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IN THE COMPETITION

Case No. : 1291/5/7/18 (T) & 1295/5/7/18 (T)

APPEAL
TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP
(Remote Hearing)

Monday 11 October 2021

Before:
The Honourable Mr Justice Roth
Hodge Malek QC
Professor Anthony Neuberger

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Ryder Limited and Another

Applicant

v

MAN SE and Others

Respondent

—
AND

Dawsongroup plc and Others

v

DAF Trucks N.V. and Others

A P P E A R A N C E S

Robert Palmer QC and Anneliese Blackwood (On behalf of Dawsongroup)
Josh Holmes QC and Fiona Banks (On behalf of Ryder)
Julian Gregory (On behalf of DS Smith)
Meredith Pickford QC and David Gregory (On behalf of DAF)
Charles Hollander QC and Andrew McIntyre (On behalf of Iveco)
Daniel Jowell QC and Jonathan Scott (On behalf of MAN)

Sarah Abram and Hugo Leith (On behalf of Volvo)
Paul Harris QC, Ben Rayment and Alexandra Littlewood (On behalf of Daimler)

Digital Transcription by Opus 2

Monday, 11 October 2021

(10.30 am)

(Proceedings delayed)

(11.48 am)

Housekeeping

THE PRESIDENT: Good morning, I am sorry to keep you all waiting. We have been discussing the case. I must start, as always, with a warning which many of you will have heard before but it is important that I repeat it, as there may be observers of this hearing who have not previously watched live stream or online Tribunal hearings, and that is to say that, although this is being heard remotely, it is as much a Tribunal proceedings as if it were being heard here in the courtroom in Salisbury Square House, where all three Tribunal members are sitting. An official transcript and recording is being made of the proceedings but it is strictly prohibited for anyone to make an unauthorised recording, whether audio or video, of the proceedings, and to do so is punishable as a contempt of court.

We have in the materials before us certain passages that are marked "Confidential". We trust that all the advocates in the usual way will be careful not to refer to any confidential matters out loud. If necessary, you can direct us to those passages but I do not anticipate

1 that it will be necessary to go into a closed session
2 for one of the confidentiality rings. If that should
3 arise, we will address it when it happens.

4 Thirdly, could I ask you all, when you first speak,
5 for the benefit of the transcribers, to say who you are
6 and which is the company that you represent.

7 Finally, before turning to substantive matters, can
8 I say that if any party needs to extend a deadline, it
9 really is important that any such application is made in
10 a timely way. We made a direction for responsive
11 evidence in this case by 4 pm on 30 September. It is
12 wholly inappropriate to get a message at 2 pm saying
13 that one of the expert statements in response cannot be
14 ready by four and they want a 24-hour extension. That
15 must have been apparent some time earlier and those
16 applications must be properly made in future; otherwise,
17 we will get to a point where such an application is
18 refused and the evidence is just excluded, which serves
19 nobody's interests.

20 Right. Turning to substantive matters before us,
21 can I deal first with something which was not formally
22 on the agenda but we saw from the materials -- and
23 I think this concerns Mr Jowell's client, MAN. We see
24 that MAN SE, as I understand it, no longer exists and
25 its business and liabilities at least have been

1 transferred to another company. I think it is
2 Traton SE. Is that right, Mr Jowell?

3 MR JOWELL: Yes, that is indeed correct, sir.

4 THE PRESIDENT: And I think MAN is not in the Dawsongroup
5 action but you are in the Ryder action and I think also
6 defending the DS Smith claim.

7 MR JOWELL: That is also correct, sir, yes.

8 THE PRESIDENT: Yes, go ahead.

9 MR JOWELL: There has been correspondence between the
10 parties as to the position on this, and we hope that it
11 should be possible to resolve it, but the position is as
12 you have described it, essentially.

13 THE PRESIDENT: So presumably, those claimants, so far as
14 they want to pursue a claim regarding liability to
15 Man SE will want to substitute Traton SE. It is not
16 your decision but that is what one anticipates, and if
17 that is asked for, will it be opposed?

18 MR JOWELL: I believe not, sir.

19 THE PRESIDENT: Yes. I mean, we can leave it for
20 correspondence or we can formally give permission to
21 make that amendment.

22 MR JOWELL: We are grateful. I think we would prefer to
23 leave it for correspondence for now, sir, if that is
24 convenient, but we appreciate it is something that does
25 need to be addressed.

1 THE PRESIDENT: Yes, unless either Ryder or DS Smith
2 actually are asking for permission to amend today, we
3 will not then say more about it. Is that satisfactory,
4 Mr Holmes?

5 MR HOLMES: It is, sir.

6 THE PRESIDENT: Yes, very well. Then we will turn to one of
7 the main issues for this CMC, namely expert evidence.

8 Issue of Expert Evidence

9 THE PRESIDENT: We cannot, of course, conduct a mini trial
10 in the CMC as to which method is more robust or
11 accurately reflects the claimant's approach, whether it
12 is to truck purchasing or to rental pricing and so on.
13 Our concerns are to keep the trial manageable and
14 proportionate, even with the large claims, and
15 therefore, we are concerned about the numbers of experts
16 and that they are, as it were, speaking off, broadly,
17 the same page even though in a very different way, and
18 that will guide our approach.

19 I think the first of the various matters raised, or
20 one we can take first, is volume and value of commerce.
21 I think there is a distinction between volume and value.
22 There is a question of just how many trucks and what
23 trucks are within the scope of the claims, and that is
24 something we will come back to when we get to the
25 consolidated database, but that does not seem, to me at

1 least, a question of expert evidence; that is a factual
2 question.

3 There is then the question of at what price those
4 trucks were sold as trucks or chassis. Again, that is
5 a factual question. That is not a question for expert
6 opinion evidence. There is a question of how the
7 transaction should be valued, which involves arguments
8 about the way bundle products should be treated or
9 discounts on what one of you has described as "other
10 elements" and so on.

11 That may indeed involve expert evidence, and that is
12 an economist's evidence, as we understand it, and
13 I think the Defendants wish to put in evidence from
14 their respective economists on this and, as I understand
15 it -- and you will correct me if I am wrong -- Ryder
16 does not object to that but Dawsongroup does. Is it
17 right, Mr Holmes, that you are not objecting that it is
18 on that basis that the valuation issues of the
19 transactions?

20 MR HOLMES: That is correct, sir. There is one point
21 I would wish to make in relation to the relevance of
22 expert evidence to volume. I do not know if you would
23 like me to do that now or if you would prefer that
24 I came it to later.

25 THE PRESIDENT: Why do you not do it now?

Submissions by MR HOLMES

1
2 MR HOLMES: It is simply to note that expert questions can,
3 as we see things, arise in relation to volume as well as
4 value in two respects. First -- and this is a point
5 that Dr Wu makes in his evidence at paragraph 2.3 --
6 there may be questions about how data sets have been
7 prepared and cleaned, to use the technical jargon, by
8 particular parties, which go to volume as well as value,
9 and that may be something on which the experts will have
10 something to say, whether particular adjustments to data
11 sets are appropriate from an expert perspective, and
12 I would not want that to be shut out in terms of the
13 order that the Tribunal makes today.

14 The second point is that there may also be
15 a question relevant to the experts and touching upon
16 volume in relation to the run-off period of the cartel
17 and whether particular volumes are included within the
18 volume of commerce in relation to a period following the
19 end of the infringement and on that as well there may be
20 things that the experts can usefully say.

21 THE PRESIDENT: Yes. I understand. And for both of those,
22 plus the question of bundles, of the relevance, and so
23 on, you would wish to adduce the evidence of Dr Wu. Is
24 that right?

25 MR HOLMES: That is correct.

1 THE PRESIDENT: So you will want your economist. Yes.

2 MR HOLMES: Yes, and just to flag one further point in
3 relation to bundle products, you have, of course, seen,
4 sir, that there is a dispute as to the pleadings. There
5 are pending pleading amendments which have not yet been
6 granted and we therefore ask that any permission that is
7 granted in relation to bundle products should be
8 provisional upon a subsequent determination of any
9 objections that are taken in the light of pleading
10 amendments, which we understand to be forthcoming on
11 that topic.

12 THE PRESIDENT: Yes. Well, if we cannot -- it seems clear
13 that we cannot deal with the amendments at this CMC, we
14 can only set a timetable, which itself is disputed, for
15 amendments. It does seem sensible that we should
16 determine directions for experts but, of course, the
17 experts can only give evidence related to pleaded
18 issues, so if the bundled product either disappears or
19 is narrowed from the pleading, that will affect the
20 scope of their evidence, but I do not think we want to
21 postpone consideration of what expert evidence should be
22 given to some future occasion. So it will be
23 conditional in that respect because it will be relating
24 to whatever the pleaded issues are.

25 MR HOLMES: We are content with that, sir.

1 THE PRESIDENT: So I think I then go to Dawsongroup because,
2 as I understand it, that is not the position, Mr Palmer,
3 is it, of Dawsongroup, or can you help us?

4 Submissions by MR PALMER

5 MR PALMER: No, it is not. There is an objection, sir,
6 which, if I may, if it is the appropriate time, will
7 develop.

8 THE PRESIDENT: So this is Mr Palmer for Dawsongroup.

9 MR PALMER: Sorry, Robert Palmer for Dawsongroup. Thank
10 you, sir. The key point is, as you have identified
11 already, the main question on the value of commerce is
12 one of fact, and if there is to be expert evidence to
13 assist with how trucks should be valued beyond their
14 purchase price -- you will understand that we say you
15 should simply take the purchase price, what actually was
16 paid by Dawsongroup -- then any such expert evidence
17 must nonetheless be based on fact and, in particular, it
18 must be based on relevant fact.

19 The proposal which has been put forward to the
20 Tribunal has a problem in that regard right at its
21 heart. The problem is that it focuses on the motives of
22 the vendor for offering the discount. But there is no
23 material to identify which discounts did in fact
24 incentivise the purchase of a truck or related product
25 sold with a truck.

1 So Mr Biro's approach, which he has outlined in
2 Biro 6 and which I anticipate the Tribunal will have
3 read, is all from the perspective of what was in the
4 mind of the relevant sales person or sales people at VR,
5 not on the question of whether the discount offered on
6 related products did in fact incentivise the purchase of
7 the truck as opposed to incentivise the purchase of
8 a related product such as, for example, an extended
9 warranty.

10 It might help to turn to paragraph 13(a) of
11 Mr Biro's sixth report -- the reference for that is at
12 {DG-B1/83/5}. This is a point which is developed fully
13 at paragraphs 10 and 11(b) in particular earlier, but 13
14 has a useful example, which really brings out the
15 approach which Mr Biro is recommending. He says, three
16 lines down:

17 "For example, suppose that a trucks supplier offers
18 a price reduction on a service and maintenance contract
19 of £250 to incentivise the purchase of this contract,
20 and then an additional discount of £150 on the same
21 service and maintenance contract to encourage the
22 customer to purchase the truck in question. In this
23 case, it would only be relevant to consider this
24 additional discount of £150 for the purpose of assessing
25 the Claimant's value of commerce."

1 So there is a £400 discount on the related service.
2 We have to distinguish between -- according to what was
3 in the mind of the sales person and what they thought
4 they were incentivising: I will do 250 because that will
5 help with this contract, I will do 150 because that will
6 help with the truck.

7 Neither of those points -- is our principal
8 objection to the whole endeavour -- concerning with what
9 effect the offer of those incentives actually has on the
10 purchaser. It is all from the point of view of the
11 vendor. That is the principal objection that we raise.

12 But, further, how on earth is this factually going
13 to be evidenced, even if the correct test, which we
14 certainly dispute, is what was in the mind of the sales
15 person when offering incentives rather than did the
16 offered incentives actually make a difference as to
17 whether the truck was bought by the purchaser.

18 The evidence on which it is going to be based, if
19 you go down to paragraph 14 first of all -- you will see
20 reference there, just below, to various commercial and
21 accounting policies that the vendor have. That will not
22 give you the answer either to what is in the mind of the
23 sales person in negotiating the deal or certainly not
24 what actually incentivised the truck.

25 There is also a data point referred to at

1 paragraph 10(b) -- that is on page {DG-B1/83/4}. The
2 data point appears in footnote 3 to that paragraph.

3 That raises a confidential issue, which --

4 THE PRESIDENT: Shall we just read 10(b).

5 MR PALMER: Yes, please, 10(b) and footnote 3.

6 THE PRESIDENT: Yes. (Pause).

7 Yes.

8 MR PALMER: The first point comes, it is purely based on
9 internal attributions, nothing to do with so what
10 actually incentivised the truck purchase, but the point
11 which we make in our skeleton argument -- which is
12 marked "Confidential", so I am just going to give you
13 the paragraph number. It is at the foot of page 12 of
14 our skeleton argument, beginning (b), 23.5(b), you will
15 see it highlighted at the foot of page 12. If I could
16 just ask the Tribunal to read that and over the page.

17 (Pause)

18 THE PRESIDENT: Yes.

19 MR PALMER: So the upshot is, in fact, deciding whether any
20 discount offered on bundle products incentivised,
21 whether intended to incentivise or actually did
22 incentivise the purchase of a truck, is going to be
23 a matter of pure speculation on the part of the expert
24 and not based on any facts provided by the truck
25 company.

1 So Mr Biro explains what he is going to do if he is
2 uncertain and we say that, inevitably, he will be
3 uncertain on all the truck purchases as to whether any
4 discount should be properly attributed to the value of
5 the truck or not. He explains, "I am just going to
6 offer those two sets of figures to the Tribunal." In my
7 respectful submission, that is no good at all without
8 any factual basis for distinguishing between the two
9 sets of figures.

10 The alternative approach, which is the approach that
11 Mr Harvey recommends, is you simply take the price
12 actually paid by the purchaser for the truck. That will
13 often include, although not always, some bundled
14 products, and the way to deal with that is by
15 econometric analysis to control for that, just as all
16 parties are agreed the economists must control for the
17 variation between the specification of the different
18 trucks actually bought. They come with different
19 features, different add-ons, different specification.
20 All of that must be controlled for as part of
21 econometric analysis. These bundled products can be
22 controlled for in exactly the same way based on actual
23 prices, not, essentially, made up or arbitrary prices
24 based on how those prices happened to be allocated
25 within Volvo/Renault's or Daimler's internal systems

1 which could be affected by any number of other matters,
2 such as tax arrangements, such as particular targets
3 that sales people had in respect of particular bundled
4 products, or trucks, as the case may be. All of that
5 will be entirely unknown and very difficult to
6 interrogate.

7 So before the Tribunal were to sanction such an
8 approach, in my submission, it would need to be assured
9 that there was a factual basis for the experts to offer
10 an opinion on, rather than, as we say, speculate on the
11 basis of unclear figures in a manner which is entirely
12 divorced from the actual work of the incentives offered
13 and the actual connection that the offering of those
14 incentives had with the decision to purchase a truck,
15 none of which is touched by any of this.

16 There is, on top of that, a whole series of further
17 problems with this approach, which Mr Harvey has
18 developed in Harvey 11, not least, again, really
19 destabilising the entire project is that Mr Biro's
20 approach does not take account of the purchase price of
21 the related products. It focuses only on the size of
22 the discount.

23 So, as Mr Harvey has explained, that has an entirely
24 distortive effect because it is quite common practice
25 for certain products to have a list price from which

1 a vendor will often or frequently, or indeed fully
2 expect to, offer a discount. So the size of the
3 discount will depend on how inflated the list price is
4 above the realistic expectation of the sales person.

5 So you can have, say, a £5,000 related product which
6 is then discounted by £2,000 to £3,000. Mr Biro will
7 say, well, that is 2,000 off the price or value of the
8 truck, but if instead the related product had been
9 listed at £6,000 but reduced to precisely the same level
10 of £3,000, Mr Biro would say that is a £3,000 discount.
11 That is a discount off the value of the truck.

12 It is utterly unstable and makes no sense. The only
13 way you can address this issue is to look at the actual
14 price paid for the package as a whole and control for
15 that, and that would be a perfectly standard econometric
16 approach.

17 So for those reasons, we say this is effectively
18 going to be expensive to interrogate, if produced on
19 this basis, and the Tribunal should not sanction it
20 unless persuaded that it was a proper methodology on
21 which to proceed. We say it cannot possibly be, for
22 reasons I have sought to outline to you.

23 THE PRESIDENT: We will just take a few moments.

24 MS ABRAM: May I make some submissions, before you take
25 a few moments, on behalf of the defendants? It is

1 Sarah Abram.

2 THE PRESIDENT: No, I do not think so. We will come back to
3 you. We will not rule out your evidence without hearing
4 from you, do not worry. (Pause)

5 Well, Mr Palmer, we have considered that. You may
6 well be right or you may not be. It seems to us that is
7 an argument very much for trial and not one we can
8 resolve now.

9 What we think is important is something that is
10 indicated in the last sentence of paragraph 14 of
11 Mr Biro's statement, namely that he intends to examine
12 how the results of his VOC assessment would change if
13 these forms of price reduction were to be excluded from
14 the analysis. In other words, we do not think it would
15 be right to prevent the defendants, if they so wish,
16 from conducting an analysis, through their economists,
17 of bundles pricing in that way, provided that they also
18 indicate the analysis without it so that, if you are
19 successful in the arguments you have eloquently advanced
20 to us, we can see where they stand having knocked out
21 the bundles and you will be able to make the arguments
22 (a) that it is inappropriate, (b) that it is unstable,
23 it is arbitrary, all the things that you said to us at
24 trial, but we do not think we can -- it would be going
25 quite far into an analysis of the experts' arguments to

1 say that that is so manifestly hopeless that we should
2 exclude it at this stage.

3 So that is where we feel, having listened to you.
4 You have put down --

5 Issue of disclosure statement

6 Submissions by MR PALMER

7 MR PALMER: Could I ask the Tribunal then to consider one
8 related point, which is linked to my point about the
9 missing factual basis for this exercise, and could I ask
10 the Tribunal to consider ordering a disclosure
11 statement, similar to the sort of statements which the
12 Tribunal has ordered in the past, most recently as to
13 the pricing statements and so forth, that the
14 defendants -- this is both VR but also Daimler --
15 provide a statement by way of disclosure, setting out
16 how these discounts were offered and on what basis, in
17 what circumstances, so that we can understand the
18 factual basis upon which this expert evidence is to be
19 advanced.

20 Submissions by MR HOLMES

21 MR HOLMES: Sir, can we also support that and ask for the
22 same in relation to the Ryder proceedings. We do share
23 many of the concerns that Mr Palmer has outlined, and
24 this will affect our approach to the pleadings. I know
25 that is a topic we are coming to subsequently, but

1 actually, a disclosure statement or a pleading is not
2 going to do what the claimants want it to do because
3 this really will be primarily a matter for witness
4 evidence. So it will come out in witness evidence in
5 the ordinary way.

6 So I resist that for that reason. Then, to go back
7 to the points, if I may, that were discussed between
8 you, sir, and Mr Holmes, to address first volume of
9 commerce, I happily and respectfully agree with
10 Mr Holmes that there are points on volume of commerce on
11 which expert evidence may be very likely to be useful.

12 In addition to the two points identified by
13 Mr Holmes, which are just examples, but perfectly good
14 examples, of where expert economic evidence in that area
15 might be useful, one can conceive of further possible
16 questions. For example, there may be a question, when
17 you are interpreting the data, about how you identify
18 the date of sales or purchases, so whether you look at
19 the invoice date or the order date and how you interpret
20 the underlying data, and expert economic evidence on
21 that may again be a useful thing, so again, we seek
22 permission and we respectfully agree with Mr Holmes, and
23 I think also Mr Gregory, that expert evidence on volume
24 of commerce will be useful to the Tribunal.

25 The second point: on value of commerce, I am not

1 wholly clear on whether there is any distinction in
2 anyone's mind between allowing expert economic evidence
3 on what we have called the total value point, so the
4 discount on other elements, on which the Tribunal has
5 allowed evidence, and value of commerce more generally.
6 I do not know whether there is any remaining objection
7 to expert evidence on value of commerce, but what I do
8 say about that is that total value is just one example
9 of where expert economic evidence on value of commerce
10 may be really useful.

11 You mentioned, sir, in your introductory remarks,
12 the question of discounts and how they should be
13 attributed across truck purchases. In my submission,
14 just kind of standing back and looking at the question,
15 it is actually going to be very difficult to define or
16 predict in advance the particular issues under value of
17 commerce on which economic evidence is going to be
18 useful to the Tribunal and, in my submission, the better
19 and the more appropriate approach would be to give
20 permission for that at this stage.

21 The third point -- and this may not be the moment to
22 address submissions on it -- goes to the pleadings on
23 total value, and there I have, respectfully, to disagree
24 with Mr Holmes, where he suggested that any expert
25 permission on total value should be only provisional

1 because the point is not yet fully pleaded. We, as you
2 will have seen from on my skeleton -- with respect, that
3 is not right in relation to Volvo's case. The point is
4 already pleaded, so either now or later on, whichever is
5 better, I will want to argue that there is no question
6 of giving provisional permission with the prospect of
7 that being revised later.

8 THE PRESIDENT: Yes. It was not so much provisional
9 permission as saying that if experts give evidence on
10 something which is not within the scope of the pleading,
11 then it will not go anywhere without scrutinising the
12 pleading, which may differ between different defendants
13 on this point anyway. So that was the point I was
14 making, that all we would say is, as regards pleaded
15 issues, and that would be a matter that can then be
16 worked out.

17 Yes, Mr Harris.

18 Submissions by MR HARRIS

19 MR HARRIS: Sir, good morning, Paul Harris, for Daimler. We
20 also oppose the last minute suggestion of something
21 called a disclosure statement by reference to the
22 pleading, which I do not fully understand, in any event,
23 but the point is that we adopt the submissions of
24 Ms Abram here. This is essentially an on-the-hoof call
25 for advance factual witness evidence, which,

1 incidentally, is going to be coming in the spring next
2 year, in any event, and it is unnecessary, for the
3 reasons Ms Abram gave, and it is not as though it would
4 be limited. The exposition to the Tribunal of this
5 factual material would not be limited only even to the
6 factual witness statements because the experts, who are
7 going to address it in the manner that is explained most
8 fully in Ms Abram's skeleton and Mr Biro's evidence, but
9 also in both of the expert witness statements from
10 Dr Nitsche, Dr Nitsche 1 and 2 -- it is also explained
11 there. It will also have to be addressed by the
12 experts. So the experts will have to say, "I rely upon
13 the facts as explained by Mr or Ms So and So and So and
14 So." So there will be no danger of the Tribunal
15 arriving at the determination of this matter at trial
16 not understanding the relevant factual context.

17 So those are the additional submissions that we make
18 in opposition to the last-minute suggestion that is not
19 in any application.

20 THE PRESIDENT: Yes. Mr Pickford, before we go back to the
21 claimants?

22 Submissions by MR PICKFORD

23 MR PICKFORD: Thank you, my Lord. Just very briefly to
24 endorse the comments just made by Mr Harris, that it is
25 quite improper --

1 THE PRESIDENT: Sorry, just before you go on, that is
2 Mr Pickford for DAF.

3 MR PICKFORD: I beg your pardon, sir, indeed. Yes, the idea
4 of disclosure statement was not even canvassed. It is
5 not in a draft order. It was not canvassed in any
6 evidence at all. So it is quite improper just to try
7 and ambush us with that, in addition to the substantive
8 points that have been made by my learned friends as to
9 why it is not a good idea.

10 The only other minor point that I just want to
11 mention is we were a little puzzled by Mr Holmes'
12 position on the bundled products because Ryder has
13 consented to our amended pleading in relation to bundled
14 products, so we are not entirely sure what is being
15 reserved there. I presume that is a reservation in
16 relation to other parties but, as far as we are
17 concerned, by letter of a few days ago, that is no
18 longer an issue between us.

19 THE PRESIDENT: Consenting to your pleading does not mean
20 they agree it is a good point.

21 MR PICKFORD: No, of course, but my understanding was that
22 Mr Holmes was saying that they reserve -- well, possibly
23 I misunderstood his submission but my understanding of
24 his submission was that they reserve their position
25 because they had not yet consented to everybody's

1 pleadings on that matter. Possibly if he is making
2 a different point, then it would apply equally to us.

3 THE PRESIDENT: Yes. So Mr Holmes?

4 Submissions by MR HOLMES

5 MR HOLMES: Thank you, sir. So the key point is that the
6 position in relation to bundled products has not at all
7 crystallised on the pleadings, so the parties are not
8 all in the same position in relation to this, and it is
9 important to understand that from the outset. Daimler
10 and Iveco have no existing pleading in relation to
11 bundled products. They have pending pleading
12 amendments, to which we have yet to consent. Iveco has
13 yet to identify even which products and services their
14 allegation concerning bundled products relates to. They
15 have candidly indicated in correspondence that they do
16 not yet know and they are continuing to make enquiries.

17 As regards Volvo/Renault, there are draft pleading
18 amendments to their existing pleading in relation to the
19 bundled products and they have not applied to have those
20 determined today, so a practical issue arises in
21 relation to the pleadings which will need to be
22 determined in due course, and that is the subject of the
23 second item on the agenda. We are not satisfied that
24 what is currently on the pleadings of some of the
25 defendants is adequately particularised to show

1 a sustainable case, and we have proposed a process
2 whereby they can bring forward further pleading
3 amendments. Daimler and Iveco have both agreed. They
4 have both indicated that they are content with that
5 proposal in their skeleton arguments, and I can take you
6 to that if it would be helpful.

7 THE PRESIDENT: Yes, we have seen that.

8 MR HOLMES: Yes. Volvo/Renault, on the other hand, says it
9 is content with the existing state of its pleading. It
10 is not clear whether it therefore withdraws the pending
11 pleading amendments, but this will need to be dealt
12 with --

13 THE PRESIDENT: Can I interrupt you, sorry. We will come on
14 to pleadings and, as I say, any permission for expert
15 evidence on bundled products or complements or related
16 discounts will be to give evidence insofar as the
17 defendants have pleaded such a case, which means,
18 obviously, in a pleading which they have permission to
19 put forward, and the pleadings will be sorted out well
20 before the expert evidence is due in; so I do not think
21 you need be concerned about that, but if you want to
22 respond on the particular point, which you had not
23 raised before, about a disclosure statement that you
24 supported Mr Palmer's application --

25 MR HOLMES: I understand, sir, and that is helpful. My

1 point is simply that we regard their cases as
2 inadequately explained at present, and that could be
3 resolved, in my submission, either by way of
4 a disclosure statement, as Mr Palmer has proposed, or by
5 way of pleading amendments brought forward, as some of
6 the defendants have proposed to do.

7 We are happy with either approach, but the important
8 point is that the case, as currently set out, is not
9 sufficiently articulated to enable the case to progress
10 in an orderly fashion to trial.

11 THE PRESIDENT: Yes. Well, Mr Palmer, do you want to add
12 anything to that?

13 Submissions by MR PALMER

14 MR PALMER: Yes, please. First we want to support the
15 absence of proper pleadings. I was surprised to see
16 Mr Pickford chiming in on this one because there is no
17 pleaded case from DAF at all on this point, only the
18 complements point is pleaded in DAF's case, so if this
19 argument is to be run by DAF in support of their case on
20 the overcharge and scale of the overcharge, then that
21 ought to be pleaded.

22 The evidence to which we were looking earlier,
23 Mr Biro's evidence, was filed on behalf of Volvo/Renault
24 by way of responsive evidence a few days ago. We have
25 had nothing from Daimler's economist explaining the

1 basis upon which they are going to set out their bundled
2 analysis. So we would like at least confirmation as to
3 whether it is the same approach or not.

4 This request is not an ambush of course. We have
5 been requesting in correspondence throughout an
6 explanation of what the factual basis of this proposed
7 expert evidence is to be. Now that the Tribunal has
8 decided that in principle it ought to be at least
9 permitted so that it can be scrutinised, we will have to
10 consider whether our own expert analyses discounts in
11 this way, when calculating the overcharge, and how to
12 respond to the points.

13 We need, if it is going to be in at all, to
14 understand what the factual basis of it is, just like
15 back in May the defendants needed to understand the
16 basis upon which we were pricing trucks for the purposes
17 of pass-on. It was not enough then to say, "Wait for
18 the factual witness statements." It is not enough now.
19 We need early explanation as to the basis upon which the
20 defendants put their case, so that our expert can
21 understand that and prepare expert evidence with that in
22 mind.

23 MR MALEK: Just on this. The sort of detail that you want
24 in a disclosure statement is going to go way beyond what
25 one would expect on a pleading, is it not, because you

1 will want to know how the discounts and bundle product
2 analysis worked throughout the period of the cartel,
3 because it may have changed. It may be different on
4 different trucks and products, because if you are trying
5 to identify where the information is going to come from,
6 you have the pleadings, which I think are not going to
7 be specific enough for what you are saying. You have
8 the witness statements, which come further down the
9 line, and the problem with that is that it may not cover
10 the entire period or it may not have the detail that you
11 need and by the time you get the witness statements you
12 may say, well, is that not quite far down the line?

13 The third level is to look at the disclosure being
14 provided by the trucks companies, and that probably will
15 give you some information about how discounts worked,
16 but sometimes it is like a needle in a haystack; in this
17 case there is so many documents, it is quite difficult
18 to pull the threads together.

19 The fourth source for this is your own employees and
20 your own documents, because your people would have been
21 negotiating it, but the problem with that is that, if
22 this is a recent cartel, it will be quite easy. If it
23 is going back to 97, you may not have the people there
24 to explain, you may not even have the documents there.

25 So am I right in thinking that the sort of statement

1 that you are looking for is going to be relatively
2 detailed, covering the whole period of the cartel?

3 MR PALMER: Sir, yes, that is what would be required so that
4 all parties can prepare for the case, and I would say
5 also, if it is to be asserted, which it has not been --
6 we simply do not know. If it is to be asserted that the
7 discount policy during the cartel period was different
8 from the discount policy either before or after, so that
9 greater discounts were offered to make up for the
10 overcharge -- if that is to be asserted, well, we need
11 to know and understand that.

12 At the moment that does not make any sense to us at
13 all, that the defendants could be saying, well, given
14 that there was an overcharge, our discounts had to be
15 greater.

16 MR MALEK: You may get different permutations. You may have
17 a number of options in relation to a specific sale or
18 group of sales, so it is not necessarily a black and
19 white issue, but certainly, when I have looked at the
20 pricing statements in this case, they have been really,
21 really helpful and they form an anchor for everything
22 else that we do, and the issue we are going to have to
23 consider is whether or not we need a similar anchor when
24 dealing with this, but I think I have said enough for
25 now.

1 MR PALMER: I accept all of that and would respectfully
2 submit that such an anchor is required now that it is
3 clear that the defendants are to be permitted to go down
4 this route.

5 THE PRESIDENT: Ms Abram, do you want to add something?

6 Submissions by MS ABRAM

7 MS ABRAM: Yes, I wonder if I might make a suggestion that
8 might provide a way of cutting through this. The
9 concern that is being expressed by my learned friends
10 and by Mr Malek is that we may get to a point, I think,
11 when expert evidence is due, when the claimants still do
12 not have sufficient detail of our case to be able to
13 understand it in a granular enough way to analyse it in
14 the economic evidence.

15 Economic evidence is a long, long way down the track
16 in this case, so primary exchange of expert reports is
17 not due until September 2022. What I would suggest is
18 that, because we say that this is really best addressed
19 in factual witness evidence, the parties should have an
20 opportunity to put forward their evidence on this in the
21 same way as on all the other bits of the case, and if
22 the claimants feel after that that they do not have the
23 level of granular detail that they need, that would be
24 the appropriate moment to come back and say, "Actually,
25 we need further information. We need to understand how

1 the factual evidence fits with the disclosure," or
2 similar. But, in my submission, it would be very odd
3 and irregular to pre-judge that now.

4 THE PRESIDENT: Yes, thank you. Well, I think we need to
5 move on. I think we will just take a moment to consider
6 what has been said. (Pause)

7 We think this is potentially quite a big area,
8 because if we are going to be looking at discounts or
9 potential discounting of ancillary services or
10 complementary products, we will need to understand the
11 pricing of ancillary services and complementary
12 products. We found the pricing statements on the trucks
13 themselves extremely helpful and that it is not
14 something that should be left to be pieced together from
15 various witness statements.

16 So, insofar as any defendant wishes to advance this
17 case, we think they should provide a disclosure
18 statement explaining their approach to the underlying
19 pricing and any discounting of ancillary services and
20 complements which they say should be taken into account
21 when assessing the value, and that should be provided at
22 the same time as their pleading on this matter is
23 determined.

24 We come later to look at the timetable for
25 pleadings.

Submissions by MR HARRIS

1
2 MR HARRIS: Thank you so much. We strongly object to this
3 last-minute suggestion for a new statement, not just for
4 the reasons that I gave before, which I apprehend that
5 you have discussed with your colleagues and made
6 a decision about, but there are also timing and
7 proportionality concerns here that I have not addressed.
8 Mr Malek said before -- and I noted it down -- that this
9 was to be an exercise "relatively detailed for the whole
10 period of the cartel", and precisely so. If this is
11 something that the defendants are going to be ordered to
12 do, then it is an involved exercise and, of course, I am
13 not in a position to address you today, unsurprisingly,
14 as to quite how involved it will be. I do not know how
15 many people it would involve but, since it is relatively
16 detailed for the whole period of the cartel, I apprehend
17 it will be quite a few people.

18 The reason I am not in a position to address you on
19 that is because, directly contrary to what Mr Palmer
20 submitted before, this has not been floated at all,
21 ever, in correspondence, that there would be an advance
22 round of witness statements or statements on this issue.
23 So I already have received instructions that it is
24 simply not realistic to think that we could do this at
25 the same time as putting forward the pleadings, but it

1 may well be that, if I had had advance notice of this
2 point, I would also be submitting to you that it is
3 disproportionate to be doing this at all in advance of
4 the witness statements. It effectively will amount to
5 a first round of witness statements being ordered now,
6 on this topic, in advance of the round of witness
7 statements that has already been ordered for March of
8 next year.

9 So we respectfully contend that this is an unfair
10 proposal by Mr Palmer, made on the hoof, and it is not
11 fair to make us do it, and certainly not at the same
12 time as pleadings and, furthermore, that we ought to
13 have further submissions on this topic when I have been
14 able to take proper instructions about proportionality.

15 Submissions by MR HOLLANDER

16 MR HOLLANDER: Charles Hollander for Iveco. I was not at
17 all clear that any application was being made, even on
18 the hoof, that affected Iveco, because what Mr Holmes
19 said about Iveco, quite rightly, was that there had been
20 agreement with Ryder, subject to date issues, that it
21 would be dealt with by amendments, and he said he was,
22 for himself, happy either that it be dealt with by
23 amendments or by a disclosure statement. If I had
24 understood that, that he was actually making an
25 application, then I would have responded. In fact,

1 because it was made on the hoof, we have not been able
2 to take instructions.

3 I agree respectfully with Mr Harris, this is
4 potentially a very, very substantial task, if it is to
5 be done properly. We have not been able to take
6 instructions about it and, I mean, there are major
7 concerns here, which needed to be addressed in evidence
8 and correspondence, which have just not been dealt with
9 at all, and I think if it is going to happen, it is
10 going to push back, on any view, the question of dates
11 for amendments because, if this task has to be done at
12 the same time, that is going to be a very long task. We
13 just have not had a chance to investigate it at all.

14 THE PRESIDENT: It may be it is more satisfactory that, when
15 we see the amendments and when the amendments are
16 determined, at that point, one can decide, reflecting
17 whatever detail or lack of detail there is in the
18 amended pleading, whether such statements are needed and
19 by what date. We are getting, when we come to
20 amendments, it will -- the time from amendments to
21 factual evidence of 10 March is not so long that it is
22 something that can come either close to or even with the
23 factual evidence because it will, or should, reflect the
24 factual evidence, but it may be very helpful to have it
25 in one statement, separately from a series of factual

1 witness statements, so that you have persuaded me and
2 I need to ask my colleagues that we should not order it
3 to be produced with the pleading but we will consider it
4 further when we have settled the pleadings and seen the
5 final shape of the pleadings, but you have all been told
6 that we think in principle it may be very helpful and it
7 is something you are going to have to look at because
8 you will need that to support such case as you are
9 making on taking account of discounts or bundles.

10 Would that meet your concern, Mr Hollander?

11 MR HOLLANDER: I just simply have not had a chance to take
12 instructions upon this. I think the Tribunal knows the
13 witness statements of 10 March and at the moment there
14 seems to be a discussion -- I do not know how far it has
15 got. As I understand it, there is a discussion about
16 a possible date in February some time to consider the
17 amendments. The amendments issue. I am sorry, I do not
18 know whether that is something that the Tribunal are
19 aware of or not. But that is actually going to happen
20 very shortly before witness statements. So that may
21 be -- sir, you have made the point very clearly as to
22 what would help the Tribunal. I suspect by that time we
23 will be close enough to witness statements that it would
24 be sensible for these matters to be dealt with in
25 witness statements, to the extent necessary.

1 THE PRESIDENT: Yes, Mr Harris.

2 Submissions by MR HARRIS

3 MR HARRIS: Sir, may I also add that, as I now understand
4 the point, it is very much a two-sided coin, so if there
5 were discounting and offsetting policies as regards
6 bundles, or perhaps at times somebody calls them
7 complements, then there were two counterparties. This
8 is again a point that Mr Malek made. The other side to
9 each one of these discounts and offsets was none other
10 than the claimants. So in my respectful submission, if
11 there is to be a dedicated round of statement/witness
12 evidence, or whatever one might call it, on this topic,
13 after pleadings are closed, then it should apply every
14 bit as much to the claimants as it does to the
15 defendants. That is only logical.

16 THE PRESIDENT: Mr Palmer.

17 Submissions by MR PALMER

18 MR PALMER: Sir, can I respond to two points. The first is
19 the link with the pleading. There is no pleading issue
20 that arises in the Dawsongroup case on which we are
21 awaiting. We have a limited pleading from Volvo/Renault
22 and from Daimler already. What we have from
23 Volvo/Renault is evidence from Mr Biro which explains
24 that their approach is to value trucks based on the
25 basis upon which incentives were offered.

1 It is extraordinary, with respect, to hear at this
2 stage that no one has investigated this, if this is the
3 basis upon which this expert evidence is being produced.
4 There should be -- there must be a factual underpinning
5 of what we have and I did say what we have explored in
6 correspondence is the question of what is the factual
7 underpinning for this expert evidence.

8 So the defendants must know, if they are planning to
9 produce it, the -- it is not a two-sided coin. We have
10 Mr Biro's explanation that it is based on the basis upon
11 which the incentives were offered. If that is the case,
12 we need to understand the basis upon which the
13 incentives were offered, the circumstances in which they
14 were and from what starting prices. That is what we are
15 asking for, an explanation of the factual basis upon
16 which Mr Biro's proposal was produced, but we are also
17 asking, if Daimler are adopting the same approach, for
18 them to confirm that. If it is a different approach,
19 then that will have to be separately identified. No
20 such explanation has been produced in evidence before
21 the Tribunal.

22 We are not waiting for any pleading amendments from
23 either of those defendants.

24 THE PRESIDENT: Right. We will withdraw again. (Pause)

25 We have considered it further and we may have been

1 a bit hasty. Our concern is that this material is
2 produced by all defendants who rely on this point, and
3 the question is how and when and that it is produced in
4 sufficient time for the claimants' experts to consider
5 it.

6 We made it clear, I think, what we believe is
7 relevant to assess this point. That is to say not
8 simply discounting but also the underlying pricing of
9 ancillary products and services. The discount cannot be
10 looked at in isolation. We will leave the defendants
11 who take this point free to do so in their witness
12 statements, but if they do not adequately do it in their
13 witness statements, it should be clear from what has
14 been said that we will be very receptive to an
15 application by the claimants that they should, in short
16 order thereafter, produce what has been called
17 a disclosure statement, setting this out for the
18 duration of the period. It seems to us that if they are
19 going to run this argument, they will have to look at
20 the factual evidence. They must be working on that, and
21 they know the date is 10 March, and we think therefore
22 we will not make an order for disclosure statements. We
23 will say and make it clear that it needs to be covered
24 and that if it is not adequately covered in the factual
25 evidence, then the claimants can ask for a further

1 order.

2 With that, can we move on then to the -- and going
3 back to volume/value of commerce, again we will give
4 permission to all parties to have an economist to
5 address those matters insofar as they concern opinion
6 evidence, having made it clear that the actual factual
7 questions of what trucks were sold and at what price is
8 something that should be separately dealt with by way of
9 the consolidated databases.

10 Can we go on then to the next question, which is the
11 estimate of the overcharge.

12 I think that all parties seek to use econometric
13 analysis from an economist. As we understand it, all
14 parties will be looking only at trucks in the UK and the
15 analysis will be particular to each manufacturer. It
16 will not be a market-wide analysis. If we have
17 misunderstood that, please could someone let us know.
18 Everyone, as we understand it, wishes to do that by the
19 evidence of their economic expert, and we give
20 permission.

21 Submissions by MR HOLLANDER

22 MR HOLLANDER: I think we have made it clear, we have not
23 ruled out a wider consideration. I mean, I think that
24 was made clear in correspondence. We simply have not
25 ruled it out yet. Experts are considering the point.

1 THE PRESIDENT: Right. When you are wider, you mean UK
2 market-wide, do you?

3 MR HOLLANDER: Yes. I think we made it clear that our
4 experts are simply considering the issue at the moment.

5 THE PRESIDENT: Yes. Well, I think at the moment this is
6 a case where we do not want people working in an
7 entirely different way. We will say at the moment the
8 permission is for each manufacturer. If you want to
9 approach it differently, I think you need to come back
10 and ask, Mr Hollander, with an explanation from your
11 expert as to why; otherwise, we will get analysis on
12 a different basis.

13 MR HOLLANDER: Understood.

14 THE PRESIDENT: The next question is then what has been
15 called the plausibility of causation of loss, which is
16 a point being raised by the defendants as a sort of
17 anterior question of whether this cartel, as described
18 in the Commission decision, would have caused any price
19 rise. I think that seems to be the point and I think,
20 is it, Mr Jowell, who is leading on this? Is that
21 correct?

22 Submissions by MR JOWELL

23 MR JOWELL: That is correct. I think it is common ground
24 between the parties that there should be opinion
25 evidence on this from the experts. The only issue,

1 I think, between us is whether, in the case of Ryder,
2 they should have an additional expert to deal with it.

3 THE PRESIDENT: Well, before we go to that, can you just
4 explain the point a bit to us.

5 MR JOWELL: Certainly --

6 MR PICKFORD: I beg your pardon, Mr Jowell, sorry. I think
7 there may be a bit of overlap here, but I am very happy
8 to cede --

9 MR JOWELL: No, absolutely, if Mr Pickford wishes to deal
10 with the point of the relevance of the evidence, then I
11 am certainly happy for him to do so and I will cede to
12 him. Then I will pick up the question of whether they
13 should have an additional expert.

14 THE PRESIDENT: Yes, Mr Pickford.

15 Submissions by MR PICKFORD

16 MR PICKFORD: Thank you, sir. We have tried to be as
17 efficient as we can in dividing up topics, so we are
18 obviously trying to assist only when we need to.

19 So to address the Tribunal on the question about
20 what we are seeking, it is obviously, as, sir, you
21 indicated, common ground that everyone wants to conduct
22 an analysis of the relationship between prices before
23 and after the infringement so that we can assess whether
24 there is some systematic unexplained price difference,
25 and what was that, sir, you referred to first.

1 But that only tells us whether there is an
2 unexplained price difference. That does not tell us
3 anything about the causal relationship and whether, in
4 fact, there is a plausible causal relationship that
5 whatever exchanges of information there were in this
6 case, that they led to any price difference, and so that
7 is the issue that we would like to explore, and indeed
8 all of the defendants would like to explore, and indeed
9 Ryder would also like to explore, through further
10 economic evidence. That is something for which the
11 Tribunal has given permission in the Royal Mail and BT
12 proceedings.

13 THE PRESIDENT: Yes.

14 MR PICKFORD: It is something that is not opposed by
15 Dawsongroup, albeit Dawsongroup says we do not think it
16 is necessary and we do not want to do it. That is
17 obviously a matter for them.

18 THE PRESIDENT: Can I ask you, is it something about DAF
19 specifically or is this something about the nature of
20 the cartel and whether it --

21 MR PICKFORD: (Overspeaking) although it will depend
22 potentially, obviously, on evidence in relation to how
23 particular OEMs went about setting their prices. So it
24 is not something that is particular to DAF; this is an
25 issue that arises in relation to all of the defendants.

1 We all wish to advance evidence on the issue of the
2 plausibility of there being a mechanism by which prices
3 were actually raised. It is obviously not an
4 impossibility that there are factual circumstances that
5 differ between different OEMs but, ultimately, it goes
6 to the question of whether, together, any information
7 exchanges that took place plausibly would have led to
8 the alleged increases in prices, and that is a different
9 question from whether there is in fact a correlation.

10 THE PRESIDENT: Yes. What we are wondering is does it
11 really need evidence from each expert of each defendant
12 or is it not something that could be addressed in common
13 by one of your economists?

14 MR PICKFORD: Sir, our position certainly hitherto has been
15 that we each wanted to advance such an analysis using
16 our own --

17 THE PRESIDENT: I am sure you do because you get five people
18 addressing it. But is it really necessary?

19 MR PICKFORD: Well --

20 THE PRESIDENT: We are not saying that evidence should not
21 be given. We accept that it is an issue and it can be
22 advanced and it is for an economist, but what is
23 concerning us, before we even get to the question of
24 what Ryder should be allowed to do, is whether it needs
25 five experts to address this.

1 MR PICKFORD: Well, sir, I think that is something that has
2 not been raised so far, so I would need to take
3 instructions to provide as full an answer as possible in
4 relation to it, but, as I said in my opening remarks,
5 our position is that there is a relationship, that
6 potentially depends on the particular ways in which
7 different OEMs set their prices, that is relevant here.
8 So it is not necessarily the case that you can have one
9 expert acting for all of the OEMs to produce some sort
10 of consolidated analysis. What they are going to be
11 looking at is, in the light of the way that the
12 particular OEM for whom that economist is acting set its
13 prices and the information that it received, is there
14 a plausible mechanism by which it would have been able
15 to increase its prices.

16 There are, obviously, relationships here between all
17 of the OEMs because, ultimately, what is said against us
18 is, well, it is the exchange of information between all
19 of you that ultimately led to the increases in prices,
20 but it is not necessarily a simple global issue that can
21 be addressed for each OEM by one particular expert, and
22 that is certainly not how we have approached it so far.

23 Obviously, I can go back and I can seek to take
24 instructions on the extent to which there may be some
25 economies of scope, but my understanding is that those

1 do not exist to the extent that it would be possible to
2 do it in the way that the Tribunal suggested, and it is
3 certainly not something that we have as yet canvassed or
4 have evidence on, so it would be very difficult, I
5 think, for us to address that probably in this hearing
6 because we would need to obviously explore that to
7 a greater extent, but my understanding is, currently,
8 the answer to your question is no.

9 THE PRESIDENT: We know that is what you are seeking to do.

10 It would be pretty strange for all these different
11 manufacturers to make an arrangement which plausibly
12 would not affect the price of some but would of others.
13 Wonder what on earth they thought was the point of
14 having the people who could not plausibly be affected in
15 the discussions, but that may be a matter to be explored
16 later.

17 Submissions by MR HOLLANDER

18 MR HOLLANDER: Sir, I think there are difficulties with this
19 because, in respect of each defendant, the analysis is
20 based on that defendants' specific data and, remember,
21 there are contribution proceedings between the various
22 defendants, and I suspect there are conflicts, apart
23 from anything else, but I get the impression no one has
24 actually considered this previously, but I would have
25 grave reservations as to whether it actually is

1 workable.

2 THE PRESIDENT: Yes. Yes, I am not clear how far -- that is
3 why I was asking Mr Pickford -- it is based on
4 defendant-specific data or looking at the cartel and
5 what is said about the cartel.

6 Submissions by MR PICKFORD

7 MR PICKFORD: Sir, if I may assist on that, my instructions
8 are that it is defendant-specific. It is a plausibility
9 analysis that depends upon the defendants' specific
10 regression, which, of course, is based upon largely,
11 though not exclusively, some defendant-specific data,
12 and these are, of course, not additional reports. This
13 will be a section about the plausibility of causation
14 within the main regression report on overcharge, and so,
15 for those additional reasons, we also consider that it
16 is not sensible or workable to have a single joint
17 economic expert on this topic.

18 THE CHAIRMAN: Yes. Right. Well, then there is the
19 question -- we will consider what you have said -- of
20 how Ryder wishes to deal with it. Mr Holmes, this is
21 the question of Professor Connor and why you really
22 need -- the point is going to be raised. There will be
23 expert evidence on it from the economists for the
24 defendants. You have got your economist in Dr Wu, who
25 is very experienced. He does not say he cannot do it;

1 he says he has a lot to do and it would be helpful if
2 that could be taken over by someone else, but equally,
3 he has quite a bit of time to do it and he will need to
4 think about this sort of thing in deciding his
5 regression anyway.

6 Submissions by MR HOLMES

7 MR HOLMES: If I might make three points. The first is that
8 the reason why we have proposed to adduce evidence from
9 Dr Connor is because we see him as particularly well
10 placed to assist the Tribunal on this separate topic of
11 plausibility. He is an academic economist who has made
12 a specific study of cartels and their effects. Indeed,
13 it is fair to say that it is the defining focus of his
14 career over at least two decades and we, therefore, see
15 him as being very well placed to address this issue of
16 plausibility, which we understand to relate not to the
17 position of individual defendants but to how the cartel,
18 understood in the context of this market structure and
19 analysed in the light of economic theory, may be
20 expected to have worked its effect.

21 The topic is, as we see it, a discrete one, which
22 does not overlap substantially with the work to be done
23 by Dr Wu. Dr Wu's focus will be on the econometric
24 modelling, and the defendants have recognised that there
25 is a clear distinction between the modelling work and

1 the question of plausibility, and indeed, that was the
2 point that Mr Pickford impressed upon you.

3 So there is, in our submission, no issue of any
4 significant overlap between the work to be done by Dr Wu
5 and Dr Connor. The proportionality of Ryder's proposal
6 needs to be viewed against the backdrop of the
7 defendants' expert evidence. They are fielding five
8 separate economists, each of whom will be producing
9 their own econometric models. As a result of the
10 business we have just been discussing, we know that
11 those econometric models will be on the basis of several
12 permutations; for example, they will take into account
13 any bundled product plea, if allowed, and they will
14 exclude that plea. So there will be more than one
15 econometric model. There will be also be economic
16 evidence from DS Smith about pass-on, and so, at trial,
17 Dr Wu will have his work cut out for him and that is, in
18 our submission, a good reason for the Tribunal to allow
19 Ryder to deal with this discrete topic by means of
20 a separate and distinguished academic economist.

21 For Ryder to break off this specific topic for
22 a separate expert also needs to be viewed in the context
23 of the scale of its claim, which concerns the purchase
24 of 44,000 trucks and, in those circumstances, we say
25 that it is proportionate. The distinction that you,

1 sir, have suggested, whereby a single defendant
2 economist might address this topic, which we see as
3 having significant appeal, reinforces the separateness
4 of the topic and lends added force, in my submission, to
5 our proposals.

6 The objection that the split will increase cost is
7 overblown. At trial, questions need only be asked of
8 one expert, Dr Wu in the case of the econometric
9 modelling and Dr Connor in the case of plausibility, and
10 in preparation for trial, Dr Wu and Dr Connor will, of
11 course, liaise carefully to avoid duplication and, in
12 those circumstances, there is no material risk of costs
13 being substantially increased.

14 So those, sir, are my submissions.

15 THE PRESIDENT: Thank you. We have run on rather late
16 because we started late. So we will consider that over
17 lunch, if we need to call on other parties on it. We
18 will return at 2.15.

19 (1.21 pm)

20 (The short adjournment)

21 (2.15 pm)

22 THE PRESIDENT: Mr Holmes, we are against you on Dr Connor.
23 We do not think it is appropriate or proportionate to
24 have an additional expert on that issue.

25 Insofar as there are, as you described it, general

1 questions based on the study of cartels more widely, on
2 what cartels are likely or experience has said that
3 cartels do, there are now a range of published studies
4 to which Dr Wu can refer. There is the Commission Staff
5 working guide on damages, which says something about it.
6 There is the Oxera study and so on. Further, there is
7 likely to be a judgment from trial number 1, where this
8 issue has been raised, and there are judgments coming
9 out from courts across Europe, albeit addressing
10 different national markets, on what this cartel is
11 doing, and we think it is superfluous, or at least
12 disproportionate, in that Dr Wu will be well able to
13 deal with that.

14 As regards the defendants, we do not think it is
15 appropriate to make any order limiting them to one
16 expert on this. All we would say is that insofar as the
17 defendants, through their expert, are seeking to make
18 some general point based on the nature of this cartel
19 that is not defendant-specific but is based on analysis
20 of how cartels of this nature work, their experts should
21 speak together and decide which one is going to lead on
22 that and he -- I think at the moment they are all he but
23 there may be he or she in due course -- should deal with
24 that and it should not be duplicated by evidence from
25 the other experts.

1 When it comes to what Mr Hollander referred to, the
2 more specific data for a particular -- why it would not
3 have affected that manufacturer's prices, of course that
4 will be dealt with by that company's expert, and if it
5 was not envisaged that Dr Connor was going to get down
6 to that level of detail anyway, that is something that
7 Dr Wu was, in any event, going to deal with.

8 So that is the position on Dr Connor.

9 I think that we then move on to pass-on.

10 Issue of supply pass-on

11 THE PRESIDENT: The first form of pass-on is what has been
12 called "supply pass-on", and the defendants are using
13 Mr Grantham jointly, who will use forensic accounting.
14 That is what they wish to do. We do not see that it is
15 right to say to them that they are not entitled to
16 advance their case that way.

17 We note that Mr Harvey says there are all sorts of
18 flaws in the way Mr Grantham is approaching it but those
19 are objections which can be taken to his analysis, it
20 seems to us, and if they are effective and accepted by
21 the Tribunal, then the defendants will have failed to
22 prove supply pass-on. But we really do not see that as
23 a Tribunal we can say, "No, you are not entitled to
24 advance your supply pass-on case the way you wish to do
25 so because one of the other experts say there are

1 various flaws in it."

2 So, Mr Palmer, we really do not see, subject, of
3 course, to your comments -- as you know, what we do is
4 we indicate our provisional views, having studied all
5 the material, and then you can address us and try, and
6 sometimes succeed in, persuading us that our provisional
7 view was wrong, that we should preclude the defendants
8 from using Mr Grantham as their expert. So, Mr Palmer,
9 do you want to come back on that?

10 Submissions by MR PALMER

11 MR PALMER: Yes, please, sir, and thank you for that
12 indication. I would like to take the opportunity to
13 raise the concerns which motivate the objection. Of
14 course, we have well in mind that it is the defendants'
15 own preference to defend the claim in this way. But we
16 also have well in mind what the consequences of that
17 would be for the overall proportionality of the trial
18 because, although Mr Harris in his skeleton argument,
19 apparently speaking for all the defendants on this
20 point, says there is no objection at all to experts from
21 different disciplines dealing with the same topic and
22 interrogating each other, so to speak, that is not the
23 position of DAF, expressly, who wish to call their
24 econometric expert in response to Mr Harvey on this
25 topic and Volvo/Renault, and indeed Daimler, have

1 reserved their position on that, as we understand it,
2 and their expert proposals, and we note, although it
3 does not concern us, in the Ryder proceedings that MAN
4 and Iveco also wish to respond by way of economic
5 evidence on pass-on, insofar as Ryder put forward
6 econometric evidence in relation to pass-on --

7 THE PRESIDENT: Can I interrupt you. You are sort of
8 starting down the line a bit. The pass-on is being
9 raised by the defendants. If they did not raise
10 pass-on, you would not put in any evidence on pass-on;
11 it is because they are saying you did pass on that this
12 arises, and they have to prove it, and they have chosen,
13 rightly or wrongly, to do so by a forensic accounting
14 method, and you will be able to say, "This method does
15 not work, for all these reasons, and it is flawed," and
16 all the -- I will not attempt to summarise the various
17 things that Mr Harvey says -- we all have them in
18 mind -- and if you are successful in making those
19 points, that is the end of supply pass-on. You do not
20 have to prove that there is not supply pass-on, so if
21 they say, "This is the way we are going to try to do
22 it," and if you are right that it actually does not
23 work, well, then you have got nothing to worry about.
24 You will make that case.

25 But to say that they should not be entitled to seek

1 to do it by a forensic accounting, which is, after all,
2 not unknown as a method for looking at supply pass-on,
3 and they have no doubt thought hard about it and they
4 think that is going to do it for them -- to say no, they
5 are not entitled to do that, that is something that we
6 find a little difficult to grapple with.

7 So that is where we start, before we get to the
8 point of, well, what can you do in response.

9 So, I am sorry to have interrupted you but you have
10 sort of leapt over that point in the way you were
11 developing your submissions.

12 MR PALMER: Again, I am grateful. I just wanted to start
13 with where I was going to end up, just to put in context
14 some of our concerns. We had understood the Tribunal to
15 have made clear on at least four occasions that it was
16 for the Tribunal to decide the overall method which any
17 expert would adopt in relation to any issue and then it
18 was for matters of methodology to be dealt with at
19 trial. That is what the Tribunal said as long as two
20 years ago in the September 2019 disclosure hearing and
21 again in its January 2020 disclosure ruling, that it
22 would consider what methods of analysis were to be used
23 by experts for calculating pass-on, and that was
24 repeated at the February 2020 CMC, that overall method
25 would be determined, leaving subsequent difference of

1 detail within that approach to be explored in trial.

2 Daimler have cited from that in their skeleton
3 argument at their paragraph 12 but, no doubt for reasons
4 of space, omitted the words which follow the dots at the
5 end, which were, of course, "Once the overall method is
6 agreed."

7 It was me, sir, you and Mr Malek will recall, in the
8 May CMC who pressed strongly for these issues to be
9 determined at that stage, recalling all of the above
10 points that I have made and inviting the Tribunal to
11 determine what expert evidence would be led in response
12 to these issues. The acknowledged difficulty at that
13 stage was that the defendants had not made any
14 applications or adduced any evidence to explain their
15 position, and the issue was put off to this CMC on the
16 defendants' application so that there could be further
17 discussion between the parties and opportunity to agree
18 an approach. It was Mr Williams QC for DAF who led for
19 the defendants on that issue on that occasion, and he
20 said that they were keen to make progress on these
21 issues to reach resolution, really for the reasons that
22 I had advanced, he said. He said there is no question
23 of the Tribunal's previous guidance having been
24 forgotten or ignored and he said, in fact, you will have
25 seen in our submissions and Ms Edwards' evidence that we

1 too are very keen to avoid the ships in the night
2 problem; indeed, that is in large part what is driving
3 the process which we have proposed. That process was
4 for the parties to set out explanations of their
5 experts' approach, to discuss and then inform the
6 Tribunal and then for any differences of approach to be
7 resolved in this two-day CMC, which was set down for the
8 purpose. But the defendants' approach, which,
9 provisionally, taking what you have said, sir, on board,
10 the Tribunal appears to endorse, is, actually, they can
11 name whatever approach they want and the Tribunal should
12 wave it through and we, as the claimants, have to live
13 with that because they have the burden of proof on this
14 issue.

15 But, of course, we have a heavy evidential burden on
16 this issue as well. We have produced evidence in
17 response to onerous disclosure requests already but are
18 still being continued to be pressed by the defendants
19 for this further disclosure -- they say what we have
20 done is still not adequate -- and we say, look, hold on,
21 this is all subject to the Tribunal's approval, as
22 a matter of principle. All sides have acknowledged that
23 expert evidence of some form is going to be required to
24 deal with supply pass-on but the issue is what approach
25 should be adopted. If we leave that until trial for us

1 to point out what we certainly advance now are the real
2 difficulties of principle why in this market, with this
3 claimant, the forensic accounting approach proposed in
4 the way advanced by Mr Grantham simply will not work.

5 In those circumstances, what the Tribunal is
6 inviting, and indeed allowing, is precisely the approach
7 it has warned against and which Mrs Justice Rose, as she
8 then was, warned against in the Emerald proceedings, in
9 which it was made, we thought, tolerably clear, that the
10 last thing the Tribunal was prepared to contemplate was
11 to wait until it got to trial before someone pointed out
12 grave problems in the methodology adopted, and all that
13 work, all that disclosure, all the further disclosure
14 which shall be required or the engagement with the
15 expert evidence that would be required, the
16 cross-examination and so forth is all for nothing.

17 Of course, we could sit back, sir, as you suggest,
18 and say, we are cognisant of our position. If the
19 defendants want to go down this route, more fool them
20 and we will point that out at trial and explain why it
21 does not work, just as we have been explaining now why
22 it does not work. Certainly, we could take that
23 approach, and you may be surprised to see us being at
24 pains to point out to the defendants why their approach
25 to expert evidence on this issue will not avail them and

1 will not demonstrate what it would need to demonstrate.

2 The answer is, as I foreshadowed, if it is allowed,
3 that will impose a whole burden on us as well in terms
4 of answering that. It will not be sufficient just to
5 sit back and say, here is a properly done econometric
6 analysis. What it will do is double the work that
7 everybody has to engage in because we will have to
8 interrogate that forensic accountancy approach, we will
9 have to appoint an expert to engage with that and assist
10 us with that and potentially to appear before the
11 Tribunal and reply, if so advised and if necessary, to
12 deal with that, just as they will have to engage with
13 the econometric evidence which we will produce, which we
14 will say will properly show, on a properly controlled
15 basis, that the overcharge did not cause us to pass on
16 to our customers.

17 You end up with a doubling of effort and
18 a disproportionate outcome.

19 So may I just invite you just to refresh your memory
20 of paragraphs 9 to 11 of our skeleton argument. I will
21 not go through it, but just so you know what points I am
22 on. Just go back to first principles. First by
23 reference to the Supreme Court's judgment in Sainsbury's
24 and the key point about the point of causation arising
25 and the price rise must be causally connected to the

1 imposition of the overcharge, and then we reproduce the
2 Commission guidelines on a similar point, explaining the
3 need to address the hypothetical situation, ie the
4 counter factual scenario, and therefore, what the issue
5 is, as we identify in paragraph 11 -- the issue being
6 whether Dawsongroup was able to pass on overcharge in
7 the form of higher rates than it would have achieved in
8 the absence of the overcharge.

9 This is where we start. That is the lens through
10 which any proposal must be assessed: is it going to
11 address that issue. My submission to the Tribunal is,
12 regardless of that being the preferred approach of the
13 defendants, if they cannot show that the expert evidence
14 they are going to adduce is going to address that issue,
15 then, in my submission, the Tribunal should not permit
16 it. The Tribunal does have the power under its case
17 management powers to control the evidence it receives,
18 in particular expert evidence, and the very least it
19 should be satisfied of, in my submission, is that the
20 evidence it permits is actually relevant to the issue
21 before the Tribunal.

22 In a nutshell, the difficulty is that Mr Grantham's
23 approach is all directed towards showing that, as he
24 puts it, in fact, the claimants recovered the overcharge
25 through the prices it charged. That is not the issue.

1 It would not be at all surprising to find out that the
2 rental rates covered the price of trucks, including the
3 overcharge. That is not the issue before the Tribunal.
4 The issue is whether the prices were higher than they
5 would have been in the absence of the overcharge.
6 Without that, you do not have the causal connection
7 identified by the Supreme Court.

8 That is not a question, as to how you approach that
9 task, which can be answered on some sort of high level
10 of abstraction by reference to the fact, as you pointed
11 out, sir, I fully accept forensic accountancy evidence
12 is often used in this context to address supply pass-on
13 questions. But we just have to bring it down to
14 specifics here, the specifics of this industry, this
15 claimant and this pricing strategy. That is what I set
16 out in paragraph 12 of the skeleton argument. It is
17 marked "Confidential", so I am obviously not going to
18 refer to its contents out loud, but can I just ask you
19 to remind yourselves of just the first sentence -- that
20 is the first five lines -- the first sentence, an
21 absolutely basic point, just what the approach was and
22 in particular what it was not.

23 Then if I could just ask you to call up the pricing
24 statement. The reference is {DG-C1/IC32/1}.

25 THE PRESIDENT: If this comes up on screen, do I take it it

1 is only seen by people in the inner confidentiality
2 ring?

3 MR PALMER: That would be my understanding but I would be
4 grateful to be corrected if I am wrong about that.

5 THE PRESIDENT: Yes, very well. No one is correcting, so
6 IC32/1.

7 MR PALMER: Yes, that is the beginning of it. Then within
8 that exhibit it is page 301. You should find there
9 Dawsongroup's price setting statement.
10 {DG-C1/IC32/301}.

11 If you have that, it is at page 302, the next page,
12 paragraph 1.5 --

13 MR HOLMES: Sir, I hesitate to interrupt. We are obviously
14 not in the Dawsongroup ring, and I should say we are
15 currently seeing an unredacted version of page 302. So
16 there may be others who are in the same position, who
17 are outside the ring.

18 THE PRESIDENT: Right. Thank you, Mr Holmes. In that case
19 let us see if we can get a hard -- something slipped up
20 there because the whole idea is we do not have to get
21 hard copies. Let us see if we have a hard copy. Just
22 pause.

23 I am not sure. We do not have it, do we? I do not
24 think we do. Just pause a moment.

25 Mr Palmer, we should be able to get our own internal

1 electronic bundles, without it going on the Opus screen.

2 So if you give us a moment, we will navigate to that.

3 MR PALMER: If you need the reference again -- no, no.

4 THE PRESIDENT: The reference is {DG-C1/IC32/302}, I think.

5 MR PALMER: That is it, sir, thank you. (Pause)

6 THE PRESIDENT: Yes, we have it.

7 MR PALMER: I am very grateful to the Tribunal. The

8 Tribunal will be familiar with the distinction between

9 what is known as "transient rentals" and "contract

10 rentals", transient rentals being rentals less than 12

11 months. The precise balance in Dawsongroup's business

12 between transient and contract rentals is confidential,

13 but I am authorised to say it is at least half, whether

14 measured by volume or value, are transient rentals, and

15 I just ask you to just note first of all the first

16 sentence on 1.5, just by way of introduction. Then for

17 further detail, to go on to page 312, paragraph 2.27,

18 {DG-C1/IC32/312}, which you can see relates to transient

19 rental, and you will see by reference to what matters

20 prices are set. I cannot say more than that, obviously.

21 But I would ask you just to refresh your memory of (i)

22 and (ii) there.

23 THE PRESIDENT: Yes. Well, give us a moment.

24 MR PALMER: Yes, thank you.

25 THE PRESIDENT: Do you want us to read beyond 2.27?

1 MR PALMER: Not directly. Then to move on to page 313,
2 {DG-C1/IC32/313}, and look at 2.31, because just to
3 introduce this point, at paragraph 2.31 it will be
4 apparent Mr Grantham's approach depends on the
5 identification of a pricing model or similar. I just
6 ask you to read 2.31, with particular emphasis on the
7 final six or seven lines of that paragraph, going on
8 over the page, the top of the next page.

9 THE PRESIDENT: Yes.

10 MR PALMER: Just in relation to those last five or six
11 lines, I can say openly that the Dawson group has been
12 able to identify two documents, both at the very
13 beginning of that earlier period but not beyond, and has
14 otherwise not been able to identify any other documents
15 falling into that category.

16 Then lastly on this document, if you could go
17 forward to look at contract leasing at pages 318 and
18 319, {DG-C1/IC32/318-319}, at 318, you will see that for
19 the long-term contracts -- that is over 12 months --
20 just the first sentence, please, of 2.45. (Pause)

21 I just make the point this is specifically about
22 contracts, not transient.

23 Then, 2.50 to 2.51, which lead on from that point.

24 THE PRESIDENT: Yes.

25 MR PALMER: Where does all that take me? It takes me to

1 this -- this is just for your note but at Harvey 11,
2 paragraphs 2.3 to 2.5 -- let me just summarise it in
3 this way. It is against that background that inevitably
4 any analysis of supply pass-on has to follow three
5 steps. First, any expert will need to identify the
6 factors that may have influenced prices, including but
7 certainly not limited to truck costs, for example,
8 varying levels of demand, other competitive conditions,
9 the matters that I have just taken you to, which you
10 have just --

11 THE PRESIDENT: Yes.

12 MR PALMER: That is the first step. Mr Harvey agrees that
13 Mr Grantham, through his method, is perfectly well able
14 to identify those other factors. That first step of the
15 analysis both experts can do.

16 Secondly, an expert -- in order to answer that
17 ultimate question, the issue which I identified for you
18 earlier -- will then need to isolate the effect of the
19 overcharge on the actual prices charged by the claimants
20 from the other factors that could have affected them.

21 Thirdly, then need to calculate the counterfactual
22 prices that Dawsongroup would have charged without the
23 overcharge, because you can only do that if you have
24 separated -- isolated, as I have put it -- the effect of
25 the overcharge from all those other factors.

1 Those three steps are a function of those price
2 setting arrangements I have just shown to you. It might
3 be very different in a regulated context, at least in
4 certain models of regulation. In certain circumstances,
5 costs can be quite closely connected with prices, with
6 a transparent way of following through from a change in
7 one cost bucket to an ultimate price. It does not
8 follow in all regulations contexts and, of course, some
9 sensitivity has to be adopted even in that context.

10 But that cannot be done in this context. You need
11 those steps two and three isolating the effect of the
12 overcharge and assessing what the counterfactual would
13 be.

14 So the key objection to Mr Grantham's approach,
15 which we have raised consistently, is we acknowledge it
16 fulfils step one in identifying the factors but it
17 simply does not have the ability to fulfil step 2 or
18 step 3.

19 We have repeatedly asked for an explanation as to
20 how Mr Grantham intends to use his exercise to reach
21 that counterfactual price and answer the correct
22 ultimate question, and Mr Harris, in his skeleton
23 argument, observes that we have asked that question
24 repeatedly. He is right about that. What he is wrong
25 about is the suggestion that at any stage an answer has

1 been provided.

2 Instead, what we have had is an answer given in
3 Grantham 2, given in Grantham 3. First of all his
4 approach is a factual exercise that looks at what the
5 claimants actually did during the relevant period and
6 therefore depends upon information and explanations
7 provided by the claimants themselves, absolutely true.
8 But we have provided that price setting statement now,
9 which he did not have at the time. There has been no
10 amendment to his proposals whatsoever in the light of
11 it, and in Grantham 3 he made clear his position that he
12 would be looking at how Dawsongroup actually managed
13 their day-to-day business, to identify whether there has
14 been pass-on as a matter of fact, and he said it would
15 necessarily consider how the market and other factors
16 may have affected Dawsongroup's business and
17 decision-making.

18 So he said, so he would not need to control for
19 other market factors that drive prices, as those market
20 factors would be included in the factual matrix of the
21 analysis. And here is our point: yes, those factors
22 will be included in the factual matrix -- that is at
23 step 1 -- but what you cannot do is then isolate the
24 effect of the overcharge from all those other factual
25 matrix matters.

1 He does not claim -- or did not at that stage
2 claim -- that it could be isolated from other factors,
3 and certainly not that they could be quantified
4 separately from the impact of other factors, such as
5 varying demand.

6 That is the point that we have raised consistently
7 and we were told that we should wait until the
8 defendants produced their joint expert evidence
9 proposals in July this year, in accordance with the
10 Tribunal's order. There was a letter of 22 June, we
11 were told that they would address that analysis further
12 in their expert proposals, they said. But when they
13 produced them, they simply said that Mr Grantham would
14 rely upon forensic accounting evidence, including on
15 supply pass-on, forensic accounting assessment of
16 whether any alleged overcharge was passed on in whole or
17 part by the claimants to their customers in the form of
18 higher prices.

19 So no engagement, no explanation at all.

20 So we went back and they said, look at Grantham 2
21 and Grantham 3 and we said, yes, we know that, but what
22 is our answer to our point? Then we got a letter on
23 10 September this year, which, for the first time,
24 actually expanded and even went so far as to say again,
25 first of all, no separate control for other relevant

1 factors, unnecessary, it was said, and it was said here
2 that Mr Grantham's factual forensic accounting analysis
3 of what Dawsongroup actually did does not necessitate
4 the separate calculation of counterfactual prices.

5 Quinn Emanuel gave an illustrative example, which
6 refers only to the contract pricing, long-term. It does
7 not address transient at all.

8 So their approach, Mr Grantham's approach: no
9 isolation of individual factors, as they are looking at
10 what in fact was done, and no counterfactual.

11 So that is going to show that the overcharge,
12 insofar as it formed a part of the truck cost, was
13 recovered by rental and leasing charges.

14 That will not assist the Tribunal in answering the
15 question: would the charges have been lower in the
16 absence of the overcharge in that counterfactual
17 scenario.

18 So that has been explored further and then, late on
19 Friday, 1 October, we had Grantham 4. I just want to
20 turn to that. That is at {DG-B1/IC84/1}. Responsive
21 evidence, not advanced on any proactive basis at all in
22 support of the defendants' application. Paragraph 2.3
23 starts a section headed "Controlling for other factors".

24 THE PRESIDENT: Yes.

25 MR PALMER: I just ask you to look at that first sentence

1 and you see the elision straight away of two separate
2 issues. It says: {DG-B1/IC84/7}

3 "One of the principal concerns articulated at
4 paragraph 3.32 of Harvey 10 is that it is said that my
5 proposed analysis will not 'control for', or take
6 account of, market factors other than costs which might
7 have influenced the Dawsongroup Claimants' prices."

8 Just pause there. There is a difference between
9 taking account of market factors other than costs --
10 that is step 1 in my process -- and controlling for
11 them. That is step 2/Step 3, isolating them from the
12 overcharge and working out the counterfactual on the
13 basis of that isolated matter.

14 What then proceeds to do is to say how his approach
15 does necessarily take account of other factors because
16 it is looking at what prices were in fact charged. But
17 it does not take you any further at all to answering
18 that counterfactual question.

19 Then at 2.4 to 2.6, {DG-B1/IC84/8}, you have got
20 what we have called the three analyses. We have
21 addressed this in our skeleton argument, which you will
22 have read, so I can take it quickly, but the first
23 analysis is -- here is 2.4, you can remind yourselves of
24 that, and again, look at what he says. It says:

25 "... the 'analysis will allow the Tribunal to

1 determine directly the rate at which the Claimants did
2 in fact recover any changes to truck costs (including
3 any alleged overcharge)'. That analysis will, I expect,
4 show the extent to which changes in Truck costs caused
5 or were likely to cause a change in the actual prices
6 set as distinct from changes in other factors ..."

7 Well, that is a novel claim, but then look at how he
8 explains that:

9 "For example, if the Claimants operated a cost-plus
10 model and set themselves a target margin, then the
11 factual ..."

12 You have seen what the evidence is on that in the
13 pricing statement. I will not go back to that. But, of
14 course, if that is not the position, you are in
15 a different situation altogether.

16 2.5 I will come back to because 2.6, which is what
17 we call the third analysis, suffers from exactly the
18 same problem.

19 2.5, it is this single paragraph now. All our
20 pressing, all our reminding of what the actual issue
21 before the Tribunal is and all our explanations as to
22 what the pricing approach of Dawsongroup actually was,
23 begins answering that five lines down:

24 "if it is always the case ..."

25 And then what follows:

1 "... the question is whether the Dawson group
2 Claimants would have charged less, if Truck prices had
3 been lower, ie absent any alleged overcharge?"

4 That is the first time that Mr Grantham actually
5 identifies the correct question:

6 "To answer this question, it is necessary to
7 understand the extent to which the Dawson group
8 Claimants' own pricing documents show how prices were
9 set."

10 I just showed you that:

11 "This part of my analysis will consider a sample of
12 the Claimants' pricing models, together with associated
13 management decisions that led to the actual prices that
14 were included in the agreements with customers. This
15 analysis will cover periods when there is said to have
16 been an overcharge and periods when that is not said to
17 have been the case. By comparing the two, it will be
18 possible to demonstrate whether, and if so by how much,
19 the Claimants would have changed prices in response to
20 a change in Truck costs."

21 Of course, that comparison requires isolation of the
22 effect of the overcharge from all other factors and the
23 calculation of the counterfactual.

24 As Mr Harvey has explained repeatedly, but most
25 recently it is paragraph 2.9 of Harvey 11, if any other

1 factors changed between those two periods, Mr Grantham
2 would be measuring the combined effect of the overcharge
3 and these changes. And therefore, he would fail to
4 determine how much of a price change was causally
5 connected to the overcharge.

6 So the result is none of these analyses, none of
7 these approaches, offer a robust way to isolate the
8 effect of the overcharge or identify the difference in
9 the counterfactual scenario. The second and third steps
10 that I have outlined to you are simply missing.

11 That is the point we have repeatedly asked and
12 raised. It is the point which Mr Grantham has
13 repeatedly failed to answer.

14 There is a difference in approach because, of
15 course, we say an econometric approach is designed to
16 control for other factors and isolate the overcharge,
17 will be based on the facts, will be based on empirical
18 evidence. Each of the parties already has an expert
19 economist schooled in the ways of econometrics on board
20 because they are doing that for the overcharge and
21 resale pass-on. Daimler make much of the fact they have
22 had Mr Grantham on board since 2019 but they have also
23 had ECA economics on board since 2019 as well and are
24 dealing with that, all in the knowledge that the
25 Tribunal has repeatedly made clear that the approach is

1 a matter for the Tribunal to determine and grant
2 permission for.

3 If the defendants were permitted to go down this
4 route in respect of Dawsongroup, despite the fact that
5 it simply does not fit with the Dawsongroup's price
6 setting evidence and does not answer the ultimate
7 question, that would not relieve us of the need to
8 engage with it, to instruct an additional expert that we
9 do not have on board, to respond to it, to analyse it,
10 to explain why it has not got any better in the telling
11 than it was in the original conception.

12 So we say there are two priorities for the Tribunal.
13 The first priority is to have the evidence it needs to
14 assess supply pass-on, be able to compare like with
15 like, not apples with pears, which is the situation
16 which the defendants are urging upon it, and the other
17 priority, we would submit, is for the Tribunal to ensure
18 that the case is managed proportionately and bearing in
19 mind that we all have econometric experts on the case
20 and for all that Daimler are prepared to use them for
21 supply pass-on we should avoid duplication. We say this
22 does point strongly to refusing permission for
23 Mr Grantham to give evidence on supply pass-on,
24 notwithstanding -- I fully acknowledge it would be
25 unusual to do so at this stage but in a case of this

1 size, of this complexity, of this expense, of this cost,
2 it would be a wholly proportionate and legitimate
3 decision for the Tribunal to take, in circumstances
4 where, despite multiple opportunities -- and there
5 should be no further, in our submission -- having set up
6 a process for all this to be explained and examined and,
7 if necessary, decided upon by the Tribunal at this CMC,
8 if there is no good answer to how this approach of
9 Mr Grantham's is going to engage with the actual facts
10 of our price-setting process despite the fact that the
11 Tribunal, with this in mind, amongst other things,
12 ordered that disclosure statement to be provided so that
13 the defendants could engage with it -- they have not.
14 They have not engaged with it, they have not adopted
15 that approach, they have not engaged with our questions.
16 They have fobbed us off repeatedly, and then they have
17 come to the Tribunal to say, "Wave us through despite
18 all that." In our submission, that is the wrong
19 approach, and we invite the Tribunal to refuse
20 permission for it.

21 THE PRESIDENT: Thank you. Mr Holmes, do you want to say
22 anything from the Ryder perspective as far as this is
23 concerned?

24 Submissions by MR HOLMES

25 MR HOLMES: Simply to note that we share a number of Mr

1 Palmer's and his client's concerns, but we have not
2 opposed the use of forensic accounting evidence by the
3 defendants in relation to the Ryder matter.

4 THE PRESIDENT: I think on this, it might be helpful to hear
5 also on this occasion on the approach that will be taken
6 by DS Smith, who are also looking at supply pass-on.

7 Mr Gregory?

8 MR GREGORY: Thank you, Julian Gregory, DS Smith.

9 Submissions by MR GREGORY

10 MR GREGORY: Yes, we are proposing to use a single expert,
11 Dr Veljanovski. His evidence on pass-on will be
12 directed primarily at Ryder pass-on. He is proposing,
13 in his initial expert report, to do that via a cost and
14 margins analysis, targeted at Ryder, but he is competent
15 to deal with matters of econometrics, as well as matters
16 of forensic accountancy, so he will potentially respond
17 to issues of econometrics raised by the other experts in
18 his reply report.

19 THE PRESIDENT: Yes, thank you.

20 Right. For the defendants, who is taking this
21 matter forward. Mr Harris?

22 Submissions by MR HARRIS

23 MR HARRIS: Thank you, sir, good afternoon. I am going to
24 take this much shorter order than Mr Palmer because, in
25 our respectful submission, nothing that he said should

1 shake the provisional view expressed by the tribunal.
2 Indeed, he did not really address, despite the length of
3 his submissions, the key point that you put to him,
4 which is that we have a competent and experienced expert
5 to put forward the point upon which we jointly, as
6 defendants, have the burden, in an entirely orthodox
7 manner, as compared to other cases, and indeed compared
8 to these cases, where Mr Ilett will be addressing this
9 matter as a matter of forensic accountancy on behalf of
10 none other than Ryder, and to boot, as we have just
11 heard from Mr Gregory, Dr Veljanovski, though an
12 economist and therefore also trained in econometrics,
13 will be addressing this matter on a factual basis, which
14 means a factual forensic accountancy basis as well.
15 I think Mr Gregory's words were he is competent to deal
16 with both.

17 The only outlier here is Mr Palmer's clients, and
18 they are way out on a limb, and I stand by all the
19 points that we put in our skeleton as to why, as
20 a matter of principle, it would be misconceived to deny
21 the defendants jointly, who responsibly have jointly
22 instructed Mr Grantham, to address this matter in
23 a manner that they responsibly see fit, bearing in mind
24 as well, of course, that Mr Palmer's clients are
25 responsive to this, the point that you put to him, that

1 he did not address at all, and they are saying that
2 there is no basis for it. So that would be an illogical
3 approach, to deny us a responsible and orthodox way of
4 addressing this point, in exclusive favour of an
5 approach from a defendant who does not bear the burden,
6 who is denying the prospect of any such pass-on.

7 So that is the general point.

8 Much more shortly, five quick points. I feel as
9 though I have just been transported in time forward 18
10 months and heard Mr Palmer's closing submissions at the
11 end of trial. No doubt we will hear exactly those
12 points at the end of the trial, when he does not agree
13 with what Mr Grantham has said, exactly. He is at
14 liberty to do that, if he still takes those points.
15 They are not points for today.

16 The second point is that Mr Palmer referred, in his
17 skeleton argument, to some extracts from the Commission
18 guidelines. But not only is the Tribunal's provisional
19 view, in general terms, entirely orthodox but may
20 I just -- if it can be brought up on the screen, that
21 would help so we can all have it in mind. The document
22 is common bundle, A2/12/33, and it is paragraph 153 of
23 the Commission guidelines, part of which were cited by
24 Mr Palmer in his skeleton, that we saw before.
25 {COM-A2/12/33}. If I could just ask you, members of the

1 Tribunal, with respect, to read to yourselves
2 paragraph 153 -- it is very short -- under the heading,
3 "Choice of Method." (Pause)

4 So it is plainly the final sentence. Mr Palmer's
5 final closing submissions, that we heard prefaced
6 a moment ago, are the sort of things contemplated in the
7 guidelines as being within his gift at trial to say,
8 well, you have not made out your case.

9 And over the page, if Opus would, please, just
10 scroll down to paragraph 156, {COM-A2/12/34}, the same
11 guidelines, unsurprisingly, state that:

12 "When estimating the passing-on effects ..."

13 That is, of course, what we are arguing about now:

14 "... national courts may use pieces of direct
15 evidence relevant for the case. For instance, internal
16 documents or other documents of a qualitative nature
17 produced by the ... indirect purchaser ... If this type
18 of evidence is available, the court may find it
19 sufficient to estimate the passing-on-related effects
20 ..."

21 Final sentence:

22 "Hence, the availability of qualitative evidence may
23 play an important role when a court decides ..."

24 So what we have is, in essence, Mr Palmer saying on
25 behalf of his clients, that "No, only econometrics.

1 That is the only thing that can do it in this case," and
2 that is flatly contradicted by the Commission guidelines
3 and he can make all of those points at trial.

4 On a more discrete point -- this is the third of my
5 points -- again rather short -- you may not need to turn
6 this up. I will just give you a reference, it is in
7 Mr Grantham's fourth witness statement and it is his
8 paragraph 2.12. I say maybe do not call it up because
9 some of that might be confidential, although not marked
10 as such, but it is a direct rebuttal or answer, in
11 granular detail, of the point that Mr Palmer was making
12 about the specific facts of his specific client not
13 being capable of being addressed by Mr Grantham's
14 analysis.

15 So at that paragraph 2.12, you will see some
16 specific numbers referring expressly and only to
17 Dawsongroup as a direct response to one of the points
18 that Mr Palmer put.

19 To summarise, for those who cannot see it, it simply
20 means that Mr Grantham is entirely on top of the
21 specific facts of Dawsongroup, entirely able to deal
22 with them, and indeed, goes into some detail about how
23 he will deal with them and what the relevance is, and
24 yet, if Mr Palmer does not like that at the end of the
25 trial, he can make those submissions.

1 Then the penultimate point is there was an
2 extraordinary and brand new suggestion made, as
3 I understood it, by Mr Palmer in those submissions,
4 that, in fact, one of the reasons he objects is because
5 he might himself somehow need another new expert. No
6 doubt the Tribunal can dismiss that in short order.
7 There is no application from Mr Palmer for a different
8 and new expert on supply pass-on. He has never sought
9 a forensic accountant. There is no application, it is
10 not in his expert methodology, it is not in the areas of
11 agreement/disagreement, there is no evidence for it.

12 So that is the end of that. We would very firmly
13 oppose any suggestion now, a bit like the disclosure
14 statement that was pulled out of a hat before the short
15 adjournment, that now suddenly there should be an
16 on-the-hoof application for a new and different expert
17 on behalf of Dawsongroup.

18 My final point is just to remind the Tribunal, again
19 with great respect, that Mr Grantham's both area of
20 expertise and experience in his methodology is shared by
21 none other than Mr Ilett, the forensic accountant for
22 Ryder. So unless I can assist further, and standing by
23 the points in the skeleton, those are the reasons why
24 Mr Palmer's objection should, with respect, be
25 dismissed.

1 THE PRESIDENT: Thank you. As I understand it, you have, as
2 it were -- in the way that the defendants have shared
3 out the issues, you are speaking for all the defendants.
4 Is that right?

5 MR HARRIS: I am speaking for all the defendants on this
6 issue, although it is fair to say that, if there are
7 additional points, I think Mr Pickford may have an
8 additional point.

9 THE PRESIDENT: Yes, Mr Pickford.

10 Submissions by MR PICKFORD

11 MR PICKFORD: My additional point is simply on the issue of
12 if there is permission granted to Dawsongroup for its
13 economic evidence and to Ryder for its, then
14 notwithstanding that our primary position is that we
15 want forensic accounting evidence, in order to avoid the
16 situation, the genuine situation of ships passing in the
17 night, we would obviously need permission to have
18 econometric evidence of our own in order to be able to
19 respond to whatever evidence the claimants are permitted
20 to rely on.

21 We have foreshadowed that. You asked for that. We
22 made that clear in Mr Stannard's evidence, and we would
23 say it is self-evident that we would need it because,
24 otherwise, we will not be effectively able to challenge
25 that evidence and the Tribunal will not have any

1 effective assistance in appraising it.

2 THE PRESIDENT: Would that be by way of response rather than
3 primary evidence on supply passing-on?

4 MR PICKFORD: There is a question there, I think, yet to be
5 decided about its precise approach. Obviously, we came
6 to this CMC on the basis that what we were asking for
7 was forensic accounting evidence. I think we would need
8 to liaise amongst the OEMs, as we have sought to do
9 already, to see what possibilities there would be for us
10 to potentially join forces, potentially not, that is not
11 clear yet. Certainly I am not asking for any specific
12 order in relation to the form of that evidence, other
13 than that, in general terms, we should be able to also
14 have economic expert evidence of our own.

15 THE PRESIDENT: Would it be -- the way you put it, that you
16 would need it so as to be able to respond to whatever
17 economic evidence the Dawsongroup put forward, so that
18 would not be your primary way of arguing supply, you
19 would like it so that you could answer and counter any
20 economic evidence from Dawsongroup? Is that right?

21 MR PICKFORD: My Lord, I think, assuming that permission is
22 given for economic evidence generally, we then have to
23 consider what is the most helpful approach that we can
24 adopt, also given timing issues and no doubt the desire
25 of the claimants to respond to whatever it is that we

1 put in. It is true that the way in which this issue has
2 arisen as a practical matter is that we are seeking
3 permission, as you say, responsively, because the
4 claimants envisage being granted permission for economic
5 and econometric evidence. But that permission having
6 been granted, it is not clear to us that the best
7 practical method of proceeding thereafter is simply to
8 respond. It may be that having given the matter further
9 consideration, the best thing for us to do is to put in
10 a report at the same time as them.

11 But that is not a matter that I am able to assist
12 the tribunal on further at this stage because it is not
13 the primary basis on which we came to this CMC. So all
14 we are seeking currently is permission to be able to put
15 in economic evidence.

16 If it turns out that, through correspondence and
17 sensible liaising between the parties, there is
18 a disagreement between us as to whether that should be
19 a form of primary evidence or responsive evidence, we
20 would suggest that we would need to come back and ask
21 the Tribunal to resolve that matter.

22 THE PRESIDENT: Yes. But at the moment I do not see why, if
23 the forensic accounting evidence is given jointly on
24 this, which is entirely focused on Dawsongroup's prices,
25 you need more than one economist on that.

1 MR PICKFORD: Well, that may be so, sir --

2 THE PRESIDENT: You may not have discussed it yet, but

3 I just cannot see any reason why.

4 MR PICKFORD: I see the force in that point and, obviously,

5 you have my submission, that the next thing we would

6 need to do, if permission is granted to the claimants,

7 is for the OEMs to liaise amongst one another.

8 Obviously, it is in our own interests to ensure that our

9 evidence, insofar as we produce econometric evidence, is

10 complementary to the forensic evidence. So there is

11 obviously at least the possibility we would want to do

12 the same thing we are seeking to do in relation to

13 forensic evidence, but I am not in a position, as DAF's

14 representative, to commit other OEMs at the moment to

15 a particular course that has not yet been agreed upon.

16 THE PRESIDENT: No. Mr Jowell.

17 Submissions by MR JOWELL

18 MR JOWELL: Of course, MAN is not a defendant to the

19 Dawsongroup proceedings, but we do have something to add

20 in relation to the question of whether there should be

21 economic evidence as well as forensic accounting

22 evidence in the Ryder proceedings. I do not know

23 whether that is something you would like to deal with

24 compendiously or whether you would like to decide the

25 Dawsongroup issue first.

1 THE PRESIDENT: I think before you address that, it would be
2 appropriate to hear from Mr Holmes as to why there
3 should be before you address us on why there should not
4 be. I think we are, at the moment, on the Dawsongroup
5 proceedings.

6 MR JOWELL: Fully understood.

7 THE PRESIDENT: Which you and Iveco are not party to.

8 MR JOWELL: Indeed.

9 THE PRESIDENT: As I say, Mr Harris has expressed us
10 compendiously on that, as we understand it, on behalf of
11 all the defendants to Dawsongroup, but Mr Pickford added
12 something, so I think, Mr Palmer, would you like to
13 respond?

14 MR MALEK: Before Mr Palmer responds, I just want to
15 understand. Mr Palmer, I understand what your points
16 are and why you say permission should not be granted for
17 Grantham in this report. But when you look at the basic
18 tests in Bonython and approved by the Supreme Court in
19 the Kennedy v Cordia case, do you accept that both of
20 those elements are satisfied in the sense that this is
21 an area of expertise where the Tribunal would benefit
22 from assistance and, secondly, that Mr Grantham has
23 got -- he is an expert, he has got sufficient expertise
24 to be an expert on that subject. Do you accept at least
25 that?

1 MR PALMER: Sir, I make no challenge at all to Mr Grantham's
2 expertise as a forensic accountant.

3 MR MALEK: That's part two. Okay, part one.

4 MR PALMER: I make no challenge to the proposition that
5 expert evidence is reasonably required to resolve the
6 issue of supply pass-on, but my submission to you,
7 consistent with everything that the Tribunal has said
8 for itself to date, is that is not the end of it because
9 you still have to be satisfied that this particular
10 expert evidence is reasonably required to answer the
11 ultimate question before you. For reasons I have given
12 you, it does not answer the issue.

13 MR MALEK: Are you basically saying that the evidence that
14 Mr Grantham wants to produce is not sufficiently
15 reliable to go before the Tribunal at trial? Is that
16 the essence of what you are saying?

17 MR PALMER: It is not answering the right question.

18 MR MALEK: You are saying it is not relevant, essentially.

19 MR PALMER: Any evidence has to pass the test of relevance.
20 I certainly accept it is relevant to the first of my
21 three steps, but my point is it is not relevant to the
22 second or third and, indeed, not just of my submission
23 to you in the absence of any supporting evidence from
24 the experts here to be cross-examined; it is what they
25 have said themselves: we are not going to isolate it, we

1 the two cannot be read across. No answer to that point
2 at all.

3 The only other thing I want to respond on is
4 Mr Pickford's position, which we say effectively just
5 lets the cat out of the bag. Even if reduced to one
6 expert, you could hear that -- practically see the
7 gloss, the varnish, that was being applied to the
8 defendants' position with their wish to proactively
9 adduce econometric evidence as well. I understand that
10 position because that is the one thing that would fill
11 the gaps that I have identified, but if they want to
12 lead on forensic accounting evidence, then any
13 econometric evidence which the Tribunal gives leave for
14 should be purely responsive to our evidence, just as --
15 this is not some new proposal but it's an obvious
16 point -- we would be free to critique the forensic
17 accounting evidence. That is not because I want to lead
18 with forensic accounting evidence, I do not. I make no
19 application for that, but if it were permitted, we would
20 obviously have to be free to respond to it and, if
21 necessary, to lead evidence in response on a purely
22 responsive basis.

23 If Mr Pickford's econometric evidence is on a purely
24 responsive basis, that is one thing, but he was going
25 deliberately, glossing his position, to go much further

1 than that and say, no, we actually might want to be
2 leading evidence on this and once we have got these
3 economists in there anyway, it is for them to assess how
4 they can best assist the Tribunal. Before you know it,
5 you have got two separate -- what he called
6 complementary analyses. That goes back to the Royal
7 Mail. That is the position in Royal Mail/BT, where the
8 Tribunal specifically ruled against that complementary
9 approach. It seemed at one point to be another stab at
10 that, and we say that the Tribunal should not permit it.
11 But my point to you, so far as the forensic accounting
12 evidence is concerned, is what Mr Pickford's submission
13 to you shows is the soft underbelly of the forensic
14 accounting approach because there is no answer to that
15 gap. If you are not going to construct the
16 counterfactual, you are not going to answer the right
17 question before the Tribunal.

18 THE PRESIDENT: It is appropriate to have a short break, and
19 we will take ten minutes to consider. Thank you.

20 (3.26 pm)

21 (A short break)

22 (3.35 pm)

23 THE PRESIDENT: Before taking a concluded view on the
24 Dawsongroup position, we think it is appropriate to
25 consider Ryder's position, which also involves an

1 economist, so Mr Holmes, you are seeking permission to
2 put in evidence both from Dr Wu and Mr Ilett, I think.

3 Submissions by MR HOLMES

4 MR HOLMES: Yes, that is correct, sir. So if I could first
5 just explain what it is that we are asking for.
6 Although the burden in relation to pass-on is on the
7 defendants, they have put pass-on in issue in these
8 proceedings, and we think that it is appropriate for us
9 to address the issue of pass-on, both supply and resale
10 pass-on, in our first round evidence, and that is
11 important to avoid the risk of ships passing in the
12 night. It means that everyone will see the case that we
13 are planning to advance at the first round stage and can
14 respond to it appropriately.

15 What we are seeking permission for is a package of
16 evidence consisting of two elements, addressing discrete
17 questions; on the one hand, economic evidence from
18 Dr Wu, which would analyse the correlation between
19 upstream and downstream prices and would control for
20 other explanatory variables insofar as that is possible;
21 that is to say econometric analysis. And that we say is
22 obviously an issue that is suitable for an economist to
23 address.

24 In addition, we seek permission for Mr Ilett to
25 analyse Ryder's accounts and internal business and

1 financial documents in order to identify and give
2 evidence on the factors affecting its pricing, which
3 will then inform the analysis that Dr Wu will undertake,
4 helping him to identify drivers that may need to be
5 controlled for as part of econometric analysis, and this
6 is again an activity for which, in our submission,
7 a forensic accountant is well suited, the consideration
8 of the accounts, the internal business and financial
9 documents of the business.

10 Objection is taken by the defendants to Ryder
11 adducing evidence (inaudible) the objection as not well
12 founded, and we would make four points in that
13 connection.

14 The first point is that our proposal leads to no
15 proliferation of experts. The defendants are proposing
16 to call both economic experts and a forensic accountant
17 at the trial. We do not oppose that. So there is no
18 dispute that both disciplines would be represented in
19 the Ryder matter, if the tribunal gives leave for that.
20 And the defendants do not dispute that Ryder's experts,
21 Dr Wu and Mr Ilett, will both be able to give evidence
22 at trial. They accept that Dr Wu can appropriately give
23 evidence on overcharge and they accept that Mr Ilett can
24 appropriately give evidence on taxation, acquisitions,
25 financing costs and interest.

1 So, subject to the Tribunal, there will be evidence
2 for both defendants and for Ryder in relation to
3 forensic accounting and economics.

4 The second point is that the defendants themselves
5 are proposing to call both economic evidence and
6 accounting evidence at the Ryder pass-on stage of the
7 trial. As the Tribunal will have seen, they break
8 pass-on down between supply pass-on -- that is to say an
9 investigation of the downstream prices charged by Ryder
10 for rental and leasing -- and resale pass-on; that is to
11 say the downstream prices charged by Ryder when selling
12 the truck on later in its economic life, and they
13 propose to address supply pass-on through forensic
14 accounting evidence and they propose to address resale
15 pass-on through economic evidence, and Ryder is content
16 for the defendants to proceed in this way and, if the
17 Tribunal agrees, it will mean, therefore, that both
18 economic and forensic accounting evidence is heard at
19 the pass-on stage of the trial.

20 The third point is that DAF at least accepts, as we
21 had apprehended from their skeleton argument and from
22 their evidence, that Ryder can call either an economist
23 as its primary expert on pass-on or a forensic
24 accountant as its primary expert. That is its position,
25 and it says that the Tribunal cannot appropriately

1 resolve the question of which method is more
2 appropriate, more useful, at this stage.

3 Well, we are prepared to accept that, but the
4 consequence is that Ryder can elect to advance economic
5 evidence on both supply and resale pass-on in the first
6 round.

7 Mr Pickford on his feet and MAN in its skeleton
8 argument appear to suggest that Ryder should only be
9 permitted to call forensic accounting evidence, but that
10 is at odds with the defendants' acceptance that
11 Dawsongroup can call economic evidence on pass-on and it
12 is also inconsistent with the defendants' own approach
13 on resale pass-on, and we should say that we do not see
14 a stark distinction between supply pass-on and resale
15 pass-on. The two elements of an overall assessment to
16 determine the degree to which the downstream price is
17 achieved in respect of a truck are affected by the
18 upstream pricing.

19 The fourth point is that Ryder must, in fairness, be
20 permitted to call responsive evidence from an expert of
21 the same discipline. The defendants accept this
22 proposition. They say that if Ryder is permitted to
23 call Dr Wu on supply pass-on, they should have
24 permission to adduce evidence from an economic expert,
25 and the same point has just been canvassed in relation

1 to Dawsongroup and Mr Pickford reserved his position on
2 whether the evidence would be first round or responsive.

3 So even if Ryder were confined to calling evidence
4 from Dr Wu on supply pass-on in the first round, it
5 would be permitted, we say, or it should be permitted,
6 to call responsive evidence from Mr Ilett to address the
7 evidence of the defendants' forensic accountant,
8 Mr Grantham.

9 So in that scenario, both Dr Wu and Mr Ilett could
10 give evidence on both types of pass-on but Mr Ilett
11 would be confined to giving responsive evidence.

12 Standing back, we say that that is a narrow and
13 refined restriction, which is difficult to sustain in
14 circumstances where both types of expert will be there
15 at the pass-on stage and will be heard in relation to
16 both types of pass-on.

17 So we seek permission that, as part of a combined
18 package at the first stage, we would be permitted to
19 produce evidence addressing discrete questions on
20 pass-on, both types of pass-on, from Dr Wu and from
21 Mr Ilett.

22 THE PRESIDENT: Can you just clarify for me: the way you put
23 it at the start, that they are two discrete elements,
24 Mr Ilett, it is proposed, would do an analysis -- is
25 this right? -- not to establish whether there was

1 pass-on but to establish the factors affecting prices so
2 as to feed in Dr Wu's analysis, which is the one you say
3 that would establish whether or not there is pass-on?
4 Is that correct?

5 MR HOLMES: That is correct. He would be providing
6 complementary evidence in order to assist Dr Wu in his
7 giving of evidence but on a matter that is obviously
8 within, we say, the expertise of a forensic accountant.

9 THE PRESIDENT: Yes, but not that he would himself express
10 an opinion of whether the accountancy evidence shows
11 pass-on but to establish the factors and how they
12 affected pricings for the purpose of Dr Wu to do
13 a regression or correlation analysis, which would be the
14 one that you say would establish whether there is
15 pass-on or not or to what extent.

16 MR HOLMES: That is correct. The output would be Dr Wu's.

17 THE PRESIDENT: Yes, yes, thank you. Who is it who responds
18 to that? It is Mr Jowell, is it?

19 Submissions by MR JOWELL

20 MR JOWELL: Yes, sir. We resist permission being granted
21 for econometric evidence in addition to forensic
22 accounting evidence in relation to supply pass-on by
23 Ryder. There is no doubt, in our submission, that using
24 the broad axe, for the reasons that Mr Harris has
25 already given, forensic accounting approach can be used

1 to arrive at a reasonable estimate. We say it should be
2 used.

3 The Tribunal, in its judgment of 13 May of this year
4 in Royal Mail Group v DAF -- I do not think we need to
5 take it up because I'm sure the Tribunal will be well
6 familiar with it, but in that judgment, the Tribunal
7 rejected the attempt by DAF to adduce evidence from
8 Professor Neven, who wished to produce a regression
9 analysis on pass-on in addition to the forensic
10 accounting evidence that they proposed to adduce, and
11 the tribunal rejected that on grounds of
12 proportionality.

13 We acknowledge, of course, that part of the reason
14 for rejecting such additional evidence was the fact
15 that, in that case, it would have necessitated a good
16 deal of additional disclosure. But that was not the
17 only reason. The Tribunal also recognised that using
18 additional experts can significantly increase costs and
19 result in a longer trial and thereby take up more court
20 time and resources, and you will see that in
21 paragraph 14 of the judgment.

22 But more fundamentally, we say that the Tribunal has
23 now taken that decision in the Royal Mail proceedings.
24 It has taken the decision in that case to determine
25 supply pass-on using forensic accounting expertise and

1 that approach.

2 These various truck proceedings have, of course,
3 been carefully scheduled to be sequential, so that each
4 successive case can learn from the judgment before it.
5 And it is desirable, we say, therefore, that there
6 should be a degree -- a considerable degree of
7 consistency in approach, and if this Tribunal now
8 permits a different approach and uses a different
9 methodology for the assessment of pass-on in these
10 proceedings, that consistency will inevitably be
11 sacrificed and clarity will be undermined.

12 Not only will the prior trial be a less reliable
13 guide to the latter trial but it is also the case that,
14 if these two different methods lead to radically
15 different results, then it is not an exaggeration to say
16 that the integrity of the administration of justice will
17 be undermined.

18 So we say that both proportionality and consistency
19 in the court's process points to the Tribunal limiting
20 the expert evidence on this point to forensic
21 accountancy and we invite it to so order.

22 If, however, the Tribunal is against us on that
23 point, then we do seek permission, as you will see from
24 paragraph 26 of our skeleton argument, to also call
25 evidence from both disciplines. And we think it is

1 desirable to do so right from the outset.

2 So those are our submissions unless I can be of
3 further assistance.

4 Submissions by MR HOLLANDER

5 MR HOLLANDER: So far as Iveco is concerned, there is
6 obviously a prior issue, which my learned friend
7 Mr Jowell has just raised, about whether Ryder should be
8 allowed to call one or two experts on supply pass-on.
9 I have got nothing to say on that. Our position
10 essentially is very similar to my learned friend
11 Mr Pickford. If Ryder are allowed to call two experts,
12 then again, we should be allowed to have two as well on
13 supply pass-on, and we do not have a view at the moment
14 about whether that should be initial or reply, and we
15 would certainly hope to do it, as the chairman has
16 suggested, with one joint expert, if that is at all
17 possible. That has not yet been considered in detail.

18 If Ryder are allowed to have two experts on supply
19 pass-on, we should have two. If Ryder are only allowed
20 one, then if it is the question that one side is having
21 econometric evidence and the other is putting in
22 forensic accountancy evidence -- if that is the
23 position -- then I suspect provision will need to be
24 made that everybody can call expert of the other
25 discipline at least in reply.

1 That is Iveco's position.

2 THE PRESIDENT: Yes, Mr Holmes, you have got your hand up.

3 MR HOLMES: Sir, I was going to address you on the Royal
4 Mail judgment, if I may, which was raised by Mr Jowell.

5 THE PRESIDENT: Yes.

6 MR HOLMES: It is in the authorities bundle at {HS3-A/7/7}.

7 It is on the screen, I think.

8 THE PRESIDENT: Yes.

9 Submissions by MR HOLMES

10 MR HOLMES: We say that this case is very clearly
11 differentiated on its facts, and we make three points.
12 First, in paragraph 16, you see Mr Beard for DAF's
13 acceptance that:

14 "... Professor Neven's proposed regression analysis
15 was not being proposed to fill any gaps in Mr Bezant's
16 approach or method. It was duplicative in its object
17 ..."

18 I refer you, sir, to the exchange that we had during
19 my opening submissions for the application, that in this
20 case you have complementary analyses and that Dr Wu
21 would be providing the output.

22 The second point is that there was a clear
23 proportionality concern in circumstances where, looking
24 down the paragraph, one sees that the claimants'
25 evidence was that:

1 "... as regards Royal Mail ... the proportion of
2 business that is unregulated accounted for only
3 10 per cent of Royal Mail's turnover ..."

4 And it was in relation to that part of the business
5 that Professor Neven's analysis would bite. And you see
6 the conclusion that the Tribunal drew from that in the
7 final sentence:

8 "It follows that Professor Neven's analysis would in
9 any event be relevant to only a small part of the
10 claims."

11 That was a key consideration when assessing the
12 proportionality of what was being proposed.

13 The other important point, which Mr Jowell
14 acknowledged, at paragraph 17, is that the proposed
15 additional analysis would have involved substantial
16 additional disclosure in proceedings where the extent of
17 disclosure being provided by the claimants is already
18 vast. And that, we say, is a very important
19 differentiating consideration. In this case, there is
20 no such difference in disclosure that would result from
21 the analysis that Ryder is proposing to advance.

22 The other point that Mr Jowell made was that having
23 experts relating to both forensic accounting and
24 econometrics giving evidence in relation to supply
25 pass-on would risk increasing costs.

1 In circumstances where the pass-on stage of the
2 trial will already involve evidence of both kinds, we
3 say that this concern is not justified, it is
4 overstated, and, in fact, what is being proposed by
5 Ryder is proportionate in the circumstances. It comes
6 down to a narrow question, which is whether, in addition
7 to the econometric evidence that we proposed to advance,
8 we should also be permitted to advance the forensic
9 accounting evidence in the first round, and we say it is
10 sensible to provide a package so that the defendants can
11 see what we are saying and can address the evidence in
12 reply.

13 THE PRESIDENT: Yes. You addressed us on that earlier, yes.

14 Yes, Professor Neuberger.

15 PROFESSOR NEUBERGER: Can I just ask one question about the
16 difference between supply and resale pass-on, which was
17 raised by Mr Holmes? Is there a good reason why
18 different approaches should be used for the two types of
19 pass-on?

20 Submissions by MR JOWELL

21 MR JOWELL: In our submission, there is, and thank you for
22 raising that. The reason is that in relation to resale
23 pass-on, what one is talking about are used trucks and,
24 therefore, the appropriate method is closely analogous
25 to that which is used for new trucks and, therefore, one

1 uses a conventional econometric approach, as one does
2 for any overcharge. So one is looking at the
3 overcharge, effectively, on the used trucks.

4 So it is really an overcharge analysis rather than
5 a pass-on analysis. And that is the reason why the
6 methodology is different.

7 MR HOLMES: Sir, we do not accept that. We see the relevant
8 question as looking at the value that Ryder is able to
9 recover across the economic life of the truck and to
10 consider how that is affected by upstream pricing. So
11 there is no difference in principle between the task
12 that is to be undertaken in relation to resale price
13 pass-on and supply pass-on. In each case there may be
14 other variables which affect the downstream pricing
15 beside changes in the upstream pricing and they should
16 appropriately be controlled for, insofar as that is
17 possible, in order to isolate the effects of the
18 upstream pricing.

19 THE PRESIDENT: Right. We will come back about ten past
20 four.

21 (4.02 pm)

22 (A short break)

23 (4.09 pm)

24 THE PRESIDENT: We do not find this entirely straightforward
25 and we are going to reflect on it overnight, and we will

1 press on with the next aspect which has been touched on,
2 which is resale pass-on, or also one could call it used
3 truck pass-on, I think. Same thing.

4 Issue of re-sale pass-on

5 THE PRESIDENT: There, as we understand it, the defendants
6 want to use an economist, for reasons Mr Jowell just
7 explained. Dawsongroup there is in the same position,
8 as we understand it, using Mr Harvey, and, Mr Holmes, on
9 that one, it is you who wishes for Ryder to have both
10 Dr Wu and Mr Ilett.

11 So, Mr Holmes, can you address that.

12 Submissions by MR HOLMES

13 MR HOLMES: That is right, sir. It is essentially for the
14 same reasons that I have already developed in relation
15 to supply pass-on. The proposal is for the same package
16 of evidence with again Mr Ilett considering the factors
17 affecting pricing at the second-hand stage, the resale
18 stage, and Dr Wu using those factors for the purposes of
19 his econometric modelling.

20 THE PRESIDENT: I think the question of to what extent there
21 is resale pass-on, the estimate will come from Dr Wu,
22 not from Mr Ilett.

23 MR HOLMES: Yes, that is correct.

24 THE PRESIDENT: So, Mr Ilett is really a sort of preparatory
25 report for Dr Wu. Is that simplifying too much?

1 MR HOLMES: It is correct that he is providing complementary
2 evidence that will inform Dr Wu's assessment, but that
3 evidence, we say, is appropriately evidence to receive
4 from a forensic accountant in view of the nature of the
5 analysis that will be undertaken to identify the factors
6 by reference to the accounts and the business papers of
7 the business.

8 THE PRESIDENT: Yes. Thank you. Mr Jowell, you are
9 responding?

10 Submissions by MR JOWELL

11 MR JOWELL: Yes, sir, briefly. We do not see a difference
12 really in principle between this and the overcharge
13 analysis on new trucks, and we don't see that there is
14 a need, therefore, for a forensic accountant to sit
15 between the factual evidence and the economic evidence.
16 It is possible for the econometrician to look at the
17 factors that affect pricing of used trucks, just as they
18 are able to look at the factors that affect the pricing
19 of new trucks, and therefore, we see no difference in
20 principle between the way that this should be approached
21 and straightforward overcharge on new trucks -- in
22 principle at least.

23 So at most, there is some difference of degree, but
24 we do not think -- and in this we believe we have this
25 in common with Dawsongroup as well -- we do not see that

1 any slight differences of degree necessitate the
2 intervention and the additional burden on the Tribunal
3 and on all the parties of additional expert evidence.

4 THE PRESIDENT: Yes. Anyone else? So, Mr Holmes, any
5 response? Very short points.

6 MR HOLMES: No, sir, I think you have my points about that.

7 THE PRESIDENT: Yes. Thank you. Well, we will consider
8 that with the other pass-on and deal with them in the
9 round or at least together.

10 The next, I think, is loss of volume -- loss of
11 profit. Is that only in the Ryder case? Is that right?
12 Does that arise in the Dawsongroup case?

13 Issue of loss of profit/loss of volume

14 Submissions by MR PALMER

15 MR PALMER: Loss of volume arises in Dawsongroup, sir, not
16 loss of profit, because we make no claim for loss of
17 profit, but loss of volume really goes hand in hand with
18 my submissions on supply pass-on. Our point is again,
19 for the same reasons, in the same way, you need to
20 isolate the effect of overcharge from other factors and
21 then consider the effect on volumes in the
22 counterfactual scenario. So whereas forensic accounting
23 evidence can certainly inform what I have called stage
24 one -- as it seems to be intended to inform the Ryder
25 econometric analysis, it is a feed-in to stage one, here

1 are the factors -- what it cannot do is get you to stage
2 2, stage 3, isolating the effect, assessing the
3 counterfactual. So it is exactly the same point, so
4 I don't have to develop it any further. I think you
5 have it.

6 THE PRESIDENT: Can you just help me. If there is no loss
7 of profit claim, you are saying we rented less trucks,
8 are you? Or we had less rentals of our trucks?

9 MR PALMER: If there was pass-on, then the effect of those
10 higher prices than would otherwise have been charged in
11 the counterfactual scenario may have been assessed.
12 That is as far as it goes.

13 THE PRESIDENT: But is there then a loss of rental income or
14 how is it relevant if there is -- that is what I am
15 trying to understand.

16 MR PALMER: Well, yes, there would be a loss of rental
17 income. The difference between us and the way we have
18 put our case, we have not pleaded a separate loss of
19 profit head of damage, which is what Ryder has done.
20 That is the only distinction I am making.

21 THE PRESIDENT: And therefore, the loss of volume feeds into
22 what?

23 MR PALMER: Well, the extent of damages, the overcharge is
24 our primary head of damage. The defendants seek to
25 reduce that by saying you passed it on. We deny that.

1 sold, considering the elasticity of demand. That is
2 a classically economic question which a forensic
3 accountant would not be well placed to address.

4 Mr Ilett would then assess the impact of lost volumes on
5 profitability, having regard to his analysis of Ryder's
6 accounts, and that is an archetypally accounting issue
7 and is the evidence that we understand the defendants
8 wish to deploy.

9 THE PRESIDENT: Yes. That is very clear. For the
10 defendants, who is it? Mr Harris?

11 Submissions by MR HARRIS

12 MR HARRIS: Yes. This is essentially the same debate as my
13 learned friends have already referred to, that we had on
14 the earlier topic, but for your note (inaudible) we give
15 the cross (inaudible) fourth witness statement about
16 providing some further detail on loss of volumes and
17 they are paragraphs 3.2 to 3.4 of Grantham 4, and the
18 first page of that document is {DG-B1/IC/84}. There is
19 no particular need --

20 THE PRESIDENT: Sorry to interrupt you, is this
21 a confidential document? There is some confidential
22 material in his witness statement. I think not 3.2 to
23 3.4. No.

24 MR HARRIS: They appear, to my reading, to be fairly generic
25 explanations, and they do not particularly need to be

1 read out or dealt with at length right now. Suffice it
2 to say that Mr Grantham has experience and expertise in
3 this matter and he, unsurprisingly, points out that his
4 will comprise -- I am reading here from 3.3:

5 "... both a review of qualitative information and
6 quantitative analysis."

7 And he includes, at the end of 3.3(b):

8 "... ascertaining what relationships can be found
9 between metrics."

10 And he also of course identifies that there has to
11 be grounded in the relevant facts and that there will be
12 interplay between all of these factors. That is just
13 shorthand for saying that he has analysed this topic and
14 that he is confident with his expertise, he can address
15 his mind on behalf of all the defendants to the right
16 questions, and that, in those circumstances, we seek
17 permission, on behalf of all of the defendants, for
18 Mr Grantham to address this topic.

19 The reason I just read out the contemporaneous
20 qualitative and quantitative analysis line from 3.3 is
21 that it is almost identical to what Mr Ilett proposes to
22 do for Ryder, and you do not need particularly to turn
23 it up. It is in our footnote 64, the cross-reference of
24 our skeleton, but Mr Ilett, at his paragraph 4.2, says
25 that he will conduct himself:

1 "... based on my review of Ryder's contemporaneous
2 documents."

3 And at 4.3:

4 "I also intend to review contemporaneous qualitative
5 and quantitative documents."

6 In other words, there seems to be a substantial
7 degree of coincidence between the type of approach that
8 Mr Grantham proposes to undertake responsibly on behalf
9 of all the defendant group and at least part of the
10 analysis that is going to be done by Ryder.

11 For the reasons I have previously addressed you on,
12 there would be no good or solid or safe basis upon which
13 to deny the defendants the ability to address that
14 matter in this way.

15 Unless I can assist further, that is a shorthand --

16 THE PRESIDENT: Yes, that is about Mr Grantham. And

17 I think, as I understood it, Mr Holmes seeks to deal
18 with this primarily through Mr Ilett but here, in
19 a sense, the roles are reversed, with a price elasticity
20 analysis of this market by Dr Wu, which is a distinct
21 exercise. And are you objecting to that?

22 MR HARRIS: No, we do not object. If Mr Holmes has

23 persuaded you of the proportionality of that approach,
24 then we don't object. But again, it is not being
25 advanced as a reason to deny Mr Grantham his permission,

1 it is not Ryder's stance, and rightly so.

2 THE PRESIDENT: No, I understand.

3 MR HARRIS: If he or Mr Palmer wishes to object based on the
4 granularity of the evidence at trial, then that is
5 a matter for them and no doubt we will do the same in
6 reverse.

7 THE PRESIDENT: Yes. And you are not seeking an economist
8 on this point, on price elasticity?

9 MR HARRIS: No, we are not.

10 THE PRESIDENT: No. Thank you.

11 I think the next thing is, is it --

12 MR HOLLANDER: Sorry.

13 THE PRESIDENT: Yes, Mr Hollander.

14 Submissions by MR HOLLANDER

15 MR HOLLANDER: We are in the same position, save that,
16 I mean, if it is the position that Ryder get permission
17 to use two experts in respect of this, then -- I mean,
18 the same point arises in respect of supply pass-on --
19 you know, we will need to consider in the light of that
20 whether we wish to put in some econometric evidence as
21 well. It is the same point as before.

22 THE PRESIDENT: Yes. I'm not sure to what extent it is an
23 econometric analysis that is being done here. It is
24 certainly not a regression. That is my understanding,
25 Mr Holmes. Is that right?

1 MR HOLMES: That is correct. You do not analyse the price
2 elasticities through econometric analysis.

3 THE PRESIDENT: No, that is what I had understood.

4 The next one is mitigation.

5 MR PICKFORD: Sir, I beg your pardon, before we move on,
6 I had my hand raised.

7 THE PRESIDENT: Sorry, I didn't see that. Yes, Mr Pickford.

8 Submissions by MR PICKFORD

9 MR PICKFORD: Just a very short coda. I think it is
10 essentially the point that Mr Hollander has made but
11 just to be clear about what we are seeking: in the event
12 that an economist, not an econometrician but an
13 economist, is permitted to provide evidence on behalf of
14 the claimants, we seek economic evidence in response; it
15 is the same point that I made before in relation to the
16 econometric evidence, and to be clear, when I say in
17 response, our position would be that we should be given
18 permission generally and we can then seek to find the
19 most efficient means of providing (inaudible) report
20 should be a main report.

21 MR JOWELL: We would certainly echo that.

22 Issue of mitigation

23 THE PRESIDENT: Yes. And then it is mitigation, as it has
24 been called. That is only in the Ryder case. And the
25 defendants wish to use Mr Grantham as a joint expert

1 and, Mr Holmes, what is your position on that?

2 Submissions by MR HOLMES

3 MR HOLMES: Sir, that would be Mr Ilett who would respond.

4 You have my point, sir, that any permission given would
5 be provisional in the sense that we canvassed earlier.

6 If the scope of the pleadings were to be confined so
7 that mitigation points were not included, then at that
8 point any permission given would fall away.

9 THE PRESIDENT: It will be permission to call evidence from,
10 for the defendants, the joint expert, Mr Grantham; from
11 Ryder, Mr Ilett, to address mitigation issues that arise
12 on the pleadings. And that will determine its scope.

13 Ms Abram?

14 Submissions by MS ABRAM

15 MS ABRAM: Sir, just to say, as before in respect of the
16 total value point, we may need to come back, possibly
17 tomorrow, to the question of what is pleaded in the
18 process for moving towards a determination of that issue
19 because that, I am afraid, in itself is disputed.

20 THE PRESIDENT: Yes. Very well. But I think on mitigation
21 we have then agreement, happily, and we can give
22 permission on that basis for Ryder to give evidence on
23 forensic accountancy by Mr Ilett, the defendants jointly
24 by Mr Grantham as regards mitigation issues that arise
25 on the pleadings.

1 Issue of acquisition

2 THE PRESIDENT: Next is, I think, again only for Ryder.

3 There is the acquisition issue, which I think concerns
4 the amount paid for Hill Hire and how relevant that is.

5 Again the defendants seek Mr Grantham, and I think that
6 is not opposed, and, Mr Holmes, Ryder would want

7 Mr Ilett. Is that correct?

8 MR HOLMES: Correct.

9 THE PRESIDENT: So again permission for both sides on that
10 basis.

11 Issue of interest, financing and tax

12 THE PRESIDENT: Finally there is interest, financing, tax.

13 For Ryder, you seek Mr Ilett; the defendants jointly,
14 Mr Grantham. What is the position of Dawsongroup,
15 Mr Palmer?

16 Submissions by MR PALMER

17 MR PALMER: It is Mr Harvey again on interest/financing
18 losses. I understand that is not opposed and we do not
19 oppose the defendants' proposals on this head either.

20 THE PRESIDENT: So Mr Harvey on interest and financing
21 losses and what about tax?

22 MR PALMER: Sir, tax, there is a dispute. I do not know if
23 you want to hear that -- I am conscious of the time.
24 There is a dispute.

25 THE PRESIDENT: I think that is the last issue on expert

1 evidence, as far as I can see, unless you tell me there
2 is yet something else. So I think it would be desirable
3 to wrap up the submissions on the experts.

4 I know there is a subsidiary issue of the scope of
5 Mr Veljanovski's evidence for DS Smith but, as with all
6 the permissions, it is insofar as there are issues on
7 the pleading and not to give evidence on other matters
8 that are not pleaded issues. If we need to spell it
9 out, it can be done and we can hear you on that, but
10 beyond that, I think it's just tax that is left.

11 Mr Pickford has his hand up. Do you want to
12 intervene, Mr Pickford?

13 Submissions by MR PICKFORD

14 MR PICKFORD: Yes, just to make sure that when you say, sir,
15 that it is only tax that is left, that the Tribunal
16 thinks we have dealt with something and it is not the
17 case that it has simply been overlooked.

18 So we had a discussion earlier on, I think it was
19 this morning, in fact, about bundles of products.

20 THE CHAIRMAN: Yes.

21 MR PICKFORD: DAF has a particular plea about complements,
22 which is obviously intimately connected with bundled
23 products. We wish to adduce evidence from a simulation
24 model, just as in the Royal Mail/BT proceedings, to
25 support our basic point that, as a matter of economics,

1 if the price of one product, namely a truck, goes up, it
2 follows that the price of complementary products, such
3 as bodies and trailers, will tend to go down, and so we
4 seek permission to rely on evidence of Professor Neven
5 in relation to that. It may be that the tribunal thinks
6 that that has already been covered earlier this morning
7 but I wanted to make sure that it did not get lost
8 (inaudible) opposed by both Ryder and (inaudible).

9 THE PRESIDENT: Dawsongroup has agreed to that, I think. Is
10 that right?

11 MR PALMER: That is right. Reservations but no objection.

12 THE PRESIDENT: And obviously, your economist can also give
13 evidence on complementary products.

14 MR PALMER: Yes, indeed, thank you.

15 THE PRESIDENT: What is the position of Ryder?

16 MR HOLMES: Ryder is in the same position, sir; accepted the
17 pleading amendment in relation to complements. Now it
18 has been narrowed to the two specific products in
19 question and we would seek permission for our economic
20 expert to give evidence on that point.

21 THE PRESIDENT: So any defendant who raises this,
22 Dawsongroup and Ryder each has permission to adduce
23 evidence from an economist on the issue of complementary
24 products, as pleaded. Yes.

25 MR HOLMES: Thank you, sir.

1 MR HOLLANDER: Just for completeness, as you were
2 identifying items on expert evidence, I had a short
3 point on the wording of DS Smith's order on expert
4 evidence. I was proposing to deal with that when we
5 come to deal with DS Smith directions tomorrow unless
6 you would like me to deal with it now.

7 THE PRESIDENT: No, I think that is very sensible,
8 Mr Hollander. We obviously have to deal with a lot of
9 DS Smith issues tomorrow, but I would like to deal -- so
10 I will not ask you, Mr Gregory, now. I see your hand is
11 up. I would like to deal with tax tonight. What is the
12 issue -- on tax, as I understand it, the defendants seek
13 to use Mr Grantham. It is obviously an accountancy
14 matter rather than economist matter.

15 What is the position on tax that Mr Holmes, you have
16 said there is an issue on tax. No, you did not.

17 I think Mr Palmer.

18 MR PALMER: It is for us.

19 THE PRESIDENT: Yes, Mr Palmer.

20 Submissions by MR PALMER

21 MR PALMER: Yes, sir, I do not know if you have seen the
22 draft order that was annexed to our skeleton argument.

23 THE PRESIDENT: I certainly have seen it. But I can't
24 pretend to have them all in my head.

25 MR PALMER: No. Do you have it to hand physically?

1 THE PRESIDENT: Yes, we can have it to hand physically with
2 your skeleton.

3 MR PALMER: I am very grateful. Paragraph 11 sets out what
4 we propose. It is a procedure for the issue to be
5 explored further between the experts, and I will briefly
6 explain why in a moment but I just ask you to see what
7 it is that we are asking for. Permission in principle
8 to adduce written and oral expert evidence in relation
9 to the tax issues for all parties but for a meeting
10 without prejudice to seek to agree their proposed
11 approach to the tax issues and, if and insofar as
12 agreement cannot be reached, then two weeks later to
13 file and exchange statements setting out their proposed
14 approach and the reasons for adopting that approach, and
15 then the tribunal determining that following oral
16 hearing, if necessary, and finally, identifying the
17 respective experts in relation to tax issues at that
18 point.

19 THE PRESIDENT: When you say "at that point", surely that
20 has to happen before your point (b), does not it? How
21 are they going to meet if you have not identified them?

22 MR PALMER: At the moment we have Mr Harvey -- and I will
23 explain this and how this has arisen in just a moment,
24 but that is the order we are seeking, which is closely
25 modelled, I am told on the order that was made in the

1 Royal Mail/BT case. I am not directly involved in that,
2 but that formed the inspiration for the suggestion.

3 Let me explain why we propose this at this stage.
4 It is this: there has been a real lack of clarity as to
5 what approach Mr Grantham proposes to take and it has
6 recently been suggested that Mr Grantham will act on
7 behalf of all defendants as a joint expert. We looked
8 to the proposal in July, as ordered by the Tribunal
9 in May, for an explanation. The explanation was
10 unhelpful. It simply said:

11 "An analysis of the tax consequences for the
12 claimants resulting from any alleged overcharge for
13 which credit needs to be given in quantifying any
14 alleged loss."

15 Well, no issue with any of that but not the sort of
16 helpful explanation of approach that the Tribunal had in
17 mind. It might be thought positively obstructive to
18 fail to give any details at all on the approach, when
19 that was the Tribunal's express purpose.

20 But can I contrast Dawsongroup's proposals, which
21 explain what we have put forward and had anticipated,
22 with a reasonable degree of confidence at that stage, it
23 could form the basis of agreement. It is at
24 {DG-C1/IC32/1}, which is the confidential exhibit to
25 Mr Coulson's 13th witness statement, and within that it

1 is page 385. {DG-C1/IC32/385}

2 THE PRESIDENT: Is that a confidential document?

3 MR PALMER: I do not think this -- it is in a confidential
4 exhibit, but I do not think there is anything
5 particularly confidential about what I am going to show
6 you. No. Thank you. I have had that confirmed. It is
7 page 385, which is the section of Dawsongroup's
8 proposals, as ordered, served in July, on tax. I hope
9 that has come up for you in paragraph 24, on tax.

10 THE PRESIDENT: Yes.

11 MR PALMER: I can take it swiftly. Dawsongroup's approach
12 was accounting:

13 "... for the effect of corporation tax on the losses
14 it claims."

15 You will see (i), (ii) -- I needn't read it out, but
16 you will be able to see the basic approach.

17 THE PRESIDENT: Yes.

18 MR PALMER: And indeed, that approach was set out right from
19 the beginning in table 2 of our particulars of claim
20 with some figures there.

21 That was an overview, 25, of the method. It
22 obviously needs to be updated to reflect latest tax
23 rates. That depends on when any award of damages
24 occurs. 26, we were seeking permission for our
25 expert -- that is Mr Harvey again:

1 "... to opine upon the accuracy and appropriateness
2 of those calculations ..."

3 As part of his evidence about overall quantum. If
4 that approach is taken, it simply does not require any
5 specialist tax expertise. Mr Harvey is not a tax
6 specialist but he is obviously numerate and able to
7 perform that sort of analysis and to quantify the
8 effects.

9 In his third witness statement, served over two
10 years ago, two and a half years ago, he outlined the
11 basis of his approach. He set out four options as to
12 what could be taken before settling on option 3 as being
13 the proportionate approach. Option 1, making no
14 adjustment, that is not a very good idea. Secondly,
15 making an adjustment simply based on publicly available
16 information of headline rates, if you like, without
17 reference to actual tax circumstances. He did not
18 recommend that. 3, he was making an adjustment
19 reflecting the tax Dawsongroup actually paid and other
20 significant or atypical tax arrangements, but, 4,
21 replacing Dawsongroup's tax returns in full,
22 effectively, with a lower truck cost, rerunning the
23 entire tax return process, which he thought would be
24 disproportionate, in particular having in mind the broad
25 axe principle.

1 As we see at 28, {DG-C1/IC32/386}, option 3 was the
2 appropriate approach, right balance between accuracy,
3 cost and effort, and so we put forward Mr Harvey on that
4 basis.

5 Mr Grantham responded to that in his fourth witness
6 statement, again having not done so previously. This
7 came late. If you go back to Mr Grantham -- if you do
8 not have it open it is as {DG-B1/IC84/1}.

9 THE PRESIDENT: Is this the most recent statement?

10 MR PALMER: Yes, it is the most recent Mr Grantham. It is
11 1 October, the one that was served late.

12 THE PRESIDENT: Yes.

13 MR PALMER: And within that it is page 17 that he starts
14 dealing with taxation. {DG-B1/IC84/17}. This is what
15 has introduced the note of doubt as to how things can go
16 forward. Mr Harris shakes his head, but here it is for
17 the first time, these points being put forward, these
18 criticisms of option 3.

19 These have been answered by Mr Harvey in his 11th
20 statement. There is some criticism about whether he is
21 going to take an effective tax rate, rather than just
22 a prevailing tax rate and take into account various
23 matters, such as matters brought forward, held back and
24 so forth. Mr Harvey has clarified that is absolutely,
25 yes, what he is suggesting, but I will not read out

1 everything that Mr Grantham says. Where it takes us is
2 that he says at 5.5 that he expects to prepare what he
3 calls mini computations for truck costs, showing the
4 actual and adjusted positions.

5 It is not clear to us whether that is taking us into
6 option 4 territory for tax returns or whether this is
7 just option 3, as originally proposed, or whether it is
8 something in between. It is completely unclear and
9 opaque because Mr Grantham does not explain.

10 We would have severe concerns about anything which
11 amounted to option 4 or sat halfway between option 3 and
12 4 on grounds of proportionality. But we also accept
13 that it may just be that actually what Mr Grantham is
14 here advocating is actually just option 3 that is just
15 a mismatch between the experts' current understanding of
16 what each other is proposing, i.e. how detailed that
17 analysis has to be. To be clear, we are not suggesting
18 that you just take the headline rates and apply them to
19 however much corporation tax happened to be paid in each
20 year. It is more sophisticated than that, it is more
21 careful than that but it is not a complete rerun of
22 everything.

23 We, therefore, propose that the experts -- that is
24 Mr Harvey and Mr Grantham -- get together and see if
25 they can actually agree what this exercise is going to

1 entail because, if they can agree that, then it's just
2 a question of just crunching numbers, but if Mr Grantham
3 is going to contend for something much more detailed
4 than that, then it may be that, if the Tribunal then
5 approve that approach instead of what Mr Harvey has
6 proposed, well, it may be then that Mr Harvey, who is
7 not a tax specialist, would not be able to deal with it,
8 and that is why we would at that point need to bring in
9 a specialist tax expert who is competent to deal with
10 more detailed tax matters.

11 We hope that is not the outcome. We hope that it
12 can be agreed that Mr Harvey, as a non-tax specialist,
13 can simply agree this with Mr Grantham, but this late
14 evidence does put the cat among the pigeons, does leave
15 us unsure, and we do not want to be in a situation where
16 Mr Grantham, who, of course, is part of AlixPartners,
17 who has its own dedicated tax specialist within it, who
18 will no doubt inform Mr Grantham and help, but Mr Harvey
19 is not in that situation and we do not want him suddenly
20 to find that Mr Grantham is contending for something
21 much more detailed than he is competent to deal with.

22 So we hope our expert will remain Mr Harvey but,
23 before we can put him forward on that basis, we do need
24 to understand what level of detail Mr Grantham says
25 needs to be gone into to produce the mini computations.

1 That is not yet apparent because it has not been
2 explained.

3 THE PRESIDENT: Yes. Understood. And that is why you
4 propose, as per paragraph 11 --

5 MR PALMER: That is why.

6 THE PRESIDENT: -- of your draft order.

7 MR PALMER: That is why, inspired by the experience of Royal
8 Mail. Similar events happened.

9 THE PRESIDENT: Yes, and that is why you are not able to say
10 today, following this late evidence, whether you would
11 want Mr Harvey or a tax specialist.

12 MR PALMER: That is right. We hope not a tax specialist,
13 but I think you understand the point.

14 THE PRESIDENT: Yes. Yes, Mr Holmes.

15 MR HOLMES: I was just going to add that if there is to be
16 a meeting between experts to discuss methodology in
17 relation to tax questions, it may be sensible if
18 Mr Ilett were also to attend that so that he can hear
19 and understand how Mr Grantham is proposing to proceed
20 and can express his views on the matter.

21 THE PRESIDENT: Yes.

22 MR PALMER: There may be issues of confidentiality around
23 tax affairs but that is a matter which can be dealt
24 with.

25 THE PRESIDENT: I think it is a question of methodology,

1 conceptual methodology, rather than the details of
2 the --

3 MR PALMER: That is the main thing.

4 THE PRESIDENT: -- company's actual tax position. So that
5 is what is proposed on tax, rather than taking a firm
6 view today. Clearly, you will all have experts on tax
7 and you will each be allowed an expert on tax. And
8 there is no objection to Mr Grantham being the
9 defendants' joint expert on tax. Is there any objection
10 to the Dawsongroup proposal in paragraph 11? Mr Harris?

11 Submissions by MR HARRIS

12 MR HARRIS: Yes, sir. This is a disappointing and
13 misconceived last-minute suggestion by Mr Palmer on
14 behalf of Dawsongroup. The position, very clearly,
15 prior to my learned friend's solicitor's letter of
16 6 October, was that the defendants had jointly proposed
17 a forensic accountant, who has tax expertise, namely
18 Mr Grantham. Obviously, a sensible course.

19 Ryder had also proposed a forensic accountant with
20 tax expertise, Mr Ilett. Again, with respect, obviously
21 a sensible course.

22 In contrast and as an outlier, despite Mr Grantham
23 having begun to explain his approach to tax matters two
24 and a half years ago -- and I will show that you in
25 a moment -- Dawsongroup has persisted throughout the

1 period in not putting forward a forensic accountant/tax
2 expert. To the contrary, Dawsongroup, for at least two
3 and a half years, up until 6 October, has said, "We have
4 a tax expert who is not a forensic accountant. He is
5 none other than Mr Harvey," who appears to be an expert
6 in every discipline.

7 That was the expert methodology they put forward,
8 that was the application that they have made, notably
9 did not change even with, as you adverted to at the
10 outset, sir, the late extra expert witness statement
11 from Mr Harvey that came in without permission and out
12 of time. That was the position up until the letter of
13 6 October. Then, suddenly, it seems to have dawned on
14 Dawsongroup that, despite the fact that all other
15 litigants have chosen the right sort of expert with the
16 right sort of expertise to address tax, that they quite
17 possibly, indeed probably, have not done so. Their
18 Mr Harvey, who hitherto had always been described as a
19 tax expert -- it suddenly appears that they are losing
20 confidence in him on this front.

21 THE PRESIDENT: Mr Harris, come on. I do not think one can
22 make a forensic play with all this. What they are
23 saying is it depends on quite the nature of the tax
24 analysis, whether this is within Mr Harvey's expertise
25 or not. They want to understand exactly what is the tax

1 approach that is going to be adopted and then they will
2 know whether it is within Mr Harvey's expertise or it
3 needs a tax expert. You may object to the Tribunal
4 determining the approach but in terms of the expert's
5 meeting without prejudice to seek to agree what will be
6 the tax approach, I do not quite see the objection to
7 that, so they can all understand exactly what approach
8 Mr Grantham will be taking.

9 MR HARRIS: The objection, sir -- this was precisely the
10 directions that were given by this Tribunal to lead up
11 to today. Today is the day upon which we decide what
12 the experts are and what their summary methodologies
13 are, and that was to be preceded by, back in September,
14 an explanation in summary form from each side of what
15 their expert methodologies were, by which experts, in
16 what disciplines, and then there was to be a series of
17 documents that were all submitted on time, saying what
18 the areas of agreement and disagreement were, and at no
19 point in that process, which was the one that was set up
20 for good order in order to allow the determinations at
21 this hearing, was it was said by Mr Palmer's clients
22 that, no, actually, we are not quite sure whether it
23 should be Mr Harvey, maybe it should be Mr Harvey, maybe
24 it shouldn't, maybe it would be some other -- what he
25 just called a moment ago "another tax specialist".

1 None of that is in the methodology statement. None
2 of it is in the areas of agreed or disagreed topics for
3 today's hearing. This has emerged just a few days ago.

4 But it gets a lot worse, sir, because we addressed
5 this matter, through Mr Grantham, two and a half years
6 ago -- and I would, if I may, like to turn up an item in
7 {DG-B1/8/1}. That is Mr Grantham's first witness
8 statement. So this is dated two and a half years ago,
9 in April 2019. And if one were to go through towards
10 the back of that document, it is an internal page number
11 of 25, so it is paragraph 73. If perhaps that could be
12 scrolled down to by Opus, {DG-B1/8/25}, there is
13 a heading "T2: information in respect of tax
14 computations" and, as I say, if you were to look on the
15 front page, this is 17 April 2019, and this was in
16 support of the requests that were made for disclosure on
17 the topic of tax, and Mr Grantham was being put forward
18 as the tax expert. We do not need to read it all. He
19 talks about a post-tax approach, which I think is common
20 ground, but what he does go on to say over the page, if
21 one scrolls down, is that -- at 76: {DG-B1/8/26}

22 "... historic tax rates are publicly available."

23 It is not for those, it is much more granular. This
24 is the third sentence:

25 "It is a request to understand the amount of taxes

1 that each Dawsongroup claimant was liable to pay.
2 Knowing the corporation tax rate that applied at the
3 time is only a small part in a complex calculation of
4 the actual amount of tax which was payable and which can
5 depend on a number of factors ..."

6 And he identifies them all this long time ago. He
7 wants to analyse -- this is what he is saying, he wants
8 information on the following matters because it is
9 a complex calculation of actual amounts of tax. They
10 include capital allowances and reliefs, what is claimed
11 in both of those respects and granted to and
12 attributable to truck purchases. So he explains that
13 this is what a forensic tax specialist accountant is
14 going to look at. Then he goes on to say, I also need
15 to look at:

16 "... company or group issues including relief for
17 losses. I set out examples at paragraphs 43 ..."

18 I do not need to turn them up:

19 "... above."

20 Then he talks about effective rates of tax. Then he
21 goes on, 77:

22 "Further, with regard to capital allowances, the
23 effect of capital allowances is to spread the cost of a
24 truck over a number of years ..."

25 And he goes on to explain how and why that is

1 relevant. He finishes in that paragraph:

2 "It will be important for an expert to understand
3 how the capital allowances were first claimed in order
4 to make an assessment of the effect of any overcharge."

5 It could not be clearer what he is going to do and
6 the expertise that he is going to use. Then he goes on:

7 "The tax computation includes, in one place, the
8 particular factors in respect of tax which affect the
9 Dawsongroup claimants and which may need to be taken
10 into account when considering how tax might affect the
11 calculation of damages ..."

12 Then there is a reference back to post tax. Then he
13 ends -- this is, as I say, April 2019: {DG-B1/8/27}

14 "In my view, the provision of the Dawsongroup
15 claimants' tax computations would be the most efficient
16 method of addressing taxation."

17 So for Mr Palmer to suggest that a clear and present
18 focus upon the actual tax computations, with all of
19 their myriad complexities, including allowances,
20 reliefs, group and otherwise, over the years is somehow
21 new and surprising could not be more wrong. It was set
22 out all that time ago. What is more, this evidence by
23 way of disclosure has been granted by the Tribunal and
24 either provided in full or in part.

25 So when Mr Grantham puts in number 4 -- this is to

1 be found at {DG-B1/IC/84}, and he again at the end of
2 that statement comes to talk about taxation under
3 heading number 5 -- if that could be called up, it is in
4 paragraph 5.1, which is towards the back of that
5 statement. I think it is three pages in from the back
6 of that statement, {DG-B1/IC84/17}. Thank you so much,
7 so on the screen.

8 He talks about Mr Harvey by this stage has developed
9 three apparent options, four we now know. That is
10 a matter for Mr Harvey. Mr Harvey had been put up,
11 since April 2019, as Dawsongroup's tax expert.

12 Mr Harvey comes up with four options. Well, that is
13 a matter for him. That is not what we are doing. But
14 Mr Grantham, in contrast, goes on, over the page, to
15 explain various things about prevailing rates -- that is
16 in 5.2 -- and then at 5.3 about effective tax rates,
17 {DG-B1/IC84/18}, and then he addresses a particular
18 criticism of Mr Grantham, where he, Mr Harvey -- this is
19 5.4 -- says that:

20 "... his 'Option 3 would allow for a sufficiently
21 accurate analysis of the impacts of tax on Dawsongroup's
22 claim without the need to undertake a full replication
23 of Dawsongroup's tax returns ..."

24 This is all misconceived, because Mr Grantham has
25 never said, at the beginning or now, that he wants to do

1 an entire rerun of every tax computation that was ever
2 done by Dawsongroup and the various claimants within it
3 for the entire period. On the contrary, he reverts back
4 to the evidence that he gave two and a half years
5 earlier in his 5.5 and then he says:

6 "In my view, in considering taxation, it will be
7 necessary to identify a methodology that is sufficiently
8 reflective of the adjustments that would be made to a
9 Claimant's tax computations ..."

10 That is exactly what he said in April 2019:

11 "... and that reliably estimates the change in the
12 amount of tax that would have been payable."

13 Those are the points he made in April 2019 about
14 group relief, tax relief, capital allowances over the
15 years, and what he says is:

16 "I intend to review the tax computations to
17 understand ..."

18 That is what he said in April 2019. That is why we
19 sought that disclosure. So this has all been completely
20 on the table ever since then, and then he says, I want
21 to review them so I can then consider:

22 "... the effect that a change in the Truck costs
23 (and any associated costs) would have had by reference
24 to that treatment. I expect that this approach will
25 involve preparing a 'mini' computation for Truck costs

1 (and any associated costs) showing the actual and
2 adjusted positions."

3 Actual and adjusted by reference to things like
4 capital allowances and group reliefs and all the other
5 things that he mentioned when he was seeking disclosure.

6 So it is completely wrong for Dawsongroup to suggest
7 that this has been somehow a new point or it has sprung
8 upon them or they have not understood it. The fact is
9 they have understood it all along and they now think
10 that they might not have the right man. That is
11 something that was designed to be flushed out by the
12 expert methodology statements well over a month ago, and
13 if they then wanted to make an application -- let's be
14 quite clear about this. What Mr Palmer said a moment
15 ago was:

16 "Now want possibly another tax specialist."

17 Well, that is wrongheaded. There is no application
18 for that. There is no basis for it, and he has already
19 been told a long time ago what we are going to do on
20 behalf of all the defendants and, as far as I can make
21 out, that is what Mr Ilett is also going to do. So that
22 is the reason that we oppose this suggestion of adding
23 another layer of time and cost in the form of expert
24 meetings.

25 MR PICKFORD: Sir, I had a short supplementary point to make

1 on behalf of DAF. I realise it is 5 o'clock.

2 THE PRESIDENT: Very quickly because we are going to have to
3 stop. Yes.

4 Submissions by MR PICKFORD

5 MR PICKFORD: I understand. Simply in response to
6 Mr Palmer's reliance on the Royal Mail/BT proceedings as
7 support for his paragraph 11. Of course, we are the
8 other parties in those proceedings and there is
9 a substantial difference between those proceedings and
10 these --

11 THE PRESIDENT: I do not think we are terribly influenced by
12 what may have happened there. The question is what is
13 the most sensible to do where we are now in these
14 proceedings. There are many differences in the Royal
15 Mail position.

16 MR PICKFORD: Indeed, in particular because the tax
17 situation there was highly complex.

18 THE PRESIDENT: Yes.

19 MR PICKFORD: The point then, to cut to the chase, that
20 I was simply going to make about paragraph 11 is that it
21 is very substantially overengineered. Of course it is
22 sensible for the experts to meet, as indeed it is always
23 sensible for the experts to meet and seek to discuss
24 their methodologies. But that is all that needs to
25 happen. What we do not need to have is an elaborate

1 process of tax statements and further hearings to
2 determine further proceedings in relation --

3 THE PRESIDENT: Yes.

4 MR PICKFORD: So the goodness, as it were, can be milked out
5 of paragraph 11 by substantially simplifying it and
6 simply requiring the experts to meet and discuss their
7 methodologies to seek to agree where they can.

8 THE PRESIDENT: Yes, well, that will happen, of course,
9 anyway.

10 MR PICKFORD: Indeed.

11 THE PRESIDENT: The only question that goes through my mind
12 is if, notwithstanding all that Mr Harris says, there is
13 some genuine -- in the light of the witness statements
14 that came in very recently, some concern on the part of
15 Dawsongroup that they do not entirely follow what method
16 Mr Grantham is going to use, that they should be allowed
17 Mr Harvey to meet him, with Mr Ilett present, if he
18 wishes, on a without prejudice basis, and then following
19 that, that Dawsongroup can decide whether the expert
20 they call on tax should be Mr Harvey or a tax
21 accountant. That seems to me the scope of the relevant
22 issue at the moment.

23 MR PICKFORD: Yes, and you have Mr Harris' submissions on
24 that and I have nothing further to add to that.

25 THE PRESIDENT: Yes. That seems to me, Mr Palmer, as far as

1 it is reasonable to go at the moment, if you think that
2 may avoid you having to seek a different expert.

3 Submissions by MR PALMER

4 MR PALMER: Sir, we would be grateful for that. Just in
5 response to Mr Harris -- maybe I do not need to
6 respond -- you will stop me if I do not, but his first
7 point was this is all astonishing and ludicrous, given
8 where we have got to now has been preceded by what he
9 called a carefully structured process of putting forward
10 summaries on areas of agreement and disagreement in the
11 proposals. That point might have had more force if his
12 clients had engaged with that process, but I read you
13 what they put forward, which was a one-liner, just
14 saying an analysis of the tax consequences resulting
15 from any alleged overcharge.

16 THE PRESIDENT: Yes.

17 MR PALMER: That does not assist, and nor has there been any
18 other engagement until that late witness statement.

19 His second point was that does not matter because,
20 if you go back two and a half years to Grantham 1, to
21 a witness statement in which he was asking for various
22 forms of disclosure, it all should have been obvious
23 anyway. I am afraid it is not obvious to us now, even
24 after hearing Mr Harris, precisely what Mr Grantham
25 proposes to do. In that witness statement at

1 paragraph 76, where Mr Harris began, he was explaining
2 that the effective rate of tax paid by the entity is
3 usually different to the corporation tax rates as
4 published. We entirely agree and Mr Harvey agrees, and
5 he is at pains to point out that he is after --

6 THE PRESIDENT: Yes, I think I will stop you. We will take
7 just a moment and come back to you.

8 MR PALMER: Sir, the only point then is just whether you can
9 short circuit the proposed terms of our paragraph 11 by
10 missing out the product from that meeting and bringing
11 it back to the Tribunal if necessary, because it does
12 seem to us that it would be profitable to have the
13 Tribunal's view, if there is a divergence of views, on
14 whether what is proposed by Mr Grantham --

15 UNKNOWN SPEAKER: Sorry, Mr Palmer, the President has just
16 left. (Pause)

17 THE PRESIDENT: Mr Palmer, I gather it was not clear. I did
18 say that we shall take a moment to consider. What we
19 propose to do is to give permission to the defendants to
20 call, as their joint expert on tax, Mr Grantham, invite
21 the claimants to call Mr Ilett, your clients to call
22 Mr Harvey, to direct that there is a meeting between
23 those three experts on a without prejudice basis. You
24 suggested 26 November. That seems reasonable but if
25 somebody says that does not give sufficient time,

1 although in our view it ought to, on a without prejudice
2 basis to discuss the methodology, if following that
3 meeting you wish to substitute another expert for
4 Mr Harvey, you can make an application naming that
5 alternative expert.

6 We would be surprised if at that point it were
7 opposed. If it were opposed, we will then consider it,
8 but that will enable you to go forward, having
9 understood exactly what Mr Grantham is proposing to do.

10 MR PALMER: Thank you, sir.

11 THE PRESIDENT: Is 26 November, a date that seems to us
12 quite far away for something like this, where
13 Mr Grantham has obviously considered it --

14 MR HARRIS: That is very good for us, thank you.
15 Mr Grantham.

16 THE PRESIDENT: Yes, for Mr Grantham. So that deals with
17 tax. We will consider the matters that we have reserved
18 and we hope to be able to give you a ruling tomorrow
19 morning. I think it sensible that we start at
20 10 o'clock tomorrow morning unless that causes personal
21 problems to anyone.

22 No? Very well, at 10 o'clock tomorrow.

23 (5.09 pm)

24 (The court adjourned until 10.00 am the following day)

25

INDEX

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

Housekeeping..... 1

Issue of Expert Evidence..... 4

Submissions by MR HOLMES..... 6

Submissions by MR PALMER..... 8

Issue of disclosure statement..... 16

Submissions by MR PALMER..... 16

Submissions by MR HOLMES..... 16

Submissions by MS ABRAM..... 17

Submissions by MR HARRIS..... 20

Submissions by MR PICKFORD..... 21

Submissions by MR HOLMES..... 23

1 Submissions by MR PALMER25

2

3 Submissions by MS ABRAM29

4

5 Submissions by MR HARRIS31

6

7 Submissions by MR HOLLANDER32

8

9 Submissions by MR HARRIS35

10

11 Submissions by MR PALMER35

12

13 Submissions by MR HOLLANDER38

14

15 Submissions by MR JOWELL39

16

17 Submissions by MR PICKFORD40

18

19 Submissions by MR HOLLANDER44

20

21 Submissions by MR PICKFORD45

22

23 Submissions by MR HOLMES46

24

25 Issue of supply pass-on..... 50

1

2 Submissions by MR PALMER51

3

4 Submissions by MR HOLMES73

5

6 Submissions by MR GREGORY74

7

8 Submissions by MR HARRIS74

9

10 Submissions by MR PICKFORD80

11

12 Submissions by MR JOWELL83

13

14 Submissions by MR PALMER86

15

16 Submissions by MR HOLMES89

17

18 Submissions by MR JOWELL94

19

20 Submissions by MR HOLLANDER97

21

22 Submissions by MR HOLMES98

23

24 Submissions by MR JOWELL100

25

1 Issue of re-sale pass-on..... 102

2

3 Submissions by MR HOLMES..... 102

4

5 Submissions by MR JOWELL..... 103

6

7 Issue of loss of profit/loss of..... 104

8 volume

9 Submissions by MR PALMER..... 104

10

11 Submissions by MR HOLMES..... 106

12

13 Submissions by MR HARRIS..... 107

14

15 Submissions by MR HOLLANDER..... 110

16

17 Submissions by MR PICKFORD..... 111

18

19 Issue of mitigation..... 111

20

21 Submissions by MR HOLMES..... 112

22

23 Submissions by MS ABRAM..... 112

24

25 Issue of acquisition..... 113

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

Issue of interest, financing and tax..... 113

Submissions by MR PALMER..... 113

Submissions by MR PICKFORD..... 114

Submissions by MR PALMER..... 116

Submissions by MR HARRIS..... 125

Submissions by MR PICKFORD..... 134

Submissions by MR PALMER136