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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)

Tuesday 12 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)

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Tuesday, 12 October 2021

(10.00 am)

THE PRESIDENT: Good morning. Having reflected on what we heard yesterday, there are two matters we would like, please, to clarify with the parties. The first is this: we understand on supply pass through the defendants wish to approach that by expert evidence in the form of forensic accounting and alike as a joint expert Mr Grantham.

Issue of supply pass-on and resale pass-on

THE PRESIDENT: On resale pass through, we understand that you wish to do that by economic evidence but it appeared that you each want to have a separate economist and we are not clear at the moment why on resale pass through there should be separate economists and not, as with supply pass through, a joint expert, in this case an economist.

Can someone, please, explain that to us, unless we have misunderstood and you do indeed seek a joint expert. Ms Abram.

MS ABRAM: Sir, you have not misunderstood. We do seek separate experts on resale pass through and a joint expert on supply pass through, and the reason for that is that the nature of the analysis we anticipate will be a bit different. So when you are looking at resale pass

1 through, to state the obvious, you are looking at  
2 whether any overcharge on the sale of the trucks by the  
3 individual OEMs, that then are sold on as used trucks by  
4 Ryder or Dawsongroup, whether any overcharge went  
5 through. So you are really basing the resale pass  
6 through analysis on the econometric analysis that will  
7 have been done already. There will be a substantial  
8 link between the analysis of the downstream used truck  
9 sale and the upstream sale as a new truck.

10 So that will be OEM-specific to a substantial  
11 degree, whereas supply pass through really is a question  
12 of the Ryder and Dawsongroup businesses. So that  
13 genuinely is a question of the extent to which Ryder and  
14 Dawsongroup pass on any overcharge through their own  
15 services to their own customers. Does that help?

16 THE PRESIDENT: But the resale pass through is also looking  
17 at what Ryder and Dawsongroup separately achieve,  
18 whether it is through auction or whatever, in selling  
19 the truck.

20 MS ABRAM: Of course. Of course --

21 THE PRESIDENT: Separately. But why does that differ as  
22 between the different OEMs?

23 MS ABRAM: Of course. What one might posit is a scenario,  
24 for example, where one OEM reduced an overcharge on the  
25 sale of their own trucks as new. So, for example, just

1 for hypothetical illustrative purposes, a 5 per cent  
2 overcharge by OEM A, whereas OEM B had no overcharge at  
3 all, so the starting point, when you are looking at the  
4 onsale of those trucks by Ryder and Dawsongroup, kind of  
5 generation below in the market, will be quite different  
6 between those two OEMs because the back story, as to  
7 whether there was any overcharge to begin with or the  
8 amount of the overcharge is different, so you are  
9 starting from a different point, and that is why we say  
10 that when you look at resale pass through, you will be  
11 looking back to the story that has already been told on  
12 overcharge at the new truck sale.

13 THE PRESIDENT: Why does not that apply to all pass through?

14 MS ABRAM: For --

15 THE PRESIDENT: If there is no overcharge to begin with,  
16 there is nothing to pass through.

17 MS ABRAM: Although, the position is different, I would  
18 suggest, on supply pass through because I suggest it is  
19 unlikely that Ryder and Dawsongroup are renting a Volvo  
20 truck and a DAF truck, for example, at different rates.  
21 So when they set prices, they will just be setting  
22 prices for a truck of a particular specification or size  
23 or whatever. So it will not be OEM-specific in the same  
24 way.

25 THE PRESIDENT: Yes, can someone else -- Mr Pickford, do you

1           want to add something?

2           MR PICKFORD: Yes, we very much support what Ms Abram has  
3           said and if I could just add from DAF's perspective: the  
4           key issue here, or one of the key issues, is a practical  
5           one because what we are concerned with in the  
6           second-hand market for resale pass through is an  
7           analogue of what we are concerned with in the primary  
8           market, which is an alleged overcharge, and we are  
9           conducting an analysis of overcharge, and each OEM is  
10          using its own economist to do that, and the position  
11          that we have taken -- and our view on how best to assess  
12          the issue of resale pass through -- is to look at  
13          overcharge but rather than looking at the primary  
14          market, is to look at the extent to which there was any  
15          overcharge in the secondary market, namely the  
16          second-hand market.

17                 It would be deeply inefficient, to say the least,  
18                 for the parties to not be able to take advantage of the  
19                 analysis that they have each done in relation to their  
20                 own data in relation to overcharge and then be forced to  
21                 conduct some entirely different analysis through  
22                 a further economist which does not actually bear on and  
23                 utilise all of the analysis that they are doing in  
24                 relation to overcharge because we see those two issues  
25                 as highly interlinked. In essence, it is an overcharge

1           analysis twice, firstly on the primary market, secondly  
2           on second-hand trucks.

3       THE PRESIDENT:  So will your economist, as regards resale  
4           pass through, be conducting that analysis specifically  
5           on the resale pass through of DAF Trucks?

6       MR PICKFORD:  That is right, yes, because --

7       THE PRESIDENT:  He won't be looking at resale pass through  
8           of Daimler trucks.

9       MR PICKFORD:  No, my understanding is that the analysis will  
10          be an analogue of the analysis for overcharge but one  
11          step on, looking at the second-hand market, not the  
12          first hand market.

13      THE PRESIDENT:  So each expert will be looking at resale  
14          pass through of trucks of that manufacturer and not --

15      MR PICKFORD:  Yes --

16      THE PRESIDENT:  -- generally of the secondhand market.

17      MR PICKFORD:  That is right.

18      THE PRESIDENT:  Ms Abram is nodding and Mr Jowell is  
19          nodding, so that is then our understanding.  Does anyone  
20          else want to add anything?

21      MR HARRIS:  Sir, that is correct.  That is Daimler's  
22          position as well.

23      MR HOLMES:  Sir, I must say we find this a little  
24          unsatisfactory because, for a start, this does look as  
25          though it is a matter that one might have expected to

1 see covered in evidence from the various defendants'  
2 experts. We do not accept or agree with the position  
3 that Ms Abram was explaining to distinguish between the  
4 two different types of pass-on. What one is involved in  
5 here is considering whether the upstream prices of the  
6 OEMs, which included an element of overcharge, were  
7 recovered on separated downstream markets by Ryder and  
8 Dawsongroup respectively, and we do not see a difference  
9 in principle or in fact between those two.

10 Ms Abram posited, as a speculation, that the pricing  
11 by Dawsongroup and Ryder would have been the same in  
12 renting trucks of different brands as between Ryder and  
13 Dawsongroup. That is not accepted at all. It is  
14 a matter on which we would have wished to put in  
15 evidence if we had heard that suggestion before.

16 THE PRESIDENT: Sorry to interrupt you, you will be putting  
17 in evidence on your rentals of how you price your  
18 rentals, but I do not think you have queried this  
19 previously. We were trying to understand the logic of  
20 what the defendants were seeking to do and why and the  
21 way they are seeking to do it as a sort of carry through  
22 of econometric analysis of the new truck.

23 MR HOLMES: That is understood, sir, and the point I am  
24 making goes to the permission that the Tribunal will  
25 give today, and my submission is that you have not heard



1 a good basis from Ms Abram or Mr Pickford, giving  
2 evidence on their feet, to justify a difference of  
3 approach between resale and supply pass-on, and to  
4 justify allowing separate experts.

5 At the very least we say that it would be  
6 appropriate to have a lead expert by one of the  
7 defendants to address the issue of resale pass-on, or  
8 alternatively, that this point is revisited at a later  
9 date, but we find it unsatisfactory that this should be  
10 decided in this way on the basis of these late  
11 clarifications.

12 THE PRESIDENT: Well, no one asked for clarification  
13 yesterday, when that is the way it was put forward. It  
14 is only when we reflected on the matter, after the  
15 hearing, that this particular concern was ventilated in  
16 discussions between the members of the Tribunal and we  
17 wanted to understand what actually is being proposed.  
18 It has been clear from the materials that you all had  
19 that they were seeking each a separate economist, and  
20 that was not challenged in the course of the  
21 submissions. So I do not want to re-open the argument.  
22 I think we will just consider among the Tribunal the  
23 explanation we have been given.

24 I want to move on to the second point, which is  
25 a Dawsongroup point.

1 Issue of loss of volume

2 THE PRESIDENT: It is something I raised with you,  
3 Mr Palmer, but reflecting on it and re-reading the  
4 transcript, we are still puzzled, and that is the issue  
5 of loss of volume. We can understand Ryder's claim.  
6 They say, if there was any pass-on, our rental charges  
7 were higher, we therefore rented less, we therefore  
8 suffered loss of volume, which meant we lost profit, and  
9 they claim that as part of the damages, and that is  
10 a fairly orthodox, if I can put it that way, claim, when  
11 dealing with pass through.

12 But we were told in clear terms that you are not  
13 claiming a lost profit or lost volume but have a loss of  
14 volume claim and, at the moment, we are struggling with  
15 that. When we look at the reason why loss of volume is  
16 an issue at all in the Dawsongroup action, that is  
17 explained in your expert proposals, if we could look at  
18 those, which is at bundle B1/77. Here I am looking at  
19 a hard copy. I'm not sure what the Opus reference is,  
20 and perhaps someone can supply it, but it is  
21 Dawsongroup, B1, tab 77, page 6, {DG-B1/IC77/6}.

22 PROFESSOR NEUBERGER: {DG-B1/IC77/6}.

23 THE PRESIDENT: If you go to page -- is it page 6? That is  
24 it, thank you very much. "Loss of volume", and you see  
25 17. And then if we scroll down to paragraph 19:

1 {DG-B1/IC77/7}

2 "The reduction in volumes may have reduced  
3 Dawsongroup's costs, as at least some of its costs are  
4 likely to be variable. Therefore, it will be necessary  
5 to subtract the implied fall in variable costs from the  
6 loss in revenue when calculating the overall lost profit  
7 resulting from lost volumes."

8 So we can see that there was a lost profit claim,  
9 but we are told there is not.

10 MR PALMER: I can assist. This is probably a lack of  
11 clarity on my part, which stems from various  
12 nomenclature which has fallen into common usage between  
13 the parties to distinguish various heads of damage which  
14 is being claimed. To be clear, Dawsongroup does have  
15 a claim for loss of profits based on loss of rental  
16 income to which the supply pass-on and loss of volumes  
17 issues are relevant for precisely the reasons set out in  
18 that expert proposal.

19 What we do not have is an equivalent to Ryder's loss  
20 of profit claim, which includes a claim that, for  
21 example, they had to close depots and so lost profits  
22 arising from that.

23 We do not have a claim of that type. We have used  
24 the nomenclature, the loss of profit claim, to refer to  
25 that latter aspect and it is my fault for not making

1           that clear when I used the shorthand.

2           MR MALEK: Mr Palmer, can you take us to your pleading and  
3           show us where you have got that plea. I have got bundle  
4           A1. Bundle A1, tab 2.1, page 55 starts off with  
5           causation of loss and then particulars of loss and  
6           damage.

7           MR PALMER: I think the way it is put -- I will be helped by  
8           those who are looking, but the way it is put in the  
9           particulars of claim is a claim for the overcharge.  
10          Anything which then follows as a result of supply  
11          pass-on in defence is by way of reducing that claim for  
12          overcharge, and loss of volumes then has to be taken  
13          into account to the extent that the supply pass-on  
14          allegation were to succeed to counterbalance that supply  
15          pass-on.

16          MR MALEK: So you are only claiming it as a reduction on the  
17          supply pass-on defence of the manufacturers?

18          MR PALMER: Yes, that is right, sir. I was just taking  
19          a moment because I think we will find that in the reply  
20          rather than the particulars.

21          MR MALEK: It will be in the reply. If that is the only way  
22          you are using it, then I can fully understand that is  
23          going to be in the reply rather than your amended  
24          particulars of claim.

25          MR PALMER: Can I just check for a moment whether there is

1 anything else that needs to be said.

2 No, that is the position. Is there a reference you  
3 want to give me?

4 THE PRESIDENT: Yes.

5 MR PALMER: It is paragraph 8 of our reply, sir, which is  
6 headed "Volume Effects".

7 THE PRESIDENT: So that is at tab 6.1. This is the reply to  
8 the first four defendants but presumably it is the same  
9 in all.

10 MR PALMER: The one at 6.1 is at paragraph 7, again headed  
11 "Volume Effects".

12 THE PRESIDENT: "If and to the extent ..."

13 MR PALMER: That is my point about it.

14 THE PRESIDENT: Yes, you are claiming lost profits, yes.

15 MR PALMER: That is the point. But what we do not have is  
16 a separate head of claim in the first place, which is  
17 equivalent to Ryder's loss of profit claim, which stems  
18 from other factors beyond this.

19 MR MALEK: Let me understand. Are you only claiming it,  
20 effectively, as a set-off as against the pass-on point?

21 MR PALMER: Yes.

22 MR MALEK: You are not claiming it as a free-standing head  
23 of damage in your particulars of claim.

24 MR PALMER: No, that is right.

25 MR MALEK: Okay, that is why you have done it this

1 particular way.

2 MR PALMER: Yes.

3 MR MALEK: Because that's not self-evident from your  
4 statement at paragraph 19 on that on the issues, but now  
5 you have clarified I can see you have got it --

6 MR PALMER: I hope that has got it.

7 MR MALEK: You have got it within your pleadings that way.

8 Thank you.

9 THE PRESIDENT: So your expert will be looking at the lost  
10 volume and the consequent lost profit that flows from  
11 that lost volume.

12 MR PALMER: Yes, by taking account of the reduced volumes  
13 but also any reduced costs which flow from the reduced  
14 volumes.

15 THE PRESIDENT: Yes.

16 MR PALMER: That leaves you the loss of profits based on the  
17 loss of rental income, to the extent that the supply  
18 pass-on defence is established.

19 THE PRESIDENT: Yes. No, I think we now understand. Right,  
20 we will take a few moments to digest what we have been  
21 told. So we will be back in --

22 MR PICKFORD: Sir, just very, very briefly, before the  
23 Tribunal takes its decision in relation to resale pass  
24 through, I do just need to address one point which was  
25 raised by Mr Holmes. We were somewhat taken aback by

1 the suggestion that it was unexpected to Ryder, the  
2 approach that we are taking in relation to that.  
3 Mr Burrows' own evidence says very clearly at paragraph  
4 2.28 -- this is his -- which report is it? It is his  
5 ninth witness statement, and he says in terms at  
6 paragraph 228 -- I can give the Tribunal the  
7 reference --

8 THE PRESIDENT: Yes.

9 MR PICKFORD: (Overspeaking) first sentence:

10 "I do not understand there to be a material  
11 difference between the Ryder claimants and the  
12 defendants in respect of their respective approaches to  
13 the assessment of resale pass-on. All of the defendants  
14 have indicated that their experts intend to conduct some  
15 form of correlation analysis between new truck prices  
16 and used truck prices, and in Mr Stannard's evidence he  
17 attaches --

18 THE PRESIDENT: Yes, we saw that -- I made that point to  
19 Mr Holmes. This is not a surprise.

20 MR PICKFORD: Yes.

21 THE PRESIDENT: It was clear and it was something that we  
22 should have sought clarification yesterday because we  
23 were puzzled the logic, and it dawned on us after the  
24 hearing, and we wanted to clarify the rationale. But  
25 the fact that you are approaching it that way and wish

1 to do so was clear throughout. What was not entirely  
2 clear, but has been clarified, is that each expert will  
3 be looking at resale pass through only on that  
4 manufacturer's trucks and not across --

5 MR HOLMES: That was my point, sir.

6 THE PRESIDENT: Yes, well, thank you. We will be back at  
7 10.30.

8 (10.22 am)

9 (A short break)

10 (10.30 am)

11 THE PRESIDENT: In the course of the CMC in these two  
12 actions, the Tribunal is determining the parties'  
13 requests for permission to adduce expert evidence. This  
14 is being considered according to the specific issues  
15 which the experts seek to address. The parties are in  
16 agreement as regards to the approach to several of those  
17 issues. However, on a number of issues, questions have  
18 arisen regarding the appropriate discipline and number  
19 of experts that should be permitted.

20 The actions are follow-on damages claims arising  
21 from the EU Commission's decision concerning the trucks  
22 cartel. There are a significant number of such claims  
23 before the Tribunal and these two actions will be heard  
24 together as the second trial of such claims, scheduled  
25 to begin in March 2023.



1           The claimants in the two actions, referred to as  
2           Ryder and Dawsongroup, are companies engaged in the  
3           business of hiring out trucks on short-and long-term  
4           contracts and which, therefore, bought trucks for that  
5           purpose.

6           Many of the same issues arise in both actions.  
7           However, the joint management of the proceedings is  
8           challenging for a number of reasons, including the facts  
9           that Ryder is claiming against five truck manufacturing  
10          groups, whereas Dawsongroup is claiming against only  
11          three of those five groups, and that Ryder and  
12          Dawsongroup have not always adopted the same approach to  
13          questions of expert evidence.

14          The Tribunal's approach to expert evidence seeks to  
15          manage this closely, since it is an area that involves  
16          substantial expense and has significant implications for  
17          the shape and length of the trial.

18          It is clearly important that the expert evidence  
19          should be relevant and proportionate. So far as  
20          possible, duplication of expert evidence should be  
21          avoided. At the same time, the Tribunal, at this stage  
22          of these complex proceedings, is obviously not in  
23          a position to assess the voluminous documentary material  
24          or the facts.

25          This ruling concerns three particular issues

1 involving expert evidence: one, so-called supply  
2 pass-on, that is the extent to which any overcharge on  
3 trucks bought by the claimants was passed on to their  
4 rental customers through higher rental charges than  
5 would have been charged in the counterfactual; two,  
6 so-called resale or used truck pass-on. That is the  
7 extent to which the overcharge was passed on through an  
8 increase in the price the claimants obtained when  
9 eventually disposing of the trucks after use; and three,  
10 loss of volume of rental business by reason of any  
11 supply pass-on and what profits were lost as a result.

12 All of these issues are, of course, contingent on  
13 there being an overcharge in the first place, which the  
14 defendants deny.

15 Supply pass-on.

16 As regards supply pass-on, the defendants for both  
17 claims wish to address this by means of forensic  
18 accounting, using a single joint expert,  
19 Mr Andrew Grantham. Dawsongroup object to this saying  
20 Mr Grantham's method will not address one of the main  
21 aspects of supply pass-on; that is, whether any increase  
22 in rental prices was caused by the overcharge, as  
23 opposed to other factors. To control for those other  
24 factors, Dawsongroup submits that an econometric  
25 regression analysis is appropriate. It, therefore,

1 submits that Mr Grantham's evidence should be excluded  
2 as irrelevant and seeks permission to adduce economic  
3 evidence from an economist, Mr Andrew Harvey.

4         Ryder adopts many of the specific criticisms made by  
5 Dawsongroup of Mr Grantham's approach, although it does  
6 not go as far in urging the Tribunal to refuse to allow  
7 it. But Ryder also wishes to adduce econometric  
8 evidence from an economist, Dr Lawrence Wu, along with  
9 forensic accountancy evidence from Mr Frank Ilett. The  
10 defendants, for their part, strongly reject  
11 Dawsongroup's criticism of Mr Grantham's approach.

12         In some circumstances, the Tribunal may be in  
13 a position well before trial to decide which expert  
14 approach is more appropriate or desirable. In that  
15 event, it can determine which approach is to be adopted  
16 and exclude the alternative. That, obviously, has  
17 benefits. See the Tribunal's ruling regarding expert  
18 evidence for the first trucks trial, *Royal Mail v BT*  
19 *Communications v DAF* [2021] CAT 10.

20         However, here the position is more complicated.  
21 Supply pass-on is potentially a particularly important  
22 issue, since these claimants were in the business, as  
23 I have said, of hiring out trucks, and the purchase of  
24 trucks, therefore, accounted for a significant part of  
25 their costs. We suspect that neither of the two

1 methods, regression analysis and forensic accounting, is  
2 likely to be conclusive, and we find it impossible to  
3 say on the material before us which of the two methods  
4 is likely to produce a more reliable estimate.

5 While we appreciate the criticisms directed by  
6 Dawsongroup and its expert at Mr Grantham's methodology,  
7 we do not consider that we can, at a case management  
8 hearing, determine that it is conceptually flawed such  
9 that it should be excluded. Those criticisms are  
10 matters to be explored at trial.

11 As the European Commission's guidelines on  
12 passing-on make clear, various methods can be used to  
13 estimate pass-on and each has advantages and  
14 disadvantages. As the guidelines also point out,  
15 sometimes several methods may be used.

16 Having given this careful thought, we have come to  
17 the conclusion that this is a case where, given the  
18 importance of the issue and the state of the evidence  
19 before us, it would be inappropriate to prevent either  
20 claimants or defendants from using their preferred  
21 method.

22 The defendants bear the burden of proof on pass-on  
23 and it would be a strong thing to say that they cannot  
24 seek to advance that by their chosen method of forensic  
25 accountancy. That was not the position in the Royal

1 Mail case, to which I have referred, where the issue  
2 arose by way of additional duplicative expert evidence.

3 Thus, here, we give the defendants permission to  
4 call Mr Grantham as their joint expert, using that  
5 method.

6 In the light of that, Ryder will also be able to  
7 rely on the forensic accounting evidence of Mr Ilett,  
8 and we further grant them permission to adduce  
9 econometric evidence from their economist, Dr Wu.

10 As regards to Dawsongroup, they will be able to rely  
11 on the econometric evidence from their economic expert,  
12 Mr Harvey.

13 The defendants will, therefore, have permission to  
14 adduce econometric evidence from a single joint expert  
15 economist. We see no reason to permit each defendant to  
16 adduce separate econometric evidence on supply pass  
17 through. It is for them to decide whether they wish to  
18 do so in the first round or only in response to the  
19 evidence from Dr Wu and Mr Harvey.

20 Finally, Dawsongroup has not sought to adduce  
21 forensic accountancy evidence. It may be that  
22 Mr Harvey, as an economist, will be able to respond by  
23 way of criticism to Mr Grantham's report. If not, or to  
24 the extent that Dawsongroup would wish to adduce  
25 evidence from a forensic accountant, it will need to

1 apply for permission to do so. If such an application  
2 is made, we would hope that it can be determined on the  
3 papers.

4 Resale pass-on.

5 All the defendants wish to address this by evidence  
6 from their economists, so does Dawsongroup. As  
7 clarified, in response to the Tribunal's questions, each  
8 defendant seeks its own expert, as each expert will be  
9 concerned only with the resale of the trucks of that  
10 manufacturer and not trucks purchased from the other  
11 defendants.

12 Ryder also wishes to adduce evidence by way of  
13 correlation analysis from Dr Wu, but Ryder seeks, in  
14 addition, to adduce evidence on resale pass-on from  
15 Mr Ilett. This was explained by Mr Holmes QC for Ryder  
16 on the basis that their evidence will be complementary  
17 and that Mr Ilett's analysis of Ryder's business will  
18 inform Dr Wu's analysis.

19 In his witness statement, Dr Wu says that his  
20 modelling:

21 "... is likely to be enriched by an understanding of  
22 any internal factors that may be relevant to any price  
23 correlation."

24 He says that he would gain that from Mr Ilett's work  
25 and says that both Volvo/Renault's expert, and, it

1           seems, Iveco's expert, will have regard to Ryder's  
2           price-setting practices and other empirical data for the  
3           purposes of informing their correlation analysis.

4           That is likely to be correct. But none of the other  
5           economists sees a need for a separate expert report from  
6           a forensic accountant. No doubt all the economists will  
7           be using a team to assist them. We see no reason why  
8           Dr Wu cannot draw on Mr Ilett's work and use it to  
9           inform his analysis, acquainting himself with the  
10          empirical material on Ryder's business and pricing  
11          practices gathered by Mr Ilett, but that can be  
12          reflected in Dr Wu's report. We are not persuaded that  
13          separate expert evidence from Mr Ilett is necessary or  
14          proportionate.

15          Accordingly, for resale pass through, all the  
16          parties have permission to call evidence from one  
17          economist. No further expert. The expert called by  
18          each defendant may give evidence regarding resale  
19          pass-on of that defendant's trucks.

20          Loss of volume and resulting loss of profit and  
21          a separate loss of profit claim in the Ryder action.

22          On these questions, the defendants seek again to use  
23          a joint expert by way of forensic accountancy evidence  
24          from Mr Grantham. That is not opposed and they have  
25          permission to do so. Dawsongroup seek to address this

1 by evidence from Mr Harvey. As we understand it, that  
2 is not opposed and it has permission to do so.

3 Ryder wants to call evidence from its economist to  
4 inform the calculation of loss of volume by way of  
5 analysis of price elasticity and, for that purpose, to  
6 put in the evidence of Dr Wu, then the assessment of  
7 loss of profit would be carried out by its accountancy  
8 expert, Mr Ilett.

9 Clearly, loss of profit analysis may be addressed by  
10 an accountancy expert, but here we accept that evidence  
11 from Dr Wu, as explained, is distinct and complementary.  
12 Price elasticity of demand is an appropriate approach to  
13 inform the estimate of loss of volume caused by a price  
14 rise. We therefore give permission to Ryder to call  
15 Dr Wu to give evidence on price elasticity. We  
16 therefore also give the defendants permission, if so  
17 advised, to adduce evidence from a single joint expert  
18 economist on price elasticity.

19 I think that concludes the issues of expert evidence  
20 and we, therefore, wish to move on. Mr Palmer, is that  
21 not correct?

22 MR PALMER: Just one point of clarification, if I may.

23 THE PRESIDENT: Yes.

24 MR PALMER: You indicated that the defendants would have  
25 permission to adduce econometric evidence on supply



1 pass-on, given that the two claimants are producing  
2 evidence on supply pass-on from economists, and  
3 indicated that it would be up to them to decide whether  
4 to serve that evidence in the first round or in reply.

5 As I have understood the ruling, it is not the  
6 intention of the Tribunal that the defendants should  
7 have permission to advance two alternative primary  
8 expert analyses, a forensic accounting and an  
9 econometric one, but that the purpose of the permission  
10 granted in this context is in order to reply to the  
11 econometric expert being adduced by the claimants in  
12 respect of supply pass-on.

13 THE PRESIDENT: No, that is not quite correct. I think we  
14 said if they wish only to do so in reply, they may do so  
15 but if they wish to put it forward at the outset, they  
16 can, and that will enable the response to come, on one  
17 view, in a more orderly way because if they put it in in  
18 reply, you then may want to reply to their reply, and  
19 that has implications for the whole timetable, so  
20 sometimes, if they are going to rely on that sort of  
21 evidence, it is actually helpful if they put it in in  
22 the first round. But we are not requiring to do so.  
23 Indeed, this is, as they say -- it is not their primary  
24 desire to do this by econometric evidence, but we have  
25 said that, in this case, we will allow both forms of

1 analysis to be conducted by all parties.

2 MR PALMER: Right. That seems to lead to a slight mismatch  
3 and go beyond what was actually applied for, as we  
4 understand it, by the defendants.

5 THE PRESIDENT: We did not understand that. Indeed, we  
6 understood the submission, I think -- well, I will not  
7 draw my memory of who it came from -- of someone saying  
8 that it is often much more convenient if it is done in  
9 the first round, and that was certainly the submission  
10 that we understood was, if contrary to their primary  
11 position, Dawsongroup and Ryder were able to put in  
12 econometric evidence on supply pass through, so should  
13 the defendants.

14 MR PALMER: Well, yes, it would then follow that the  
15 claimants would have the same liberty to adduce  
16 a forensic accounting analysis on that basis --

17 THE PRESIDENT: That is indeed what Ryder has sought to do,  
18 as we understand it.

19 MR PALMER: Yes.

20 THE PRESIDENT: You have not at the moment, but that is why  
21 we said, if you wish to do so, you should apply and we  
22 hope to deal with that application on the papers.

23 MR PALMER: Thank you. Thank you, sir.

24 THE PRESIDENT: Mr Holmes?

25 MR HOLMES: Sorry, another point of clarification, sir.

1           Given the approach taken to the defendants' supply  
2           pass-on economic evidence, do we need a direction  
3           providing for the defendants to identify a single  
4           economist by a particular date?

5           THE PRESIDENT: That might be sensible. Clearly, they will  
6           have to identify their joint expert. Perhaps you could  
7           reflect -- what I suggest is you reflect over the lunch  
8           adjournment -- the defendants reflect -- what is an  
9           appropriate date that they would suggest and then we  
10          will incorporate that in the order, rather than doing it  
11          on the hoof. They will need to consider how much time  
12          they need. Mr Pickford?

13          MR PICKFORD: Sir, you anticipated the point that I was  
14          going to make, so I put my hands down.

15          THE PRESIDENT: All right. Thank you. Can we then move on.  
16          I think the next item is pleadings and amendment to  
17          defences.

18                   Issue of pleadings and amendment to defences

19          THE PRESIDENT: Can I ask for clarification. It may be that  
20          one can distil this from all the various skeletons.  
21          Which defendants now wish to amend their pleadings? If  
22          we take the Ryder action.

23                   I do not know if, perhaps, Mr Holmes, you will have  
24          noted this. Just take us through it.

25          MR HOLMES: Yes, sir, my understanding is that all of the

1 defendants have pending pleading amendments served in  
2 draft, which are said to particularise their mitigation  
3 plea, and those have not been the subject of consent or  
4 application today.

5 The defendants have also said, in joint  
6 correspondence to the Tribunal, that further amendments  
7 on mitigation may be forthcoming following review of  
8 disclosure given by Ryder in September, and this review  
9 process, the Tribunal may recall, was used by the  
10 defendants to support vacating the July hearing, which  
11 the Tribunal had listed to hear strike-out and summary  
12 judgment applications following the Royal Mail and  
13 Stellantis rulings and, in their joint letter to the  
14 Tribunal of 28 June 2021, the defendants described this  
15 as the most efficient and --

16 THE PRESIDENT: I do remember. That applies to all  
17 defendants?

18 MR HOLMES: Yes, sir.

19 THE PRESIDENT: No one is dissenting from that summary.

20 Right. In the Dawsongroup action is the position the  
21 same, Mr Palmer, for the three defendants that you are  
22 dealing with?

23 MR PALMER: Daimler and Ryder have pleaded the point  
24 already. We are not asking for any further  
25 clarification. If DAF wish to take the point, they

1           would need to plead it. We are not aware of any  
2           application being made by DAF in order to do so.

3           THE PRESIDENT: There is no pending DAF draft pleading?

4           MR PICKFORD: That is correct, sir.

5           THE PRESIDENT: And you are not applying, Mr Pickford, as  
6           things stand? Not seeking to amend?

7           MR PICKFORD: That is correct.

8           THE PRESIDENT: So is that right then that in the  
9           Dawsongroup action, Mr Palmer, there are no applications  
10          to amend at the moment?

11          MR PALMER: That is right, sir.

12          THE PRESIDENT: Right. Well, then let us deal with the  
13          Ryder action. It is really a question of a timetable so  
14          that this can be addressed. I know you have suggested,  
15          Mr Holmes, that this should be done in short order with  
16          a further hearing after 17 November.

17          MR HOLMES: Yes, sir.

18          THE PRESIDENT: The Tribunal has not got availability in  
19          those last weeks of this term. We could -- and I think  
20          it is wise at least to put in a -- schedule a potential  
21          hearing. If it proves that it is unnecessary and it can  
22          be done on the papers, all well and good, but if  
23          a hearing is needed, it takes time, as we all know, to  
24          get that set up with this many parties.

25                 The days when we could hear this are 12 and

1           13 January and no earlier. So that may help in working  
2           back from that. We know that, I think, the relevant  
3           defendants, we have seen from the skeletons, perhaps  
4           all, have suggested that they produce drafts only in  
5           mid December, but we would think that it should be  
6           possible to do that a bit earlier and the timetable we  
7           would have in mind is that the defendants produce their  
8           draft amendments by 3 December and that Ryder responds  
9           by 17 December, and that will give people time, with the  
10          Christmas break, to serve skeletons for a hearing on 12  
11          and 13 January.

12       MR HOLMES: It is very tight, isn't it?

13       THE PRESIDENT: Let us turn first --

14       MR HOLMES: I am sorry, sir, that was not intended as  
15          a submission. I hadn't realised my microphone was live.

16       THE PRESIDENT: Yes. That gives you a fortnight to respond,  
17          but you know -- you have seen some things in draft  
18          already and you can anticipate, to a certain extent,  
19          what is coming, I think.

20                Are you saying that you would find that -- you can  
21          have closer to Christmas, but I think the important  
22          thing is that there should be some time for people to  
23          prepare their skeletons for the hearing on 12 January.

24       MR HOLMES: Excuse me, sir, would you give me just one  
25          moment.

1 THE PRESIDENT: I think you all might need a few moments to  
2 just consider that and take instructions, because it  
3 applies to all the defendants in the Ryder case as well.

4 That will also include, I think, those who are  
5 amending on bundled products as well, which I think does  
6 not include MAN, if my memory is correct, but does  
7 include some of the others. So would you like to all  
8 just take instructions? Shall we then take a ten-minute  
9 break to enable you to do that and return at ten past  
10 11.

11 MR HOLMES: We would be grateful for that. Thank you, sir.  
12 (10.58 am)

13 (A short break)

14 (11.10 am)

15 THE PRESIDENT: Yes, I think defendants first. Mr Harris?

16 MR HARRIS: Sir, yes, those dates are doable at our end for  
17 the defendants' pleading amendments by 3 December,  
18 subject to any -- there may be a specific issue for  
19 a particular defendant -- I will let them raise that,  
20 but in general terms we can review the disclosure that  
21 came through, including some fairly late on  
22 17 September, which is important, in sufficient time to  
23 allow those pleading amendments by the day that you have  
24 suggested.

25 THE PRESIDENT: Yes, Ms Abram?

1 MS ABRAM: Thank you, sir. Two points from Volvo/Renault.

2 First, in respect of the hearing on 12 and 13 January,  
3 of course there is no objection at all to a hearing  
4 being provisionally put in the Tribunal's diary in case  
5 it is required, but may I just note that the costs of  
6 these hearings, I am sure for all parties, are extremely  
7 substantial and so, certainly from our perspective, and  
8 I am sure from the perspective of all parties, we would  
9 be very keen, if possible, for matters to be resolved on  
10 paper, and it does strike us -- and we said, in fact,  
11 repeatedly in correspondence and in skeleton arguments  
12 that we do think that both of the pleading issues should  
13 be susceptible to being resolved on paper and we will be  
14 extremely keen for that to happen, if at all possible.

15 But, of course, no objection, as I say, to a date  
16 being provisionally put in the diary in the meantime.  
17 The second point, I just wanted to raise, as you noted,  
18 sir, there are two pending issues between the defendants  
19 and Ryder on pleadings.

20 The first is the cost reduction litigation on which  
21 you have been focusing primarily, and we do accept there  
22 that the ball is in our court, in the sense that Ryder  
23 has given some relevant disclosure, we are reviewing it,  
24 we are considering whether we want to bring forward any  
25 further draft pleading amendments, so no quibble there.



1           On total value, sir, so far as Volvo is concerned,  
2           we have pleaded our case on total value. We proposed  
3           some further draft amendments back in the summer, which  
4           were genuinely intended to be helpful to Ryder, to  
5           clarify our position. They withheld their consent to  
6           those further draft amendments and it seems to be that  
7           they said that is because they do not understand what  
8           our position is. In my submission, the last day and  
9           a half should mean that, if they did not understand our  
10          position before, they definitely ought to understand it  
11          now.

12          With respect, we really do not understand why Ryder  
13          are not consenting to our amendments on total value. Of  
14          course we cannot make them, but I am really seeking to  
15          put down a marker that we think our case is properly  
16          pleaded. We will have to consider whether to make  
17          a further application to amend if they still do not  
18          consent, but if we have to make that application, we  
19          will be seeking the costs of doing so against them  
20          because we do not think their stance --

21          THE PRESIDENT: You have put down your marker. As regards  
22          the hearing, of course it is music to everyone's ears  
23          that, if a hearing is unnecessary, it can be vacated, as  
24          indeed happened in July, and I think everyone  
25          appreciates the costs. It is also possible that an

1 issue regarding an amendment arises only as regards one  
2 defendant and the others are consented to, in which case  
3 it is not a mega hearing like this one but it is a more  
4 limited hearing with less parties and obviously less  
5 expense. We just do not know at this point.

6 So as far as you are concerned, Mr Holmes, if you  
7 get everything -- some you have had already -- by  
8 3 December, can you respond -- you are not responding by  
9 pleading, as we understand it, you are responding about  
10 whether you consent/object and, if so, why, by  
11 17 December.

12 MR HOLMES: Yes, that is our understanding as well. So to  
13 take it in stages, we are very happy with the date for  
14 the hearing of 12 and 13 January. We are also happy to  
15 set out our position by 17 December. We will be  
16 considering several pleadings made by reference to  
17 disclosure particulars and we, therefore, wonder whether  
18 there is scope to push the date back by one week for the  
19 defendants to bring forward their amendments to  
20 26 November. The disclosure was provided -- the  
21 disclosure relied on by the defendants in the letter  
22 I referred to before from July was given on 3 September.  
23 They have since referred to the 17 September disclosure  
24 but they have had both of those tranches -- will have  
25 had both of those tranches for a considerable period,

1 and Volvo/Renault's skeleton indicates that they have  
2 identified on initial review approximately 600 documents  
3 as relevant to this point, and we say that that review  
4 task can and should be undertaken in good time to bring  
5 forward any amendments by the 26th.

6 THE PRESIDENT: So, Mr Harris.

7 MR HARRIS: I have taken instructions on that, and indeed  
8 Mr Grantham is here with me, and that is not feasible  
9 because of the number of documents and the fact that  
10 some key documents came as late as 17 September, but he  
11 is prepared to prioritise work and shift commitments  
12 with his team and he can do 3 December.

13 THE PRESIDENT: Well, I think, Mr Holmes, 26th, I think, is  
14 asking for a lot. I think I am prepared to make it  
15 1 December, give you an extra couple of days, which I am  
16 sure is possible.

17 MR HOLMES: I am grateful for that.

18 THE PRESIDENT: But no more than that. As we understand it,  
19 if things are consented to, all well and good. As  
20 Ms Abram says, a lot of money will be avoided. If there  
21 are objections which can be dealt with through  
22 correspondence, all well and good. If there is to be  
23 a hearing, as we understand it, this will be objections  
24 on legal grounds. It is not a case where anyone will be  
25 serving evidence. Is that right, Mr Holmes?

1 MR HOLMES: We think that is likely to be correct, sir.  
2 Clearly, evidence would be unusual in relation to the  
3 scope of the pleadings. The only slight hesitation  
4 I have is that Mr Biro has served evidence for  
5 Volvo/Renault in relation to the total value pleading.  
6 I am not going to get into the detail of that, but that  
7 has raised further concerns and has deepened our lack of  
8 understanding, rather than assisting in understanding,  
9 the case that Volvo/Renault has pursued. We will pursue  
10 that in correspondence.

11 THE PRESIDENT: Yes.

12 MR HOLMES: But it may be that short evidence will be  
13 required on that. If that is the case, we would  
14 anticipate serving that well in advance of the process  
15 dates that we have just set out, so that everyone can  
16 see our position in good time, and that should,  
17 therefore, preserve 12 and 13 January as viable dates.

18 THE PRESIDENT: It is very important to preserve those  
19 dates.

20 MR HOLMES: Yes.

21 THE PRESIDENT: As far as evidence, bear in mind we do not  
22 need, or indeed want, evidence from parties' advisers  
23 arguing the case or setting out long histories of what  
24 has happened in correspondence. The correspondence can  
25 be referred to in a skeleton.

1 MR HOLMES: Yes, we have that well in mind, sir, yes.

2 THE PRESIDENT: Because if there is a hearing on -- and we  
3 have put in two days out of caution -- it means that we  
4 need skeleton arguments by the end of Friday, 7th.

5 MR HOLMES: Yes.

6 THE PRESIDENT: By 4 pm on the 7th, and if there is to be  
7 evidence, which, for a pleading amendment, would be  
8 unusual, conscious of the Christmas break and people's  
9 holidays and so on, time for that is quite compressed.

10 MR HOLMES: Yes, sir, we appreciate that, and that is why  
11 I say that, you know, insofar as we can, we would bring  
12 it forward as early as possible and in advance indeed of  
13 the further round of pleading of particulars, which is  
14 the subject of this timetable.

15 THE PRESIDENT: Yes, well, I would think any evidence has to  
16 be in, if there is any, by 23 December.

17 MR HOLMES: Yes. We are content with that.

18 THE PRESIDENT: If any.

19 MR HOLMES: Yes.

20 THE PRESIDENT: But we are not encouraging or inviting  
21 evidence, let me make very clear. Skeletons by 4 pm on  
22 7 January. Ms Abram, you have got your hand up.

23 MS ABRAM: I do. May I just be really clear about where  
24 this point fits into the pleading amendments. So the  
25 point on which Mr Biro has put in evidence is on the

1 total value aspect. This is a point that is already  
2 pleaded in our defence, so we propose some amendments to  
3 clarify and just make sure that what we were saying was  
4 beyond doubt. I really do not see why Ryder would want  
5 to put in evidence in respect of that pleading amendment  
6 application or --

7 THE PRESIDENT: Ms Abram, I will cut you short. I do not  
8 see why either, but I just want to make sure that if,  
9 for some reason, which we are not going to explore now,  
10 there is going to be evidence, it is going to be in in  
11 time so that you have time to do your skeletons. So it  
12 is better to schedule it, with all the provisos I have  
13 given that it would be unusual and I am not encouraging  
14 it, but it is there so we can have an effective hearing,  
15 if it is needed, on those two days in January, and  
16 people can still enjoy their Christmases, which is also  
17 important.

18 MR MALEK: Just one point, which is that I do not want any  
19 party to be ambushed because if that evidence timetable  
20 is 23 December -- that is a hard date and there is not  
21 expected to be any responsive evidence, I would have  
22 thought it might be sensible that a week ahead of that  
23 the parties write to each other confirming whether or  
24 not they wish to have any evidence and, if so, on what  
25 topics.

1 MR HOLMES: That seems sensible.

2 THE PRESIDENT: Yes, yes, as with all Mr Malek's  
3 suggestions, that makes very good sense. We will adopt  
4 that.

5 Yes, Mr Harris.

6 MR HARRIS: It has just been drawn to my attention, sir,  
7 that actually the date in January that is suggested is  
8 a real difficulty for Daimler. In the CMC last week, in  
9 the other trucks matters, 13 January -- was it the  
10 14th? -- was set down as the date for Daimler and Scania  
11 to have litigation regarding the French banking secrecy  
12 law.

13 THE PRESIDENT: That is the 14th?

14 MR HARRIS: That is right, but what it means, therefore, is  
15 that there is a crunch point in January for preparing  
16 for that and for this, which are more or less the same  
17 time, and my instructions are that we would ask for this  
18 issue on the pleadings to be resolved later in January,  
19 as necessary, particularly since there is a real  
20 prospect of it being done on the paper.

21 THE PRESIDENT: No, I think it has got to be those dates.  
22 You have all got large legal teams. We see from the  
23 list of names of lawyers in the confidentiality rings,  
24 which is impressive, shall we say, and certainly not  
25 small. You are going to have to deal with -- if it is

1 the same case -- these different issues that week. We  
2 cannot find dates, there are great problems of listing.  
3 I am sorry, I appreciate the problem. I can tell you  
4 members of the Tribunal are also being squeezed on  
5 having to read things for other cases that are on the  
6 14th.

7 MR MALEK: Mr Harris, just on that point, on the French law  
8 point, I have not seen any draft order which proposes  
9 the timetable of evidence and the dates for exchange of  
10 submissions and stuff like that. You know, you and the  
11 other parties can get together and make sure, insofar as  
12 you can, that all the steps are taken, say, prior to the  
13 Christmas break, and so that by the time you get to the  
14 New Year, that hearing is all prepared. So you will not  
15 have a crunch at the beginning of 2022.

16 MR HARRIS: Sir, I understand that. I have been asked to  
17 submit that another difficulty on Daimler's part is that  
18 I am going to be in trial in the CAT from mid-January  
19 for six weeks on another matter, so that adds to the  
20 difficulties.

21 THE PRESIDENT: That means that you would not be able to  
22 hear this in late January -- to represent Daimler  
23 mid-January or early February because you are doing  
24 another case.

25 MR HARRIS: That is true, but what it would allow is greater



1 leeway with the overlap on the French banking secrecy  
2 point for me to be involved, even though I would not be  
3 physically appearing for the hearing on this matter we  
4 are canvassing now, the pleading amendments, and that is  
5 what we seek. Those are my instructions, to seek more  
6 leeway given that crunch period and these other  
7 commitments.

8 THE PRESIDENT: Well, we will confer for a moment. (Pause)

9 Well, I am sorry, Mr Harris, but we really cannot  
10 assist you, other than for you to pursue the suggestion  
11 of Mr Malek, namely that you can seek with the other  
12 parties to agree dates for any exchanges and skeleton  
13 arguments on the French law issue being heard on  
14 14 January, so that is all served before Christmas.

15 It is mid October, so you have got two months in  
16 which to deal with that so that you can concentrate on  
17 this issue on the 12th and 13th and the week before, but  
18 it will have to be that date.

19 MR HARRIS: Thank you for taking these matters into  
20 consideration. Can I take it, sir, that, with the  
21 Tribunal's approval, we could at least make, in  
22 correspondence with the VSW claimants -- or in my case  
23 the W claimants -- in the other matter, that the  
24 Tribunal strongly encourages there to be agreement found  
25 for a pre-Christmas timetable on the French law issues.

1 I appreciate you are not directing it and they are not  
2 here but, for obvious reasons, it would be beneficial  
3 for my solicitors to be able to say that in the  
4 correspondence.

5 THE PRESIDENT: Well, I think you can say that the Tribunal  
6 has said that you have good reasons for seeking that  
7 timetable and, if it is not agreed, you can apply to the  
8 Tribunal for directions in the VSW matter for exchanges,  
9 putting out that timetable with your reasons, and we  
10 will make directions, if they cannot be agreed, but  
11 obviously hearing from the VSW parties.

12 MR HARRIS: I am very grateful.

13 THE PRESIDENT: That is as far as we can go today.

14 Yes, Mr Hollander. Mr Hollander, you are muted.

15 MR HOLLANDER: Sorry. Can I just ask to clarify Mr Malek's  
16 proposal. If Ryder are not going let us know whether  
17 they accept or make an application in respect of the  
18 draft amendments until the 17th, he was proposing that  
19 everyone lets everybody else know whether they intend to  
20 put in evidence a week before the 23rd, which takes us  
21 to the 16th. I do not think that quite works.

22 I completely understand the suggestion and it seems,  
23 with respect, very sensible, but I do not think the  
24 dates work.

25 MR MALEK: You are right about the dates. We are going to

1           have to make it fewer than one week, are we not, before  
2           the 23rd, so --

3       MR HOLLANDER: One could, I suppose, push Ryder back two  
4           days, so the two weeks is maintained. If we are doing  
5           it by the 1st, they could go on the 15th and, therefore,  
6           something like the 18th or the 19th or something like  
7           that --

8       MR MALEK: That does sound --

9       MR PICKFORD: Or, sir, it could be the same day. I think  
10          the key difficulty, that Mr Hollander rightly  
11          recognises, is that it does not makes sense for one to  
12          come before the other, but there is no reason why Ryder  
13          could not actually do the two together.

14       MR HOLMES: We are happy to do them together. We would  
15          prefer not to push back the date given my previous  
16          submission.

17       THE PRESIDENT: Yes. If you do it together on 17 December  
18          and indicate the date by which your evidence will be  
19          provided, which needs to come very quickly after that.

20       MR HOLMES: I had assumed it would be 23 December.

21       THE PRESIDENT: Yes.

22       MR HOLMES: We would keep that date.

23       THE PRESIDENT: Yes.

24       MR MALEK: Do we not need to have some provision in case the  
25          defendants themselves want to perhaps serve some

1 evidence as well, so we need to have a date for them.  
2 I can see why Ryder should be 17 December, but I would  
3 have thought you would need maybe a couple of days after  
4 that to give the defendants the opportunity to state  
5 whether or not they wish to file evidence as well and,  
6 if so, on what topics.

7 THE PRESIDENT: Do you need, Mr Holmes -- you keep the 17th.  
8 Could you not provide any evidence in fact by the 21st?  
9 The end of that week? I would have thought so.

10 MR HOLMES: That is fine, sir.

11 THE PRESIDENT: Yes. So you will tell people, "Provide it  
12 by 21 December," and, on that basis, if there is to be  
13 evidence, any evidence in reply could come by 4 January.

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

15 MR HOLLANDER: That sounds --

16 THE PRESIDENT: On any view, this evidence is not going to  
17 be voluminous, is it, not on something like a pleading  
18 amendment --

19 MR HOLMES: No, quite.

20 THE PRESIDENT: I mean, there may be none at all. Anything  
21 else on that?

22 Right, then we move on. The next item is the  
23 consolidated datasets. That concerns, I think, only  
24 Ryder and not Dawsongroup.

25

1 Issue of consolidated datasets

2 THE PRESIDENT: You have a draft order dealing with that,  
3 Mr Holmes, which I think we find attached to your  
4 skeleton.

5 MR HOLMES: Yes, sir, we should have flagged this, sir, but  
6 it was, in fact, tweaked in subsequent correspondence to  
7 deal with a small imprecision in the original version  
8 and that is at {R-B/310.1/1}, which we may need to get  
9 up on the Opus system.

10 THE PRESIDENT: Yes, we have not got that.

11 MR HOLMES: Could we show, please, {R-B/310.1/1}. Then if  
12 we could go through it to page 4, please, {R-B/310.1/4}.  
13 You see these are the directions that are proposed. The  
14 only clarification that this order contains is to make  
15 clear that the engagement in relation to the price issue  
16 is only in relation to those trucks where there is no  
17 disagreement in relation to whether they are within or  
18 outside scope. It was to address the concern that was  
19 raised by the defendants, that it would be wasteful of  
20 resources for them to address price where there was an  
21 unresolved question as to scope. But, as we have  
22 explained in correspondence, there are a large number of  
23 trucks, I think about 19,000, in relation to which the  
24 defendants have, as yet, raised no objection as to  
25 scope, and for those, we think it would be helpful to

1 work on a common data set relating to price as well.

2 I am sure that I do not need to press the point.

3 The Tribunal will have well in mind the advantages of  
4 a common data set. It will mean that the experts are  
5 working on the same basis, on a common basis, at trial.  
6 It will make their evidence much easier to compare and  
7 it will also help to flush out any areas of disagreement  
8 so that they can be dealt with well in advance of the  
9 trial by way of factual or expert evidence.

10 THE PRESIDENT: Yes. And as I understood it, no one is  
11 saying that it is a bad idea?

12 MR HOLMES: I think that's right, sir. I think it all comes  
13 down to brass tacks. It comes down to timing and which  
14 directions should be given now. If it assists, sir,  
15 matters have moved on slightly in correspondence even  
16 since this draft order and Travers Smith, DAF's  
17 solicitors, have sent a proposal overnight, which the  
18 Tribunal may be interested to consider and I might  
19 perhaps make a few submissions by reference to that so  
20 you can see where the dividing lines now stand between  
21 the parties. Would that be helpful?

22 THE PRESIDENT: It may. Can I just ask you: I am not  
23 abreast of what has happened overnight, obviously.

24 MR HOLMES: No, of course.

25 THE PRESIDENT: If it is, as it were, a moving feast, is it

1 something -- and we are down to -- with the important  
2 clarification that you have made -- not clarification  
3 actually, revision of the trucks covered by the price  
4 issue, which was a point, as you know, that several of  
5 the defendants raised.

6 MR HOLMES: Yes.

7 THE PRESIDENT: Is this a matter that would perhaps be  
8 advanced by some further discussions today during lunch?  
9 We could put it back to the afternoon, if you think that  
10 is advantageous, but if you think really it is something  
11 that is now right for us to hear submissions on, go  
12 ahead.

13 MR HOLMES: I think, sir, the parties have set out their  
14 positions, and I wonder whether very much progress will  
15 be made in discussion.

16 THE PRESIDENT: Okay. On that basis, let us proceed.

17 You have brought up on the screen the revised  
18 paragraph 6 and, in particular, the revised 6(c). Is  
19 there any other revision in this draft from the one we  
20 have with your skeleton?

21 MR HOLMES: No, sir, otherwise, the dates are as set out in  
22 the skeleton argument and the stages.

23 THE PRESIDENT: Right.

24 MR HARRIS: I am so sorry to interrupt you and Mr Holmes.

25 Could I ask that we do put this back a short while, to

1 later in the day, possibly to straight after lunch. The  
2 reason for that is that I have received some  
3 instructions on this matter during the course of the  
4 morning and I need, as a minimum, five minutes to take  
5 instructions, and it may be that that could more  
6 conveniently be done over the short adjournment and we  
7 come back at two. If progress can be made on timings in  
8 that period, then that would be a double benefit.

9 THE PRESIDENT: Yes.

10 MR HARRIS: So in other words, I need at least five minutes,  
11 come what may. I am so sorry about that.

12 MR HOLMES: I think the order in which we take points does  
13 not matter, sir. We can certainly come back to this in  
14 the afternoon, if that would assist Mr Harris to take  
15 instructions.

16 THE PRESIDENT: Let us do that, and it may be that some of  
17 the issues narrow.

18 MR HOLLANDER: I am not sure how many further issues there  
19 are in fact. There is the issue of DS Smith, which I do  
20 not think will take all that long. It may or may not  
21 take you until the short adjournment. But anyway.

22 THE PRESIDENT: I think you are an optimist, Mr Hollander.

23 Let us turn to DS Smith.

24 Issue of DS Smith

25 THE PRESIDENT: We will come back to this after lunch.



1           So DS Smith. First of all, can I just clarify, the  
2           confidentiality -- somebody is not muted. Could you  
3           mute, please, because we are getting feedback.

4           Confidentiality ring orders for both sets of  
5           proceedings with DS Smith, are they now agreed,  
6           Mr Gregory?

7           MR GREGORY: In substance, yes, I think both agreed. You  
8           have got a draft consent order for the arrangements  
9           between Ryder and DS Smith, which I think was sent to  
10          you on Friday. In relation to Dawsongroup, Dawsongroup  
11          and DS Smith have agreed equivalent arrangements. All  
12          that we are waiting for in relation to that is, I think,  
13          for Dawsongroup to provide the names of people for the  
14          annex, and I think the defendants have yet formally to  
15          confirm their agreement with the text, although, as it  
16          is equivalent to the Ryder/DS Smith text, I am hoping  
17          that will be a formality.

18          THE PRESIDENT: Right, so you are not asking us to do  
19          anything on the CROs at this hearing?

20          MR GREGORY: No, hopefully, you will have draft consent  
21          orders which have been agreed by all the parties in  
22          short order.

23          THE PRESIDENT: Yes. I would anticipate there will not be  
24          any issue on the draft order in Ryder that has been  
25          consented to.

1           Right, then there is disclosure. We have a consent  
2           order on disclosure, I think, at DS2. Is it --

3           MR GREGORY: I think 177 is the draft version.

4           THE PRESIDENT: Yes.

5           MR GREGORY: The Tribunal has perhaps yesterday received  
6           a clean version as well. So that has been agreed as  
7           between DS Smith and the defendants. It proposes that  
8           DS Smith disclosure will be given by 14 January,  
9           obviously in relation to pass-on.

10           Our skeleton mentioned that there was a question  
11           about whether the order should apply to MAN SE, which  
12           has been involved in a merger, as you noted briefly  
13           yesterday, and that issue has been resolved and it is  
14           agreed that this particular order, which imposes  
15           obligations on DS Smith, should not apply to MAN SE. So  
16           you now have a draft order which is agreed between  
17           DS Smith and the defendants.

18           There is then, obviously, a separate question about  
19           substituting MAN SE in the DS Smith and Ryder claims as  
20           a whole, but I understand that is going to be addressed  
21           in correspondence.

22           THE PRESIDENT: Yes. We have just been handed the order  
23           that came yesterday, so we will look at that over the  
24           short adjournment.

25           So then we turn to the substantive question, which

1 is your client's participation and evidence in this  
2 trial.

3 As far as, if we take perhaps the most  
4 straightforward aspect, which is the stage 3, the Ryder  
5 claim, on factual evidence, I think what is being  
6 proposed is that you will provide your factual evidence  
7 on pass through on the same date as the other parties  
8 and that is now accepted. Is that right, Mr Gregory?

9 MR GREGORY: Yes, I think that is right.

10 THE PRESIDENT: As regards expert evidence, you have  
11 suggested that it should come on 31 October of next  
12 year -- that is to say after the others. The other  
13 expert evidence, I think, comes on 19 September, so you  
14 are suggesting that it is six weeks later. You  
15 explained the logic for that in your skeleton argument  
16 at paragraph 47, I think, and onwards, on the basis that  
17 it may overlap with the defendants and might, therefore,  
18 reduce the scope of your expert evidence if  
19 Dr Veljanovski could see the defendants' experts' report  
20 first.

21 Is that right?

22 MR GREGORY: Yes, that is right. We do think there would be  
23 some potential cost savings, both for us and also the  
24 other parties, and, obviously, potential time savings  
25 for the Tribunal, if our initial expert report could be

1           delayed, but we understand that the effect of that will  
2           be to reduce the time available to the other parties to  
3           respond and that, obviously, needs to be taken account  
4           of as well. On balance, we think a delay of a few weeks  
5           would be the better course, but we are in the Tribunal's  
6           hands about that. You obviously understand the costs  
7           and the benefits of the different approaches.

8           THE PRESIDENT: There will, on pass through, as I recall --  
9           remind myself on the order -- there will be an expert  
10          meeting before reports are exchanged. Is that right?

11          MR GREGORY: Yes. I think my note of the timetable has  
12          expert discussions by 15 July 2022.

13          THE PRESIDENT: Yes. So Dr Veljanovski will know what  
14          approach is being taken by the other experts. He will  
15          know what they are going to do -- in this case the  
16          defendants' experts it will be -- and to what extent --  
17          there is nothing to stop them exchanging -- him and the  
18          defendants' experts exchanging drafts. We will fix  
19          a time for the experts to meet but they are obviously at  
20          liberty to talk to each other at other times in addition  
21          and apprise themselves of what they are going to say and  
22          whether he needs to repeat it or can say, "I understand  
23          this is going to be discussed in detail in the report of  
24          Dr X, so I shall not expand upon it here," and so on.

25                 So I think it may overcomplicate it and squeeze

1           Ryder on time if it comes later, so I think, on balance,  
2           subject to my colleagues, it is probably better if you  
3           do it also on 19 September.

4           MR GREGORY: Fine, we are content with that. You know, we  
5           floated the option of delaying because, you know, it is  
6           repeatedly being emphasised we should try and minimise  
7           duplication where possible, and we thought that was one  
8           way in which that could be achieved, but we appreciate  
9           there are other considerations as well.

10          THE PRESIDENT: Yes, I think that is certainly the wish of  
11          Mr Holmes' clients, and indeed of some of the  
12          defendants.

13                 Right. So that is expert evidence. Now the written  
14          openings.

15          MR HOLLANDER: Sorry, just before we leave DS --

16          THE PRESIDENT: Yes.

17          MR HOLLANDER: Just a point which should go in the order to  
18          clarify. The wording of the DS Smith draft order in  
19          terms of the reply report is unlimited. It just ought  
20          to tie in with the order the Tribunal made on the May  
21          hearing as to the limited nature of the evidence which  
22          DS Smith are allowed to give. I suspect that is not  
23          controversial, but it seemed ambiguous in the draft  
24          order and that just needs to be made clear.

25          THE PRESIDENT: Yes, thank you for raising that,

1           Mr Hollander. We have not really commented on the draft  
2           order. This is at --

3           MR HOLLANDER: I think it is particularly ambiguous at  
4           paragraph 6, which is the reply report. I mean, the  
5           wording --

6           THE PRESIDENT: Yes.

7           MR HOLLANDER: The wording can be done very easily, just to  
8           reflect the reply report but I just think that needs to  
9           be made clear.

10          MR GREGORY: We are very happy for the order to specify that  
11          the expert evidence of ours will be limited to pass-on.

12          THE PRESIDENT: Yes. Yes, thank you. So be it. It shall  
13          be.

14                 Written openings. The overcharge, which is, of  
15          course -- this is in stage 1, so that affects also  
16          Dawsongroup, where DS Smith is only an intervenor, you  
17          have suggested 24 February and I think Ryder agrees with  
18          that. What is the date for written openings for  
19          everybody else for the trial?

20          MR GREGORY: The claimants' openings are due on 17 February  
21          and the defendants' openings are due on 3 March. So the  
22          date that we suggested for our opening submissions was  
23          in the middle, one week after the claimants and one week  
24          before the defendants.

25          THE PRESIDENT: Yes.

1 MR GREGORY: The defendants have come back with a suggestion  
2 that our intervener submissions on overcharge should  
3 come at the same time as the claimants' opening  
4 submissions and our submissions on pass-on should come  
5 at the same time as the defendants' opening submissions,  
6 so we should have split opening submissions.

7 In relation to that, we do not really mind when our  
8 submissions on pass-on come, whether they come on the  
9 24th, as we suggested, or 3 March, as the defendants  
10 have suggested. What we do think would be sensible  
11 would be for our opening submissions on overcharge,  
12 where we are intervener and under an obligation not to  
13 duplicate the submissions of the claimants, for those to  
14 come after the opening submissions of the claimants, for  
15 the simple reason that it is very difficult to avoid  
16 duplicating someone if you do not know what they are  
17 saying.

18 THE PRESIDENT: Yes. Dawsongroup -- I am not clear if they  
19 have expressed a view on this. Mr Palmer, do you have  
20 instructions on that?

21 MR PALMER: We prefer 24 February for that, for the reasons  
22 that Mr Gregory has just given.

23 THE PRESIDENT: So you agree -- yes.

24 MR PALMER: Overcharge, yes.

25 THE PRESIDENT: Yes. So what is the position of the

1 defendants with regard to this 24 February suggestion?

2 MR HOLLANDER: Well, I think we would like to see the  
3 submissions on everything other than pass-on; in other  
4 words, their role as interveners, where they are in the  
5 same position as claimants, at the same time as the  
6 claimants' submissions on the 17th. In a sense, it is  
7 a point quite similar to the point we just dealt with on  
8 expert reports. It is actually much more sensible if  
9 those submissions appear at the same time, and therefore  
10 the defendants are able to consider them all in one go,  
11 rather than having two lots, and whilst DS Smith say  
12 there is sufficient for them to do otherwise, it is  
13 inefficient for the defendants.

14 So we propose that they produce their opening  
15 submissions as intervener on the 17th. When they  
16 produced their submissions on pass-on, we were content  
17 that they did it at the same time as the defendants,  
18 namely 3 March. Whether that is done on 24th or  
19 3 March, I do not think we have a strong view, but that  
20 is what we proposed, and that -- with respect, there  
21 seemed to be a logic to that. It aligns them with their  
22 different roles as intervener and as a party.

23 THE PRESIDENT: Yes. Do you want to say anything in  
24 response, Mr Gregory? I think we understand the  
25 argument.



1 MR GREGORY: Yes, simply that -- I mean, the defendants have  
2 obviously taken the position they have, but if our  
3 opening submissions on overcharge do come after the  
4 submissions of the other claimants, then it is very  
5 probable that we will say less about it and there will  
6 be less for the defendants to respond to and to  
7 consider.

8 THE PRESIDENT: Yes. Thank you. Well, we will take just  
9 five minutes to consider that. We will come back at  
10 12.00 pm.

11 (11.53 am)

12 (A short break)

13 (12.00 pm)

14 THE PRESIDENT: We can see that there is a benefit to the  
15 parties in having the DS Smith opening on pass-on on  
16 24 February because it means the defendants can take  
17 that into account when putting their openings on  
18 pass-on, and it gives them that time to do so.

19 On the same logic we think there is some benefit for  
20 DS Smith to see the claimants' opening on overcharge.  
21 We think putting it to 24 February is a little bit late,  
22 given 3 March for the defendants and, as 17 February is  
23 a Friday, we will direct that the DS Smith opening on  
24 overcharge will come by 4 pm on Tuesday, 21 February.  
25 We are sure that the defendants will have enough to do

1 in the intermediate days in digesting the claimants'  
2 opening and will not be prejudiced if the DS Smith  
3 opening comes those few days later. That will enable  
4 the DS Smith legal team to finalise their opening in the  
5 light of the final version of the claimants' opening  
6 and, as I said earlier, there can, of course, be  
7 discussions voluntarily to clarify between legal teams  
8 what is going to be covered, to try and avoid  
9 duplication.

10 We then move to the structure of the stages of the  
11 trial.

12 Stage 3 is clear. The Ryder claim on pass-on.  
13 Stage 1 is clear, where DS Smith is an intervener.  
14 Stage 2 is the Dawsongroup claim regarding issues of  
15 pass-on. As we understand it but, please, confirm,  
16 Mr Gregory, DS Smith's position is that you do not wish  
17 to take part in stage 2 and are content to be bound by  
18 the outcome of stage 2 as regards such of your trucks as  
19 were rented from Dawsongroup, which is very limited. Is  
20 that correct?

21 MR GREGORY: Yes, that is correct. We are certainly not  
22 going to be submitting any sort of evidence that relates  
23 specifically to the 17 or whatever trucks it happens to  
24 be. I think the issue between us and Dawsongroup at the  
25 moment -- and it also, you know, has implications for

1 the Tribunal and the other parties -- is whether what we  
2 say primarily in respect of Ryder is capable of being  
3 taken into account by the Tribunal when it reaches its  
4 findings in respect of Dawsongroup pass-on, simply  
5 because, regardless of how the trial is structured, some  
6 of the evidence relating to Ryder pass-on may be  
7 relevant because there are the same or similar issues in  
8 respect of the Dawsongroup pass-on.

9 THE PRESIDENT: It is, in a sense, a management and  
10 structural issue because, if Dawsongroup is not present  
11 in stage 2 of the trial, where that evidence is given,  
12 it cannot be taken into account as against them. It is  
13 also then slightly problematic because, of course, the  
14 Tribunal has heard that evidence, although I think any  
15 judicial Tribunal can say it does not apply as against  
16 this party. But there will be, as we understand it, and  
17 confirmed by implications of what you have just said,  
18 certain sort of common evidence about the truck rental  
19 market, and that was what was ventilated when the  
20 suggestion was put forward, I think by the Tribunal,  
21 that there might be a stage 1B, where more generic  
22 issues about the rental market are heard, so that all  
23 parties, Dawsongroup, Ryder, DS Smith, and, of course,  
24 the defendants, are there.

25 I think that is probably the only way in which that

1 can fairly be done. It means that one has to consider  
2 quite carefully, well, what is going to be heard in  
3 stage 1B and to draw a line that is practical. Our  
4 present feeling is that we are not in a position to do  
5 that today but it does increasingly seem that that is  
6 the way to go forward, and that there ought to be  
7 a further CMC at some point, bearing in mind that trial  
8 is not until the spring of 2023, when that is gone into  
9 in some detail and everybody has had a chance to think  
10 about it.

11 The question is when that should be. I do not think  
12 anyone is suggesting that we can do that today.

13 MR GREGORY: No.

14 THE PRESIDENT: But we do see the force of what you have  
15 said and that to exclude that sort of evidence from the  
16 Dawsongroup trial would be artificial and have  
17 unfortunate implications because, clearly, there has got  
18 to be a judgment that is consistent as between those  
19 issues as applied to Ryder and Dawsongroup and that  
20 means Dawsongroup must have the opportunity to hear that  
21 evidence and challenge it as it thinks appropriate.

22 So one is increasingly thinking in terms of the  
23 stage 1B. The question is when is the right time for  
24 that to be explored properly. It may, we appreciate,  
25 have some relevance to the way the factual evidence is

1 put forward but, equally, it will be assisted by seeing  
2 what the factual evidence is. So one could do it before  
3 factual witnesses are exchanged or one could do it  
4 afterwards, with the possible consequence that some  
5 witness statements may have to be redrafted and split  
6 into two parts, as it were. But that would probably be  
7 just a slight revising exercise; it would not mean  
8 actually having new evidence, it is just putting it in  
9 a way that these paragraphs are redacted from the stage  
10 1B part of the trial.

11 So I think it would help us to hear from you and  
12 then the other parties as to when you think is the right  
13 time for the Tribunal to consider a stage 1B and  
14 specifically what it should comprise.

15 MR GREGORY: I think just responding to the comments you  
16 made just now, specifically in relation to the factual  
17 witness evidence, it may not even be necessary for those  
18 to be revised. It may simply be a question of an order  
19 specifying that certain parts of the statement are not  
20 relevant to the Dawsongroup proceedings. We are not  
21 proposing, I think, to lead any material factual  
22 evidence relating specifically to pass-on by  
23 Dawsongroup. It is simply that we will be putting in  
24 some factual evidence relating to the UK leasing market  
25 as a whole, and I think Dawsongroup's point is whether

1           that more general factual evidence should be capable of  
2           being taken into account by the Tribunal in relation to  
3           Dawsongroup pass-on.

4           On the more general question of when these issues  
5           will be sufficiently clear for the Tribunal to take  
6           a judgment, for my part I would say that is definitely  
7           not going to be the case before the factual witness  
8           statements and, in fact, the reality is that most of the  
9           arguments in relation to pass-on are going take place in  
10          the expert reports. You can obviously have factual  
11          evidence in itself, but the key issue will be the extent  
12          to which and how the experts are going to incorporate  
13          the factual evidence, both from the witness statements  
14          and the documents, into their pass-on analyses, so while  
15          it obviously would involve a delay in determining this  
16          issue, I would have thought the most appropriate time to  
17          do that is after the initial expert reports have been  
18          served because by that stage I think these issues should  
19          be much clearer.

20        THE PRESIDENT: So that would be some time in, say, October  
21          of next year --

22        MR GREGORY: Yes.

23        THE PRESIDENT: The initial reports, we have just  
24          determined, all come on 19 September, so in late October  
25          or thereabouts? Early in the Michaelmas term 2022?

1 MR GREGORY: Yes.

2 THE PRESIDENT: Yes. Mr Palmer first because this  
3 particularly concerns your clients.

4 MR PALMER: Yes, it does concern us, sir, and we are  
5 concerned at the moment we are looking through this  
6 through the wrong end of the telescope, if I can put it  
7 that way. We are concerned about the scope of the  
8 factual and, in particular, expert evidence, which  
9 DS Smith is permitted to serve in the first place.  
10 I just want to unpack three broad themes of my  
11 submission.

12 The first one I know the Tribunal has well in mind  
13 already, proportionality is the key here. We have set  
14 out in our paragraph 33 of our skeleton argument just  
15 how limited the overlap with DS Smith is here. It is 15  
16 trucks we are talking about, eight of which were hired  
17 for less than two months and four of those for less than  
18 one week, and so if one analyses those trucks in terms  
19 of the five-year contracts on which DS Smith bases the  
20 valuation of its claim, we are talking about the  
21 equivalent of less than two trucks.

22 We are also talking about costs being incurred, so  
23 far, by my clients, in dealing with DS Smith, already  
24 exceeding £75,000 more than the full amount of  
25 overcharge in respect of those trucks, even if DS Smith

1 were to succeed in showing 100 per cent pass-on in  
2 respect of those.

3 So any other cost we incur is already  
4 disproportionate to the value of the claim and, of  
5 course, these costs, given DS Smith is an intervener in  
6 our claim, we may not even be able to recover. So it is  
7 not just a question of saying this is disproportionate,  
8 it has got to the point already where it is just unjust.

9 We are litigating with DS Smith, apparently, two  
10 trucks at hugely disproportionate cost when, in terms of  
11 their overall value, in the context of this claim, it is  
12 closer to the stuff of the small claims court than it is  
13 to a six-month multiparty trial before the Competition  
14 Appeal Tribunal. That is the first thing that really  
15 motivates our approach. That is the first thing.

16 The second thing is this: obviously, the Tribunal  
17 has left open a stage 1B, and nothing has been applied  
18 for yet, and we totally agree now is not the right time  
19 to identify what should or should not be heard in any  
20 stage 1B which is ordered in due course.

21 But what is the right time is to decide what expert  
22 evidence in respect of Dawsongroup DS Smith should be  
23 permitted to lead in the first place. We have heard  
24 repeated assurances in writing and orally from  
25 Mr Gregory that they are not proposing any material



1 factual evidence and they are not proposing to focus on  
2 Dawsongroup in their expert evidence. But that,  
3 firstly, already goes too far and, secondly, it does not  
4 reflect the terms of the order which they are actually  
5 seeking, either in their expert proposals put forward to  
6 the Tribunal, 15 September, or in their more recent  
7 draft order.

8 If I can just show you what is in the expert  
9 proposal because it does show our concern here. It can  
10 come up on Opus, it is at {DG-C1/IC32/630}. It is in  
11 the confidentiality bundle but it is not confidential.

12 THE PRESIDENT: This is a letter, is it?

13 MR PALMER: This is the letter to the Tribunal -- if we go  
14 back to the preceding page, if you want to place it in  
15 context. This is 15 September to the Tribunal. This  
16 followed the Tribunal's order that the parties serve  
17 their expert proposals on the Tribunal on that date.

18 THE PRESIDENT: Yes.

19 MR PALMER: And the relevant proposal is in paragraph 3,  
20 which is on the next page, 630, the top of the page --  
21 top middle, paragraph 3. You will see there it is  
22 written that:

23 "Dr Veljanovski's expert evidence will focus on  
24 pass-on by Ryder, and pass-on issues that are common to  
25 the Ryder and Dawsongroup claims."

1           There is then some suggestion about the costs plus  
2 approach applied at least in particular by Ryder, it is  
3 said, and:

4           "Subject to completion of our investigation of the  
5 documentation, we presently anticipate that  
6 Dr Veljanovski will focus on two main areas: (i)  
7 preparation of a report on pass through that looks at  
8 the position from a costs and margins analysis of the  
9 respective party's accounting and documentary evidence  
10 ..."

11           Pausing there, we read "respective parties" meaning  
12 both Ryder and Dawsongroup. We simply say, given they  
13 are not participating in stage 2 and given the tiny  
14 number of trucks, it is quite inappropriate to be doing  
15 a costs and margin analysis of Dawsongroup's accounting  
16 and documentary evidence, and that is not the sort of  
17 common generic issue that the Tribunal has in mind to  
18 deal with in stage 1B either. Then (ii):

19           "... an evaluation of the approach taken by experts  
20 for either Ryder or Dawsongroup on pass-on issues ..."

21           It is there said "and overcharge". I think  
22 overcharge is not now pursued. We interpret that as a  
23 responsive expert report to our expert evidence on  
24 pass-on, again criticising the detail of Dawsongroup  
25 evidence.

1           So neither of those are framed around common generic  
2 issues. Our submission is that sort of expert evidence  
3 is clearly disproportionate insofar as it concerns  
4 Dawsongroup. It may well be entirely appropriate to  
5 Ryder, of course, given DS Smith's full participation in  
6 stage 3. Obviously, you would not expect me to raise  
7 any objection about that and I do not, but as far as  
8 Dawsongroup is concerned, it is entirely inappropriate.  
9 If such evidence were led, well, then we would have to  
10 be entitled to cross-examine it and challenge it, and  
11 that is not our understanding of the point of common  
12 generic issues to be dealt with in stage 1B.

13           We note there is no distinction there between the  
14 approach to be taken with Ryder and with Dawsongroup,  
15 despite what is said about where they will focus. The  
16 point about focus is not enough. They just have no  
17 business, we say, doing this exercise in relation to  
18 Dawsongroup at all.

19           That is our second main theme. The third and final  
20 main theme about this is a point about how do you deal  
21 with common issues that do arise. The point we make is  
22 that it is certainly not the time now to say whether any  
23 common issues have arisen. Obviously, if expert  
24 evidence is properly focused on Ryder but includes,  
25 perfectly legitimately, points taken against Ryder which

1 relate to generic points about how the leasehold market  
2 works -- again, I have no objection to that sort of  
3 evidence being led in the context of their evidence to  
4 participate in Ryder -- it might well be that, insofar  
5 as that evidence is disclosed to us in the first  
6 place -- and the Tribunal will be aware we are in  
7 a different confidentiality ring from Ryder, of course.  
8 Insofar as that is disclosed to us and insofar as it is  
9 generic, there may be points which we would want to take  
10 issue with and say, well, that does not apply to  
11 Dawsongroup for the following reasons or insofar as that  
12 is said to be a general picture of the leasing market as  
13 a whole, we disagree.

14 So there may be points adduced primarily against  
15 Ryder but which we would want to make submissions to or  
16 challenge insofar as it could be applied to us by the  
17 Tribunal.

18 That is the point at which a common issue arises.  
19 When we put it in issue, then it becomes common to  
20 Dawsongroup as well, but what DS Smith are trying to do  
21 is have permission at this stage -- we can go to their  
22 draft directions, which refer to permission to adduce  
23 evidence on what they call the common issues. It is not  
24 clear what those common issues will be, and it will not  
25 be clear until we have got to that stage of looking at

1 the evidence aimed at Ryder and saying, well, these bits  
2 of it could be applied to us, if right, and we want to  
3 challenge that.

4 So our submission is, both in respect of expert  
5 evidence and in respect of factual evidence, that the  
6 only permission that DS Smith should be given at this  
7 stage is to adduce factual and expert evidence in  
8 respect of the Ryder pass-on issues to be heard in stage  
9 3. Secondly, then, to the extent that it turns on later  
10 on down the line that includes generic points about how  
11 the leasing market is said to work relevant to Ryder,  
12 that it may be then that Dawsongroup will wish to join  
13 issue, if it affects the Dawsongroup claim on those  
14 points. If so, they should be identified at that stage  
15 as a common issue suitable for resolution in stage 1B,  
16 but at the moment, that is speculative and it is only  
17 a possibility and the existence of that future  
18 possibility should not be treated as a basis to allow  
19 DS Smith's expert to conduct a full analysis of  
20 Dawsongroup's pass-on analysis or critique Dawsongroup's  
21 evidence on all or any pass-on issue or unilaterally for  
22 them to decide that there are what they call common  
23 issues at this stage because, inevitably, anything  
24 Dawsongroup-specific, we say is by definition  
25 disproportionate. So we resist any order allowing

1 permission for evidence on "common issues" at this  
2 stage, when they have not been identified, we do not  
3 know what they are, and it would give carte blanche to  
4 DS Smith.

5 So that is our point. The order actually applied  
6 for goes beyond the various assurances given in  
7 DS Smith's skeleton referring to focus, or, as  
8 Mr Gregory has put it now, we are not proposing to any  
9 material factual evidence specific to Dawsongroup.  
10 Well, there should not be any if they are not  
11 participating in stage 2, and we will deal with any  
12 common generic leasing market points when they arise, if  
13 they arise, and to the extent, if at all, they actually  
14 affect Dawsongroup.

15 That is our position. I hope that is clear.

16 THE PRESIDENT: Yes, thank you. Just one gloss on what you  
17 have said. You said generic issues to the extent that  
18 Dawsongroup may wish to join issue with them. I mean,  
19 it would be equally, would it not, to the extent that  
20 the defendants to the Dawsongroup claim would wish to  
21 adopt them as against Dawsongroup, because the  
22 defendants to your claim may say, "We wish to rely on  
23 that evidence."

24 MR PALMER: Yes.

25 THE PRESIDENT: As against Dawsongroup, and that will also,

1           indeed, give you some cost protection. If the defendant  
2           is saying, "We are going to rely on that" --

3 MR PALMER: Yes.

4 THE PRESIDENT: -- it would apply there as well.

5 MR PALMER: Yes, I entirely accept that.

6 THE PRESIDENT: Yes.

7 MR MALEK: Can I just raise one point, which is that the  
8           Fieldfisher letter of 21 September, under expert  
9           evidence, says:

10                 "Dr Veljanovski's reply report, in which he will  
11                 respond on the expert evidence of the other parties on  
12                 pass-on and potentially also on overcharge."

13                 So are we going to be getting expert evidence from  
14                 Mr Veljanovski?

15 MR PALMER: That has been dropped, I think. I think  
16                 DS Smith has since explained that that was said in  
17                 error.

18 MR MALEK: That is dropped, so I can just cross that off?

19                 Okay, that is fine, thank you very much.

20 THE PRESIDENT: Before we ask for Mr Gregory to respond, do  
21                 any of the defendants want to make observations on what  
22                 we have heard?

23 MR HOLLANDER: I do not want to respond to what Mr Palmer  
24                 said because Iveco are not involved in Dawsongroup. Can  
25                 I just say more generally, we have not considered -- the

1 question of exactly the structure of the trial, there  
2 are obviously some quite heavy questions to be  
3 determined, and exactly when they should be determined,  
4 I think, is very much up for debate and probably -- I am  
5 sure it would be too early prior to witness statements,  
6 and I actually think that there may be quite a lot to be  
7 said in what my learned friend Mr Gregory said, that the  
8 appropriate time is something like October, but that has  
9 not really been the subject of discussion.

10 It is obviously too early now to consider what 1B  
11 might involve, and I think the Tribunal recognises that.

12 Another possibility for consideration -- and I am  
13 not suggesting that anyone deals with this today at all  
14 but I just raise it -- is as to whether Ryder should be  
15 heard within the trial before the Dawson part of the  
16 trial, given that everybody is involved in Ryder and it  
17 is a bigger claim. It might make more sense, but I just  
18 simply mention that now and that is perhaps a matter for  
19 the future.

20 But I think the chairman suggested that one  
21 possibility might be considering all this before witness  
22 statements submissions. I am sure we would say that was  
23 significantly too early. Exactly when the date should  
24 be, I think is a matter for consideration.

25 THE PRESIDENT: Yes, thank you. Any other defendant before



1           we go to Mr Holmes and Mr Gregory? Mr Holmes?

2           MR HOLMES: Simply to say that we are also attracted by the  
3           suggestion of a CMC after first round expert reports in  
4           the autumn, at which questions of the scope of 1B, and  
5           perhaps other matters relating to the structure of the  
6           trial and the order in which particular parts take  
7           place, could be canvassed.

8           THE PRESIDENT: Yes.

9           Well, I think, subject to the views of my  
10          colleagues, that certainly seems sensible, and I was  
11          just floating various alternatives to see how you felt.

12          So I think we can agree and direct that there will  
13          be a CMC in the first part of the Michaelmas term 2022,  
14          to consider the structure of the trial, including  
15          whether the Ryder stage should precede the Dawsongroup  
16          stage. There was no magic in the order that we  
17          specified previously. That can explore, in the light of  
18          the evidence, as it stands then, whether there are  
19          common issues.

20          What does have to be addressed today is the scope of  
21          the DS Smith expert evidence and the points raised by  
22          Mr Palmer, so, Mr Gregory, would you like to address  
23          those on the basis that, as regards the question of  
24          whether there is a 1B, what it comprises and so on is  
25          going to be determined in about a year's time.

1 MR HOLLANDER: Yes. I am so sorry, before Mr Gregory  
2 responds, can I just mention also there is a point --  
3 I think my learned friend Mr Gregory and I now agree on  
4 the wording of paragraph 2 of the draft order. Sorry,  
5 I only wanted to say this because I know he is about to  
6 reply. I think he and I -- I think he has agreed that,  
7 as relation to the Ryder claim, that the appropriate  
8 wording is to take out everything in (a) after the words  
9 "Trial 2" in the first line until the end of (iii).

10 THE PRESIDENT: So that it reads:

11 "Identification of the DS Smith value of commerce  
12 for the purpose of Trial 2."

13 MR HOLLANDER: And then you delete everything until leaving  
14 in (b) and (c).

15 THE PRESIDENT: Yes. So it does not go into that detail?

16 MR HOLLANDER: Yes, that is right. Sorry, I apologise for  
17 interrupting, but I just thought it perhaps better to  
18 get in before Mr Gregory deals with the other matters.

19 THE PRESIDENT: Yes. Well, at the moment, your draft order,  
20 Mr Gregory, with that amendment, as regards (b), is  
21 limited to pass-on by Ryder and generic pass-on issues  
22 but then your (c) goes to, much more generally, the  
23 approach taken by Dawsongroup experts, and the letter  
24 that we are shown indeed seems to go a bit wider still,  
25 hence Mr Palmer's concerns.

1 MR GREGORY: Yes, there was subsequent correspondence to  
2 that letter and, on 4 October, we wrote a letter stating  
3 explicitly that Dr Veljanovski's intention is that his  
4 costs and margins analysis will focus on Ryder's  
5 pass-on. So we made it clear before the skeleton  
6 arguments that he was not intending to conduct a costs  
7 and margin analysis in relation to Dawsongroup pass-on.

8 THE PRESIDENT: Yes.

9 MR GREGORY: We were slightly surprised to see the  
10 paragraphs in Dawsongroup's skeleton arguing against  
11 that.

12 THE PRESIDENT: Just to be absolutely clear -- I am not sure  
13 it is not used as an ambiguous term, but when you say  
14 costs and margins analysis will focus on Ryder, what you  
15 mean is it will concern Ryder?

16 MR GREGORY: Yes, I think the only reason we are sort of  
17 using that language is points that we make in relation  
18 to Ryder may be of more general relevance in relation to  
19 leasing pass-on.

20 THE PRESIDENT: That I understand, but you are not going to  
21 do a costs and margin analysis concerning Dawsongroup?

22 MR GREGORY: Absolutely not.

23 THE PRESIDENT: Which is, I think, the concern of  
24 Mr Palmer's clients.

25 Right, then what about the evaluation of the

1 approach taken by the Dawsongroup experts?

2 MR GREGORY: Yes, again, we have no intention of engaging  
3 with Dawsongroup's experts insofar as their evidence  
4 relates specifically to, and only to, Dawsongroup  
5 pass-on and the level of pass-on associated with the 17,  
6 whatever, overlapping trucks. To the extent  
7 Dawsongroup's experts are making arguments about, for  
8 example, the most appropriate way to assess pass-on,  
9 given the characteristics of the UK leasing market, then  
10 those points are potentially of relevance to us, both in  
11 the context of the Ryder claim and also in the context  
12 of our wider claim. Two thirds of our leasing claim  
13 falls outside the scope of Trial 2 and, of course, we  
14 and a lot of other trucks parties are going to be having  
15 regard to the Trial 2 judgment for guidance in relation  
16 to how questions of leasing pass-on are best addressed.

17 It is only in respect of those general issues that  
18 we are planning to engage with them.

19 THE PRESIDENT: Yes. Well, I mean, one possibility is that  
20 the CMC that everyone has proposed, and we have directed  
21 should be held in the Michaelmas term, should be held  
22 after the exchange of first round experts' reports but  
23 before the submission of reply reports, so that one will  
24 see from the first round reports what are, if any, the  
25 common issues raised by Dawsongroup's expert, and then

1           it will be possible for the Tribunal, with the benefit  
2           of submissions from you and Mr Palmer, to say, well,  
3           actually what can Dr Veljanovski say, if anything, in  
4           reply to Dawsongroup's expert. At the moment, we are  
5           all working a bit in the dark, talking in general terms,  
6           without knowing exactly what might arise, and that it  
7           could be, rather than giving general permission now, we  
8           limit the permission to the Ryder expert but give  
9           liberty to you to apply at that CMC to address also  
10          specified aspects of the Dawsongroup expert report.  
11          That would, it seems to me, cover your concern, and  
12          I will hear from Mr Palmer in a minute whether it would  
13          cover Dawsongroup's concern.

14       MR GREGORY: Sir, that seems perfectly sensible and  
15          satisfactory to us. I can say that, obviously, what  
16          will take place before then is the submission of the  
17          factual witness evidence, and what we can do, in the  
18          light of your comments earlier, is, insofar as we want  
19          to say things that relate to the leasing market  
20          generally -- actually, I suspect that most of our  
21          factual witness evidence will be general in nature and  
22          not targeted specifically at Ryder -- that just be made  
23          clear in terms of the structure of the statement so that  
24          it will be easier later on to identify the evidence that  
25          is potentially relevant to a stage 1B.

1 THE PRESIDENT: Yes. We have -- I am sorry, we have got  
2 some drilling, which we are trying to stop, if you can  
3 hear that.

4 As far as the experts' reports, you may recall that,  
5 unusually, there was a sort of two-stage for the initial  
6 reports, to take account of the judgment in Trial 1,  
7 but, of course, that judgment in Trial 1 is concerned  
8 with -- well, it will concern pass through but not pass  
9 through of the kind concerning the leasing market, and  
10 there is quite a gap between the first date,  
11 19 September, and then the revised report, 7 November.  
12 I do not think we need wait for the revised reports  
13 because then that pushes everything quite tight. It  
14 seems to me, if the CMC were to be in October, so that  
15 everyone has had time to consider the first round  
16 reports, that will give you time then to prepare your  
17 reply report, which is due in early December on that  
18 basis.

19 Well, Mr Palmer, if we were to take that course,  
20 namely that the order would say they can respond in  
21 reply, it is an evaluation approach taken by the expert  
22 for Ryder but that there is liberty to apply at the CMC  
23 for permission to respond to specified aspects of the  
24 expert report for Dawsongroup, that would preserve your  
25 position and you can address this at that CMC if

1 permission is sought. Would that take care of your  
2 concerns?

3 MR PALMER: Yes, it would. Just to be clear, looking at  
4 that draft order, paragraph (b) would simply read  
5 "pass-on by Ryder", and paragraph (c) would simply read:

6 "An evaluation of the approach taken by the expert  
7 for Ryder in a reply report."

8 Then there would be liberty to apply in the terms  
9 that you have just set out, sir, so that, if there were  
10 common issues of a generic kind emerging from that  
11 evidence or from Dawsongroup's own evidence in its  
12 claim, then that could be discussed at that CMC and  
13 identified precisely. So there is that point.

14 So the second point I wish to make is that should  
15 relieve the need for DS Smith to continue to submit  
16 questions specifically aimed at Dawsongroup's pass-on  
17 disclosure at this stage, which is what is racking up  
18 the costs, we say out of all proportion, so all of those  
19 matters can be left until the CMC and the focus can be  
20 properly on what are genuinely common generic issues  
21 which, if they exist at all, can be identified at that  
22 stage.

23 THE PRESIDENT: I mean, Mr Gregory, if you are not  
24 participating in the Dawsongroup part of the trial, and  
25 you are not going to do specifically Dawsongroup

1 analysis of pass through, then, insofar as  
2 Dr Veljanovski is gathering information about the trucks  
3 market, of course he can address questions to anyone but  
4 they may or may not wish to reply. There will be public  
5 sources of information, but it does seem right that  
6 Dawsongroup should not be burdened with the costs of  
7 looking into enquiries and engaging in correspondence.  
8 There seems some force in that.

9 MR GREGORY: Yes, in terms of what happened to date, we have  
10 actually --

11 THE PRESIDENT: We do not have to go back into what happened  
12 to date because that will no doubt take us all  
13 afternoon. But going forward.

14 MR GREGORY: Yes, I think I will just need to get this  
15 confirmed by my instructing solicitors but, in general,  
16 it seems like a reasonable approach to me.

17 Can I just mention specifically in relation to  
18 subparagraph (c) in the draft directions that you were  
19 looking at -- and this is a product actually of our own  
20 drafting -- we are anticipating that our engagements in  
21 relation to the supply pass-on will be primarily with  
22 the other claimants because we may have a certain amount  
23 of common ground with the defendants, but we obviously  
24 do not want Dr Veljanovski to be shut out from  
25 commenting on the supply pass-on analysis of the



1 defendants as well.

2 THE PRESIDENT: Yes. So an evaluation approach taken by the  
3 experts --

4 MR GREGORY: The parties in the Ryder proceedings or in  
5 respect of Ryder pass-on.

6 THE PRESIDENT: Yes, taken by the experts for the parties in  
7 the Ryder proceedings. Yes. You may want to comment  
8 indeed on what the defendants' experts say in the Ryder  
9 case.

10 MR GREGORY: My instructing solicitors --

11 THE PRESIDENT: Which will be all the defendants anyway.

12 MR GREGORY: Yes. My instructing solicitors have just  
13 passed me the digital equivalent of a Post-It note,  
14 saying they are content with what you just said earlier  
15 in terms of I do not think there is going to be need for  
16 us to engage with the sort of detail of the Dawsongroup  
17 disclosure, given where we have got to.

18 THE PRESIDENT: Yes. So there will be a paragraph (d)  
19 saying that liberty to DS Smith to apply at the CMC.  
20 There will be provision for the CMC, of course, in all  
21 the orders in all three cases at the CMC to respond to  
22 the specified aspects of the report from the expert for  
23 Dawsongroup.

24 MR PALMER: Sir, the only other remaining point, it is just  
25 applying the same approach in respect of the factual

1 witness statements. The permission given to DS Smith to  
2 file factual witness statements should, in our  
3 submission, be limited to Ryder. Of course, we accept  
4 that, in addressing Ryder's case, there may be factual  
5 points which relate to the generic position, but the  
6 same approach can be taken at the CMC in respect of any  
7 such generic matters which are raised by those factual  
8 witness statements to discuss --

9 THE PRESIDENT: I think --

10 MR PALMER: 1B and what needs to be dealt with in 1B.

11 THE PRESIDENT: Yes. At the moment, it simply states that  
12 they shall file and exchange witness statements.

13 MR PALMER: (Overspeaking) we would ask.

14 THE PRESIDENT: Witness statements in respect of the issues  
15 raised by the DS Smith trucks forming part of the Ryder  
16 action.

17 MR PALMER: Yes, I am grateful.

18 THE PRESIDENT: Good. There is then a question, I think,  
19 regarding the disclosure of --

20 MR MALEK: Mr Chairman, on the witness statements, we have  
21 still got the point that they are not going to be giving  
22 witness statements on the overcharge. Are we saying  
23 these witness statements are going to be confined to  
24 pass-on issues?

25 THE PRESIDENT: Yes.

1 MR GREGORY: I think that is covered by the previous order  
2 from the May CMC.

3 THE PRESIDENT: That is certainly what was envisaged.

4 MR MALEK: That is envisaged --

5 THE PRESIDENT: Yes, it can be specified here, but  
6 certainly, it was ordered back in the order in May,  
7 actually drawn in July but made at the May CMC, that  
8 your participation is only in terms of evidence in  
9 respect of pass-on issues and, as regards overcharge,  
10 you have no permission to serve evidence.

11 So I think they read together. I think that is  
12 effectively covered.

13 MR GREGORY: We can check the wording runs through but  
14 I think it is common ground that that is the position.

15 THE PRESIDENT: I am just looking at that earlier order.

16 MR MALEK: Mr Chairman, my recollection is in the previous  
17 order it is just maybe safer just to put pass-on in  
18 paragraph 10 --

19 THE PRESIDENT: Yes, it does say in 27(b), paragraph 27(b)  
20 of the order following the May CMC:

21 "DS Smith will not be permitted to adduce any  
22 factual or expert evidence in this regard."

23 Which is regarding overcharge issues. So I think it  
24 is clear, but we certainly can say as regards factual  
25 witness statements on pass-on issues. But I think we

1 all understand -- we will not draft it, as it were, in  
2 the hearing -- what is involved.

3 There is then an issue about, I think, disclosure of  
4 pleadings regarding complements. Is that right?

5 MR GREGORY: Yes, that is right and we say that -- we have  
6 not had sight of any of the correspondence or draft  
7 pleadings relating to complements in bundles. We did  
8 ask for them and the defendants' solicitors wrote back  
9 saying they did not think we were entitled to them  
10 because we are only involved in the overcharge and  
11 pass-on aspects of the trial.

12 In our view, those issues are, in fact, relevant  
13 both to overcharge and pass-on. They may have been  
14 given a different label but, as we understand it -- and  
15 as I said, we have not seen all of the documentation --  
16 the defendants are raising the complements and bundles  
17 argument as a way of reducing the overall level of the  
18 overcharge. So we see that as part of the overcharge  
19 argument. There is a further issue for us, which is  
20 that the outcome of those issues is directly relevant to  
21 our value of commerce assessment for the purposes of  
22 supplier pass-on. It may be helpful if I just take  
23 a moment and summarise what --

24 THE PRESIDENT: This is disclosure of the defendants'  
25 pleadings you are seeking, as regards complements?

1 MR GREGORY: Yes, I mean, I think -- and also we just want  
2 to have sight of the correspondence going forwards as  
3 well in relation to these issues. I doubt -- you know,  
4 we are not planning to pitch into the battle but we  
5 would like to have sight of them because they appear to  
6 be relevant both to issues of overcharge and leasing  
7 pass-on.

8 THE PRESIDENT: Yes. I am not clear -- park correspondence  
9 for a moment. I am not clear why there is objection to  
10 providing you with the pleading. It is not a separate  
11 pleading, is it? It's just part of the defences. If  
12 you are an intervener in Trial 1, you cannot call your  
13 own evidence, but it seems to me -- again, I have not  
14 spoken to my colleagues, but you need to see the  
15 pleadings. What is the objection to providing DS Smith  
16 with a copy of the full pleading, therefore including  
17 what is said about complements? Who is objecting to  
18 that and why?

19 MR HARRIS: Just to be clear, Daimler does not object to  
20 DS Smith seeing the pleadings, including on the bundling  
21 point.

22 THE PRESIDENT: Ms Abram.

23 MS ABRAM: For our part, we were unaware of this until we  
24 saw Mr Gregory's skeleton on Thursday, and so it seems  
25 very likely to be something the parties can take away

1           and agree between themselves, frankly.

2       THE PRESIDENT: Yes, I think they have clearly got to get  
3       the pleading. We said we are going to reserve one point  
4       until after lunch. We can take a slightly earlier break  
5       and perhaps that can be ironed out, but I have made my  
6       views clear.

7           The correspondence may be slightly different. You  
8       just want to be copied in, do you, on the  
9       correspondence?

10       MR GREGORY: I think in general we just want to have sight  
11       of how these issues are progressing because we have been  
12       largely blind to it all. So, you know, we do not  
13       necessarily need to have all of it but, as the sort of  
14       material steps progress in relation to these issues, we  
15       would like to know what is going on.

16       THE PRESIDENT: Yes. Well, I think you have explained the  
17       position. I think what we will do is we will, subject  
18       to checking there are not other items -- I would suggest  
19       that -- hear from Mr Palmer in a moment -- I see your  
20       hand is up -- we take a break slightly earlier, give you  
21       a chance to try and iron that out. Mr Harris will get  
22       his instructions on the issues concerning the data set.  
23       We can then deal with these matters after lunch and,  
24       clearly, we are not going to need all afternoon by any  
25       means.

1 Mr Palmer?

2 MR PALMER: Sir, thank you. So far as we are aware, all the  
3 remaining issues on the Tribunal's agenda are  
4 Ryder-specific and, whilst we remain at the Tribunal's  
5 disposal, we wondered if, in those circumstances,  
6 Dawsongroup might be released from attending this  
7 afternoon.

8 THE PRESIDENT: The data set is certainly Ryder-specific.  
9 As far as the correspondence is concerned, the point we  
10 have just raised, it is not, I think, proposed that  
11 DS Smith's solicitors will engage in the correspondence  
12 on overcharge. They just want to be copied in so they  
13 can see what is going on. Is there any objection from  
14 your side to that happening?

15 MR PALMER: No, there is no objection on our part.

16 THE PRESIDENT: Right. So I think then the remaining issue  
17 is the one we have just mentioned -- and you have  
18 clarified your position -- and the consolidated data  
19 set, which is Ryder-only. Are there any other issues on  
20 our agenda that we have not covered?

21 MR MALEK: I just want one clarification from Mr Jowell,  
22 which is at paragraph 59 of his skeleton argument.  
23 I presume that whole issue has been resolved. Is that  
24 right, Mr Jowell?

25 THE PRESIDENT: That is the paragraph that has been deleted,

1 is it?

2 MR JOWELL: Yes, that has been resolved, sir.

3 MR MALEK: That's good. Yes, that is what I thought.

4 THE PRESIDENT: Thank you very much.

5 MR HARRIS: I do not know if it assists the Tribunal but

6 I have been able to take instructions. My point is very

7 short. It may be more convenient to the Tribunal to

8 just complete the VOC data issues now and then nobody

9 will have to come back this afternoon. I am in the

10 Tribunal's hands, obviously.

11 THE PRESIDENT: I do not know if you are the only person

12 raising issues on the datasets. There is a number of

13 issues that have been raised.

14 MR PICKFORD: Sir, I think DAF is due to go first on that

15 issue for the OEMs. Obviously, we have no objection at

16 all to Mr Harris also making submissions on behalf of

17 his client.

18 THE PRESIDENT: I think we will break now. I doubt it is

19 a ten-minute question with this many parties. It may be

20 that it is only a 30-minute question, but I think it is

21 probably better if we break and return at five to two,

22 on the expectation that we will not need to spend very

23 long of the afternoon here, and Dawsongroup is excused.

24 MR PALMER: I am very grateful. Thank you, sir, and thank

25 you, members of the Tribunal.



1 (12.53 pm)

2 (The short adjournment)

3 (1.55 pm)

4 THE PRESIDENT: Returning to the matter of disclosure to DS  
5 Smith of the pleadings, everyone has had a chance to  
6 take instructions. Is there any objection to an order  
7 that DS Smith should be provided with copies of the  
8 pleadings?

9 We shall make that order. Then that they should be  
10 copied in on correspondence in the two actions. Any  
11 objection to that?

12 No, we will make that order. So, Mr Gregory, is  
13 there anything else outstanding in your involvement in  
14 the Trial 2?

15 MR GREGORY: No, other than I was going to ask permission if  
16 we could now drop out in the same way that Mr Palmer and  
17 his team have dropped out for the remaining agenda item.

18 THE PRESIDENT: I do not think you are concerned with the  
19 data set, are you? So in the light of that, you have  
20 got the reassurance you wanted and you can withdraw.

21 MR GREGORY: I am very grateful.

22 THE PRESIDENT: So we are left with the issue of the  
23 consolidated data set.

24 Issue of consolidated data set.

25 THE PRESIDENT: I think, is it helpful to look, Mr Holmes,

1 at your draft order?

2 MR HOLMES: Yes, sir. If it would help, there is a red line  
3 which shows exactly what has changed by comparison with  
4 the version that was attached to our skeleton, which  
5 I could show you on Opus. Would that be helpful?

6 THE PRESIDENT: Yes.

7 MR HOLMES: The changes will be quite apparent to you  
8 because I am sure you have reviewed the order already.  
9 It is as {R-B/310.2/4}. If Opus could pull up, please,  
10 {R-B/310.2/4}.

11 THE PRESIDENT: Ah, 310, I think that it was misunderstood.

12 MR HOLMES: 310.2. It is {R-B/310.2/4}. Thank you.

13 So you will see, sir, there is a change to 6(c) and  
14 (d), which we do not understand to be controversial,  
15 which just introduces a definition of "Deductions  
16 Issue". The deductions issue was always in the order.  
17 I do not think that need detain us.

18 If we turn on to page {R-B/310.2/5}, you see the  
19 specific and practical steps that are proposed. If we  
20 could turn on a page, please, Opus. You see that the  
21 first stage relates to the so-called "Scope Issue".  
22 That concerns which trucks are within the scope of the  
23 claim, and the proposal that we make is that by  
24 3 December, we should consider the comments provided by  
25 the defendants on 27 August and provide a response to

1 the defendants' comments in relation to the scope issue.

2 By way of background, the progress that has so far  
3 been made on the consolidated data set proceeded in this  
4 way: on 21 May, we served detailed value of commerce  
5 schedules to each defendant, giving details of the  
6 41,000 trucks covered by the Ryder claim, and the truck  
7 details included matters relevant to scope, such as the  
8 order date, invoice date, purchase date, VIN number and  
9 registration number, and also matters relating to price,  
10 an indication of the price that we understood to have  
11 been paid for the truck. The defendants commented on  
12 this on 27 August 2021. So this stage described at  
13 paragraph 8 would be for the Ryder claimants now to  
14 address the comments provided by the defendants and  
15 produce a response to the defendants' comments in  
16 respect of the scope issue, and we do not understand  
17 that stage to be controversial.

18 The next stage we propose is for the defendants to  
19 consider the scope response and the VOC schedules more  
20 generally, and this was the clarification that I noted  
21 before lunch:

22 "... (save in respect of any Trucks for which the  
23 Scope Issue is not agreed) ..."

24 To provide now a response in respect of the price  
25 issue, which will state the various things set out

1           there, including, at (c):

2            "Insofar as [the defendants] do not agree, provide  
3           their own, alternative data from their own records  
4           stating the reasons why they consider that that data is  
5           to be preferred."

6           Here, there is disagreement between us and the  
7           defendants. The defendants say that they should not  
8           need to provide a price response to the value of  
9           commerce schedules. Instead, we should bring forward  
10          a further response in relation to price, dealing with  
11          the limited comments that we have so far received. But  
12          we say that that is not the right way of proceeding.  
13          The VOC schedules contain our best estimation of the  
14          price of the trucks. It was a huge exercise to pull  
15          that together and, to move matters forward, we now  
16          really need to know what the defendants say about that,  
17          including what price they have identified in respect of  
18          these trucks, so that we can understand the differences  
19          between us, so that is our proposal.

20          Then you see as a next stage that the proposal is  
21          that the parties should then update the Tribunal, and if  
22          we could just turn down the page, the deductions  
23          issue -- if Opus could just move down the page,  
24          please -- is then left for further engagement between  
25          the parties on our proposal.

1           So that is what we put forward.

2           Travers Smith wrote on behalf of the defendants with  
3 their latest offer in response to this and if I could  
4 show you that, please, and just briefly respond to the  
5 points made there. That is at {R-B/342/1}, and you see  
6 at the bottom of the page DAF's further proposal. It  
7 may be that this is in fact sent only on behalf of DAF  
8 and not the other defendants but they can clarify in due  
9 course.

10           If we could go to the bottom part of the page,  
11 please, you see DAF's revised proposal.

12           At stage 1: by 10 November 2021, Ryder to write with  
13 comments on the scope issue. So this brings forward the  
14 scope response.

15           Our point about that is we need until the date that  
16 we have specified in the order, which was previously  
17 agreed; that is to say 3 December 2021.

18           If we could go over the page, please, {R-B/342/2},  
19 and focus on the top of the page, you see that as  
20 a second stage, the defendants propose to respond to  
21 Ryder's scope response by 17 December 2022. Given that  
22 we are sticking at 3 December, we propose that that date  
23 be amended to the date previously suggested by the  
24 defendants, which is, I think, 28 January 2022, and then  
25 at stage 3 what the DAF proposal suggests is that Ryder

1           should set out its proposal regarding the price issue as  
2           a next stage but, as I said, Ryder has already set out  
3           its position in great detail in the VOC schedule as to  
4           what it understands the price is, and so our proposal  
5           would be that it is now for the defendants to respond to  
6           that VOC schedule with specific indication where they  
7           think that the price differs from the price that Ryder  
8           has proposed. The reason we say that is that we have  
9           done our best -- and, of course, the defendants have  
10          a great detail of data themselves, rich data, about  
11          pricing and they are, therefore, well placed now, in  
12          order to produce a commensurate set, to give their  
13          response.

14        THE PRESIDENT: Can I just interrupt you, I am trying to  
15          understand.

16        MR HOLMES: Of course.

17        THE PRESIDENT: Stage 3, as set out in this letter of  
18          12 October -- can we go back to the previous page,  
19          please. {R-B/342/2}. Thank you.

20                 Stage 3. What is it there envisaged Ryder is to do  
21          that you have not done already?

22        MR HOLMES: In the VOC schedule?

23        THE PRESIDENT: Yes.

24        MR HOLMES: We will obviously hear what Mr Pickford has to  
25          say about that. It may be that he intends to refer to

1           some very general comments which were made in some of  
2           the defendants' responses in August 2022 at a very high  
3           level in relation to those schedules.

4       THE PRESIDENT:  But the schedule that you served, does that  
5           include the price that you say -- you -- I mean Ryder,  
6           of course -- that Ryder paid for each truck?

7       MR HOLMES:  Yes, it does

8       THE PRESIDENT:  Because --

9       MR HOLMES:  -- where data is available.  It may be that  
10           there are some trucks where data is lacking but it is  
11           our best view, based on the evidence that we have of the  
12           price of each truck.

13       THE PRESIDENT:  Why should you be further advanced in doing  
14           that after a scope response?  This is not -- this is  
15           separate, isn't it?  You are doing it for the trucks you  
16           say are within scope.

17       MR HOLMES:  Yes, but all of the trucks we have put forward,  
18           there is a price -- all of the trucks identified in our  
19           schedules, where we have data, have a price attached to  
20           them, including a large number of the 19,000 trucks,  
21           which are not, as we understand it, the subject of any  
22           scope dispute based on the engagement to date.

23       THE PRESIDENT:  Yes, I see.  Anyway, that's what -- so your  
24           position is, as regards what is set out here for stage  
25           3, that you have already done that?

1 MR HOLMES: Indeed. So we should go now and we should have  
2 directions now for what in this draft is described as  
3 stage 5; that is to say, the defendants writing to  
4 respond on the price issue proposal, and we are very  
5 happy for them to set out their proposals on the  
6 deductions issue at the same time. That seems very  
7 sensible, so that we understand exactly what they say  
8 about deductions.

9 But that should not await, as is proposed in the DAF  
10 proposal, a further update to the Tribunal and it should  
11 not require directions at some further stage.  
12 Directions should be given for that now, today. So we  
13 do seek directions for that. We are also -- this  
14 reference to comment on the price issue proposal does  
15 give us cause for concern.

16 If by that is meant a response along the lines we  
17 have set out in our draft order, then we are content but  
18 we do need substantive engagement, not just comments.  
19 We need them to give their best estimate of the price  
20 from the data that they have available to them and then  
21 we are happy also for directions to be given for a stage  
22 6, where we write with comments on the deductions issue  
23 proposals, to close this off.

24 But that full suite of directions, we say, would  
25 advance matters and would ensure that we make good and



1 palpable progress towards a consolidated data set in  
2 good time before expert evidence.

3 The dates are very much a matter for discussion  
4 today but it is important that this is done in good  
5 time, before the expert evidence and ideally before the  
6 June 2022 date, which is here proposed, so that the  
7 experts have the consolidated data set or what agreement  
8 has been achieved about it in good time before their  
9 expert evidence.

10 There is also the possibility that some targeted  
11 factual evidence -- if this overruns the fact evidence  
12 dates, as seems inevitable, there may need to be some  
13 targeted factual evidence which accompanies the expert  
14 reports insofar as there are matters in dispute about  
15 the data which require factual evidence which only come  
16 to light as the process progresses. But we do not  
17 propose that any directions be given about that today.

18 THE PRESIDENT: Yes. Thank you.

19 Who is dealing with this for the defendants, or who  
20 wishes to go first. Is it Mr Pickford?

21 MR PICKFORD: It is, sir, yes, in the first place. So

22 I have some very short general points, which I make on  
23 behalf of all the defendants, first, before then moving  
24 to the specific question of the timetable, and in  
25 relation to the timetable the submissions that I make

1 I believe are supported by Volvo, Renault, Iveco and  
2 MAN, but I understand that Mr Harris for Daimler has  
3 some particular points that he wants to make on  
4 Daimler's position. So that is the scheme of the  
5 submissions.

6 So, just very briefly, Ryder's letter of Friday,  
7 which is to be found in the bundle at {R-B/IC332/3}.  
8 I am looking at page 3 of that. It will come up on the  
9 Opus system. That would be very helpful.

10 This is to contextualise what we are currently  
11 considering, this is a table that sets out the position  
12 just prior to this hearing, and I believe the specific  
13 numbers may be confidential but it does give the  
14 Tribunal some idea of what we are currently dealing  
15 with.

16 There are a couple of points to draw from this  
17 table. The first is that, as matters stand,  
18 notwithstanding the impression perhaps given by Ryder  
19 that scope is largely done and dusted, we see that the  
20 majority of trucks fall into the contested category,  
21 rather than the uncontested category, as regards scope  
22 issues. So there is much work still to be done in  
23 relation to those.

24 That is the first point.

25 One sees that from the percentage column on the

1 right-hand side.

2 Then the second point, which is relevant to the  
3 timetabling issue I am going to come on to, is that one  
4 sees from this table that DAF bears a very heavy burden  
5 in relation to this particular claim. DAF accounts for  
6 over 60 per cent of the trucks for which Ryder claims.

7 One can see that from taking the number in the --  
8 THE PRESIDENT: Can you pause a moment, Mr Pickford, sorry,  
9 can you just pause. (Pause)

10 We have just been informed there are some technical  
11 difficulties at Opus.

12 Thank you, Mr Pickford. You were saying that DAF  
13 bears a very heavy burden because you have over  
14 50 per cent of the total trucks in the claim.

15 You are on mute, Mr Pickford.

16 MR PICKFORD: Thank you, sir. Yes, indeed, over  
17 60 per cent. One sees from the column entitled "Total  
18 number of trucks in VOC schedule" a figure for DAF. At  
19 the bottom there is a total and I am not able to give  
20 the confidential -- well the numbers that may be  
21 confidential, but what I can say is that we account for  
22 over 60 per cent of that total figure.

23 THE PRESIDENT: Yes.

24 MR PICKFORD: So the position then, as far as the defendants  
25 are concerned, is that there are still very substantial

1 problems with Ryder's datasets, even as regards scope,  
2 before we even get on to the price issue, which I am  
3 going to come to very shortly. Indeed, one sees from  
4 the following paragraph that Ryder accepts that there  
5 are still issues between us and we clearly need to  
6 grapple with those. The question then is, in the light  
7 of the position that we are currently in, what are  
8 sensible directions that would take the parties forward.

9 We have consistently taken the position -- and we  
10 still take the position -- that it is sensible to  
11 address the scope issues first, before addressing  
12 pricing issues, and that is for the obvious reason that  
13 what we do not want the parties to do, for example, is  
14 waste a lot of time dealing with some potentially quite  
15 difficult issues on price, only to find that the trucks  
16 that we are currently considering are ultimately agreed  
17 to be out of scope. So there is a very sensible reason  
18 for doing that.

19 Ryder purport to have addressed that problem in  
20 their order by the changes that you saw to paragraph 9,  
21 and I will come on to that, but we say the difficulty  
22 with their revised order is it just substitutes one  
23 problem for a different problem.

24 So if we could go, please, back to that order --  
25 I was going to look at it with a different reference to

1 the one that Mr Holmes gave but I am very happy to look  
2 at it in the marked-up version, if that is the one that  
3 is easier for the Tribunal.

4 The marked-up one, I think, was at {R-B/310.2/5}.  
5 The key paragraph is paragraph 9. If we could go to  
6 page 5, please. Thank you. Paragraph 9.

7 So what Ryder are saying is, "Do not worry, we  
8 understand your concern." So they have inserted into  
9 paragraph 9 the proviso that we do not have to respond,  
10 save in respect of any trucks for which the scope issue  
11 is not agreed.

12 So their position is that -- that is the means of  
13 dealing with the problem that I just identified.

14 However, the problem with that is it is going to  
15 lead to obvious inefficiency and duplication of effort  
16 because if what happens is that we have an order to deal  
17 very soon with pricing issues, given the state of the  
18 parties' joint knowledge in relation to scope, we are  
19 going to have to deal with all of those issues again  
20 because there will be a whole set of trucks for which we  
21 have not dealt with pricing issues.

22 So rather than dealing with it in an orderly way,  
23 where we simply get to where we can with scope, decide  
24 that that is as far as we can get with scope and then we  
25 turn to price, we are going to be doing it back and

1           forth. There will be some price on these trucks and  
2           then we will pause and then we will go -- and it is not  
3           a sensible way of taking that matter forward. It is  
4           obviously going to lead to multiple rounds and revisions  
5           of the parties' positions. Indeed, one can see that it  
6           is potentially going to cause difficulties with  
7           assessing the best approach to the issue of value, to be  
8           trying to do that before you even know which trucks are  
9           in scope and not in scope because it may be that the  
10          best means of addressing the whole depends on which  
11          trucks you are talking about.

12                 So our position is that one should deal with scope  
13          first and then value, rather than seeking to do it in  
14          a way that necessarily involves revisiting those points.  
15          Indeed, Ryder themselves, in their skeleton, recognise  
16          that:

17                 "You need to address scope as the necessary next  
18          step."

19                 So that is what we say in terms of how one should  
20          approach this as a matter of principle. In terms of  
21          then how one takes this forward in practical terms,  
22          Mr Holmes took you to our proposal of our letter of  
23          12 October and if we could then, please, go on to that,  
24          and I can go through the points of difference between  
25          Ryder and ourselves. So that reference is {R-B/338/1}.

1 I beg your pardon, sorry, I have given you the wrong  
2 reference. It is 342, I beg your pardon, {R-B/342/1}.  
3 So as Mr Holmes said, the proposals begin at the bottom  
4 of the first page but just before getting into those, it  
5 is important, I think, to bear in mind two preliminary  
6 points. The first is that, as the Tribunal will  
7 appreciate, there has been quite a bit of back and forth  
8 on this issue. The timetable that we are now proposing  
9 is a highly accelerated one relative to our original  
10 position, and our submission is that we really have  
11 accelerated it as far as we are able to go. The reason  
12 for that, in particular, is that our expert,  
13 Professor Neven, and his team are heavily involved, as  
14 the Tribunal may appreciate, in preparation for Trial 1  
15 until March to April of this year and it is simply not  
16 realistic to require us to engage with the pricing  
17 issue, which is going to very heavily engage the  
18 economists, until then.

19 Indeed, there is a problem for all parties,  
20 including Ryder itself, that if we are made to do this  
21 process, which is one where we are supposed to be  
22 attempting to cooperate with each other, prior to when  
23 our economists have the capacity to properly engage,  
24 inevitably the process is going to be far less useful  
25 because we are going to be no doubt forced to adopt

1 a conservative position, where we can agree less because  
2 we have not had adequate time to attempt to agree more.

3 So it is not in anyone's interests, including  
4 Ryder's, for us to be forced into that position and, as  
5 I showed the Tribunal, the reason why I refer to DAF  
6 particularly here is because we shoulder the majority of  
7 the burden in relation to this particular exercise.

8 So that is the first point of compromise.

9 The second is that, on the question of deductions --  
10 and I think this is a point on which I anticipate  
11 Mr Harris may want to make some submissions -- we have  
12 also sought to compromise because we say actually that  
13 should be a question on which Ryder properly should go  
14 first because it is only once that has been grappled  
15 with that one can have a real estimate of the true net  
16 price for a truck, but nonetheless, in the pragmatic  
17 spirit with which we have approached this generally, we  
18 have provided for us attempting to go first on that  
19 issue.

20 So that is the context.

21 If we then go through the particular points, it is  
22 suggested by Mr Holmes that he needs until 3 December  
23 rather than 10 November to engage with us on the scope  
24 issue. That appears to us to be a rather generous  
25 amount of time but I think probably, so long as the rest



1 of the timetable is pushed back accordingly, I'm not  
2 sure we would have a grave difficulty with that. The  
3 problem is that that probably then creates squeezes  
4 later on in the timetable. So our primary position is,  
5 given the amount of time that Mr Holmes' clients have  
6 already had, 10 November should be quite sufficient,  
7 given that they were provided with comments by us on  
8 27 August.

9 As regards stage 2, the key point there is we simply  
10 need an appropriate amount of time to respond to  
11 whatever it is that the claimants say, so if the  
12 Tribunal is going to make a different provision for  
13 stage 1, that will affect the timing of stage 2.

14 THE PRESIDENT: Can we just scroll down to the next page,  
15 please.

16 MR PICKFORD: Yes. Sorry, I think ...

17 {R-B/342/2}

18 THE PRESIDENT: So you have suggested 17 December on the  
19 basis --

20 MR PICKFORD: Yes.

21 THE PRESIDENT: So you say you want effectively five weeks,  
22 is it?

23 MR PICKFORD: Yes, it's just over five weeks.

24 The difficulty, of course, with Ryder's position is  
25 that we are actually seeking to help here, in the sense

1 that they complained, "Your timetable is going to take  
2 too long," so we are trying to bring things forward and  
3 accelerate matters as much as we can but if they then,  
4 whenever it comes to a time when Ryder has to engage,  
5 push the timetable right back again, then that is  
6 obviously going to create problems for everyone?

7 The key point, I think, that came out of discussion  
8 between the Tribunal and Mr Holmes at stage 3 was who  
9 should go next on price, and there was a revealing  
10 qualification to Mr Holmes' submissions on that because  
11 you, sir, asked him, "Have you set out your position on  
12 price," and he said, "Yes, of course we have," and then  
13 the qualification was, where there is evidence on it.

14 The difficulty we have there --

15 THE PRESIDENT: I thought he said, "Where we are able to."

16 MR PICKFORD: Where we are able to, yes. Well, where they  
17 have -- presumably because they are doing it on the  
18 basis of the evidence that they believe that they have.

19 The problem with their position that, well, we have  
20 given it a go, now it is over to you, is there are large  
21 tranches of trucks for which they simply have not set  
22 out a price and we do not know what their claim is. It  
23 is really not appropriate for us, as the defendants, to  
24 be given the task of filling in the blanks for the  
25 claimants in relation to an issue as fundamental as

1 price. We do not really accept that they have  
2 necessarily done everything that they possibly can.  
3 What they are seeking to do, effectively, is to say,  
4 "Well, we have given it a bit of a shot but we would  
5 really much prefer it if you did the work for this. So  
6 take it away and have your go," and we think that is not  
7 the right approach. The burden should most definitely  
8 lie on the claimants to set out their position fully in  
9 relation to price.

10 There is nothing exceptional about what we seek at  
11 stage 3; it is that they set out in clear terms their  
12 position on the price that they say they paid for each  
13 truck, excluding the price that Ryder paid for other  
14 goods and services that it acquired to go with the  
15 truck, that being obviously not subject to the alleged  
16 overcharge.

17 They need to be able to tell us that.

18 MR MALEK: Mr Pickford, you are saying on this point that it  
19 is such a high percentage of trucks where they have not  
20 dealt with the scope issue that you should not have to  
21 respond to the price issue until they have sorted that  
22 out. What more do they need to do on the price issue  
23 that they have not done?

24 MR PICKFORD: Sir, you are right, there are two different  
25 points here.

1 MR MALEK: Yes.

2 MR PICKFORD: The first one is about ordering, and that is  
3 quite right.

4 MR MALEK: Yes.

5 MR PICKFORD: We say that there is such a large proportion  
6 of points in relation to scope that that needs to be  
7 grappled with first.

8 MR MALEK: I understand that point.

9 MR PICKFORD: There is a second separable point, which is  
10 that, when we then get on to that stage on price, it is  
11 for the claimant -- it is their claim. Their claim is  
12 that, "We have been overcharged by X amount," and it is  
13 not really good enough for them to say, "Well, we have  
14 been overcharged, we do not actually know by how much,  
15 we have not really got a case on that because we do not  
16 know how much we paid and we are not actually going to  
17 bother to think about that too much. We are going to  
18 ask you to tell us in the first case what you think our  
19 claim is." That is the wrong way round. It is their  
20 claim and they need to put their very best foot forward  
21 on that, and we do not accept that they have done that  
22 so far.

23 MR MALEK: Are you saying there is a whole load of records  
24 or sources of information they have not tapped in order  
25 to get that price information?

1 MR PICKFORD: Sir, I do not have evidence on particulars of  
2 how Mr Holmes' clients have gone about assessing their  
3 position in relation to price. What we do know is that  
4 their schedule has significant gaps in it, and that is  
5 why we are asking them to do the job. If we were  
6 content with what they had provided us with, then we  
7 could respond on it, but we are not.

8 MR MALEK: But the thing is that presupposes they have got  
9 something that they could add in. If Mr Holmes' case is  
10 that we have done everything we can, we have looked at  
11 all the records that we have got, we have spoken to the  
12 relevant people, we just do not have that data, I think  
13 their case is that there is not much more that they can  
14 do. Your case is that there is more, in which case what  
15 is that more that they have not looked at?

16 MR PICKFORD: Well, I think the position of the parties --  
17 obviously, they have corresponded in relation to this  
18 issue. We do not accept that everything that could have  
19 been done has necessarily been done because there are  
20 very large gaps, and that is surprising. But I cannot  
21 tell you now, because this is not the basis on which we  
22 prepared for this hearing, that here are the particular  
23 things that we say that Mr Holmes' clients should go  
24 away and do now. What we say is that the onus is still  
25 on them because of the significant gaps that arise.

1           If they want to engage in a dialogue with us and  
2           say, "Actually we have done X, Y and Z, and there  
3           literally is nothing more that we can do, we are really  
4           sorry," obviously, we can take that forward. But it is  
5           their claim, and our current position is we are not  
6           sufficiently satisfied with the information that we have  
7           been provided with.

8           MR MALEK: Are you saying you do not know what they have  
9           done? Is that part of the problem? You are saying they  
10          have not told you precisely where they have looked and  
11          what they have done to try and get these figures and so  
12          you are not satisfied they have done a proper job? Is  
13          that what you are saying?

14          MR PICKFORD: Sir, yes, but it is also -- the fundamental  
15          point is it is their claim. They need to advance some  
16          basis on which they say we owe them money. It is very  
17          unusual to come to any court or Tribunal and say, "You  
18          owe us money for X, but over to you to try and work out  
19          in the first instance how much it is that we owe you."  
20          If there are gaps, perhaps they need to provide an  
21          estimate, perhaps they need to think about how they fill  
22          in the difficulties with their claim but, otherwise,  
23          they are presenting us a problem which they have with  
24          their claim, which we then have to grapple with.

25                 Rhetorically, what are we then supposed to do? If

1           they say, "Okay, here are the trucks, we are not telling  
2           you how much we think we paid for them." Do we have to  
3           decide how much we think it is that they are claiming?

4       THE PRESIDENT: I think what they are saying is fairly  
5           clear, is it not? They are saying, "Our records are not  
6           complete on these trucks, so we cannot find out the  
7           price, but you may have better records, so check your  
8           records and you may be able to determine the price that  
9           was paid." You may say they are not entitled to ask for  
10          that because the burden of proof is on them, but it is  
11          pretty clear what they are suggesting should happen.

12       MR PICKFORD: Sir, with respect, I don't understand that  
13          point because we have had disclosure. They have our  
14          records. So what is it now that -- they are seeking to  
15          give us a burden. They say, "We have given it our best  
16          shot, we have looked through the disclosure, we simply  
17          do not know what we want from you. But here we go --

18       MR MALEK: Mr Pickford, look, what would help us -- because,  
19          look, if, for example, you look at their schedule and  
20          you look at your documents you have disclosed to the  
21          other side and you can say, "Look, here are ten examples  
22          of where that data is in our documents. You have not  
23          even bothered to put that into the schedule. There is  
24          a huge gap."

25                 We do not have that sort of evidence or dialogue, do

1           we? Mr Holmes is going to say, "We have looked at all  
2           of your data and we have come to the -- and we have  
3           filled out the schedules." You are not telling me that  
4           you can give examples of the data you have given has the  
5           answers which have not been filled out in the schedule.

6           MR HOLMES: If I might interpose for one moment, just to say  
7           the schedules were prepared on the basis not only of our  
8           own data sources but the disclosure that we have had  
9           from the defendants. So it factors in already the  
10          material that --

11          MR MALEK: Yes, I understand that --

12          MR PICKFORD: That is my point, sir. That is a point  
13          against Mr Holmes because, were it the case that we were  
14          in possession of a large tranche of information that his  
15          clients do not have because we are dealing with  
16          pre-disclosure, there might be more force in saying "We  
17          have done the best we can with our information, now over  
18          to you," but that is not the situation we are in. We  
19          are post disclosure. They have a job to do, and if they  
20          cannot do the job on the basis of the disclosure that  
21          has been given, why should it then become our problem,  
22          on the basis of the same documents, to seek to mend  
23          issues that they have with their claim. It is not  
24          really up to us, we say, to mark their homework in  
25          relation to a point where they have the very same



1 documents and the very same material that we have.

2 (Overspeaking) claim.

3 MR MALEK: Let me try and understand the extent of this.

4 When you look at the price column or whatever on these  
5 schedules, what sort of percentage is blank, where they  
6 put no figure at all?

7 MR PICKFORD: Sir, I would have to take instruction on the  
8 precise percentage. My instruction is it is  
9 a significant problem.

10 MR MALEK: Is it like the sort of percentages we are dealing  
11 with with the other part of the schedule, which is  
12 46 per cent, where only 46 per cent is uncontested and  
13 you have got 54 per cent which is contested. Are we  
14 talking about maybe half that are blank or are we  
15 talking about a much smaller percentage?

16 MR PICKFORD: Sir, on my feet, I am afraid I do not know the  
17 answer to that question. I am happy to seek  
18 instructions on that point. My solicitors may or may  
19 not know, but I am afraid I cannot assist with that  
20 particular figure.

21 MR MALEK: Mr Hollander might know.

22 MR HOLLANDER: I was going to raise -- and it may assist if  
23 I do it at this stage -- a related point on this. Let  
24 me explain it.

25 I have got nothing to say about the scope issue,

1 I am concerned about deductions and the impact on price.  
2 The price is subject to -- the word "deductions" is used  
3 in two completely different senses by different people  
4 and it is slightly confusing. There is what I might  
5 refer to as the Biro deductions, which are subsidies,  
6 discounts, extended warranty discounts and the like.  
7 I am not concerned with that for present purposes. I am  
8 concerned with what we have referred to as deductions,  
9 which relate to the composition of the price invoice.  
10 So where you have an invoice that says 100 is the price,  
11 the question is: is that just the chassis, is that just  
12 the truck, or does it include the warranty? Is it 95  
13 chassis, 5 warranty and so forth. That is a purely  
14 factual issue as to what is the price of the truck. It  
15 particularly affects Iveco because so many of the sales  
16 in relation to Iveco are through non-Iveco owned dealers  
17 and, therefore, we do not have the documents. So we are  
18 reliant on what we have got from Ryder, so Ryder has  
19 this information, not Iveco.

20 Sometimes the material is on the invoice as to the  
21 fact that it includes a warranty, sometimes it is not  
22 very clear, but it is an important question to isolate  
23 the chassis price. So when I say it relates to the  
24 deductions, it is a question of identifying what is the  
25 proper price of the chassis and take off the warranties

1 and matters such as that.

2 It may well be in some of these cases, where it is  
3 not actually on the invoice, it is much more  
4 complicated.

5 We have been raising this point in correspondence  
6 and we have said that before we can respond on the price  
7 point, we need to understand what the composition of the  
8 invoice is and we need this, and we have raised this in  
9 our letter of 27 August. I am not sure we need to go to  
10 it. We have explained this point in terms, and we have  
11 not had a response from Ryder in respect of it, and that  
12 is the point we make in our skeleton about this, that we  
13 need to have this information properly to engage with  
14 the price.

15 We had supported the DAF proposal, which is on the  
16 screen. If you look at item 3 and item 5, item 3 was  
17 drafted in a way to take into account of this point.  
18 Ryder to set out its clear terms, its position as to the  
19 price it says it paid for each truck, ie excluding the  
20 price that Ryder paid for other goods and services it  
21 acquired together with the truck. That is the subject  
22 of its claim.

23 That was intended to take into account what I call  
24 the composition of invoice deduction, as opposed to  
25 a wider point at item 5, which is deductions, which

1 I have called the "Biro deduction".

2 The only point I really wanted to raise in respect  
3 of this is that, in order to provide a response on price  
4 which engages, we need to have that information before  
5 we can respond and there needs to be a scheme whereby  
6 that is done first. Exactly how it is done, the  
7 Tribunal may have different views as to exactly -- they  
8 may not agree with what has been put forward on the DAF  
9 proposal, they may not agree with the Ryder proposal,  
10 but that is the thing we absolutely need in order to be  
11 able to provide the information.

12 As I said, it is more important for Iveco, I think,  
13 than for others because of the fact that so many of  
14 Iveco's trucks are non-Iveco-owned dealer purchases and,  
15 therefore, the information, the primary information and  
16 the detail as to how one gets the explanation, the  
17 background information, is within Ryder's knowledge.

18 We have not been able to understand the position at  
19 all from such explanations they have given us. We have  
20 banged on about it in correspondence. Indeed, the  
21 letter of 27 August -- maybe we can -- I do not know if  
22 someone has a reference to that. I have got it here  
23 actually. It is {R-B/IC220/1}.

24 MR MALEK: While you are doing that, Mr Hollander, when you  
25 say price, you just want to have the price for the

1 chassis?

2 MR HOLLANDER: Yes, that is all I am concerned with on what  
3 I am saying, I need to have that information in order to  
4 provide a response.

5 MR MALEK: Okay.

6 MR HOLLANDER: We had supported the DAF proposal, and you  
7 can form your own view in respect to that, it is  
8 entirely a matter for the Tribunal. But that is the  
9 point -- if you look at this letter, paragraph 5,  
10 please -- can Opus scroll down, please. Yes.  
11 Paragraph 5 is raising the point. It also comes in  
12 paragraph 6 in a moment. But you can see they:

13 "... are incomplete as they do not provide  
14 information on any deductions to be made to the invoice  
15 price to arrive at the VOC for each individual truck in  
16 question. As raised in the prior correspondence, the  
17 obligation remains ..."

18 So it is not the first letter either.

19 Then there is paragraph 6 over the page, which is  
20 more specific and deals with the chassis price, which is  
21 essentially the same point but I need not perhaps go  
22 into it, it is a specific element of that in relation to  
23 chassis price. {R-B/IC220/2}

24 So that is the information I need in order to be  
25 able to do it. We would suggest -- and again it is

1 a matter for debate as to exactly how this is done, in  
2 what order and how but before we can respond on that, we  
3 need this information. We would like Ryder to itemise  
4 what is in the deductions in the sense that I mean it,  
5 composition of invoice deductions, so we can see clearly  
6 what these are, and that is the point we wanted to  
7 raise.

8 There is also, I know, a point Mr Harris wants to  
9 raise, which is related, which also affects us. I do  
10 not particularly want to steal his thunder and I will  
11 leave him to do that because he has had a two-hour delay  
12 especially to deal with it. So I would not want to  
13 waste that opportunity. But I think that is also  
14 a point that affects us. But this is the important  
15 point so far as we are concerned, and that needs to be  
16 dealt with, and we just have not had a response from  
17 Ryder in respect of that.

18 MR HARRIS: Yes, if it is now convenient, mine is a short  
19 point but it is related to that of Mr Hollander. We  
20 share, first of all, the concerns of Mr Hollander, for  
21 the reasons he has elucidated. We adopt the submissions  
22 of DAF. We have no difference with those of  
23 Mr Pickford, but there is an additional point. It is  
24 not volume rebates or volume discounts. What has so far  
25 happened in the price disclosure, such as it is, in the

1 schedules by Ryder is it does not make clear what volume  
2 discounts or volume rebates there has been and the  
3 trucks to which it applies.

4 That is a problem for two reasons. It is a problem  
5 for exactly the same reason that Mr Hollander has just  
6 put forward by reference to other matters that appear on  
7 the invoice. We need to know the actual price paid for  
8 the chassis, the actual truck that forms part of this  
9 claim, and if it has had a volume discount or rebate  
10 applied to it, then that needs to be identified and  
11 deducted. But it also ties into the sequencing points  
12 that Mr Pickford made. He was submitting, with which  
13 I agree, that all the information from Ryder about  
14 price, including the discounts to which I refer and to  
15 which Mr Hollander refers, ought to come first, but this  
16 volume rebate point reinforces that point because it is  
17 my instructions that volume rebates, as one will  
18 appreciate, thinking about it for a moment, may well be  
19 applied at the end of a certain period, at the end of  
20 say, six months or at the end of the year.

21 Let us say, for the sake of argument, Ryder has  
22 bought, for argument's sake, 1,000 trucks. Then the  
23 volume rebate is applied across the thousand trucks. If  
24 they bought 1500 trucks, the volume rebate is different.  
25 It may be different not just in absolute terms but in

1 percentage terms. Then one has to go back to those  
2 thousand or 1500 trucks for the period in question, to  
3 apply the rebate for these purposes, and, of course, one  
4 does not know the relevant trucks to which to apply this  
5 aggregated discount until one knows which are the trucks  
6 that are genuinely within the scope of claim. So that  
7 reinforces the point that we need to have clarity upon  
8 scope before we start addressing price.

9 So unless I can assist further on that point, those  
10 are the additional matters that Daimler wishes to raise.

11 MR HOLLANDER: Incidentally, on Iveco trucks, I am told 37  
12 per cent. Ryder have given no prices at all.

13 MR PICKFORD: If I might just conclude then DAF's  
14 submissions on this point, because I didn't actually get  
15 on to the final parts of our proposal, the points that  
16 Mr Hollander has made, and Mr Harris makes as well, are  
17 all illustrative of the general complaint that I make,  
18 that this is Ryder's case. It is their claim, and it is  
19 up to them to set out how they propose to deal with  
20 issues such as gaps in their data. There may be gaps,  
21 and if there are gaps, it is up to them to say this is  
22 how we propose to address our claim. They have the same  
23 data as we do, and we can then respond to that and we  
24 might say, "Okay, you have come up with an idea and we  
25 think that is fair," or we might say, "Actually, we do



1 not think that your proposal is any good." But it is  
2 not up to us to seek to do that in the first instance,  
3 in relation to whatever issue it is, including all the  
4 ones that Mr Hollander and Mr Harris rightly refer to.

5 So that is why we have the proposal that we do at  
6 stage 5, that we then respond, and, as I said in the  
7 first part of my opening, 22 April has been advanced as  
8 the best date that we can really grapple with that,  
9 given both the materiality of the exercise and also the  
10 obligations on our economists in relation to Trial 1.  
11 Then we propose a final stage at stage 6, where the  
12 claimants respond accordingly.

13 MR MALEK: If we look at Mr Hollander's example, so  
14 37 per cent of Iveco's trucks, there is no price at all  
15 in the column. There may be a reason for that. The  
16 reason might be because neither the records of Iveco,  
17 nor the records of Ryder have that figure. They do not  
18 have that information, in which case how are you going  
19 to get to the next stage of coming to an agreed price  
20 for that and that -- what you are saying is, well, if  
21 neither of us have got that data, then it is for them,  
22 ie the other side, Ryder, to come up with a proposed  
23 figure that you then can come back with and then you can  
24 negotiate. It is not for you to come up with the first  
25 bid, let us say, and say, "That figure should be X."

1 MR PICKFORD: You have encapsulated in a far more succinct  
2 way the submissions that I was seeking to make before.

3 MR MALEK: Yes.

4 THE PRESIDENT: Yes, Mr Holmes.

5 MR HOLMES: Sir, if I could start with the last point,  
6 Mr Pickford's submission that this is our claim. Of  
7 course, that is correct, but we see the consolidated  
8 data set, as a practical issue, as a stage in preparing  
9 expert evidence on the same basis. All of the parties  
10 are going to be putting forward econometric analysis of  
11 overcharge and their estimates of VOC as part of their  
12 expert reports in calculating the level of the  
13 overcharge in reports in September. It is obviously  
14 sensible, insofar as possible, that we pool the data  
15 from which we are working, we look at the disclosure  
16 that has been given by both sides and we try to arrive  
17 at a common basis. That has been done in a number of  
18 other cartel claims and it makes very good sense. It is  
19 not about shifting the burden of proof, it is just about  
20 using the common resources of the parties in terms of  
21 disclosed data so that people proceed on a common  
22 footing, insofar they can, and that has all of the  
23 advantages which we discussed earlier in terms of, you  
24 know, avoiding the experts giving evidence on  
25 a divergent basis about the data.

1           The second point concerns the amount of pricing data  
2           that has been provided by Ryder and the quality of that  
3           data. I am instructed that over 70 per cent of the  
4           trucks in the VOC schedules have a price figure  
5           included. Ryder, in preparing that price figure, has  
6           sought to account for the chassis price, insofar as it  
7           can, using the available data. As Mr Malek rightly  
8           observed, the data is compiled using disclosure from  
9           each side and we have taken it as far as we can, and  
10          that is why we say that it is sensible for the  
11          defendants now to contribute to this process by  
12          responding to what we have set out in the VOC schedule  
13          and helping to see how complete a data set we can  
14          produce, and showing where there are areas of  
15          disagreement.

16          Mr Pickford pointed towards the highly accelerated  
17          timetable, and we are conscious of this. I myself do  
18          say that we need until 3 December because of the volume  
19          of trucks, to which Mr Pickford alluded by reference to  
20          our letter of earlier this week.

21          But we are working in parallel towards expert  
22          evidence in September. So all of the parties' experts  
23          are going to be thinking about data, they are going to  
24          be preparing datasets on the basis of which to opine,  
25          and that work cannot be avoided, and it is sensible that

1 we collaborate insofar as we can, and that is what these  
2 directions are aiming to achieve.

3 Mr Pickford pointed to the number of trucks where  
4 there is a dispute as to scope. As to this, we say that  
5 we have sought to accommodate that in the form of the  
6 directions by leaving out of account for now on price  
7 the trucks where there is a dispute as to scope.

8 We do not accept Mr Pickford's submission that that  
9 would give rise to any inefficiency or duplication of  
10 work. Each truck that is within scope will only need to  
11 be addressed once. It is a big task, but it needs to be  
12 done sooner rather than later, and what we say is, where  
13 it is clear that there is no dispute as to scope, let us  
14 see where we get to about price now, and that material  
15 in relation to those trucks really will not need to be  
16 revisited.

17 So, those, sir, are my submissions in response,  
18 unless there is anything else from -- no, that is  
19 everything.

20 THE PRESIDENT: Is it clear from your schedule, where you  
21 say, "We have sought to state the chassis price" -- we,  
22 of course, have not seen the schedules or data set --  
23 how you have derived the chassis price from the invoice  
24 price?

25 MR HOLMES: Certainly there are explanatory notes provided

1 with the VOC schedule, which sought to explain how we  
2 compiled the data. We haven't seen any detailed  
3 engagement, I think, in any of the materials that the  
4 Tribunal has been shown today with those explanatory  
5 notes suggesting that they are in any sense unclear or  
6 inadequate. Of course, we will happily engage, but we  
7 do see the next step, given that we have compiled these  
8 VOC schedules really now, is for the defendants to  
9 address the material on price, at least in relation to  
10 those trucks where the scope is undisputed.

11 We, I think, would be happy with the 22 April date  
12 for that engagement, if that is the best that the  
13 defendants are able to do. That is certainly the date  
14 that DAF was able to offer in correspondence, and  
15 I understand he speaks for the majority of the  
16 defendants in making that offer.

17 MR PICKFORD: Just to be clear, that was obviously an offer  
18 made contingent on all the other steps in the timetable.  
19 So if they are pushed back substantially to accommodate  
20 Mr Holmes' clients, that has ramifications.

21 MR HOLLANDER: He says there has not been any engagement.  
22 So far as Iveco is concerned, there was engagement in  
23 our letter, in correspondence, we have explained the  
24 position and we have not had a response. It is wrong to  
25 say there has been no engagement. They have not



1 is that it is for the Ryder claimants to consider the  
2 comments provided by the defendants on 27 August and  
3 provide their response.

4 The defendants have proposed that this should be  
5 done by Ryder by 10 November. Ryder says it needs until  
6 3 December. I find it difficult for us to say what is  
7 a reasonable time for Ryder because we cannot have any  
8 sense at the moment of the magnitude of the task. Any  
9 delay may cause squeezes at the end. But if Mr Holmes  
10 tells us that 3 December really is the best that Ryder  
11 can do, then that will be the date.

12 The defendants are then to comment on that response.  
13 That is also common ground. The defendants had offered  
14 to do that by 17 December but that was on the assumption  
15 that they are getting Ryder's response by 10 November.  
16 If they only get it on 3 December, then they will not be  
17 able to provide their response, we suspect, until some  
18 time in January, and that will then have to be a date  
19 which we can hear submissions of what is a reasonable  
20 time. It means that Christmas has intervened but there  
21 will be some time in January by which that can be done,  
22 and we can hear proposals on the date.

23 So that is the scope issue to start with and then  
24 the parties to engage constructively regarding scope  
25 through further correspondence, if necessary.

1           Price is more problematic. There are prices for  
2           some of the trucks, a significant number, in the  
3           schedule that Ryder has served but there are also  
4           a substantial number with no price. Where there is  
5           a price, this is, as we understand it, to be the chassis  
6           price. That is what we are told and, Mr Holmes, you can  
7           just confirm, is that right, that is what you are  
8           seeking to provide, is the chassis price?

9           MR HOLMES: Yes, we have sought to provide the chassis  
10           price, sir.

11           THE PRESIDENT: Yes, that is what we thought.

12           So we think that Ryder should give an explanation in  
13           the schedule of how the price is derived, how the  
14           chassis price is derived. We have not seen the  
15           schedule, so we do not know if there is scope here for  
16           a further column, but presumably, it is an electronic  
17           schedule, so a column can be inserted. If it is simply  
18           price on invoice, that can be said. If it is price  
19           derived from invoice by some apportionment because of  
20           what is referred to in the Travers Smith letter as  
21           exclusion of other goods and services, then that should  
22           be explained. It may be there is some common method has  
23           been used, in which case there can be a code which,  
24           therefore, identifies the method used. But the aim  
25           should be that therefore any defendant reading that



1 schedule, seeing that this truck has this price, knowing  
2 the documents from which that has been derived, can see  
3 how Ryder has got to that price.

4 At the moment, it seems to us that, as Ryder has  
5 already done that and it is a case of just inserting in  
6 abbreviated form in a revised schedule what it has done,  
7 we would hope that could also be done by 3 December so  
8 that this is served in one go.

9 This is separate from the point raised by Mr Harris  
10 about group rebates or discounts, which we will come to,  
11 volume rebates. If you have incorporated a volume  
12 discount in getting to that price, no doubt that will be  
13 explained.

14 That will then be the schedule that is provided to  
15 the defendants on 3 December. We think then that the  
16 defendants should engage with that schedule, not only  
17 for the comments on scope but also for the prices that  
18 are there set out.

19 We recognise that there may be some inefficiency if  
20 subsequently they have to consider prices on other  
21 trucks which were not included in the schedule, but we  
22 think that progress should be made and can be made and  
23 they should, therefore, engage with the prices that are  
24 specified and explained in the way I have outlined and,  
25 therefore, that they should respond on those prices and

1 say in their response, to come at a date to be agreed,  
2 which covers not only scope but on the price issue,  
3 whether they agree with the prices that have been  
4 specified by Ryder in the schedule and, insofar as they  
5 do not agree, state what they say is the correct price  
6 and explain why.

7 We do not see it is for them to provide alternative  
8 data from the records. As we understand it, disclosure  
9 has taken place and everyone has got all the data. So  
10 it is simply that they say what they consider is the  
11 correct price and explain equally how they have done it.  
12 The parties can then engage on those differences  
13 thereafter and similarly seek to agree constructively  
14 through further correspondence on the particular trucks  
15 that are not involved.

16 We think there should be a separate schedule setting  
17 out for each manufacturer what were the group discounts  
18 or rebates or volume rebates that were agreed, when they  
19 were agreed, for what period and what they cover. We  
20 think again there has to be a process by which Ryder  
21 prepares its draft of that schedule, it is sent to the  
22 defendants and the defendants can then comment, and we  
23 will need some suggestions as to when Ryder can do that  
24 and then when the response can come.

25 We would hope that could also be done by Ryder on

1           3 December, in the hope that documents recording group  
2 discount or rebate agreements are more readily  
3 accessible than documents concerning individual trucks.

4           That leaves, of course, all the trucks for which  
5 Ryder is not able to produce any price and Ryder has had  
6 disclosure from the defendants. The question then is  
7 what does Ryder propose should happen to produce a price  
8 for those trucks, which will be an estimated or  
9 extrapolated price or whatever. That is a question of  
10 methodology. We think that should be kept separate from  
11 this schedule because this schedule is looking at hard  
12 data. So there has to be a separate process whereby  
13 Ryder puts forward its proposals of how one should  
14 derive an estimated price to be attributed for those  
15 trucks for which it could not identify a price in the  
16 schedule. It is for Ryder to do that and then for the  
17 defendants to comment.

18           So there are several separate strands to this  
19 process that have to be set in place. That is how we  
20 think sensibly this should be taken forward.

21           So if we go through that in specific detail, first  
22 of all, scope. Mr Holmes, is 3 December the best you  
23 can do, given also you need to do the price element in  
24 the way I have explained, bearing in mind you will not  
25 then get a response by Christmas? Just a moment,

1           Mr Jowell. Mr Holmes? Yes, are you taking  
2           instructions, because you are muted?

3           MR HOLMES: I am, sir, apologies. I just wanted to check.  
4           My understanding is that that is the best we can do on  
5           scope, and I will address you on the timing of price in  
6           a moment. If you can just give me one second, I think I  
7           have someone here who will be able to give me  
8           a definitive indication. So it will just take one  
9           second.

10          THE PRESIDENT: You do that and Mr Jowell will just be  
11          patient.

12          MR HOLMES: Sir, yes, that is fine for scope but we do not  
13          think we can do any faster than 3 December. It depends  
14          on the availability of particular people, and 3 December  
15          is the fastest that we think we can do it --

16          THE PRESIDENT: Yes. That will be also then for the scope.  
17          It is scope and also with a new column explaining how  
18          you have got the chassis price.

19          MR HOLMES: Well, sir, on that, I do not think we can give  
20          a firm indication here and now. We would hope to be  
21          able to meet that date, but what we propose to do, if we  
22          may, is take it away from the hearing and, if it turns  
23          out that the date is not doable, we will explain that  
24          and we will seek to agree alternative dates during the  
25          process of preparing the order and will present those to

1 the Tribunal for its consideration and approval.

2 THE PRESIDENT: Yes. Well, I think you have got to bear in  
3 mind that, obviously, any date you come up with is going  
4 to push things back but, given that -- we are talking  
5 about prices that you have already specified, as  
6 I understand it, in the schedule.

7 MR HOLMES: Yes.

8 THE PRESIDENT: So you just have to go back and check how  
9 you did it.

10 MR HOLMES: That is right, sir, but there is a particular  
11 individual, as I understand it, who was very important  
12 in this activity and there may be particular issues in  
13 relation to his availability. It may also be necessary,  
14 in order to avoid a bottleneck here, to consider adding  
15 further individuals to the confidentiality ring. We  
16 would like, if we may, to consider this in short order  
17 so that we arrive at a date that is durable and that  
18 will not give rise to any slippage down the line during  
19 applications.

20 THE PRESIDENT: Yes. So we will hear from Mr Jowell but we  
21 would also like to know how long the defendants, if it  
22 is a 3 December date when they get the comments from  
23 Ryder or response to the comments from the defendants,  
24 which you have had since 27 August -- how long the  
25 defendants need to respond to that. That is on the

1           scope issue, and then how long they will need on the  
2           pricing points. Mr Jowell.

3           MR JOWELL: Thank you. May I address you briefly just on  
4           two small points on the order, which we hope would be  
5           uncontroversial. The first is that, Mr Chairman, you  
6           mentioned that the Ryder scope response should be to the  
7           27 August letters. Strictly speaking, MAN also wrote  
8           a letter on 31 August, relating to certain issues also  
9           arising out of the volume of commerce data set, and we  
10          assume that the responses that Ryder provide will also  
11          respond to that 31 August letter.

12                        So that is the first point.

13          THE PRESIDENT: Yes, that is agreed.

14          MR JOWELL: I am grateful. The second point is really  
15          a point about version control. We wrote on 27 August,  
16          providing certain versions of the schedules, and it  
17          would certainly be convenient if the chassis price  
18          explanations were provided on those versions and not on  
19          the prior May versions of the schedules.

20          THE PRESIDENT: Yes, I think we are getting down to a sort  
21          of micromanagement, which is difficult for us to express  
22          any view, and I would hope that is the sort of thing  
23          that parties and legal advisers of the sophistication  
24          involved in this case can agree, rather than hearing  
25          submissions now. You can put it in the order. If you

1 cannot agree, you can write in with alternative versions  
2 of the order, with an explanation. We will deal with  
3 it. But I do not think we want to start hearing  
4 submissions as to, you know, which version at this  
5 point. You have put down your marker that it should be  
6 the appropriate version. I am sure that is right, but  
7 what it is, we cannot possibly decide now. Yes,  
8 Mr Pickford.

9 MR JOWELL: Well, I am grateful.

10 THE PRESIDENT: Mr Pickford.

11 MR PICKFORD: Thank you, sir. So on the question of  
12 responding on scope, certainly from DAF's perspective,  
13 we are content to respond by 28 January, which was the  
14 date that was in Mr Stannard's first witness statement,  
15 on the assumption -- the original assumption -- that  
16 Ryder would be providing their comments by 3 December.  
17 So that is simply reverting to where we were previously,  
18 and we are happy to stick with what we previously said.  
19 That would be 28 January 2022 for that.

20 In relation to pricing, we hear what Mr Holmes says.  
21 It is obviously slightly unsatisfactory that this is his  
22 application, and all that he is being asked for in  
23 relation to the pricing issue is to set out what they  
24 have actually done, just to explain how they came upon  
25 the numbers that they have got, and that is two months

1 away, but if his position is he cannot give a date,  
2 well, then, he cannot give a date, but we had been  
3 hoping to get some degree of clarity, but we are always  
4 pragmatic and we will seek to liaise in the sensible way  
5 we have done so far.

6 MR HOLMES: Sir, you will appreciate there are 41,000 trucks  
7 and there may be particularities. It may be --

8 THE PRESIDENT: We do appreciate that, but equally, I was  
9 suggesting you ought to be able to do it by 3 December.  
10 We can say best endeavours by 3 December but the problem  
11 is if we do not get a definite date, we cannot tie the  
12 defendants --

13 MR HOLMES: That is understood. We are content with best  
14 endeavours.

15 THE PRESIDENT: By 3 December. The response will have to  
16 take account of any delay when you provide them. If it  
17 is provided by 3 December, Mr Pickford, can DAF respond  
18 by 28 January on that aspect as well?

19 MR PICKFORD: No, sir, we cannot. That is the issue that  
20 particularly engages our economists and, as I mentioned,  
21 we have a real problem and a crunch point, that they are  
22 preparing for Trial 1 --

23 THE PRESIDENT: Sorry to interrupt you, this is not an  
24 economic opinion evidence, as I understand it, this is  
25 looking at the invoice. If it is an invoice, or the data



1           that Ryder says the figure is derived from and saying,  
2           yes, that is right or no, it is not because you have not  
3           taken account of a warranty which we price at so much  
4           and needs to be deducted. We are not dealing with  
5           trucks for which there is no price and some method has  
6           to be used to estimate a price. We are looking at hard  
7           data here, as I understand it.

8           MR PICKFORD: Sir, yes, I do appreciate that point. There  
9           is, of course -- there are two ways in which each of the  
10          OEMs, and certainly DAF, is using its experts. One is  
11          to provide expert opinion evidence, and that will  
12          ultimately take the form of the reports that the  
13          Tribunal will see. But certainly in DAF's case, our  
14          economists are also heavily involved in assisting us  
15          with the technical issues that are involved in dealing  
16          with this very large-scale, significant litigation and  
17          dealing with the burden of addressing some of these  
18          sorts of issues that involve reviewing large amounts of  
19          data and processing it and helping to provide our case  
20          on it. We do not have the internal resources to do all  
21          of that ourselves.

22                 I can take instructions on whether, in the light of  
23          the way that the Tribunal has sought to distinguish  
24          these two points now, there is a means by which we can  
25          do the first task on pricing ahead of the methodological

1 task.

2 THE PRESIDENT: Methodological price is a quite different  
3 task.

4 MR PICKFORD: (Overspeaking) we were asking for 22 April  
5 still.

6 THE PRESIDENT: I think if you get this on 3 December, it is  
7 not acceptable that you need until 22 April to check the  
8 prices.

9 MR PICKFORD: Sir, may I take instructions?

10 THE PRESIDENT: Yes, while you are doing that, let us hear  
11 from -- the other thing which I should have asked you,  
12 Mr Holmes, is the schedule of discounts and rebates for  
13 each of the manufacturers for whom that applied, is that  
14 something you can prepare also by 3 December on a best  
15 endeavours basis?

16 MR HOLMES: On a best endeavours basis, sir. You will  
17 appreciate that this is a slightly separate exercise.  
18 It may be that it is a schedule that sets out our  
19 understanding of the discounting practices that were in  
20 place. Whether it will be as granular as the other  
21 material, I cannot, at this stage, guarantee because  
22 I just do not have instructions on that point.

23 THE PRESIDENT: Yes. I mean, I think what is behind the  
24 submission Mr Harris made, as we understood it, is while  
25 some invoices might say less the 12 per cent discount,

1           there are others where it will not, and the discounting  
2           or rebate came quite separately as a payment at the end  
3           of the year or a credit to your account. So it will not  
4           be, as it were, per truck in the same way. That is how  
5           we understood his point, and that will have to be dealt  
6           with separately. I think you have got the point.

7           MR HOLMES: I have, sir.

8           THE PRESIDENT: Yes. Right. So that is DAF. Mr Hollander  
9           for Iveco.

10          MR HOLLANDER: I was not proposing to say --

11          THE PRESIDENT: Scope response by 28 January?

12          MR HOLLANDER: I was not proposing to say anything further  
13           on timing in addition to what has been said already.

14          THE PRESIDENT: So you are content with 28 January?

15          MR HOLLANDER: Yes, absolutely.

16          THE PRESIDENT: Well, I would like you to say something  
17           because when you get the price information, it is hoped  
18           by 3 December, how long do you wish for Iveco to prepare  
19           its response, saying whether it agrees or whether it  
20           does not, what it says is the correct price?

21          MR HOLLANDER: I think we are taking instructions as I am  
22           speaking. So if you give me a moment or so, we will  
23           respond to that.

24          THE PRESIDENT: Sure. That will also cover this schedule on  
25           discounts.

1                   Then Daimler, Mr Harris? 28 January on scope?

2       MR HARRIS:  Sir, yes, 28 January on scope.

3       THE PRESIDENT:  Price?

4       MR HARRIS:  We ask for the end of February.

5       THE PRESIDENT:  End February in practice.  So that would

6       be --

7       MR HOLLANDER:  We would be happy with that too.

8       THE PRESIDENT:  Yes, so that is -- well, let us think of

9                   Friday, 25 February.

10      MR HARRIS:  Yes, sir, thank you.

11      THE PRESIDENT:  We have not decided it but that is what I am

12                   taking down your proposal.  Then Ms Abram for

13                   Volvo/Renault.

14      MS ABRAM:  So 28 January is fine for us and for scope as

15                   well.  We also think that the end of February should be

16                   fine for us on the later exercise.  It might be said

17                   that the parties might be able to go away and agree the

18                   precise dates because there is obviously a bit of

19                   uncertainty on Ryder's side as well as on the

20                   defendants' side.  So we might sensibly be able to reach

21                   agreement on the details.  Obviously, we are in the

22                   Tribunal's hands.

23      THE PRESIDENT:  That would be very helpful for us because

24                   you are all trying to take instructions, often, I

25                   suspect, from people who are not in the room with you,

1 and to-ing and fro-ing at 4 o'clock on the details of  
2 the chronology of sequence is not particularly helpful.

3 We have set out what we think ought to happen and  
4 what we will rule will happen. There is a quite  
5 separate exercise, which we do not regard as part of  
6 this data set, which is what you do where there is not  
7 the data and what the methodology should be, and that is  
8 for Ryder to consider, no doubt with its experts, and  
9 come up with a proposal, and then for the defendants to  
10 respond, and I think again there should be a timetable  
11 for that. You will need to talk to your expert as to  
12 what is possible. So we would like you to go away and  
13 see what can be agreed. It may be that, if there is  
14 dispute about the methodology, that is something that  
15 could be accommodated at the hearing that is going to  
16 take place in January so that at least you can have  
17 developed your method for dealing with, as it were, the  
18 gaps in the data set over the next six weeks and take it  
19 forward that way.

20 I think Ms Abram makes a very fair point, that it  
21 will be much easier to work this out if you can consider  
22 it offline with your teams and then propose and seek to  
23 agree dates, and anything that cannot be agreed, we can  
24 resolve on the papers.

25 MR HOLMES: That seems very sensible to us.

1 THE PRESIDENT: Does anyone else wish to come in on that  
2 point? I think we have agreement -- I do not think  
3 I actually came back to Mr Jowell on the 28 January  
4 date, which everyone else --

5 MR JOWELL: Yes, we are content with that and also with  
6 the February date, if that is what is agreed, but we are  
7 very content with leaving it all for future agreement.

8 THE PRESIDENT: I think, Mr Holmes, if your best endeavour  
9 is 3 December, I think it may be that the February date  
10 is a reasonable one for the defendants because it may be  
11 a significant exercise.

12 MR HOLMES: We understand what you say, sir. Shall we see  
13 where we get to in discussion amongst the parties --

14 THE PRESIDENT: Yes.

15 MR HOLMES: -- and then come back with our proposals and any  
16 points of disagreement for the Tribunal to consider?

17 THE PRESIDENT: Yes. So we shall leave it like that. Is  
18 there anything else we need to deal with on the data set  
19 point?

20 MR HOLMES: Not on the data set point. There was one point  
21 we noted from this morning that may still be a loose  
22 end, which was just the date for the defendants to  
23 specify their joint expert, which I think was something  
24 that they were going to come back about.

25 THE PRESIDENT: Yes, this is the joint expert on -- the



INDEX

1		
2		
3	Issue of supply pass-on and resale.....	1
4	pass-on	
5	Issue of loss of volume.....	8
6	Issue of pleadings and amendment to.....	25
7	defences	
8		
9	Issue of consolidated datasets.....	42
10		
11	Issue of DS Smith.....	46
12		
13	Issue of consolidated data set.....	87
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		



1

2

3

4

5