Neutral citation [2022] CAT 32

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1291/5/7/18 (T)

6 July 2022

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Before:

HODGE MALEK QC
(Chairman)

BETWEEN:

(1) RYDER LIMITED
(2) HILL HIRE LIMITED

Claimants

- and -

~~**(1) MAN SE**~~
~~**(2) MAN TRUCK & BUS AG**~~
~~**(3) MAN TRUCK & BUS DEUTSCHLAND GMBH**~~
~~**(4) MAN TRUCK AND BUS UK LIMITED**~~
(5) AB VOLVO (PUBL)
(6) VOLVO LASTVAGNAR AB
(7) VOLVO GROUP TRUCKS CENTRAL EUROPE GMBH
(8) VOLVO GROUP UK LIMITED
(9) RENAULT TRUCKS SAS
(10) DAIMLER AG
(11) MERCEDES BENZ CARS UK LIMITED
(12) STELLANTIS N.V. (FORMERLY KNOWN AS FIAT CHRYSLER AUTOMOBILES N.V.)
(13) CNH INDUSTRIAL N.V.
(14) IVECO S.P.A.
(15) IVECO MAGIRUS AG
(16) IVECO LIMITED
(17) PACCAR INC.
(18) DAF TRUCKS N.V.
(19) DAF TRUCKS DEUTSCHLAND GMBH
(20) DAF TRUCKS LIMITED

Defendants

Heard remotely on 6 July 2022

RULING: DISCLOSURE

APPEARANCES

Mr Mark Brealey QC (instructed by Ashurst LLP) appeared on behalf of the Ryder Claimants.

Mr Ben Rayment (instructed by Macfarlanes LLP) appeared on behalf of the Daimler Defendants.

Mr Tony Singla QC and Mr Andrew McIntyre (instructed by Herbert Smith Freehills LLP) appeared on behalf of the Iveco Defendants.

A. INTRODUCTION

1. By its decision in *Trucks*, adopted on 19 July 2016 ("the Decision") the European Commission ("the Commission") found that five major European truck manufacturing groups had carried out a single continuous infringement of Article 101 of the Treaty on the Functioning of the European Union with respect to the sale of medium and heavy trucks ("Trucks") over a period of some 14 years between 1997 and 2011 ("the Infringement").

2. Another major truck manufacturing group, Scania, did not participate in the settlement and was the subject of a separate Commission decision on 27 September 2017, finding that it was a participant in the Infringement and imposing a fine of €880 million. Scania's appeal against that decision was recently dismissed by the General Court, Case T-799/17, *Scania v Commission* EU:T:2022:48, but Scania is appealing further to the Court of Justice of the European Union.

3. Seven actions claiming damages against the addressees of the Decision and related companies have been transferred from the High Court to the Tribunal and these have been treated by the Tribunal as the first wave of proceedings (the "First Wave Proceedings"). For the purposes of this ruling, the addressees of the Decision and defendants to these actions may be referred to simply by the corporate name of the group to which they belong, DAF, Daimler, Iveco and Volvo/Renault, and together they are referred to as the "OEMs", the original equipment manufacturers.

4. Six case management conferences in these proceedings ("CMCs") have taken place in the Tribunal, on 21 to 22 November 2018, 2 to 3 May 2019, 6 February 2020, 29 to 30 October 2020, 5-6 May 2021 and 11-12 October 2021.

5. Disclosure has featured heavily in each of the CMCs and this aspect is being closely managed by both the parties and the Tribunal given the complexities, importance and costs of the exercise.

6. The seven actions in the First Wave Proceedings have been split into three for the purposes of trial. The first group is Royal Mail and BT. These proceedings

concern the sale of trucks in the UK and only against one OEM, which is DAF. This was tried from 3 May 2022 to 30 June 2022. Judgment has been reserved.

7. The second group are the Ryder and Dawsongroup proceedings, which concern the sale of trucks in the UK, and against multiple OEMs[1]. These are due to be tried starting on 13 March 2023.

8. The third set of proceedings are the Veolia, Suez and Wolseley proceedings (the "VSW proceedings"), each of which involve numerous claimants and concern the sale of trucks in the UK and Europe, including for current purposes France and Germany. The Suez proceedings are brought by 339 claimants against DAF and Fiat, who brought in the other OEMs, including Scania, as third parties. The Veolia proceedings are brought by 139 claimants against all five OEMs, the subject of the Decision, who in turn had brought third party proceedings against DAF and Scania. The Wolseley proceedings are brought by 154 claimants against DAF and Fiat, who had brought in the other OEMs, including Scania, as third parties. The VSW proceedings are due to be tried starting on 9 April 2024. These are not the only truck actions before the Tribunal. Further waves of claims have been brought, but in the main these are all at a relatively early stage.

B. APPLICATION

9. By an application letter dated 13 June 2022 from Macfarlanes on behalf of all of the Defendants, the Defendants seek an order against both Claimants that the Claimants undertake searches in respect of certain categories of documents and provide disclosure of any responsive documents. The disclosure sought is by reference to the categories set out in the Redfern Schedule dated 17 December 2021 and cover the areas of supply pass-on, mitigation and loss of profits. The form of order sought is appended to Iveco's skeleton argument, but it was amended at the disclosure hearing to reduce its scope as indicated in square brackets, which at paragraphs 1 to 5 sets out the categories of documents sought:

[1] By an order of the Chairman dated 13 December 2021, the claims against the MAN Defendants in Case 1291/5/7/18(T) were stayed by consent.

"Supply Pass-on

1. Within [6] weeks of the date of this Order, the Claimants shall:

   a. undertake the searches requested by the Defendants in respect of categories: PO5(f)/2 [agreed], PO7(b)/(Enrich), PO7(d)/1 (JBA), PO7(d)/3 (Enrich), PO7(f)/(Enrich), in the Redfern Schedule but limited in relation to revenue and costs attributable to Trucks and disclosure any responsive documents/data.

   b. [alternatively], in relation to categories PO7(d)(1)/(Enrich) and/or PO7(d)/1 (JBA) search for and provide all fixed and variable costs data attributable to trucks held on those databases.

   c. confirm, via a disclosure statement, whether the HHRS system contains costs data falling within PO7(d)/6 (HHRS) or utilisation data falling within PO7(f)/(HHRS) and, if it does, to conduct the searches requested by the Defendants and disclose any responsive data.

Mitigation

2. Within [6] weeks of the date of this Order, the Claimants shall undertake the following searches and disclose any documents responsive to categories M1 and/or M5:

   a. Searches of the Ryder Custodian Data using the proposed search terms specified at rows [1,] 2 and 4 of pp.8-9 of the Redfern Schedule;

   b. [A search of the Ryder Custodian Data using the following sets of search terms:

      *integrat*w/15 ("Fleetcare" OR "Contract Services")* [restricted to 2004]

      "FleetCare Centre" [restricted to 2004]

   c. A search of the Hill Hire Custodian Data using the proposed search terms specified at rows 2 to 5 of pp.10-11 of the Redfern Schedule;

   d. A reasonable and proportionate search of the Hill Hire Custodian Data for documents relevant to the Initiative identified at paragraph 17.6(a) of Annex 1 to the Claimants' Disclosure Statement as "Project Jess";] and

e. Reasonable and proportionate searches of the Ryder Custodian Data for documents relevant to the Further Initiatives.

3. [The First Claimant shall consider whether any additional custodians may hold documents relevant to the Initiative identified at paragraph 17.12(i) of Annex 1 to the Claimants' Disclosure Statement as "a redundancy programme carried out in 2009" and, insofar as it is reasonable and proportionate to do so, search those custodians' data using the search terms specified at paragraph 17.13(i) of Annex 1 to the Claimants' Disclosure Statement, and disclose any responsive documents.]

4. To the extent that any of the searches in relation to an Initiative referred to in paragraph[s] 2(a)[-(c)] of this Order return fewer than 10 relevant results, the Claimants shall consider whether any additional custodians may hold documents relevant to categories M1 and M5 in the Redfern Schedule in relation to the relevant Initiative and, insofar as it is reasonable and proportionate to do so, undertake the following searches in respect of those custodians' data and disclose any responsive documents:

a. The searches in relation to the relevant Initiative specified at paragraph[s 17.7 (for any additional Hill Hire custodians) and] 17.13 [(for any additional Ryder custodians)] of Annex 1 to the Claimants' Disclosure Statement; and

b. The searches specified at paragraph 2(a)[-(c)] of this Order.

<u>Loss of profits</u>

5. Within [6] weeks of the date of his Order, the Claimants shall undertake the following searches and disclose any responsive documents:

a. A search of the JBA and Enrich systems and documentation for financial and operational performance information on a depot-by-depot basis in respect of the First Claimant; or

b. If the information referred to in paragraph 5(a) of this Order is not available, a reasonable and proportionate search for further management commentary and other reports detailing the decision-making process to close depots of the First Claimant."

10. Upon receipt of the application, the Tribunal determined that it was suitable to be dealt with by way of a Friday application to be decided by me by way of a short hearing with evidence limited in length. The matter was subsequently listed to be heard on 6 July 2022 with a time estimate of half a day. The aim is to deal with such applications in a cost-effective way in accordance with the Tribunal's governing principles set out in Rule 4 of the Competition Appeal Tribunal Rules 2015.

11. The application is supported by the fifth witness statement of Mr Andrew Grantham of Alix Partners UK LLP. Mr Grantham and his firm are the Defendants' forensic accounting advisors in relation to the Claimants' claim for damages suffered as a result of the Infringement by the Defendants. The application is opposed by the Claimants, who have filed evidence of their own in the form of the following statements dated 24 June 2022:

    (1) the first witness statement of Mr Jonathan Gale of Ashurst LLP, solicitors for the Claimants.

    (2) the sixth witness statement of Dr Lawrence Wu of NERA Economic Consulting, Dr Wu and his firm are the economic advisors to the Claimants. Dr Wu was appointed as an independent expert in these proceedings pursuant to an order of the Tribunal dated 11 February 2022 to provide expert evidence in the field of regulatory and competition economics covering, inter alia, supply pass-on.

    (3) the second statement of Mr Frank Ilett of Kroll Advisory Limited. Mr Ilett and his firm are forensic advisors to the Claimants. Mr Ilett was appointed as an independent expert pursuant to the Tribunal's 11 February 2022 order to provide expert evidence in the field of forensic accounting covering, inter alia, the issues of supply pass-on, loss of volume and loss of profit.

12. The parties filed skeleton arguments on 28 June 2022. The bundle for the hearing amounted to 88 documents exceeding 2,400 pages. This is significantly more material than what is envisaged by the process for Friday applications.

For future applications the parties should endeavour to limit the material to what would fit into a single lever arch file.

C. BACKGROUND

(1) Approach to disclosure in the Trucks actions

13. This application for disclosure is being made pursuant to paragraphs [50] to [53] of the Tribunal's ruling on disclosure made on 15 January 2020 ([2020] CAT 3) ("the Disclosure Ruling").

> "50. To address any concerns the parties may have that there is insufficient time at a disclosure hearing and/or CMC to deal with all the disclosure issues in dispute, either the President or Mr Malek QC will be available in principle on one Friday each month to hear further disclosure applications, either matters that have been held over or new matters that may arise ("Friday Applications"). It is envisaged that any such hearings would deal with discrete issues between individual claimants and individual defendants. Outstanding issues in dispute between individual claimants and individual defendants may also be resolved on the papers if appropriate.
>
> 51. Before making any Friday Applications, the parties should engage with each other in a co-operative manner, in accordance with the governing principles, to seek to agree, as far as possible, any of the matters in dispute. As observed by Green J in Peugeot, "the efficacy of this process involves close and sensible cooperation between the parties and the experts". Failure to do so may result in a costs order being made against the relevant party should a misconceived application be brought before the Tribunal.
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> 52. The timetable for any Friday Applications is as follows:
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> …
>
> (5) No later than two weeks before the hearing date: the relevant party is to file its application with supporting evidence and an updated extract from the relevant Redfern schedule. Supporting evidence is limited to a maximum of two witness statements (including one from an expert) and an exhibit of no more than 25 pages.
>
> (6) The Tribunal will confirm in writing to the parties whether the application is of a nature that is suitable for determination at a Friday hearing.
>
> (7) No later than one week before the hearing date: the respondent(s) to the application are to file any responsive evidence, which is subject to the same limits set out at (5) above.
>
> (8) Short skeleton arguments and a hearing bundle are to be filed two clear days before the hearing date.
>
> 53. As to the stage at which a particular disclosure application should be made, the Tribunal will adopt a common-sense approach with a view to maximising

the most efficient use of the Tribunal's time and avoiding potentially inconsistent rulings on the same point. Therefore, if there are, for example, four defendants to a claim, and only three wish to pursue a disclosure application at a particular juncture, the Tribunal could well decide to proceed with hearing the application in which case the fourth defendant would need to be prepared to make submissions. Conversely, if a single defendant wishes to proceed with a disclosure application when the other defendants wish to defer it until a later stage, the Tribunal may defer consideration of the application until it can hear all defendants together."

14. The Disclosure Ruling sets out the approach which the Tribunal has adopted in relation to the disclosure across all seven "Trucks" actions, which until 2020 had been case managed together. In providing this ruling, I have followed the approach set out in the Disclosure Ruling and the procedure for dealing with the various types of disclosure applications as explained by the Tribunal in *Dawsongroup Plc v DAF Trucks NV* [2021] CAT 13 at [3]-[11].

15. The applicable rules and procedure in relation to disclosure in relation to these proceedings are set out in some detail in the Disclosure Ruling. The broad principles are summarised in the Disclosure Ruling at [35]:

> "Even in cases where broad disclosure is required, it is possible to lay down some broad principles that are applied by the CAT. These are:
>
> (1) Orders for standard disclosure will not in general be made.
>
> (2) Disclosure will be confined to relevant documents. Relevance is determined by the issues in the case, derived in general by reference to the pleadings, although in appropriate cases disclosure can be in relation to matters not specifically pleaded.
>
> (3) A strong justification would be required to make any order along the lines of the 'train of enquiry' test in the classic formulation of the test for disclosure enunciated by Brett LJ in *Compagnie Financière du Pacifique v. Peruvian Guano Co*. (1882) 11 QBD 55 at 63. An example where train of enquiry disclosure may be justified is a case alleging a cartel infringement where the underlying facts are unknown to the claimants but are in the hands of the defendants.
>
> (4) Disclosure cannot be ordered in respect of a settlement submission which has not been withdrawn or a cartel leniency statement (whether or not it has been withdrawn). This does not preclude a party which made such a submission or statement providing it by way of voluntary disclosure.
>
> (5) Disclosure will not be ordered in respect of a competition authority's investigation materials before the day on which the authority closes the investigation to which those materials relate.
>
> (6) Ordinarily disclosure will be by reference to specific pleaded issues and specific categories of documents.

(7) Disclosure will only be ordered and the order will be framed to ensure that it is limited to what is reasonably necessary and proportionate bearing in mind a number of aspects, the most important of which are:

(a) the nature of the proceedings and the issues at stake;

(b) the manner in which the party bearing the burden of proof is likely to advance its case on those issues;

(c) the cost and burden of providing such disclosure;

(d) whether the information sought can be obtained by alternative means or be admitted; and

(e) the specific factors listed in r. 4(2)(c)."

16. The broad principles as to the Tribunal's general approach in relation to disclosure are provided in the Disclosure Ruling at [40]:

"In light of that, we set out the following broad principles as to the general approach the Tribunal will take that affects disclosure.

(1) The initial burden of proof is on the Claimants to satisfy the Tribunal on the balance of probabilities that the Infringement had an effect on prices.

(2) If that hurdle is passed, the Tribunal will seek to arrive at a reasonable estimate of what the effect might have been and what any pass-on (within the relevant legal principles) might have been, again on the balance of probabilities.

(3) A reasonable estimate in this context means an estimate that is arrived at in a proportionate manner. We recognise of course that these are very large damages claims. However, any estimate will still be reached through averages, extrapolations and aggregates. It does not mean that every logical avenue that might be relevant can be explored, or that all data which is arguably relevant must be provided. As observed by Birss J in *Vodafone v Infineon Technologies AG* [2017] EWHC 1383 (Ch), at [31]:

"while of course more [disclosure] can be better …it is relevant to ask how much more would it be and how much better would it make the result."

The decision as to what disclosure to order is appropriate is informed by the views of the economic experts but it is not determined by what data they would like to have or what method they would like to use. It is for the Tribunal to decide.

(4) In reaching that decision, the Tribunal has regard to the principles of effectiveness, that cases should not be unreasonably difficult to bring, and of proportionality as set out in rule 60(2) read with the governing principles in rule 4 and also the Disclosure PD.

(5) It is not therefore simply a question of relevance, as some of the skeleton arguments we received seemed to suggest. Disclosure will only be ordered in relation to a specific category of documents if the Tribunal is

satisfied the documents sought are relevant and that disclosure would be necessary and proportionate. The Tribunal will not make an order merely because it determines that the documents are relevant to the issues.

(6) These actions seek damages for loss on many hundreds of transactions, involving a very large number of vehicles, carried out over an extensive period, and in some of the cases by a very large number of claimants. Further, the Infringement involved contacts and communications between the participants over a 14 year period, with different involvement on the particular occasions. The approach to proof of causation and quantification, both as regards any overcharge and as regards pass-on, will therefore be very different from that which can apply where the claim is for loss on one or two very large transactions concluded following extensive negotiation: cp. *BritNed Development Ltd v ABB AB* [2018] EWHC 2913 (Ch). It is unlikely to be realistic in these cases for the issues to be approached by examining each price charged for each transaction subject to the claim and seeking to ascertain how any antecedent exchange of information or coordination between the OEMs may have influenced that price (whether directly or by reference to a gross price). Similarly, as regards pass-on, it would appear to be disproportionate even if it were possible to consider the resale or disposal of each truck that is subject to the claim. Accordingly, it is important to establish how in practice the issues at trial will be approached, and to do so before and not after vast time, effort and expense is devoted to yet further disclosure."

(2) Disclosure in the *Ryder* proceedings

17. Disclosure in these proceedings has been on a staged basis. On 19-20 September 2019, I made an order providing for disclosure by all the parties to the proceedings, including in relation to the Value of Commerce and Overcharge (the "Initial Disclosure Order"). This disclosure is central to the issues between the parties as it goes to i) whether or not, as a result of the Infringement, prices for Trucks sold by the Defendants were higher than they would have otherwise been, and ii) the numbers of Trucks acquired and at what cost.

18. The Initial Disclosure Order directed at paragraph 9(c) that the Claimants should by 30 April 2020 disclose the documents and/or data in their control that are responsive to categories PO2 to PO7 identified in Annex 6. Annex 6 specified under PO7, inter alia, the following:

> "Detailed monthly sales data by individual units if applicable, for the Claimants for sales, including data relating to:
>
> …

> (a) Product characteristics or service details for the products or services provided by the Claimants;
>
> …
>
> (b) Fixed and variable revenues for all Claimants' business lines, even if not directly related to truck use;
>
> …
>
> (f) Quantities supplied of products of services provided by the Claimants;
>
> …"

19. On 6 November 2020 I made an order providing for disclosure of documents by the Claimants and the DAF Defendants, including in relation to the Communications Disclosure. The order was amended on 26 November 2020 ("the DAF Disclosure Order"). I made similar orders for disclosure in respect of the other Defendants. These orders envisaged that the parties would search for documents relating to the pricing for Trucks and hence was a separate exercise to the database disclosure under the Initial Disclosure Order. On 19 November 2021 I determined an application by the Claimants in respect of disclosure from Iveco relating to information contained in data extracts from Iveco's Statcom System: [2021] CAT 34. On 13 January 2022 I determined an application by the Claimants against the DAF Defendants in respect of communications between or within any of the DAF Defendants relating to the sales prices for actual and potential transactions with the Claimants: [2022] CAT 1. In dealing with the present application for disclosure against the Claimants, I have taken into account the fact that the Defendants have provided a great deal of disclosure at significant expense in relation to disclosure sought by the Claimants. I also follow the approach that I have taken in relation to disclosure applications made by the parties both in these proceedings, but also in the other lead actions.

20. The disclosure sought against the Claimants in support of the Defences of the Defendants has focused on supply pass-on, mitigation and loss of profits. It is the Defendants' case that if there was an Overcharge, then part of all of the Overcharge was passed on by the Claimants to their customers or to subsequent buyers of the Trucks with the result that the loss was reduced if not eliminated. In *Sainsbury's v Visa* [2020] UKSC 24 at [216] the Supreme Court confirmed

that the legal burden of establishing pass-on lies on the Defendants, but once they have raised the issue of mitigation in the form of pass-on, there is a heavy evidential burden on the Claimants to provide evidence as to how they have dealt with the recovery of their costs in their business: see also *NTN Corporation and Others v Stellantis N.V. and Others* ([2022] EWCA Civ 16).

21. In *Royal Mail Group Limited v DAF Trucks Limited & Ors* [2021] CAT 10, the Tribunal referred to the evidential burden on claimants which arises when defendants have raised the issue of mitigation in the form of supply pass-on. The Tribunal stated at [33]:

> "The effect of a pleaded mitigation defence in general terms is to cast a significant burden on a follow-on claimant to disclose and give evidence about its business operations and procedures, which in many cases, as here, may extend over a period of many years. The process of giving disclosure and providing evidence about the financial controls of a large business is likely to be very time consuming and very expensive. The Supreme Court emphasised in the Sainsbury's judgment at [189]:
>
> > "The principle of effectiveness applies to the procedural and evidential rules by which the court determines whether and to what extent the claimant has suffered loss."
>
> We have considered whether this principle may be contravened in certain cases by such a burden imposed on the pursuit of a claim for damages against a cartelist such as DAF. In some cases, including many of the other trucks damages claims, there will not be the degree of equality of arms that exists in these claims, where not only DAF but also the Claimants are very well resourced. There is a real risk, in our view, of infringement of this principle unless there is some basis other than pure theory for believing that a defence of mitigation has some factual basis for it and so can properly be pleaded."

22. In *Stellantis,* the Court of Appeal stated:

> "[17]. The basic test is that there has to be a sufficient causal nexus or connection between the steps that a defendant says a claimant took by way of mitigation (the off-setting) and the overcharge.
>
> …
>
> [63].…the mere fact that there is a cost control system which involves targets does not reasonably (logically or rationally) lead to the inferred conclusion that [the Claimant, FCA] would in fact mitigate an overcharge by obtaining better prices from suppliers of other products.
>
> …
>
> [81]. I return finally to the argument that the analysis of the CAT places [the Defendant, NTN] in a "Catch 22" predicament whereby the CAT accepted that in principle an off-setting defence could be pleaded but, simultaneously, made

> it impossible to plead sufficient facts to get such a defence off the ground by denying NTN the chance to obtain and review disclosure from the claimant. The short answer to this is that if a defendant does not have any realistic evidence of a possible defence, then it has no right to go fishing in disclosure to see if there is anything that might turn up which would help. As the CAT below and in Royal Mail observed there has to be a properly pleadable starting point before the claimant is put to the heavy burden that disclosure involves. In this case the pleading simply does not arrive at the starting point."

23. As regards mitigation in these proceedings, it is the Defendants' case that the Claimants mitigated any Overcharge by reducing the costs which they paid to their suppliers. It is asserted that the Claimants would have sought to mitigate any increase in their input costs by virtue of such Overcharge by negotiating lower input costs and otherwise reducing their costs of supply. As regards loss of profits, the Defendants contend that it is for the Claimants to prove any loss of profits and the mechanism by which that loss of profit occurred, including the alleged reduction in the volume of transactions concluded, the quantum of any alleged profitability and the extent to which the Overcharge was absorbed in the Claimants' business. One particular aspect in issue in respect of loss of profits is the Claimants' pleaded case that the implementation of various cost-cutting measures caused a reduction in the volume of transactions concluded in the relevant period. This included the closure of a number of maintenance depots. The Defendants do not accept that and hence have sought depot-by-depot financial and operational performance data from the Claimants.

24. As regard supply pass-on disclosure, the Initial Disclosure Order provided for pass-on disclosure by the Claimants, including for monthly revenue and cost data covered by category PO7. On 29 May 2020 the Claimants provided disclosure pursuant to the Initial Disclosure Order, including documents responsive to categories PO2 to PO7 and a Disclosure Statement and Guidance Note, which explained that what was being provided in respect of category PO7 was in effect the best available evidence responsive to that category. This matter was followed up in correspondence by the Defendants including, in particular, a letter from the Defendants dated 19 April 2021. On 4 May 2021 the Claimants wrote to the Defendants referring to difficulty in obtaining monthly data from the dataset and invited the Defendants to withdraw their request under category PO7. On 5 May 2021 the Defendants indicated that the request for monthly data would not be pursued at that stage, namely at the May 2021 CMC. On 3

September 2021 the Claimants filed a consolidated Disclosure Statement, which included category PO7, which provides as follows:

> "15. **CATEGORY PO7A**
>
> 15.1 Category PO7A required further explanation as to why the Ryder Claimants disclosed annual rather than monthly data relating to Ryder's revenue earned and costs incurred under category PO7 of the Disclosure Order dated 26 November 2019.
>
> 15.2 As has been explained to the Defendants on numerous occasions, UCR data has been disclosed on an annual basis because it more accurately reflects revenue on a per Truck basis and because monthly UCR data may be unhelpful and misleading due to significant "noise" or potential distortions in the data. By way of example, monthly UCR data would include all maintenance events for each month (e.g. a vehicle service or MOT) which therefore results in significant cost variation from month to month. These variations would not correlate with actual revenues associated with each vehicle. In addition, there are adjustments to account for either (i) maintenance conducted under warranty, or (ii) credits provided to Ryder's customers for whatever reason (e.g. refunding maintenance conducted under warranty or amounts billed in error). Such adjustments will distort monthly UCR data (e.g., result in negative values). In summary, the Ryder Claimants provided the UCR on an annual basis precisely because it more accurately reflects the overall revenue generated on a per Truck basis.
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> 16. **CATEGORY PO7B**
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> 16.1 Category PO7B related, in respect of Hill Hire, to granular and disaggregated monthly data about revenue earned and costs incurred in respect of (or allocated to) individual Trucks (including the calculation of these revenues and costs).
>
> 16.2 The Ryder Claimants agreed to address this request in this Disclosure Statement. To the best of the Ryder Claimants' knowledge, belief and understanding Hill Hire's systems did not record fixed and variable costs for specific Trucks. The Ryder Claimants understand that Hill Hire principally focused on branch level profit and loss detail rather than at the level of individual Trucks."

25. Pursuant to the Tribunal's Order dated 3 December 2020, the Defendants served Redfern Schedules on the Claimants on 29 January 2021 which made 6 disclosure requests in relation to the mitigation issue (M1 to M6) and one in respect of loss of profits (LP1). By the Tribunal's Order dated 29 July 2021, the Claimants were directed to carry out reasonable and proportionate searches in relation to categories M1, M5, M6 and LP1.

26. On 3 September 2021, the Claimants provided disclosure in response to categories M1, M5, M6 and LP1 and in their Disclosure Statement set out the

parameters of the searches they had conducted in respect of those categories. The Defendants, having reviewed the disclosure, identified what they considered to be gaps in the disclosure. Hence on 17 December 2021 the Defendants served a further Redfern Schedule containing (inter alia) additional disclosure requests in respect of categories PO7, M1 to M6 and LP1. On 21 March 2022 the Claimants provided their response to the further Redfern Schedule. They declined to carry out further searches or provide further disclosure in respect of categories PO7, M1 to M6 and LP1. On 14 April 2022, following review of the Claimants' witness evidence, the Defendants provided Redfern replies in respect of PO7 limited to only those requests that were prioritised on the basis of their importance to the Defendants' experts' analysis. On 28 April 2022, the Defendants provided Redfern replies in respect of categories M1 to M6 and LP1. Following further correspondence, on 20 May 2022 the Claimants provided a further response and maintained their position that no further searches and disclosure was necessary. Only categories PO7, M1, M5 and LP1 are the subject of the present application.

27. So far as is relevant to the present application, the Claimants have given disclosure from the following three databases:

(1) Enrich system covering the period from July 2004 to December 2018. It was used by the First Claimant alone until 2011, then by both Claimants from 2011. It was the primary system for financial recording and the management of fixed assets and customer contracts.

(2) JBA system covering the period from around December 1993 until the implementation of the Enrich system in July 2004. It was used by the First Claimant as its general ledger and sub-ledger, including its fixed assets register and accounts payable, contract billing records and accounts receivable.

(3) Hill Hire Rental System ("HHRS") covering the period from around August 1999 until 2011. This was used by the Second Claimant to record its contract billing history and fleet data.

Whilst the Enrich system is still in use, the Claimants do not employ anyone who has historic knowledge of the JBA and HRRS systems. There are and have been significant difficulties in extracting relevant data from both systems.

28. The categories of documents sought by way of the present application are as follows:

CATEGORY	DESCRIPTION OF REQUEST
A. PASS ON (PO CATEGORIES)	
(i) Monthly truck-by-truck cost and revenue data[2]	
<u>PO7(b) / (Enrich):</u> monthly revenue	Data post 1 July 2004 on a truck-by-truck basis in respect of **the Claimants**. The Defendants request lease and rental revenue on: (i) all trucks; and (ii) all other business lines even if not directly related to truck use, and request that the response should include the truck registration number, the truck chassis number and the customer number (for lease hire customers).
<u>PO7(d)/(3) (Enrich):</u> monthly breakdown of all fixed and variable costs	Data post 1 July 2004 on a truck-by-truck basis and attributable to other sources in respect of **the First Claimant**. The Defendants request monthly breakdown of running, fixed, and variable costs (including, for example repairs and tyres and washing and cleaning costs), and request that the response should include the truck registration number, the truck chassis number and the customer number (for lease hire customers).
<u>PO7(d)/1 (JBA):</u> monthly breakdown of all fixed and variable costs	Data pre-July 2004 on a truck-by-truck basis and attributable to other sources in respect of **the First Claimant**. This is the same request as PO7(d)/(iii) (Enrich) but applies to data pre-July 2004 and therefore involves interrogating the Claimants' legacy fleet management system, the JBA. The Defendants request monthly breakdown of running, fixed and variable costs (including, for example, repairs, tyres and washing and cleaning costs), and request that the response should include the truck registration number, the truck chassis number and the customer number (for lease hire customers).
<u>PO7(d)/6 (HHRS):</u> monthly breakdown of	Data on a truck-by-truck basis and attributable to other sources in respect of **the Second Claimant**. This involves interrogating the defunct HHRS fleet management system.

[2] As at the time of filing of their skeletons, the Defendants only pursued truck-related costs disclosure in these categories (see paragraph 66).

CATEGORY	DESCRIPTION OF REQUEST
fixed and variable costs	The Defendants request monthly breakdown of fixed and variable costs allocated to individual trucks, information on a branch-by-branch basis, and for the monthly costs to be broken down by category (which should include costs such as repairs and maintenance, labour, licence fees, depreciation, interest costs, spare parts and overhead costs).
(ii) Monthly utilisation data (i.e., how often trucks were used)	
PO7(f) / (Enrich): monthly volumes and utilisation percentages[3]	Data on a truck-by-truck basis in respect of **the First Claimant** for a 14-year period between 2004 to 2018. The Defendants request monthly volumes and utilisation percentages for rental trucks, broken down by truck type / class.
PO7(f) / (HHRS): monthly volumes and utilisation percentages	Data on a truck-by-truck basis in respect of the **Second Claimant** for a 14-year period between 1997 to 2011. The Defendants request monthly volumes and utilisation percentages for rental trucks, broken down by truck type / class.
(iii) Finance Committee Ryder Inc Meetings	
PO5(f)/2: minutes of the Ryder Inc Finance Committee meetings[4]	The Defendants request a complete set of the minutes for the 25-year period between 1993 to 2018.

B. MITIGATION (M CATEGORIES)	
M1 category: for the 23 year period between 1997 to 2018	The Defendants request (i) further searches to be made to fill gaps in the disclosure already made of 11 strategic initiatives undertaken by the Claimants[5]; and (ii) searches to be made in respect of 6 further key strategic initiatives identified in a document disclosed by the Claimants.
M5 category: for the 23 year period between 1997 to 2018	The Defendants request all documents showing the amount of the costs that were the subject of 11 strategic initiatives and 6 further key strategic initiatives.

[3] This category was not pursued by the Defendants at the disclosure hearing.

[4] The Claimants have consented to providing documents responsive to this category. This category was therefore not pursued by the Defendants at the disclosure hearing.

[5] The Defendants originally sought disclosure of 11 initiatives out of the 19 cost-cutting initiatives that had been identified in the Disclosure Statement. At the disclosure hearing the Defendants confirmed that they were pursuing only 2 of the 11 categories: Ryder initiatives 2 and 4 (a procurement strategy review in 2004 and a programme to reduce overheads in 2005).

CATEGORY	DESCRIPTION OF REQUEST
C. LOSS OF PROFITS (LP CATEGORY)	
<u>LP1:</u> financial and operational performance on a depot-by-depot basis	For the further searches relating to the operation and financial performance of the First Claimants' maintenance depots and the rationale as to why certain depots were closed.

29. As set out in the Disclosure Ruling parties are expected to carry out a reasonable and proportionate search for relevant documents that are the subject of a disclosure order. Thus, it is provided at [36] of the Disclosure Ruling:

> "The search required will be a reasonable and proportionate search and it will be for the disclosing party to specify what search it has carried out and why it contends any particular search would be unreasonable when it complies with the order. In appropriate cases, the Tribunal may rule on what would be required by way of a reasonable search prior to disclosure being provided. The factors relevant in deciding the reasonableness of a search include (cf. CPR r.31.7):
>
> (a) the number of documents involved;
>
> (b) the nature and complexity of the proceedings;
>
> (c) the costs of retrieval of any particular document which is likely to be located during the search;
>
> (d) the significance of any document which is likely to be located during the search;
>
> (e) the location of material, and the type and nature of databases and storage involved; and
>
> (f) the resources available to the disclosing party."

30. Accordingly, paragraph 7 of the DAF Disclosure Order provided:

> "The Claimants' and DAF Defendants' disclosure pursuant to this order shall be accompanied by a disclosure statement by an appropriate person which shall (a) set out the extent of the search that has been made in order to locate the data to be disclosed, (b) specify the manner in which the search has been limited on reasonableness and proportionality grounds and why, and (c) certify to the best of his knowledge and belief that the disclosure order has been provided."

31. It is therefore for the party providing disclosure to justify any limitation in the scope of any search on reasonableness and proportionality grounds. The Claimants in their Disclosure Statements and in correspondence have explained the limitations on the disclosure given and why they contend further searches would not be reasonable or proportionate. The Claimants have responded to over 1,000 separate queries in addition to preparing detailed guidance notes

covering the disclosure from relevant databases. The Claimants' Disclosure Statement dated 29 May 2020 explained their response to PO7 categories and in June 2020 the Claimants provided a detailed guidance note. The Claimants' updated PO7 disclosure in December 2020 was also accompanied by an updated version of the PO7 guidance note. On 3 September 2021 the Claimants provided their Disclosure Statement in respect of PO7 and other categories.

32. In dealing with this application, I bear in mind the amount of documents already provided and considerable costs incurred by the Claimants in providing disclosure, what stage the action has reached, the likely cost and burden of providing the disclosure sought, the extent to which further searches are likely to be fruitful, and the importance of the disclosure sought to the case as a whole.

33. As regards and amount of disclosure already provided and costs to date, the Claimants have given disclosure of over 18,000 documents at a cost of more than £3.1 million. This is not a disproportionate amount given the size of the task, the value of the claim (£250 million excluding any claim for compound interest), the period of time involved, and the number of locations and databases that needed to be inspected. As regards the pass-on documents sought, the data has already been provided on an aggregated annual basis, at heart of the application in that regard is whether data should be provided on a monthly basis. In respect of mitigation, the Claimants have already disclosed 440 documents in response to categories M1 and M5. In respect of loss of profit, the Claimants have disclosed some 314 in response to category LP1.

34. The action is already at a fairly advanced stage. In accordance with the directions given at the May 2021 CMC disclosure should have been complete by 17 December 2021, lists have been exchanged along with Disclosure Statements, witness statements have been exchanged for trial and expert reports are due to be served by 19 September 2022.

35. The Claimants, where practicable, have given estimates of the likely cost of carrying out further searches and providing disclosure. In the case of providing monthly truck-by-truck revenue and costs data (PO7), the Claimants estimate that this could only be provided at a significant cost in terms of both money and manpower. For example, the Claimants estimate a reconciliation exercise for

monthly data pre-2003 held on JBA (PO7 (d)/1) would cost anything between £500,000 and £1 million.

36. The extent to which further searches are likely to be fruitful in terms of actually uncovering the documents and data sought is an important factor. In respect of certain categories previous searches indicate that further searches are unlikely to produce the documents sought. This would appear to be the case in respect of monthly truck-by-truck revenue and cost data pre-2003 held on JBA (PO7(d)/1), monthly truck-by-truck fixed and variable costs data for 1993 to 2011 held on HHRS (PO7(d)/6) and monthly truck-by-truck utilisation data held on Enrich and HHRS (PO7(f)).

37. As regards the importance of the documents sought to the case as a whole, I accept that all of the documents sought are relevant and in an ideal world should be produced if they can be located and that can be done at a reasonable and proportionate cost. However in this case the evidence is never going to be perfect and estimations and rough and ready exercises will have to be conducted by the parties and their experts.

38. The following sections of this ruling break down into the following order:

D. Pass on categories (PO7).

E. Loss of profits category (LP1).

F. Mitigation categories (M1 and M5).

D. PASS ON CATEGORIES (PO7)

(1) Defendants' submissions

39. The Defendants' requests under PO7 cover a series of sub-categories of database disclosure of revenue and fixed and variable costs information from the First Claimant ("Ryder") and the Second Claimant ("Hill Hire"), which the Tribunal has already ordered. The Defendants bear the legal burden of proof on pass-on. Their expert Mr Grantham considers that this information is critical to

carry out a detailed assessment of the relationship between costs (which include the cost of a truck) and revenues. In particular, Mr Grantham considers that monthly data will provide him with the necessary understanding so as to properly analyse that relationship, given the significant variations that could arise on a monthly basis.

40. The Defendants contend that the need for the relevant monthly data from Mr Grantham's perspective as a forensic accounting expert is plain. To establish the existence and calculate the extent of downstream pass-on Mr Grantham needs to analyse the relationship between the Claimants' costs and the Claimants' revenues. This requires him to analyse the Claimants' performance in response to internal and external factors. Annual figures are simply not sufficiently granular or detailed for this analysis, especially in the face of the Claimants' denials of such a relationship. It would plainly be unacceptable and unfair for Mr Grantham's analysis and calculations to face criticism by the Claimants where monthly data exists that the Claimants can and should disclose.

41. The Defendants state the Claimants' blanket reliance on proportionality is also wrong and misconceived. First, they have until now failed to properly explain the basis of their claims of disproportionality. A high degree of transparency is required given the "*heavy burden*" of disclosure which falls on them in relation to pass-on, particularly in a claim of this scale. Secondly, their argument that it would be duplicative and disproportionate to require them to disclose relevant monthly data when they have already provided annual data is simply relying on the fact that they have not provided what they should have done, which is illegitimate and should be rejected. It would not be disproportionate to provide monthly data responsive to the categories sought where it exists.

(2) Claimants' submissions

42. The Claimants contend that, in respect of disclosure in these proceedings, the Tribunal has recognised that searches must be limited to what is reasonable and proportionate and stated that where a party finds that an order would lead to an unreasonable or disproportionate search, the party should set out the reasons in a disclosure statement explaining why the disclosure has been limited: "it is

therefore for the party providing disclosure to justify any limitation in the scope of any search on reasonableness and proportionality grounds."[6]

43. Moreover, the Initial Disclosure Order expressly provided that it was open to a party to provide the "best available evidence". The Annexes to the Initial Disclosure Order set out the category of documents ordered, but paragraph 10(a) provided that disclosure "may be confined to the best available evidence about the information which is the subject matter of the categories identified in each Annex to this Order. In each case, the party, disclosing documents and/or Data pursuant to this provision should explain why the evidence it is providing is the "best available evidence" and why further disclosure is not proportionate."

44. The Tribunal's recognition of the practicalities of disclosure is important to the Defendants' present application. This is because the Annex to Grantham 5 often seeks disclosure by reference to the 2019 November Disclosure Order and by reference to 29 July 2021 Consent Order, as if disclosure is a given.

45. However, the Claimants have repeatedly informed the Defendants since 2019 in various Witness Statements, Disclosure Statements and Guidance Notes why disclosure has been limited (e.g., why annual as opposed to monthly revenue and costs data was disclosed) and why the requested disclosure would be impracticable and/or unnecessary or disproportionate.

46. The Defendants' request for cost data on a monthly truck-by-truck basis over 25 years seeks further data sets containing potentially millions of data points. The Defendants also seek Ryder revenue on a monthly truck-by-truck basis over 15 years. The Claimants consider these are not necessary or proportionate requests, as the Claimants have been saying for over 2 years.

(3) Tribunal's analysis

47. The key issue in relation to the five categories on pass-on disclosure is whether in addition to the annual data already provided from the Claimants' three databases, the Claimants should be required to produce such data on a monthly

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[6] The Disclosure Ruling at [36].

basis. This arises from paragraph 9 of the Initial Disclosure Order, which directed in relation to categories PO2 and PO7, that such disclosure be on a monthly basis. Disclosure has been provided by the Claimants and in their Disclosure Statements they have pointed out that on proportionality grounds they restricted such disclosure to annual information rather than monthly information and since then, there has been a significant amount of correspondence between the parties.

48. An initial point is taken by Mr Brealey QC on behalf of Ryder that this application cannot be pursued because it should have been pursued earlier and now it is too late to deal with it. The foundation of that submission is that they had made clear what they had done and in April 2021, the Defendants' solicitors were pursuing through correspondence the monthly data and had proposed that they look at least at one stage at four months of data to see and assess that and see where they went from there. That proposal is set out in the Defendants' letter of 19 April 2021.

49. In response to that, Mr Burrows, of Ashurst LLP, filed his eighth statement on 23 April 2021 and he gave reasons why providing even a representative sample on a monthly basis is neither necessary nor proportionate. He pointed out that estimating is what is required, not precision. He also pointed out that in his view that monthly data could be misleading, there is a lot of noise in the data and that the annual data is more reliable.

50. All of this came in the run-up to the CMC in May 2021. On 4 May 2021, Ashurst LLP responded to PO7A and again pointed out why their clients, the Claimants, considered that the disclosure on a monthly basis is unnecessary and disproportionate.

51. The Defendants at that stage decided not to pursue the matter at the CMC and they in effect left it open. In my analysis, what the Defendants did not do is agree that they would never pursue this application. They were doing what the Tribunal expected them to do, that is to deal with things on an incremental basis. That is exactly what they did.

52. But there is another aspect on this, which is that the trial has been fixed to start in March 2023, and the case is at an advanced stage, and I will take that into account when assessing each of the individual categories, but I do not regard that as an absolute knock-out blow. If I was minded to order disclosure it would be feasible to provide the disclosure sought by the last quarter of 2022.

PO7(b)/Enrich: monthly revenue

(1) Defendants' submissions

53. The Claimants accept that this information could be extracted from Enrich, their current 'live' system. Further, the process of extraction would take about three people approximately ten working days to complete. There is nothing disproportionate about an exercise of this nature having regard to the scale of the Claimants' claims. Moreover, the significant narrowing of the Claimants' claims for loss of profits means that revenue data related to other business lines is no longer required.

(2) Claimants' submissions

54. The Claimants consider the requests in relation to monthly truck-by-truck revenue and cost data is not necessary for the following reasons:

(1) Such monthly truck-by-truck granular information is not necessary to conduct the broad-axe estimation of any pass-on.

(2) Substantial disclosure on pass-on has been given to the Defendants over the last two years in addition to the annual revenue and cost data, including: (i) information on transactions by agreements for individual units; and (ii) unit cost records which provide a cost and revenue record for each truck, with margin data separated into rental and lease revenues and costs. This is also in addition to the substantial pass-on disclosure given in other PO categories.

(3) The reasons given by Mr Grantham for requesting monthly truck-by-truck data fall far short of establishing that such data is necessary, still less that is “*critical*” or “*essential*”.

(4) The Claimants’ experts say that the annual cost and revenue that has been disclosed is likely to be more reliable than monthly data for estimating pass-on. This is because annual data smooths out distortions or variations: for example, a truck not being available in any month for maintenance.

(5) The history of this application is inconsistent with the notion that it is “*critical*” or “*essential*”. Although Mr Grantham now says the information is “*critical*” or “*essential*”, in his second witness statement sworn in support of the extensive PO disclosure he sought at the May 2021 CMC, he did not even mention these categories, let alone say that they were critical to his analysis and that he needed them immediately. Moreover, the application by Iveco for monthly data post 2004 that was made at the May 2021 CMC was resolved by the Defendants agreeing to accept an explanation in a Disclosure Statement as to why annual as opposed to monthly data had been provided as reflected in the 2021 Order. Ryder has also confirmed that the use of annual data is consistent with what the business had regard to in practice during the relevant period.

(6) According to Dr Wu, if Mr Grantham wishes to use monthly *revenue* data for his analysis, he can compile this himself using the “*contract-level data that has already been disclosed*.” For lease contracts, the Defendants have had disclosed monthly payments made under the leases and they know the duration of each lease. Monthly rental revenues can be calculated from the “*updated rental revenue data*”.

(7) A breakdown of costs over a 25-year period between fixed and variable costs is not necessary as variable and running costs incurred by lease and rental customers were not subject to the Overcharge and bear no obvious relation with the chassis cost of the truck and the breakdown requested

by the Defendants is of limited value for the purposes of estimating pass-on.

55. Disclosure of the monthly data post 2003 involves interrogating the Enrich system again and is not proportionate for the following reasons:

(1) The exercise would be complex, time consuming and expensive. The request for fixed and variable cost data on a monthly truck-by-truck basis would be complex and impracticable as there would be millions of data points to be examined and reconciled and not all could be linked to particular trucks. Mr Ilett considers that would take an individual audit consultant many months of work.

(2) The process of extracting monthly revenue data would not be possible during working hours due to the demands it would place on the system that is used by Ryder on a day-to-day basis. It is estimated that it would take three people working overnight approximately ten working days.

(3) It would disrupt the trial timetable.

(3) Tribunal's analysis

56. In respect of categories PO7(b) and PO7(d)/(3) (considered below), in relation to the Enrich database, I am satisfied that the material being sought is relevant, and that the material may well be useful, but I cannot be sure at this stage, because on the one hand the Claimants say that the annual data is going to be more reliable and have fewer distortions and that they consider that the monthly data may in itself have its own distortions, whereas the Defendants do not accept that. Whilst the Defendants accept there are consistency issues even with monthly data, they want their expert to analyse that material for himself. I do not regard that it is absolutely critical in this case for the experts to have the data on a monthly basis for their analysis, even if it is desirable. So, I need to look at each category one by one to see where the balance lies on proportionality grounds.

57. In relation to PO7(b), I am satisfied that extracting the volume of monthly revenue data would be proportionate. However, although I would not reject this category on proportionality grounds, given my decision in relation to PO7(d)/(3) below, it is not necessary for the Claimants to give disclosure in relation to PO7(b).

PO7(d)/(3) Enrich: monthly breakdown of all fixed and variable costs

(1) Defendants' submissions

58. The Defendants note that the Claimants have already provided from their live Enrich system an annual breakdown for running, fixed and variable costs on a per truck basis.

59. The process of extraction is estimated to be similar to that required in relation to PO7(b)/(Enrich) i.e. it would take about three people approximately ten working days to complete, which would not be disproportionate given the scale of the claim.

60. The Defendants contend that the Claimants' estimate for the cost of providing this essential information is unclear and likely to overstate the costs involved. First, in light of the Claimants' significant narrowing of their claim for loss of profits the Defendants can correspondingly significantly limit their request to data in relation to Truck-related costs. Second, given Enrich is a modern up-to-date system it is unclear why the cost information or at least the majority of it would not already be categorised as it was entered on the Enrich system in order to enable the Claimants to prepare their financial statements. The disclosed Enrich reports in relation to annual cost data have already been: (i) categorised as "running", "variable" or "fixed" costs; and (ii) allocated to an individual truck (for both contract hire and rental hire). The allocation of these costs should not generally be expected, in the Defendants' expert's view, to be a manual process.

(2) Claimants' submissions

61. The Claimants contend the disclosure sought is unnecessary and disproportionate for the reasons given at paragraphs 54 and 55 above.

(3) Tribunal's analysis

62. In relation to PO7(d)/(3), whilst the extraction process may take the same amount of time as in relation to PO7(b), a reconciliation exercise, let alone an analysis exercise, will take a very significant amount of time and cost. I am satisfied that it would take a consultant months of work to carry out the reconciliation exercise as explained by Mr Gale at paragraph 4.19 of his statement. The issue that arises is whether the Claimants themselves should carry out or ought at least have the opportunity of carrying out such a reconciliation exercise in order to provide the disclosure. Given that the Defendants have already indicated that they would carry out such an analysis, it would be prudent if not necessary for the Claimants to carry out their own reconciliation. In my view, they cannot be expected to disclose huge amounts of raw data without reconciling it themselves. In addition, as part of any disclosure exercise comprising monthly data or at least as a result of it, the Claimants and their experts would want to analyse what they are disclosing. This too would involve significant costs and take time.

63. I refuse the application in respect of PO7(d)/(3) on proportionality grounds but not on relevance grounds.

PO7(d)/1 (JBA): monthly breakdown of all fixed and variable costs

(1) Defendants' submissions

64. The First Claimant has provided two pre-configured report extracts from the JBA system:

    (1) The first extract contains monthly lease 'running' and 'fixed' costs on a truck-by-truck basis for contract hire but there is no breakdown of the costs (e.g. depreciation). Unlike the extracts from Enrich it does not include a 'variable costs' category. Therefore the Defendants' experts have requested, in respect of contract hire, (i) confirmation that either the JBA system does not have a variable cost category or, if these costs have been included within either fixed or running costs, confirmation of which costs would be shown as variable costs within the Enrich system;

and (ii) a breakdown of all 'running', 'fixed' and 'variable' costs (if relevant), such that the individual components making up 'running', 'fixed' and 'variable' costs are identifiable.

(2) The second extract contains monthly rental 'running' cost percentages (of revenue) for various truck categories. However, when this is calculated and subtracted from revenue, it does not reconcile to the margin percentage. This means costs are missing from the aggregate costs which the Defendants cannot identify. Therefore the Defendants' experts have requested in respect of rental hire: (i) a breakdown of monthly rental 'running', 'fixed' and 'variable' costs (if relevant) on a truck-by-truck basis, such that the individual components making up 'running', 'fixed' and 'variable' costs are identifiable; and (ii) if the JBA system does not record variable costs as a distinct category, the Defendants require similar confirmations to those requested above in respect of contract hire.

65. This information is important for the Defendants' expert's pass-on analysis. Indeed, although not previously acknowledged by the Claimants, it is now apparent that Mr Ilett agrees with Mr Grantham that the information available is insufficiently granular to, for example, identify the extent to which fixed costs relate to depreciation. Mr Ilett envisages discussing this with Mr Grantham to see what assumptions might be applied, but no indication is given in relation to the primary question of whether there are other data sources recording this information.

66. The Defendants submit that the task is likely to be less costly than suggested by the Claimants, because now that the Claimants have significantly narrowed their claim for loss of profits, the Defendants only require Truck-related costs. Further, and as an alternative the Defendants would be prepared to receive the underlying cost data from the JBA database. This will enable the Defendants' experts to understand the data in the JBA reports that have been provided at a more dis-aggregated level for the purpose of their analysis and to carry out such reconciliations as they consider necessary to assure themselves as to the

robustness of the data contained in the reports. This more limited exercise would also be less costly.

(2) Claimants' submissions

67. The Claimants contend disclosure of this category is unnecessary for the reasons given at paragraph 54 above. In addition, the Claimants contend that it would be disproportionate to disclose this data as:

(1) The database has been interrogated but the specific cost data requested by the Defendants was not identified. It would be wholly disproportionate to undertake further searches at this late stage of the proceedings.

(2) The previous interrogation of the legacy JBA system was significant in terms of both time and cost. It took over ten months to restore and extract the previous information from the JBA. Mr Ilett refers to the fact that one individual worked on this task for over 400 hours and Kroll incurred fees in excess of £100,000 and Ryder also incur (on an ongoing basis) "*hosting*" fees of £16,500 per quarter totalling £145,000 to date. Ashurst fees were in excess of £50,000.

(3) Even if the data did exist there would be "*tens of millions of rows of data*" relating to the 5,800 trucks purchased before 2003, and significant further work would have to be undertaken in respect of a reconciliation exercise which it is envisaged would require a further £500,000 – £1 million in Kroll's forensic accounting and consultancy fees alone.

(4) It would disrupt the trial timetable.

(3) Tribunal's analysis

68. The main concern in relation to this is the actual cost of disclosure. The Claimants have already spent £3.1 million and I do not think it is right for them to disclose raw data without some form of reconciliation exercise. It would be completely imprudent for Ryder to do that and then be faced with an expert who

has done the reconciliation exercise. I consider that Ryder would also have to undertake the reconciliation exercise.

69. Therefore, my view on PO7(d) is that there is no evidence that this material still exists on the system, albeit further searches could be undertaken, but it is unlikely those further searches will find this data, and even if they did, such material would be extremely expensive to analyse both in terms of cost and time.

PO7(d)/6 (HHRS): monthly breakdown of fixed and variable costs

(1) Defendants' submissions

70. The Defendants invite the Tribunal to order the Claimants to confirm in a disclosure statement whether the HHRS system contains costs data falling within PO7(d)/6 (HHRS) and, if it does, to conduct searches and disclose any responsive data.

71. To assess whether the Claimants were able to pass on any alleged Overcharge, the Defendants require monthly fixed and variable cost data for costs related to trucks broken down by: (i) costs attributable to trucks only; (ii) cost category (e.g., maintenance, depreciation etc.); and (iii) depot / branch.

72. The Hill Hire Rental System ("HHRS") was a bespoke system providing the majority of tools needed to run the business including "accounting". The Defendants accordingly queried why it would have not included fixed and variable cost information. The Claimants have confirmed however that they understand that "*…costs were not recorded on a per Truck basis*."

73. The Claimants have confirmed in response to the Defendants' queries that notwithstanding that they have already provided certain other extracts from the HHRS "*there were no reports within HHRS which would contain the information requested*."

74. This is surprising given the nature of the HHRS and the fact that the Claimants have already provided certain other extracts from the HHRS and explained that

they have been able to carry out targeted extraction, locate certain fields in the system and interrogate and consolidate relevant data tables. The Defendants remain concerned that no relevant information has been identified. In the event it is confirmed that any such information is identified, the Defendants do not accept that it would be disproportionate to provide it (including in circumstances where the Second Claimant's claim constitutes around half of the total alleged claim value).

(2) Claimants' submissions

75. The Claimants consider the request is not proportionate for the following reasons:

(1) the Claimants interrogated the HHRS database in 2020 and so far, as they are aware there were no reports within HHRS, which would contain the information requested and that to the best of the Claimants' knowledge and belief, costs were not recorded on a per truck basis in any event.

(2) To be required to undertake another interrogation of the database at this late stage "would be a very costly and time-consuming exercise. It is estimated that would cost at least £100,000 to analyse any such cost information, even if a further search found the data to exist.

(3) It would compromise the trial timetable.

76. In addition, the information requested is unnecessary as sufficient information has been disclosed in order for the Defendants to undertake the assessment of pass-on. In addition, breaking down costs into fixed, variable and running costs when the overcharge is alleged to be on the chassis only is of marginal utility and Mr Grantham falls short of saying he cannot undertake an assessment of pass-on.

(3) Tribunal's analysis

77. In view of the fact that Ryder's evidence is that there are no reports on the HHRS system which would contain the information requested, and in any event, it would be extremely difficult and expensive to extract and analyse, I refuse this request. I agree as a matter of good order all this should have been in a disclosure statement, but there is enough information in Mr Gale's witness statement at paragraph 4.31 onwards that means it is not necessary to file a further disclosure statement at this stage.

PO7(f)/(HHRS): monthly volumes and utilisation percentages

(1) Defendants' submissions

78. The Defendants invite the Tribunal to order the Claimants to confirm in a disclosure statement whether the HHRS system contains utilisation data falling within PO7(f)/(HHRS) and, if it does, to conduct searches and disclose any responsive data.

79. Utilisation data was a key metric for the management of the Second Claimant's rental business and monthly data is necessary for the Defendants' expert to undertake his pass-on analysis (and to assess any loss of volumes) as a result of the overcharge (if any). According to the Second Claimants' Pricing Statement "Utilisation was monitored on a daily basis on Hill Hire's operating system [i.e. HHRS]".

80. However, only patchy documentary evidence of utilisation has been provided. The Claimants state that from their searches to date they are unable to confirm categorically whether or not the requested data was recorded in the HHRS and also that it would be disproportionate to restore the HHRS for this purpose. The person who has given information on this issue is a Mr Burston, who did not work for the Second Claimants and the Second Claimants had other people who worked in their rental business available to them. The Claimants should be required to confirm whether utilisation data is recorded in the HHRS given the evidence set out in the Second Claimant's Pricing Statement, and the

availability of Mr Fairbotham who has worked at the Second Claimant since February 1991 (including in senior roles in the rental side of the business).

81. In the event it is confirmed that actual utilisation data is contained with HHRS the Defendants do not accept that it would be disproportionate to provide this information (including in circumstances where the Second Claimant's claim constitutes around half of the total alleged claim value) or why it would be appropriate to estimate utilisation rates which inevitably would be prone to error by comparison with actual contemporaneous data.

(2) Claimants' submissions

82. The Claimants consider disclosure is not proportionate as the information does not exist and the cost of having to extract the information from HHRS even if it could be found would be significant, and in excess of £100,000.

83. The Claimants submit the data requested is not necessary as there is other information that has been disclosed that enables the Defendants to estimate the utilisation of the trucks (how often they were used) and thus to estimate any pass-on. In addition, other material that has been disclosed contains utilisation data and information. Management accounts disclosed under PO4(c) contain utilisation information by fleet or truck type which Mr Ilett proposes to use. Transaction data can be used to generate a utilisation as explained by Dr Wu, and which Mr Ilett also proposes to use.

(3) Tribunal's analysis

84. I do not consider that it is necessary and proportionate to file a further disclosure statement given the contents of paragraph 4.33 of Mr Gale's witness statement dated 24 June 2022. It is most doubtful that the utilisation data requested or any preconfigured reports containing utilisation data actually exists. It is not proportionate to require the Claimants to carry out any further searches over and above what has already been done.

85. That concludes the issues in relation to pass-on and the application for disclosure in respect of pass-on fails. However, I would like to point out that it

was a reasonable application to make in the circumstances and it has been useful to consider these issues.

E. LOSS OF PROFITS

86. In addition to their primary claim to recover the amount of the alleged overcharge, the Claimants bring a claim for profits allegedly lost as a result of the overcharge. As pleaded, this claim has two dimensions:

(1) Loss of profit in the form of "a reduction in the volume of transactions concluded by the Claimants during the relevant period"; and

(2) Loss of profit in the form of "a reduction in the profitability on transactions actually concluded during the relevant period".

87. The Claimants have confirmed that they are no longer pursuing the loss of profits claim on the second basis.

88. In their Defences, the Defendants put the Claimants to proof of the loss of profits claim. The Defendants have also sought clarification of the Claimants' case by way of Request for Further Information.

Category LP1

89. Disclosure category LP1 comprises:

> "Documents and information in respect of the operational or financial performance of the maintenance depots operated by each Claimant (and referred to in paragraph 74D(a) of the RAPOC) and the rationale for why certain depots (but not others) were closed. This may take the form of:
>
> (a) financial information, presentations, briefing papers, memoranda and/or any other relevant information relating to the performance of the business segment which includes the maintenance depots in the Period and if available such financial information to be presented on a depot by depot basis (including those depots that were not closed); and
>
> (b) documents in respect of the decision to close certain depots, such as (but not limited to) board minutes, internal presentations etc."

(1) Defendants' submissions

90. The Defendants initially contended, based on the Claimants' pleaded case at the time skeleton arguments were exchanged, that the purpose of this request was to enable them to understand and assess the Claimants' allegations that (i) the closure of certain maintenance depots was a consequence of the alleged overcharge (and more specifically a result of their purported "*inability to recover the cost of maintenance and servicing*"); and (ii) these closures "*impacted negatively*" on the Claimants' profitability and/or revenue. However, after the parties filed their skeleton arguments, the Claimants provided the Defendants with a revised amended pleading on loss of profits. The amended pleading alleges that the overcharge, and in particular the reduction in revenues and margin caused by the overcharge, restricted the Claimants' ability to respond to competition in the downstream market, including with the Defendants' downstream businesses. In particular, the First Claimant's closure of maintenance depots placed it at a competitive disadvantage vis-à-vis the Defendants' downstream businesses. For each depot that was closed, the Defendants say that they need to understand why it was closed (including, for example, whether it would have been closed even absent the alleged overcharge); and what impact this had financially on the Claimants' business.

91. The search already undertaken by the Claimants in respect of category LP1 is described in their Disclosure Statement. In summary, the Claimants began by identifying 22 depots closed by Ryder in the relevant period and 7 closed by the Second Claimant. The Claimants then searched the data of certain Ryder email custodians in the Initial Document Set for the relevant depot name along with the search terms "w/5 shut* or clos*".

92. The Defendants argue that disclosure of depot-by-depot financial and operational performance for Ryder remains necessary to enable them to understand and assess, for each individual depot that was closed, the basis and the impact of the closure; and to draw comparisons between depots, such that the Defendants can identify (and test the Claimants' case as to) why certain depots were closed but not others; and how the depots that were closed might have performed if, counterfactually, they had not been closed.

93. The Defendants consider that this information exists but has not been disclosed.

(2) Claimants' submissions

94. In the present case the Claimants claim that the overcharge (a) represents a loss because it is money that should not have been paid to the Defendants and (b) the overcharge caused the Claimants to be less competitive in the downstream markets. The Claimants say that they supplied less trucks in the distorted actual world than they would have done in the undistorted counterfactual world. They say that the overcharge was the cause of this distortion.

95. The claim for loss of profit is simply a claim for profit foregone because they supplied fewer trucks. Contrary to the Defendants' suggestions at times, the Claimants are not claiming for any loss of profit in respect of discrete depot closures. In other words, the Claimants are not claiming any identifiable sum in respect of depot closures themselves. The Claimants loss of profit claim is based on a reduction in volume of the trucks supplied.

96. The proportionality of the Defendants continued requests under category LP1 for more disclosure of depot closure must be seen in this context. Depot closures are relevant, but they are not a decisive issue upon which a claim for loss of profit is made.

97. The Claimants consider that the Defendants' request for more searches is neither necessary nor proportionate:

(1) Ryder has already undertaken reasonable and proportionate searches under LP 1. It has disclosed 314 documents responsive to LP1. Documents have been disclosed that contain depot-by-depot information both under LP 1 and under other categories, for example PO4(d)/1. The Defendants have received the management accounts and the issue of depot closures has been dealt with by Mr Hunt, Ryder's factual witness.

(2) The reasons for insisting that Ryder be put to the additional time and expense are not persuasive. There is no statement by Mr Grantham that

he has insufficient information to make informed decisions on Ryder's depot closures. He effectively says that he would have expected more information and, in reality, once again, this is "nice to have information" (if it exists).

(3) The continued requests have to be examined against the nature of the issue in the overall context of the loss of profit claim. There is no identifiable claim for loss of profit advanced specifically in respect of depot closures.

(3) Tribunal's analysis

98. The Claimants make a plea in relation to the depots at paragraph 74G of their Re-Amended Particulars of Claim, namely that the overcharge and in particular the reduction in revenues and margins caused by the overcharge restricted the Claimants' ability to respond to competition in the downstream market, including the Defendants' downstream businesses, in particular the First Claimant's closure and maintenance depots placed them at a competitive disadvantage, vis à vis the Defendants' downstream business.

99. I have no doubt that the documents sought by the Defendants are relevant. There is an issue between the parties as to the extent to which there has already been disclosure on a depot-by-depot basis. Mr Gale, in his witness statement, deals with the depot information category at paragraphs 6.15 to 6.19. He does state that there has been some depot-by-depot information provided. I am satisfied that the amount of information on a depot-by-depot basis that has been provided is in fact quite limited.

100. I appreciate that 314 documents in relation to this have been provided but I do consider it is most likely that further information exists.

101. As to the cost of locating that information, there is no specific evidence as to the burden that would be imposed on the Claimants in making further searches for this material. I appreciate that some of the information will be on the JBA system which is a redundant system and there will be some costs in reactivating it. But I do not think such costs, in the context of a claim of 250 million plus

compound interest, would be disproportionate. There has already been some disclosure and it is only appropriate that the Claimants provide sufficient and full enough disclosure on this topic.

102. I appreciate that Mr Hunt does deal with the closures of the depots in his witness statement filed by the Claimants for trial, but in order to effectively cross-examine him and get into some of the granular detail it will be important to see what contemporaneous documents can actually be put to him. The events in question took place a considerable time ago and over an extended period. In such circumstances contemporaneous documents can be valuable evidence in reconstructing events as well as assisting witnesses to recall what actually happened. So, I will grant the application in relation to loss of profits.

F. MITIGATION

103. The Defendants' have pleaded the defence of mitigation by off-setting in their Defences. In their Reply, the Claimants take issue with the Defendants' mitigation defence. In particular, the Claimants criticise the Defendants' cases as being insufficiently particularised.

Categories M1 and M5

104. Disclosure category M1 comprises:

> "Internal documents (such as reports, presentations, briefing papers, memoranda) including associated analyses, explanations and commentary prepared by the Claimants during the Period in relation to 11 Initiatives and any "Key strategic initiatives" of the First Claimant's procurement department employed or considered by the Ryder Claimants, including the drivers of the initiatives, the projected and actual effects of the initiatives, and explanations of why the initiatives were undertaken or not."

(1) Defendants' submissions

105. In broad summary:

(1) The Claimants began by identifying a number of specific "*cost saving and/or efficiency initiatives, analyses, assessments or consultations*

employed or considered" by each Claimant. For Hill Hire, 9 Initiatives were identified. For Ryder, 10 Initiatives were identified.

(2) For each Initiative, search terms were created and run across (i) for Hill Hire, the email custodian data of all Hill Hire custodians in the Initial Document Set; and (ii) for Ryder, the email custodian data of Peter Backhouse (former Managing Director of Ryder) and David Hunt (former Finance Director and current Managing Director of Ryder). Each search was limited in date to the approximate period of the Initiative in question.

106. Having reviewed the disclosure given by the Claimants, the Defendants considered that inadequate disclosure had been given in relation to 11 of the 19 total Initiatives identified by the Claimants in order for them to assess the extent to which the alleged overcharge (if any) was mitigated by off-setting of costs, as set out in *Sainsbury's v Mastercard*.

107. Moreover, in addition to the 19 Initiatives identified by the Claimants in their Disclosure Statement, the Defendants have identified 6 further cost-cutting Initiatives which are likely to be relevant.

108. Category M5 seeks disclosure of the following:

> "Documents or information relating to the monetary value of costs that were the subject of employed or considered cost saving initiatives, or relating to the estimated costs savings incurred or projected as a result of employed or considered cost saving initiatives, including methodology for estimating actual and projected cost savings."

109. Category M5 is closely related to, and follows on from, M1. It is designed to capture data on monetary value so as to enable the Defendants to calculate the impact of relevant cost-cutting measures on the Claimants' overall loss.

110. The Defendants submit that the underlying evidence supporting the Defendants' mitigation defence is in the hands of the Claimants. As a result, the Claimants must provide proper disclosure of documents relevant to their cost cutting measures. The importance of the Claimants giving full and proper disclosure of that material is underscored in this case by the approach they have taken in the

Reply, in which they criticise the Defendants' case for a purported lack of particularisation and seek to argue that the Defendants have not discharged the legal burden.

111. The present need for further disclosure arises from a number of inadequacies that the Defendants have identified in the disclosure given to date. In broad overview:

(1) The searches designed by the Claimants in respect of the Initiatives often appear to have generated no more than a handful of relevant hits (and in at least one case, no relevant hits at all).

(2) Even where the searches have returned documents, those documents often provide very few details as to the nature of the Initiative in question (e.g. the rationale for the Initiative; the specific costs renegotiated; and the costs savings achieved, and the way in which they were achieved).

(3) In some instances, the documents returned by the searches suggest that the Initiative in question was known by another name which the Claimants have not searched for. For example, the Initiative referred to by the Claimants as a "*programme to reduce overheads in 2005*" (in respect of which the Claimants used the search term "overhead w/5 reduc*") appears from the disclosure to have formed part of Ryder's "Tactical Profit Enhancement Plan", but no search has been conducted based on that title.

112. For any Initiative in respect of which the further search terms proposed by the Defendants return no or very few relevant results – the Defendants submit that the Claimants should consider whether there are any further custodians who may hold responsive documents and, if so, carry out searches in relation to the documents of those custodians (explaining their approach in a further disclosure statement).

113. In relation to the 6 Further Initiatives, the position is slightly different. As the Further Initiatives were not identified by the Claimants in the Disclosure Statement, no targeted searches have been carried out in respect of these

Initiatives at all. The Defendants submit that, given their obvious potential relevance, the Claimants should now perform reasonable and proportionate searches for documents relating to these Initiatives.

(2) Claimants' submissions

114. In broad summary, the Claimants make the following points:

(1) Further disclosure (new search terms) must be linked to the issue of mitigation of the type referred to by the Supreme Court. Requests in relation to the Claimants' redundancy programmes, of the implementation of the Enrich system, of fleet reduction programmes (to sell off trailers) are not relevant to any negotiation with the Claimants' suppliers (i.e., Ryder is not passing on the overcharge to its suppliers). Further disclosure of a procurement strategy designed to obtain better prices from DAF and Mercedes is also not relevant to the issue of mitigation in the sense used by the Supreme Court as these companies are the cartelists. Nor is a Ryder initiative to achieve synergies on the acquisition of Hill Hire a relevant example of mitigation.

(2) For all the requests there is no cogent explanation that seeks to link the new search terms with any possible overcharge, and which would justify the time and expense of further searches. Care must be taken that the new search terms are not simply designed to catch all costs savings and efficiency initiatives that the Claimants sought to achieve over the 14-year period of the cartel. It was exactly this type of problem that led the Supreme Court to caution against disclosure getting out of hand and leading to costs that were not proportionate.

(3) The disclosure already made has identified the initiatives. The Claimants' witnesses deal with them, often by reference to other disclosed documents. There is ample information for the Defendants to examine these initiatives and use them as part of any – correctly applied – principle of mitigation: which is dependent on estimation not precision.

(3) Tribunal's analysis

115. Ryder contends that the Tribunal should be very cautious in dealing with disclosure applications in respect of mitigation pleas in the sense of pass-on of any overcharge to suppliers in the form of reduced costs. The relevant authorities are well-known, and the two main authorities are the Supreme Court's judgment in *Sainsbury's* and the recent Court of Appeal judgment in *Stellantis* both of which are referred to at [20] to [22] above.

116. I do not consider that the plea that has been made by the Defendants is so deficient that one cannot seek disclosure on the back of it. It is a coherent plea by the Defendants that if there has been an overcharge the Claimants would have sought to recoup that Overcharge by way of reducing its costs, i.e., the amounts it pays to its suppliers.

117. Some disclosure has already been given in respect of strategic initiatives and the question I have to determine is whether or not there should be further disclosure. I do not accept that this is a case where one can say that there should be no disclosure in relation to strategic initiatives, particularly as there has already been some disclosure and the issue is whether or not the disclosure given is sufficient. One has to be very careful in this regard because sometimes there may be significant gaps in disclosure and what has been disclosed can be misleading. Therefore the specific aspects of the application now fall to be considered category by category.

118. I therefore now turn to categories M1 and M5 which are sought by the Defendants and resisted by the Claimants. These relate to initiatives at Ryder which had in part the aim of reducing costs in looking at the business overall.

119. A significant amount of disclosure has been given, 440 documents already in relation to initiatives and initially further disclosure had been sought in relation to 11 out of 19. Since issuing the application that has been narrowed to two. These two initiatives are a procurement strategy review in 2004 and a procurement programme to reduce overheads in 2005.

120. In relation to the first, it is noted by Mr Gale that insofar as there were references to reducing cost from suppliers, that was in relation to other OEMs, particularly DAF and Mercedes. Mr Singla QC on behalf of the Defendants referred to a selection of documents at the disclosure hearing, which are confidential. These appear to show or at least indicate that the cost reductions being sought actually related more broadly and extended to other suppliers. Similar points could be made in relation to a programme to reduce overheads in 2005, where I am satisfied that there is sufficient evidence that there were cost-cutting programmes designed to reduce costs from other suppliers. I do not regard this as a speculative or unwarranted application, but instead it is a properly focussed and proportionate application.

121. There are references in a document from 2004 which again is confidential to six other initiatives and no disclosure, I am told, has been given in relation to those other initiatives.

122. I do not consider that it is appropriate for me to quote from that document in this ruling, but I am satisfied that there should be disclosure in relation to those initiatives. It is said by Mr Gale that given that no documents have been turned up in relation to them so far so, then it should be inferred that if there had been, they would have been identified already by Ryder. I am not satisfied that is an answer to the application, especially as there is no evidence of any specific search for documents falling within these six initiatives. I will order reasonable and proportionate searches in relation to the six initiatives.

123. I do not consider that the disclosure sought would be burdensome. There is no evidence at all from the Claimants as to the cost and amount of time that it would take and of course there is limited time. They are only required to carry out such searches which are reasonable and proportionate bearing in mind all the other things which are going on in this case and how far this action has progressed. I do not expect the Claimants to spend huge amounts of money on a 'deep-dive' looking for these documents; what is required is a reasonable and proportionate search.

G. CONCLUSION

124. For the reasons given above:

(1) The Defendants' requests in relation to Pass-on are refused.

(2) The Defendants' requests in relation to Mitigation are granted.

(3) The Defendants' request in relation to Loss of Profit is granted.

(4) The costs of the application are costs in the case.

Hodge Malek QC
Chairman of the Competition Appeal Tribunal

Charles Dhanowa O.B.E., Q.C. (Hon) 6 July 2022
Registrar