if that would assist, either now or over lunch.

24          THE PRESIDENT: Yes. I mean, what we -- although without in  
25          any way deciding whether tax is going to be decided at

1 trial or post-trial, the point Mr Brealey made, we think  
2 that some tax disclosure will be helpful because it will  
3 assist the defendants also working out what any  
4 potential plan might be on various assumptions of  
5 overcharge, and therefore might assist the parties  
6 generally.

7 MR WARD: Sir, I see that. You will have seen as well from  
8 both the schedule and our submissions that our  
9 overarching concern in this area is about excessive  
10 granularity of approach.

11 THE PRESIDENT: Yes. What we're looking for is something  
12 that isn't overgranular but starts to give information  
13 on which the defendants' accountants can do some useful  
14 work, even if it's not the complete picture as yet.

15 MR WARD: I wonder if I may take instructions over lunch?

16 THE PRESIDENT: Yes, and if the defendants could also  
17 consider that as regards the Dawsongroup action which  
18 I think concerns, as well as Daimler, concerns  
19 Volvo/Renault and DAF.

20 MR HARRIS: Yes. Could I just, for the purposes of  
21 indication over lunch, just remind the Tribunal what it  
22 says in Mr Grantham's letter at 5.6 as regards this T2  
23 category, which is:

24 "This is the most straightforward and conveniently  
25 available source of information to determine the effect

1 of taxations. The tax computations as scheduled setting  
2 out et cetera et cetera will have formed the basis of  
3 the annual tax returns. Historical tax computations  
4 requested under category T2 should be readily available  
5 to the claimants and represent a key set of documents in  
6 respect of taxation. Their disclosure should not be  
7 onerous."

8 So the point I just wish to make briefly is that our  
9 evidence supports, including by somebody who deals with  
10 this day in day out as an expert, that this whole  
11 category is, and I quote, "should not be onerous" and  
12 I quote is "readily available". While I'm happy for  
13 Mr Ward to take instructions, that's one of the reasons  
14 that category is framed the way it is.

15 THE PRESIDENT: Yes, and it's been indeed amended to reduce  
16 the scope of what's being sought to the computation.

17 MR HARRIS: Yes.

18 THE PRESIDENT: Mr Ward, you will bear that in mind when  
19 discussing that with your clients.

20 MR WARD: We will.

21 THE PRESIDENT: That leaves tax just as regards Wolseley  
22 where it's pursued as against your clients. What do you  
23 say about that, Mr Jones?

24 MR JONES: The amendment that was just being discussed which  
25 may have been important to the decision for the other

1 claimants, we're not sure what that amendment is and  
2 whether it appears also in the request against us. So  
3 we're slightly unsure whether we could provide what is  
4 being asked --

5 THE PRESIDENT: Yes, can I just look at the tax in your  
6 Redfern schedule which is -- is it there at all?

7 I don't think it's being sought against you, is it?

8 MR JONES: Well, it is, it's at tab 4, page 43.

9 THE PRESIDENT: I'm so sorry, yes, I'm looking in the wrong  
10 place. Page 43, yes, it is. Well, the amendment to the  
11 other schedule was to delete the first words "Documents  
12 or information showing the", so it just starts:

13 "Tax computations [...]"

14 Secondly it's for each year from 1997.

15 MR HARRIS: Just to confirm, we're happy to make those  
16 corresponding amendments.

17 THE PRESIDENT: So it's not all documents and information,  
18 it's just the tax computations for each year but for  
19 each claimant.

20 MR JONES: Sir, I see the force of what's being suggested.  
21 We see that it's sensible to provide something which is  
22 readily accessible. Could I take instructions over the  
23 short adjournment as to whether that is readily  
24 available given those amendments?

25 THE PRESIDENT: Yes. Thank you. Is there anything else on

1 tax at this point?

2 MR PICKFORD: Sir, it's on the issue of the debate between  
3 Wolseley and Daimler as regards their order. Before we  
4 get drawn into particular points on tax between them  
5 that we might -- and others, we had an overarching point  
6 we wanted to make in relation to that whole debate which  
7 we say should cut through it. I don't mind when I make  
8 it other than it should happen prior to any  
9 particular --

10 THE PRESIDENT: Make it now.

11 MR PICKFORD: Okay. The position --

12 THE PRESIDENT: If it cuts through the whole debate, it's  
13 even more welcome.

14 MR PICKFORD: The position in the Wolseley claim is that all  
15 four defendants to the Wolseley claimants' claims have  
16 reached an agreement which is embodied in the consent  
17 orders that the Tribunal has already made.

18 Daimler, as the Tribunal will be aware, is a Part 20  
19 defendant in respect of the Wolseley proceedings only.  
20 The only approach which appears to us to be sensible in  
21 the circumstances where the four main parties who are  
22 defendants to the claim have reached an agreement with  
23 Wolseley is that Daimler should be required to provide  
24 the same disclosure and should receive the same  
25 disclosure as has been agreed as between the other

1 defendants at this stage. That is for the following  
2 reasons.

3 The Tribunal is obviously well aware these are  
4 complex and large scale proceedings and one of the  
5 things that the Tribunal must actively encourage is  
6 agreement by the parties wherever possible.

7 THE PRESIDENT: I'm not quite clear -- to interrupt you,  
8 these are points that may be relevant when we come to  
9 the other Daimler applications as against Wolseley, of  
10 which there are quite a lot, but on the particular one  
11 about tax, tax computations, I appreciate, we appreciate  
12 that that's not covered by the consent order.  
13 Nonetheless, if it really does seem sensible and if it's  
14 not onerous on Wolseley to provide it, then we could see  
15 force in the fact that it should be provided and if it's  
16 going to be provided to Daimler, then of course you can  
17 say it should be provided to the four actual defendants  
18 as well. That clearly follows, so you're all in the  
19 same position. But we're not looking at the rest of it  
20 where -- points about consistency and so on.

21 MR PICKFORD: I realise that, sir. The point I was going to  
22 make was a slightly different one and it does actually  
23 bear across all of the potential categories of  
24 disclosure, albeit it's perhaps more acute in relation  
25 to some than others. But it's a short point. I'm happy

1           to make it now or happy to make it at another juncture,  
2           just as long as I get to make it.

3       THE PRESIDENT:  As long as I quite understand where you're  
4           coming from, please make it now because you say it cuts  
5           across.

6       MR PICKFORD:  So the point is this.  If the Tribunal  
7           generally entertains a detailed set of applications as  
8           between Daimler and Wolseley, that is going to not only  
9           effectively potentially unpick aspects of our agreement  
10          but particularly undermine the incentives of parties  
11          generally to make such agreements in the future.  The  
12          reason for that is as follows.  Suppose that as  
13          defendants, down the line when we then come to argue  
14          about points that currently we're not seeking to argue  
15          about with Wolseley, it is said that we are able to make  
16          those submissions entirely without prejudice to the fact  
17          that there has been some prior order as between Daimler  
18          and Wolseley.  That potentially prejudices Wolseley  
19          because it may find it's having to go back and look for  
20          things that have already been looked at in relation to  
21          Wolseley, if we're not to be prejudiced.

22               Equally, if the Tribunal takes the view that it  
23               isn't open to us to adopt an entirely blank canvas at  
24               that point, that we have to take account of what has  
25               happened as between Wolseley and Daimler, then we will

1 be prejudiced because we won't be in the position of  
2 starting with the fresh canvas that we would like to.

3 So either way what that will tend to do is prejudice  
4 one party to another and undermine their incentives to  
5 reach very sensible agreements as we have done with  
6 them. That is why particularly in this case, where  
7 Daimler is just a Part 20, it really I think has to put  
8 up with the fact that the main parties have reached  
9 a sensible agreement and make a very, very compelling  
10 case to the Tribunal that it shouldn't simply adopt the  
11 same approach, because otherwise the ability of the  
12 Tribunal to contain these sorts of proceedings through  
13 agreements is going to be severely curtailed.

14 THE PRESIDENT: We fully understand that. We do think that  
15 at the moment we're looking at tax across all  
16 proceedings, although not Suez/Veolia where there are  
17 particularly complications because of the large number  
18 of foreign claimants, but only as regards Wolseley. But  
19 if it's not a difficulty, and we don't know because  
20 Mr Jones is going to take instructions, to provide that  
21 disclosure, we don't think that cuts across the general  
22 point you make which I can see for myself, I can't speak  
23 for Mr Malek, may have a force when we come to look at  
24 the large number of particular disclosure requests that  
25 are being made by Daimler as set out in the Redfern



1           schedule and which go beyond the agreement that you all  
2           reached.

3           MR PICKFORD:  Sir, I respectfully agree.  The point I made  
4           is a general one but it does so happen in relation to  
5           the tax issue that arises here, making that order, as  
6           long as it applied to everyone, would not cut across the  
7           agreement but more generally it does have application.

8           MR MALEK QC:  But in many of the categories which aren't  
9           being pursued, the parties have said, okay, we'll leave  
10          it for now, we'll come back to that later, and so if we  
11          do look at some of those now in the context of Daimler,  
12          it doesn't necessarily cut across the fact that you have  
13          done the deal.  This means maybe at some stage you'll  
14          come back and say, well, we want the same.

15                 What I don't want to do is to shut out Daimler  
16          from -- I'm not sure if we've got power even to say well  
17          you can't pursue these requests.  We can look at them  
18          and rule on them or we can say we're not going to rule  
19          on them today, we'll rule on them at some other stage,  
20          but I think we would need to hear from Mr Harris before  
21          we decide where to go on this.

22          THE PRESIDENT:  We will look at those requests after lunch,  
23          bearing in mind the point you've made, and what's the  
24          sensible way of managing the Wolseley proceedings  
25          bearing in mind that Daimler is not actually

1 a defendant. So we will do that.

2 MR PICKFORD: Yes. In response to Mr Malek's point, the  
3 Tribunal obviously has a discretion in relation to how  
4 it case-manages these points. We are not seeking to  
5 shut Daimler out from asking for things at an  
6 appropriate juncture.

7 MR MALEK QC: Exactly. It could just be a question of time.

8 MR PICKFORD: The issue is when is the appropriate juncture  
9 to do it? The Tribunal certainly has the power to say  
10 to Daimler, we think the appropriate juncture at which  
11 to seek these things is in the next round of disclosure,  
12 not now, and that's because of the complications that  
13 I have adverted to.

14 MR JONES: Sir, simply to add that we of course agree with  
15 Mr Pickford, and I'll be making more submissions on  
16 that. So it is important, in my submission, that this  
17 threshold question of whether you're going to entertain  
18 Daimler's requests at this point be decided before, as  
19 it were, delving into the detail.

20 THE PRESIDENT: Yes. We'll come back to that at 2 o'clock  
21 and you'll look at the particular point about tax and  
22 the one or two other points that I think have been left  
23 over for people to take instructions.

24 MR HARRIS: Sir, do I take it that after the short  
25 adjournment we're going to have this argument about

1           whether the tax issues should be dealt with at trial or  
2           everything post-trial?

3       THE PRESIDENT:  No, we're not going to decide that.  We're  
4           dealing with disclosure today.  We're not giving trial  
5           directions.  Trial is some way off.

6       MR HARRIS:  Fine.  Thank you.

7       (1.00 pm)

8                               (The short adjournment)

9       (2.00 pm)

10      THE PRESIDENT:  Yes, I don't know who goes first.

11      MR WARD:  I was going to try to answer your question, sir,  
12           from before the short adjournment, if I may.  You asked  
13           me firstly about the notes to table 2 in the particulars  
14           of claim.

15      THE PRESIDENT:  Yes.

16      MR WARD:  The question was, what was the basis upon which  
17           this was prepared?  The answer is it's what we call  
18           Harvey 3.  The third approach of Mr Harvey.  Does that  
19           ring any bells or would it be more useful for me to  
20           explain what that means?

21      THE PRESIDENT:  Please explain.

22      MR WARD:  Mr Harvey, our economist, in his evidence said  
23           there could be four approaches to tax.  Approach one  
24           would be no adjustment and he says that's not the right  
25           approach.  Approach two would be to just apply standard

1 rates of corporation tax and he says, well, that's  
2 probably not ideal. Then he advocates approach three,  
3 where you make an adjustment to the effective rate of  
4 tax that the claimants actually paid by reference to the  
5 publicly available rates. But he doesn't support  
6 approach four which is the defendants' preferred  
7 approach, where you essentially seek to replicate the  
8 tax returns and run a counterfactual based on what  
9 difference the overcharge might have made.

10 We've seen in the evidence prepared for today that  
11 they want, for example, to look at periods of  
12 depreciation and how capital allowances have been used,  
13 all of which are areas where there is room for some  
14 manoeuvre by a lawful taxpayer, and run a complex and  
15 developed tax counterfactual. That's of course the  
16 issue that's before the court.

17 What we have done here, I think I'm told we're the  
18 only claimant that has provided any kind of post-tax  
19 calculation.

20 THE PRESIDENT: Yes, that's right.

21 MR WARD: That was, bluntly, as much as anything, something  
22 that could be useful for settlement. It gives the other  
23 parties an idea of where we stand. But what it doesn't  
24 avoid is -- you'll recall in the *Sainsbury's v*  
25 *Mastercard* case there is a short judgment on tax,

1 I don't know if it's helpful to turn it up, but the  
2 phrase that the CAT used on that occasion was "avoiding  
3 unnecessary collateral enquiry". Can I just show that  
4 to you --

5 THE PRESIDENT: Before you do. So the third approach, which  
6 is what was being done here, Mr Harvey's third approach  
7 is to adjust the rate the claimants -- when you say  
8 effectively paid --

9 MR WARD: It's how much they actually paid, so their  
10 effective tax rate, rather than just taking the  
11 high-level published rate but saying: what did you  
12 actually pay, adjust by reference to the overcharge and  
13 then calculate.

14 THE PRESIDENT: But the defendant reading this won't know  
15 what was the rate to which -- the effective rate because  
16 that's not been provided.

17 MR WARD: No, that is true. But in the dispute over tax  
18 disclosure what we've made clear is that what we would  
19 propose to do would be to tell the defendants how much  
20 tax was paid and what the effective tax rate was.  
21 I mean, not just tell them, but through disclosure. But  
22 what we've resisted is any form of wider tax disclosure.

23 THE PRESIDENT: You would -- when you say through  
24 disclosure, the documents that you would disclose are  
25 then what?

1 MR WARD: That's a good question, I don't know the answer to  
2 it. If I just take a moment. (Pause). I'm told it  
3 would be HMRC statements of what actual tax was paid.

4 THE PRESIDENT: But that wouldn't show the effective rate,  
5 would it?

6 MR WARD: Sorry, sir. I'm told it would. Sir, of course,  
7 if you need a better understanding of that, I'm sure it  
8 can be obtained.

9 It's also, sir, useful perhaps to see in the Redfern  
10 schedule of the defendants' request to Dawsongroup,  
11 there are two agreed categories which actually relate to  
12 interest which will also contain some tax information.  
13 That's on page 25 of that request to Dawsongroup. Do  
14 you have that, sir?

15 THE PRESIDENT: Yes.

16 MR WARD: You will see DG11 and DG12, which are grey, and  
17 this relates to calculations behind average finance cost  
18 figures in table 3. Table 3 of the particulars of claim  
19 is dealing with interest. Then compound interest, the  
20 same thing in DG12.

21 So there will be information there about the  
22 conversion from pre tax to post tax. What we are  
23 resisting is providing the information that would open  
24 the can of worms of enabling the defendants to run  
25 a full counterfactual tax analysis. The reason for that

1 is essentially proportionality of effort as much as  
2 disclosure because, as you said, sir, and I fully  
3 accept, the tax returns that went to HMRC could be  
4 provided. It's really where that leads us. The  
5 evidence of, for example, Mr Grantham, as Mr Harris has  
6 already alluded to, makes clear that what they want to  
7 do is a very elaborate reconstruction of how the  
8 overcharge might have affected the way in which capital  
9 allowances were booked, how the trucks were depreciated  
10 and so on and so forth.

11 Now, if we were fighting a tax case, one could see  
12 that level of granularity might be appropriate but, in  
13 our submission, having regard to the remarks you made at  
14 the beginning, sir, about proportionality, it's just  
15 excessive where this is really -- I'm going to use the  
16 Tribunal's words -- an unnecessary collateral enquiry  
17 where, as in the *Sainsbury's v Mastercard* case,  
18 they take a broad-brush approach at the end of the  
19 trial -- or a broad axe, I'm so sorry, is the  
20 time-honoured phrase -- and simply make an adjustment  
21 once the overcharge has been calculated.

22 Now, they say, ah, it's very different because these  
23 are assets that depreciate over time but that just  
24 points to the complexity of the kind of counterfactual  
25 analysis that they want to run. In our submission, it's

1           just too much for what is, at the end of the day, a very  
2           second order issue.

3           Is it helpful to look at the Sainsbury's tax  
4           judgment?

5       THE PRESIDENT: I think for myself not at the moment. I'm  
6       just trying to see what you provide, you say, that can  
7       show the effective -- HMRC documents will show what tax  
8       rate was paid and then the capital allowances you  
9       applied to it are, again looking at your note, table 2,  
10      the notes to table 2 of your pleading on page 100, how  
11      it would -- using relevant corporation tax and capital  
12      allowance.

13      MR WARD: Yes. Adjustment using the publicly available  
14      rates rather than running a counterfactual about what  
15      might have happened if we'd had 26% less of a charge on  
16      the trucks that were actually purchased, in case that  
17      might have made some kind of strategic difference to the  
18      way the accounts were prepared. Which is essentially  
19      the case the defence want to test.

20           A case by the way they've produced no evidence that  
21      suggests it would make any material difference. They  
22      haven't even provided a stylised calculation to show  
23      this would have any impact.

24      THE PRESIDENT: Yes, thank you. Just a moment. (Pause).

25           Mr Ward, we see what you say about it may be an



1 inappropriate approach that they wish to pursue.

2 I think it's difficult for us to rule on that now  
3 without extensive argument. It is not a burdensome, to  
4 that extent, request that you disclose tax returns and  
5 the computation behind the return and, as I point out,  
6 it's not actually for all claimants for all years  
7 because of the switch of transfer of the business.

8 Then what the defendants seek to use it for and how  
9 much time and effort they spend running arguments based  
10 on it is a matter for them and it's open to you later to  
11 say, no, that's the wrong approach the Tribunal  
12 shouldn't be adopting to get to a post tax figure.

13 So to say at this point they shouldn't have -- not  
14 a large number of documents, not documents that are  
15 difficult to get, would be I think a little difficult  
16 for us at this stage.

17 MR WARD: Sir, I absolutely hear what you say. The only  
18 thing I would like to just test for a moment is the  
19 introduction of the word "computation" as well as tax  
20 returns because potentially tax returns sit on top of  
21 quite a lot of work that's done within the organisation.  
22 The tax return is the material that's actually filed  
23 with HMRC.

24 I confess I'm not able to tell you how much  
25 information that return would contain but in the spirit

1 of a somewhat rolling iterative process, could the order  
2 be limited to the return for now and then, if the  
3 defendants want more, they can come back?

4 THE PRESIDENT: Is a computation not filed with the Revenue  
5 sometimes with a return, certainly as regards capital  
6 allowances, how it's been --

7 MR WARD: As I don't know the answer, could the order just  
8 be confined to whatever was filed with the Revenue?

9 THE PRESIDENT: Well, we can consider doing that and then at  
10 one of these supplementary hearings, a defendant could  
11 come back and say, "Actually, to understand these  
12 figures in the return we need the computation". That  
13 would be one way of dealing with it but we haven't heard  
14 from Mr Harris.

15 MR HARRIS: Sir, with great respect, this is already dealt  
16 with in the evidence of an expert about tax,  
17 Mr Grantham. This is the paragraph I read to you before  
18 the short adjournment, paragraph 5.6. As has been  
19 explained repeatedly in correspondence, the reason that  
20 this is such a proportionate request at this stage is  
21 because, and I quote from Mr Grantham's third sentence  
22 in that paragraph 5.6:

23 "Tax computations are schedules setting out the  
24 calculation of the tax payable by each claimant for each  
25 accounting period prepared by each claimant or by its

1 tax adviser for each accounting year and which will have  
2 formed the basis of annual tax returns submitted to  
3 HMRC."

4 As he goes on to say somewhere else, if somebody  
5 perhaps could find me the reference, this tends to be  
6 done especially in groups like Dawsongroup and Ryder by  
7 the Central Treasury function, by their internal tax  
8 people. So that is the material that we seek and that's  
9 why it's so manageable.

10 As you've pointed out, sir, this is just for the  
11 particular annual period and in Mr Ward's client's case,  
12 that's different companies over different years.

13 So the suggestion that's now made is that, "Oh,  
14 well, there's a bit more to it". We've got evidence on  
15 that...

16 THE PRESIDENT: What one is looking for, Mr Ward, are the  
17 final computations. There might have been lots of  
18 preparatory work but it's the final computations that  
19 support the figures in the returns, showing how those  
20 figures are calculated, not all the preparatory work or  
21 earlier discussions, but this is the return and that's  
22 the back-up computation or schedule. Some of us may  
23 have experience of this in our own personal tax returns,  
24 that a figure is stated, whatever, dividends, income, X  
25 and there's a schedule, a computation showing how that X

1           has been arrived at.

2       MR WARD:  Sir, I understand what you're saying.

3       THE PRESIDENT:  I think that does seem sensible.

4       MR WARD:  If there's later dispute about precisely what's  
5           within the scope we'll be back, but I do understand.

6       THE PRESIDENT:  I think we will say that it is the -- it's  
7           the tax returns and supporting computation or schedules.

8       MR WARD:  Could you include the word "final", sir?

9       THE PRESIDENT:  Final computations, if they were schedules  
10           or spreadsheets or whatever, for the... yes.

11           That will be for, I'm trying to recall whether  
12           you've -- have you claimed -- your claim goes to which  
13           year?

14       MR WARD:  I'm so sorry, sir?

15       THE PRESIDENT:  To which year does your claim go?  Some have  
16           sought a run-off period and some haven't.

17       MR WARD:  We have a run-off period but we don't know how  
18           long.

19       THE PRESIDENT:  You have a relevant -- you say losses  
20           throughout the relevant period.  Your relevant period  
21           is...

22       MR WARD:  Of course the difficulty at this stage is knowing  
23           when the run-off period ends because it isn't specified.

24       THE PRESIDENT:  Well, your claim is down to the year by year  
25           to the end of the cartel, isn't it?

1 MR WARD: Yes but there is also a pleaded claim for run-off.

2 MR HARRIS: For which disclosure has been ordered until  
3 September 2017.

4 THE PRESIDENT: Yes, so it's up till September 2017. To  
5 September 2017, yes.

6 MR HARRIS: Sir, you asked me to take some instructions or  
7 I volunteered and was asked to take some instructions on  
8 some discrete matters. Can I get those out of the way?

9 THE PRESIDENT: Yes.

10 MR HARRIS: One was in response to Mr Jones in the Wolseley  
11 claim where he queried the extent of VoC disclosure and  
12 he drew the Tribunal's attention helpfully to the fact  
13 that there was an agreed end date for VoC disclosure  
14 categories at the end of 2013 and that is correct. So  
15 there should be, as regards disclosure categories that  
16 are VoC only, that remains agreed as being reciprocally,  
17 ie both directions, the end of 2013.

18 What I for my own part also wish to clarify is that  
19 our expert has said on the record that some of the  
20 categories go to both VoC and overcharge and at this  
21 stage he is not able to specify which one, because it  
22 may end up being both. Just for the sake of good order  
23 therefore, because it's sought for VoC and overcharge,  
24 those are not end date December 2013 because they are,  
25 for these purposes, overcharge categories. Therefore

1           it's September 2017. In just the same way that those  
2           categories that have been identified as being only  
3           overcharge, we're all ad idem they should be  
4           September 2017. I just wanted to make that clear.

5       THE PRESIDENT: That makes sense, thank you.

6       MR HARRIS: The postscript on this one is, as we have just  
7           heard from Mr Ward in in his case Dawsongroup and in  
8           Mr Brealey's case Ryder, the end date isn't 2013,  
9           it's September 2017 because that distinction wasn't  
10          drawn.

11       THE PRESIDENT: Yes, good.

12       MR HARRIS: The second point on which I sought the  
13          opportunity to take instructions was when should be the  
14          date by which Ryder should provide disclosure in T2.  
15          You will recall Mr Brealey sought on his feet to suggest  
16          the end of March but he gave no reasons and he has no  
17          evidence in support of such a date, six months away from  
18          now. We say six months is very substantially too long  
19          to give T2 tax disclosure of precisely the variety that  
20          we've just been debating. These ought to be readily  
21          available materials because they've already been  
22          submitted.

23                We say, with great respect, and especially in the  
24          absence of any evidence of any difficulty, this should  
25          be the same date that Mr Hoskins was given for his

1 client to provide fairly readily available further  
2 information. In his case it was about some databases.  
3 We say mid-November should apply to Mr Brealey too.

4 In particular, it's important that this type of  
5 disclosure is given well before the end of this year  
6 because if there are disputes about it, we say that this  
7 is a relevant matter and should be assessed and brought  
8 back before the Tribunal in the February CMC. In other  
9 words, it can't -- it's grossly too far to allow it to  
10 be pushed into March when there's no good reason.

11 THE PRESIDENT: Yes.

12 MR HARRIS: Then the third --

13 THE PRESIDENT: That would be -- is it 15 November?

14 MR HARRIS: That's the date that was given to Mr Hoskins --

15 MR HOSKINS: The disclosure from the BNA and Partner is  
16 29 November, the reports are 15 November.

17 THE PRESIDENT: 29 November, yes.

18 MR HARRIS: I'm agnostic as to the 15th or 29th.

19 Just for clarity, the T1 disclosure shouldn't be  
20 overlooked. This is disclosure that is sought from  
21 Wolseley.

22 THE PRESIDENT: T1?

23 MR HARRIS: T1 which we haven't spent a lot --

24 THE PRESIDENT: There's no T1 in the Dawsongroup schedule.

25 MR HARRIS: No. That's because it was dealt...

1           We received the clarification that we need already  
2           in that regard but -- this is quite a short point, sir,  
3           if I can just briefly address it. T1 is about VAT  
4           status which self-evidently bears potentially quite  
5           materially upon tax computations, in particular if you  
6           have some kind of input tax deduction, which you may do  
7           depending upon the time of your business and the year of  
8           the legislation et cetera.

9           What we had simply said in the case of the various  
10          defendants is that we would like -- if you were to turn  
11          up, for example, the T1 category in our schedule, so  
12          defendants seeking it from claimants and in the case of  
13          VSW, it's towards the back of that.

14        THE PRESIDENT: That's tab 4.

15        MR HARRIS: What it talks about is:

16                "Where VAT is an applicable regime [...]"

17                Do you have that one, members of the Tribunal? I've  
18                got it at page 42.

19        THE PRESIDENT: Yes, that's right.

20        MR HARRIS: This is a very short point. If you were to

21                trace across the T1 --

22        THE PRESIDENT: Just a moment. (Pause). Yes.

23        MR HARRIS: The reason it's short is this. If you were to

24                trace right over to the right-hand side and look at the

25                VSW response to the request and just read the first



1 sentence, that's the one that I wish to address you on:

2 "VSW confirms that they are not subject to any VAT  
3 input limitations so this request can now be deleted."

4 All I ask, sir, is that that be formalised into  
5 a statement with a statement of truth because this is  
6 a very important point, it's germane and significant to  
7 the tax computations, and what we're very conscious of  
8 is that this is -- with respect, because we do  
9 understand that effort has gone into these schedules and  
10 they've been taken very seriously, but nevertheless this  
11 is a very important point. What we say is it's not  
12 satisfactory to leave it as simply a comment in a final  
13 column of a Redfern schedule which has several hundred  
14 other categories and, in particular, where there have  
15 been -- where there are many, many different claimant  
16 entities in the Wolseley claim. There are companies  
17 called Downton and Brakes and what have you.

18 THE PRESIDENT: We understand the point.

19 MR HARRIS: Just to be clear, what we say is the way to --  
20 is to corroborate that sentence by reference to  
21 a witness statement with a statement of truth from  
22 having taken input from senior finance personnel, but  
23 with these two additions, sir: for each claimant across  
24 the multiplicity of claimants in that Wolseley claim and  
25 for each year. When we get that, which would bear out

1           this sentence, we'll be happy and it will be formalised.

2       THE PRESIDENT: Yes. Well, thank you. First of all,

3           Mr Brealey, Ryder T2 disclosure, 29 November?

4       MR BREALEY: I was accused of thinking on my feet just

5           a moment ago by Mr Harris. I thought we were going to

6           liaise over lunch. I don't want to think on my feet

7           again. I have asked behind me. They say they could do

8           it by the end of December 2019.

9       THE PRESIDENT: Yes. Right, well, let's say the end of

10          December, okay, 31 December. Equally, Mr Ward, your

11          disclosure which we have been debating, 31 December?

12       MR WARD: Yes, sir.

13       MR HARRIS: Sir, I've been asked for the 20th. I've been

14          told specifically during the short adjournment that it's

15          no use if it comes in in the middle of the Christmas

16          holidays and I'm faithfully relaying those comments.

17          After all, there are people behind us who have to do

18          this work and they're --

19       MR BREALEY: I can't believe that someone is going to be

20          looking at Ryder's tax after Christmas.

21       MR MALEK QC: I don't want to ruin their Christmas. Maybe

22          they're better off ruining their Christmas --

23       MR HARRIS: Save for this reason, Mr Malek, whereby I've

24          also been specifically told that this may well be

25          something that has to be revisited in the February 2020

1 CMC which I was also told was 5 and 6 February. So that  
2 difference between a working week before people leave  
3 for Christmas as opposed to the middle of the  
4 holidays --

5 THE PRESIDENT: Which date are you suggesting?

6 MR HARRIS: 20 December, whichever the Friday of that --

7 THE PRESIDENT: That means there's only one other working  
8 day before the Christmas break which is Monday 23rd.

9 MR HARRIS: Sir, what you will of course know is that people  
10 stagger their holiday.

11 THE PRESIDENT: Mr Harris the 31st you say.

12 Now, the next thing is the T1 disclosure, Mr Jones,  
13 VAT.

14 MR JONES: Sir, yes, I think I have to address T1 and T2.  
15 I'll take T1 first.

16 Sir, the point on T1 is really an issue relating to  
17 sensible cooperation between parties. The reason why we  
18 are resistant to Mr Harris' suggestion is that, as far  
19 as we can see, it is completely unnecessary and not  
20 a sensible way to proceed. I appreciate it's a small  
21 point but it's an important point because if we are  
22 required to give this sort of confirmation on this sort  
23 of point there is essentially no end to the number of  
24 things Mr Harris could ask us.

25 Let me explain why I say that. Our understanding of

1 the VAT point is that it is a point which, if it arises  
2 at all, is only harmful to my clients. What I mean by  
3 that is our understanding of the point which is being  
4 made in simple terms is that when an overcharge is paid  
5 by my client, they pay VAT on it and our understanding  
6 of what is being said is, ah, well, if when you make  
7 supplies your supplies are VAT exempt, you may not have  
8 been able to pass on the VAT on the overcharge to your  
9 customers.

10 So Mr Harris says: we understand this, we're  
11 concerned that you might be overclaiming -- you might be  
12 underclaiming and you may be entitled to more, you may  
13 be entitled to VAT on your overcharge. That's why we've  
14 simply said: thank you for your concern, it doesn't  
15 arise, we don't make VAT exempt supplies and essentially  
16 that is the end of the point.

17 That is why -- now, if I've misunderstood what is  
18 being asked for, that could be explained to us. We've  
19 covered this in correspondence. But that's why we're  
20 resistant to then being told we have to go away, think  
21 about it again and put a witness statement in.

22 THE PRESIDENT: So you're claiming for the overcharge  
23 excluding VAT?

24 MR JONES: Yes.

25 THE PRESIDENT: That's true of all the claims?

1 MR JONES: Yes.

2 THE PRESIDENT: Well, can you through your solicitors write  
3 a letter confirming what you've just said, that the  
4 claims in respect of any overcharge exclude VAT and  
5 we're not seeking to claim for VAT?

6 MR JONES: Yes, sir. I think we've done it but we can  
7 certainly do it.

8 MR MALEK QC: If that can be by way of a formal admission  
9 because then you would need leave to withdraw it.

10 THE PRESIDENT: So that makes clear there's no claim for VAT  
11 and if there's no claim for VAT there's no input VAT to  
12 be -- it doesn't arise. That's the point you're making.  
13 Yes, I see.

14 What was the second point?

15 MR JONES: The second is on T2 and I was going to come back  
16 to the suggestion that Wolseley might provide similar  
17 disclosure on T2. We've given consideration to what we  
18 can provide, what is readily available. What we suggest  
19 is that we provide the tax returns and computations  
20 filed for each tax group in the United Kingdom from  
21 1997. So you will see there are a couple of caveats in  
22 there and I just want to explain why that is, why is it  
23 limited to tax groups and why is it limited to the  
24 United Kingdom.

25 The broad point is, whether or not there are more

1 readily available documents, quite frankly we are not  
2 sure because in the discussions that we've been having  
3 with the other defendants where we've been focusing on  
4 readily available documents, no one has asked to apply  
5 that to the tax section. The other defendants didn't  
6 see the tax points, Daimler has not wanted to engage in  
7 readily available discussions. We are simply not sure.  
8 We are concerned, having taken soundings over lunch,  
9 that providing computations if indeed they exist at  
10 a level below the tax group level might be onerous and  
11 may also not be relevant.

12 THE PRESIDENT: Yes.

13 MR JONES: We're also concerned that we don't know exactly  
14 what it is that is the equivalent in other jurisdictions  
15 and in particular in the core markets where disclosure  
16 has been focused to France and Germany. What we are  
17 very happy to do is to look at this promptly to explain  
18 to Daimler and of course others in correspondence what  
19 we've done and what we think the equivalents are, and  
20 there is then now the mechanism of being able to make  
21 applications each month if some dispute should arise.  
22 But we are prepared to approach this in a cooperative  
23 manner and to look for what's readily available.

24 THE PRESIDENT: That can be done by 31 December? Like the  
25 other --

1 MR JONES: Yes, I'm getting nods, yes.

2 THE PRESIDENT: I think it's back to Mr ...

3 (Pause).

4 When you say tax computations filed, we had that  
5 discussion before with Mr Ward, I don't know what degree  
6 of computations were filed, what one wants is the final  
7 computation producing the figure in the return. Whether  
8 the computation is filed or not, it might have been not  
9 filed with HMRC but on the file of your accountants.  
10 But by "filed" one assumes that means filed with the  
11 Revenue, the point being that if there is a figure in  
12 the return for, say, capital allowances, and just  
13 a figure of X thousand pounds, there is a computation  
14 showing how that's been calculated. That is what's  
15 wanted.

16 MR JONES: Can I explain my thinking on that. I also, I  
17 must confess, am slightly out of my depth on exactly  
18 what is filed with the tax return.

19 Our understanding is, as I think someone suggested  
20 earlier, that a computation is filed with the return.

21 That's the understanding that we have.

22 THE PRESIDENT: Yes.

23 MR JONES: Now, that being our understanding, it made sense  
24 to us to say returns and computations filed, because if  
25 one doesn't limit it to what is filed there will then

1 inevitably, we think, be a question about precisely what  
2 is the final computation? Is it one document or is it  
3 a series of documents? That's why we've done it that  
4 way. But we take the point, and again it's something  
5 which can be looked at and can be picked up at a later  
6 stage.

7 THE PRESIDENT: Yes, thank you.

8 Mr Harris, on VAT, does that satisfy? On the first  
9 point, VAT, does that satisfy --

10 MR HARRIS: What satisfies us is something formal that can't  
11 be resiled from without the permission of the Tribunal.  
12 If that's a letter or if it's an amended pleading,  
13 yes --

14 THE PRESIDENT: Just confirming that they are not seeking to  
15 claim VAT on any overcharge.

16 MR HARRIS: Yes. As long as we're totally clear that that's  
17 going to be formalised in at least a letter if not an  
18 amended pleading and that can't be resiled from without  
19 the permission of the Tribunal, then we can move on.

20 On the other points, we're quite surprised by  
21 Mr Jones' submissions just a moment ago. We have  
22 pursued this issue of tax right from the very beginning.  
23 It's been an outstanding issue for a long time and we've  
24 never once been told, whether in Redfern schedules or in  
25 correspondence, let alone in any evidence, that if and



1 insofar as there is to be T2, it should be limited to  
2 three things: in the UK, tax groups and filed. It's  
3 not, with respect, open to Mr Jones, we respectfully  
4 contend, to now come to the Tribunal, absent any  
5 evidence, having had literally months if not years to  
6 get this evidence together, and say it should be  
7 whittled down by reference to certainly the first two,  
8 the tax groups and in the UK. Therefore it's not open  
9 to him to say that now. He should have done that.

10 We're not happy that it be tax groups because  
11 there's not even the shred of an indication now to this  
12 Tribunal, notwithstanding that he's just made this  
13 submission, what difference it makes to the number of  
14 claimants. There are a lot of claimants here across the  
15 six corporate groups that appear in the Wolseley claim.  
16 They're in different locations, they do slightly  
17 different things. They're in different jurisdictions.  
18 You and we, we don't know whether that means the  
19 difference between, for the sake of argument, 50 returns  
20 with supporting computations or three. We don't know  
21 and that's wrong in principle to allow that diminution  
22 in disclosure at this stage absent evidence. We don't  
23 understand the point about limited to the UK. Every  
24 other country has tax authorities as well. Every other  
25 country has to have tax returns with supporting

1           computations made to them. So we simply don't  
2           understand that. If there were a point there, that  
3           should have been made in evidence in the very ample time  
4           that has been available to them and it hasn't been made.

5           We thought we'd already -- on the third point, file,  
6           we thought this had already been dealt with. It is not  
7           limited to pieces of paper that get put in an envelope  
8           that goes to HMRC or the equivalent in France or  
9           Germany. That is expressly not what is going on in T2.  
10          Instead, as the learned President of the Tribunal said  
11          only moments ago, it has to be those final computations  
12          that support the figure that goes to the figures that go  
13          in the envelope. Therefore, that submission should be  
14          rejected.

15        THE PRESIDENT: Thank you.

16                   (Pause).

17          Mr Jones, we really don't quite see why the  
18          computations are different in your case from the other  
19          cases. I mean, we've made it clear what one wants to  
20          understand is how the figure is arrived at. If the  
21          computation is filed with the return, fine; if it isn't,  
22          it will underline the return, there will be a final  
23          computation, it can be produced and it would have been  
24          retained in case there was any query on the return.

25                   So there really shouldn't be any problem. You would

1           have until 31 December. You've got liberty to apply.  
2           If it turns out there is some mysterious problem about  
3           that, you can apply to vary the order. But it does seem  
4           to us that, just as Dawsongroup and Ryder are providing  
5           the computations, so should Wolseley. So we are against  
6           you on that.

7           The tax group, we don't quite follow. If the return  
8           is for a group of companies, that will be the return for  
9           those companies and there won't be individual returns if  
10          they file it in a consolidated way. If they file it  
11          company by company, then it will be a separate return.

12       MR JONES: Yes. Well, sir, I said frankly that we were  
13          trying to work out what we might have and if it turns  
14          out that any of these assumptions which we're discussing  
15          are not right, as you say, sir, we can come back.

16       THE PRESIDENT: Yes but I think it should be for all the  
17          companies in the Wolseley claim. Now, the real  
18          question, it seems to us, is about the foreign  
19          companies. I think the main -- although I can't now  
20          recall how many companies are in the Wolseley claim --

21       MR JONES: About 153 I think.

22       THE PRESIDENT: But the foreign ones, am I right, it's  
23          mostly France and Germany is the bulk? Is that correct?

24       MR JONES: Yes. Sorry, sir, I should remind you that the  
25          overcharge disclosure has been limited to France and

1 Germany, so disclosure outside of those --

2 THE PRESIDENT: Yes, that's what I thought.

3 So for France and Germany, what is the problem of  
4 providing tax returns and computations?

5 MR JONES: The suggestion I was making was that we would  
6 look at what the equivalent is of the computations.  
7 Now, perhaps it is identical in which case there's no  
8 problem. I'm simply trying to take it in a staged way.  
9 We would be happy with an order that we do it for France  
10 and Germany. If computations are something different  
11 and it's therefore not possible, then we can come back.

12 THE PRESIDENT: We'll say computations or equivalent and you  
13 have liberty to apply. But we do think that Mr Harris  
14 has a point, that it's been clear they've been seeking  
15 this and if you're claiming for France and Germany,  
16 French and German companies, they can expect to have to  
17 deal with the tax position in those countries. So  
18 I think it will apply to all in France and Germany, not  
19 the others. 31 December, liberty to apply.

20 Is there anything else on tax? Good.

21 Then we move to Wolseley and Daimler.

22 Mr Jones, can you just help us. As I understand it,  
23 you've had consent orders with the defendants to your  
24 claim by which you've agreed to give them various  
25 categories and they've agreed to give you certain

1 categories?

2 MR JONES: Yes.

3 THE PRESIDENT: The position that you take with Daimler, and  
4 clarify or correct me if this is wrong, is that you  
5 would be content to do the same with Daimler, in which  
6 case you wouldn't pursue the outstanding issues on the  
7 schedule, of which there are about four I think, because  
8 they've not been provided by the other defendants -- by  
9 the defendants in fact. They're only being pursued if,  
10 contrary to your submission, Daimler is not confined to  
11 what the other defendants are getting but pursues these  
12 various requests as against you. Is that the position?

13 MR JONES: Sir that isn't entirely correct for this reason.  
14 We have the staged process with the other defendants.  
15 The missing link is Daimler. There needs to be an order  
16 against Daimler. The orders against the others are  
17 based on what they have said is readily available.  
18 Daimler has declined to engage in that exercise and we  
19 have therefore had no alternative but to say we'll  
20 therefore seek to have an order against you, essentially  
21 on the terms that we've been seeking in the Redfern  
22 schedules. So that would involve --

23 THE PRESIDENT: Can I interrupt you just to clarify? There  
24 are, of actual defendants to your claim, they are DAF  
25 and Iveco, is that right?

1 MR JONES: Yes.

2 THE PRESIDENT: So those two. Are the orders the consent  
3 orders against them and indeed it's also, is it not,  
4 against the other contribution parties in those claims,  
5 in other words -- and I think indeed Scania as well. So  
6 MAN and Volvo and Scania are covered by one consent  
7 order, is that right, as I see it?

8 MR JONES: Iveco has its own consent order.

9 THE PRESIDENT: Iveco has its own, the others are all in  
10 one?

11 MR JONES: Yes.

12 THE PRESIDENT: Are there, in what you are obtaining from  
13 DAF, MAN, Volvo, Scania, are there differences between  
14 them?

15 MR JONES: There are some differences, yes.

16 THE PRESIDENT: I see.

17 MR JONES: Yes, there are differences because it's what's  
18 readily available. I would also say we have made the  
19 point today in correspondence that the sensible way to  
20 resolve this would be for them to essentially mirror  
21 what others have done. So they've refused to tell us  
22 what's readily available, and we've said why not just  
23 follow, for example, the Iveco format, and they've  
24 refused to do that.

25 It's right to say that in those circumstances we are

1 seeking to have these, I think it's three outstanding  
2 issues resolved against them. Sir, to go to the point  
3 which I think you're alluding to, it's also right to say  
4 that in the consent orders against the other defendants,  
5 the other defendants have not agreed to give us  
6 everything that I'm pursuing against Daimler. Sir,  
7 I think that may have been your starting point and that  
8 is correct. But the reason is that practically we've  
9 tried to reach an agreement with Daimler. They've  
10 refused to engage, they've refused to come up with  
11 a sensible compromise and this really goes to the point  
12 which Mr Pickford was making about incentives.

13 THE PRESIDENT: Yes.

14 MR JONES: It seems not to be appropriate for us then to  
15 say, well, fine we'll just ask the Tribunal for some  
16 pared back version which we will come up with even  
17 though Daimler isn't. That's where we are on what we're  
18 seeking from Daimler.

19 THE PRESIDENT: Just pausing there, in fact I think you said  
20 in your skeleton that there are actually relatively few  
21 issues on the schedule with Daimler that are in  
22 dispute --

23 MR JONES: That was the other part of the thinking. So  
24 there are -- in the skeleton there are four, actually  
25 one of those has been agreed so there are actually

1           three.

2       THE PRESIDENT: Right. Which one has been agreed?

3       MR JONES: O5A(e).

4       THE PRESIDENT: Yes, so that's agreed. So there are now

5           three, yes?

6       MR JONES: There are now three. I should also just say that

7           two of those also, as I understand it, arise in the

8           Ryder claim, so two of the ones which we're seeking

9           Ryder is also seeking. So our thinking in advance of

10          today was we will pursue them because there's overlap

11          and that anyway makes it easy. Those two, for your

12          note, is O5A(h).

13       THE PRESIDENT: Market intelligence.

14       MR JONES: Market intelligence which is the same as what is

15          in Ryder called O4A(h), and Conf 2 which is called Conf

16          2 in Ryder as well. So there's that overlap. But there

17          are only a few --

18       THE PRESIDENT: Can I ask, on those two, market intelligence

19          documents and configurator documents, what's the

20          position with the defendants under the consent order?

21       MR JONES: None of them are giving us those, sir.

22       THE PRESIDENT: So none of them are giving you those but you

23          haven't abandoned it, you've just simply deferred it?

24       MR JONES: That's right.

25       THE PRESIDENT: Just one second. (Pause).



1           Then on the remaining one which is emission  
2           standards and the R&D costs I think, O3(b), what's the  
3           position from the other defendants and the other  
4           contribution parties?

5           MR JONES: I'm told that's also not covered in the consent  
6           order.

7           THE PRESIDENT: It's not covered. So in fact now, given  
8           what's recently been agreed, the three points you're  
9           pursuing against Daimler are not being equivalently  
10          provided by the other parties in that action?

11          MR JONES: No.

12          THE PRESIDENT: Therefore I ask if we don't hear you on  
13          those, everything else with -- what you provide Daimler  
14          has been agreed with Daimler because that is all you're  
15          pursuing?

16          MR JONES: Everything else which Daimler would provide to us  
17          has --

18          THE PRESIDENT: Has been agreed?

19          MR JONES: Has been agreed, yes.

20          THE PRESIDENT: Before we get to what Daimler is seeking  
21          from you, it really doesn't seem to us, and we'll hear  
22          you as appropriate, very sensible case management to  
23          hear applications in an action which has many parties,  
24          I think two defendants, four contribution parties, so  
25          six other parties of particular categories of

1 disclosure, to hear you and Mr Harris for one other  
2 battle it out on that category when that category has  
3 been postponed as regards all the other parties, because  
4 that means at some point, whatever we decide regarding  
5 Daimler doesn't bind the others and, if we're against  
6 you on Daimler, doesn't prevent you pursuing it as  
7 against someone else and, more particularly, if you  
8 succeed against Daimler, say, in getting configurators,  
9 that's not going to bind MAN or DAF or Iveco. So they  
10 then might be able to persuade us that you shouldn't get  
11 it as against them and we then get a very inconsistent  
12 result.

13 It's not only that. Aside from inconsistency, we  
14 hear argument about the same category twice on two  
15 different occasions which is not a sensible use of the  
16 Tribunal's time.

17 So it seems to us, before we hear you on this, our  
18 provisional view is if these categories have been  
19 postponed for the others in your action, they should be  
20 postponed for Daimler. We're not refusing them, we're  
21 simply saying it should be deferred as you have agreed  
22 with all the others it should be deferred, and then it  
23 can be argued in one go as against everyone.

24 MR JONES: Sir, we entirely see the force of that. All

25 I would say also is that we have sought to achieve that

1 same outcome and the important point from our  
2 perspective is that what's sauce for the goose is sauce  
3 for the gander. It's a much bigger problem the other  
4 way round because there are a huge number of requests  
5 being made by Daimler.

6 THE PRESIDENT: Yes, I take your point completely. But  
7 subject to the fact that the logic must apply both ways,  
8 do you seek to resist that?

9 MR JONES: I don't seek to resist that. Could I just make  
10 this additional point about the distinction with  
11 Daimler, which is at least if we were to get disclosure  
12 against Daimler today, it would simply involve Daimler  
13 having to disclose to us, so you're right to say that  
14 there may then be other arguments with other defendants  
15 at a later stage. There wouldn't though be the risk of  
16 Daimler doing, as it were, double disclosure. What's  
17 different and worse in the context of Daimler's  
18 applications against my clients is that all of the  
19 points which they're making come from the same Redfern  
20 schedule that all the other defendants are arguing with  
21 my clients about and will be resurrected in future after  
22 the staged approach. So if Daimler were to proceed, we  
23 would not only have the argument twice --

24 THE PRESIDENT: We have this very much in mind, that the  
25 same approach must apply both ways. I wanted to clarify

1 your position, which is helpful.

2 Mr Harris, on the basis that those then won't be  
3 argued today, the same logic, it seems to us, applies  
4 the other way around, that you're making a whole host of  
5 requests, you would get I think -- I need to clarify --  
6 Mr Jones, you've talked about what the other defendants  
7 are giving you. In terms of what you have agreed to  
8 give them, are you prepared to give the same disclosure  
9 to Daimler?

10 MR JONES: Yes.

11 THE PRESIDENT: Yes. So Mr Harris, you will get what  
12 everyone else in the action has got. You want a whole  
13 lot of other categories, so do some of the other parties  
14 in that action but they've agreed to defer argument  
15 about that until they've received, analysed and digested  
16 what they will receive and what you can receive. So  
17 what is the sense in terms of case management of hearing  
18 this first now from you and then in a few months from  
19 everybody else?

20 MR HARRIS: Well, sir, there are a number of important  
21 points of principle here that arise. The first is that  
22 we respectfully contend that these orders in the VSW  
23 proceedings, this is absolutely no criticism of the  
24 Tribunal, because of the way they were presented to the  
25 Tribunal were made on the papers without hearing the

1 points that I'm about to make, including about  
2 insufficient progress across substantive areas of  
3 disclosure.

4 THE PRESIDENT: They're consent orders. They weren't made  
5 on the papers, they were agreed.

6 MR HARRIS: Yes. What I meant by that was without the  
7 benefit of hearing the arguments that I'm about to make  
8 regarding the lack of progress that is made in those  
9 orders. It is important to note that Daimler's position  
10 is that more progress should be made here, not less,  
11 considerably more progress. One of the major flaws with  
12 the VSW consent orders is that there is very little  
13 progress and what we urge upon the Tribunal in the  
14 spirit of earlier case management conferences is that  
15 there should be considerably more progress.

16 THE PRESIDENT: If there's more progress as regards you, why  
17 should you advance ahead of everybody else?

18 MR HARRIS: Well, I'm going to address you in a moment, if  
19 I may, as to the amount of skin in the game, to coin  
20 a phrase from an earlier hearing, that Daimler has in  
21 the Wolseley case. I'm going to take you back, if  
22 I may, to the judgment that was given by this Tribunal  
23 in the context of the strike-out of the counterclaim.  
24 I'm going to come back to that. That's very important  
25 and I need to show you those passages to just remind you

1           how important this claim is to Daimler.

2           The first point is that there is very, very little  
3           progress made in the VSW orders. So, for instance,  
4           there is hardly any, with respect, disclosure from the  
5           claimants, the VSW claimants, to the defendants and  
6           that's because they say that notwithstanding that this  
7           litigation is being -- has been ongoing for some  
8           considerable time and notwithstanding how on earlier  
9           occasions they've urged upon this Tribunal that we  
10          should move things forward, in fact it transpires that  
11          when push comes to shove and they're asked to provide  
12          claimant disclosure to the defendants, they say "Well,  
13          we haven't got hardly anything that's readily  
14          available". So the VSW consent orders therefore provide  
15          that they provide very little in this first stage. We  
16          say no, actually there should be more progress.

17          We particularly pick up the Tribunal's comments in  
18          an earlier case management conference, which we've cited  
19          in our skeleton so I can get you the reference if you  
20          need it, that there should be progress, and this is the  
21          Tribunal's phrase, "across the board". Why was the  
22          Tribunal so concerned to make progress across the board?  
23          It was because, and we strongly endorse this, we always  
24          have done, there needs to be consistency of approach  
25          between the actions.

1           So to summarise so far, very little progress made in  
2           these orders; we're willing, able and indeed urge upon  
3           you that there should be more progress, consistent with  
4           how the Tribunal has proceeded today. We further urge  
5           upon you that it should be consistent. VSW shouldn't be  
6           left behind and --

7           THE PRESIDENT: So you're making an application for  
8           disclosure to all the defendants, even those who are not  
9           asking for disclosure?

10          MR HARRIS: No, what we say --

11          THE PRESIDENT: When you say consistent within the action.

12          MR HARRIS: I can't do that but what I do say, and I pick up  
13           on the Tribunal's remarks earlier on, we shouldn't have  
14           rehearings of points of principle. What there should  
15           be, because I recognise that the Tribunal can't make  
16           a binding order as against -- or for that matter in  
17           favour of, say, MAN or VT/RT or whomsoever today if  
18           they're not pursuing the application, but it should be  
19           made very clear that we're all ready here today to argue  
20           these points of principle and indeed discrete categories  
21           and it should be made very clear that this is the  
22           opportunity to have that argument.

23          THE PRESIDENT: Well, we can't -- sorry to interrupt you.  
24           We can't have an argument which various defendants are  
25           not seeking and are not therefore prepared to pursue.

1 They are entitled to say, "We don't want to seek this  
2 disclosure now, we're quite happy to come back in two  
3 months", so the result of hearing you on them is that we  
4 will hear these categories argued twice.

5 Just suppose, despite your eloquence no doubt on  
6 category O2(e), we decide against you. It may be that  
7 when Mr Pickford and Mr Hoskins come to argue that  
8 category, they'll persuade us it should be granted.  
9 Then no doubt you come back and say, "Well, they've got  
10 it now; although you ruled against me last time, now we  
11 would like it because that's only fair". Is that the  
12 sensible way to deal with these contested items?

13 MR HARRIS: Sir, what that leaves out of account is that  
14 a large number of these contested items that we seek to  
15 pursue against Wolseley are going to be debated and  
16 resolved in any event in this two-day hearing as against  
17 Dawsongroup and Ryder. They are the same points.  
18 Indeed some of them are already agreed as between the  
19 defendants and Dawsongroup and Ryder.

20 What we say is exactly in the same way that  
21 sensible, mature, additional progress is being made in  
22 Dawsongroup and Ryder on a whole host of additional  
23 categories, that is the sort of progress that should be  
24 made in the Wolseley claim, given that we haven't  
25 agreed.



1           It's important to just understand why it was that we  
2 didn't agree. We would have been the first to stand  
3 here today and say that if there had been consent orders  
4 for frankly not very much across all the actions so as  
5 to retain that consistency, and again to adopt the  
6 Tribunal's phrase, across the board, we would not have  
7 opposed it. But that has never happened. All that has  
8 happened is that the VSW claimants, with respect to  
9 them, are not ready to give meaningful and substantial  
10 disclosure, and that's why they've only agreed to give  
11 very little, and the other defendants have gratefully  
12 lapped that up as regards that claim because they also  
13 don't want to provide any further disclosure.

14           But we stand ready to address these issues and if so  
15 ordered provide further disclosure, but it has to be on  
16 a reciprocal basis. So it can't be overemphasised that  
17 the reason that Daimler hasn't done this is because  
18 insufficient progress is being made and because it leads  
19 to a significant inconsistency between the two actions.

20           Can I also just draw to your attention, sir, why we  
21 already now know, from what's happened yet so far today,  
22 why the VSW orders are unsatisfactory and demonstrate  
23 insufficient progress? So, for instance, we've had the  
24 debate this morning about tax treatment. Tax treatment  
25 does not feature at all in the VSW consent orders and

1           that's because VSW claimants would say, oh, no, no, no,  
2           we don't want to give any tax disclosure at all. That's  
3           disclosure that we have to give to the defendants  
4           whereas in the VSW consent orders we give very little  
5           disclosure of anything to the defendants up until  
6           Christmas.

7           But what's the Tribunal done? The Tribunal, because  
8           principally Daimler has pursued this tax topic, in  
9           contrast to nearly all the other defendants, but because  
10          Daimler has pursued it, what's happened, the Tribunal  
11          has said, yes, absolutely, we should be making progress  
12          on tax and then we've been through it. So that is an  
13          addendum to the VSW consent order.

14          We've said: exactly. You're not making enough  
15          progress, that's why we don't agree.

16          Let me give you another example. Prior to today,  
17          there was going to be in the VSW consent orders an end  
18          date for the various VoC and overcharge categories of  
19          December 2016. That's what was agreed in those orders.  
20          I appreciate there was a slight wrinkle with DAF because  
21          they had already provided some more and a slight wrinkle  
22          with Iveco because they've said we'll do a mirroring  
23          provision. But what's the Tribunal actually done? They  
24          said, actually, that's not good enough. Those VSW  
25          consent orders, they're not good enough. What you have

1 to do is go beyond what you've agreed to September 2017.  
2 That's another example of where we say insufficient  
3 progress was being made and the Tribunal has agreed with  
4 it.

5 Let me give you another example. Interest. There  
6 is substantial agreement as regards interest disclosure  
7 categories between Daimler on the one hand and  
8 Dawsongroup and Ryder on the other hand. What's VSW  
9 doing about that in the consent orders? Absolutely  
10 nothing. Nil progress. But we say, woah, hang on  
11 a minute, that's not appropriate. We need to make  
12 progress on these things, not just because we should be  
13 moving forward and not just because of consistency but,  
14 in our case, because we say these are important rights  
15 of defence.

16 We want to be able to begin to exercise our rights  
17 of defence in a case in which we've got lots of skin in  
18 the game. I am going to go back to that because I just  
19 want to remind you of those figures. I haven't reached  
20 that point yet.

21 It's not right to say, sir, that what's sauce for  
22 the goose is sauce for the gander. There's no necessary  
23 parallel between claimant disclosure going in one  
24 direction and defendant disclosure going in the other  
25 direction because we should be entitled to exercise our

1 rights of defence by reference to matters that we've  
2 pleaded, for example on tax and for example on interest,  
3 and for that matter on mitigation and pass-on, because  
4 we're entitled to defend ourselves wholly irrespective  
5 of whether any other defendant wishes to defend itself  
6 in that manner. Wholly irrespective. That is our  
7 right. We have put these matters into our pleadings and  
8 we've said these pleadings have been out for a while,  
9 now you need to give disclosure.

10 But what do they do in the VSW consent orders?  
11 Nothing. There is minimal disclosure from the claimants  
12 on some of the pass-on categories but by no means all,  
13 the rest are completely ignored. That's why these are  
14 not satisfactory approaches.

15 Now, can I just take you to a judgment. Mr Rayment  
16 has brought some copies because it's important that when  
17 Mr Malek said earlier a remark that we gratefully  
18 endorse, Daimler should not be shut out, it's just  
19 important to remind the Tribunal with the greatest of  
20 respect that in the Wolseley claim, you may recall the  
21 submissions that I made in the context of whether or not  
22 we should be allowed to pursue a counterclaim. I hope  
23 you now have the judgment in that action, 8 May this  
24 year, the hearing was a lot earlier.

25 One of the reasons that I said that the point about

1 the counterclaim was so important to us is because it's  
2 pure happenstance that Daimler hasn't been actually sued  
3 as a named defendant in that case. Pure happenstance.  
4 It's no doubt for tactical reasons. We know not. But  
5 the fact is -- there are three parts of the judgment  
6 I would like to take you to, the first is in  
7 paragraph 10, I'm just going to do them in the order  
8 they appear in the judgment. The indented paragraph at  
9 paragraph 10:

10 "The additional defendants [that's me] shall be  
11 allowed to participate in the trial of the main claims.  
12 Insofar as the additional claims raise issues  
13 [et cetera] regarding overall loss and damage suffered  
14 by the claimants or the liability of the main  
15 defendants, such issues shall be tried with the main  
16 claims."

17 These disclosure points that I seek against Wolseley  
18 go to the very issue in which I as an additional  
19 defendant am the subject of an order that allows me to  
20 participate in the trial. So the mere fact that other  
21 people don't want to do that, for entirely tactical  
22 reasons of their own, that's irrelevant because I'm  
23 ordered to be a full participant.

24 Closely related to that is that if you were to turn  
25 up now paragraph, please, 22, at the bottom there's

1 recorded a submission, and I quote:

2 "As Mr Harris QC colourfully put it, Daimler has  
3 a lot of skin in the game."

4 That's the catchphrase before the points that are  
5 set out helpfully in the judgment at 33:

6 Just to remind you, we sought various declarations,  
7 ultimately they weren't given but it was in this  
8 context, they would be useful to Daimler and the  
9 Tribunal. "This is a very large claim and the trucks  
10 which are the subject of the claim include over 2,000  
11 Daimler trucks, just short of the number of DAF Trucks."

12 DAF is a defendant, right, and we are the second  
13 highest number of trucks and it is a very considerable  
14 number, and what is more, considerably more than the  
15 trucks that are the subject -- the number of Iveco  
16 trucks. They happen to be a defendant. But in fact  
17 we've got a lot more at stake than they do, albeit that  
18 Wolseley had chosen not to sue Daimler. We had that  
19 debate in that hearing, I don't want to go back over it.

20 Then it goes on:

21 "In fact, in respect of certain of the trucks sold  
22 in Ireland that are recovered by the claimant, only  
23 Daimler trucks were in issue."

24 Who is going to defend the claim by reference to the  
25 correct disclosure about the Irish trucks?

1 THE PRESIDENT: We've got all those points. As it happens  
2 that this is our judgment, we do remember.

3 MR HARRIS: Yes. I'm grateful.

4 Then there are some similar points made at 43 about  
5 our, and I'm quoting from the judgment:

6 "[...] permitting D2 [we're D2 for these purposes]  
7 to participate in the main trial and call evidence."

8 And:

9 "The effective resolution of the question [this is  
10 the final line] is ensured by D2's involvement in the  
11 trial."

12 We need this disclosure to involve ourselves fully  
13 in the trial and to start to exercise our rights of  
14 defence, notwithstanding that other people don't seek to  
15 do that at the moment.

16 THE PRESIDENT: Yes.

17 MR HARRIS: May I just take a moment?

18 THE PRESIDENT: Yes. (Pause).

19 MR HARRIS: I beg your pardon, sir. One of the issues that  
20 hasn't been dealt with yet by Mr Jones which we say is  
21 a significant problem is that, as regards certain of  
22 these categories, they are going to go ahead now anyway  
23 as against Dawsongroup and Ryder. So the point that the  
24 Tribunal has stressed to me, which I fully understand,  
25 about duplicating argument, well, that's going to happen

1           anyway because nobody is suggesting that there shouldn't  
2           be live applications argued out in the time available in  
3           Dawsongroup and Ryder, nor could there be any basis for  
4           denying them.

5           What we say is we put the boot on the other foot.  
6           Given that those arguments are going to be had out today  
7           as regards many of these categories in any event and  
8           there's no ability or suggestion of stopping them, well,  
9           fine, let's have them against Wolseley too. That way  
10          proper progress is made in the Wolseley action where  
11          we've got so much at stake.

12        THE PRESIDENT: Yes. Anything else?

13        MR HARRIS: I beg your pardon, sir. (Pause).

14                Sir, I think there's another point if I've  
15                understood it correctly, so I will endeavour to make it.

16        THE PRESIDENT: Well, if you haven't understood it,  
17                I suspect we won't.

18        MR HARRIS: No, I'll do my best.

19                So Mr Jones' clients, they say they wish to make  
20                a market-wide analysis for the purposes of, for example,  
21                VoC and overcharge. That's across the V of the VSW, the  
22                S and the W. We're not in the V or the S and it's been  
23                agreed that they won't get that disclosure in the V or  
24                the S. It therefore follows on their own case that they  
25                can't pursue that market-wide analysis. If they can't



1           pursue it, they don't need disclosure from us of those  
2           matters. That's step one.

3       THE PRESIDENT: When you say need disclosure, you've agreed  
4           various categories of disclosure to them in the  
5           schedule.

6       MR HARRIS: Yes.

7       THE PRESIDENT: Yes. So that they're going to get.

8       MR HARRIS: Yes.

9       THE PRESIDENT: That's what they're going to get from not  
10          all but some of the other parties in that action.

11       MR HARRIS: Yes but that's by no means -- there's so little  
12          progress made in the VSW consent orders that they can't  
13          progress this market-wide analysis that they themselves,  
14          their evidence is that's what they're going to do. So  
15          in contrast, however, this was the point about should it  
16          be the same in both directions and we say no. In  
17          contrast we're not in the V, we're not in the S but we  
18          are entitled to defend ourselves in Wolseley. We say  
19          that irrespective of the fact that they don't get more  
20          out of us beyond that which has been agreed or beyond  
21          that which is in the consent orders, nevertheless we're  
22          entitled to exercise our right of defence by reference  
23          to what we say should be greater progress on disclosure  
24          in the W part alone. That's why it's not a true  
25          parallel.

1 THE PRESIDENT: Yes.

2 Right, thank you. Will you give us just a moment?

3 MR PICKFORD: Sir, I beg your pardon. I think I began some  
4 of this, I do have two short responsive points to make.

5 THE PRESIDENT: Just a moment, please. (Pause).

6 Decision

7 Thank you very much. We have got before us at this  
8 disclosure hearing three of the several actions that are  
9 being case managed together, in particular the claim  
10 brought by the Ryder claimants, the claim brought by the  
11 companies in the Dawsongroup and the claim brought by  
12 I think some 153 claimants in the Wolseley action. The  
13 Wolseley action has been ordered by the Tribunal to be  
14 tried together with two other actions, the Suez action  
15 and the Veolia action which are not before us today for  
16 disclosure.

17 Although a lot of progress has been reached by  
18 agreement, a number of matters have not been agreed.  
19 But in the Wolseley action itself it is relevant to  
20 recall that there are two defendants, namely DAF and  
21 Iveco, and there are then four additional Part 20  
22 defendants, Part 20 being the reference to the  
23 Supreme Court Rules as the case started in the  
24 High Court before being transferred to this Tribunal.

25 Through discussions, Wolseley has reached agreements

1 embodied in the consent orders with DAF, Iveco, MAN,  
2 Volvo/Renault and Scania as to the scope and categories  
3 of disclosure to be made between those parties. Daimler  
4 did not reach a consent order with Wolseley and while  
5 many categories of disclosure have been agreed with  
6 Wolseley, Daimler is pursuing a number of requests on  
7 which Wolseley did not agree.

8 The agreement made with all the other parties, that  
9 is to say with the five other parties including together  
10 defendants and Part 20 defendants in the Wolseley  
11 action, do not finally resolve categories on which  
12 disclosure has not been given. They have only deferred  
13 them so that they may be pursued on a later occasion.  
14 We put to Daimler and to Wolseley the proposition that  
15 the categories that they're seeking should also be  
16 deferred so that they can be heard when they are being  
17 pursued by the other parties.

18 Mr Jones eventually, but with little need for  
19 persuasion from the Tribunal, accepted that course as  
20 being sensible. Mr Harris for Daimler strongly resisted  
21 it on the basis that Daimler, although a Part 20  
22 defendant, is effectively one of the parties most  
23 exposed in the Wolseley action because of the very large  
24 number of Daimler trucks involved.

25 Secondly, that the scope of the consent orders in

1 fact means that in practice very little progress is  
2 going to be made in the Wolseley case, which is  
3 unsatisfactory, and he adds further that given that the  
4 Tribunal is going to hear argument in some cases about  
5 the very same categories over the period of this  
6 disclosure hearing, it would be sensible, convenient and  
7 consistent to hear those same categories, albeit they  
8 arise in the Wolseley action, so that the argument is  
9 heard for everything together.

10 We can see some force in the final point but, in our  
11 view, that is greatly outweighed by other  
12 considerations, namely this: first, the importance of  
13 consistency, while it applies as between the different  
14 actions, applies with still more force within a single  
15 action. Given that there are six parties to the  
16 Wolseley action, disclosure should proceed in parallel  
17 for all six. While Daimler has a lot at stake, as  
18 Mr Harris has emphasised, in the Wolseley action, so too  
19 for example has DAF. Indeed I think DAF not only  
20 a direct defendant but has more trucks that are subject  
21 to the claim than Daimler. DAF has, no doubt with the  
22 benefit of careful advice, considered that what's been  
23 agreed makes sufficient progress in defending itself  
24 against the claim and it seems to us that Daimler should  
25 be in a consistent position.

1           Moreover approaching matters that way serves to  
2 encourage the parties to reach agreement on disclosure  
3 allowing one party to pursue applications when the  
4 others do not wish to at this point but have been  
5 content by agreement to defer it because they consider  
6 they're getting enough for the time being.

7           That process gets undermined if the Tribunal then  
8 hears an individual party ahead of all the others on the  
9 same point. It further creates the risk that if we hear  
10 Daimler now and were, for example, to rule against  
11 Daimler on one of the categories for which it seeks  
12 disclosure, that of course does not bind DAF or indeed  
13 Iveco, MAN, Volvo or Scania and they will be entitled in  
14 due course to persuade us to reach the opposite view.

15           We will therefore have heard argument on the same  
16 category in the same case twice, potentially reach  
17 a different view and then no doubt Daimler comes back  
18 and says for consistency we should revisit any decision  
19 we might reach against it today. That is not, in our  
20 judgment, a sensible way forward.

21           But I return to Daimler's final point that some of  
22 these categories will be the subject of argument today.  
23 Daimler is in fact a defendant in the Dawson group action  
24 and in the Ryder action. Accordingly there is no  
25 question of shutting Daimler out from argument on those

1 categories because it will be able to make its arguments  
2 when we come to Dawsongroup disclosure and Ryder  
3 disclosure.

4 If, after argument in one or other of those actions,  
5 we decide that a category should now be disclosed, while  
6 that decision is not binding in the VSW claims, no doubt  
7 the defendants in VSW will take note of it and may then  
8 apply in due course for equivalent disclosure in their  
9 claim. But there is not, we should stress, a complete  
10 parallel between all the actions just because the  
11 category may be described in the same terms.

12 One of the elements of proportionality is the  
13 difficulty and cost with which the requested  
14 documentation or data can be provided. That is not  
15 necessarily the same as between all the claimants so it  
16 is quite possible that a certain category is ordered for  
17 disclosure now as against one claimant but not  
18 necessarily as against another and not necessarily  
19 according to the same timeframe and so forth.

20 So for all those reasons, we do not think it is  
21 sensible in the case management of these proceedings to  
22 deal with one of the six parties in Wolseley's  
23 application now while the others have deferred it, or  
24 indeed to deal with an application in the Wolseley  
25 action distinct for what may prove to be a similar or

1 identical application in the Suez and Veolia actions  
2 that are being tried together with it.

3 We therefore will not hear today these applications  
4 sought by Daimler. We make it clear we are not  
5 rejecting them, we are saying as a matter of case  
6 management they should be deferred until the other  
7 parties seek to advance them or abandon them and that  
8 Daimler should coordinate with the other parties in the  
9 Wolseley case as to when there should be a further  
10 hearing to consider those matters.

11 Equally, when they are being advanced there can then  
12 be discussions no doubt with the VSW claimants as to  
13 whether and what agreement might be reached about them,  
14 as has been done in a number of instances to date.

15 So on that basis, we will order that Wolseley  
16 provides to Daimler the disclosure which it has provided  
17 to the other parties. We shall order that Daimler by  
18 consent provides the categories that have been agreed  
19 and we will also defer Wolseley's application for the  
20 three categories that have not been agreed.

21 Case Management Conference (continued)

22 MR HARRIS: Sir, thank you very much for the careful  
23 attention paid to those submissions.

24 Can I raise an important point about the order, it  
25 isn't in front of me but could be. My understanding is

1 the VSW order says as regards certain of the defendants  
2 they are to provide the best available or best readily  
3 available categories, and then it's, as we heard before,  
4 bespoke, it's slightly different. So we need to liaise,  
5 if you like off-line, whilst the order is being drawn  
6 up, as to what that means in our case.

7 THE PRESIDENT: You've done in the schedule -- you've said  
8 what you agree to so it will follow the schedule plus  
9 the one other item that Mr Jones said has since been  
10 agreed. I think it was, what was it, O5A(e), I think.

11 MR HARRIS: Yes, that one was to do with safety regulation.

12 THE PRESIDENT: But the schedule deals with that,  
13 doesn't it?

14 MR HARRIS: Not quite. It gets quite detailed. Certain  
15 defendants have agreed to provide certain parts of  
16 certain categories by reference to what is readily  
17 available or best available to them now. All I'm saying  
18 is that I just want to make it quite clear that in the  
19 same way defendant A has said this is what you get from  
20 us by reference to that test and then defendant B has  
21 said this is what you get from us by reference to that  
22 test, it's common ground Mr Jones knows that different  
23 things are going to be provided.

24 THE PRESIDENT: We are now -- as regards you, we follow what  
25 you've said and agreed in the Redfern schedule as to



1           what you're going to provide. It doesn't mirror the  
2           other defendants. We're not concerned with the other  
3           defendants. We're concerned with what you have agreed  
4           to in your schedule. That's all we're concerned with.

5       MR HARRIS: Yes, I accept that.

6       THE PRESIDENT: So we don't -- I hope it's all covered.

7       MR JONES: Absolutely. There's no readily available caveat.

8           Those readily available discussions were lengthy,  
9           detailed discussions with the defendants so we could  
10          understand what they said was available, we could  
11          consider it, eventually there was a consent. That is  
12          how one does a deal. If Mr Harris's clients are  
13          interested in future, one needs to engage in detailed  
14          discussions. It's not that you get an order and then go  
15          away.

16       THE PRESIDENT: We're told and have been weighing the  
17          assumption that a lot in your schedule has been agreed.  
18          If it's been agreed it goes into the order.

19       MR JONES: Absolutely.

20       THE PRESIDENT: If there's any argument about the drafting  
21          of the order you can come back to us, but otherwise we  
22          have to go through each of the agreed categories, which  
23          the whole point is we don't.

24       MR JONES: Absolutely. It's what is agreed, which is pretty  
25          much everything we were seeking.

1 MR HARRIS: Sir, what you will appreciate from earlier  
2 remarks is what was agreed by Daimler was by reference  
3 to relevance. That's how we've approached those Redfern  
4 schedules. We're not seeking to resile from that at  
5 all. If we've agreed that it's relevant, it's relevant.  
6 But what was actually ordered in the consent order from  
7 the other defendants was when they've agreed or  
8 accepted, whether for pragmatic purposes or relevance  
9 purposes, that they're going to provide it, it was by  
10 reference to what is essentially readily available.

11 That's one of the reasons why I made the complaint  
12 in the submissions that I did that not a lot of progress  
13 has been made.

14 MR MALEK QC: Are you saying you've only addressed relevance  
15 and not proportionality as to whether or not disclosure  
16 should be ordered?

17 MR HARRIS: That's right but that's not how these VSW orders  
18 have been done in the other direction. Put the point  
19 another way, if there's to be disclosure in both  
20 directions of the entire...

21 THE PRESIDENT: The whole idea of the Redfern schedules is  
22 we know what you've agreed not just is relevant but  
23 agreed to provide.

24 MR HARRIS: We're not the only ones who have done this, sir.  
25 Take for example Ryder. We've approached it on the

1 basis that the normal way to go about at this stage,  
2 particularly given the parameters of the hearing, was to  
3 address relevance. Then -- and then -- for the  
4 disclosure statements to either say we can do it or we  
5 can only do this much or that much.

6 But be that as it may, that's water under the  
7 bridge. You've not agreed with us, it means therefore  
8 you've not agreed for example with Ryder either. But  
9 all I'm saying is the actual mechanics of the VSW  
10 schedules are we'll provide you with this category, in  
11 some cases some of the defendants say bits of this  
12 category, and we'll provide you with essentially what is  
13 readily available. That's why there's limited progress.

14 For us to now be the subject of those orders, that's  
15 what the Tribunal has decided and fair enough, what it  
16 doesn't mean is you just give a full scale disclosure  
17 across all of those categories without any reference to  
18 what is readily available. The whole purpose of those  
19 VSW schedules was to allow essentially what we've  
20 complained of as being not a lot of progress because  
21 people are only doing what is readily available.

22 All I'm saying is that in the same way, if what is  
23 sauce for the goose is sauce for the gander, then in the  
24 same way we should be saying now okay, fine, we've  
25 always agreed this is relevant or that's relevant but

1           that doesn't mean you can have all of it, for example,  
2           by -- I think some of the first dates are in the end of  
3           November or perhaps in December, I can't remember off  
4           the top of my head.

5           The other way of looking at it would be that if that  
6           weren't the case, and we don't get to provide only  
7           what's readily available on the facts of our case, the  
8           same must be true for VSW. So when they've said, here's  
9           a category but we'll only provide you by whatever the  
10          date was that was agreed, I think December, we'll only  
11          provide you, the Defendants' camp, with what's readily  
12          available to us, well, they shouldn't be allowed to do  
13          that either. If we're not allowed to do it, they  
14          shouldn't be allowed to do it.

15          There's got to be parity in that sense otherwise  
16          it's grossly unfair because what happens is they get  
17          a massive amount of disclosure from us in the first  
18          tranche without any reference to what's readily  
19          available and we get very, very little in return.

20          That's an unfairness of exactly the variety that the  
21          Tribunal has said in its ex tempore judgment a moment  
22          ago that they can't be allowed to proceed like that.

23          MR MALEK QC: What should have happened is you should have  
24          engaged with each other and said we accept this is  
25          relevant, this is readily available, make an order in

1           respect of that. But you haven't done that, you haven't  
2           been through that exercise. So far as I can see, you've  
3           said this is relevant but you haven't, so far as I can  
4           understand, said what's readily available or not. Is  
5           that right?

6           MR HARRIS: That's right. That's the step that should now  
7           be done if there's to be parity --

8           MR MALEK QC: That step clearly does need to be done. How  
9           long is that going to take?

10          MR HARRIS: We can probably do it within weeks. We will  
11          start the process -- well, maybe not tomorrow because of  
12          the hearing date, but it will have to be done promptly.  
13          You can see the point. It can't be right that just  
14          because that hasn't been done now, therefore it should  
15          be ignored. On the contrary, the Tribunal's whole ethos  
16          in its opening remarks today was we have to take account  
17          of proportionality, and then you see what you get and if  
18          need be you come back and get some more.

19                   (Pause).

20          THE PRESIDENT: Mr Harris, it's not where we hoped we were  
21          and understood we were. You say that, I'm looking at  
22          the schedule, that you've gone to relevance of category  
23          but not on what can reasonably actually be disclosed.

24          MR HARRIS: That's correct.

25          THE PRESIDENT: That needs to be done. What I think is

1 sensible is you now try and agree with Wolseley on those  
2 matters what you can provide or what is readily  
3 available and, in so far as you can't, or agree a form  
4 of words for those categories, which are the ones  
5 highlighted in grey, you come back at a hearing on  
6 4 October, the morning of 4 October when Mr Malek will  
7 sit to hear argument on those agreed categories but as  
8 to what is appropriate disclosure.

9 MR HARRIS: It follows that we will therefore promptly be  
10 making those proposals in correspondence to Mr Jones'  
11 clients.

12 THE PRESIDENT: I think that's the way we have to proceed.  
13 I think there's been a bit of a misunderstanding.

14 Mr Jones, I think that's what we have to do, looking  
15 at the schedule, what Daimler have said, and I think  
16 it's perhaps been -- no one was alert to that Daimler  
17 agreed this was a relevant category of disclosure and  
18 Mr Harris saying that meant no more than that.

19 MR JONES: Sir, Mr Harris says that. One could spend time  
20 going through the number of times that they have  
21 objected on proportionality grounds and you can see in  
22 the skeleton argument the first half is about how it  
23 shouldn't, one shouldn't look at proportionality and  
24 then they go on to make all sorts of points about  
25 proportionality.

1           What happened in the background was that when the  
2 defendants set out their stance on the requests which  
3 the claimants had made, the other defendants had more  
4 objections in broad terms than Daimler, so Daimler was  
5 prepared to accept almost all of them. That was why,  
6 when one gets into discussions with defendants, it makes  
7 sense to focus on taking it in stages and what's readily  
8 available.

9           Now, I hear, sir, what the Tribunal has said about  
10 now rolling that out to Daimler although we do say  
11 Daimler is going to have to look carefully at not just  
12 what is immediately readily available but, more  
13 generally, what it accepts is going to be proportionate  
14 to provide to us in these proceedings and that that  
15 needs to be done very quickly because everyone else has  
16 done it, everyone else has engaged in that process and  
17 we're getting disclosure by the end of November. If  
18 Daimler wants to pull back what it's giving us, then it  
19 needs to be made to do that on the same timetable. So  
20 we want disclosure by the end of November.

21 MR MALEK QC: Let's just make it clear. They've done the  
22 first half, which is to say what they accept is  
23 relevant. The second half is to say, do they accept  
24 it's proportionate to make the order in respect of that  
25 category? Once you've got that, that's the order.

1           Then, when it comes back to the disclosure  
2           statement, their only obligation is to do a reasonable,  
3           proportionate search and if they say having looked at it  
4           this isn't reasonable or proportionate, they've got to  
5           say what searches they've done, why the additional  
6           searches are not practicable and we deal with it at that  
7           stage.

8           But what I expect to happen between now and the 4th  
9           is that the parties involved will meet early next week  
10          and start getting through this and going through it  
11          category by category. This isn't rocket science,  
12          everyone knows where we are on this. These aren't  
13          particularly difficult issues when you look at them  
14          individually. I can understand it's difficult when you  
15          have to look at so many at the same time but none of  
16          these are really difficult issues to resolve.

17       MR JONES: Sir, the timetable as I understand it is by the  
18          4th we will be told what Daimler says is  
19          proportionate --

20       MR MALEK QC: No. On the 4th I will be here in the morning.  
21          I will deal with anything that you haven't resolved and  
22          the idea is that next week you should have a meeting  
23          with the other side to try and agree and see what you  
24          can agree and what you can't agree. If there are any  
25          difficulties I will resolve those on the 4th.



1 MR JONES: I'm very grateful, sir.

2 MR HARRIS: Thank you, sir.

3 THE PRESIDENT: So any application for Mr Malek to resolve  
4 should be lodged by 5.00 pm on 1 October, which is the  
5 Tuesday. That gives Mr Malek a day to consider it  
6 before a hearing on the 4th.

7 MR HARRIS: I'm grateful for that indication.

8 The last two matters that arise out of that are  
9 simply -- for the record, of course, what's happened is  
10 that there's now quite a substantial slower pace for the  
11 VSW case as compared with Dawsongroup and Ryder and we  
12 understand the reasons for that and we accept them. But  
13 what won't be satisfactory is if, in six months' time,  
14 VSW come along and say, you know what, we wanted a lot  
15 more time and to do things a lot more slowly back in  
16 autumn 2019 but now we want the whole thing re-expedited  
17 so as to catch up -- what's happened by dint of  
18 agreement of the others, which we've now been ordered  
19 essentially to pursue, is it's slowed down. Fine, but  
20 it's now slowed down.

21 THE PRESIDENT: There are a whole other things in the VSW  
22 case such as foreign law which means that it's not being  
23 tried together with the other cases at the moment.  
24 I think that resolves that. Is there anything left on  
25 Wolseley?

1 MR JONES: Sir, I've been asked if we can have an order that  
2 we are told by the end of next week what Daimler says  
3 would be proportionate because we're on otherwise quite  
4 a tight schedule. We need to have that at least by next  
5 week so that we can then make an application by the 1st  
6 if necessary.

7 MR MALEK QC: I've directed that you meet next week.

8 MR JONES: We meet but we need them to tell us exactly what  
9 they say is going to be proportionate.

10 MR MALEK QC: Obviously they'll tell you at the meeting and  
11 they'll provide you with a schedule after that meeting  
12 as to what they can provide and what they can't provide.

13 THE PRESIDENT: Then you make your application by 5.00 pm on  
14 Monday, the 1st. They're going to meet you to discuss  
15 these points and tell you what they can do and you reach  
16 agreement or you don't.

17 MR JONES: I'm grateful for the indication that the  
18 expectation is that they will tell us exactly what they  
19 can give us and that's sufficient.

20 MR HARRIS: Of course we're not going to go to a meeting  
21 with no schedule and no suggestion. Let's be mature  
22 about this.

23 THE PRESIDENT: I won't comment on the way other  
24 negotiations internationally take place but I think we  
25 will -- at that point we shall rise for five minutes

1           until 3.50. I think, Mr Jones, you are now excused, and  
2           your team, from the rest of this hearing.

3           (3.43 pm)

4                               (A short break)

5           (4.00 pm)

6           THE PRESIDENT: Yes, Mr Ward for Dawsongroup, I think we  
7           turn to your action and we've also had helpfully from in  
8           fact I think it's the solicitors to DAF a little  
9           schedule showing where we are with what's really  
10          outstanding which is very helpful.

11          MR WARD: Yes, I think that is agreed as with us and I don't  
12          know whether -- I think and with Daimler and I'm not  
13          sure what Volvo/Renault's position is. But if we feel  
14          our way forwards, I'm sure I'll be pulled up if we make  
15          a mistake on this, because in a positive way, this has  
16          been something of a moving target.

17                 So if I may, I will start with Dawsongroup's request  
18          to the defendants. If you don't already have it to  
19          hand, I believe it's in bundle B1 under tab 20.

20          THE PRESIDENT: We're in the Redfern schedule, are we?

21          MR WARD: Redfern schedule.

22          THE PRESIDENT: I think we've got them in our bundle COM-C  
23          {COM-C/1/20}, and at tab 1 is your solicitors' BCLP's  
24          letter of 31 July, the disclosure request, that you're  
25          referring to?

1 MR WARD: Thank you, sir. There's a lot of good news about  
2 the schedule which is to say there is an overarching  
3 point by Volvo/Renault about proportionality which we  
4 must not lose sight of but if I may just put that to one  
5 side for a moment, if that is put to one side I believe  
6 there are just four categories where there is a dispute  
7 and in each case it is a dispute with just one defendant  
8 I believe.

9 When we get on to the defendants' Redfern schedule  
10 of requests for Dawsongroup, there are similarly  
11 a handful of volume of commerce type categories which  
12 are disputed and then there is a big dispute of  
13 principle about what the approach should be to pass on  
14 and mitigation. That is a matter that the Tribunal can  
15 potentially deal with as a high-level issue. In my  
16 respectful submission, it would be unlikely but I accept  
17 possible that you will find it beneficial to go through  
18 the details but pass on categories 4, 5 and 6 in that  
19 part of the schedule.

20 So mindful of the time, subject to the Tribunal's  
21 view, I would just take you through the four categories  
22 where there is a dispute on the Dawsons schedule.

23 I think these are actually quite brief and in a  
24 sense not obviously more difficult than the categories  
25 that have been agreed in many cases but there we are.

1           The first one is at O2 which is at page 41 of the  
2 schedule. This is a very simple point for our part,  
3 good or bad but a simple one {COM-C/1/41}. These are,  
4 as you will see:

5           "Data, documents or information which shows the  
6 costs of developing, manufacturing and installing in  
7 Trucks the components associated with complying with  
8 each of the Euro standards from Euro III to Euro VI  
9 [...]"

10          Now, the logic of this request is in a sense an  
11 obvious one. You will recall that one of the  
12 specifically identified elements in the cartel was the  
13 timing and passing-on of costs for introducing Euro III  
14 to VI. We can see that in recital 2 of the decision.  
15 I can turn it up if it would be helpful but I know  
16 you've seen this many times.

17          So this is, albeit in, as you know, a summary  
18 decision, one of the elements that the Commission has  
19 particularly identified. I think the dispute is oddly  
20 a narrow one, in that nobody argues that we shouldn't be  
21 allowed to have disclosure in this respect but there is  
22 objection by Volvo/Renault to this being a stand-alone  
23 category because of course O1 contains the broader truck  
24 pricing information -- cost information, I'm sorry.

25          Our point here really is very simple. We wanted O2

1 in to make sure this specific aspect of the cartel did  
2 not get somehow lost. If in fact the relevant material  
3 is disclosed in any event under O1, well then, that can  
4 be said in the disclosure statement. So it's there just  
5 to ensure it isn't somehow, if you like, lost in the  
6 wash. It may well be that in practice it does collapse  
7 into O1.

8 THE PRESIDENT: Can I then check, looking at page 41, DAF  
9 has provided this, is that right?

10 MR WARD: Yes.

11 THE PRESIDENT: We know that the Daimler comment goes to  
12 relevance, it doesn't go to proportionality.

13 MR WARD: Yes.

14 THE PRESIDENT: So we have to clarify that. Then we need to  
15 remember which column is which.

16 MR WARD: It goes DAF, Daimler, Volvo.

17 THE PRESIDENT: DAF, Daimler, Volvo, yes.

18 Looking at the sub-categories, total and average  
19 cost by type of truck, when incurred. What's (c)?

20 MR WARD: Total and average cost per truck of the  
21 manufacture and installation of the components that go  
22 into it for this purpose.

23 THE PRESIDENT: So that's average per type of truck?

24 MR WARD: Yes.

25 THE PRESIDENT: When it says per truck, you mean per type of

1 truck?

2 MR WARD: Yes. Nobody has argued about whether those are  
3 the appropriate categories, it's just an argument about  
4 whether they're needed at all.

5 THE PRESIDENT: You say it's for Euro III to --

6 MR WARD: VI. As I'm sure you know, those are the different  
7 levels of emission standards and those are the ones that  
8 were specifically identified in the decision as having  
9 been cartelised.

10 THE PRESIDENT: Thank you. I think we'll take these item by  
11 item, I think that's sensible.

12 MR WARD: May I say a quick word about Daimler's position  
13 because obviously you had a lively exchange about the  
14 position of VSW. It is slightly different in our case  
15 because of course, as you know, there hasn't been any  
16 agreement as to any form of staged disclosure so there  
17 isn't the same question of, if you like, packets of  
18 disclosure on the one side and a broader disclosure on  
19 the other.

20 We have -- Daimler has taken the same approach which  
21 is "We'll disclose relevant documents to the extent  
22 reasonable" and broadly that is also Dawson's approach.  
23 We've gone further than Daimler because we've identified  
24 what we think are key repositories but we do understand  
25 that doesn't cut down the overarching obligation of

1           proportionate search.

2           So in a sense, in our case, what is proposed on both  
3           sides is, if you like, full execution of the overarching  
4           obligation of proportionate search rather than  
5           a compromised form of disclosure at an initial stage on  
6           either side.

7       THE PRESIDENT: So Mr Harris, looking at your entry on this  
8           item or rather the entry on behalf of your clients, is  
9           that agreed to provide on the basis of a proportionate  
10          search?

11       MR HARRIS: Yes, exactly. Exactly what Mr Ward has just  
12          said.

13       THE PRESIDENT: Yes, thank you. Reasonable and  
14          proportionate search I think one should say.

15       MR HARRIS: As always, sir.

16       THE PRESIDENT: Yes, as Mr Malek reminds me.

17                 DAF is covered so it's Volvo I think that raised an  
18                 issue, you invite the claimants to explain why. You've  
19                 heard from Mr Ward, Mr Hoskins.

20       MR HOSKINS: So if we're looking at the Redfern schedule,  
21           you see our position, it's in the fifth column, we say  
22           we don't understand the rationale but we go on to say:

23                 "To the extent the DG claimants require general  
24                 costs data, this is addressed by category 01 above."

25                 Then if you turn over the page {COM-C/1/42},



1 page 42, the final column is Dawsongroup's response to  
2 us. You see the final paragraph begins:

3 "In relation to Volvo/Renault's response [...]"

4 If you go about halfway down that entry, you'll see  
5 a sentence that begins:

6 "To the extent that these costs are covered by  
7 searches responsive to the disclosure category O1 above,  
8 and that Volvo/Renault consider that any further  
9 searches would not be reasonable and proportionate, this  
10 can be reflected in the disclosure statement [...]"

11 Now, on his feet and in their skeleton argument,  
12 Dawsongroup have made quite clear that this is a belt  
13 and braces application. Citing from paragraph 47 of  
14 their skeleton argument, I'll just read it to you:

15 "Disclosure is sought in respect of this specific  
16 feature of the cartel to avoid the risk that it is not  
17 given as part of a more general category."

18 That's why we say it is belt and braces, because  
19 we've said you're going to get we think what you need in  
20 O1, and they're saying, well, we might not so we'll have  
21 it in any event just in case.

22 Our submission is that the appropriate approach to  
23 this therefore is that it should be a staged approach  
24 which is that they will get O1 and then, if they don't  
25 get what they need, they can come back and ask for what

1 they need. That is consistent with our general approach  
2 on this matter.

3 Can I show you some evidence on why we say that's  
4 appropriate, so it's not just me making that suggestion.  
5 The first point is, in relation to Renault, because you  
6 will have seen our evidence, you have to treat Renault  
7 and Volvo for disclosure purposes effectively as  
8 separate entities. Work has to be done for each of  
9 them, there is not a common pool. In relation to  
10 Renault, Dawsongroup's claim covers just 226 Renault  
11 trucks. I used the phrase de minimis earlier which  
12 maybe is slightly too much but it's a very limited  
13 number of trucks in the grand scheme of things. In  
14 terms of proportionality with Renault, that's important.

15 THE PRESIDENT: 226.

16 MR HOSKINS: 226. That's a Renault-specific point. Now  
17 I come to points that are a reply to both Renault and  
18 Volvo. I'd like you to look at Mr Biro's statement,  
19 that's at bundle {COM-C/10/28}. Paragraphs 89 to 90, he  
20 says:

21 "[...] any increase in prices during the  
22 infringement period as a result of this effect [that's  
23 in relation to emission standards] would be captured  
24 within a general overcharge analysis rather than  
25 requiring a separate analysis. In particular,

1 I understand that the emissions technology incorporated  
2 into a truck is not separately priced by VT/RT."

3 Then paragraph 90:

4 "As a result, any increases in costs and prices as  
5 a result of the implementation of new emissions  
6 standards would be reflected in VT/RT's  
7 transaction-level sales data."

8 We say that's a very powerful proportionality point.  
9 If there is an effect as a result of emissions data, it  
10 will be captured in any event by the analysis that's to  
11 be conducted in relation to prices. The President is  
12 giving me a very quizzical look.

13 THE PRESIDENT: I'm just looking at the fact that what you  
14 get under category O1 will be general costs and prices.  
15 If one wanted to see what are the costs that  
16 specifically relate to the particular Euro standard,  
17 which one might then wish to say that element should be  
18 looked at separately because it was subject to  
19 a particular agreement, that might not be clear from  
20 what is provided under O1. That's why, as I understand  
21 it, they say, well, either you can say it is clear or  
22 you say -- which is what you put in your disclosure  
23 statement -- or if you're not able to say that, you  
24 should at the same time provide it and avoid them having  
25 to come back.

1 MR HOSKINS: Yes, so there's two points in relation to that.

2 The first one is, Mr Biro's first point is you don't  
3 need the costs related to emissions standards compliance  
4 because, if you look at the prices and the overcharge  
5 analysis, that will capture any overcharge as a result  
6 of emissions in any event without having to go to  
7 particular analysis of the costs.

8 He has a second point which again goes to  
9 proportionality, this is at paragraphs 91 to 94 of his  
10 statement, and in particular -- I know you've had a lot  
11 to look at. Can I ask you to look at 92 and 93 to  
12 refresh your memory because this is the point I wish to  
13 take out of it.{COM-C/10/29}. (Pause).

14 THE PRESIDENT: Yes.

15 MR HOSKINS: So he really makes two points and it is the  
16 first one which is particularly germane to the  
17 disclosure application, which is on the information as  
18 he currently has it, he doesn't believe there will be  
19 the isolated information that is sought.

20 The second point he goes on to make is that it would  
21 be very difficult to construct it. Of course that's not  
22 a matter for disclosure. The question is, do the  
23 documents exist? The evidence you have from Mr Biro is  
24 he doesn't believe that it will be possible because they  
25 won't exist. It's for that and the other reasons I've

1 described, so it's the Renault-specific point, it's the  
2 point that the overcharge analysis will cover this  
3 anyway and you don't need to go to granular emissions  
4 costs and it's the third point which is there is not  
5 simply, we believe, a package of those costs there. We  
6 suggest what should happen is disclosure should be given  
7 of O1 and if there is still a problem, Dawsongroup  
8 should come back at that stage. Those are our  
9 submissions.

10 THE PRESIDENT: The second point he makes appears to relate  
11 to components, not to R&D costs, as I understand it.

12 MR HOSKINS: It's the same point to be fair to him. What  
13 he's saying is that if there is not already held within  
14 the business a discrete "This is the cost for R&D for  
15 emissions, this is the cost for components", then it's  
16 going to be very difficult to recreate.

17 So again, to be absolutely clear, we're not saying  
18 the Tribunal should rule now that this category is dead  
19 forever more as between us, what we are saying is on the  
20 specific evidence we have provided, the proportionate  
21 approach, particularly in relation to Renault but we say  
22 also in relation to Volvo, is to have a staged approach.

23 THE PRESIDENT: Yes.

24 MR HOSKINS: Those are the submissions.

25 THE PRESIDENT: Yes, Mr Ward.

1 MR WARD: Sir, on Renault it isn't right to describe it as  
2 de minimis. 226 trucks is still a substantial claim.  
3 It just happens that two cartelists merged and Volvo  
4 supplied a lot more trucks to this claimant than Renault  
5 did. One cannot say that somehow a 226-truck claim does  
6 not matter.

7 With respect to Mr Biro's evidence, it is of course  
8 evidence from an economist as to his view firstly of how  
9 the overcharge would be captured, but that of course is  
10 something we want to test. Then at 92 and 93 his  
11 evidence is, and this is not a criticism but it is very  
12 carefully couched, it "may not be feasible"; "product  
13 upgrades may have affected the costs" of some of the  
14 components; "data which attributes costs to the  
15 introduction of new emissions standards may not be  
16 available"; may potentially require assumption,  
17 et cetera.

18 May we please have the disclosure to test all of  
19 that and find out what the position is, to the extent  
20 that is reasonable and proportionate to provide it.

21 That's the request.

22 THE PRESIDENT: Yes, Mr Jowell, you're not in this action,  
23 are you?

24 MR JOWELL: Sir, we're not in the Dawsongroup claim but we  
25 are in the Ryder claim and initially at least a similar

1 application has been made in the Ryder proceedings and  
2 we are somewhat concerned that we may be prejudiced if  
3 we are not given an opportunity to make submissions at  
4 this point if, as it were, a precedent is laid down in  
5 relation to this. So if I may make just a brief  
6 observation.

7 THE PRESIDENT: Just a minute. (Pause).

8 Yes, we've been conferring because it's really  
9 a point of how are we going to handle this from now on  
10 because it's not the only parallel point, there are  
11 a number of other parallel points, whether we should  
12 take them together, which will slow things down in one  
13 sense but may speed it up in another. I think on  
14 balance we'll see how we get on but we will take the  
15 parallel point and hear it. It doesn't mean we  
16 necessarily decide it the same way, which means  
17 obviously we'll have to hear Mr Brealey as well and  
18 everybody else on...

19 MR SINGLA: Sir, with apologies for complicating this  
20 further, I'm in the same position as Mr Jowell on this  
21 category in that Ryder make a similar request which we  
22 have something to say about. But one of the things that  
23 we say in relation to this category is that we will give  
24 some data but we resist the broader request on the basis  
25 that it's qualitative disclosure. So we would be or

1 I would be concerned about taking this category by  
2 category, as it were, because one would actually need to  
3 have the debate about qualitative versus quantitative  
4 before descending into these individual categories.

5 THE PRESIDENT: Yes.

6 MR SINGLA: I appreciate the Tribunal's desire to take the  
7 categories insofar as they overlap but I'm afraid,  
8 certainly insofar as Iveco is concerned, our objections  
9 have a common theme and therefore one actually has to  
10 have a debate about the higher level principle so that  
11 may affect how the Tribunal wants to take things.

12 THE PRESIDENT: You say this is qualitative, this request?

13 MR SINGLA: As formulated in the Ryder proceedings, the  
14 request is for any documents produced at HQ or UK level  
15 or submitted to regulatory authorities.

16 THE PRESIDENT: Yes, I see.

17 MR SINGLA: So we have a point that we are prepared to  
18 give --

19 THE PRESIDENT: That's not a parallel --

20 MR SINGLA: Exactly, exactly.

21 THE PRESIDENT: Just a moment. (Pause).

22 I think what we'll do is this. We'll deal with the  
23 Dawsongroup request. Insofar as it overlaps with the  
24 Ryder request, to that extent and therefore people who  
25 are subject to the Ryder request want to make



1 observations on it, on this request, that's to say the  
2 Dawsongroup request, because of an overlap, we'll hear  
3 that. Insofar as the Ryder request goes further than  
4 this, we won't deal with that now. We'll hear it when  
5 we go through Ryder. So we're focused on the  
6 Dawsongroup request but if there are points of principle  
7 on this as framed which are mirrored in Ryder, then  
8 we'll hear everyone now to avoid repeat of the argument  
9 and inconsistency and so on.

10 MR WARD: Sir, that is at least a welcome qualification.

11 When Mr Singla stood up and started talking about  
12 quantitative versus qualitative, an issue we've stayed  
13 completely clear on --

14 THE PRESIDENT: Yes, we understand that. I think let's try  
15 that. I think we'll have to see how we get on.

16 So we've heard the argument from Volvo on this which  
17 is the Dawsongroup. If we look at Ryder, which is  
18 really going to whether it's proportionate to hear this  
19 first, to order disclosure at the same time or to wait  
20 and see when general cost data is provided, that's the  
21 issue.

22 MR JOWELL: Yes.

23 THE PRESIDENT: We should therefore hear first from  
24 Mr Brealey on that, I think, if that's the point that's  
25 being raised because you are seeking that. If you can

1 help me with the equivalent reference in your schedule  
2 at tab 5, and I think it's again request 02 at page 25,  
3 is it not? What you seek is -- leave out the "any  
4 documents", it's really whether this is (a) relevant and  
5 (b) covered by -- whether separate disclosure of costs  
6 and date of R&D expense is necessary and relevant and  
7 whether it's covered by the general cost data that are  
8 in your request 01.

9 MR BREALEY: It is slightly difficult because a lot of our  
10 arguments are tied up to qualitative but if I can go  
11 first of all --

12 MR MALEK QC: You accept the way it's drafted in the  
13 Dawsongroup, it's not qualitative, it's quantitative?

14 MR BREALEY: Well, that's the debate we're going to have and  
15 I have a note to hand up because we say that Iveco and  
16 MAN don't understand both what is qualitative and  
17 quantitative and it's actually then quite important.  
18 The Tribunal has already ordered documents, information  
19 relating to emissions technology and, as I understand  
20 it, what MAN want to do is restrict this to raw data,  
21 for example, in an Excel spreadsheet. That is not what  
22 has been ordered to date. That's why it is quite  
23 important to work out exactly what is communications,  
24 negotiations and qualitative.

25 Mrs Justice Rose has ordered information, so has

1 my Lord the President, on two occasions in the Royal  
2 Mail proceedings, has ordered what we would call  
3 qualitative information. That is information which  
4 would explain raw data. That is essential for Dr Wu to  
5 perform his analysis.

6 What Mr Hoskins and co are trying to do is just give  
7 us tonnes of Excel spreadsheets with numbers and we're  
8 told to go away and sort it out.

9 MR MALEK QC: Are you saying there never was an agreement to  
10 limit it to quantitative data or are you saying there  
11 was an agreement but we have different views as to what  
12 it means?

13 MR BREALEY: There was never an agreement on qualitative  
14 data as MAN and Iveco advance today.

15 THE PRESIDENT: I think this is an important but different  
16 point. The point we're dealing with is whether it is  
17 relevant and proportionate to disclose in whatever,  
18 qualitative or quantitative separately, the cost of  
19 developing the emission standards including costs  
20 relating -- specific to R&D and when such R&D costs were  
21 incurred. Or whether those costs are in fact reflected  
22 in the overall cost and you don't need them separately.

23 That I think is the Dawsongroup dispute. Quite what  
24 documents they should be providing, whether they're  
25 qualitative or quantitative is another matter but it's

1           really whether one needs emissions standards separately  
2           or it's just wrapped up in the overall overcharge and  
3           therefore the overall costs.

4       MR BREALEY: We say it's very important that we have  
5           disclosure as to this specific category, costs emissions  
6           technology, because this went to the heart of the  
7           cartel. It's not something that can be swept away under  
8           just tonnes of Excel spreadsheets.

9           If one goes to our skeleton, if it's possible,  
10          I don't know if you have it to hand but Dr Wu's  
11          statement, actually tomorrow I would like to take the  
12          Tribunal to the document Dr Wu refers to. This is  
13          Dr Wu, page 25 of his statement.

14       THE PRESIDENT: Just a moment, we've got to find it. Do you  
15          know which bundle it's in?

16       MR BREALEY: R-C/IC/4.

17       THE PRESIDENT: Yes.

18       MR BREALEY: So for Magnum, we'll try the non-confidential,  
19          it's {R-C/4.1/1}

20       THE PRESIDENT: Paragraph?

21       MR BREALEY: Paragraph 96. This is concerned with Euro II  
22          which I will have to address separately but it is  
23          equally applicable to all the other Euros.

24       THE PRESIDENT: This is page 25 for the purposes of Magnum  
25          {R-C/4.1/25}.

1 MR BREALEY: Paragraph 96. This is the notes of a  
2 competitors' meeting in 1998. The note, it's  
3 a competitors' meeting:

4 "[...] everyone is forbidden to inform the market  
5 that the main investments having been made under Euro II  
6 - Euro III will be free."

7 There is a little bit more to go into when we get to  
8 the document but this is an example of the competitors  
9 specifically dealing with the emissions technology and  
10 why the issue of pass-on of this technology -- the costs  
11 of this technology is relevant.

12 THE PRESIDENT: Isn't it really -- that's specifically  
13 dealing with Euro II but isn't the general point at  
14 paragraphs 88 to 91? If we go back to page 24.

15 MR BREALEY: Yes.

16 THE PRESIDENT: Isn't that -- that's dealing with the point  
17 we're concerned with, why you need specific information  
18 on costs related to emissions technology.

19 MR BREALEY: We want to know what the defendants thought  
20 about passing on the costs of emissions technology and  
21 DAF has already agreed to provide this information, it  
22 was ordered by Mrs Justice Rose, both relevant,  
23 necessary and proportionate. It is going to the heart  
24 of the cartel, as found by the Commission. For  
25 Mr Hoskins and Volvo to say, well, you can try and work

1           it out by punching the numbers in an Excel spreadsheet  
2           severely prejudices the claimants.

3       THE PRESIDENT: I think what they are saying, if  
4           I understand it, what Mr Biro is saying is you don't  
5           need to work it out, not that you should try to work it  
6           out by inference. You don't need to work it out because  
7           you're looking at the total price and how the total  
8           price would have been different and that will capture it  
9           within everything else. I think that's what he's  
10          saying.

11       MR BREALEY: If one is undertaking -- I don't know what  
12          Mr Biro is doing but if one is doing a super-duper  
13          regression model with all the Excel spreadsheets, maybe  
14          he is right. But what about if we wanted to see a  
15          margin analysis of 1996, 1997, 1998 so we could actually  
16          compare five years of how these costs were being passed  
17          through, if at all? So it's just too easy to say, well,  
18          you can do this super-duper regression model which  
19          spectacularly failed in the BritNed case, and ignore  
20          other methods of an overcharge, for example a margin  
21          analysis, and specific calculating the extent to which  
22          these costs were passed through, which is one method  
23          that Dr Wu at paragraph 24 wants to examine.

24       THE PRESIDENT: Yes, thank you. I think that's the point  
25          you're making really on this.

1 Right.

2 MR HOSKINS: Sir, I've got a problem now because I could  
3 address you specifically on the point made by Dr Wu on  
4 whether there should be staged disclosure because we say  
5 you'll get information in O1, but Mr Brealey has just  
6 opened up a whole other can of worms and I need to  
7 address you far more fully on that but I am in your  
8 hands.

9 THE PRESIDENT: About margin analysis?

10 MR HOSKINS: All sorts of other -- because in their Redfern  
11 schedule we make six points in response to this, one of  
12 which is the same one we make in Dawsongroup and five  
13 are different.

14 THE PRESIDENT: Yes. Well, we're just dealing really  
15 with -- we're trying to deal with purely overlap.

16 MR HOSKINS: Can I deal with that then?

17 THE PRESIDENT: Yes.

18 MR HOSKINS: That one point because it does come up. Park  
19 for a moment all the other stuff about margin analysis  
20 et cetera, we'll come back to that. There is a narrow  
21 point about whether -- because what we're not saying to  
22 Ryder again, it shouldn't be necessary to make it clear,  
23 we're not saying you can never have this, we're saying  
24 there should be a staged approach. We're not asking the  
25 Tribunal to decide at this stage whether this is in or

1 out; what we're saying is get the O1 data and then if  
2 you think there's still a problem, come back.

3 I'll show you where that comes up in the Redfern  
4 schedules. We're looking at {COM-C/5/25}. This is  
5 Ryder's O2 request but couched in different terms but  
6 we're leaving that aside for a moment. The Volvo  
7 response starts at page 26, you'll see the heading in  
8 the middle. Then if you follow that through on to the  
9 next page {COM-C/5/27} there is a sentence, it's the  
10 second complete paragraph down on page 27:

11 "VT/RT do, however, note that the transaction-level  
12 data that falls to be disclosed in response to category  
13 VoC2/O1 above (ie data from the BNA and Partner systems)  
14 include costs data relating to emissions standards."

15 So what we're saying is you will get data relating  
16 to emissions standards.

17 Now, the response to that is in Dr Wu, bundle R-C,  
18 tab -4.1, page 30, {R-C/4.1/30} it's paragraph 114.

19 He says:

20 "VT/RT notes that some of the cost information will  
21 be provided in response to O1. As noted above, I do not  
22 think that the information in O1 will give sufficient  
23 coverage of the costs incurred centrally in developing  
24 these emissions technologies."

25 That is speculation on his part. Our point again is



1 a very simple one. We have said that the O1 material  
2 will contain relevant data, get the relevant data, look  
3 at it and come back with another request. But  
4 importantly as well if there is to be another request  
5 and there may well be, I accept that, a more focused  
6 request, because you've had the benefit of the O1 data.

7 It means that rather than fishing -- it is not  
8 a criticism of the claimants, they don't know the detail  
9 of what we have, so at the moment, understandably, they  
10 have to couch all their requests and the scope of their  
11 requests as broadly as possible.

12 We're saying rather than having an all-encompassing  
13 approach where it must all be decided, let's have  
14 a staged approach and this is one of the areas in which  
15 it would be sensible to have a staged approach. We're  
16 not shutting them out. It's the simple point that  
17 I made in response to Dawsongroup.

18 THE PRESIDENT: Mr Jowell, you wanted to say something on  
19 this?

20 MR JOWELL: Very briefly because Mr Hoskins has really  
21 covered the ground. We also oppose this essentially on  
22 the grounds of prematurity, like Mr Hoskins, that this  
23 is something that should be covered by the overall  
24 overcharge analysis.

25 THE PRESIDENT: I'm sorry to interrupt. It remains that we

1           are under time pressure. If you're making the same  
2           point, you can just adopt what he said --

3       MR JOWELL: As I said, we gratefully adopt the point. The  
4           only additional point I would make in relation to  
5           Mr Brealey's margin point is that the same applies.  
6           Because as with an overcharge analysis based on  
7           a regression model, so in a margin analysis. They will  
8           be receiving information on both prices and costs which  
9           should enable them to carry out margin analysis and  
10          those costs should include the costs of the emissions,  
11          of the emissions technology and their introduction.

12                 That means that, just as it will be wrapped up in  
13          the overcharge analysis, so too in an overall margin  
14          analysis. So this is a quintessential moment where the  
15          Tribunal should apply the staged approach that it says  
16          is correct in principle because it may well turn out  
17          that this is completely unnecessary.

18                 Of course -- the other point I would just stress is  
19          this. This is not an easy matter to comply with. One  
20          is talking about data that is of considerable -- and if  
21          Mr Brealey gets his way, documents that are of  
22          tremendous antiquity. One is going back potentially  
23          almost 25 years. That is a very burdensome process to  
24          put the defendants under when it is likely to be  
25          unnecessary.

1 THE PRESIDENT: Yes, thank you.

2 MR SINGLA: Sir, for completeness, I should say we adopt  
3 what Mr Hoskins says insofar as this is concerned with  
4 data, the documents point being left over.

5 MR BREALEY: Can I just make two points by way of reply.  
6 The first is I would urge the Tribunal not to accept  
7 this staged approach. I know we will have a staged  
8 approach but it is costing an absolute fortune for these  
9 disclosure applications. Simply saying we can have it  
10 at a later date, why can't we have it now? DAF have  
11 provided it. It's too easy an excuse.

12 The second is that O1 category will not capture  
13 whether these costs were delayed and that is what the  
14 cartel was all about. Delaying passing through the  
15 costs, not competing on technology. Therefore just  
16 taking the raw Excel spreadsheet data will not give the  
17 human story and that is why we need some of the human  
18 documents.

19 THE PRESIDENT: Thank you.

20 Decision

21 Thank you for those arguments. We won't give  
22 extensive reasons because we're going to be working  
23 through a lot of categories. We think that Dawsongroup  
24 should be granted this disclosure as against  
25 Volvo/Renault in the same way as has been agreed by

1 Daimler and DAF, that's to say reasonable and  
2 proportionate search for it. Under the decision of the  
3 Commission there was a very specific agreement regarding  
4 these technologies and the costs being incurred.

5 If parties make such a specific agreement on the  
6 specific costs and the time of their introduction we  
7 think it is only right that they should be put to the  
8 burden of making disclosure of those costs that reflect  
9 that agreement. So in this case we think that given the  
10 terms of the cartel, that specific extra data should be  
11 provided.

12 Case Management Conference (continued)

13 MR WARD: Sir, it's nearly 4.50. I'm pleased to say even  
14 whilst I've been on my feet a category has fallen away.  
15 Mr Pickford will be pleased to know that his offer in  
16 respect of O6 is now accepted so that has gone away.  
17 That means that on the entirety of the Dawson Redfern  
18 schedule there is only one remaining category and once  
19 it's resolved an order can be made.

20 THE PRESIDENT: Yes, we'll hear that now and then we'll have  
21 to rise.

22 MR HOSKINS: I'm slightly concerned, I don't know if I've  
23 been parked because I haven't done a checklist but it  
24 doesn't tally with what I've got in my notes that  
25 there's only one thing left between myself and Mr Ward.

1           Maybe we have a separate party tomorrow.

2       THE PRESIDENT: Can you sort that out overnight? We can't  
3           decide on what you have agreed, you have to decide that  
4           between yourselves.

5           Take us to this one category.

6       MR WARD: The category is O4 and it's on page 45. This is  
7           another one that has been agreed by everybody except  
8           Volvo/Renault.

9       THE PRESIDENT: Yes.

10      MR WARD: If I can just explain what this is about and then  
11           perhaps you can read it because it is a little hard  
12           work. On the sheet you'll see it starts at page 45, and  
13           because of the nature of the column entries, it then  
14           resumes on 49 but that's all just layout.

15      MR HOSKINS: Sir, I am going to have to address you in some  
16           detail on this so I accept we may be sitting late but  
17           it's not a five-minute point.

18      THE PRESIDENT: Well, we'll rise at 5.00, let's see how we  
19           get on.

20      MR HOSKINS: Certainly.

21      THE PRESIDENT: Continue, please.

22      MR WARD: Thank you, sir.

23           What this is about is factors that affect price  
24           other than the truck itself. {COM-C/1/45}. The object  
25           of this is to look for the purpose of the econometric

1 analysis at factors that the business took into account  
2 when it set the prices. That way the factors can be  
3 baked into the overcharge analysis and they can be  
4 controlled for so that they can be eliminated from the  
5 sums that otherwise might make up the overcharge.

6 If you do read the detailed objections, some of them  
7 I can deal with in advance although this has already  
8 been made clear. This is not being sought on an  
9 individual truck basis and it is not being sought on the  
10 basis of every sub-component of the truck or anything of  
11 the kind. The idea is to find the things that might  
12 have influenced the prices when the prices were set.

13 You'll see it's -- if you look at page 45, it's put  
14 as "prices (including ... gross list prices, dealer net  
15 prices ... and internal pricing)".

16 That's because I'm sure you will have seen by now  
17 there is quite a lively debate between the parties about  
18 the gross list prices which were explicitly mentioned as  
19 part of the decision and then other aspects of pricing  
20 which are also mentioned in the decision but albeit with  
21 a bit less specificity as gross list prices, therefore  
22 some defendants at least are arguing that gross list  
23 price fixing really has nothing to do with prices people  
24 actually paid.

25 There's obviously a chain of prices between gross

1 list prices and the amount actually paid by the end  
2 consumer.

3 So two defendants accept this category,  
4 Volvo/Renault object and that's, I suspect, a point for  
5 Mr Hoskins to explain why.

6 MR SINGLA: Sir, again this overlaps with Ryder because this  
7 is a hotly-contested category with Ryder, O4A, and I'm  
8 afraid with the best will in the world we need more time  
9 than the remaining seven minutes to deal with this.

10 THE PRESIDENT: What I think we'll do is we won't be able to  
11 deal with this today but it helps us just to understand  
12 the request being made by Dawsongroup and similarly the  
13 equivalent request by Ryder so that we can also just  
14 reflect a bit further and then we'll hear all the  
15 objectives tomorrow.

16 MR MALEK QC: Can I just ask you one question on this?  
17 There may be quite a number of documents that have  
18 overlapping information. Are you just looking for  
19 a selection of documents that show what you're looking  
20 for or are you saying "We want every document within  
21 this category"; do you understand what I mean?

22 MR WARD: I understand the question, may I make sure I give  
23 the right answer?

24 MR MALEK QC: Yes, okay. (Pause).

25 MR WARD: Sir, I am happy to say the answer is a selection

1           that demonstrates the approach.

2           MR MALEK QC: Yes, that's fine.

3           MR HOSKINS: Sir, that's very helpful. Can I suggest that

4           what Mr Ward may want to do, because one of our main

5           concerns is the vagueness in the scope of the request,

6           if they were to formulate, because it will have to go in

7           an order anyway, a more confined order in the sense that

8           he's just indicated they're seeking, that may well save

9           a lot of time.

10          MR MALEK QC: That was my main concern on this category.

11          MR HOSKINS: Likewise ours.

12          MR MALEK QC: If you can talk about it overnight, then that

13          may resolve it.

14          MR HOSKINS: We might be able to cut through.

15          MR WARD: We would be happy to.

16          THE PRESIDENT: Yes. So Mr Brealey, in your schedule, this

17          is O4A we've been told, on page 29.

18          MR BREALEY: Yes, we can obviously try and narrow it down

19          but again the purpose of the request is to try and glean

20          from the defendants what factors influenced the prices.

21          You may not get that simply by crunching numbers in O1.

22          So if there's a document that says prices are going up

23          because of the exchange rate, documents saying prices

24          have gone up because of raw material, oil prices in

25          Russia or whatever, that is extremely important for the



1 economists to know when they're looking at the numbers.  
2 That is just absolutely standard and what I really fail  
3 to understand is that the defendants are resisting this  
4 sort of information but when it comes to pass-on, and  
5 this is something this I'll develop tomorrow, they ask  
6 exactly for the same sort of documents from us because  
7 they say "Well, we need this sort of information to find  
8 out why it happened, what happened".

9 The purpose again is the human factor. What was the  
10 senior management doing when it was setting the prices,  
11 what were the factors leading to price increases or  
12 price decreases. It's absolutely standard for  
13 economists and experts to have access to this sort of  
14 information in order to understand the numbers. It may  
15 well be, Mr Malek, we have drawn it too widely and we'll  
16 have to look at that.

17 MR MALEK QC: You have overnight to do that.

18 MR BREALEY: Yes, we will. But again Mrs Justice Rose has  
19 ordered this in the Royal Mail proceedings, recognising  
20 the relevance and necessity of this category.

21 MR MALEK QC: Yes. The relevance is seen and the necessity  
22 is seen, it's just a question of making sure the  
23 category is not overly broad because potentially it  
24 could lead to very voluminous disclosure with documents  
25 basically repeating and saying the same thing. I think

1           we all know what you're looking for but you need to get  
2           the right balance.

3           MR BREALEY: We need to get the right balance. To a certain  
4           extent the category is what it is and the defendants  
5           can, with a reasonable scoping exercise, say this is the  
6           sort of documents that we will give you. So it is  
7           a two-way process. It's very difficult sometimes to  
8           describe the category but it is a two-way process and we  
9           will try to narrow it down as much as we can overnight.

10          THE PRESIDENT: We'll hear from all the defendants on these  
11          two categories and encourage the claimants, perhaps  
12          particularly Ryder which seem to have even more  
13          sub-categories than Dawsongroup, both to see if it can  
14          be narrowed overnight and inform counsel on the other  
15          side.

16                 We propose to sit at 10 o'clock tomorrow to give us  
17          a little bit more time in working through. It does seem  
18          that it is sensible to take some of the common  
19          categories together and deal with certain points of  
20          principle. We've now done that on two of these items  
21          and it does seem to make sense to deal with it in one go  
22          across the two actions.

23          MR MALEK QC: Can you identify what additional points you  
24          think are in issue?

25          MR HOSKINS: Sorry, on?

1 MR MALEK QC: On the Dawson group.

2 THE PRESIDENT: We did --

3 MR MALEK QC: On one view there's only one item left.

4 THE PRESIDENT: Is this the only item left?

5 MR WARD: Yes.

6 MR MALEK QC: According to you but --

7 MR WARD: Subject to we understand that Volvo/Renault has

8 what we call overarching proportionality concerns and

9 I flagged that up and I stood by it. But as far as we

10 understood, subject to that, the other categories were

11 not contested for relevance.

12 MR HOSKINS: That's the nub of what we have between us

13 because the Dawson group schedule, everything in grey is

14 supposed to be agreed and yet there are proportionality

15 arguments. I don't know how Mr Ward intends to deal

16 with that with --

17 MR MALEK QC: Obviously it would be helpful if you've got

18 time to talk and see where you are on that because we

19 keep reiterating the same point, which is the litmus

20 test to make an order for disclosure in the first place

21 is relevance, reasonableness and proportionality. You

22 can't just say: shove off the whole issue of

23 proportionality into the disclosure statement which

24 comes further down the line. You've got to get --

25 there's a prior stage.

1 MR HOSKINS: That's my point. I will grab Mr Ward when this  
2 finishes and we will go and sit in a room together and  
3 we will see if we can narrow the scope on it.

4 There's one other point, it's just a suggestion,  
5 which is there is this issue about qualitative  
6 disclosure and it's a point of principle and I would  
7 suggest, at least what the Tribunal thinks about this,  
8 we need to hear submissions on that as a point of  
9 principle, because otherwise, as Mr Brealey quite fairly  
10 says, he has these points come into all sorts of his  
11 individual ones. Either you have that argument just on  
12 the side and individual ones or we say, it'll probably  
13 be me that starts tomorrow, we need to hear the  
14 submissions on qualitative v quantitative and see if  
15 there is actually a point of principle here, because  
16 otherwise it will just get dealt with by accretion in  
17 not a very satisfactory way. But that's just a  
18 suggestion.

19 THE PRESIDENT: Yes, we'll think about that. Either we do  
20 that in that way or we wait until the first category  
21 where this arises and then have that discussion --

22 MR HOSKINS: I think it's arisen already in this at the very  
23 least, if not the first one.

24 THE PRESIDENT: Then take it from there because it's phrases  
25 like, or terms like qualitative, quantitative, in the

1           abstract, one really needs to have to think of them as  
2           applied to what particular documents or data is one  
3           dealing with.

4       MR HOSKINS: I think it may help the way we dealt with  
5           temporal scope. If we deal with that, it might then  
6           actually deal with a lot of the individual arguments and  
7           individual factors.

8       THE PRESIDENT: Temporal scope is very clear, it's this date  
9           or that date. Qualitative/quantitative is a somewhat  
10          looser distinction, that's my concern.

11      MR JOWELL: May I add one point. I'm slightly unclear as to  
12          which particular items Ryder is still pursuing, because  
13          I thought Mr Brealey gave an indication this morning  
14          that he might be confining the particular categories and  
15          it would be very useful to know that in advance of  
16          tomorrow.

17      MR MALEK QC: You can speak to him after this hearing.

18      THE PRESIDENT: Yes. If there are any further agreements --  
19          either agreements or categories not being pursued,  
20          please can you let us know by 10 o'clock tomorrow.  
21          Well, before 10 o'clock if possible, but obviously it's  
22          helpful to us to know.

23      MR WARD: Sir just one observation on qualitative and  
24          quantitative, as it's an issue in the Ryder case but has  
25          not arisen in our case because we have been fully

1 focused on economic disclosure for the purpose of  
2 essentially overcharge analysis, so I would be very  
3 concerned if -- the approach the Tribunal has taken,  
4 which I respectfully accept and understand, has been to,  
5 as it were, determine these things in parallel.

6 I really would be concerned if a debate about  
7 qualitative/quantitative might spill over into our case  
8 where essentially our request is really for economic  
9 data.

10 THE PRESIDENT: But the request against you, doesn't that  
11 include --

12 MR WARD: It probably does.

13 THE PRESIDENT: I thought that was part of the objection so  
14 it does come into your case.

15 MR WARD: It does but there's a whole debate about what, if  
16 you like, qualitative -- this Redfern schedule generally  
17 does not address the question of what qualitative  
18 evidence may be required at some stage. That has not  
19 been a matter that we've engaged on. I respectfully  
20 agree, sir, there is definitely a qualitative element in  
21 the pass-on disclosure sought against us. You've seen  
22 we've got a whole series of objections to that.

23 THE PRESIDENT: So it's not irrelevant to your case, or the  
24 case involving your client.

25 MR WARD: But we shouldn't be understood to have joined

1 issue on that at this stage. We confined ourselves, or  
2 at least sought to, to economic disclosure.

3 MR PICKFORD: Sir, you asked what was no longer going to be  
4 pursued. For the assistance of the Tribunal, so you  
5 don't have to bother with it this evening, in the light  
6 of the Tribunal's comments this morning we've taken the  
7 view that we are going to adjourn our application in  
8 respect -- or seek for it to be adjourned in respect of  
9 VoC2/O1(1), that's about complements and bare trucks.  
10 VoC2/O1 category (1). It concerns complements and bare  
11 trucks. It's partially agreed and was partially not  
12 agreed. We're happy in the first instance to look at  
13 the information that we're going to be provided with  
14 that's been agreed together with other information, and  
15 we'll consider our position on that further.

16 THE PRESIDENT: This is in Dawsongroup?

17 MR PICKFORD: That's in Dawsongroup because in Ryder it's  
18 fully agreed. This is just as against Dawsongroup.

19 THE PRESIDENT: Thank you, that's very helpful.

20 Right. 10 o'clock tomorrow morning.

21 (5.06 pm)

22 (The hearing adjourned until

23 Friday, 20 September 2019 at 10.00 am)

24

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

INDEX

Case Management Conference .....1

Decision .....48

Case Management Conference .....50

(continued)

Decision .....121

Case Management Conference .....126

(continued)

Decision .....162

Case Management Conference .....163

(continued)