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**IN THE COMPETITION APPEAL TRIBUNAL**

Case No: 1284/5/7/18
1290/5/7/18

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 3 May 2022

Before:
The Honourable Mr Justice Michael Green
Derek Ridyard
Sir Iain McMillan CBE FRSE DL
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Royal Mail Group Limited
BT Group PLC and Others v DAF Trucks Limited and Others **Claimants**

v

DAF Trucks Limited and Others **Defendants**

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**A P P E A R A N C E S**

Tim Ward QC, Ben Lask and Cliodhna Kelleher (On behalf of RM/BT)
Daniel Beard QC, James Bourke and Daisy Mackersie (On behalf of DAF)

1 Tuesday, 3 May 2022
2 (10.00 am)
3 THE CHAIRMAN: Good morning, everyone, and welcome to
4 everyone watching online. These proceedings, as you are
5 aware, are being livestreamed. I must start therefore
6 with the customary warning. These are proceedings in
7 Good morning, Mr Ward.
8 MR WARD: Good morning, sir.
9 THE CHAIRMAN: Thank you very much for your skeleton
10 arguments and for your reading list. I think all three
11 of us have managed to get through most of it. Is there
12 any housekeeping that we need to do before we start?
13 MR WARD: Sir, no. There are two small matters but I would
14 like to deal with them at the end of the day as one of
15 them gains context from some of my submissions, but they
16 are both very brief.
17 THE CHAIRMAN: All right. Well, we have read the letters in
18 relation to Mr Jeavons' second witness statement but we
19 understand that is all agreed that --
20 MR WARD: It is not opposed.
21 THE CHAIRMAN: It is not opposed and the costs are being
22 reserved; is that right?
23 MR BEARD: In relation to the costs, I think it was put
24 forward as being costs in the case, and we do not see
25 that that is appropriate here because we can deal with

1 these matters, but it was obviously served extremely
2 late and we do not think -- as you have seen from the
3 correspondence, we are not content that the manner in
4 which it was dealt with was in any way appropriate, but
5 I am happy to leave those matters, if the tribunal would
6 like to leave them, until later in the day.
7 THE CHAIRMAN: Yes. I think probably we should get started
8 on other things. We will reserve the costs rather than
9 say costs in the case.
10 MR BEARD: Yes, and I would like to make some observations
11 about that.
12 THE CHAIRMAN: Can I check, in relation to Mr Jeavons' oral
13 evidence, that on the timetable is scheduled for Friday
14 morning. There is no possibility of him going in on
15 Thursday if we run out of witnesses then?
16 MR WARD: I can check, but I know that his availability was
17 a great challenge.
18 THE CHAIRMAN: Right, but we do need to finish by lunchtime
19 on Friday so, if we need to start earlier, whatever, to
20 get through Mr Jeavons in that time, maybe we can do so.
21 I should also say we will have a ten-minute break in
22 the morning and afternoon for the transcribers so at
23 around 11.30, if you have a convenient moment, we will
24 break.
25 MR WARD: Thank you, sir.

1 Opening submissions by MR WARD
2 MR WARD: As the tribunal will be aware, Royal Mail and BT
3 claim damages in the form of an overcharge and finance
4 costs on the trucks they purchased from DAF. The claims
5 arise out of a secret cartel that lasted for 14 years,
6 from 1997 until the Commission carried out dawn raids in
7 2011, bringing it to a halt.
8 The cartel involved almost all of the suppliers of
9 trucks in Europe. It was a blight on the industries of
10 Europe for 14 years. It was both sustained and
11 all-pervasive. It took place in all manner of different
12 forums, from headquarters' meetings to trade shows. It
13 covered the entirety of the EEA. The absolute core of
14 the cartel was price collusion. There was pricing
15 agreements and a massive-scale exchange of pricing
16 information. It was methodical, it was systemic.
17 Special spreadsheets were compiled by the cartelists to
18 make it even more effective before they gave each other
19 access to their computer systems. They exchanged
20 information on matters down to the smallest detail, such
21 as paint colour options. All of this was with the
22 object of restriction of price competition. It was as
23 far from independent competition as it is possible to
24 imagine.
25 Now, the core facts and the infringement are

1 admitted by DAF. It made those admissions to obtain
2 a discount on the fine from the Commission and certain
3 other benefits, but, even after that discount, it paid
4 it 752 million euros in fine. That was part of a set of
5 fines that were the highest ever levied by the European
6 Commission.
7 DAF's position in this case, though, is an extreme
8 one. It says it is not even plausible that the cartel
9 had an effect on prices and it makes that case without
10 adducing any factual evidence at all to explain why it
11 participated in the cartel for all that time and took
12 extraordinary legal risks in order to do so.
13 It then says that the overcharge was zero or, on
14 various measures, actually negative, so on that view the
15 overcharge may even have been a benefit to my clients.
16 Then it says that, if there was an overcharge, then BT
17 and Royal Mail's prices were set that for most periods
18 of the claim they would have recovered the overcharge
19 through their pricing, so somehow the overcharge can be
20 traced through to the price of a stamp. For one period,
21 they say Royal Mail even made a profit on the
22 overcharge.
23 These are extreme submissions and they should be
24 rejected, but last week DAF wrote us a letter which
25 helps to explain why DAF is fighting this case every

1 step of the way. The tribunal will recall we have
2 concerns about Mr Professor Neven's ability to act as an
3 independent expert in this case. He has worked for DAF
4 since 2013, he advised DAF in the settlement proceedings
5 on this very decision about how to address the
6 Commission's arguments or, you might say, to come up
7 with defences, and we were aware he was acting for DAF
8 in a large number of damages cases. But DAF has
9 now explained that it is facing 1,700 claims in
10 19 jurisdictions and Professor Neven is assisting with
11 all of them.
12 Now, this gives rise to very significant concerns
13 about his ability to maintain his independence which we
14 will of course come back to later, but putting that
15 aside, what this shows is the stakes are extraordinarily
16 high for DAF. It has erected obstacle after obstacle in
17 this litigation. It has put forward evidence, expert
18 evidence at least, of exceptional complexity and the
19 case it brings before the tribunal is designed to set
20 the bar for success impossibly high for the claimants.
21 So it seeks to suggest, for example, the claimants
22 cannot succeed unless they can trace individual acts in
23 this 14-year period of collusion through to specific
24 prices paid by BT and Royal Mail. But that is not the
25 right approach.

1 As I will explain later, the claimants have
2 approached this case in precisely the manner envisaged
3 by the CAT, primarily through independent economic
4 expert evidence, rather than trying to reconstruct
5 transactions from 25 years ago. The tribunal called
6 that a "top-down approach".
7 That evidence demonstrates, unsurprisingly, that
8 this cartel was a success. Its aims were met, prices
9 were increased and that was to the detriment of my
10 clients and, it seems, thousands of others across
11 Europe.
12 I am going to start with the nature of the claim,
13 then I will turn to the decision, then I will explain
14 why we say it is not just plausible but obvious that the
15 cartel would have had an effect on prices, then I will
16 deal with some legal arguments on causation, then this
17 afternoon expert evidence and, finally, Mr Lask, my
18 learned junior, is going to address you on tax and
19 finance.
20 So starting with the nature of the claim. As the
21 tribunal will appreciate, this is a claim for breach of
22 statutory duty. It follows on in the jargon from the
23 Commission's decision, as is common in competition
24 cases. That decision is binding on the court and the
25 issues the court is concerned with are causation and

1 quantum. But for that purpose, the nature of the
2 decision is of critical importance.
3 Before I turn to the decision, I want to show the
4 court one leading authority on the approach here from
5 the Supreme Court, namely the *Sainsbury's v*
6 *Mastercard* judgment, which is in authorities bundle 4,
7 11.3, {AU/11.3/1}, and at page 66, {AU/11.3/66}, the
8 Supreme Court sets out some very basic legal
9 propositions in this context.
10 THE CHAIRMAN: You are using hard copies.
11 MR WARD: I am, but I am also giving the Opus reference so
12 I was hoping it would pop up on the screen.
13 THE CHAIRMAN: Because I am using electronic copies for the
14 authorities.
15 MR WARD: So authorities {AU/11.3/66}. Further down,
16 please, or the next page. Next page, please, 67,
17 {AU/11.3/67}. It is paragraph 188:
18 "In relation to claims under national law for
19 damages for breach of the statutory rules of competition
20 law, the requirements of EU law are that a member state
21 can lay down procedural rules governing actions which
22 safeguard such rights derived from EU law, provided that
23 the rules comply with the principle of equivalence and
24 the principle of effectiveness ... We are not concerned
25 on these appeals with the principle of equivalence. The

1 only constraint on national law at the relevant time
2 therefore was the principle of effectiveness which
3 requires that the rules of domestic law do not make it
4 practically impossible or excessively difficult to
5 exercise rights guaranteed by EU law. The court must
6 therefore give effect to the rules of [EU] law governing
7 claims for damages for breach of statutory duty unless
8 those rules were to conflict with the principle of
9 effectiveness."
10 Then in paragraph 189:
11 "It is ... a question of fact in each case, which
12 the national court must resolve on the evidence ...
13 before it, whether an overcharge resulting from a breach
14 of competition law has caused the claimant to suffer
15 loss or whether all or part of the overcharge has been
16 passed on by the claimant to its customers or otherwise
17 mitigated. The principle of effectiveness applies to
18 the procedural and evidential rules by which the court
19 determines whether and to what extent the claimant has
20 suffered loss."
21 Pausing there, just by way of note, the Court of
22 Appeal has confirmed this year that the principle of
23 effectiveness can be found in the common law. We need
24 not go there, but the case is *NTN v*
25 *Stellantis*, and it is authorities 17, page 9,

1 paragraph 29.

2 But staying in the Supreme Court's judgment for

3 a moment, turning on to page 75, {AU/11.3/75},

4 paragraph 217 -- so that is the first principle, the

5 principle of effectiveness, and now we are going to talk

6 about the broad axe, which of course the court will be

7 well aware of:

8 "The court in applying the compensatory principle is

9 charged with avoiding under-compensation and also

10 over-compensation. Justice is not achieved if

11 a claimant receives less or more than its actual loss.

12 But in applying the principle the court must ... have

13 regard to another principle, enshrined in the ...

14 objective of the Civil Procedural Rules, that legal

15 disputes should be dealt with at a proportionate cost.

16 The court and the parties may have to forego precision,

17 even where it is possible, if the cost of achieving that

18 precision is disproportionate, and rely on estimates.

19 The common law takes a pragmatic view of the degree

20 of certainty with which damages must be pleaded and

21 proved ..."

22 Then you will see in the paragraph below the famous

23 quote from Lord Shaw in Watson Laidlaw that:

24 "... spoke of restoration by way of compensation

25 being 'accomplished to a large extent by the exercise of

1 a sound imagination and the practice of the broad axe'
2 and of the attempt of justice 'to get back to the
3 status quo ante ... or to reach imaginatively by the
4 process of compensation, a result in which the same
5 principle is followed'."
6 Then one sees just a little further down:
7 "But the task of valuing claims for purely monetary
8 losses may also lack precision if the compensatory
9 principle is to be honoured, particularly when one is
10 dealing with complex trading entities ..."
11 I mention this judgment now just because it is
12 important framing material given the sheer complexity of
13 the arguments that have developed in this case.
14 Against that background, what I would like to do now
15 is just turn to the decision which -- you may already
16 have a version on the go, but in the authorities
17 bundle at 3.9 is the non-confidential version, which is
18 all we need for today's purposes, {AU/3.9/1}. There is
19 a confidential, slightly less redacted version, just for
20 your notes, at {I6/IC82}, but neither the claimants nor
21 their lawyers have ever had sight of a fully redacted
22 [sic] version.
23 The first thing that we would note about the
24 settlement decision -- sorry -- the first thing that we
25 would note about the decision is that it is a settlement

1 decision and we can see how it came about on pages 10
2 and 11, {AU/3.9/10-11}, where you will see, at
3 Recital 31, {AU/3.9/10}, that it all started
4 in September 2010, when MAN applied for immunity. Then,
5 at 32, you will see, in January 2011, the Commission
6 carried out inspections, in other words dawn raids, and
7 then various parties applied for immunity or leniency.
8 Then on the next page, Recital 39, {AU/3.9/11}, then
9 there was an adoption of a statement of objections,
10 which is essentially the Commission putting its case
11 back to the parties. The addressees had access to the
12 complete file of the Commission and then, at 40, they
13 approached the Commission and asked to continue the case
14 under the settlement procedure.
15 Then, at Recital 43, as part of that, they each had
16 to make settlement submissions, and the first hyphen
17 explains that that was:
18 "An acknowledgement in clear and unequivocal terms
19 of the Addressee's liability for the infringement
20 summarily described as regards its object, the main
21 facts, their legal qualification, ... its role and the
22 duration of its participation in the infringement in
23 accordance with the results of the settlement
24 discussions."
25 Then we see, at Recital 45, the Commission explains,

1 on the next page, {AU/3.9/12}, that the principal
2 documentary evidence relied upon were the immunity and
3 leniency documents that were supplied to the Commission
4 together with the documents seized in the inspections
5 and requests for information.
6 THE CHAIRMAN: I notice that DAF are not in paragraph 45.
7 MR WARD: Yes, I was about to make a point about that. We
8 cannot see the settlement submissions, DAF's nor anybody
9 else's. They are all protected from disclosure, so this
10 is an aspect of the decision that remains a mystery to
11 us.
12 THE CHAIRMAN: It appears that they were not relying upon
13 documentary evidence provided by DAF.
14 MR WARD: Well, they were relying on the file, they
15 obviously were satisfied with DAF's submissions or they
16 would not have accepted it for settlement, but plainly
17 what they are saying here is that -- well, I cannot read
18 into it other than they say they did not rely on it in
19 this paragraph, but that is all we can do because we
20 cannot go behind it, we cannot see those submissions, we
21 do not know what DAF said.
22 But what we do know -- in fact we do not even know
23 if it is accurate. What we do know is at Recital 3 --
24 THE CHAIRMAN: I think we can take it as being accurate, can
25 we not?

1 MR WARD: Yes, I assume so, sir, though there are other
2 typos in this decision.
3 Recital 3, it says very importantly, {AU/3.9/6}:
4 "The facts as outlined in this Decision have been
5 accepted by MAN, Daimler, Iveco, Volvo and DAF ... in
6 the settlement procedure."
7 Indeed it is worth saying that, even though it was
8 a settlement procedure, they still had the right of
9 appeal. If they did not like it, they still could have
10 appealed against the decision.
11 Now, it is of course of real importance therefore
12 that the facts contained in this decision have been
13 admitted and they are largely reflected -- they are
14 reflected in the pleadings now, although it has been
15 quite a struggle to get there. DAF originally disputed
16 quite a wide range of issues and facts that are in the
17 decision and, of course, as you know, the tribunal
18 determined a preliminary issue on this and concluded it
19 was an abuse of process for them to do so insofar as
20 they were not bound. The cartelists, including DAF,
21 asserted all the way to the Court of Appeal that they
22 were still entitled to resile from the admissions in
23 these proceedings. They sought a reference to the
24 Court of Justice in Luxembourg, unsuccessfully; they
25 even sought permission to appeal to the Supreme Court.

1 That took them nowhere. So where we end up is very
2 substantial pleadings that largely accept these
3 recitals, albeit with various attempts to finesse them,
4 and two issues which we will come to a little bit later.
5 Now, it is important to appreciate that the
6 settlement bestowed very substantial benefits on DAF and
7 the other cartelists and they were, if I may
8 respectfully say, well summarised by Lady Justice Rose,
9 as she then was, in the Court of Appeal decision, which
10 threw out DAF's appeal against the binding recitals
11 judgment. May we please turn that up? It is
12 authorities 11.1, page 27, {AU/11.1/27}. It is
13 paragraph 83.
14 "There are already many advantages for a settling
15 addressee as compared with the addressee of a contested
16 decision facing a follow-on damages claim ..."
17 A "contested decision" meaning, in other words,
18 a full Commission decision.
19 "... in addition to the reduction in the fine and
20 the savings in their own legal costs and management
21 time. The brevity of the decision in many cases creates
22 an obstacle for future damages claimants because there
23 is less detail about the infringement and much less
24 information about the effects of the cartel on prices.
25 Although cartel cases are always 'object' infringement

1 cases so that the Commission does not need to establish
2 effect for the purposes of infringement, there is often
3 useful material in a contested decision about the effect
4 of the cartel in the context of justifying the amount of
5 the fine. One of the factors relevant to the size of
6 the fine is the gravity of the infringement, including
7 whether or not the infringement has been implemented.
8 Because the addressees to a settlement decision have
9 already indicated that they will accept the level of
10 fine ..., the decision does not include anything about
11 implementation."
12 So this is one of the core reasons why there
13 remains, despite everything in this case, an information
14 asymmetry, as we call it, between the claimants and DAF.
15 We have had extracts, substantial extracts, from the
16 Commission file that were ordered, but even if -- even
17 if -- the parties had sought somehow to recreate the
18 full details of the Commission decision, they would not
19 actually have been able to do so because they do not
20 have access to the submissions which form a key part of
21 its basis.
22 As we will see when we go through it in a moment, it
23 proceeds by way of high-level description and by
24 example. What this means is we only have a partial
25 record of the collusion. That, to some extent, is

1 typical even in cartel cases where there is a fully
2 reasoned decision.
3 I would like to show you now a judgment of this
4 tribunal which explains that. It is in authorities
5 bundle at 2.10, and I would like to go to page 59,
6 {AU/2.10/59}. This is a case called
7 *JJB Sports*, which was one of the earlier
8 cases in the tribunal, from 2004. Sir Christopher
9 Bellamy was the chair and at page 59 -- it looks like we
10 have the wrong thing on the screen. I must have given
11 the wrong reference. I have got 2.10.
12 THE CHAIRMAN: I have *JJB Sports*.
13 MR WARD: Sorry. Maybe it is the right judgment, wrong
14 page. We want paragraph 206, please, {AU/2.10/68}.
15 There we are. Thank you. So sorry. I do not know why
16 I have different page numbering.
17 "As regards price fixing cases under the Chapter I
18 prohibition [which is the equivalent English law
19 provision], the Tribunal pointed out in Claymore Dairies
20 that cartels are by their nature hidden and secret;
21 little or nothing may be committed to writing. In our
22 view even a single item of evidence, or wholly
23 circumstantial evidence, depending on the particular
24 context and the particular circumstances, may be
25 sufficient to meet the required standard ..."

1 Then the tribunal quotes from a judgment of the
2 European Court in Aalborg Portland, and one can pick up
3 the quote at quoted paragraph 56:
4 "'Even if the Commission discovers evidence
5 explicitly showing unlawful conduct between traders,
6 such as the minutes of a meeting, it will normally be
7 only fragmentary and sparse, so that it is often
8 necessary to [reconstruct] certain details by deduction.
9 "'In most cases, the existence of an
10 anti-competitive practice or agreement must be inferred
11 from a number of coincidences and indicia which, taken
12 together, may, in the absence of another plausible
13 explanation, constitute evidence of an infringement of
14 the competition rules.'"
15 Now, I cite that not because the evidence in this
16 case is sparse -- it is absolutely voluminous -- but it
17 points to the fact that the written record in a file of
18 an infringement going back to 1997 is inevitably going
19 to be partial and, as we will see in a moment, in this
20 case the contact was described as "continuous" and
21 indeed through all kinds of manner of means, including,
22 for example, telephone calls.
23 Now, DAF's strategy in this litigation has been to
24 take advantage of this asymmetry. Only one of its
25 witnesses even mentions the infringement and then in

1 order to deny knowledge of one particular detail. As
2 I have already said, it has provided us with no
3 explanation of its participation in the cartel. Why
4 did it do it, using vast amounts of management time and
5 taking huge legal risks? Why was this extraordinary
6 wealth of competitor information of no practical use?
7 This matters because DAF invites the tribunal to
8 conclude, on the basis of expert evidence, that it was
9 implausible that the cartel had any effect on prices,
10 but it is asking you to do this in the absence of having
11 given any explanation of why it took part in the cartel
12 at all.
13 Indeed, one point we made in our skeleton -- and
14 I will just give you the note in the interests of
15 time -- is that it is striking that there are numerous
16 times in which DAF said it was going to provide evidence
17 on matters and it never did, including on the details of
18 the collusion itself. The references are in our
19 skeleton at page {S1/25}, paragraph 57, but in the
20 interests of time I am not going to take you through
21 them. We are going to see a particularly choice example
22 a little later. But this failure to explain is, in our
23 submission, a really important feature of this case.
24 I want now just to go through the decision as
25 quickly as I can, but to make sure the tribunal has

1 firmly in mind what it is saying because it is key to
2 everything that follows, of course. That is in
3 authorities at 3.9, and the starting point is at
4 page 30, which is the actual finding, the formal
5 finding, of the Commission, {AU/3.9/30}. It is
6 Article 1 of the decision:
7 "By colluding on pricing and gross price increases
8 in the EEA for medium and heavy trucks; and the timing
9 and the passing on of costs for the introduction of
10 emission technologies for medium and heavy trucks
11 required by EURO 3 to 6 standards, the following
12 undertakings infringed Article 101 ..."
13 That is of course in very general terms, and the
14 recitals serve to justify it and provide an explanation
15 of what lies behind it.
16 Now, there are some highly convoluted pleadings by
17 DAF on those recitals but they are largely admitted now
18 as far as material. Again for your note, in our
19 skeleton, at page 16, paragraph 38, we provide
20 a high-level summary of it.
21 I want to just draw attention to more details of the
22 decision, and the first thing is Article 101 itself.
23 That is explained on page 19 in Recital 79, {AU/3.9/19}.
24 It must be page 18, {AU/3.9/18}. It is paragraph 77,
25 please. Sorry, 79 I wanted but I can see it now.

1 "To come within the prohibition laid down in
2 Article 101(1) of the TFEU ... an agreement or
3 a concerted practice must have as its object or effect
4 the prevention, restriction or distortion of competition
5 in the internal market ..."
6 There are two points to make about this. The first
7 is it applies to agreement or concerted practice.
8 Agreement need not be something as formal as a written
9 contract, but concerted practice is something far less
10 formal or structured. It is the form of practical
11 cooperation that falls short of a formal agreement so it
12 can cover things such as information exchange.
13 The absolute crux of it is that it is action which
14 reduces uncertainty as to the conduct of a competitor on
15 the market. We have included an authority for that,
16 should you need it, which is authority -- we do not need
17 to go there -- {AU/2.10.1}, paragraph 200.
18 The second point, as we can see from this recital,
19 is an infringement is committed if the conduct has
20 either the object or the effect of distorting
21 competition. As Lady Justice Rose said, it is typical
22 and here the Commission has relied on object, and DAF
23 relies on that very heavily but we will come back to it.
24 Now I want to actually just walk briefly through the
25 substantive recitals please.

1 THE CHAIRMAN: Did the Commission find an agreement or --
2 MR WARD: It found agreements among other things, so
3 agreement and/or concerted practice.
4 THE CHAIRMAN: But does it define what the agreements were?
5 MR WARD: Well, again, we will see in a moment it talks in
6 general terms about the existence of agreements, but
7 because this is only a summary decision, it does not
8 itemise them in the way that one might otherwise expect.
9 It is another frustrating and elusive fact. But we have
10 pleaded in our particulars of claim a whole range of
11 things that were agreed and largely they are admitted.
12 So there were agreement elements but there was also
13 a great deal more information exchange, collusion of all
14 kinds, which might not have crystallised into formal
15 agreement. But competition law says that makes no
16 difference. If you imagine a simple bid-rigging case,
17 someone might tell you what they are going to bid, that
18 might not be something that is agreed, but once you have
19 that information, as we will see later, European law
20 assumes you take it into account when you give your bid
21 unless you can prove otherwise. I am going to come back
22 to that specific point a little bit later.
23 So with that, if I may, I would like to go through
24 the core recitals. Staying in the same document, could
25 we try page 9, {AU/3.9/9}? Yes, thank you. The first

1 part is "Price setting mechanisms and gross price
2 lists", and this is important and it is contested, as we
3 will see a little bit later -- contested although
4 admitted, of course. All of this has been admitted.
5 "The pricing mechanism in the truck sector follows
6 generally the same steps for all of the Addressees."
7 All of them including DAF, one might say.
8 "Like in many other industries, pricing starts
9 generally from an initial gross list price set by the
10 Headquarters. Then transfer prices are set for the
11 import of trucks into different markets via wholly owned
12 or independent distributor companies. Furthermore there
13 are prices to be paid by dealers operating in national
14 markets and [then] the final net customer prices. These
15 final net customer prices are negotiated by the dealers
16 or by the manufacturers where they sell directly to
17 dealers or to fleet customers."
18 So, as in this case, they sold directly to BT and
19 Royal Mail.
20 "The final net customer prices will reflect
21 substantial rebates on the initial gross list price.
22 Not all steps are always followed, as manufacturers also
23 sell directly to dealers or to fleet customers."
24 That is a very important recital from which we will
25 explain DAF impermissibly seeks to resile.

1 Then it explains:
2 "With regard to the initial gross price lists of new
3 trucks, all of the Addressees except Iveco applied
4 a gross price list with harmonised gross list prices
5 across the EEA."
6 Then you will see that DAF did this from
7 September 2002. Then skimming to the last sentence:
8 "The EEA price lists contained the prices of all
9 medium and heavy truck models as well as all
10 factory-fitted options ..."
11 Then the decision goes on to talk about
12 transparency. This is Recital 29:
13 "The truck sector is characterised by a high degree
14 of transparency. The Addressees had access to
15 competitively relevant data such as truck registrations
16 through public registries. Furthermore, truck producers
17 and their distributor companies had regular exchanges
18 within various industry associations. Within some of
19 those associations, data on order intake and delivery
20 periods or stock levels was exchanged."
21 Something that later in the decision the Commission
22 describes as "confidential".
23 "In addition, the Addressees had access, to varying
24 degrees, to further data through customers spontaneously
25 presenting competitors' offers in order to negotiate

1 prices [something DAF said did happen] and via mystery
2 shopping."
3 Recital 30 is important:
4 "As a result, one of the remaining uncertainties for
5 the Addressees on the trucks market was the future
6 market behaviour of competing truck producers and in
7 particular their respective intentions with regard to
8 changes to their gross prices and gross price lists."
9 That was the uncertainty that the cartelists cured
10 through the cartel.
11 Then if we turn on a couple of pages to Recital 46,
12 please, {AU/3.9/12}:
13 "All of the Addressees exchanged gross price lists
14 and information on gross prices, and most of them ...
15 engaged in exchanging computer-based truck
16 configurators. All of these elements constituted
17 commercially sensitive information. Over time, truck
18 configurators, containing the detailed gross prices for
19 all models and options, replaced the traditional gross
20 price lists. This facilitated the calculation of the
21 gross price for each possible truck configuration. The
22 exchange was operated both on a multilateral and on
23 a bilateral level.
24 "In most cases, gross price information for truck
25 components was not publicly available and information

1 that was publicly available was not as detailed and
2 accurate as the information exchanged between, amongst
3 others, the Addressees. By exchanging current gross
4 prices and gross price lists, combined with other
5 information gathered through market intelligence, the
6 Addressees were better able to calculate their
7 competitors' approximate current net prices -- depending
8 on the quality of the market intelligence at their
9 disposal."
10 That is another recital that DAF objects does not
11 apply to it, but we will come to that again shortly.
12 But what we see here is really important information
13 about the role of gross prices and how it actually
14 helped to understand the transaction prices, the
15 so-called current net prices. It does not give you the
16 precise answer to whether a particular Daimler truck is
17 37,423.12 euros, it tells you approximately the kind of
18 prices they were going to be charging.
19 Then Recital 48 --
20 THE CHAIRMAN: DAF objects to that, you say?
21 MR WARD: They do, but I will show you exactly what they
22 say, sir, rather than try to paraphrase it.
23 THE CHAIRMAN: Okay.
24 MR WARD: Recital 48:
25 "Similarly, the exchange of configurators helped the

1 comparison of own offers with those of competitors,
2 which further increased the transparency of the market.
3 In particular, it could be understood from the truck
4 configurators which extras would be compatible with
5 which trucks, and which options would be part of the
6 standard equipment or an extra. All of the Addressees,
7 with the exception of DAF [which we will come to], had
8 access to the configurator of at least one other
9 Addressee. Some configurators only granted access to
10 technical information, such as bodybuilder portals, and
11 did not include any price information."
12 Pausing there and just for your note, you may
13 remember the debate we had about this at the pre-trial
14 review.
15 THE CHAIRMAN: Yes.
16 MR WARD: We do not need to go there, but at bundle
17 {A/IC16.1}, is the RFI that DAF served in the
18 *Ryder* case, and at page 6, paragraph 1.7, it
19 confirms that DAF itself received several configurators.
20 Moving on, the next section is the nature and scope
21 of the infringement and it is actually tantalisingly
22 short. It is only three and a half pages, just over
23 three pages. In a typical contested decision, this
24 would be very large indeed, so what we see instead is
25 summary. But the summary is still powerful because it

1 explains just how wide-ranging this collusion actually
2 was. Recital 49 explains that -- and I should say
3 actually, before I embark on this, one thing that DAF's
4 skeleton says which we did find remarkable is that there
5 is only limited and intermittent exchanges. That is
6 paragraph 129 of their skeleton. But actually what we
7 are going to see is quite the opposite. It is
8 all-encompassing and it is continuous.
9 Now, Recital 49 says:
10 "The collusive contacts engaged ... in the period
11 1997 to 2010 took place in the form of regular meetings
12 at venues of industry associations, at trade fairs,
13 product demonstrations by manufacturers or competitive
14 meetings organised for the purpose of the infringement
15 [and I will show you one or two of those]. They also
16 included regular exchanges via e-mails and phone calls.
17 The Addressees' headquarters ... were directly involved
18 ... until 2004."
19 Then 50 is another place where the Commission
20 summarises this:
21 "Those collusive arrangements included agreements
22 and/or concerted practices [so there is your answer,
23 sir] on pricing and gross price increases ..."
24 So it is not just gross price increases; it is
25 pricing. It is elusive to try and understand what that

1 means, but it is not just gross price increases.
2 "... in order to align gross prices in the EEA and
3 the timing and the passing on of costs for ... emission
4 technologies required by Euro 3 to 6 standards."
5 There there is a bit more colour at 51,{AU/3.9/13},
6 but again it is very general:
7 "From 1997 until the end of 2004, the Addressees
8 participated in meetings involving senior managers of
9 all Headquarters ... In these meetings, which took place
10 several times per year, the participants discussed and
11 in some cases also agreed their respective gross price
12 increases. Before the introduction of price lists
13 applicable at a ... (EEA) level ... [they] discussed
14 gross price increases, specifying the application within
15 the entire EEA, divided by major markets."
16 That means the UK.
17 "During additional bilateral meetings ... the
18 relevant Addressees exchanged information on harmonising
19 gross price lists for the EEA. Occasionally, the
20 participants, including representatives of the
21 Headquarters ... also discussed net prices for some
22 countries. They also agreed on the timing of the
23 introduction of, and on the additional charge to be
24 applied to, the emissions technology complying with EURO
25 emissions standards."

1 That is very important, the additional charge.
2 "In addition to agreements on the levels of price
3 increases, the participants regularly informed each
4 other of their planned gross price increases. .... they
5 exchanged their respective delivery periods and their
6 country-specific general market forecasts .... In
7 addition to the meetings, there were regular exchanges
8 of competitively sensitive information by phone and
9 email."
10 Then it gives just examples, alas, not the whole
11 narrative. One of them is important, and we see it here
12 in Recital 52, towards the end, last sentence:
13 "They agreed not to offer EURO 3 standard compliant
14 trucks before it was compulsory to do so and agreed on
15 a range for the price additional charge for [those]
16 trucks."
17 That is I think admitted.
18 "On the upcoming changes to Euro price lists, the
19 evidence shows ... that all of the Addressees were
20 involved in discussions about using the introduction of
21 the Euro currency to reduce rebates."
22 At 54:
23 "After the introduction of the Euro currency and
24 with the introduction of pan-European ... price list ...
25 [they] started systemically to exchange their

1 respective gross price increases through their German
2 subsidiaries ..."
3 So what we see here is them stepping up the cartel
4 activity, having had five or six years of it.
5 It was:
6 "... through their German subsidiaries ... while the
7 collusive contacts at the level of senior managers ...
8 continued in parallel between 2002 and 2004. For
9 example during a meeting [in] ... April 2003 ...
10 discussions took place concerning, amongst other things,
11 prices and the modalities of the introduction of Euro 4
12 standard compliant trucks, similar to [those] that had
13 ... been held concerning the Euro 3 ..."
14 There is again an admission that there was an
15 agreement there.
16 Then 55, {AU/3.9/14}, there were regular competitor
17 meetings and contacts with German subsidiaries. The
18 topics were technical topics, delivery periods, prices,
19 normally gross prices.
20 "Frequently, the participants of these exchanges,
21 including the Addressees, also exchanged commercially
22 sensitive information such as order intake, stock, and
23 other technical information by email and phone.
24 "In later years, the meetings ... became more
25 formalised and gross price increase information that was

1 not available in the public domain was usually inserted
2 in a spreadsheet split by truck standard model for each
3 producer. These exchanges took place several times per
4 year. The future gross price increase information ...
5 referred either only to the basic truck models or to the
6 trucks and the available options ..."
7 Again, usually, no net price or price increases were
8 exchanged. Usually, but not always.
9 Then if we look at Recital 57:
10 "The exchange on planned future gross price
11 increases and on the new emissions standards technology
12 continued over the years and as of 2007 regularly
13 included also the delivery periods ... As of 2008, the
14 exchanges became more formalised by using a unified
15 template ..."
16 Then 58 is important:
17 "The exchanges, at least, put the Addressees in
18 a position to take account of the information exchanged
19 for their internal planning process and the planning of
20 future gross price increases for the coming ... year.
21 Furthermore the information may have influenced the
22 price positioning of ... [the] products."
23 Then there is a further example now about emissions
24 standards. Again these are just examples but just
25 skimming to the end of paragraph 59, {AU/3.9/15}, you

1 can see, last six or so lines:

2 "During one of these latter sessions ... all of the

3 Addressees, exchanged information about their planned

4 future gross price increases for 2005 and 2006 as well

5 as the additional cost of complying with ... EURO 4 ...

6 Further meetings involving representatives of the

7 German-Subsidiaries continued the discussions on price

8 increases and the price increases for Euro 4 and Euro 5

9 [at other meetings]."

10 Now, that is all we have in terms of a description

11 of a 14-year cartel, but there are some more findings

12 that are very important.

13 If we can go now to Recital 61 on the next page:

14 "The geographic scope of the infringement covered

15 the entire EEA throughout the entire [period]."

16 So that is UK market, 1997 to 2011.

17 I want to look now at the Commission's assessment in

18 this decision of what this meant. Maybe now turn to

19 Recital 71 on the next page, {AU/3.9/17}:

20 "In the present case, the conduct described ...

21 constitutes a single and continuous infringement ... At

22 the same time, on the basis of the facts described

23 above, any one of the aspects of conduct, including in

24 respect of any one of the products and in respect of any

25 one of the Member States ... has as its object the

1 restriction of competition and ... constitutes an
2 infringement ..."
3 The next sentence is very important:
4 "The single anti-competitive economic aim of the
5 collusion [so of all of this collusion] ... was to
6 coordinate each other's gross pricing behaviour and the
7 introduction of certain emission standards in order to
8 remove uncertainty regarding the behaviour of the
9 respective Addressees and ultimately the reaction of
10 customers on the market."
11 Those words are very, very important because the
12 object was to know what consumers would do; in other
13 words, what they would pay.
14 "The collusive practices [all of them] followed
15 a single economic aim, namely the distortion of
16 independent price setting and the normal movement of
17 prices for Trucks in the EEA."
18 THE CHAIRMAN: Is the object to know what consumers would do
19 or the other cartelists?
20 MR WARD: Well, to know what the other cartelists would do
21 and ultimately the reaction of consumers. So, in other
22 words, if Daimler tells you this is what its pricing is
23 going to be, you are learning what the reaction of
24 consumers will be on the market. That was the object.
25 It was not some esoteric exercise in finding out what

1 Daimler's philosophy was; it was about the reaction of
2 customers on the market, and what are customers
3 interested in? They are buying trucks and at what
4 price?
5 THE CHAIRMAN: There is no finding that the addressees were
6 coordinating on actual prices?
7 MR WARD: As I said, if you go through this, there is
8 reference to occasionally on net prices, but I fully
9 accept that those are somewhat fragmentary, although we
10 will see some in a minute. This certainly happened, but
11 I am not here to suggest that there was active
12 comprehensive collusion for 14 years over actual
13 consumer prices because, of course, one of the features
14 of those prices is they are individually negotiated on
15 an individual truck package with a different combination
16 of seats and axles and all the rest of it.
17 We are going to come back to whether that matters.
18 DAF says that is an insuperable obstacle to us
19 succeeding in this case, but it is not. What it tells
20 us is that that level of granularity of information was
21 not available. There was no website that contained
22 every single exact price charged by Daimler to every
23 single one of its customers across Europe of each truck
24 that was purchased.
25 So what the decision says, as we have already seen,

1 is this exchange enabled them to understand approximate
2 net prices. So if Daimler was putting up its gross
3 prices, that gave you a basis to understand what the net
4 prices were likely to be or what the ballpark would be.
5 So if you are going to go and buy a Volkswagen Golf and
6 you fancy your chances of chiselling the dealer a little
7 bit, if you hear there is going to be a list price
8 increase next month, you might think, "I will go in now
9 because I am going to get a better price". So of course
10 there is imprecision here, but that is a feature of this
11 particular market and this particular cartel.
12 We do not accept -- on the contrary we assert -- it
13 is not in any way an answer to our claim because what we
14 have is massive-scale collusion on pricing and that had
15 an impact on the net prices.
16 Can I show you a little bit more of this decision
17 now? We are nearly done with it, I am pleased to say.
18 THE CHAIRMAN: Yes.
19 MR WARD: 72 is important, the next recital:
20 "Several factors such as the common characteristics
21 of the content of the contacts, the identity and, for
22 some of the Addressees, overlaps of individuals
23 participating in the contacts, the timing of the
24 contacts or the proximity in time confirm that the
25 collusive contacts were linked and complementary ...

1 since each of them was intended to deal with one or more
2 of the consequences of the normal pattern within the
3 framework of an EEA-wide plan having a single
4 objective."
5 That matters because it helps us to understand that
6 the collusion over emissions standards was part of this
7 wider collusion over prices.
8 "The evidence available shows that the conduct
9 described above constituted an ongoing process and did
10 not consist of isolated or sporadic occurrences. The
11 contacts between the Addressees were of a continuous
12 nature, with numerous regular contacts (face-to-face
13 meetings, phone calls and email exchanges)."
14 That is why the record is incomplete, as well as the
15 fact that the dawn raids happened 14 years after it
16 started.
17 "The different elements of the infringement were in
18 pursuit of a common anti-competitive object ... which
19 remained the same through the entire period of the
20 infringement ... the anticompetitive conduct followed
21 a similar pattern throughout the entire period ..."
22 Then Recital 75, {AU/3.9/18}:
23 "By exchanging EEA-wide applicable gross price
24 lists, the Addressees were in a better position to
25 understand from the price increase information exchanged

1 ... each other's European price strategy ..."
2 Then, again, if we can, the Commission sums up the
3 objective of this infringement at Recital 81 on the next
4 page, {AU/3.9/19}:
5 "The anti-competitive behaviour described ... above
6 has the object of restricting competition ... The
7 conduct is characterised by the coordination between
8 Addressees, which were competitors, of gross prices,
9 directly and through the exchange of planned gross price
10 increases, the limitation and the timing of the
11 introduction of technology complying with new emission
12 standards and sharing other commercially sensitive
13 information such as their order intake and delivery
14 times."
15 Then this is very important:
16 "Price being one of the main instruments of
17 competition, the various arrangements and mechanisms
18 adopted by the Addressees were ultimately aimed at
19 restricting price competition ..."
20 So all of it was part of an overall objective of
21 restricting price competition. It carried on in the
22 same form for 14 years.
23 Then just to finish off, if we could please turn on
24 to -- I think you are going to have it at page 23,
25 {AU/3.9/23}. So sorry. Try the next page, {AU/3.9/24}.

1 Sorry, I was trying to be helpful. Recital 102 is what
2 I am looking for. Thank you.
3 "Given the secrecy in which the arrangements of the
4 infringement were carried out, in this case it is not
5 possible to declare with absolute certainty that the
6 infringement has ceased. It is therefore necessary for
7 the Commission to require the undertakings to which [it]
8 is addressed to bring the infringement to an end (if
9 they have not already done so) and to refrain from any
10 agreement or concerted practice which may have the same
11 or a similar object or effect."
12 Not a ringing endorsement there by the Commission.
13 Then at 104, the next page, {AU/3.9/24}:
14 "In this case, based on the facts described in this
15 decision, the Commission considers that the infringement
16 was committed intentionally."
17 Then if you please move on two pages to page 26,
18 {AU/3.9/26}, this is part of its assessment of the
19 penalty, recital 115:
20 "Price coordination arrangements such as those
21 described in this Decision are, by their very nature,
22 among the most harmful restrictions of competition."
23 That it fed into its fine, which, as you have
24 already heard, led to a fine of 752 million euros for
25 DAF.

1 Now, this is all critical to understanding why we
2 say it is likely this infringement had an effect on
3 prices, and I will come back to that later. But
4 I wanted also just to show you a little bit of our
5 pleaded case here because what we have done, of course,
6 is rely on these recitals, but we have used the file
7 documents to try and illustrate this collusion a little
8 bit more fully. I would like to just ask you to do
9 quite a speedy page-turn through the operative part of
10 our pleadings. It is probably a comfort to know that
11 the BT and Royal Mail pleadings are materially identical
12 and I am only going to ever refer to the Royal Mail one,
13 but that is purely convenient.
14 The non-confidential version is in bundle B1 under
15 tab 11. Sorry, I said "tab 11". It is in bundle B,
16 tab 1, {B/1/1}. I am so sorry.
17 If we could turn, please, to page 11 of the
18 pleading, {B/1/11}, you will see this is where we start
19 to set out examples. I am just going to page-turn
20 through this. I cannot possibly take you through all of
21 these and of course they are largely admitted. DAF's
22 approach has been to admit the bare minimum it has to on
23 the face of whatever the file document says but not
24 really advance any positive case about any of it.
25 But just to give you the flavour and really no more,

1 you will see, starting on page 11, we have a great deal
2 of information and examples of collusion over gross list
3 prices, whether just agreements or information
4 exchanges. Then if we move on to page 14, {B/1/14},
5 again we have a series of examples involving net prices.
6 So, again, we do not say it was continuous but there
7 were plenty of examples to be found on the file.
8 Then at page 17, {B/1/17}, we have examples of
9 collusion in respect of the Euro 3 to Euro 6 standards,
10 and despite something that DAF says in its skeleton, we
11 have a pleaded case here in respect of all of the
12 standards that actually matter in this case.
13 I want to actually just point to -- sorry, we do not
14 need to do that now -- at page 23, {B/1/23}, where we
15 have examples of other commercially sensitive
16 information exchanged. So this is not to do with price
17 or euro standards, and it is a startling list and just
18 to give you the flavour of it, we have delivery periods,
19 market forecasts, order intake, stock information,
20 production and export figures, technical information of
21 various kinds, warranties, labour rates, manuals, repair
22 manuals, spare parts, safety systems, cruise control,
23 collision warnings, at 11, {B/1/24}, "Information on how
24 they trained their staff", repair and maintenance
25 contracts. Then I think the next one might be marked as

1 confidential. I do not know why, it cannot possibly be
2 justified, but I will not read it out. Then paint
3 colours, music interface options, Xenon lights, dealer
4 incentives.
5 This is why we say this is about as far from
6 independent competition as it is possible to imagine.
7 This is collusion that is astonishing in its breadth and
8 depth. Just to illustrate this, I want to show you just
9 a handful of examples from the pleadings, but just
10 actually show you the underlying documents. I do not
11 think any of them are confidential so there is no
12 difficulty in proceeding with them.
13 Can I please go to document {I1/376T}? This is an
14 email chain and actually we want to start at the bottom
15 of it, at the bottom of page 2. This is in German.
16 Sorry, I want the same document but T. {I1/376T}, it
17 should be.
18 THE CHAIRMAN: "T" is for the "translation", I presume?
19 MR WARD: Exactly. If it is not there, I will come back to
20 this example after the next break. Underscore T, I am
21 told.
22 Can my solicitor come and see if he can point it to
23 you? (Pause)
24 THE CHAIRMAN: I am afraid my German is not good enough.
25 MR WARD: No. (Pause)

1 Mr Beard says he can see it, which is good.
2 MR BEARD: It is definitely somewhere in there. I do not
3 have privileged access to Opus.
4 THE CHAIRMAN: Do you have an address?
5 MR BEARD: It is in the general hearing bundle under the
6 non-confidential section, as Mr Ward said, at bundle I1.
7 I just scrolled down and I get a 376 and then a 376T
8 underneath it, so I was not doing anything complicated.
9 THE EPE TECHNICIAN: I do not have any translations in this
10 bundle.
11 THE CHAIRMAN: Do you have different versions of the
12 bundle then?
13 MR WARD: That is news to me.
14 MR BEARD: I think it is the same on both sides of the
15 court, I do not think we have anything different.
16 MR WARD: Could you possibly bring it up in your own Opus?
17 THE CHAIRMAN: I1?
18 MR WARD: 376 and then T. It will be the next document.
19 (Pause)
20 While we are waiting, can you see if you have
21 I2/88T, which we are also going to go to. (Pause)
22 THE CHAIRMAN: We are all there.
23 MR WARD: Thank you. I do of course understand the
24 difficulties of this. It is always a challenge, despite
25 everyone's best efforts, so thank you to everyone for

1 doing their best with it.

2 If we could turn to the bottom of page 2,

3 {I1/376T/2}, you can see an email from Bernhard

4 Purschke, who is of DAF Trucks Deutschland, and it is

5 2004 and you can see from the addresses he is basically

6 emailing the competitors. The subject is "Price

7 increase 2005", and he says on the next page,

8 {I1/376T/2}:

9 "Dear colleagues,

10 "It comes round every year ... no, no what you're

11 thinking now (although it's nearly that time), but the

12 question from the boss as to if and when you'll be

13 turning the price screw in the coming year. To this

14 end, I would like to ask if you would kindly share this

15 information with all of us in order to save us a lot of

16 time making individual enquiries.

17 "As soon as I have the relevant information, I will

18 send you a summary."

19 Then the top email is indeed the summary. We can

20 pick it up at the beginning of page -- the middle of

21 page 1 of this same document, {I1/376T/1}, where he

22 emails back the same group and says:

23 "Please find below the individual feedback on price

24 adjustments in 2005 in a brief summary."

25 We can see the first one is DaimlerChrysler. You

1 can see if you go about three lines into it:
2 "The price of the vehicles will be increased by
3 approx. 1.0% net, depending on the equipment. This will
4 be implemented by raising the gross list prices."
5 So that is Daimler explaining exactly the mechanism
6 that the Commission put forward in the decision: you
7 want a net price increase, but it is derived from
8 raising the gross prices.
9 Then again in the next bullet it says:
10 "All series are increased on average by approx. 1.0%
11 net. The PE [price something] will be implemented by
12 reducing discounts ..."
13 Then there is more information from MAN and Volvo
14 and Renault, but right at the bottom there is
15 information from DAF.
16 THE CHAIRMAN: So Mr Purschke is DAF?
17 MR WARD: He is DAF. So he is helpfully circulating the
18 group with the information he has collated from the
19 others, so he is acting as a kind of hub. Then just
20 over the page, {I1/376T/2}, towards the bottom, before
21 he signs off with "Kind regards":
22 "DAF.
23 "From order date 01.04.2005, the list prices will be
24 raised by 3% for vehicles [and] SE ... "
25 I am not quite sure what "SE" is. Possibly "special

1 equipment". I do not know.
2 But we can then see DAF actually --
3 THE CHAIRMAN: Presumably something in German?
4 MR WARD: Perhaps. I do not know. We do not need to know
5 luckily.
6 We can now turn to a document which is not
7 translated and therefore I hope we will be able to get
8 on the screen, which is {I1/347}. Could we try that?
9 No, sorry, that is not the right document. Did
10 I give the wrong reference? I am so sorry, I have given
11 the wrong reference. It is entirely my fault.
12 {I1/342}. I cannot read my own writing!
13 Thank you. That is the one I wanted. This is a DAF
14 internal memo addressed to managing directors of sales
15 units, and DAF UK is a sales unit. It says:
16 "This weekend the general price increase of 3% ..."
17 Sorry, it is March 2004.
18 "This weekend the general price increase of 3% will
19 become effective."
20 Then it gives some information about discounting,
21 which we are going to explore later in the trial.
22 So there it is, exactly what they said they were
23 doing by way of collusion, and DAF actually argues in
24 its skeleton argument at 129(b) that there is nothing
25 harmful in sharing planned increases. But of course

1 what this shows is that the exchange was not unilateral.
2 DAF was also getting information from its competitors.
3 It was part of a much wider and longer collusion that
4 obviously feeds into its own prices and obviously gives
5 it the confidence to execute this price increase.
6 THE CHAIRMAN: When it says "the general price increase of
7 3%", is that to gross prices or to net prices?
8 MR WARD: We do not know. It does not tell us.
9 THE CHAIRMAN: Right. But this is internal to DAF --
10 MR WARD: Totally internal.
11 THE CHAIRMAN: -- to the sales -- the people actually
12 selling the trucks?
13 MR WARD: The local subsidiaries, sales units like DAF UK,
14 and it has those type of units around Europe.
15 THE CHAIRMAN: So showing that Europe-wide there will be
16 a 3% price increase?
17 MR WARD: Yes, exactly right. Exactly right.
18 SIR IAIN MCMILLAN: Chairman, can I ask a question, if
19 I may, here?
20 THE CHAIRMAN: Of course.
21 SIR IAIN MCMILLAN: When it says "All new orders received
22 ... will be processed with the 'new' prices", does that
23 mean that the orders will be processed with the new
24 prices, ie the amount to be paid?
25 MR WARD: Sorry, Sir, I did not quite catch the end of your

1 question.
2 SIR IAIN MCMILLAN: Because it is new orders received up
3 to -- or after Sunday, 4 April, "will be processed with
4 the 'new' prices" -- new, processed new prices, is it
5 your case that they will actually be -- new prices will
6 actually be charged to the customer?
7 MR WARD: Yes, that is the obvious implication of this
8 email. Of course there is no one here to explain it,
9 but what it is saying is, if there are orders up to
10 4 April, you can apply the old prices, but for the new
11 orders after that, you apply new prices, obviously
12 implying that DAF expected this to have an effect. But
13 it is not just a paper exercise. This is an issue I am
14 going to explore with DAF witnesses in due course.
15 SIR IAIN MCMILLAN: Thank you.
16 MR WARD: Just to reiterate, this is the same 3% that we saw
17 in Mr Purschke's summary of what was going to happen.
18 My next example is, alas, another translated
19 document, so can we have a try? This is document
20 {I2/88T}. This is not a DAF document and it is not
21 actually about DAF but it again illustrates how this
22 infringement actually worked. This is an internal
23 Daimler email in fact. It says:
24 "Hello Uli,
25 "First of all I would like to report back in

1 following my holiday.
2 "RE Volvo:
3 "Volvo is indeed planning to increase its prices as
4 follows:
5 "Gross + 5 ... on BM.
6 "Gross + 3 ... on SE.
7 "Total effect gross: approx + 4 ...
8 "Our estimate of the net impact: + 2.5 ..."
9 So we point to this because it is just a nice
10 example of exactly what the Commission was saying in the
11 decision or indeed the parties admitted in the decision,
12 that they were better able to calculate net prices from
13 gross prices. This is all rough and ready, it is not
14 down to the last euro, but it is valuable information
15 that Daimler here evidently knew how to interpret.
16 Now, here we get to one of DAF's remarkable
17 submissions about causation because it says in its
18 skeleton argument at paragraph 147 that we fail to show
19 how these net price information type exchanges affected
20 their own transaction prices, so they are saying we have
21 to show a connection between this and a particular truck
22 that was bought by Royal Mail. But, of course, what
23 they are doing is setting the bar unfeasibly high.
24 These are all just examples of what is inevitably an
25 incomplete record, but they help to understand how this

1 collusion worked, why there was this enormous tapestry
2 of collusion over 14 years and how it is -- it helps you
3 understand how it is that it actually had value.
4 THE CHAIRMAN: Do they ever explain -- maybe this is
5 a question for Mr Beard in due course -- how they used
6 the gross price information from their competitors?
7 MR WARD: No, no, not at all. It is not like --
8 THE CHAIRMAN: What benefit they got from the cartel over
9 14 years?
10 MR WARD: No, there is absolute silence on that topic. I am
11 going to come to the legal implications on that a little
12 later this morning.
13 According to them -- their case before the tribunal
14 is just based on Professor Neven's evidence.
15 Professor Neven has exerted himself a great deal to
16 produce three reports to show it is implausible it had
17 any effect, but DAF has said nothing about any of this,
18 nothing.
19 THE CHAIRMAN: Well, Professor Neven I think says that there
20 is no correlation between the gross prices which were
21 exchanged and the actual transaction prices, but --
22 MR WARD: He says there is no correlation between DAF's
23 gross prices and DAF's transaction prices.
24 THE CHAIRMAN: Yes.
25 MR WARD: We will come on to explain why we do not think

1 that is an answer to the case at all. But part of the
2 reason for that is of course Royal Mail and BT think
3 they are buying trucks by tender. They are. They do
4 not think they are, they are. But they are buying
5 trucks by tender in a completely cartelised market where
6 all of this is happening and when DAF are bidding in
7 that market, they are bidding in the context where they
8 have all this cartel information and so the cartel
9 itself has affected the way that this would work.
10 Even if DAF says, "Well, our list prices were
11 completely irrelevant to us", the market -- not just the
12 actual manufacturers in the market -- sorry, not just
13 the cartelists but the whole market is affected by the
14 cartel. This is the well-known principle of umbrella
15 effects. As it is, the cartel is almost everyone in the
16 market in any event. But I am going to come back to
17 that, if I may, sir.
18 I want to show you another example which illustrates
19 the sheer level of detail which some of these exchanges
20 went to, and this is {I2/39.2}, please. We cannot look
21 at all of this document because it is some 50-odd pages
22 long, but it is a MAN price list. What we learn from
23 the file is that it actually came from Iveco because the
24 file index helps you to understand who had what
25 document. It is 54 pages of the most extraordinary

1 detail. Could I just ask, please, that we scroll
2 through? You can see "Price", the column in the middle,
3 and then a description of what it is, so the very first
4 price item is just 60 euros, "company plate loose".
5 Then there are various other items here, quite small
6 but could you just scroll to the next page please? Then
7 more really detailed things, "aluminium sideboards" et
8 cetera et cetera. Then the next page, please, more of
9 the same. The next page, all sorts of very detailed
10 items, "brake system" and so on and so forth.
11 THE CHAIRMAN: Not actual prices though.
12 MR WARD: There are prices. The column is "Price". So the
13 first one, "brake system, 261 AF", price 625, for a
14 "towing brake connection front". There are 54 pages of
15 this, 54 pages, so it is just an extraordinary level of
16 difficulty.
17 THE CHAIRMAN: This was exchanged?
18 MR WARD: Yes, because it was found in Iveco's documents.
19 Then I want to go to a topic that has cropped up
20 quite a bit in the pleadings, the so called peers group
21 meeting, and this is {I6/127}. This is a meeting that
22 took place in the UK, and you can see at the top "Peers
23 Meeting 1st December 2003, Castle Coombe, Wiltshire".
24 All the manufacturers are there and it is attended for
25 DAF by Stuart Hunt, if you look, "Attendees",

1 "Stuart Hunt PACCAR/DAF". He was the managing director
2 of DAF UK. I want to go through this document with
3 a little bit of care because it is an indication of the
4 sheer breadth and depth of collusion that we are talking
5 about.
6 The first topic is "Pricing":
7 "Volvo indicated that they had increased their
8 prices by 3% on 1 October. There was a lot of
9 discussion about the impact of currency movements.
10 Total agreement that prices have to go up in 2004.
11 Volvo indicated that they would have two further small
12 increases in 2004 of 3 ... and 4.5 ... -- making a total
13 of 9ish. DAF indicated a price increase ... of 3%. The
14 general consensus was that prices would rise, on average
15 next year, between 5 & 6%."
16 Then under "2. The Market":
17 "The consensus view was that the 15 tonne plus
18 market would be approximately 32,000 ... next year. The
19 clear loser in 2003 is MAN/ERF."
20 Then there is a discussion at the end there:
21 "Discussion took place as to why the market has been
22 so high ..."
23 Over the page, {I6/127/2}:
24 "To counter this, discussion took place, with no
25 real view ... as to why the huge amounts of nearly new

1 buy-back vehicles are not impacting on the new market."
2 Then there is the topic of "Residuals", which is the
3 guaranteed amount in the price that you will get back,
4 and the different manufacturers explain what they are
5 doing.
6 So we can see in the third paragraph -- this is the
7 number of deals they do that involve residuals:
8 "Iveco were at 20% and Renault at 30%, DAF are
9 running at 20%."
10 Then just before the heading "Block Exemption":
11 "All present indicated that they make efforts to
12 improve their residual values by stopping vehicles
13 coming into auction and ... by direct contact with the
14 CAP organisation."
15 CAP are the ones who value residuals.
16 Then over the page at 5, {I6/127/3}:
17 "*Scania* have increased their parts prices by 7%,
18 Volvo similarly. All agreed that parts prices will be
19 increased directly in line with currency exchange
20 movements."
21 Then under "Miscellaneous" they talk about stock,
22 just above "Venue":
23 "No other Manufacturer is currently holding stock
24 and, in fact, the meeting generally spoke about stock
25 with everybody agreeing that stock is a bad thing and

1 nobody is ordering for stock. MAN are going to change
2 their policy for 2004 and will not order for stock
3 although in 2003 this has been their normal method ....
4 Delivery leading times are generally running at 10/12
5 weeks.
6 "The venue was excellent. The meal and wine was
7 first class ..."
8 So, again, an extraordinary breadth of collusion
9 here, not just prices, but there were prices and there
10 were future prices; stock levels and so forth, which
11 obviously goes to the question of how soft prices are.
12 Then we can see DAF in fact implementing this
13 proposed -- exactly what they propose at this meeting.
14 We can see that if we could please go to {I6/100},
15 and this is another of these same product information
16 bulletins. This one comes from Ray Ashworth, who is one
17 of DAF's witnesses, who was at various times the
18 managing director of DAF UK, but at this point he was
19 commercial sales director. He sends the document to all
20 dealer document controllers and all marketing and sales
21 recipients.
22 "List Price Increase of 3% Effective 5th April ..."
23 So exactly what they discussed in the peers group.
24 What happened here was a little complicated and
25 I confess we do not fully understand it:

1 "All Net prices were increased on the 1st March,
2 however the list prices & option prices in Sprint did
3 not change."
4 Sprint is their computer system.
5 "As previously advised, from 5th April all list and
6 option prices will increase by 3% however, the net
7 prices will remain unchanged."
8 So somehow they increase their net prices and then
9 the list prices have somehow caught up with that. We do
10 not exactly understand what happened, but what we do say
11 is this is precisely what was agreed at the peers group
12 meeting.
13 Now, sir, I see the time is 11.30.
14 THE CHAIRMAN: Yes. Shall we have our ten-minute break now?
15 MR WARD: Thank you.
16 (11.29 am)
17 (A short break)
18 (11.42 am)
19 MR WARD: Just one more thing I meant to say about peers
20 group meeting and so forth. I think DAF's skeleton says
21 something about how this is only one example of
22 collusion in the UK. It is not. There are others in
23 our pleading.
24 I want to turn now to another topic, another
25 example, which is about exchange rates. You know there

1 is of course a lot of economic evidence about the impact
2 of exchange rates on the cartel, but this is an example
3 of a number about exchange rate collusion, colluding
4 over the impact of exchange rates on prices.
5 We have pleaded a whole series of these in our claim
6 but I want to show you one. It is already up on the
7 screen -- thank you -- and it is {I2/51.3/3}. This is
8 an email thread which is within Daimler, but actually we
9 will see in a minute refers to DAF. The first email we
10 are looking at on page 3 is from Ian Jones, who is the
11 managing director of Mercedes Benz UK. It is a "Dear
12 Uli" again. He says:
13 "Dear Uli
14 "When you visited the UK recently to discuss the
15 outcome of [something called] the LIMES Study, we
16 briefly discussed the significant negative movement of
17 the Pound against the Euro and our urgent need to take
18 action accordingly.
19 "We recognise that within a ELP [which we think must
20 mean 'European list price'] structure, changing list
21 prices is a complicated and difficult process --
22 therefore our recommendation is to make no change to the
23 ELP, but to implement a revision to the exchange rate
24 utilised, with immediate effect. Our proposal is to
25 implement a 4% increase at the earliest opportunity."

1 Then there is a bit of discussion about this, and
2 then Mr Jones emails again, which is the first page,
3 {I2/51.3/1}, and if we can pick this up about the fourth
4 paragraph, he says:
5 "I am somewhat surprised that we should be
6 discussing either an ELP gross price increase ... or
7 a discount reduction, since it seems the most sensible
8 approach it to take the existing ELP list price in Euros
9 and apply a different (+ 4%) exchange rate to achieve
10 a new UK price list. I discussed this issue at the
11 CV Show [which is a kind of trade fair] this week with
12 some of my industry competitors and this is the approach
13 that they are taking."
14 So we have collusion here expressed in a general
15 way, but it is helpful for our purposes that Mr Jones
16 clarified what he was talking about in a subsequent
17 email, which we can see at {I2/52}, please. It is the
18 top of the chain:
19 "Just to keep you updated.
20 "We had no response following Uli's visit and I felt
21 it is better to drive this than be driven. Both DAF and
22 MAN are taking similar action ..."
23 Then finally on this topic we have another email
24 from Ian Jones, still talking about this. This is
25 {I2/65}, please. Again it is internal but again it

1 refers to the same topic, including DAF. Second
2 paragraph:
3 "When I met with yourself and Uli in Berlin some
4 weeks ago, we discussed an exchange rate recovery price
5 increase of between 4 and 5% and agreed 4.5%."
6 Then he says:
7 "There were two factors ...
8 "Firstly that it is unrealistic to expect a 100%
9 achievement of a price increase, particularly where the
10 increase is so large ... It was therefore proposed that
11 we plan on the basis of an 80% achievement of the total
12 price increase and I believed that this was understood
13 and accepted ... (For your information, DAF took a 4.5%
14 price increase, including inflation, and advised me
15 privately that they were budgeting on realising 2.4%)."
16 So this is important because we have collusion over
17 how to deal with the exchange rate movements and then
18 information from DAF about what it meant for real prices
19 to increase the list prices by 4.5%. So coming back to
20 Sir Iain's question, we see here a connection directly
21 to the list -- to the actual prices the customer was
22 paying.
23 I should say by way of just advance warning -- we
24 are going to explore this topic in depth with DAF's
25 witnesses. I am not proposing to try and open it in

1 detail today -- but it certainly is our case that there
2 is a real world connection between list prices and
3 prices customers actually pay.
4 THE CHAIRMAN: This is internal to Daimler?
5 MR WARD: Daimler, yes, yes.
6 THE CHAIRMAN: How do you get this document?
7 MR WARD: From the file.
8 THE CHAIRMAN: From the Commission file?
9 MR WARD: Yes, and we plead it and I think DAF generally are
10 saying, "Well, we just do not admit things that are in
11 third party documents".
12 Anyway, that is, in our respectful submission,
13 really a quite telling example. Then we can actually
14 see -- if we now go to {I2/51.2}, please, we can see DAF
15 again seemingly doing what it told Daimler. This is
16 another product information bulletin,"New List Prices":
17 "A price increase [to be fair it says 4.8, not 4.5]
18 of 4.8% will be effective immediately. This will
19 consist of new list prices reflecting a 3% increase ..."
20 Then, very importantly:
21 "In addition, there will be a local increase which
22 is 1.8% for the UK -- in total ... 4.8% ..."
23 Then just as in the other one we looked at, there is
24 detail about which orders this will actually apply to.
25 Just moving on, emission standards.

1 THE CHAIRMAN: Sorry, who was Phil Moon?
2 MR WARD: He is product marketing manager. This is a DAF UK
3 document, as we understand it.
4 If I can move on now to the topic of emissions
5 standards, which obviously are important in the case as
6 it is one of the contested areas in the overcharge. But
7 it is very important to appreciate DAF has made very
8 extensive admissions about collusion over the timing and
9 passing on of emissions standards, but we have also
10 pleaded examples over emission pricing.
11 I want to just show you one to give you a flavour of
12 this, and this is a T document and it is {I1/373T}. It
13 is a Renault document of a meeting on 29 November 2004.
14 If we could turn, please, to page 5, I think,
15 {I1/373T/5}, we can see as part of this there was a --
16 you can see in the third column, a "Net price
17 competitors meeting 08/04", and various prices are
18 given, including some with the word "NET" against it for
19 MAN. Then under the table it says:
20 "EURO 4: Common objective of constructors of 5,000
21 euros net to client all ranges ..."
22 This is just one example and in our pleading we have
23 got examples of price collusion on the other euro
24 standards. I will just give you the references in the
25 interests of time.

1 So Euro 5 we have pleaded at paragraph 18[l] 11/12
2 and Euro 5 EEV at paragraph 18(n) 1 to 2. One of the
3 things DAF says about all this is, "Well, there was some
4 public domain information about emission standards and
5 their costs", but of course that is no answer to the
6 case that there was also collusion because that enabled
7 the manufacturers to safely set their prices knowing
8 what the others would be doing.
9 Now, before I leave these examples, there is another
10 very important topic I need to talk to you about which
11 goes to the way in which the collusion was implemented.
12 It relates to DAF's mandate system, and you will have
13 seen from DAF's skeleton and from the evidence that it
14 operated a system of a cascaded authority from the top,
15 from DAF NV, where people at different levels had
16 authority to price within a different number of
17 percentage points of approved margins.
18 Mr van Veen explains this in his evidence. What
19 that evidence also explains is that the system operated
20 under the authority of someone called the "M&S
21 director", and that is "marketing and sales" rather than
22 "Marks & Spencer". We can see this is explained by
23 Mr van Veen at paragraphs 55 and 56 of his statement and
24 Mr Ashworth, who is the managing director of DAF UK, he
25 explains that he reported to the M&S director. That is

1 page 3 of his witness statement.
2 No M&S director has been called to give evidence to
3 this court, but we found out from the Commission file
4 who they were because the Commission file contained
5 a couple of dramatis personae. If I can ask you,
6 please, to go to {I6/80.2}, this is one of the documents
7 we found on the file. These are names and jobs. I want
8 to show you the names.
9 We have got Mr Kerry McDonagh, and we can see,
10 against his name, under "function/position", at one time
11 he was managing director of DAF Trucks Limited, the UK
12 subsidiary, but also for many years he was director of
13 marketing and sales, which is a position in DAF NV.
14 Then we see Mr Edo van den Assem, and he also was
15 a director of marketing and sales slightly earlier, and
16 then Fred van Putten, who was also a director of
17 marketing and sales. So we found out the names and we
18 also got some very important pleadings from DAF about
19 these people because we -- could I ask you now to turn
20 up bundle C4, which is a response to an RFI that we sent
21 to DAF many years ago in this claim, in 2017. Please
22 turn to what I think is page 14, {C/4/14}.
23 You will see the "Of", of which this is an RFI, is
24 in the middle of the page there. The pleaded admission
25 was:

1 "... it is admitted that the First Defendant [which
2 is DAF UK] was aware at some times during the period of
3 infringement of the fact of the Admitted Conduct ..."
4 We asked them, "Well, who?". The answer is at
5 paragraph 21 below. Could we scroll down enough to see
6 that?
7 "The basis for the admission that the First
8 Defendant was aware at some times during the period of
9 infringement of the fact of the Admitted Conduct is that
10 three individuals who took part in some conduct forming
11 part of the Admitted Conduct ..."
12 By the way, "Admitted Conduct" is their euphemism
13 for the infringement decision.
14 "... took part in some conduct forming part of the
15 Admitted Conduct whilst acting on behalf of the Second
16 Defendant [DAF NV] ... were also statutory directors of
17 the First Defendant at certain times ... The individuals
18 in question are Kerry McDonagh, Edo van den Assem and
19 Fred van Putten."
20 Then this:
21 "Any further explanation is a matter for evidence in
22 due course."
23 Of course it goes without saying that that was not
24 ever provided. But there is another pleading I am going
25 to show which adds a little flesh to these bones, but no

1 evidence is given about any of these people or their
2 roles. I think I am right in saying none of their names
3 even appear in the witness statements.
4 You can see here this has slightly undersold the
5 position because what we know is that Kerry McDonagh was
6 not just an M&S director but he was actually the
7 managing director of DAF UK for a period.
8 But can we now turn please --
9 THE CHAIRMAN: Sorry, what are you saying? They are
10 admitting there that those three individuals who were
11 the M&S directors --
12 MR WARD: Were actually involved in the cartel.
13 THE CHAIRMAN: -- actually took part in the cartel?
14 MR WARD: Yes, and they had a dual role because they were
15 M&S director in DAF NV and, as they admit here, they
16 were also directors of DAF UK, but actually Mr McDonagh
17 was more than a director, he was actually the managing
18 director for a period.
19 All of this pleading arose because at one point it
20 looked important whether DAF UK actually had knowledge
21 of the infringement. For legal reasons, that does not
22 really matter now, although we do say they do have
23 knowledge, but it is not as important as it was in 2017,
24 when this RFI was being asked.
25 THE CHAIRMAN: But it is important to see how it filters

1 down to the lower levels --
2 MR WARD: Exactly.
3 THE CHAIRMAN: -- who are actually negotiating the
4 particular transactions.
5 MR WARD: Exactly. I want to show you what they also say
6 about their participation in C/4, which is a pleading
7 about so-called non-addressee liability, which is DAF UK
8 liability. If we go to page 3 of this, please,
9 {C/4/3} -- I think I have got the wrong reference. It
10 is my fault. It is C/16, I am sorry. {C/16/3}.
11 They give a little bit more detail about what they
12 did, and in the bullet points you can see:
13 "[Mr] Van den Assem was both the Marketing and Sales
14 Director ... and a statutory director ... from the start
15 of the period of infringement until ... 1999 [and]
16 attended HQ Meetings ..."
17 Although they say he did it as marketing and sales
18 director.
19 Mr van Putten was marketing and sales director
20 between 1999 and 2001, attended HQ meetings.
21 Mr McDonagh was marketing and sales director and
22 statutory director of the first defendant, and we know
23 actually managing director, and he attended HQ meetings
24 from 2001 and 2004.
25 So what we have here is M&S directors who are

1 sitting at the heart of the spider's web. They are
2 participating in the cartel but they also have a key
3 role in pricing through DAF's mandate system. DAF has
4 told us nothing about this despite the tentative
5 commitment to do so in 2017. We would submit that the
6 obvious inference is that these M&S directors carried
7 out their roles under the influence of the cartel that
8 they were participating in.
9 THE CHAIRMAN: Just so I know, what is this document?
10 MR WARD: This is a pleading that Mr Justice Roth ordered at
11 one stage to try and crystallise the issues on the
12 so-called non-addressee liability, which was the legal
13 question of whether DAF UK was bound by an infringement
14 committed by DAF NV.
15 THE CHAIRMAN: Oh, because it is not an actual addressee in
16 the decision?
17 MR WARD: Exactly, and since then the European Court
18 produced a judgment that said all of the relevant
19 subsidiaries are bound and there are no issues before
20 you that distinguish between the different subsidiaries
21 of DAF.
22 THE CHAIRMAN: So this was to establish the linkage between
23 the various companies?
24 MR WARD: Yes, exactly.
25 SIR IAIN MCMILLAN: If I may ask, just to be clear, so, for

1 example, Kerry McDonagh, he was part of the cumulative
2 sign-off ladder so that made the link between the
3 British operation and what happened in Europe with
4 regard to collusion? Is that the point you are making?
5 MR WARD: Exactly. It is, subject to one further point. It
6 is a link. It is one we have managed to smoke out
7 through the process of the litigation, but because we
8 have so little information from DAF about what it did,
9 we have tried to put the pieces of the puzzle together
10 to show one obvious route of cartel transmission here,
11 but it is not exhaustive and largely that remains
12 a black box. But what we have here is already, in our
13 submission, very, very powerful.
14 I am going to show you now just a handful examples
15 of each of these, gentlemen.
16 THE CHAIRMAN: Are you aware of whether these gentlemen are
17 still working at DAF?
18 MR WARD: I am not, but I would observe that Mr Ashworth,
19 who gives evidence, is also no longer working at DAF.
20 MR BEARD: If it assists, that document to which Mr Ward has
21 just referred actually spells out their periods of
22 employment at DAF, and so you see there, in relation to
23 Mr van den Assem, Mr van Putten, Mr McDonagh, that they
24 had all left. Mr McDonagh was the last to leave in
25 2007.

1 THE CHAIRMAN: Okay, thank you.
2 MR WARD: Whether they are there or not, no one has
3 explained anything.
4 Anyway, I wanted to show you a few examples which
5 show the link of what they were doing and pricing in the
6 UK. The first one, please, is at {I1/41} and it
7 involves Mr van den Assem. This is a meeting in
8 Brussels hosted by Renault, and if you look under the
9 attendees, all of the usual crowd are there, including
10 *Scania* on this occasion. There it is spelt
11 "van den Hassem" but we venture to suggest that it is
12 Mr van den Assem. They talk about various things and
13 over on the next page there is all sorts of fascinating
14 price information being exchanged, but "UK", bottom of
15 the page, {I1/41/2}:
16 "The highest prices in Europe, but fear of a drop in
17 the Pound which would have catastrophic consequences.
18 "Network net prices increase: + 1.5% as at
19 1/9/1998.
20 "And increase of lowest prices by 2.5%."
21 That is all very oblique, but there is
22 Mr van den Assem participating in collusive discussion
23 about pricing for the UK.
24 THE CHAIRMAN: The network, what does that --
25 MR WARD: I cannot add any gloss, of course. I do not know.

1 Mr van den Assem is not here to ask. What matters is
2 there he is talking to competitors about the UK.
3 THE CHAIRMAN: All right.
4 MR WARD: Then if we look at an example to do with
5 Mr McDonagh, please. This time it is {I1/402} and the
6 topic here is "Royal Mail [Royal Mail itself] 2005
7 approval request March 30":
8 "Attached please find latest version including
9 comments from Kerry ..."
10 You will see Kerry McDonagh is one of those copied
11 in so it is obviously the same Kerry.
12 "... and the Parts turnover on a yearly basis. Can
13 you please take it from here?"
14 In fact the attachment for this is at {I1/404},
15 which has some mystifying and unjust redactions but we
16 will still see what we can. This is a memo intended to
17 obtain price approval for a Royal Mail order and it
18 says:
19 "The Royal Mail is in the middle of a fleet renewal
20 programme and further volume can be expected in the
21 course of 2005, including heavier vehicles with higher
22 margins. Currently however a firm enquiry has been
23 received for 200 LF 45 identical to those ... under the
24 current agreement.
25 "DAF requests approval to actively pursue this

1 business."

2 Bizarrely and inexplicably, some of the finances

3 have been redacted from this document.

4 But what we see is Mr McDonagh actually involved in

5 the price approval process for Royal Mail itself. So

6 while DAF tries to set this impossible standard on us,

7 linking our prices to particular acts of collusion,

8 there at least is Mr McDonagh in action.

9 Can I now turn to Mr van Putten, who is the third of

10 the three? This time we go to {I1/105}, and this is

11 only an agenda so I cannot put too much weight on this.

12 I do not seek to. This is Renault, year 2000, addressed

13 to various cartelists, van Putten at the bottom for DAF,

14 and the agenda meeting includes "UK situation". We do

15 not know what they discussed, but there is Mr van Putten

16 meeting with competitors to discuss the UK.

17 Then one further example of Mr van Putten which

18 deals with Euro 4 collusion, and this is {I1/291}. This

19 is a fax, 2003, going out to Iveco, Renault, Volvo,

20 *Scania* and also Mr McDonagh of DAF. It is from

21 Mr van Putten and it says:

22 "During our meeting in Gothenburg we discussed the

23 market introduction of the Euro 4 specification. I took

24 on me to discuss this issue with our colleague ...

25 "Although DC [which we think probably means

1 'Daimler'] have their doubts that we all keep to our
2 promises they agree on the basis of market introduction
3 in September 2004 and the IAA. Very clearly we should
4 not offer it before this date in sales. I presume we
5 all still agree and commit to this date."
6 Indeed that is pleaded as an agreement and admitted
7 by DAF. They say it was not implemented. We disagree.
8 That will be a matter for cross-examination.
9 I just make one more point about these that I have
10 shown you. All of the examples I have just shown you --
11 sorry, two of the examples I have just shown you were
12 actually from the period before the introduction of euro
13 price lists, so it is another example of how, even
14 before then, the cartel was extending its tentacles into
15 the UK.
16 Now, if I had a week for this opening, I could show
17 you a lot more, but I hope what I have done is show you
18 the flavour of how this collusion operated and why we
19 say -- as part of why we say there is an obvious
20 connection here to what was going on in the UK. But
21 I want now to go back to the question of why we say
22 there are defects in DAF's pleadings when we look at how
23 they have addressed the recitals. For this we will need
24 two things simultaneously really, the decision but also
25 DAF's defence in the Royal Mail case.

1 Do you have the ability to have two things on the
2 screen at once or do you have hard copies of either of
3 those documents? You can put them both on the screen.
4 There you go. I should have thought of that. Thank
5 you.
6 We will start with the decision and Recital 27, and
7 that is authorities 3.9. We want to go to about page 9
8 of it. I say "about" because my numbering is obviously
9 slightly different to yours. Yes, perfect, {AU/3.9/9}.
10 Then if we can go to DAF's defence in the Royal Mail
11 case, which is {B/2/78}. Right. Now I have caught up
12 with Opus. Thank you very much.
13 Recital 27 that we have already seen says,
14 {AU/3.9/9}:
15 "The pricing mechanism in the truck sector follows
16 generally the same steps for all the Addressees."
17 "... all the Addressees", that means DAF.
18 "Like in many other industries, pricing starts
19 generally from an initial gross list price set by the
20 Headquarters."
21 So not necessarily in every case, but generally.
22 Then you will see it says, if we skim to the end:
23 "The final ... customer prices will reflect
24 substantial rebates on the initial gross list price."
25 What DAF says about this is at page 78, and it says,

1 {B/2/78}:

2 "... it is admitted that DAF had List Prices, as
3 defined in ... [the] Defence. It is averred that UK
4 List Prices [and so forth] were determined by the First
5 Defendant ..."

6 But it is the last sentence here:

7 "It is denied that pricing for DAF Trucks 'generally
8 started from' List Prices."

9 Our very short and, we would say, simple submission
10 is, well, that is just in direct conflict with the
11 decision. It makes absolutely clear that this mechanism
12 was applied to all of the addressees, even if it is only
13 how it was done generally. But DAF's case is not that
14 it did this sometimes but that there were exceptions or
15 that something -- there is some minor variation on this.
16 It is just a flat denial. In their skeleton they say,
17 "Well, nothing precludes us from explaining the pricing
18 was not in line with this generality", but the problem
19 is something does, which is the CAT's judgment, which
20 I am going to come to when we have actually looked at
21 the substance of this. But what we have here is
22 a straight conflict.

23 If we can move from that to recital 47, which we
24 looked at earlier -- that is page 12, {AU/3.9/12} -- and
25 this is dealt with in DAF's defence at page 17,

1 {B/2/17}. So recital 47, as we have already seen, the
2 important sentence is, {AU/3.9/12}:
3 "By exchanging current gross prices and gross price
4 lists, combined with other information gathered through
5 market intelligence ..."
6 Pausing there, it is admitted by Mr Ashworth that he
7 had got such market intelligence.
8 "... the Addressees were better able to calculate
9 their competitors' approximate current net prices --
10 depending on the quality of market intelligence
11 [available to them]."
12 Let us look at what DAF says about this on page 17,
13 {B/2/17}. It starts quite promisingly:
14 "The general proposition that the exchange of gross
15 pricing information could be combined [I think it should
16 read 'with'] other information gathered through market
17 intelligence to enable a better calculation of ...
18 current net prices than would have been possible without
19 [it] ..."
20 So there is an attempt to sort of put a bit of spin
21 on there, but so far at least it finishes with the words
22 "is admitted". So there is a bit of spin, but okay so
23 far.
24 "It is further admitted and averred that the
25 Commission made that finding ... as part of a finding of

1 ... object ...
2 "It is however denied, if it is alleged, that DAF
3 was in fact [I think the "not" is rogue] better able to
4 calculate competitors' approximate current net prices,
5 whether on an average basis or ... as a result of any
6 information exchanged."
7 That is a bare denial, a bare denial.
8 Then there is a bit more pleading below, but none of
9 it talks about what DAF itself could actually do. So it
10 raises in a sense -- the implication of this case
11 appears to be, well, DAF did not have the information to
12 enable it to do this. But that is not explained and, in
13 fact, DAF's witnesses do not talk about this wider
14 context. Mr Ashworth gives a bit of evidence on this
15 and says, "Well, I could not calculate this from list
16 prices alone". But what we have here is basically an
17 impermissible bare denial of the bad old kind that
18 predated the Woolf reforms.
19 Even on CPR basis, this would just be impermissible
20 and, of course, you will be well aware of the rules of
21 CPR 16.5.2: when the defendant denies an allegation, it
22 must state its reasons. In fact, under the directions
23 made in this case, the CPR pleading rules apply here.
24 But putting that aside, it is abusive in any event
25 because it is contrary to Recital 47.

1 THE CHAIRMAN: This is obviously responding to your plea.
2 MR WARD: Yes. Yes, of course. We have relied on
3 Recital 47 and they have said --
4 THE CHAIRMAN: You have basically pleaded Recital 47 and
5 this is their response.
6 MR WARD: They say, "Well, it does not apply to us". We are
7 not better able to calculate current net prices".
8 Essentially what they need this recital to say is -- the
9 recital could say, "Well, some manufacturers could do
10 this but not all. Other people might be able to but not
11 DAF". But, alas, it is entirely general and of course
12 it says the degree to which they were able to do this
13 depends on the quality of market information available,
14 but it does not say or even suggest the possibility that
15 there was a cartelist for whom this was just no use
16 whatsoever. It is transparently obvious why DAF thinks
17 that is an advantageous plea. It is just not open to
18 them --
19 THE CHAIRMAN: So they are not relying on the sort of
20 exclusion in 47, depending on the quality of the market
21 intelligence?
22 MR WARD: They say that in their skeleton, but what we have
23 here is a bare denial and what we do not have is any
24 developed evidence from DAF to explain why it is that,
25 in fact, on the basis of market intelligence, they could

1 not do this.

2 MR BEARD: I am very sorry, I do not want to interrupt, but

3 it is worth going down to (b):

4 "It is averred that the most that a Manufacturer

5 could have done based on the information exchange ...

6 depending on the quality of market intelligence

7 available to them ..."

8 Mr Ward keeps saying it is a bare denial. It is

9 pretty clear what we are doing here.

10 MR WARD: That is of course expressed in entirely general

11 terms, but the bare denial is whether DAF itself could

12 do this. Absolutely, (b), "the most that a Manufacturer

13 could have done ... depending on the quality" was to

14 estimate. Then they come up with some weasel words to

15 avoid saying the words in the actual recital, "...

16 average aspirational realised price increase based on

17 their assessment of the extent to which List Price

18 increases were likely to be achievable ...", or

19 something.

20 But what they are saying here is something at a high

21 level of generality, what manufacturers could have done,

22 but the bare denial is whether DAF could actually do it

23 themselves.

24 THE CHAIRMAN: The denial in (a) is related to the

25 information exchanged as part of the cartel, not

1 market -- not any other market information that was not
2 available to them for whatever reason?
3 MR WARD: Well, they are just seeking to deny they were
4 better able to calculate competitor approximate current
5 net prices. That is impermissible. It is just
6 impermissible.
7 I will show you now what the CAT said in its binding
8 recitals judgment about the approach to this. We can
9 find that in I think bundle F --
10 THE CHAIRMAN: Was this paragraph in its present form before
11 the CAT on that application? It was an application to
12 strike out, was it not?
13 MR WARD: No. So the way it worked was there was a very
14 protracted debate between the parties about this
15 recital, and Mr Justice Roth or, strictly, the tribunal
16 ordered, of its own volition, "let us have a hearing to
17 decide", and then he envisaged a process whereby this
18 could be resolved and today is the outcome of that
19 process; enormously protracted correspondence during
20 which DAF, to be fair, conceded away a series of
21 thoroughly bad points that they had been pursuing and we
22 have chosen the ones today that seemed to us to be of
23 most significance, rather than spending time here
24 hair-splitting over various other things that they have
25 tried to finesse, to use the euphemism, in their

1 pleadings.
2 THE CHAIRMAN: So this plea follows that ruling?
3 MR WARD: I cannot say whether it was all before or after.
4 MR BEARD: I think it is after. I will double-check but
5 I am pretty sure that is the case.
6 THE CHAIRMAN: Well, it has a few colours in it.
7 MR WARD: Yes, well, it has been quite a journey to get here
8 today, sir.
9 But if we could go, please, to what the CAT says,
10 just to understand it. It is at {F/33} and we can go to
11 page 53 because this just gets us to the guts of what
12 this is really about, {F/33/53}. This is the tribunal's
13 reasons for rejecting the cartelists' argument that it
14 is not an abuse of process to resile from all of this
15 even though they admitted it.
16 At 131:
17 "... on the basis of the English authorities ... we
18 apply a broad, merits-based approach in asking whether
19 it would bring the administration of justice into
20 disrepute and/or be unfair to the claimants if the
21 defendants are able simply to deny the facts which the
22 Decision records them as having admitted, or to 'not
23 admit' those facts in their defences to these claims and
24 ... require the claimants to prove them. In our
25 judgment, it would be an abuse of process here on both

1 accounts. That encompasses the position adopted by
2 several of the defendants regarding many of the meetings
3 referred to in the Decision: the defendants admit that
4 a meeting took place on the specified date in the
5 specified place and/or with the specified attendees, but
6 make no admission as to what occurred at the meeting."
7 That is indeed the position here, sir.
8 "The defendants would be placing on the claimants
9 the very significant burden of proving all these facts,
10 in circumstances where the relevant information is
11 largely held by the defendants, some of it may be
12 undocumented and insofar as it is documented the
13 claimants would have to obtain it by ... extensive
14 disclosure ... involving very expensive inspection.
15 "We emphasise that the factual findings in the
16 Decision were formally admitted by the Addressees in
17 a structured process, where their rights were fully
18 protected, in quasi criminal proceedings. We do not
19 regard this as remotely comparable to admissions made in
20 correspondence or a press statement, which would be
21 simply admissible but which the admitting party could
22 explain or controvert in civil proceedings.
23 "Mr Jowell [who was for MAN] argued that to hold
24 that disputing the findings is an abuse would be unfair
25 to the Addressees since they do not have a basis in the

1 settlement process to contest a finding outside their
2 own knowledge. However, in the first place, each
3 Addressee had access to the ... file and could ... see
4 [all] the evidence against it."
5 In fact what we are concerned with here is DAF in
6 any event.
7 If we move on to page 56 at 141, this is the
8 tribunal's ruling which was upheld in the Court of
9 Appeal, {F/33/56}:
10 "In our judgment, having regard to the
11 considerations ... above, the following principles
12 should apply ...
13 "It is an abuse of process for a defendant simply to
14 deny or not admit facts set out in a Recital relied on
15 by a claimant.
16 "Where the claimants do not object, it is not an
17 abuse ... to put forward a case ...
18 "Where a defendant seeks to put forward a contrary
19 position ... on the basis that it does not accurately
20 reflect the underlying document ... whether that be
21 a contemporaneous document or a statement in
22 a settlement submission, it will not be an abuse ..."
23 So that is not relevant. Then 4 is very important:
24 "Where a defendant relies on new evidence which it
25 could not reasonably have had access to at the time of

1 the proceedings before the Commission, it is not an
2 abuse if it seeks to advance facts inconsistent with
3 a recital."
4 So that is a kind of *Ladd v Marshall*
5 type rule. But that is not in issue. DAF has never
6 suggested these are new facts.
7 "Where a claimant pleads facts or allegations that
8 are more detailed than [or] additional to ... [the]
9 recital, it will not be an abuse ..."
10 Then 6:
11 "In circumstances not covered by (2)-(5), it is for
12 the defendant seeking to put forward a positive case
13 contrary to a finding in a recital to set out the
14 reasons ..."
15 But those are circumstances not covered by 2 to 5
16 and here what we see DAF doing is trying to rely on 4
17 without any actual new evidence.
18 THE CHAIRMAN: Is that what it says? What is the new
19 evidence that they are --
20 MR WARD: Well, there is no new evidence. It is not
21 suggested there is one iota of new evidence. DAF is
22 just trying to run a case contrary to the recitals. It
23 has not produced any evidence, never mind new evidence.
24 I was just going to finally show you 144, which
25 finishes the process point. It says in the fourth line:

1 "... we consider that it is in the first instance
2 for each defendant, where it seeks to advance a positive
3 case, to set out the justification for seeking [to do
4 so]. Where the claimants then do not agree ... it would
5 be for the Tribunal to rule ..."
6 That is in a nutshell where we have ended up.
7 THE CHAIRMAN: So it is over to us to find that this
8 pleading is an abuse of process?
9 MR WARD: Yes. This is the point that I flagged very
10 lightly when we were in the PTR.
11 THE CHAIRMAN: Yes.
12 MR WARD: But I do want to say one other thing, though, to
13 put it into context at this point, which is of course
14 that all of the cartelists admitted these recitals, all
15 of them, and it is only DAF who is here today seeking to
16 finesse them. So what that tells us is that Recitals 27
17 and 47 can be taken to govern the position of the other
18 cartelists. That matters because they are in the market
19 that BT and Royal Mail are buying into and that DAF is
20 selling into. So even if it is the case that DAF got
21 all of this marvellous cartel information and threw the
22 whole lot in the bin, that would not defeat our claim
23 because there is still there a mechanism by which the
24 prices that my clients paid were affected by this
25 massive-scale distortion in the market.

1 Now, I want to move on from that to an important and
2 late topic, which is plausibility. Is it even plausible
3 the infringement had an effect on DAF's prices? As you
4 know, DAF's case is that it is not and there will
5 obviously be expert evidence on this in due course. But
6 I want to make some high-level points which we say
7 really are important to informing this debate. They do
8 start with the decision because of course it is true, as
9 DAF says, that the decision does not actually prove
10 causation or damage. But what it does do is explain the
11 cartel in such a way that it is not only likely that it
12 occurred, it is in fact obvious that it would have
13 occurred.
14 If I can just highlight again some of the recitals
15 that we have already looked at to make this good. If we
16 can get the decision back, please, {AU/3.9}, I think we
17 want page 17, {AU/3.9/17}. Yes, thank you. We looked
18 at this. I emphasise it again. It is the last part of
19 Recital 71. The object of this infringement was to
20 "remove uncertainty regarding the behaviour of the ...
21 Addressees and ultimately the reaction of [consumers] on
22 the market", and it did this by following a single
23 economic aim, the distortion of independent price
24 setting. Then moving to the next page again,
25 Recital 81, {AU/3.9/19}, last four lines again:

1 "Price being one of the main instruments
2 of competition, the various arrangements and mechanisms
3 ... were ultimately aimed at restricting price
4 competition ..."
5 We have just been looking at the mechanism in
6 Recitals 27 and 47 by which the gross list price
7 information, which was obviously a very important part
8 of this cartel, actually could feed through into
9 understanding of approximate net prices. But DAF's
10 argument effectively amounts to, "It is not even
11 plausible that this cartel succeeded. It is not even
12 plausible that it did". But we need to step back here
13 and have a reality check, in our submission, because
14 this cartel lasted for 14 years. It did not wind down.
15 It was brought to an end by dawn raids.
16 Nobody left the cartel and what we have seen is an
17 astonishing degree of collusion between the
18 manufacturers. They took huge risks to do this and they
19 eventuated in the form of an 850 million euro penalty
20 for DAF alone.
21 But the expert argument is that it was all for
22 nothing in terms of actually making any money. It was
23 just pointless.
24 Now, it is absolutely true, as DAF says in its
25 pleading, that not all cartels actually do give rise to

1 an overcharge, and I suspect Mr Ridyard at least will be
2 well familiar with the Oxera study, which tells us that
3 something like 93% of cartels do. But what really
4 matters here is the nature of this cartel. It is
5 a 14-year restriction on price competition and it is
6 quite remarkable to submit that it is not even plausible
7 it would have an effect.
8 It is right to say that this argument has been tried
9 and failed in different forms, both at the
10 European Court and in Dutch proceedings and German
11 proceedings which DAF have been losing. I will just
12 show you what was said in the European Court about this.
13 It is not quite the same point but the gist of it is the
14 same, and this is *Scania*. It is authorities 14.
15 Now, as I am sure you are aware, *Scania* was another
16 party in this infringement, but it did not settle. It
17 forced the Commission to go through all of the hoops and
18 the Commission made a finding against it. Then it
19 appealed and the appeal has failed. Here is the
20 judgment of the court on appeal. It is absolutely right
21 that this is a post-Brexit judgment or strictly post IP
22 completion day judgment, therefore it is not binding on
23 this court, of course it is not, but it is still
24 illuminating in many respects.
25 I want to take you, please, to page 56, {AU/14/56},

1 where there is an argument from *Scania* saying something
2 very similar to what you have been hearing here. 334:
3 "The applicants, in order to support their argument
4 that the exchanges of information between manufacturers
5 ... concerned the gross prices in force at the time, not
6 future prices, also submit that *Scania* [Germany] did not
7 revise its prices ...", and so forth.
8 It says at 335:
9 "That argument, which must be addressed in the
10 light of the principles set out ... above, cannot be
11 accepted ..."
12 Then moving towards the end of the paragraph:
13 "The fact that *Scania* took part in exchanges
14 with its competitors for 14 years and on a regular
15 basis demonstrates the strategic value of that
16 information ..."
17 Then at 344, {AU/14/57}, it says:
18 "... it is noted that the exchanges ... took place
19 frequently and over a number of years ... [they] were
20 structured and well organised ... the participants were
21 often invited to complete an Excel [spreadsheet] ..."
22 Then it says:
23 "In the light of that fact, the argument that the
24 exchanges were ..." --
25 THE CHAIRMAN: Pause. We have not kept pace.

1 MR WARD: Sorry. I am so sorry, sir. I have been skimming
2 slightly because I am getting a bit worried about time.
3 THE CHAIRMAN: Yes, sure.
4 MR WARD: But basically again we see them saying that this
5 was all no use. Then it says, "Look, it carried on over
6 a number of years, it was well organised, they had Excel
7 spreadsheets, et cetera, et cetera".
8 "In the light of that fact, the argument that
9 exchanges at German level were of no value to
10 competitors for the purposes of planning their pricing
11 strategies is implausible."
12 There have also been proceedings in The Netherlands
13 and Germany where DAF have been trying a whole series of
14 arguments which they are also pursuing in these
15 proceedings, and they have been rejected, and they have
16 been rejected in Germany at an appeals level and they
17 have been rejected in The Netherlands at what was
18 essentially a form of preliminary issue.
19 If I had all the time in the world I would take you
20 through everything that those judgments say, but I do
21 not --
22 THE CHAIRMAN: This is Professor Neven's argument on
23 plausibility so that was being put forward in the other
24 cases?
25 MR WARD: Yes, by Compass Lexecon, I think, and we think

1 probably Professor Neven himself, based on what we now
2 know. I do respectfully submit these judgments are very
3 helpful, but given the limits on time, I am not going to
4 try to take you through them in any depth.
5 But I want to show you one passage from the Dutch
6 court, please, which is authorities bundle 12.3 at
7 page 42, {AU/12.3/42}, at 3.67. This is a certified
8 translation of a judgment in Dutch:
9 "Also at the hearing, the Truck manufacturers were
10 unable to give a convincing reply to the question about
11 the purpose of exchanging information on gross list
12 prices. According to Truck manufacturers, it was simply
13 out of interest in everything occurring in the market
14 and it was thought that there was little or no harm in
15 it."
16 We do not even have that explanation here.
17 Discretion took the better part of valour, I think, in
18 our case.
19 "This is far removed from what the Commission wrote
20 in its Decision about the purpose of the collusion: to
21 distort independent price setting and the normal price
22 movement for trucks ..."
23 That is Recital 71.
24 "It is apparent from the Decision that great
25 transparency already existed in the truck market ... The

1 future market conduct and the plans of Truck
2 manufacturers in relation to changes in gross prices and
3 gross list prices was one of the remaining
4 uncertainties. Once again, the court points out that
5 the Truck manufacturers -- excluding *Scania* -- have
6 acknowledged the Commission's findings. It is
7 impossible to fathom why a Truck manufacturer would
8 provide information about its future market conduct to
9 its competitors, unless it expects to receive something
10 (potentially) beneficial in return. In this case,
11 information about the future market conduct of its
12 competitors. This was done for the purpose of aligning
13 market conduct, as also established by the Commission.
14 The Commission furthermore established that the
15 Addressees deliberately committed the Infringement.
16 "It is furthermore obvious that the exchange of
17 information was of interest to the Truck manufacturers.
18 The Cartel operated for several years and not a single
19 member left the Cartel early. That ... negates the
20 argument that the Infringement had no effect and could
21 not have inflicted harm. The court also refers in this
22 respect to no. 81 of the Decision in which the
23 Commission considers that it can be assumed that the
24 impact on the trade was noticeable in view of the market
25 share and turnover of the Addressees ...

1 "It follows from the above that the Truck
2 manufacturers defence ... that not a single customer
3 incurred a loss or could have incurred a loss ... must
4 be dismissed, is invalid."
5 So we do respectfully agree with that.
6 THE CHAIRMAN: This included DAF?
7 MR WARD: Yes, yes.
8 Similar arguments were tried in Germany. We do not
9 actually have a certified translation yet of the German
10 judgment, but I will just show you -- I am afraid it is
11 machine translated and a certified judgment is on its
12 way, I believe. This is the German Higher Appeals Court
13 and it is saying something quite similar at 176. It is
14 {AU/12.4/15}. I am quite apologetic about even putting
15 this forward and we will provide the proper translation.
16 I am told it is here. May I hand it up? I am sorry.
17 I will now find out what it actually says, but there we
18 are. I was going to show you 176 and 177. It is
19 page -- it does not seem to be numbered. Do you have
20 that, sir?
21 THE CHAIRMAN: I have it, yes.
22 MR WARD: Thank you.
23 "... it has not been bindingly found that the cartel
24 members implemented the gross price lists as announced.
25 The cartel members however continued this exchange of

1 information for [around] 14 years with precisely this
2 aim and increasingly formalised it in the later years of
3 the cartel. The cartel members would not have borne
4 this expense if they had not assumed that the aim
5 thereby pursued, namely the coordination of the gross
6 pricing and the falsification of the pricing, could also
7 be achieved and -- with hindsight -- had also been
8 achieved.
9 "The argument that there was no foreseeable
10 relationship between gross list and net price changes,
11 for the above reasons alone ... is in contradiction to
12 the binding findings ... and is thus not valid."
13 So it is a similar flavour and indeed, if we had the
14 time, I would show you that quite a lot of the arguments
15 of detail that we are considering in this case are tried
16 and failed in these cases, including Professor Neven's
17 focal point argument and a debate we have about
18 Professor Harrington's theory which I will touch on
19 a bit later.
20 So they are both valuable in showing that, while DAF
21 might be running a coordinated defence in Europe, in
22 these two courts it obtained no traction. This takes me
23 back to the problem that they have not explained what
24 they were doing at all, and we do submit that, in
25 addition to taking into account all of the evidence, you

1 should draw an adverse inference from the silence on DAF
2 as to how the cartel was given effect and as to its
3 impact on prices.
4 I will remind you, sir, and show the tribunal the
5 *Prest v Petrodel* judgment on this, which
6 I am sure is familiar, which is {AU/3.5/24}. This is in
7 the Supreme Court and it is the judgment of
8 Lord Sumption. Paragraph 44, he starts by quoting the
9 very well-known judgment of Lord Diplock in the
10 *Herrington* case. I will just read a little
11 bit of it, although Lord Sumption does make some
12 observations about it:
13 "'The appellants, who are a public corporation,
14 elected to call no witnesses, thus depriving the court
15 of any positive evidence ...'"
16 Sorry, it is useful to see this. It is about
17 trespassing on a railway line; undertaking for injury
18 suffered by trespassers on the line.
19 "'The appellants, who are a public corporation,
20 elected to call no witnesses ... depriving the court of
21 any positive evidence as to whether the condition of the
22 fence and the adjacent terrain had been noticed by any
23 particular servant of theirs or as to what he or any
24 other of their servants either thought or did about it.
25 This is a legitimate tactical move under our adversarial

1 system of litigation. But a defendant who adopts it
2 cannot complain if the court draws from the facts which
3 have been disclosed all reasonable inferences as to what
4 are the facts which the defendant has chosen to
5 withhold.'"
6 Then, in fairness, Lord Sumption says:
7 "The courts have tended to recoil from some of the
8 fiercer parts of this statement, which appear to convert
9 open-ended speculation into findings of fact. There
10 must be a reasonable basis for some hypothesis in the
11 evidence or the inherent probabilities, before a court
12 can draw useful inferences from a party's failure to
13 rebut it. For my part I would adopt, with
14 a modification which I shall come to [which is
15 irrelevant for us, I should say], the more balanced view
16 ... [of] Lord Lowry ... [in the Coombs case].
17 "'In our legal system generally, the silence of one
18 party in face of the other party's evidence may convert
19 that evidence into proof in relation to matters which
20 are, or are likely to be, within the knowledge of the
21 silent party and about which that party could be
22 expected to give evidence. Thus, depending on the
23 circumstances, a prima facie case may become a strong or
24 even an overwhelming case. But, if the silent party's
25 failure to give evidence ... can be credibly explained,

1 even if not entirely justified, the effect of his
2 silence in favour of the other party may be either
3 reduced or nullified.'"
4 We rely on that, sir. We are in precisely that
5 situation here. We have a whole tapestry of evidence
6 both from the file, the expert evidence and all of the
7 considerations arising from the decision, which we say
8 go to show that it is plausible, indeed overwhelmingly
9 obvious, that this infringement would have had an effect
10 on DAF's pricing. What you are faced with is immensely
11 technical expert evidence and no relevant factual
12 evidence.
13 THE CHAIRMAN: How does that fit in with the burden of
14 proof?
15 MR WARD: Well, it shows the findings you can make on the
16 facts which would assist us in discharging the burden of
17 proof.
18 THE CHAIRMAN: You accept you have the burden of proving
19 causation and loss?
20 MR WARD: We have the burden of proving causation and loss
21 but I am going to show you this afternoon -- I do not
22 think it is going to be this morning now, alas --
23 exactly how that should be discharged in this kind of
24 case. We do bear that burden of at least perfecting the
25 tort before the broad axe comes into play on

1 quantification, yes.
2 THE CHAIRMAN: You say that you have got the prima facie
3 evidence of the decision, the findings in the decision
4 which are admitted, and all the other evidence as to the
5 collusion --
6 MR WARD: Yes.
7 THE CHAIRMAN: -- and now the burden effectively shifts to
8 the defendant to explain how they did not benefit from
9 this exchange of information or from the cartel?
10 MR WARD: Or at the very least you can draw an adverse
11 inference that will assist us in discharging the burden
12 of proof. I do not think I am going to go as far as
13 submitting the whole pendulum swings but that adverse
14 inference you can draw assists us in discharging our
15 burden of proof. I do not think I need to put it quite
16 as high as you might have been inviting me, sir.
17 Can I also show you a European judgment, which is
18 a European competition law variant on this presumption,
19 and this is in authorities bundle at 8.1, which is 4 if
20 anyone else has a hard copy {AU/8.1/1}.
21 This is a very, very well-known dictum and this is
22 just one -- it is repeated like a mantra by the
23 European Court and this is just an example, so we are
24 not really concerned with the facts. I think it is
25 page 67 of the document -- sorry, page 11 {AU/8.1/11}.

1 Yes, thank you. This is a classic dictum of the
2 European Court multiple-ly repeated:
3 "... the Court of Justice has held that, subject to
4 proof to the contrary, which the economic operators
5 concerned must adduce, it must be presumed that the
6 undertakings taking part in the concerted action and
7 remaining active on the market take account of the
8 information exchanged with their competitors in
9 determining their conduct on that market."
10 This comes back to when I was talking about my
11 example of bid-rigging earlier, sir. I said there is
12 European Court dicta about how this works. So if you
13 are in a tender and one of your rivals tells you their
14 proposed bid, you are presumed to have taken it into
15 account, unless you come forward and you say, "Wow, we
16 got that fax but we put it straight in the shredder and
17 the one person who read it actually took themselves out
18 of the transaction", say. You could put all of that
19 information in and discharge this presumption but we are
20 not in that territory here at all. We have got nothing.
21 I just make a couple more points again about why do
22 we say it is plausible? It is obviously plausible on
23 the basis of the decision. We rely on these
24 presumptions but there is also the point that we have
25 discussed already this morning that this is an object

1 infringement. DAF says, "Well, there you are then, it
2 is an object infringement, it does not tell you anything
3 about effect". But of course that is not right. It is
4 not right. I want to go back to the *Scania*
5 judgment, which is authorities tab 14, to show you what
6 the European Court has said about this {AU/14/1}. It is
7 again a pretty standard piece of European Court rubric
8 but we can conveniently take it from *Scania*.
9 It is pages 51 and 52 of the judgment so start at 51,
10 please {AU/14/51}. Can we go down a little bit more?
11 310 and 311 I want.
12 "The distinction between 'infringements by object'
13 and 'infringements by effect' stems from the fact that
14 certain types of coordination between undertakings can
15 be regarded, by their very nature, as being harmful to
16 the proper functioning of normal competition ..."
17 Then 311:
18 "Consequently, it is established that certain
19 collusive behaviour, such as that leading to horizontal
20 price-fixing by cartels, may be considered so likely to
21 have negative effects, in particular on the price,
22 quantity or quality of the goods and services, that it
23 may be considered redundant, for the purposes of
24 applying Article 101(1) TFEU, to prove that they have
25 actual effects ..."

1 So the important point to appreciate here is --
2 sorry, I wanted to go to --
3 MR RIDYARD: I think this is about whether the conduct is
4 illegal or not.
5 MR WARD: Absolutely. What I am showing you this for is it
6 is absolutely accepted that this is an object
7 infringement but to say it is an object infringement is
8 not to say it has no effects. It is to say they are so
9 obvious that the Commission could put 3 billion euros of
10 fines on these parties which they accepted and agreed to
11 because the effects are so obvious they do not actually
12 need to be proven.
13 The Commission does not have to go out in the market
14 and actually show it because it is just that obvious.
15 That is the point of this.
16 MR RIDYARD: When it is finding the conduct illegal. But
17 you still have an obligation to show there is an effect,
18 do you not?
19 MR WARD: I do, yes. I am not saying this gets me home.
20 Goodness me, no. This is just another factor in the
21 tapestry that I am putting forward as to why we say it
22 is at the very least plausible that this infringement
23 did have effect. To say it is an object infringement,
24 as if that somehow nullifies the proposition that
25 effects are likely, is completely unreal.

1 THE CHAIRMAN: It is just that the Commission does not need
2 to go on to find the effects because it is good enough
3 showing that it was --
4 MR WARD: Object.
5 THE CHAIRMAN: By object, yes.
6 MR WARD: That is right. The purpose of showing you this
7 dicta is just to unpack what that means. Object is not
8 strict liability; it is just so obvious that it has
9 effect, the Commission does not have to do the extra
10 work. It is a no brainer, to put it in colloquial
11 terms. That is really what this is saying.
12 THE CHAIRMAN: You have to understand how it actually works
13 though in order to work out what its effects were.
14 MR WARD: Of course. That is why I have taken time this
15 morning to show you the decision and how it worked and,
16 of course, I am not going to sit down now and say, "That
17 is our case, we would like our money". There is a whole
18 series of other elements that go into our case here.
19 We have the decision, we have Mr Harvey's theory of
20 harm which is based upon the decision and explains why
21 the decision would be expected to have effect. We have
22 other elements. We have talked about the M&S directors.
23 We are going to explore with DAF's witnesses the role of
24 list prices. We have got Professor Harrington's theory,
25 which I am going to touch on very lightly, and then we

1 have got the econometrics and we are going to talk about
2 what the econometrics shows as well.
3 SIR IAIN MCMILLAN: Can I just ask, is it your argument to
4 the tribunal, Mr Ward, that having cited that, on the
5 screen at the moment, that the court must have a greater
6 degree of presumption that that collusion by object also
7 had an effect?
8 MR WARD: May I put that in my own words because it is
9 a qualified "yes" where I would probably not use the
10 word "presumption". I would say what we are trying to
11 establish here is: did the infringement have effects?
12 What I am talking about at the moment is whether it is
13 only plausible, because of course that is contested.
14 The purpose of showing you this judgment is to show
15 not that the object infringement tells you nothing about
16 effect. On the contrary, it tells you that they were so
17 likely that they could actually be assumed by the
18 Commission when it imposed the penalty.
19 I do not say that proves my case. That would be
20 extravagant. What I do say is it is another building
21 block, a valuable indicia as to why there actually are
22 effects in this case.
23 SIR IAIN MCMILLAN: Thank you.
24 MR WARD: Is that helpful?
25 SIR IAIN MCMILLAN: Yes.

1 MR WARD: I just say, for your note, that Mr Beard's
2 skeleton, paragraph 10, footnote 6, cites authority
3 which he says meets this point but, in fact, in
4 paragraph 43 of that authority, it says exactly the same
5 thing.
6 Now, I want to just also revisit a point I have made
7 already. We have seen what the decision shows us, that
8 there was just vast amounts of information sharing going
9 on here and I have shown you the key recitals now
10 a number of times. We have got Recital 47: calculate
11 approximate current net prices; we have got Recital 58:
12 take account of the information exchanged for future
13 gross price increase planning; Recital 75: better able
14 to understand from the price increase information each
15 other's European price strategy. So we have got vast
16 amounts here going on. BT and Royal Mail thought they
17 were conducting competitive tendering exercises. So
18 even if DAF made no use of this, my clients were buying
19 in a market where all of the main competitors are also
20 in the cartel. DAF's own evidence makes clear that it
21 took into account market intelligence. It says it got
22 it from the claimants rather than the cartelists, but
23 I will just read you from Mr Ashworth's witness
24 statement. He says:
25 "I took into account ...

1 "(h) market intelligence (most often gained directly
2 from Royal Mail, although sometimes also from DAF's ...
3 dealers and customers) ..."
4 Just for your note, that is {D/22/21},
5 paragraph 72(h). He talks repeatedly about Royal Mail
6 and BT using competing bids to drive down prices. But
7 of course all of this is rigged, all of it. So this is
8 another way in which the infringement can come into
9 play.
10 Then the final piece in the puzzle is the way DAF
11 itself used the list prices and of course that is
12 something that DAF has not talked about but we are going
13 to explore in cross-examination. We do not accept that
14 list prices were irrelevant to transaction prices. Our
15 submission is going to be that they were an important
16 part of the whole pricing structure whether or not you
17 describe them as the starting point, as Recital 27 does,
18 and is indeed in our submission binding, but we will go
19 into the facts but just not today.
20 Now, despite all of this, Professor Neven's case is
21 it is not even plausible, and the basis of his theory of
22 harm is -- I am just going to talk about very briefly.
23 It is important to appreciate at the outset that
24 Professor Neven's theory of harm is only concerned with
25 the information-sharing over gross list prices,

1 information-sharing, gross list prices. We have already
2 seen that is very far from being the whole cartel. But
3 I will try to summarise what I think he is saying
4 without going to the report. I am sure Mr Beard will
5 correct me if I am not doing justice to it.
6 But he says that for the infringement to have an
7 effect on transaction prices, it would be necessary for
8 the parties to the cartel to maintain and monitor
9 a focal point for transaction prices, a focal point.
10 The idea is that the only way there could be a price
11 effect is that the parties agreed to some transaction
12 price outcome. Then he says, "Well, the difficulty with
13 this is that truck prices are individually specified and
14 those transaction prices are not observable". As I said
15 earlier, there is not a website you can just look them
16 all up. So he says, "Well, it would not be possible to
17 monitor adherence, there would be incentives to cheat
18 meaning the agreement could not be implemented". If you
19 want the references, it is {E/10/10}. Paragraphs 3.3
20 and 3.7 put that in a distilled way.
21 It is our respectful submission that this theory is
22 just set up to fail because it apparently requires the
23 ability to have full visibility of individual truck
24 prices, and of course we accept that that is not there,
25 but there is nothing in the decision to suggest that

1 this was necessary for the cartel to thrive, and it did
2 thrive for 14 years.
3 What Recital 47 shows us is that the addressees were
4 better able to calculate approximate current net prices.
5 That is a lot less granular. Were they able to monitor
6 the prices? Well, again, it is obvious there was enough
7 feedback of various kinds to sustain this cartel over
8 the years. Professor Neven's theory is, "Well, cartels
9 might break down if there is no monitoring mechanism or
10 there might be cheating". Of course, it is entirely
11 possible there was cheating, that is entirely normal in
12 a cartel situation and the authorities make clear that
13 that does not in any way defeat the existence of the
14 cartel. But our respectful submission is that, if the
15 parties put this much effort in and take this much risk,
16 it is just evident that it is beneficial.
17 Once again, Professor Neven's line of argument here
18 has been rejected in these other courts and I will show
19 you just briefly, if I may, what has been said. Could
20 we go to authorities 12 -- actually this is the German
21 judgment which we now have loose and this time it is
22 paragraph 164:
23 "... essential circumstantial evidence that
24 a monitoring of cartel discipline was actually possible
25 despite the discount options is provided by the duration

1 of the cartel. It can scarcely be assumed that those
2 involved in the cartel would have assumed the
3 organisational costs associated with the cartel and the
4 criminal risk resulting from [it] over a period of
5 around fourteen years if they had not been guaranteed
6 that the gross prices of the other cartel members, as
7 discussed and in part also agreed, would increase and
8 that these increases would not be systemically countered
9 by increased discounts ... the expert opinions of the
10 Defendant and its intervening parties with their
11 statements based on an unproven assumption of
12 a countering of the cartel through discounts lack any
13 explanation ..."
14 That is not really our point.
15 "In light of this the argument that from an economic
16 perspective every implicit or explicit agreement is by
17 its nature unstable because every company had an
18 incentive to deviate ... in order to maximise its own
19 profits ... merely provides confirmation that the
20 lengthy duration of a cartel considerably increases the
21 evidentiary effect. If the cartel despite the
22 fundamental instability is continued over so long
23 a period -- here around fourteen years -- this shows
24 that in the view of the companies concerned it has
25 functioned so well that no company had the incentive to

1 deviate ... and thus weighted the risk of the other
2 cartel members noticing any breach and due to the
3 violation ..."
4 So, again, it has been rejected in Germany; it has
5 been rejected in the Dutch proceedings, the same focal
6 point issue; and then in *Scania*, there is
7 again a fairly similar -- I do not say it is
8 identical -- point that was considered by the
9 European Court.
10 If we turn to that, please, in authorities
11 bundle 14, we can see it at 382. Here of course the
12 argument was over whether the infringement was made out
13 so it is not the same point, I fully accept that.
14 Page 64, {AU/14/64}:
15 "The applicants thus conclude that, because of the
16 complexity of trucks and the large number of factors
17 influencing the final price ... which becomes an
18 individual price, the gross prices and ... price lists
19 exchanged ... have no informative value in respect of
20 parameters of competition ... and ... the Commission
21 did not sufficiently take that ... into account ...
22 "The applicants also submit that *Scania* uses
23 a price-setting mechanism which is complex and in which
24 pricing decisions are taken at several trade levels
25 which are independent of each other, and on the basis of

1 arm's length negotiations ...", et cetera, et cetera.
2 Then towards the end of that paragraph:
3 "In support of their arguments, the applicants rely
4 on the economic report ... which demonstrates ... the
5 significant difference between distributor-to-dealer
6 gross prices and the corresponding transaction prices,
7 and the absence of a common trend in [those] price lists
8 ..."
9 Then we see on the next page, "The Commission ..."
10 at 388:
11 "The Commission also states that the fact that it
12 was not possible to calculate exactly the final prices
13 of the trucks sold to customers on the basis of the
14 exchange of information is irrelevant. According to the
15 Commission, the exchange of information revealing the
16 trend ... enabled competitors to understand the date and
17 how prices would evolve in Europe. Furthermore,
18 according to the Commission, the exchange of detailed
19 gross price lists enabled manufacturers to deduce
20 approximate current and/or future net prices through
21 a combination of different types of information which
22 they obtained ..."
23 That is our Recital 27.
24 THE CHAIRMAN: I suppose it is possible that different
25 members of the cartel would expect or would use the

1 information in different ways.
2 MR WARD: Entirely possible. Entirely possible.
3 THE CHAIRMAN: But they all must conceive it to be in their
4 best interests to remain in the cartel.
5 MR WARD: They must.
6 THE CHAIRMAN: Even though there is a risk that members of
7 the cartel are cheating on the others.
8 MR WARD: Of course. One of the reasons I took you through
9 the decision at what I hope was not tedious length was
10 to just show how massive and all encompassing this was,
11 just in terms of work product, effort, never mind legal
12 risk. It is not to be undertaken lightly. The scale of
13 the penalties imposed at the end shows what the real
14 scale of the risks were.
15 In any event, the court responds to this at
16 paragraph 390 where it says -- essentially it rejects
17 the argument but it does not have anything very
18 interesting to say. This is all on the question of
19 whether this was even an object infringement, but the
20 flavour of it is, in our submission, very similar.
21 Now, it is almost 1 o'clock but I will try in two
22 minutes to deal with my last two points here, if I may.
23 As you said earlier, sir, Professor Neven does have
24 another limb which he says is an empirical test of
25 whether changes in list prices translated into

1 predictable transaction prices. What he does is he
2 compares DAF's list prices with DAF's average
3 transaction prices. We do have a whole series of
4 concerns about this modelling which I will explore with
5 Professor Neven, but there is an obvious high-level
6 point here, which is we are not actually concerned at
7 all with whether DAF's own transaction prices tracked
8 its list prices. What we are concerned with is whether
9 its transaction prices were influenced by the cartel and
10 that is a much, much wider question about what DAF
11 learned through the cartel and what the cartellised
12 market meant in terms of the prices its competitors were
13 offering.
14 Then, finally, before lunch, sadly, as opposed to
15 finally, I will just mention Professor Harrington. He
16 is a distinguished academic who has written about the
17 cartel in the trucks case and as a result he actually
18 gave evidence in the Dutch proceedings. His evidence
19 was found to be convincing and his report is also
20 referred to in the German proceedings, although I am not
21 sure if he was personally a witness or whether it was
22 merely his published papers. But in this case he is not
23 an expert, but both of the experts do discuss a model
24 that he produced and, just for your note, it is at
25 {I4/289}, in a published paper.

1 It does involve a little bit of maths and I am not
2 going to attempt to really summarise it, but the
3 critical point is that he has produced a model to show
4 how list price information sharing can actually cause
5 transaction prices to be higher even if they are
6 negotiated separately by sales teams who know nothing
7 about the infringement.
8 The central insight is that where managers at the
9 manager level share list prices, they have an incentive
10 to increase those list prices and, if they then exercise
11 partial control over transaction prices, that creates
12 the conditions for prices to rise. That is a stylised
13 economic model and the first few pages are in words and
14 the rest of it is in symbols, but it was held to be
15 convincing, his evidence was convincing in the Dutch
16 proceedings and convincing in the German proceedings.
17 The debate here is whether it is even applicable to
18 DAF's model of organisation. We say it is.
19 Professor Neven says it is not. We will talk about that
20 later, next week, but our short point is it is just
21 another element in our plausibility case. I have shown
22 you a whole series of elements this morning, they are
23 all pointing the same way. I was hoping this morning to
24 talk about the law of causation but I am obviously out
25 of time. I have to confess, I am running slightly

1 behind time. I will obviously think about that over
2 lunch and hope not to have to trade on your indulgence
3 later in the afternoon.
4 THE CHAIRMAN: Well, we have of course read your skeleton
5 very carefully.
6 MR WARD: That is a comfort.
7 THE CHAIRMAN: So we will hope that you can actually
8 complete by close of play.
9 MR WARD: I am going to do my best. I am going to spend the
10 next hour thinking about how to achieve that.
11 THE CHAIRMAN: Thank you very much. 2 o'clock.
12 (1.01 pm)
13 (The short adjournment)
14 (2.00 pm)
15 THE CHAIRMAN: Yes, Mr Ward.
16 MR WARD: We have been talking about theory of harm and
17 plausibility and I am going to now talk about where that
18 fits into the issue of causation. This is another area
19 where DAF has made some quite extreme submissions that
20 do not acknowledge either the true nature of this cartel
21 or the process that has been adopted in these particular
22 proceedings.
23 The approach essentially seeks to defeat the
24 possibility of even bringing claims such as these and we
25 can see why that is attractive, given the number of

1 claims they face, but it is entirely wrong-headed.
2 I want to explain what it is we have to prove and then
3 how we have chosen to do so.
4 I would like to start with the case of
5 *BritNed* which is in the authorities
6 bundle under tab 7.1, I think -- yes, 7.1, please
7 {AU/7.1/1}. This is a case which was a follow-on claim
8 that went all the way through to judgment. I am afraid,
9 gentlemen, it is extremely long and we are just going to
10 pick a little bit out of it. That was a cartel in
11 respect of power cables and it was essentially a market
12 partitioning kind of cartel; in other words certain
13 customers were reserved for certain participants. The
14 claim was concerned with a single transaction for
15 a single power cable so it is about as far from this as
16 one could imagine, but there are general observations of
17 Mr Justice Marcus Smith which are of value in this case.
18 If we can please turn to page 11 of the judgment,
19 {AU/7.1/11}, he talks at paragraph 10 about the approach
20 to the tort of breach of statutory duty:
21 "In English law, competition law infringements are
22 vindicated as statutory torts. To establish a claim,
23 two things must be shown: (i) an infringement [which we
24 have of course] ... and (ii) actionable harm or damage,
25 caused by that infringement. As has been stated in the

1 [law] of negligence -- but the point holds good for
2 breach of statutory duty -- 'it is a truism that
3 a fundamental requirement for a claim in negligence is
4 that the plaintiff has suffered some past "damage".
5 A breach of duty by the defendant is not enough. The
6 cause of action will not accrue until actionable damage
7 occurs. The damage is said to form the gist of the
8 action. Recovery is not limited to this threshold,
9 'gist damage', but without it there is no cause of
10 action'."
11 Then we see of course that, as I am sure is common
12 ground, once you have established the cause of action,
13 the question of quantification is broad axe. That,
14 I think, is hopefully uncontroversial. We can see that
15 where Mr Justice Marcus Smith notes that at
16 paragraph 12.8, but I see you nodding, sir. I will not
17 take up time.
18 Then if we move on a long way in the judgment,
19 please, to page 144, {AU/7.1/144}, we can see how it was
20 applied in that particular case. I fully accept it is
21 very important to appreciate this is a very different
22 kind of cartel where there was one purchase and explicit
23 evidence about what the negotiations were. We are not
24 in that situation here. We have a lot of purchases over
25 25 years and, as a consequence, neither party has been

1 able to put forward detailed information about exactly
2 who said what to whom on what occasion.
3 But let us look at what Mr Justice Marcus Smith
4 said, and we can pick it up at paragraph 422:
5 "The first question that I must consider is what
6 constitutes the 'gist' or actionable damage to complete
7 the cause of action of breach of statutory duty. Such
8 'gist' ... must be shown to exist on the balance of
9 probabilities."
10 He notes it is the first claim for damages out of
11 a restriction of competition law that has gone to
12 judgment. At 424:
13 "Although it is possible that, in order to make good
14 the cause of action and show actionable damage,
15 a claimant must have to show that he, she or it has
16 sustained some monetary harm ... it seems to me most
17 unlikely that that should be the case for this cause of
18 action. In other torts, it may not be necessary to show
19 damage ..."
20 Then we need not go to the quote because he talks
21 about how it applies in these kind of competition cases
22 at 425 and onwards, please, down a little bit more,
23 {AU/7.1/145}.
24 "The point is that it is necessary to be exceedingly
25 careful in framing or defining what constitutes

1 actionable harm."
2 Then there is a little quotation. Then 426, he
3 quotes Article 101 and at the end of that paragraph
4 says:
5 "The provision is aimed at preserving or protecting
6 competition and maintaining the consumer benefit of
7 having a competitive market."
8 Those are very important words.
9 "When seeking to articulate what constitutes
10 actionable harm, it is necessary to have regard to the
11 object and scope of the statutory duty imposed. In this
12 case, the object and scope of the provision is the
13 preservation and protection of competition from
14 collusive efforts to undermine it. This purpose must
15 inform the 'gist' or actual damage that a claimant must
16 show ... More specifically:
17 "Cartel cases do not, by definition, involve
18 a single actor. Cartel cases involve two or more
19 actors, by agreement or concerted practice, acting with
20 the object or effect of preventing, restricting or
21 distorting competition. It is not possible, in cartel
22 cases, to identify the act of a single person that can
23 be tested as being the cause of a claimant's harm. It
24 is the collective failure to compete that is the wrong
25 at which Article 101 TFEU is aimed."

1 Then subparagraph (3), {AU/7.1/146}:
2 "What the collusive misconduct of cartelists does is
3 prevent, restrict or distort competition. To require
4 a claimant to show monetary harm in order to found
5 a cause of action is to ignore the purpose of
6 Article 101 TFEU and to impose too great a burden on the
7 claimant. Rather, what the claimant must show, as the
8 'gist' damage, is that the unlawful conduct of the
9 defendant has, on the balance of probabilities, in some
10 way restricted or reduced the level of the claimant's
11 consumer benefit. In other words, that the claimant has
12 suffered as a result of the prevention, restriction or
13 distortion of competition created by the cartel. Such
14 a restriction or reduction of consumer benefit might
15 take the form of an increased price ... but equally it
16 might take the form of a reduction in the number of
17 suppliers properly participating in a tender process.
18 I regard consumer benefit as a broad concept, and there
19 will be many ways in which conduct infringing
20 Article 101 TFEU will adversely affect it.
21 "This cartel had its origins in a desire to
22 substitute for competition a form of allocation among
23 the cartelists, determined by the cartelists. In order
24 to maintain a semblance of competition, rival bids might
25 be put in, but these would be unattractive in terms ...

1 In this way, the customer's hand could be forced and
2 a particular tenderer foisted upon it. This is exactly
3 what happened here."
4 Then after the bullets:
5 "But for the Cartel, *BritNed* would (as I find on the
6 balance of probabilities) have been presented with
7 a different commercial environment with different
8 tenderers ...
9 "Those facts are sufficient for me to hold that the
10 cause of action is made out. Of course, this says
11 nothing about the quantum of *BritNed's* loss."
12 Now, DAF says in its skeleton that it is for the
13 claimants to prove the infringement caused the increase
14 in price on the balance of probabilities and affected
15 specifically the prices they paid -- and that is page 4,
16 paragraph 8 of their skeleton -- but that is obviously
17 wrong on the basis of *BritNed*. We have to
18 prove some harm to perfect the tort and, after that, it
19 is a matter of assessment on the broad axe basis.
20 To be clear, I re-emphasise, we are not in the same
21 situation as *BritNed*. We do not have
22 a single transaction that we can analyse in intense
23 detail rather like the court did in *BritNed*
24 because there are too many transactions, they are too
25 long ago. The tribunal cannot reconstruct them and work

1 out exactly how the cartel impacted.
2 THE CHAIRMAN: I also get the impression that they actually
3 knew how the cartel worked in this case because -- was
4 it preventing other people, other participants, from
5 tendering for that particular contract?
6 MR WARD: Yes, exactly. We just have not -- we have nothing
7 like that in this case and I want to be absolutely clear
8 that we accept that.
9 But that does show, very importantly, that -- if
10 I can put it this way, the bar is not very high in
11 a competition case where there is distortion of
12 competition. That is really the point I am trying to
13 get from this. We are going to see in a moment
14 Mr Justice Roth addressed exactly this question in this
15 case in an interim judgment I am going to come to in
16 a minute.
17 What I do say by way of a kind of preview of what we
18 are saying is that we satisfy the gist in a number of
19 ways. We certainly do say that we show monetary harm,
20 for the avoidance of doubt. We do. But what we also
21 say is that there is here -- the claimants were denied
22 the opportunity to buy their trucks in a process in
23 which DAF and others would compete independently. That
24 is the very essence of the distortion of competition
25 which arises here. We rely on the information we do

1 have about the circumstances in which the claimants
2 brought their trucks, viz a cartelised market. We rely
3 on the way the cartel operated as explained in the
4 decision; in other words, that it enabled the
5 participants to see the price -- to work out the prices
6 of others. We rely on DAF's own pricing which we are
7 going to look at in cross-examination and look at the
8 links between list prices and transaction prices. We
9 rely on DAF's silence that I talked about this morning
10 about what it was doing and why. We rely on the fact
11 I have also pointed to this morning, that DAF itself
12 accepts its pricing was influenced by what others were
13 doing. Then of course we rely on the econometrics,
14 which I am going to come to again in a few minutes'
15 time.
16 So we do say that we demonstrate the gist in a whole
17 range of ways, individually and cumulatively, but it is
18 simply not the case that we need to demonstrate as
19 a strict matter of law financial harm as a matter of
20 establishing the gist.
21 THE CHAIRMAN: You say you only have to sort of get over the
22 line by proving the gist of damage and then the cause of
23 action is established?
24 MR WARD: Then it is just quantification, broad axe.
25 THE CHAIRMAN: But quantification has to be linked to the

1 damage that has been caused.
2 MR WARD: Of course. Oh, yes. You cannot prove gist apples
3 and quantum oranges, obviously not. Obviously not. But
4 it is all linked because it is all through the lens of
5 how this cartel actually operated, against which my
6 clients had to buy prices. The point I am making,
7 though, is it is just wrong to say it has to be gist in
8 the form of financial harm. That is really it. In
9 a case of this kind, we are talking about a much more
10 amorphous distortion of competition that is market-wide,
11 and that is a key factor in establishing whether the
12 gist is established.
13 Now, I want to show you the judgment of the tribunal
14 that shows what the tribunal thought was the right
15 approach in this case. This is in authorities
16 bundle tab 9, {AU/9/1}. It is a ruling of
17 Mr Justice Roth sitting with Mr Malek QC, and you will
18 see from the heading it is *Ryder*, *Wolseley and*
19 *Dawsongroup*, so these are other claimants in the trucks
20 cases. In fact it is largely the same legal team acting
21 for Dawsongroup as it is for BT and Royal Mail today.
22 What the tribunal did was give indications as to the
23 approach it should take to causation and quantum in the
24 trucks litigation more widely. If I could ask you,
25 please, to turn to page 3 of the judgment, {AU/9/3}, you

1 will see -- it was in the context of essentially
2 controlling the amount of disclosure that was being
3 sought. At the bottom of the page, paragraph 3:
4 "In the course of the Disclosure Hearing, the
5 Tribunal gave guidance to the parties as to the general
6 approach it intends to take to disclosure in these
7 actions. The purpose of this Ruling is to summarise,
8 and to expand on, certain broad principles in relation
9 to disclosure set out by the Tribunal. Although the
10 Disclosure Hearing concerned only three actions, it may
11 be expected that the Tribunal will seek to adopt
12 a broadly similar approach to all damages claims arising
13 from the Infringement that come before it."
14 In fact, as a result of this judgment, orders were
15 made in these very cases. You will see -- if you skim
16 down, you can see Royal Mail and BT's claims are
17 specifically mentioned here.
18 If we turn on to page 19, {AU/9/19}, the tribunal
19 starts to explain its approach under "Overarching
20 approach ...":
21 "At the outset of the Disclosure Hearing, we
22 emphasised that there is no single right answer in these
23 damages claims. No one can ever know what prices, both
24 for new trucks and resale of used trucks, would have
25 been charged in the absence of the Infringement since

1 that is a hypothetical world that never was. Further,
2 the President made clear during the Hearing that in
3 a case of this nature, it is necessary to consider early
4 on what ... methods will be used to determine the issues
5 of causation and quantum so that disclosure can be
6 tailored accordingly.
7 "In light of that, we set out the following broad
8 principles ...
9 "(1) the initial burden of proof is on the Claimants
10 to satisfy the Tribunal on the balance of probabilities
11 that the Infringement had an effect on prices."
12 With the greatest of respect to Mr Justice Roth,
13 that was not argued on that occasion and in fact we have
14 seen from *BritNed* there is a broader
15 approach. {AU/9/20}:
16 "(2) If that hurdle is passed, the Tribunal will
17 seek to arrive at a reasonable estimate of what the
18 effect might have been ..."
19 That is broad axe.
20 "(3) A reasonable estimate ... means an estimate
21 that is arrived at in a proportionate manner. We
22 recognise ... that these are very large ... claims.
23 However, any estimate will still be reached through
24 averages, extrapolations and aggregates. It does not
25 mean that every logical avenue that might be relevant

1 can be explored, or that all data which is arguably
2 relevant must be provided."
3 Then under the quote:
4 "The decision as to what disclosure to order is
5 appropriate is informed by the views of the economic
6 experts but it is not determined by what data they would
7 like ...
8 "(4) In reaching that decision, the Tribunal has
9 regard to the principles of effectiveness [we talked
10 about this morning], that cases should not
11 be unreasonably difficult to bring, and of
12 proportionality ...
13 "It is not therefore simply a question of relevance,
14 as some of the skeleton ... seemed to suggest."
15 Then paragraph (6) is of particular importance,
16 {AU/9/21}:
17 "These actions seek damages for loss on many
18 hundreds of transactions, involving a very large number
19 of vehicles, carried out over an extensive period, and
20 in some of the cases by a very large number of
21 claimants. Further, the Infringement involved contacts
22 and communications between the parties over a 14 year
23 period, with different involvement on the particular
24 occasions. The approach to proof of causation and
25 quantification [very importantly], both as regards any

1 overcharge and ... pass-on, will therefore be very
2 different from that which can apply where the claim is
3 for loss on one or two very large transactions concluded
4 following extensive negotiation: cp. *BritNed*
5 ... It is unlikely to be realistic in these cases for
6 the issues to be approached by examining each price
7 charged for each transaction subject to the claim and
8 seeking to ascertain how any antecedent exchange of
9 information or coordination between the OEMs may have
10 influenced that price (whether directly or by reference
11 to a gross price). Similarly, as regards pass-on ..."
12 Pausing there, that is exactly what DAF is saying we
13 need to do in this case. 41:
14 "We would wish to hear submissions on this at the
15 next CMC but our present view is that we doubt that the
16 issues can be approached from the 'bottom up' on the
17 traditional ... basis of witness statements from the
18 various key employees regarding the numerous
19 contemporary emails, notes of meetings and telephone
20 conversations, and so forth, on which they would then be
21 cross-examined ... Instead, it seems to us that the
22 issues will probably have to be approached by the
23 analysis of large amounts of pricing and market data,
24 using established economic techniques to determine what,
25 if any, was the effect of the infringement on prices and

1 any pass-on through the relevant period. That is not to
2 say that evidence of witnesses of fact would be
3 irrelevant but we anticipate it will be of a more
4 general nature ... explaining how the OEMs priced their
5 trucks and the nature of the relationship between gross
6 and net prices, the significance of configurators, and
7 so forth. The same approach would apply to the prices
8 charged by the claimants in the context of pass-on.
9 This has significant implications for the nature of the
10 disclosure to be ordered."
11 Then it talks about -- if we pick up halfway through
12 paragraph 42, {AU/9/22}:
13 "We would hope that the experienced experts can
14 therefore agree on the methodology which is appropriate,
15 ... If very different methods were to be used, requiring
16 vast amounts of different data, only for one or other
17 ... to be challenged at trial as unsound or unreliable
18 with an invitation to the Tribunal to reject it
19 entirely, that would be conducive to a massive and
20 hugely expensive waste of effort ...
21 "We of course appreciate that there are several
22 different actions and that the same issues of overcharge
23 and pass-on need not necessarily be approached the same
24 way in all of them. However, the Tribunal made clear at
25 the outset the importance of ensuring consistency as

1 between the various claims arising out of the
2 Infringement. Our present view is that there would have
3 to be very strong reasons to justify the Tribunal
4 accepting different methods of analysis of the same
5 issues ..."
6 Then what happens is that all of the claimants and
7 defendants were asked to order statements of their
8 methodology, and that was true in this case as well.
9 So what we see here then -- and both parties gave an
10 indication that they would not be taking a bottom up
11 analysis but in fact econometrics and, at the next CMC,
12 the tribunal approved the proposed experts.
13 So what we see here, then, is what we call
14 a "top-down approach", as the CAT describes it, and
15 DAF's complaints about causation need to be seen in this
16 light. It was never in contemplation that the parties
17 would approach this by linking specific elements of
18 collusion to the particular prices charged.
19 I would like just to show you what DAF says in its
20 skeleton argument about this. If we go to {S/3/4}, it
21 says at paragraph 12, talking about what the file shows,
22 the last three lines:
23 "[The file] does not show a causal impact on DAF
24 prices in the UK or, in particular, transaction prices
25 paid by these Claimants. The Claimants' skeleton is

1 striking in its lack of consideration of that evidence."
2 Similarly by way of example, at page [49] at
3 paragraph 147, they say -- this is talking about
4 discussions of net prices, the last sentence there,
5 {S/3/49}:
6 "There is no evidence that the participants ever
7 discussed the ..."
8 Sorry, the penultimate sentence:
9 "Moreover, they fail to show that these occasional
10 exchanges affected their own transaction prices. There
11 is no evidence that the participants ever discussed the
12 Claimants' transaction prices ..."
13 So what DAF is doing here is saying, "Well, you have
14 got to show this linkage between the specific acts of
15 collusion and your specific prices", and with the
16 greatest of respect, that simply ignores the nature of
17 the process that was adopted here by the tribunal in
18 this case in an effort to resolve these very complicated
19 cases.
20 Now, in our case we have fewer transactions than in
21 some of the others the CAT was considering, but it still
22 goes back 25 years and it is still true that it is
23 a very lengthy and complex course of dealing and a very
24 amorphous and multifaceted cartel, so all of the reasons
25 why the tribunal thought it was appropriate to go top

1 down are obviously correct. This is, in our submission,
2 just another attempt by DAF to erect an impossibly high
3 bar for these cases in order to say that we cannot meet
4 them.
5 So what is the role of econometrics? It is
6 obviously right, we accept, that, as *BritNed*
7 says, on its own econometrics allows causation to be
8 a matter of inference rather than proof. It does not
9 prove causation on its own. But the tribunal obviously
10 envisaged that an economic expert analysis could be
11 sufficient. But the role of the theory of harm is to
12 support the econometric analysis and to interpret it.
13 I actually think that much is probably common ground
14 between the experts. But I would like to show you how
15 Mr Harvey puts it in his first overcharge report, which
16 is {E/1/14}, where he talks about "The role of the
17 Theory of Harm". He says:
18 "I am tasked with determining what extent, if any,
19 do I find that each of Royal Mail and BT were
20 overcharged ... This is an empirical question that
21 I answer in the remainder of my report through the use
22 of regression ... Before doing so, I first summarise the
23 nature of the Infringement to the extent that I consider
24 it relevant ... I then set out why I [think] it likely
25 that the Infringement would have given rise to an

1 increase in prices, the 'Theory of Harm' ...
2 "The Theory of Harm ... serves two purposes ...
3 "(a) It confirms that there is a credible economic
4 rationale for the Infringement having led to restriction
5 in price competition and the potential for higher prices
6 being charged to Truck purchasers as a result, as set
7 out below. It therefore helps to confirm that any
8 overcharge that I identify in my regression analysis is
9 attributable to the Infringement, and not some other
10 unidentified factor.
11 "It helps me to consider how my regression model
12 should properly reflect the operation of the
13 Infringement. For example, the Infringement involved,
14 among other things, agreements in respect of and the
15 exchange of information on list prices and collusion in
16 respect of the timing and passing on of costs for ...
17 emissions technologies. The Theory of Harm helps me to
18 consider whether my regression analysis needs to take
19 different approaches to assessing the overcharge
20 associated with these different aspects ..."
21 Then he says, {E/1/15}:
22 "When considering the Theory of Harm, I do not need
23 to reach a conclusion that the Infringement would
24 inevitably have weakened competition ... and/or
25 inevitably led to an increase in prices ... This is

1 because the existence or otherwise of such an
2 overcharge, and the quantification of any ...
3 overcharge, is an empirical question that the
4 econometric analysis will answer. My econometric
5 analysis does not require any initial assumption ... of
6 an overcharge. If, as DAF argue, the infringement did
7 not cause an increase in ... [prices] ... then my
8 econometric analysis would identify this. Conversely,
9 if the infringement did cause an increase ..., then my
10 regression analysis would reveal this, and estimate the
11 amount ..."
12 Well, in our respectful submission, that is the
13 nature of the relationship between the econometrics and
14 the theory of harm, but DAF actually criticises
15 Mr Harvey for failing to conclude in his theory of harm
16 that the infringement caused prices to rise on the
17 balance of probabilities. Well, with the greatest of
18 respect, that is not the question for Mr Harvey, that is
19 the question for this tribunal. We put forward the
20 theory of harm in order to help interpret the regression
21 analysis, but, as I have been explaining, particularly
22 this morning, our case on causation is not just based on
23 the theory of harm. It is one component. It does not
24 have to discharge the burden of proof on its own.
25 Sir, these points also provide the answer to a point

1 that DAF makes about negotiation. It says in its
2 skeleton at paragraph 150 that BT and Royal Mail were
3 able to derive -- get low prices in negotiation. They
4 say this undermines the assertion that these claimants
5 suffered harm as a result of the infringement.
6 We make two points about this: firstly, BT and
7 Royal Mail may well have got lower prices than other
8 customers -- well, that is not surprising given their
9 importance -- but it tells us nothing about the price
10 they would have obtained in the counterfactual without
11 the infringement because, however hard they thought they
12 were negotiating, they were actually tendering in
13 a rigged market. Of course, it is right that other bids
14 were brought to bear, but they were also given in
15 a cartelised market.
16 The second point is, again, the top-down analysis
17 point. Both parties have conducted a market-wide
18 overcharge analysis. They have calculated an overcharge
19 percentage by reference to the entirety of DAF's sales
20 in the UK. In fact, just for your note, the joint
21 experts' statement at {E7/78/7} actually contains a
22 first question on which they both agree on the
23 superiority of market-wide overcharge data.
24 So we approach this from a top-down and
25 a market-wide basis and it is conspicuous that

1 Professor Neven does not say any adjustment is needed to
2 these figures because of BT or Royal Mail's bargaining
3 power. The econometric analysis works by applying
4 a percentage overcharge to the prices they actually do
5 pay.
6 THE CHAIRMAN: You are saying that the experts are agreed
7 on --
8 MR WARD: They approach the overcharge on the basis of
9 a market-wide figure. There is no suggestion by
10 Professor Neven that you need to adjust it to allow for
11 buyer power. It may well be that BT and Royal Mail pay
12 prices down here rather than up here -- a single
13 customer might be up here, BT and Royal Mail might be
14 down here -- but what matters is even so they were
15 paying more because of the overcharge and
16 Professor Neven is not saying that, well, that
17 generalised overcharge figure would not apply. That is
18 the top-down analysis. This point is another attempt to
19 say, "Well, we should go bottom up", and look how hard
20 BT and Royal Mail negotiated.
21 THE CHAIRMAN: But Professor Neven does not say that --
22 MR WARD: No, he does not. That is Mr Beard. That is the
23 difference. The economist does not say it.
24 THE CHAIRMAN: So if you are approaching it from a top down,
25 you say they are basically agreed on the approach?

1 MR WARD: Well, I do say that. That is exactly what I am
2 saying.
3 With that, sir, I need to go -- and I am really
4 trying to be fast --
5 THE CHAIRMAN: I will try not to interrupt you anymore.
6 MR WARD: No, I appreciate the interruption. Any
7 opportunity to clarify is really welcome. But I want to
8 go now as quickly as I can through the expert issues.
9 I spent a lot of time on this this morning because you
10 are going to be hearing from the experts at great
11 length, without my intervention, no doubt all the better
12 for that. So I wanted to set the scene very carefully
13 before we do. I will go through these as quickly as
14 I am able to now. There is value of commerce, there is
15 overcharge, there is complements, there is pass-on,
16 there is loss of volume and then there is the grand
17 finale in the form of Mr Lask on tax and finance, so the
18 race is on.
19 THE CHAIRMAN: I hope you will leave him sufficient time to
20 deal with that.
21 MR WARD: I very much intend to.
22 Now, value of commerce, what is the value of the
23 trucks that are actually subject to the claim because
24 that is the number you then multiply by the overcharge
25 to give the value of the claim. Now, there has been

1 a very long saga about this because it was immediately
2 obvious it was contested in this litigation. So in 2018
3 the tribunal ordered the parties to settle the so-called
4 effective price schedules which would work out what the
5 price was because there was a great deal of argument
6 about whether or not various invoice elements ought to
7 be included. It was eventually settled. But very late
8 in the day, August 2021, DAF wrote to say that they
9 thought truck bodies and tail-lifts should be excluded
10 from the value of commerce. It now argues, as you have
11 seen, that the overcharge only applies to what it calls
12 the "naked truck". The "naked truck" is a truck chassis
13 without a body.
14 Now, it is common ground, it is accepted by us, that
15 DAF itself manufactures trucks with bodies at its
16 Leyland plant and it also supplies trucks with bodies
17 made by third parties as part of a truck bundle to
18 Royal Mail; in other words, it uses a subcontractor to
19 provide the body and then it supplies the completed
20 truck to Royal Mail. For your note, that is
21 Mr Ashworth's evidence at {D/IC22/55}, paragraphs 217
22 and 218. So there is no dispute at all that the thing
23 it supplied sometimes, but not always, included a body.
24 But there is a short interpretative point on the
25 decision here, which is: does the decision, when it

1 refers to "trucks", mean trucks or does it mean truck
2 chassis, which is what DAF says.
3 Now, I am going to try and show you why we think
4 they are completely wrong about this as quickly as
5 I can, but it does matter a good deal. It matters as to
6 value of commerce and it matters to complements.
7 THE CHAIRMAN: Who does Royal Mail pay? They pay DAF for
8 the whole thing?
9 MR WARD: They pay DAF. They say, "Can we have a truck
10 please, with, say, a flat-sided body?", and DAF say,
11 "Here it is, it is 40,000 euros and it is all yours".
12 THE CHAIRMAN: Even if they have subcontracted or they got
13 the body in from somewhere else, they --
14 MR WARD: They just subcontract. We were baffled by this
15 when it arose. It has caused a great deal of heat and
16 not much light. I am going to try to cut through it as
17 quickly as I can.
18 The starting point is, to repeat the refrain from
19 this morning, this was a settlement decision. It is
20 inconceivable that they would have agreed to a form of
21 words which said "trucks" if they meant chassis because
22 this issue was bound to come up in damages claims, just
23 as it has today, and if they are right, it takes quite
24 a big bite out of Royal Mail's claim.
25 THE CHAIRMAN: I was going to ask, what the sort of

1 proportion of price that is spent on bodies rather
2 than --
3 MR WARD: It is quite a bit. By the way, this is
4 a Royal Mail only issue because BT did not buy trucks
5 with bodies from DAF.
6 THE CHAIRMAN: So therefore their value of commerce does
7 exclude --
8 MR WARD: It is agreed.
9 THE CHAIRMAN: -- the bodies, yes.
10 MR WARD: Someone will tell me in a moment.
11 It is a really, really short answer to that extent,
12 but I am going to go further because this matters and
13 there is quite a bit of money riding on it. I am about
14 to get the answer, I think.
15 It takes about £4 million out of the claim so it is
16 well worth ten minutes of my time; I hope yours too,
17 sir.
18 So we will go to the decision as well, if I may, and
19 just make the point that the decision says nothing at
20 all about exclusion of bodies, even though it does
21 exclude other things. If you could pick it up at
22 authorities 3.9 at page 6, {AU/3.9/6}, Recital 5.
23 "The products concerned by the infringement are
24 trucks weighing between 6 and 16 tonnes ... and trucks
25 weighing more than 16 tonnes ... both as rigid trucks as

1 well as tractor ... The case does not concern
2 aftersales, other services and warranties ..., the sale
3 of used trucks or any other goods or services sold by
4 the addressees ..."
5 You will have seen footnote 5, and that is excluding
6 trucks for military use.
7 THE CHAIRMAN: Presumably they only weigh more than
8 16 tonnes if they have a body on them?
9 MR WARD: That I do not know for sure because there are some
10 very large trucks out there.
11 MR BEARD: It is not the weight of the truck; it is the load
12 they can carry.
13 THE CHAIRMAN: Yes, of course it is. Thank you. Good to
14 get that clarified early on.
15 MR WARD: My short point -- it may be just too simple for
16 DAF but it really is, if bodies were excluded, it would
17 say so. It does not say so. They are not excluded.
18 But there is law and I am afraid I have to do more
19 given that it is £4 million, which is to say you would
20 have seen this morning that the decision repeatedly
21 talks about collusion in respect of factory-fitted
22 options and it is simply DAF's evidence that bodies were
23 fitted by it in its factory. So, again, it is rather
24 simple stuff but we do submit it is very telling.
25 I am going to just show you two documents from the

1 file which, again, make reference to bodies. One is
2 a document you saw this morning which -- sorry,
3 I thought I had the reference for it. If you just give
4 me a moment, sir, I thought I had the reference here.
5 It is {I2/39.2}. This was the price list, 47 pages of
6 it, produced by MAN and held by Iveco. We can see on
7 the very first page "Category", "Body", and then all
8 sorts of admittedly quite hard to interpret technical
9 details, and body prices carry on for three pages --
10 three and a half pages, if you just scroll a little bit.
11 Then if we go to another document, which is
12 {I6/131.1}, this is a DAF price list which the index to
13 the file says was held by Renault. This is much less
14 detailed, but what you can see, just looking down, is
15 that types of bodies are described, box body, curtain
16 sider, sweeper, tipper, box body, curtain sider and so
17 forth.
18 What we see -- I put my hands up, we do not know
19 exactly what the decision means by "options" because it
20 is not very clear whether it means some options but not
21 others, but these are just examples where you can see
22 there has been an exchange of information that did
23 indeed involve bodies.
24 A very similar argument to DAF's has been considered
25 in the European Court. I want to show you the judgment.

1 It is authorities 12.6 and this is actually the
2 Advocate General's opinion in a case called
3 *Landkreis Northeim*. The Advocate General,
4 as you probably know, gives an opinion to the
5 European Court. It is not binding upon the court, it
6 may take its own view, but he is a judge.
7 In this case you can see from paragraph 2 that the
8 issue was "whether the Decision should be interpreted as
9 meaning that specialised vehicles, in particular refuse
10 collection trucks, fall within the meaning of 'products
11 concerned by the infringement' for the purpose of that
12 decision".
13 Refuse trucks were obviously trucks with specialist
14 equipment on them.
15 If we move on to page 5, {AU/12.6/5}, paragraph 45,
16 it says:
17 "It is settled case law that 'in interpreting
18 a provision of EU law, it is necessary to consider not
19 only its wording but also the context in which it occurs
20 and the objects of the rules of which it is part'.
21 "However, the Court cannot interpret that provision
22 against its clear and precise wording."
23 Then over the page, {AU/12.6/6}, essentially it says
24 at 53:
25 "As far as specialised vehicles are concerned, given

1 that the Decision excludes from its scope only trucks
2 for military use, it must be regarded as covering all
3 trucks ..."
4 54:
5 "If the Commission had wished to exempt other types
6 of trucks, such as refuse collection trucks ... it would
7 have mentioned them explicitly."
8 59, the exclusions "must be interpreted strictly".
9 63:
10 "There is nothing in the documents before the Court
11 and ... in the Decision, which suggests that, unlike
12 other trucks, refuse collection trucks were not
13 concerned by the cartel".
14 66, it points out that all factory-fitted options
15 were included.
16 67, {AU/12.6/7}:
17 "It follows from the documents ... that the gross
18 price lists and the configurators ... are also used on
19 specialised vehicles ..."
20 68:
21 "As a consequence, optional extras and configuration
22 options were ... part of the cartel ..."
23 69, at the bottom of the page:
24 " ... it is apparent from [the] recitals ... that
25 the infringement [decision] concerned all special

1 and standard equipment ... and all factory-fitted
2 options.... "
3 That is the gist of the reasoning. I am sorry to go
4 very quickly.
5 Here, DAF is not trying to exclude the entire truck
6 but we would submit the logic of the position is the
7 same.
8 Just for your note --
9 THE CHAIRMAN: Sorry, this is the same decision we are
10 talking about?
11 MR WARD: It is the same. So sorry --
12 THE CHAIRMAN: It is exactly the same.
13 MR WARD: Yes, I am so sorry. I did not make that clear,
14 I should have done. Thank you. It is another case
15 where another cartelist is trying a different argument.
16 DAF want to take out the bodies, Daimler want to take
17 out the refuse trucks. What is a refuse truck? It is
18 truck chassis with a specialist refuse body on the back.
19 It is not binding in this court, this judgment. It is
20 not even binding on the European Court -- sorry, it is
21 not a judgment, it is an Advocate General's opinion, but
22 we do say it is clearly right and persuasive in this
23 case.
24 So, in our submission, this disposes of the issue,
25 but I do just want to mention that, if we are wrong, we

1 object to the way that Professor Neven has tried to take
2 out the bodies from the value of commerce.
3 THE CHAIRMAN: We have to construe the decision in
4 accordance with EU law; is that right?
5 MR WARD: Yes, but that particular judgment, because of the
6 particular rules around Brexit -- sorry, I must not call
7 it a "judgment", it is an Advocate General's opinion,
8 but even if the European Court tomorrow produces
9 a judgment which is verbatim, it would not be binding on
10 this tribunal. It is only something for you to take
11 into account because of the post-Brexit position.
12 THE CHAIRMAN: Yes, but I was meaning the principles of
13 interpretation --
14 MR WARD: Yes.
15 THE CHAIRMAN: -- of a decision of the Commission, those
16 principles are -- are they the same as here, that those
17 contractual principles apply?
18 MR WARD: They are as described in there, in effect,
19 construed by object and purpose. So you do not construe
20 it as a contract. It is rather broader.
21 THE CHAIRMAN: Okay.
22 MR WARD: Sir, I was just going to mention and move on
23 extremely rapidly that if we are wrong about all of
24 that, there is still a debate about how you extract the
25 price of the naked trucks because, in fact, the invoices

1 do not show a separate price for the chassis. So
2 Professor Neven has had to construct something and the
3 absence of any separate price for that is, in our
4 submission, itself a sign of just how artificial this
5 argument really is.
6 MR RIDYARD: Mr Ward, if the econometrics are based on all
7 UK sales, do you know broadly what proportion of all UK
8 truck sales involved a naked truck as opposed to a truck
9 with a body?
10 MR WARD: I do not have a figure but it is undoubtedly the
11 very vast majority --
12 MR RIDYARD: Of what, naked --
13 MR WARD: -- do not involve a body, absolutely. It just
14 happens to be that my client, Royal Mail, always bought
15 trucks with a body but it is not the only one.
16 I want to turn now to the overcharge, and I am going
17 to have to gather speed, seeing the time. You will have
18 seen that there is actually a considerable measure of
19 agreement between the experts. They have approached
20 this by building econometric models, they have sought to
21 control for other factors and there is a high level of
22 overlap between the factors they have controlled for but
23 there are radically different results. Mr Harvey finds
24 a highly statistically significant positive overcharge
25 of between 6.7 and 14.7%, depending on the period and

1 the emission standard. Professor Neven finds 0 or even
2 less, so he has negative coefficients in all kinds of
3 ways and, indeed, for his sensitivities, almost all of
4 them are negative, some as low as minus 4.8%.
5 You have seen our case that this is really a sign
6 that the model is just mis-specified, but what I want to
7 do is talk now about the three major topics of dispute.
8 The first one is by far the most complex, alas, and that
9 is the question of currency. Currency.
10 Both experts faced the same problem. There are
11 a mixture of currencies involved in the data.
12 Royal Mail and BT were invoiced in pounds, but the bulk
13 of the costs were incurred in euros and, of course,
14 DAF NV, the company that is ultimately interested in all
15 of this, works in euros. So they made different
16 choices. Mr Harvey built his model in euros,
17 Professor Neven in pounds.
18 Now, I hesitate to start on something more technical
19 while looking at Mr Ridyard, but I am going to try. In
20 theory, the impact of the exchange rates on prices could
21 be controlled by introducing a variable for exchange
22 rates within the model. That would enable the model to
23 identify the impact of exchange rates on prices just as
24 it does with other control variables such as demand.
25 But the problem with this in this case was well

1 explained by Professor Neven in his first report, which
2 is, in the jargon, a problem of identification between
3 the currency control and the infringement. I would like
4 to show you that, if I can, please, and it is {E/11/81}.
5 If we go to paragraph C.2, Professor Neven says --
6 sorry, I just need to turn this up myself:
7 "Considering exchange rate models other than only
8 considering DAF's budget rate and directly standardising
9 ..."
10 Sorry.
11 "Considering exchange rate models other than ...
12 DAF's budget rate [which is what he does] ... might
13 introduce a problem of identification of the potential
14 impact of the infringement ... Moreover, there could be
15 a multicollinearity problem between the exchange rate
16 and other variables included in the model, such as the
17 infringement variable. In such a case, there could be
18 a difficulty in separating the effect of changes in the
19 exchange rate from the effect of the infringement or
20 other events occurring at similar times."
21 Then at C.7 on the next page, {E/11/82}:
22 "There is a trade-off between including and
23 excluding the exchange rate variable from the pricing
24 regression. The inclusion of the exchange rate variable
25 introduces more flexibility to the model, allowing

1 prices to vary according to changes in the market
2 exchange rate. In the benchmark specification [which
3 means Professor Neven's model], changes in exchange rate
4 can affect prices only through variations in ... cost
5 ... A possible limitation ... is [the] budget rate only
6 varies yearly ..."
7 Then at C.8, {E/11/83}:
8 "Nevertheless, the inclusion of the exchange rate
9 variable can be ... problematic. This is [so] if
10 changes in the exchange rate are highly correlated with
11 other events ... for example, [in] the period ... from
12 1994 until 2002."
13 So he has identified that there is a problem of
14 identification, and he notes at C.11:
15 "The exchange rate variable is also highly
16 correlated with the demand controls ..."
17 So the problem is that there is a problem of
18 correlation between two things: the beginning of the
19 infringement period where the pound strengthened and
20 a later period where there was a collapse of demand, the
21 global financial crisis, so it is very difficult to
22 disentangle them. Neither expert included an
23 explanatory variable for currency in the main model.
24 They did it through sensitivities. What this means is
25 that both experts have had to make assumptions.

1 Mr Harvey has chosen euros essentially because it
2 reflected the commercial realities of what drives DAF's
3 prices. Firstly, we know from the evidence that the
4 bulk of DAF's costs are incurred in euros, even for its
5 UK plant, and I will just give you the references
6 because of time. That is Mr Habets' evidence at
7 {D/23/22}, paragraph 85. Then also Professor Neven's
8 report notes that even the UK plant at Leyland had
9 a majority of euro costs, and that is {E/11/34},
10 footnote 105. But, secondly, we have to consider what
11 DAF's ultimate commercial interest is here. DAF UK is
12 just one of many subsidiaries of DAF NV all around the
13 world. The only interest of DAF NV in local currency is
14 of course how many euros could it make. Again, the
15 evidence tells us that both DAF NV and even the American
16 parent company, PACCAR, assess transactions using
17 real-time euro exchange rates. Again, for time, I will
18 just give you the note. That is Mr Habets' evidence,
19 {D/23/17}, paragraph 71 and then paragraph 74.
20 We see even in the UK Mr Ashworth explains there was
21 a real concern about the impact of exchange rate
22 movements on prices. Again, just for your note, that is
23 paragraph 89 of Mr Ashworth's statement at {D/22/25},
24 and there are plenty of examples in the file where UK
25 prices were specifically changed because of exchange

1 rate movement. Of course we saw that this morning.
2 So what Mr Harvey says was, "Well, look, their real
3 interest is in euros, not in pounds. Pounds is just the
4 local currency". Now, Professor Neven's model only
5 allows for the impact of exchange rate movements through
6 converting costs that were incurred in euros into
7 pounds. He does that using what is called DAF's "budget
8 rate". We know again from the evidence of DAF, if I can
9 quote Mr Habets, that it uses this budget rate because
10 it has a relatively old accounting system that cannot
11 deal with actual fluctuating exchange rates, so instead
12 it sets an exchange rate annually. That is Mr Habets at
13 paragraph 36, which is {D/IC23/9}. To make matters
14 worse, this budget rate, there is no such rate available
15 prior to 2004 so Professor Neven has come up with
16 a proxy.
17 What this entirely fails to capture is the way in
18 which real-time rates might actually impact on pricing
19 decisions in just the way we have already seen. That is
20 what DAF NV and PACCAR are actually concerned with.
21 THE CHAIRMAN: Just so I understand this, DAF used a budget
22 rate for its own internal purposes for pricing any
23 particular transaction; is that right?
24 MR WARD: Used it in its system that was used, for example,
25 by dealers to price transactions.

1 THE CHAIRMAN: So they did not rely on the changes, the
2 fluctuations in exchange rates, over the course of
3 a year for the purposes of pricing particular
4 transactions?
5 MR WARD: That is right, in the system that was used by
6 dealers. But what the evidence shows is that at the
7 level of DAF NV and at the level of PACCAR, they were
8 really concerned about real-time exchange rates, and
9 even Mr Ashworth explains that in the UK they felt the
10 pressure of real-time exchange rates. So the budget
11 rate is only there because the old accounting system
12 cannot cope with fluctuating exchange rates. It is not
13 actually a commercial choice in that sense.
14 THE CHAIRMAN: But the budget rate is that -- what is that?
15 Is that a forecast rate that is established at the
16 beginning of the year or --
17 MR WARD: No, it is set annually on the basis of the
18 previous year.
19 THE CHAIRMAN: On an average of the previous year?
20 MR WARD: Something like that, yes.
21 THE CHAIRMAN: So it is not actually reflecting economic
22 reality during that current year?
23 MR WARD: Exactly right, sir. Exactly.
24 MR RIDYARD: So which exchange rate was used when it came to
25 approving or not approving a particular price?

1 MR WARD: Realtime, at DAF NV --
2 THE CHAIRMAN: Approving by whom?
3 MR WARD: At DAF NV and PACCAR it was real-time.
4 Mr Ashworth, who was sitting in the UK, explains that he
5 considered the real-time exchange rates, they felt the
6 pressure of the real-time exchange rates on their
7 prices, but it is not his evidence that he sat there
8 actively with it, as it were, on his desktop.
9 But the problem with Professor Neven's approach is
10 it simply does not allow at all for the impact of
11 real-time exchange rates and it does not allow at all,
12 as I am just going to come on to, for the fact that,
13 when one looks at how exchange rates actually operate
14 here, they make a big difference to the margins that
15 might be enjoyed by DAF NV because, of course, if the
16 pound strengthens, margins measured in euros are going
17 to increase; you are going to get 2 euros for a pound
18 rather than 1.5 euros for a pound. If the pound falls,
19 those margins are going to decline. So DAF would have
20 a decision to make if the margins do improve because the
21 pound strengthens: should it keep the prices high and
22 enjoy those margins or cut the prices to compete more
23 strongly? As we have seen, the list price setting is
24 going on at the NV level. So there is absolutely no
25 doubt that exchange rates can have an impact on margins.

1 Can I ask you to turn now to {E/IC1/100}?
2 THE CHAIRMAN: Do you say that the exchange rate impacted on
3 the gross list prices which were obviously changing
4 throughout the year?
5 MR WARD: Well, we have seen an example already this morning
6 of where list prices were explicitly changed because of
7 exchange rates.
8 SIR IAIN MCMILLAN: Can I ask a question? I know you have
9 a lot to do, but just to be clear, when DAF won the
10 contract, Royal Mail and BT, was that price fixed in
11 pounds sterling?
12 MR WARD: It was, but when they went to get approval from,
13 eg, PACCAR, the parent company, it was also showing
14 prices in euros.
15 SIR IAIN MCMILLAN: Right, and at that point was that locked
16 in terms of what they would charge the customer when the
17 product was delivered?
18 MR WARD: Yes, that would be about agreeing the price under
19 the contract, yes.
20 SIR IAIN MCMILLAN: Right. That is very helpful. Just to
21 be clear, at that point DAF did not go into the foreign
22 exchange markets and lock the currency in in the forward
23 markets; they left themselves at the mercy of the
24 changing exchange rate?
25 MR WARD: We have no evidence on that one way or the other.

1 We just do not know what they did.
2 I was going to show you, if I may -- sorry, I have
3 lost the reference myself -- {E/IC1/100}, please. There
4 is confidential text that we do not need and there is
5 a graph which is not marked as confidential which I am
6 going to show you, so as long as we do not -- yes, that
7 is fine. That does not show the confidential text.
8 This is a graph prepared by Mr Harvey of annual
9 percentage margins through the infringement. What we
10 see is a very substantial increase in margins at the
11 beginning of the cartel period. Then there is a big dip
12 for the financial crisis and then, after the cartel,
13 what we see is lower margins.
14 Now, one of DAF's criticisms of Mr Harvey's approach
15 is that it does not disentangle the exchange rate effect
16 on pricing in the margins that it finds, but, with
17 respect, we say that misses the point. This all took
18 place in a situation that was as far from a competitive
19 market as it is possible to imagine. If the market was
20 competitive, then such high margins would have been
21 competed away. Whether or not they were due to exchange
22 rate movements, they just would not be sustainable.
23 The alternative approach, which is
24 Professor Neven's, is he says, "Well, all of these
25 margins you are enjoying in euros when the exchange rate

1 changed are just to be attributed to the exchange rate
2 alone", so, in effect, he says that this improvement in
3 DAF's euro margins would have been achieved and
4 maintained even if the truck market was competitive.
5 Now, we say all of this just ignores the reality of
6 the infringement and the reality of the fact that
7 DAF NV, the parent company, is ultimately interested in
8 what it could obtain in euros.
9 Underlying this point is then a very complex
10 argument between the experts about a series of
11 sensitivities. If I can just summarise it in a few
12 words, it is this: Professor Neven says, "Actually my
13 model is robust, I can control for the exchange rate and
14 my model is sound, whereas in Mr Harvey's model, if you
15 control for the exchange rate, you get horribly
16 counter-intuitive results". Because of time I am not
17 going to take you through that, but what we in fact say
18 is that Professor Neven manages to get -- produces
19 different results by using very different sensitivities
20 on his own model and Mr Harvey's. He essentially mixes
21 and matches between different measures of exchange rate.
22 If you just give me a moment. It is best if I just
23 refer you to where this is all explained by Mr Harvey in
24 his third report, which is {E5/52/60-65}, where he
25 explains essentially that when you compare like with

1 like, Professor Neven's model is just as vulnerable as
2 his to unintuitive results if you start to measure for
3 the exchange rate.
4 Where that leaves us is that the models represent
5 a choice. You have Professor Neven who only models the
6 impact of exchange rates on costs that are converted
7 with a one-year lag or Professor Harvey who converts
8 both pound costs and prices, reflecting the way that
9 DAF, we submit, really was ultimately interested in the
10 prices of the trucks in euros.
11 THE CHAIRMAN: It seems to me that it is not an issue as to
12 whether you are converting from pounds into euros or
13 euros into pounds, it is whether you are doing it on
14 a real-time basis or you are doing it on this budgeted
15 basis.
16 MR WARD: That is only one of the issues, sir, and
17 I respectfully agree it is an issue. What we say about
18 that, though, is that it is just obvious that the real
19 interest in DAF NV is in real-time euros. The
20 accounting system may create this lag but there is quite
21 a lot of price control being conducted by DAF NV. It is
22 setting list prices, it is approving transactions that
23 get escalated up the chain and it is also controlling
24 the margin bands in which there is delegated authority.
25 So, in other words, it says you can only decide things

1 locally within a certain band of margin. So it is
2 exercising all that control and it is doing it from the
3 point of view of an organisation whose real interest is
4 in real-time exchange rates.
5 THE CHAIRMAN: But surely you get the same result if you, in
6 real-time, convert it all into pounds, do you not?
7 MR WARD: You do not, in fact, because all you do there is
8 convert the cost element of euros into pounds, which is
9 what Professor Neven does. What that disregards is the
10 consideration that is bound to happen in DAF NV about
11 what the impact of all of that is on its euro margins.
12 So it starts to enjoy fat euro margins because of the
13 exchange rate movement, is it going to cut its prices
14 and compete or is it in fact, as we see here, able to
15 sustain those margins because of course it is in
16 a cartelised market?
17 So that is why we say there is a real difference
18 between Professor Neven and Mr Harvey that is not just
19 the question of lag that you have talked about, sir.
20 Professor Neven only reflects currency impact on costs.
21 His prices, of course, are unaltered because they stay
22 in pounds throughout. Mr Harvey is able to capture the
23 fact that, when DAF is pricing, it is ultimately
24 thinking about euros and those euro margins will flex
25 with the exchange rate. At the end of the day, all

1 DAF NV is interested in is: how many euros are we
2 making? All of that pricing effect is simply missing
3 from Professor Neven's model. It is purely concerned
4 with costs.
5 So what we respectfully submit is that there is no
6 way to sensibly, flexibly control for exchange rates
7 because what the sensitivities show is it is highly
8 problematic for both models and it is simply the case
9 therefore that a choice has to be made. Mr Harvey's
10 choice is closer to the economic reality, but I also
11 just point out that there are a number of sensitivities
12 which he has done which essentially split the difference
13 between him and Professor Neven.
14 Can I turn on now to the other two areas of
15 contention, which are global financial crisis and then
16 emissions technology. The cartel straddled the global
17 financial crisis or GFC, as you will see it referred to
18 a lot in the documents, and that was of course a period
19 of extraordinary economic turmoil. Both experts control
20 in their model for changing conditions of demand
21 throughout the period of the model and there is no doubt
22 there was a dramatic reduction in demand for DAF's
23 trucks during the global financial crisis. But
24 Mr Harvey has also included controls for the crisis
25 itself, dummy variables for those years 2008 to 2010.

1 The essential reason he explored this possibility is
2 that the factual evidence says that the global financial
3 crisis actually affected DAF's own approach to pricing
4 its trucks.
5 Now, the technical issue is really
6 this: Professor Neven says, "Well, the effects of the
7 crisis will simply be picked up in his demand control",
8 but the point of including these dummies is that means
9 the model is able to test whether the financial crisis
10 impacted prices over and above the available demand
11 controls. Was there something else or was it just
12 demand? If we fail to test for that, we risk inaccuracy
13 in the model because it might conflate the global
14 financial crisis with the infringement. Of course, the
15 effect of the crisis was to push prices down so
16 excluding the crisis runs the risk of an underestimate
17 of the model. We see Professor Neven gets radically
18 lower results partly for this reason.
19 Now, what Mr Harvey found is that the global
20 financial crisis dummies were highly statistically
21 significant to the 99% confidence interval, so what that
22 was showing was that prices actually were different in
23 those years over and above the effect captured by the
24 demand variable because, like Professor Neven, he
25 included a demand variable.

1 He performed a sensitivity that shows they were
2 highly statistically significant even in
3 Professor Neven's model. Just for your note, that is
4 {E/28/83}, table 8 and table 9.
5 So the consequence of that is that Professor Neven's
6 decision to omit the controls leads to an underestimate
7 of the overcharge.
8 Now, the issues that follow are actually quite
9 limited. Professor Neven says, "Well, this approach is
10 impermissible because it somehow reduces the number of
11 trucks used to identify the overcharge", and indeed in
12 DAF's skeleton it says it removes all the trucks sold
13 during those years from the model. That is
14 paragraph 79. But Mr Harvey has explained that is not
15 right and I will just show you that. This is at
16 {E/IC52/73}, 3.126:
17 "Professor Neven is incorrect to suggest that the
18 observations 'are not used by the model for the purpose
19 of estimating the coefficient associated with
20 infringement', because the observations within this
21 period are used in my during-after model and are not
22 dropped from the regression, contrary to the suggestion
23 made by Professor Neven. In fact, they are necessary
24 for the model to determine whether the financial crisis
25 did indeed impact their prices, over and above the

1 available demand controls. This can be seen in my
2 robustness checks, where I do remove the period from
3 2008 to 2010 from the regression, and this produces
4 different overcharge estimates to my regression that
5 uses all the data ... The year dummies control for
6 the financial crisis period -- observations are not
7 removed ..."
8 So we are, with respect, a little baffled by
9 Professor Neven's concern, but he has a separate concern
10 as well. He says, "Well, look, it is arbitrary to
11 control for the financial crisis". There are just other
12 periods of extreme changes in demand and he models
13 those. I would like to show you this. This is at
14 {E/35/29}. This is paragraph 2.50. If we can just
15 scroll down a little bit further, he says:
16 "... I compute two dummy variables indicating ...
17 the highest and the lowest quartile of their respective
18 distribution, up until but not inclusive of that moment.
19 The dummies are defined on a monthly basis. The dummy
20 variable indicating the highest quartile ... would
21 control for extreme hikes in demand. The dummy variable
22 indicating the lowest quartile ... would control for
23 extreme drops in demand (such as the financial crisis)."
24 If we go to the next page, {E/35/30}, we can see
25 figure 4, which is a little graph, and the little blue

1 and red dots are for the periods of demand that he takes
2 out. So what you can see, obviously, is he takes out
3 about half of the period on the basis it can be
4 characterised as extreme, like the financial crisis, and
5 unsurprisingly, he gets a very unintuitive result. But
6 what he has done is just include these dummies for all
7 manner of demand variables, variations over time;
8 nothing to do with the global financial crisis and no
9 reason at all to think that an ordinary demand variable
10 would not pick them up.
11 MR RIDYARD: Can I just ask, why is it -- there is a demand
12 variable in the equation, Mr Harvey's equation, and the
13 GFC affects sales through its effect on demand, so why
14 does Mr Harvey believe or you believe that the GFC has
15 additional effects other than the effect on demand?
16 MR WARD: For two reasons. One is empirical and the other
17 one is based on the evidence. The empirical reason is
18 when you include it, it actually picks up something
19 statistically significant that was not being picked up
20 by the demand variable --
21 MR RIDYARD: That is not really a rationale.
22 MR WARD: No, but that is the empirical outcome. But the
23 rationale is that the evidence itself says that pricing
24 practice actually changed during the global financial
25 crisis, so, for example, many more transactions were

1 carried on up the chain, there was a change in the way
2 they were assessed so, for the first time, MLO measures
3 were used where they had not been used before, and
4 indeed, even Mr Ashworth says, "We were particularly
5 charged with trying to get higher prices in fact during
6 this demand crisis in order to counteract the lost
7 sales". So there is enough evidence to suggest there is
8 actually a change in pricing practice to at least raise
9 a question about whether the effects are wider than
10 merely on demand, that the pricing process itself
11 changed.
12 Then carrying out the exercise with the dummies
13 demonstrated in fact there was a statistically
14 significant effect, vindicating the intuition or the
15 inference from the evidence that in fact something more
16 was going on here than the demand variable would pick
17 up.
18 THE CHAIRMAN: Whenever there is a convenient moment,
19 Mr Ward, we ought to have our ten-minute break.
20 MR WARD: That would be very convenient. Thank you.
21 THE CHAIRMAN: All right. We will resume at 3.20.
22 (3.11 pm)
23 (A short break)
24 (3.21 pm)
25 THE CHAIRMAN: Mr Ward.

1 MR WARD: Sir, I have been thinking and I have been cutting
2 in your absence, but I have to concede I am behind
3 schedule and if I may make a most unpopular request. Is
4 the tribunal at all prepared or able to sit beyond 4.30
5 this afternoon? I will cut my cloth accordingly, of
6 course.
7 THE CHAIRMAN: You have been saying that all along.
8 MR WARD: I have been cutting.
9 THE CHAIRMAN: I think we can carry on for a little bit but
10 we will see where we are at 4.30 and how much longer you
11 might need.
12 MR WARD: Certainly by then you will be hearing from
13 Mr Lask, but thank you, sir, I will do my best. I may
14 have to move rapidly through the other issues. It is
15 a most unpopular request and it has been a very long day
16 already, I am sure, for everybody. I will do my best.
17 I am moving now to emissions standards. Here, as we
18 have already heard, new emission standards were
19 introduced periodically through the infringement and
20 they carried with them additional costs. Both experts
21 have included explanatory variables in their models for
22 them and Mr Harvey has identified -- attributed them to
23 the overcharge at least in the period of the so-called
24 during/after model from 2004 onwards.
25 Now, the critical difference between the experts is

1 how you actually interpret these emission standards
2 premia because both of them have identified emissions
3 coefficients and Professor Neven says, "Well, that is
4 attributable merely to willingness to pay, willingness
5 to pay for these vehicles", whereas Mr Harvey says that
6 they can be attributed to the infringements. It is
7 really important to see what these emission premia are
8 because they are premia over and above costs.
9 So what this is telling us, the model itself
10 controls for the costs of the new emission standards and
11 the costs of the vehicles which contain the new emission
12 standards, and DAF's own evidence is that customers did
13 not actually want these emission standards, they did not
14 want to pay for them. So what Professor Neven says is,
15 "Well, when they introduced new emission standards, they
16 introduced other enhancements to the trucks, essentially
17 to sweeten the pill". Of course the costs of those
18 enhancements are also controlled for in the model. So
19 the argument is that these new enhancements were so
20 desirable they drive an increase in price which is not
21 only covering the costs but persuading customers to pay
22 a higher overall margin even after swallowing the costs
23 of emission standards. That is Professor Neven's
24 argument.
25 But the problem with that is there is no evidence at

1 all to suggest that is actually right, that there really
2 was so much attraction in these new features that were
3 introduced with the emission standards that it actually
4 led to a net gain, even after this feature that people
5 did not want but had to pay for.
6 We respectfully say this just ignores the elephant
7 in the room. There is collusion around these emission
8 standards, as to their costs and even their prices, and
9 that is a far more plausible explanation as to why
10 people are willing to pay for them.
11 Moving on now very rapidly to the issue of
12 complements. This is an issue where DAF bears the
13 burden of proof and its argument is that overcharge on
14 trucks would have led to a reduction in the price of
15 bodies and trailers, that they are the complements. It
16 is partly bound up with the naked truck issue because
17 they are talking about bodies as well as trailers, so if
18 we are right about that, the bodies drop out. But if
19 there is a complements effect here, it is a form of
20 collateral benefit that is said to arise from the
21 infringement in legal terms and therefore they would
22 have to show that the reduction was a direct and
23 proximate cause, and we are going to be looking at the
24 case law in a minute on pass-on. But actually the
25 defendants have done nothing whatsoever to show

1 causation on this issue.
2 It is evidently an empirical question whether the
3 overcharge really did have the effect of pushing down
4 the price of these complements, but they have not even
5 adduced evidence from DAF to say that they noticed this
6 effect when they were negotiating with third parties or
7 manufacturing their own complements. What they have
8 done instead is advance an economic theory and
9 a simulation model. A simulation model -- I should say,
10 when it was being proposed, we were highly sceptical
11 about it and Mr Justice Roth appeared to share some of
12 that, but the simulation model does not test whether in
13 fact prices were higher in the past or lower. It runs
14 an algorithm to calculate a range of outcomes compatible
15 with certain data points. That is all it does. So it
16 is often used in merger analysis where the challenge is
17 to predict the future if two parties merge.
18 But here we are not interested in the future. What
19 Professor Neven is trying to do is predict the past. In
20 our respectful submission, this simulation analysis is
21 of absolutely no assistance. It runs on a whole series
22 of stylised assumptions that depart from reality and it
23 ends with conclusions that are radically underdetermined
24 in a very large range which itself calls the model into
25 question.

1 Professor Neven is not impressed with Mr Harvey's
2 approach here but he at least tried a form of empirical
3 analysis where he looked at body and trailer
4 manufacturer margins over time, he looked for
5 correlation of prices between trucks and trailers. He
6 could not find anything. So, in our respectful
7 submission, nothing in the simulation model can possibly
8 discharge the burden of proof.
9 THE CHAIRMAN: Do you say this is -- if you are right on the
10 volume point about the trucks, whether they included the
11 bodies for Royal Mail, that this does not arise then?
12 MR WARD: Alas it still arises. It takes the bodies out but
13 it leaves the trailers behind because no one is arguing
14 that the truck price includes trailers. This is where
15 you have a separate tractor linked to a trailer, rather
16 like a car and a caravan. It is common ground that
17 those trailers aren't part of the definition of "truck",
18 so it cuts it down but it does not kill it.
19 I want to turn now to pass-on, where I am going to
20 use most of my remaining time. You will have seen that
21 there are two kinds of pass-on alleged: so-called supply
22 pass-on, which is that Royal Mail and BT passed the
23 overcharge on to their customers in the form of
24 increased prices for stamps or telephone calls, and the
25 other is so-called resale or used truck price pass-on,

1 which is when the claimant sold the used trucks at the
2 end of their lives in the used market. Again DAF bears
3 the burden; again they fail to discharge it.
4 I am going to start with supply pass-on. Mr Bezant
5 says that Royal Mail generally passed on 100% of the
6 overcharge and actually sometimes more and for BT it was
7 100. Mr Harvey says it is highly unlikely there would
8 be any. You have seen that this issue has created an
9 enormous quantity of disclosure and 2,000 pages of
10 expert reports. It is dedicated to the proposition that
11 DAF can show it can track through the truck overcharge
12 into those prices of stamps and telephone calls. In our
13 submission, it fails entirely, both factually and
14 legally. What DAF has to show is the overcharge was the
15 proximate cause of BT and Royal Mail putting up their
16 charges, that it actually caused the prices to be
17 higher, and it simply cannot show this.
18 I should say in parenthesis that this is one of the
19 housekeeping points I want to take up with you later,
20 whether we really have enough time to deal with this
21 issue in cross-examination. The starting point is that
22 each of these businesses sells a very large range of
23 products. In 2003, Royal Mail sold 22 billion different
24 products, some of them of course very low value: stamps.
25 BT has a vast number of customers, 5.7 million broadband

1 customers in one year. The trucks are an input into the
2 business, but it is not reselling trucks. It is selling
3 something entirely different. The amount of the
4 overcharge is minuscule in comparison to either the
5 costs or revenues of BT or Royal Mail. In the case of
6 the Royal Mail brand, it never exceeds 0.05% of revenues
7 for any year. So in terms of the price of a stamp, to
8 give one year, even if the entire overcharge was placed
9 on the price of a stamp, it would be 0.014p. That was
10 for 1999/2000.
11 In the case of BT, it is also minuscule. In terms
12 of pass-on, the experts agree the most important part of
13 BT is Openreach, which does wholesale -- you will have
14 seen its vans. They do wholesale telecoms services.
15 The overcharge is worth a total of 0.003% of its
16 revenues over the relevant period.
17 Now, as if that was not enough, there is a further
18 complicating factor, that within those businesses there
19 are various stages of pass-on within the business. Both
20 BT and Royal Mail have a specific business unit to
21 purchase the trucks. They then recharge the trucks to
22 other business units. They are then put through
23 a process of cost allocation to different products,
24 albeit always as part of some wider category, like
25 transport. That cost allocation process obviously

1 involves all sorts of assumptions.
2 Then there is the internal pass-through. The
3 experts have assiduously looked at a chain from BT Fleet
4 to BT supply chain to Openreach, then on to external
5 customers and then finally you get end product pricing
6 where most of these prices are actually regulated, and
7 the regulator is bringing to bear a whole range of
8 public interest considerations in setting these prices.
9 So what we say, with respect, is all of that makes
10 it completely unreal to suggest this scintilla of
11 overcharge, relative to the giant cost axe of these
12 corporations, can possibly find its way through in a way
13 that would satisfy the law to the actual price of stamps
14 or telephone calls.
15 In the early case management conferences in this
16 case, both Mr Justice Roth and Mrs Justice Rose, as she
17 then was, were highly sceptical about this argument.
18 Can I just show you why? If we could go to {G/15/13},
19 please, we will see she says -- this is where there was
20 a debate about disclosure. She says at the top of the
21 page there:
22 "Well, perhaps before we start ordering what always
23 happens in this case, which is that ... the parties
24 start agreeing ... huge amounts of ... database
25 information ... none of which may actually be relevant

1 if the Mastercard decision is correct [which we are
2 going to come back to. This was then at first
3 instance], that unless you're actually selling on the
4 trucks to somebody you can't show pass-on because it's
5 impossible to prove a link between the price of a stamp
6 and the price that was paid for these trucks."
7 Mr Justice Roth said something quite similar in
8 another case management conference where the reference
9 this time is {G/29/24}. You will see the top right-hand
10 corner, line 5:
11 "It is not really classic pass-on at all. It is
12 a rather unusual pass-on, isn't it? ...
13 "A classic pass-on is the shoe manufacturers have a
14 cartel on the price of shoes, the shoe shop pays more to
15 get its supplies, and it then charges more to its
16 customers. So the shoe shop doesn't suffer the loss of
17 the [cartel] through the inflated price by the cartel,
18 it is passed through the price on the product."
19 Then if we go down to page 92, please, of the
20 transcript, top right again:
21 "If Royal Mail puts up the price of a postage stamps
22 once every six years by 2p, it would be very odd to say
23 that is a pass-on or it may be a pass-on of the price it
24 pays for trucks ...
25 "... it's not passing through. Every business ...

1 has to, if it has cost increases ... deal with it in
2 a certain way.
3 "If you take the shoe example, if it is not a shoe
4 shop but it is a department store and it pays more
5 for -- it doesn't, you say, 'Well, we look at what
6 you've done with the prices for kitchen equipment or
7 food in your restaurant because it might be
8 a pass-through of increased cost of shoes'. That's
9 a very broad view of [pass-on]. I am sure an economist
10 would say it is pass-through but as a matter of law ..."
11 "Then at the bottom of the page:
12 "I mean, as a matter of fact a business will absorb
13 its costs. That's ... the issue that arose in the
14 *Sainsbury's* case. The question for the
15 court is a matter of what is legal pass-through, not
16 what an economist would say or what the business
17 actually did."
18 Then if we go to 98 on the transcript, please, on
19 probably two more pages I am guessing -- or one more
20 page, thank you, {G/29/26} -- he says at 4:
21 "At the moment, I have to say, without having heard
22 argument -- and ... it would depend on ... the
23 authorities -- my very provisional view is that the
24 pass-on, as a matter of law, does not stretch beyond the
25 cartelised product or other products that incorporate

1 the cartelised product [as] a component or ... on the
2 transaction involving the cartelised product directly,
3 as in a credit card payment."
4 What Mr Justice Roth is thinking about there is the
5 *Sainsbury v Mastercard* case which
6 subsequently went to the Supreme Court which we are
7 going to come to we are in fact going to come to it now
8 because this is now the leading case.
9 To be clear, this Supreme Court judgment postdates
10 these observations. This is authorities 11.3,
11 {AU/11.3/1}. Just to explain the context, this
12 litigation was about charges levied by Mastercard on
13 each transaction in the form of something called the
14 "merchant service charge", so every time you used your
15 Mastercard, there would be a charge on the merchant and
16 that was passed on to the consumer. The question was
17 what rules of mitigation apply to assessing the argument
18 that this defeated the claim.
19 If we could turn, please, to page 67, {AU/11.3/67},
20 we can see at the bottom of paragraph 191, {AU/11.3/68}:
21 "It leaves it to the English courts to apply the
22 normal rules of English law on mitigation of damages,
23 including the [rules] of pass-on."
24 So we are into standard law of mitigation.
25 Then at paragraph 70 -- sorry, paragraph 205 on

1 page 70, {AU/11.3/71}, please, the Supreme Court
2 distinguished what it called four principal options, you
3 can see six lines down:
4 "(i) a merchant can do nothing ... and thereby
5 suffer a corresponding [loss] of profits ... (ii) the
6 merchant can ... [reduce] discretionary expenditure ..."
7 Neither of those count as pass-on, but (iii) and
8 (iv) do:
9 "(iii) the merchant can seek to reduce its costs by
10 negotiation with its many suppliers; or (iv) the
11 merchant can pass on the costs by increasing the prices
12 which it charges its customers."
13 We are really here talking about (iii) and (iv) but
14 particularly (iv). One thing that is really important
15 to pick out of (iv) is that it does envisage that prices
16 will increase; not just you absorb the cost and you
17 recover the cost, but you actually increase your prices.
18 Then at 215, {AU/11.3/74}, the Supreme Court says --
19 it applies the test of causation from
20 *British Westinghouse*. It says:
21 "We are not concerned ... with additional benefits
22 ... which was an independent commercial decision ... The
23 issue of mitigation which arises is whether in fact the
24 merchants have avoided all or part of their losses. In
25 the classic case of *British Westinghouse* ...

1 [I am sure this is very familiar] Viscount Haldane
2 described the principle ...:
3 "'When in the course of his business [the claimant]
4 has taken action arising out of the transaction [that is
5 the proximate cause test that is established in the
6 law], which action has diminished his loss, the effect
7 in actual diminution of the loss ... may be taken into
8 account."
9 The Supreme Court says:
10 "Here also a question of legal or proximate
11 causation arises as the underlined words show."
12 In the case of *Sainsbury's v Mastercard*
13 it says:
14 "But the question of legal causation is
15 straightforward in the context of a retail business in
16 which the merchant seeks to recover its costs in ...
17 annual ... budgeting. The relevant question is ...
18 factual ...: has the claimant ... recovered from others
19 the cost of the MSC, including the overcharge ..."
20 Of course, as it says, as I have shown you already,
21 by increasing its prices. It is just not enough if it
22 recovers costs overall and we will see in a minute that
23 is common ground.
24 These passages were again considered in this
25 litigation and I want to show you what the tribunal said

1 about this in its judgment, which is at 11.9 in the
2 authorities bundle, {AU/11.9}. This was a ruling of the
3 tribunal rejecting an attempt by DAF to argue that there
4 had been a form of mitigation in the form of
5 Royal Mail/BT renegotiating with its other suppliers.
6 The tribunal basically said, "This is a completely
7 baseless allegation. You do not have any basis for
8 unleashing the tsunami of disclosure that this would
9 require", and it rejected the proposed amendment. But
10 it has got observations about causation which are highly
11 relevant.
12 If we look, please, at page 15, at paragraph 34:
13 "... we do not consider that the Supreme Court could
14 have been intending to countenance ... an approach to
15 pleading a defence of [this kind]. This aspect ..."
16 I think I will skip this. Then it says at the end:
17 "... a claimant such as Royal Mail or BT in
18 a damages claim under competition law should not be more
19 vulnerable than a claimant in a domestic commercial
20 claim to a defence of mitigation.
21 "... it seems to us that it cannot be enough for
22 a defendant to plead that a claimant's business input
23 costs as a whole were not increased, or that as part of
24 the claimant business' ordinary financial operations and
25 budgetary control processes its overall expenses were

1 balanced against sales so that profits were not reduced.
2 There must be something more to create a proximate
3 causative link ... This can be inferred from the
4 Supreme Court's citation from ... British
5 Westinghouse ... at [215] ... [and] its emphasis of the
6 underlined words, '... [the claimant] has taken action
7 arising out of the transaction' ...
8 "We therefore consider that, for a defendant to be
9 permitted to raise a plea of mitigation ... there must
10 be something more than broad economic or business theory
11 to support a reasonable inference that the claimant
12 would in the particular case have sought to mitigate its
13 loss and that the steps taken by it were triggered by,
14 or at least causally connected to, the overcharge in the
15 direct manner ..."
16 Then at 41 it says, {AU/11.9/17}:
17 "There is therefore no factual support [for what DAF
18 is saying] ..."
19 Then if we can pick it up about ten lines down, it
20 says:
21 "As a matter of law, DAF contends that, in reliance
22 on *Sainsbury's* ..., the defence has
23 a realistic prospect of success."
24 This is very important:
25 "It does, however, accept that there must be

1 a causative connection between the overcharge and the
2 costs reduction. As Mr Beard put it in the course of
3 argument: 'one does need to have factual evidence that
4 it was the putative rise in prices of the product that
5 [was] affected, the trucks, that feed into and are
6 causative of, materially causative of... the fall in the
7 price ... that are entered into with [one or] other
8 suppliers' and that it is insufficient to allege that
9 all input costs of the business feed into business
10 planning and that businesses recover their costs."
11 We agree you have to show a proximate causal
12 connection to the actual price rise. {AU/11.9/18}:
13 "In our judgment, before a purely general plea of
14 mitigation ... can be pleaded, in the way that DAF seek
15 permission ..., there must be something identifiable in
16 the facts of the particular case that gives rise to
17 a prima facie inference that there may well be a direct
18 causative link ... What is sufficient to give rise to
19 such an inference will vary from case to case, but it
20 may be found in facts such as the claimant's knowledge
21 of the nature and amount of the overcharge ... the gross
22 amount of the overcharge as a proportion of the ...
23 expenditure (the higher the proportion, the more likely
24 it is that some step would have been taken ...), the
25 relative ease with which the claimant's business could

1 be expected to reduce certain input costs or ... costs
2 [more] generally ..."
3 Then it says at 44, {AU/11.9/19} -- it points out
4 just above the quote:
5 "As DAF accepts, that general principle that all
6 costs of all inputs are fed into business planning is
7 insufficient to establish the necessary causative
8 connection for a plea of mitigation ... we note that in
9 the *Sainsbury's* case [at first instance]
10 ...:
11 "'Because we have concluded that the way in which
12 the costs constituting the UK MIF [which is the merchant
13 service charge] were dealt with by *Sainsbury's* is
14 unknowable, ... it is impossible to say what proportion
15 of the overcharge was ... passed-on in higher prices or
16 ... paid out of cost-savings; or ... paid [in] ...
17 [reduced] expenditure ...'"
18 It is simply too difficult.
19 Then underneath the quote:
20 "On appeal, the Court of Appeal upheld the
21 Tribunal's approach of distinguishing between economic
22 assumptions and the applicable legal principles ...
23 That aspect ... was not challenged on the further
24 appeal~..."
25 I just want to complete the law here by showing you

1 a bit of the first instance judgment in the
2 legal *Sainsbury's v Mastercard* case that actually
3 makes the distinction between legal and economic
4 pass-on. This is in authorities 6.1.
5 THE CHAIRMAN: Mr Justice Roth did not revisit, after the
6 Supreme Court, his shoe shop example?
7 MR WARD: No, he did not. I should be clear. I am not
8 relying on just a simple binary shoe shop versus trucks
9 point. I show you that for context to show you why two
10 expert competition judges were so concerned about this
11 argument.
12 THE CHAIRMAN: When you are talking about proximate cause
13 and direct cause, as he referred to in paragraph 42,
14 quite an important factor is whether the actual --
15 whether the claimant actually knows that it suffered an
16 overcharge and is trying to pass it on.
17 MR WARD: It is and --
18 THE CHAIRMAN: That is not this case.
19 MR WARD: That is not this case. Honestly, with the
20 greatest respect to DAF, we think we have been put
21 through a vast wild goose chase on this, as the
22 2,000 pages of evidence actually ultimately show. Let
23 me go a little bit further and then I will wrap up my
24 submissions on this very briefly.
25 MR BEARD: Sorry, just to be clear, this judgment that

1 Mr Ward is referring to is dealing with what might be
2 called head 3 in the Supreme Court's possible routes for
3 mitigation and we were told "You cannot pursue that".
4 That is what this judgment does. We are talking about
5 route 4. He does not talk about that so I am not quite
6 sure what point Mr Ward is trying to get from this.
7 MR WARD: I am happy to clarify. I thought I had made that
8 clear and I am sorry if I did not. We are talking about
9 route 4. The judgment is about route 3 but it is also
10 about the legal test in *British Westinghouse*
11 which I showed the court, the Supreme Court, applied to
12 both route 3 and route 4. Would it help if I backed up
13 over that again, sir, or is that clear enough?
14 THE CHAIRMAN: I am just reminding myself which was 3 and
15 which was --
16 MR WARD: Fine. I will go back to it because it is
17 important.
18 MR BEARD: I am sorry. I will leave Mr Ward to explain it
19 in his submissions.
20 THE CHAIRMAN: 3 is negotiating with suppliers and 4 is
21 passing along to the customer.
22 MR BEARD: Exactly.
23 MR WARD: Certainly what DAF was trying to do, as I thought
24 I had made clear, was get in a type 3 argument, but the
25 reason that this is of much more general application can

1 be seen if we go back to what Mr Justice Roth said at
2 page 15. This was in {AU/11.9}. I should say it is not
3 Mr Justice Roth on his own, it is the whole tribunal.
4 If we look at paragraph 35, {AU/11.9/15} -- I already
5 showed you this:
6 "There must be something more to create a proximate
7 causative link between the overcharge and a reduction in
8 other input costs, ... to constitute mitigation."
9 "Mitigation" is the catch-all term for all of this.
10 "This can be inferred from the Supreme Court's
11 citation [of] *British Westinghouse* at [215]
12 of its judgment ..."
13 So although he is dealing with the so-called type 3
14 case, he is making observations about the
15 *British Westinghouse* test which the
16 Supreme Court makes clear applies to both.
17 THE CHAIRMAN: There still has to be the same proximate
18 cause between whether you are passing it on to suppliers
19 or customers.
20 MR WARD: Of course.
21 MR BEARD: If that is the point, I do not think there is an
22 issue.
23 MR WARD: Good. Well, I am not sure how the intervention
24 was needed, but thank you anyway.
25 I was just going to show you what the CAT had said

1 about the difference between legal and factual
2 causation. This is in the first instance
3 *Sainsbury's* case and it has not been
4 overruled. It is authorities 6.1, page 271,
5 {AU/6.1/271}, another epic judgment. Keep going --
6 sorry -- a couple more pages. We are going for --
7 484(4) is what we want, so a little bit further, please.
8 {AU/6.1/278}. So this is paragraph 484(4) of the
9 judgment:
10 "We have already noted that whilst the notion of
11 passing-on a cost is a very familiar one to an
12 economist, an economist is concerned with how an
13 enterprise recovers its costs, whereas a lawyer is
14 concerned with whether a specific claim is or is not
15 well-founded. We consider that the legal definition of
16 a passed-on cost differs from that of the economist in
17 two respects:
18 "First, whereas an economist might well define
19 pass-on more widely (... to include cost savings and
20 reduce expenditure) the pass-on defence is only
21 concerned with identifiable increases in prices by
22 a firm to its customers.
23 "Secondly, the increase in price must be causally
24 connected with the overcharge, and demonstrably so."
25 That is the law Mr Justice Roth is saying, in our

1 submission correctly, has not been in any sense
2 overtaken by events.
3 I should say, just for your note, that the judgment
4 of the tribunal we just looked at was also cited with
5 approval in the Court of Appeal recently in a case
6 called *Stellantis* at authorities 5, tab 17.
7 I am so sorry, I do need to turn that up. It is
8 authorities, tab 17, please, {AU/17/1}, and I will go to
9 page 11, {AU/17/11}, paragraph 33. This is another
10 type 3 case, a similar kind of application. You will
11 see Lord Justice Green at paragraph 33, in fact having
12 cited a lot of the judgment of the CAT we just looked at
13 in the earlier passages, he says:
14 "Pulling the strands together, the burden of proof
15 when pleading causation is on the defendant to
16 demonstrate ... that there is a legal and proximate,
17 causal, connection between the overcharge and the act of
18 mitigation ..."
19 Then the rest of it is about the strike-out test in
20 effect.
21 But he also has some observations about the
22 Supreme Court case at paragraph 48, which I think is
23 probably page 18, {AU/17/18}, where it is a very
24 different kind of cartel to ours. This case does not
25 involve trucks. But it says -- if we pick it up about

1 six lines down:
2 "It was plainly relevant that, by the time the
3 *Sainsbury's* case was heard ... the issue of
4 MIF pass-on generally had been live in the industry for
5 many years as had the compatibility of the MIF with
6 competition rules. The first EU Commission proceedings
7 ... were in the early 1990s. The CAT had addressed the
8 issue on several prior occasions ... It had been aired
9 in the [EU courts]. There was nothing secret about the
10 imposition of a MIF. It was a transparent, known,
11 charge and it was a recognised industry practice that
12 acquiring banks passed it on to retailers in the MSC ...
13 All of this was clearly relevant to the burden facing
14 a defendant in this sector seeking to raise a realistic
15 case of mitigation. The MIF was a systemic and
16 troublesome cost that any major retailer would,
17 inevitably, have had to confront. [These] facts
18 therefore contrast with those of a typical, secret,
19 price-fixing cartel."
20 Which is of course what we have.
21 THE CHAIRMAN: That was the point I was making, that
22 knowledge is relevant. But also do you have to in some
23 way separate out the overcharge from ordinary price
24 increases?
25 MR WARD: Of course.

1 THE CHAIRMAN: The overcharge is sort of built in from the
2 start to the prices because of the operation of the
3 cartel. When there are price increases over the years
4 due to other factors and that is passed on, how do you
5 separate out whether it is the overcharge bit or
6 ordinary price increases that are being passed on to the
7 customers?
8 MR WARD: Exactly. You cannot. It is a grain of sand on
9 the beach. It is a grain of sand. I will put all this
10 together now in my submission. They cannot possibly
11 satisfy the test in these cases. The connection between
12 the trucks and the end products is simply too weak and
13 indirect. It is not enough to show the business seeks
14 to recover its costs. They would have to show we
15 actually put up prices because of the overcharge, that
16 in the counterfactual the prices would have been lower.
17 As you have just said, sir, the claimants of course knew
18 nothing about the overcharge. DAF does not suggest
19 otherwise.
20 In the voluminous 2,000 pages of expert evidence and
21 goodness knows how much disclosure, there is no evidence
22 that anyone has identified of specific consideration of
23 truck prices in setting prices. There are cost stacks
24 that involve vehicles. Undoubtedly complicated cost
25 stacks went in and prices went out. It is a tiny amount

1 that has to be traced through this enormously complex
2 process of price-setting, even within the business.
3 In our submission, none of DAF's evidence actually
4 seriously grapples with this. Mr Bezant essentially
5 says it is 100% pass-on on the basis that costs were an
6 input into pricing, prices were set to recover costs,
7 but at least some of the time BT and Royal Mail did so.
8 But that is just nothing like sufficient. It is nothing
9 like. Because I am running out of time, I do not think
10 I can go through any examples of this.
11 SIR IAIN MCMILLAN: Just to be clear then, what you are
12 telling the tribunal is that the incremental overcharge
13 in terms of the whole of the company's costs was so
14 small that to recover that in the price would have
15 required a small fraction of a penny on a postage stamp
16 or a phone call or whatever, you know, that could not be
17 done or was not going to be done?
18 MR WARD: Certainly DAF have not succeeded in showing it.
19 As I said at the beginning, if you put all of the
20 overcharge on to the price of a stamp alone, as if that
21 is Royal Mail's only product -- in that one year I have
22 the data from 1999 to 2000 -- it is 0.014 of a penny,
23 0.014. It is completely unreal and there are enormously
24 convoluted arguments mounted in order to try and get
25 round this, but that is the sort of rock on which this

1 vast edifice founders.
2 If we put it in terms of British
3 Westinghouse, it is just far too indirect to satisfy the
4 case. What Mr Harvey says -- the gist of Mr Harvey's
5 evidence is exactly as you said, sir. The price setting
6 and regulation would have to be quite extraordinarily
7 fine-tuned to pick up these tiny increments of a price.
8 Even regulated prices, they may be set down to the
9 nearest penny in some cases, but they are based on huge
10 cost stacks, huge, and a big overlay of regulatory
11 judgment as well, because the regulators are balancing
12 all kinds of factors, they are testing assumptions, they
13 are flexing volume forecasts. Sometimes they disallow
14 costs that the regulated undertakings want to have taken
15 into account. Yet somehow this grain of sand is going
16 to be picked up at the end of this enormous chain and
17 shown in prices.
18 Now, in *Sainsbury's* they said, "Look, it
19 is all straightforward actually, this proximate cause.
20 It is just a question of whether prices went up". But
21 here we are not dealing with something that is just part
22 of the transaction charge. We are dealing with entirely
23 separate products sold on separate markets, tiny, tiny
24 increments of cost, and we just submit overall that
25 whether it is put in terms of fact or law, it is far too

1 small, far too indirect, to possibly satisfy the test.
2 Just pausing there, I am going to come back at the
3 very end of the day, if you let me, to the housekeeping
4 point. At the moment we have a day and a half dedicated
5 to this topic and we have 2,000 pages of expert evidence
6 and we are very concerned that that is not realistically
7 enough to deal with the argument and even deal
8 schematically with some of the detail. I am going to
9 ask for a little more time for that in the timetable.
10 But you can see why there is a whole edifice of
11 complexity below this. But frankly we think the point
12 is hopeless and we have been put to a huge amount of
13 effort. But at the end of the day DAF says this kills
14 our claim, that even if we have an overcharge, it is all
15 passed through by this means.
16 THE CHAIRMAN: If you think it is hopeless, why do you need
17 to spend any more time on it?
18 MR WARD: To simply go through it and show you why, when you
19 actually look at some of it -- I can only do it
20 selectively -- selectively some of the details, it does
21 not stack up.
22 I will come back to that at the end, if I may.
23 I am also out of time if I am going to give Mr Lask
24 a crack, so I need two more topics which I am going to
25 talk about in about five minutes, if I can -- because

1 that was only one kind of pass-on and the other one is
2 so-called resale or used truck pass-on.
3 The idea here is that Royal Mail passed through its
4 costs -- sorry, passed through the overcharge when it
5 sold used trucks to other buyers. I can show you very
6 quickly why we say this is basically, with respect,
7 nonsense. If we go to {E/IC13/49}, please -- actually
8 there is something here that is marked "confidential".
9 Is there a non-confidential version of this? Can we try
10 a non-confidential version because I do not actually
11 care about the bit that is marked "Confidential".
12 {E/13}, please.
13 Just scroll down a little bit more, please, in order
14 to look at this table. This is Professor Neven
15 summarising the nature of the trucks we are talking
16 about for Royal Mail and BT. Average new price, 26,000;
17 average resale price 3,000; average age of truck, six
18 and a half years; average mileage, 358,469. For BT the
19 trucks are in even worse condition. They are resold for
20 an average of £2,000 after 12.4 years and have
21 274,000 miles on them.
22 The argument is that they nevertheless -- the price
23 of these can be affected by the price of new trucks.
24 Indeed Professor Neven's view is that they are in
25 a sense substitutes. We do not accept that, but the

1 essential point is that these are just so far removed
2 that even if one has a change of substitution, as it
3 says in the economics, it would have to be
4 extraordinarily long and attenuated and there has to be
5 some very deep distant ripple effect between a brand new
6 shiny truck produced by somebody like DAF and what, with
7 greatest respect to my clients, does not look like
8 a high quality product at the end of it.
9 In order to try and counter this, we would
10 respectfully say, an obvious common sense proposition,
11 Professor Neven has done a whole regression analysis.
12 Now, he has done it despite the fact, of course, he has
13 no market-wide data, he only has DAF data and Mr Harvey
14 has explained why that in itself makes this hugely
15 problematic. But also what we say about this
16 eventually, ultimately, is the econometric model simply
17 cannot distinguish between two different things. One is
18 a correlation between the price of new and used trucks
19 caused by the fact they have essentially the same core
20 characteristics and a causal connection between the
21 price of new and used trucks that would show a price
22 rise in the used trucks caused by the overcharge. As
23 Mr Harvey puts it, a Ferrari will be more expensive new
24 and used than a Ford hatchback. So if you look at
25 a truck with six axles and a fantastic cab and all of

1 that new, it is not surprising that a similar type of
2 truck used costs more than a truck with two axles and
3 not a fantastic cab.
4 Professor Neven's model conflates these two things.
5 I am going to mention some jargon and then stop it. The
6 problem with his model, as Mr Harvey explains, is that
7 it risks either bias or multicollinearity, depending on
8 how it deals with these different truck characteristics.
9 Because of time, I am not going to open that any further
10 and I am going to turn super-briefly now to the final
11 topic, which is loss of volume. This is Royal Mail
12 only.
13 Royal Mail says, "Well, if you are right, DAF, that
14 we really did pass on this overcharge, then we lost
15 sales as a result because if you pass on the overcharge
16 and your prices rise, you lose marginal consumers who
17 are not willing to pay the price". Now, we do not
18 accept the premise, but actually Royal Mail has internal
19 models of price elasticity which both experts accept are
20 suitable to rely on and the result of this is you get
21 a volume effect. If you apply the logic of this, the
22 price elasticity, then you actually do get a volume
23 effect.
24 Mr Harvey says, on the basis of 15% supply pass-on,
25 it would be between 3 and 4 and £5.4 million.

1 Professor Neven says, "Well, I do not accept the
2 premise, of course, but it would be £4.1 million". But
3 this is all for Professor Neven subject to one major
4 proviso, and he says, "Well, but actually it could be
5 much less or even zero", because of what he calls
6 infra-marginal sales. His point here is that the
7 regulator would have acted to ensure that Royal Mail's
8 prices would have been set in such a way it would have
9 recovered the profits lost on the loss volumes through
10 slightly higher prices on the sales that it did make.
11 That is the argument.
12 We say again, with respect, it is just lacking in
13 reality. I can show you why very quickly, if we could
14 turn to {E/IC1/184}. This is Mr Harvey pointing out
15 what the scale of this volume effect is in real terms.
16 He says, last three lines:
17 "Even in respect of the 50% pass-on scenario, the
18 implied volume and price [changes] are very small. The
19 largest change in prices is an increase of 0.02%,
20 corresponding to a 0.01% decline in volumes ..."
21 Then the next page is a table which shows this on
22 a year-on-year basis.
23 So Professor Neven's argument is you start with
24 a change in volumes of 0.01%, that, if you pass through
25 50%, is 0.02%, but that 0.2% [sic] which is already

1 frankly too small to be realistically observable in the
2 pricing will somehow suffer some kind of micro-tweak and
3 micro-upward-tweak to compensate for the 0.01% loss of
4 volume. In our respectful submission, this is not only
5 lacking in evidence but it is entirely lacking in
6 reality.
7 Sir, it is 4.03 and I promised Mr Lask 30 minutes so
8 I am almost as good as my word. Unless I can assist
9 further, I will turn over to Mr Lask to talk to you
10 about tax and finance.
11 THE CHAIRMAN: Yes, thank you.
12 MR BEARD: Would it be sensible to sort out the housekeeping
13 points before Mr Ward finishes or should we leave that
14 to the end?
15 MR WARD: I would prefer to give Mr Lask a fair crack before
16 I derail him.
17 THE CHAIRMAN: We will deal with housekeeping at the end.
18 MR WARD: Thank you.
19 THE CHAIRMAN: Mr Lask.
20 MR LASK: Sir, I am grateful and I will be as brisk as
21 I reasonably can given the issues that need to be
22 covered.
23 Opening submissions by MR LASK
24 MR LASK: In addition to the overcharge itself, Royal Mail
25 claims damages for the cost of financing the overcharge.

1 Its case is that those damages should take the form of
2 compound interest based on its weighted average cost of
3 capital, which we refer to as "WACC". BT claim simple
4 interest at a fixed rate of 8% per annum. I will
5 address each in turn but will focus primarily on
6 Royal Mail's claim which has generated the greater level
7 of debate and indeed evidence between the parties.
8 So it is well established following
9 *Sempra Metals* that a claimant is entitled to
10 plead and prove that it has suffered loss as a result of
11 being kept out of its money and it is entitled to plead
12 and prove that such loss should be calculated on
13 a compound basis. We know that such claims are subject
14 to the normal principles governing damages claims.
15 The tribunal will no doubt be familiar with
16 *Sempra*, but I would like to show you the
17 case of *Equitas* in which the effect of
18 *Sempra* was helpfully summarised by
19 Mr Justice Males, as he then was. This is in
20 authorities bundle 3.6, {AU/3.6}, which is volume 2 for
21 those using the hard copy.
22 This claim arose from the failure by an insurance
23 broker to remit various sums on time to the syndicates
24 whose business the claimant had taken over. For the
25 most part the sums were eventually repaid so the claim

1 was for the losses suffered as a result of the claimant
2 being kept out of money for a period of time.
3 If we can pick the judgment up at paragraph 105 on
4 page 26, {AU/3.6/26}, this is where the judge introduced
5 the compound interest issue, issue D, "Calculation of
6 lost investment income", and proceeded first to review
7 the judgments in *Sempra*. I am not going to
8 take you through all of the passages from
9 *Sempra* save for one in particular, which is
10 paragraph 112 on probably page 28 -- yes, thank you,
11 {AU/3.6/28}. One sees here the extract from
12 Lord Nicholls' judgment in the House of Lords in
13 *Sempra*:
14 "... in principle, it is always open to a claimant
15 to plead and prove his actual interest losses caused by
16 late payment of a debt. These losses will be
17 recoverable, subject to the principles governing all
18 claims for damages for breach of contract, such as
19 remoteness, failure to mitigate and so forth."
20 Then 95:
21 "In the nature of things, the proof required to
22 establish a claimed interest loss will depend on the
23 nature of the loss and the circumstances of the case.
24 The loss may be the cost of borrowing money. That cost
25 may include an element of compound interest. Or the

1 loss may be loss of an opportunity to invest the
2 promised money. Here again, where the circumstances
3 require, the investment loss may need to include
4 a compound element if it is to be a fair measure of what
5 the plaintiff lost by the late payment. Or the loss
6 flowing from the late payment may take some other form."
7 So the categories are not closed.
8 "Whatever form the loss takes the court will, here
9 as elsewhere, draw from the approved or admitted facts
10 such inferences as are appropriate. That is a matter
11 for the trial judge. There are no special rules for the
12 proof of facts in this area of the law."
13 Then he says:
14 "But an unparticularised and unproved claim simply
15 for 'damages' will not suffice. General damages are not
16 recoverable. The common law does not assume that delay
17 in payment of a debt would of itself cause damage. Loss
18 must be proved."
19 Then moving on, I think it is probably two further
20 pages, to 30, {AU/3.6/30}, paragraph 118, having cited
21 the relevant extracts from the judgments in
22 *Sempra*, Mr Justice Males said this:
23 "Thus *Sempra Metals* was a case where,
24 despite what was said about the need to plead and prove
25 a loss, the damages actually awarded were determined by

1 taking a conventional rate and awarding compound
2 interest. This did not depend on any evidence as to the
3 taxpayer's actual loss, but was simply the interest
4 which a substantial commercial company would have to pay
5 to borrow the amount in question in the market at the
6 relevant time, regardless of what the taxpayer had
7 actually done. Although it may be that this approach
8 was not the subject of specific argument in the
9 House of Lords, it was clearly an approach which the
10 House endorsed."
11 So the judge here is recognising a degree of
12 pragmatism in the assessment of these sorts of damages.
13 Then at paragraph 123, which I suspect is on
14 page 31, {AU/3.6/31}, the judge sums up the impact of
15 *Sempra*:
16 "... I would summarise the position as follows.
17 "First, it is clear that damages are in principle
18 recoverable, subject to ordinary principles of
19 remoteness and mitigation, for breach of an obligation
20 to remit money, where the failure to remit has caused
21 a loss.
22 "Second [and this passage is particularly important
23 in my submission], unless there is some positive reason
24 to do otherwise, the law will proceed on the basis, at
25 any rate in the commercial context, that a claimant kept

1 out of its money has suffered loss as a result. That
2 represents commercial reality and everyday experience.
3 Specific evidence to that effect is not required and,
4 even if adduced, may well be somewhat hypothetical and
5 thus of little assistance. For example, a business man
6 may well be unable to say precisely what he would have
7 done differently if a particular payment had been made
8 to him when it ought to have been, especially if (as
9 apparently in this case) he was unaware that the money
10 was being withheld. Extensive disclosure, which would
11 no doubt be demanded by the defendant, is unlikely to
12 assist. But that does not mean that no loss has been
13 suffered. In the present case the general evidence of
14 the importance attached in the market to prompt
15 remittence of funds is more than sufficient to justify
16 the conclusion that the syndicates did suffer a loss by
17 being kept out of their money. Accordingly the question
18 in such a case is not whether a loss has been suffered,
19 but how best that loss should be measured."
20 I will not take you through all of the remaining
21 paragraphs but I will summarise their effect, if I may.
22 What the judge goes on to explain is that, absent
23 specific evidence to the contrary, the law will proceed
24 on the basis that the normal measure is the cost of
25 borrowing, using the conventional rate, but the position

1 may be different if there is good reason to think the
2 claimant would have done something other than borrowing
3 to replace the missing money; for example, if it did not
4 know the money was missing in the first place.
5 Then at paragraph 125 --
6 THE CHAIRMAN: This is dealing obviously with an obligation
7 to remit money?
8 MR LASK: Indeed and a delayed remittence of that money,
9 whereas what we are dealing here with is the other side
10 of the coin, an overcharge that kept the claimants out
11 of their money, that overcharge --
12 THE CHAIRMAN: Well, they did not have that money available
13 for other purposes.
14 MR LASK: Exactly, yes.
15 So paragraph 125, {AU/3.6/33}, the judge applies
16 these principles to the pre-1996 period and decides that
17 the relevant measure for that period is the conventional
18 rate of borrowing, LIBOR plus a margin of 1% compounded.
19 Then at paragraph 127 and following he deals with
20 the post 1996 period and he says:
21 "*Equitas*'s claim for lost investment income during
22 the period from September 1996 to March 2007 is advanced
23 by reference to the actual investment returns achieved
24 by *Equitas* during that period ... and these were
25 considerably higher than the conventional interest rate

1 of LIBOR plus 1% claimed ... [for] the earlier period."
2 Then at paragraph 133 he concludes on this aspect of
3 the claim, {AU/3.6/35}, and he says "if *Equitas* had been
4 confined to a claim as assignee in the period", it would
5 only have been able to recover at the cost of borrowing,
6 but it was "not so confined and is entitled in principle
7 ... to recover at the rate of return achieved on its
8 investment funds during the whole of the relevant
9 period".
10 I emphasise that because that later period is an
11 example of the court, on the evidence -- the evidence of
12 actual rates of return -- adopting and compounding
13 a rate other than the conventional cost of borrowing.
14 There is no suggestion in the judgment that there was
15 detailed witness evidence of what the claimant would
16 have done in the counterfactual. There was simply
17 evidence of the actual rates of return, and that is what
18 the judge relied on.
19 So to sum up, the key question in the commercial
20 context is how best to measure the loss that a claimant
21 has suffered as a result of being kept out of its money,
22 in this case the overcharge. Sometimes this will simply
23 be the cost of borrowing at a conventional rate but the
24 court will adopt other rates where this is justified by
25 the evidence. In order to illustrate, may I refer you

1 to the case of *Multi Veste*, which is
2 authorities 2.18, the same volume, volume 2 of the hard
3 copy bundle, {AU/2.18/1}.
4 This is a judgment by Mr Justice Lewison, as he then
5 was. This case concerned an agreement between the
6 developer of a new shopping centre in Wolverhampton and
7 a consortium of investors, and the investors failed to
8 provide the agreed bank guarantees, the project was
9 abandoned and the developer sued for a breach of
10 contract.
11 The judge found that there had been a repudiatory
12 breach which had entitled the developer to terminate,
13 but he then found on the evidence -- I am just
14 summarising the background here -- that even if the
15 promised bank guarantees had been provided, the project
16 would not have gone ahead for other reasons. So the
17 developer had failed to prove that the breach had caused
18 any loss and was only entitled to nominal damages.
19 Notwithstanding that, notwithstanding that this
20 rendered the question of quantification academic, the
21 judge went on to consider how he would have decided the
22 case on the quantum had he been required to. This is on
23 page 65, {AU/2.18/65}, paragraph 235. You see there he
24 says that the quantum of potential loss is academic.
25 Then he says at 236:

1 "Multi's case on loss is based on a calculation
2 showing ..."
3 Essentially the proposed calculation was to take the
4 sums that the developer would have made from selling
5 half the development, add on the value of the share it
6 was going to retain and then deduct the cost of
7 financing and building the development because, the
8 development having not gone ahead, the claimant had
9 saved the costs of financing. So as part of assessing
10 what the quantum of loss would have been, the judge had
11 to grapple with the measure of financing losses.
12 So how do we identify the financing losses that need
13 to be deducted from the rest of the claim? If one turns
14 to paragraph 257 on page 69, {AU/2.18/69}, this is under
15 the heading -- you cannot quite see the heading, but the
16 heading is "Multi's cost of capital". There is
17 a further heading above that, "Finance costs". That is
18 just really for context. The relevant passage is at 257
19 and I am reading from six lines down:
20 "Multi says that it must give credit for the amount
21 it has saved as a result of not having had to finance
22 the development [so Multi is the claimant]. The
23 NI Investors, on the other hand, say that it is not
24 a question of giving credit, because the claimant had no
25 assets of its own. Rather, the WACC is a cost which the

1 claimant would have borne in carrying out the
2 development, and it [is] to be treated no differently
3 from the other finance costs. All sources of funds are
4 external to the claimant."
5 This is the judge expressing his own view:
6 "This submission is borne out by what actually
7 happened. When Multi carried out its own cashflow
8 calculations at the time it showed the cost of capital
9 on a compounded basis. To my mind this is a strong
10 pointer towards the conclusion that this is the correct
11 method to adopt. The contrary argument is based on the
12 proposition that the return on capital would have been
13 paid out to Multi's creditors and shareholders. But
14 without income coming in it is impossible to see how
15 this could have been arranged."
16 Then he concludes:
17 "I prefer the argument of the NI Investors."
18 What is significant, in my submission, about this is
19 the judge accepts the proposition that the WACC is
20 a cost which the claimant would have borne in carrying
21 out the development and is to be treated no differently
22 from other finance costs. In accepting that
23 proposition, the judge placed weight on the evidence of
24 how the claimant had actually assessed the financing
25 costs at the time. I emphasise that because we have

1 similar evidence in this case, so it is important that
2 the judge attached weight to that sort of evidence in
3 accepting the proposition that the WACC was a relevant
4 measure of financing costs.
5 THE CHAIRMAN: They used it for the purposes of that
6 particular transaction that was under scrutiny?
7 MR LASK: That is correct, yes, and I do not say we have
8 evidence quite to that effect, but we do have evidence
9 of Royal Mail using the WACC in its business as an
10 investment appraisal tool, so we have evidence that
11 Royal Mail considered the WACC to be an appropriate
12 measure of its financing costs. Just as
13 Mr Justice Lewison attached weight to that sort of
14 evidence in *Multi Veste*, I submit that this tribunal
15 should attach weight to the corresponding evidence that
16 we have in this case.
17 SIR IAIN MCMILLAN: Can I ask a question? Does that mean
18 that the WACC is a formula that could be used
19 appropriately? So, for example, where Royal Mail leased
20 the trucks and paid the leasing costs over the time that
21 it was an asset, that was not a capital cost, it was
22 a revenue cost and therefore the incremental difference
23 of the overcharge would be the correct one there and not
24 the weighted cost of capital?
25 MR LASK: If I understand the question correctly, then yes,

1 that is correct. The WACC is not used in the context of
2 assessing lease payment and the overcharge on the lease
3 payment. Of course those matters are actually agreed
4 within the joint leasing model that has been produced
5 but, no, the WACC in this case is purely used as
6 a measure of Royal Mail's financing costs once one has
7 identified the overcharge.
8 SIR IAIN MCMILLAN: Thank you.
9 MR LASK: So just to finish on *Multi Veste*, I say it is
10 important because it is an example of a case in which
11 the court was willing to adopt the WACC as a measure of
12 the company's financing costs and to do so on
13 a compounded basis where the evidence justified it. It
14 is important because it is inconsistent with DAF's
15 submission that recourse to the WACC is somehow
16 precluded as a matter of law and it is inconsistent with
17 the argument advanced by DAF's expert, Mr Delamer, that
18 the WACC is irrelevant because the use of equity to fund
19 expenditure does not represent a cost to the business.
20 So turning then to the evidence in this case, in my
21 submission Royal Mail's evidence makes plain that the
22 most appropriate measure of its financing losses, the
23 losses that it suffered from having to finance the
24 overcharge, is its WACC. It bears emphasis that the
25 parties' experts have agreed the calculation of

1 Royal Mail's WACC. The figures are agreed and set out
2 in table J1 to the joint statement. Just for your note,
3 that is at {E/85/18}. The issue between the experts is
4 whether the WACC is an appropriate measure of
5 Royal Mail's losses and the tribunal will obviously hear
6 from the relevant witnesses and experts on this during
7 the course of the trial, but at this stage I would like
8 to highlight five points.
9 Firstly, the evidence of Royal Mail's CFO,
10 Mr Jeavons, is that trucks expenditure was, as a matter
11 of fact, financed through a funding mix of debt and
12 equity. I will just give you the relevant reference
13 rather than take you to the evidence. It is
14 paragraphs 22.1 to 22.5 of Mr Jeavons' first statement
15 at {D/7/51}, so that is the first point.
16 Second, there is no dispute between the parties that
17 the use of debt to finance trucks expenditure entails
18 a cost to the business because increasing borrowing or
19 deferring repayments on existing borrowing results in
20 a company having to pay out additional interest.
21 Third, the key issue between the experts is whether
22 the use of equity capital, the other component of the
23 WACC, and particularly retained earnings -- whether the
24 use of that source of funding to finance trucks
25 expenditure also entails a cost to the business.

1 This is a matter on which the tribunal will hear
2 oral evidence, but just to outline it, Royal Mail's
3 expert, Mr Earwaker, is unequivocal in his view that the
4 use of equity capital does represent a cost to the
5 business. Indeed he regards it as a basic principle of
6 modern corporate finance. Again, just for your note, he
7 deals with this particularly in Earwaker 2 at section 3,
8 and that is {E/32/14}.
9 The contrary view advanced by Mr Delamer is that the
10 use of equity capital and in particular retained
11 earnings is free from a company's perspective, and that
12 is where the experts disagree. Mr Earwaker explains why
13 he thinks that view is not a tenable one. So that is
14 the third point.
15 Fourth, once it is recognised that in financing the
16 overcharge Royal Mail incurred both the cost of debt and
17 the cost of equity, the question becomes, "Well, how
18 should one measure those costs?", and in my submission
19 the answer is the WACC.
20 The experts agree that the WACC is a standard
21 textbook measure of a firm's cost of capital. They
22 agree on that. They agree how it should be calculated
23 and, as I have said, they agree on what Royal Mail's
24 WACC was over the relevant period. Just, again, for
25 your note, if one looks at the joint statement, item C.1

1 on page 3 of tab -- sorry, {E/85/3}, that is where one
2 sees the agreement that the WACC is a standard textbook
3 measure of a firm's cost of capital. That is the fourth
4 point.
5 Fifth and importantly -- and I have referred to this
6 already -- Royal Mail in practice used the WACC as
7 a measure of its financing costs. It still does and it
8 has done so since at least 2002. In particular, it uses
9 the WACC for investment and appraisal purposes, to
10 assess whether the proposed investments can be expected
11 to cover the business' financing costs and then to
12 assess the success of implemented investments.
13 Rather than take you to the underlying evidence,
14 I will give you the reference again. It is
15 Ms Bradshaw's evidence, sections 5 to 7, and that
16 evidence begins at {D/2/11}. Ms Bradshaw explains how
17 the WACC was used within Royal Mail for investment
18 appraisal purposes; also Mr Jeavons' first statement
19 again, paragraph 20.2, {D/7/47}. Mr Jeavons explains
20 why, given the way in which it was used, it was vital
21 that Royal Mail calculated its WACC accurately. He sets
22 out the consequences of a failure to do so.
23 THE CHAIRMAN: So the WACC is the calculation of the cost of
24 both equity and debt?
25 MR LASK: Yes, it is a weighted average of the two.

1 THE CHAIRMAN: That is accepted by both experts?
2 MR LASK: Both experts agree on what the WACC is and they
3 agree how to calculate it --
4 THE CHAIRMAN: Mr Delamer says that equity is not a cost.
5 MR LASK: In this case, the use of equity by Royal Mail to
6 finance trucks was not a cost to Royal Mail. That is
7 what Mr Delamer says. It was not a cost to the
8 business. He says it might have been a cost to the
9 shareholders but not to the business.
10 THE CHAIRMAN: But it can sometimes be a cost to the
11 business, depending on how the equity is used? I mean,
12 if it is used in the calculation of a WACC, then that
13 assumes that it is a cost.
14 MR LASK: Certainly that is our submission.
15 THE CHAIRMAN: Yes.
16 MR LASK: I will not speak for Mr Delamer but that will
17 obviously be a matter for oral evidence.
18 Just to sum up this final point, the fact that
19 Royal Mail has in fact used the WACC as a measure of its
20 financing costs when taking major investment decisions,
21 so obviously for purposes entirely unconnected to its
22 arguments in these proceedings -- the fact that it has
23 used it in the real world is a very strong pointer, in
24 my submission, to it being the appropriate measure of
25 its costs.

1 Turning then quickly to what DAF says about the
2 WACC, DAF contends that the claim based on the WACC
3 should fail for two reasons: first, because it is bad in
4 law and, secondly, because it is bad in economics. That
5 is paragraphs 184 to 187 of DAF's skeleton, {S/3/58}.
6 I have already touched on the second of DAF's points on
7 the economics and obviously that is a matter for the
8 expert evidence, but I do want to address briefly the
9 first of DAF's points which we say rests on
10 a misinterpretation of the relevant authorities. In
11 particular, neither of the cases cited by DAF,
12 *Sainsbury's* and *BritNed*,
13 establish that the WACC cannot as a matter of law be
14 used as a measure of a claimant's financing costs. They
15 simply find that recourse to the WACC was not justified
16 on the evidence and submissions before the court.
17 You will recall from paragraph 96 of Lord Nicholls'
18 judgment in *Sempra Metals*, which we looked at, that the
19 House of Lords did not seek to limit the types of loss
20 which could be pursued by way of a claim for interest.
21 It all depends on the evidence. Then we saw in
22 *Multi Veste* that the court was prepared to accept the
23 WACC as a measure of financing costs on the evidence
24 before it.
25 Sir, given the time, I will not take you to those

1 judgments but I will give you the relevant references
2 and just make my submissions on them in summary, if
3 I may. Firstly, *Sainsbury's*, first
4 instance, is at authorities 6.1, {AU/6.1}. I would
5 invite the tribunal in its own time to read
6 paragraphs 530 to 542, which begins on page 295 of the
7 bundle {AU/6.1/295}. To summarise my submissions on it,
8 *Sainsbury's* case for the WACC in that case was based on
9 what is called the Modigliani-Miller theorem, which is
10 an economic model which posits that any reduction in the
11 cost of debt will be perfectly offset by an increase in
12 the cost of equity so that you do not need to actually
13 look at the real borrowing rates and the tribunal held
14 that that theorem was wholly unsuited to a real world
15 assessment of damages. But the short point is that that
16 theorem forms no part of Royal Mail's case and no part
17 of Mr Earwaker's opinion.
18 Mr Earwaker's opinion that the WACC is an
19 appropriate measure is firmly grounded in Royal Mail's
20 factual evidence, such as the fact that it used the WACC
21 in real life. Importantly, the tribunal in
22 *Sainsbury's* -- and you see this at
23 paragraph 541 -- did not rule out the WACC as a matter
24 of principle. What it did is state that the WACC may
25 very well be a suitable measure in an appropriate case,

1 but that was not an appropriate case.
2 THE CHAIRMAN: I assume nothing was said on the appeals --
3 MR LASK: Not on that issue.
4 THE CHAIRMAN: No.
5 MR LASK: I will be corrected if I am wrong but I do not
6 think that issue was covered.
7 Then *BritNed* again, I will give you the
8 reference. It is {AU/7.1/192}, paragraphs 543 to 549.
9 That was also a judgment of Mr Justice Marcus Smith, as
10 was *Sainsbury's*, so he has looked at WACC on both
11 occasions. In that case, the WACC claim failed because
12 the only cost identified in *BritNed*'s expert evidence
13 was the cost borne by *BritNed*'s shareholders in
14 injecting equity. So the judge's conclusions were based
15 on the particular evidence before him. He did not
16 purport to hold that as a matter of law a claimant could
17 never recover the costs of equity financing.
18 Importantly in this case, the claimants' expert,
19 Mr Earwaker, has specifically considered the argument
20 that the use of equity financing is free. That is
21 Mr Delamer's argument. Mr Earwaker has specifically
22 considered that, the argument that it is free from the
23 perspective of the business, and has explained why that
24 is simply wrong. So that is the WACC.
25 Royal Mail does have an alternative claim for

1 compound interest based on the alternative rates
2 calculated by Mr Earwaker, and those rates are based on
3 Royal Mail's cost of debt and foregone interest on its
4 short-term investments. In essence, Mr Earwaker has,
5 for completeness, sought to identify the next best
6 measure of Royal Mail's financing losses after the WACC.
7 For this purpose he considers it reasonable to assume
8 that Royal Mail would have financed the overcharge by
9 drawing down on short-term investments prior to 2008 and
10 via additional indebtedness after 2008.
11 This approach is summarised in the joint statement
12 at item D.4, which is at {E/85/14}. It is worth noting
13 that Mr Earwaker's alternative approach is very similar
14 to Mr Delamer's, what he calls his rate 4 approach,
15 albeit they use different ratings. But there is a large
16 measure of common ground between them in that the
17 experts agree the estimates of Royal Mail's returns on
18 short-term investments. They agree on the cost of debt
19 for a large chunk of the relevant period.
20 There are differences in relation to the later years
21 and they will be explored in cross-examination, but
22 there is a good measure of common ground in relation to
23 Mr Earwaker's alternative approach. Indeed,
24 Mr Delamer's own position is that the relevance of
25 Royal Mail's short-term investments and debt when

1 estimating the financing costs Royal Mail could have
2 avoided in the counterfactual is self-evident. That is
3 how he describes it. One sees that at D.3 of the joint
4 statement, which is {E/85/13}. That is Royal Mail's
5 claim.
6 Dealing then briefly with BT's claim for interest,
7 BT has claimed simple interest at 8% or at such other
8 rate as the tribunal determines. The authorities
9 indicate that with a claim for simple interest, the aim
10 is to identify a fair conventional rate using a broad
11 brush approach, and that is what BT has sought to do.
12 Just for your note, one sees the relevant principles in
13 the *BritNed* supplemental judgment at
14 paragraph 17, and that authority is at {AU/7.101}.
15 I should say this has been BT's pleaded position
16 since January 2018. Now, DAF pleaded a bare denial in
17 response to the claim for simple interest and we had
18 assumed that to be a corollary of its denial that there
19 was any overcharge, but DAF took no specific point on
20 BT's claim until its skeleton argument, which obviously
21 came in last month. There has since been some
22 correspondence on this and, in light of this belated
23 objection, BT is considering the position and intends to
24 write to DAF shortly. We will of course update the
25 tribunal accordingly.

1 If I might have three more minutes, I can deal with
2 tax quite briefly.
3 THE CHAIRMAN: All right.
4 MR LASK: This is the issue of tax adjustments which are
5 relevant to both claims, both Royal Mail's and BT's. It
6 is agreed that the claims need to be adjusted for tax in
7 two ways. First, they need to be reduced to reflect the
8 reduction in corporation tax liability that will have
9 accrued to the claimant as a result of the overcharge
10 because higher trucks prices equal lower profits equal
11 less tax.
12 Secondly, they need to be increased to reflect the
13 tax that the claimants will have to pay -- to reflect
14 the fact that the claimants will have to pay tax on
15 their damages. So the parties are agreed that those
16 adjustments need to be made and they are agreed that
17 they do not simply cancel each other out.
18 Now, Royal Mail's tax adjustments have been the
19 subject of detailed analysis and modelling by the tax
20 experts, Mr Singer and Mr Pritchard. As you may have
21 seen in the skeleton argument and the joint statement,
22 there is happily a high level of agreement as regards
23 the modelling. For your note, the joint statement is at
24 {E/86/1}. Since the joint statement was produced, there
25 has been some further narrowing of the issues and an

1 exchange of revised models. On the claimants' side, we
2 are currently considering revised modelling provided by
3 Mr Pritchard over the weekend and we will update the
4 tribunal on the remaining areas of disagreement as soon
5 as possible and certainly in advance of the non-sitting
6 week.
7 With BT, the tax adjustments are more
8 straightforward and have been carried out by Mr Harvey.
9 Again, for your note, he sets out the adjustments in his
10 first overcharge report at paragraphs 4.112 to 4.123.
11 That is {E1/116}.
12 Essentially the adjustments in BT's case have been
13 made by simply applying the relevant corporation tax
14 rates rather than seeking to model what would have
15 happened in the counterfactual.
16 Since no objection had been raised to Mr Harvey's
17 adjustment which was served in November 2021, we had
18 understood them to be common ground, but, again, DAF's
19 skeleton argument has indicated otherwise. They say it
20 is actually not common ground, so, again, we are
21 corresponding with DAF in an effort to understand the
22 position and hopefully narrow the areas of disagreement
23 as far as possible. Again we will update the tribunal
24 as soon as we are able to.
25 Unless I can assist, those are my submissions.

1 THE CHAIRMAN: It sounds like things are narrowing on at
2 least the tax front.
3 MR LASK: Happily, yes.
4 THE CHAIRMAN: Good. Thank you, Mr Lask.
5 Housekeeping
6 MR WARD: I have my two very brief housekeeping matters,
7 with apology but very briefly. The first is the
8 additional witness statement. As you heard this
9 morning, it is not opposed by DAF now. They want costs
10 to be reserved. We are quite content with that.
11 THE CHAIRMAN: I thought I had already ordered that.
12 MR WARD: Sorry, I did not know if you were -- it was simply
13 to seek formally the permission to adduce the evidence.
14 THE CHAIRMAN: Yes.
15 MR WARD: Thank you.
16 The other issue was just about timetable and the
17 supply pass-on issue. Obviously you said to me, "Well,
18 I am not sure why you need time given how
19 straightforward you say it is". At the moment the
20 timetable allows one and a half days between the
21 advocates to cross-examine this issue. There are, as
22 I have said, 2,000 pages of expert evidence and there
23 are a myriad of different periods and charge controls
24 that are at stake.
25 THE CHAIRMAN: Looking at the timetable, it looks like there

1 is two days for the hot-tubbing and then one day for
2 cross-examination; is that wrong?
3 MR WARD: No, sorry, sir, we must be at slight
4 cross-purposes and it may be my fault. The supply
5 pass-on which is in the week of 6 June --
6 THE CHAIRMAN: I am so sorry. I was looking at overcharge.
7 MR WARD: That is quite all right. What we see is a day and
8 a half with a possibility of a little overrun into the
9 afternoon of the second day, where there is a day and
10 a half for financing.
11 Of course, financing is a very big number in this
12 claim and supply pass-on, according to DAF, knocks out
13 our entire claim. What we have asked, with reluctance,
14 is that there should be an additional day for supply
15 pass-on, which would be achieved, if the tribunal were
16 willing to indulge it, by essentially starting supply
17 pass-on at the beginning of the week and moving used
18 trucks to what is currently the non-sitting day on
19 a Friday. The reason is really this, sir: obviously any
20 cross-examination of this is going to have to be largely
21 high level because we would need a week to cross-examine
22 up hill and down dale of everything, but what we do need
23 is time to show the tribunal and put to the witness
24 enough of the granular detail to show why the high-level
25 points I have made this afternoon really are borne out.

1 Even then it can only possibly be in a way that is
2 somewhat stylised by example, but just to give you the
3 flavour, for Royal Mail there are effectively four
4 different periods that matter; for BT, there are just
5 huge numbers of different products -- of BT business
6 divisions and different types of pass-on, charge control
7 and so forth. That is how we end up with this vast
8 amount of evidence. Cross-examination is going to have
9 to be, in a sense, representative rather than
10 comprehensive, but on the current timetable we have
11 effectively one and a half hours for each claimant.
12 THE CHAIRMAN: Well, what has changed since this timetable
13 was drawn up?
14 MR WARD: Only that, having made a conscientious effort to
15 prepare cross-examination that would fit for the
16 timetable in the last days and weeks, it has just become
17 clear that it is just not realistic. That is the thing
18 that has changed and obviously this timetable was agreed
19 in advance of that, in good faith and with goodwill, in
20 the hope that it would look sufficient. I just have to
21 put my hands up and say it really does not.
22 THE CHAIRMAN: Right.
23 MR BEARD: Both of the matters are essentially last-minute
24 issues. We have really dealt with Mr Jeavons' second
25 statement. Receiving a second witness statement on

1 Thursday night, one working day before the hearing, is
2 just not an acceptable way of dealing with matters. Now
3 we get a further request over the weekend or -- I am so
4 sorry -- it was last week in relation to the timetabling
5 in circumstances where all of these reports, all of the
6 structure of what we are dealing with, have long been
7 set. The supplementary reports in relation to supply
8 pass-on were served in February of this year.
9 Everyone was well aware of the volume and detail of
10 the material. Everyone has been well aware of the
11 regulatory structures. Although Mr Ward did not
12 emphasise it in his submissions, the key issue here is
13 how the regulatory schemes worked. Now, in fact there
14 is a large measure of agreement about the background
15 complexity of the regulatory schemes. Mr Ward's clients
16 say, "Oh, well, there was lots of judgment". We say
17 actually there were more mechanistic tools which meant
18 that there was supply pass-on in these circumstances.
19 We think that the sensible course is we look at
20 these three days of supply pass-on and financing and
21 essentially each party has a day and a half that it can
22 divide essentially how it wishes amongst those sections.
23 So if Mr Ward wants to spend more time on supply pass-on
24 and less on financing, that is a matter for him. We are
25 happy to go with that flexibility. We do not think it

1 is appropriate sitting again on Friday and we do not
2 want to move matters into the following week and
3 compress the written closing period that we have, which
4 is already relatively tight.
5 THE CHAIRMAN: So you do not want to change the --
6 MR BEARD: We do not want to change things.
7 THE CHAIRMAN: You are happy for those three days for supply
8 pass-on and financing to be used how --
9 MR BEARD: Yes, you get a day and a half as a party and you
10 decide how you are going to play it.
11 THE CHAIRMAN: Obviously there are different experts for --
12 MR BEARD: With different experts, yes, of course. We also
13 have indicated in correspondence that if it is a matter
14 of asking the tribunal to sit early and late, because
15 you would be dealing with different witnesses and
16 different cross-examiners, it might be that the tribunal
17 would tolerate that. But beyond those --
18 THE CHAIRMAN: It is still quite a long way off, frankly,
19 and quite a lot might happen in the meantime, including
20 there will have already been by then quite a lot of
21 cross-examination of Mr Harvey, who is obviously the
22 expert on supply pass-on --
23 MR BEARD: Yes.
24 THE CHAIRMAN: -- but you have a different expert. You have
25 Mr Bezant, is that not right?

1 MR BEARD: Yes, we do. I am not intending going to
2 Mr Harvey early on supply pass-on, tempting though it
3 may be. I was going to --
4 THE CHAIRMAN: No, of course not.
5 I think we should probably just have a think about
6 that overnight and we will come back to you with our
7 thoughts tomorrow.
8 MR BEARD: I am grateful.
9 THE CHAIRMAN: I do not know whether it is convenient to sit
10 on that Friday. It might not be. If we were minded to
11 extend the time, I would have thought it might be better
12 to go into a bit more of the following week.
13 MR BEARD: I think there are issues --
14 THE CHAIRMAN: Okay, we will talk.
15 MR BEARD: There are some potential issues on availability
16 as well, I think.
17 THE CHAIRMAN: Of the experts?
18 MR BEARD: Yes, and so I think it involves some quite
19 complicated rearrangement of --
20 THE CHAIRMAN: No, I understand. You would want to know
21 well in advance.
22 MR BEARD: Well, (a) we would want to know well in advance.
23 Mr Ward has suggested moving used trucks into the
24 following week and not sitting on the Friday and now he
25 is talking about possibly having that on a Friday. I am

1 not sure quite how it will all work, but we say this was
2 the timetable, we all knew about this. I understand
3 that, as you develop cross-examination, you come up with
4 new ideas, I am not disputing that, but the basic
5 framework of you have got thousands of pages of
6 material, actually you are going to have to focus on
7 some pretty detailed stuff and, yes, it is going to have
8 to be limited was apparent to everyone when we had this
9 timetable negotiation previously.
10 THE CHAIRMAN: I cannot remember whether -- well, this was
11 one of the issues where it was agreed there was going to
12 be no concurrent evidence. It was all --
13 MR BEARD: Yes, I think we left it open. I think we left it
14 open and I think the tribunal in the end decided -- if
15 the tribunal wants to revisit that, I do not think we
16 have a massive problem with the idea of some hot-tubbing
17 on supply pass-on, but that again --
18 THE CHAIRMAN: We are having it for resale pass-on, which is
19 used trucks; is that right?
20 MR BEARD: Yes, we are. As I say, if the tribunal wishes to
21 revisit that element of it, that is fine by us, but what
22 we are not keen to revisit is the timing staging, if
23 that is a way of putting the point.
24 MR WARD: Sir, if you are minded to allow us to do this,
25 I am sure we can work out a way with DAF. Of course it

1 is 3D chess with expert availability, but if we can hear
2 from you on the principle, then we will find a way.
3 THE CHAIRMAN: All right. We will let you know tomorrow
4 morning what we think.
5 MR WARD: May I just say how grateful I am that you have
6 indulged us both before and after.
7 THE CHAIRMAN: I hope that is not going to set a precedent.
8 MR WARD: We hope not either.
9 THE CHAIRMAN: I hesitate to ask but, Mr Beard, do you want
10 to start --
11 MR BEARD: No, I do not.
12 THE CHAIRMAN: Are you happy starting at 10.30?
13 MR BEARD: It is lovely seeing everybody, but I would much
14 rather start at 10.30 and if I require an indulgence to
15 4.30, I will ask at lunchtime, if I may.
16 THE CHAIRMAN: All right. Thank you very much, everyone.
17 We will see you at 10.30 tomorrow morning.
18 (4.45 pm)
19 (The hearing adjourned until
20 Wednesday, 4 May 2022 at 10.30 am)
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