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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

Monday 27 June 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**

A P P E A R A N C E S

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

Monday, 27 June 2022

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(10.30 am)

THE CHAIRMAN: Good morning.

MR WARD: Good morning.

THE CHAIRMAN: Carry on.

MR WARD: Thank you.

Closing submissions by MR WARD (continued)

MR WARD: I am going to start with resale pass-on, also known as "used trucks", then delay with supply pass-on and then loss of volume. Then this afternoon Mr Lask is going to talk about finance, tax and timelines.

Can we please first go to DAF's closing arguments at {S/11/7}, which is volume 2 of their closing arguments. Here is a table which explains how, on their view, everything fits together. You will see that we have complements where they say 6% or 25%, depending on Royal Mail or BT, re-sale pass-on of 13% or 8% and then supply pass-on, which is deduct 100% of the remaining overcharge. So there are lots of routes according to DAF whereby we lose and then supply pass-on is a sort of residual category and indeed they are treating it as if they can average out across different periods, which is actually quite an important issue in Royal Mail that we will come to and is indeed unjustified.

But what this shows you, in our respectful

1 submission, is how extreme DAF's case is because, in
2 fact, they say, really we claim -- we recover the
3 overcharge in all sorts of ways. Indeed one might
4 almost feel grateful that they do not regard them as
5 cumulative, but it is also important to recognise --
6 sorry.

7 THE CHAIRMAN: Are they not cumulative?

8 MR WARD: In the sense that I do not think they are claiming
9 for 123%, 126% --

10 THE CHAIRMAN: No, they claim back from --

11 MR WARD: No, there is no counterclaim that we are aware of.

12 MR BEARD: No, tempting at this stage though it is.

13 MR WARD: It is a relief, it is a relief.

14 MR BEARD: I think the clue is in "remaining overcharge",
15 the word in there.

16 THE CHAIRMAN: Do you agree that order of looking at things,
17 so that you look first at complements, then re-sale
18 pass-on, then supply pass-on?

19 MR WARD: Well, not necessarily. I do not think there is
20 any kind of tight logic to this. One thing to bear in
21 mind is that it is common ground that the supply pass-on
22 does not include the residual value of the truck, and
23 that is because of the way that both BT and Royal Mail
24 pass truck charges on through their organisations. Just
25 for the transcript, we explain this in annex 2 to our

1 closings at pages 1 to 4. But what we do respectfully
2 submit is that what this really does show is how
3 overblown the case really is. There are so many ways
4 for us to lose, apparently.

5 On resale pass-on, which I am going to talk about
6 now, the argument is that Royal Mail and BT recovered
7 part of the overcharge when they eventually sold the
8 trucks on the second-hand market.

9 But there are two things to bear in mind here. The
10 first thing is this 13% to 8% is of the total overcharge
11 passed on. It is not in some way linked to the residual
12 overcharge that you might regard as reflected in those
13 trucks when they were sold. It is 13 to 18% [sic] of
14 the entire overcharge and indeed not all of the trucks
15 were sold. Quite a lot of them were scrapped. So it
16 is, in our respectful submission, a case that is put
17 very high.

18 Against that, I wanted to turn to the substance of
19 it. The argument is, of course, as you know, that the
20 prices Royal Mail and BT received when they sold the
21 trucks were higher because of the cartel, either through
22 the so-called demand effect or the supply effect. The
23 basic problem here is, of course, that these particular
24 used trucks are very far removed indeed from new trucks.

25 It is worth, if we may, just going back to {E/2/13},

1 which is Professor Neven's report. I am so sorry, this
2 is the wrong reference. I will give you the correct
3 reference. It is {E/13/49}. Can we scroll down
4 a little more, please? For some reason, in this version
5 the number of trucks sold is blanked out. I cannot
6 imagine why. But the point is, as you have seen before,
7 you can see the new price against the resale price and
8 then you can see the average age, six and a half years
9 for Royal Mail and 12.4 years for BT, and the average
10 mileage, 358,000 for Royal Mail and 274,000 for BT.

11 So we are looking at trucks that are, if one might
12 put it this way, a very long way indeed from new trucks.
13 It is obvious -- it is just self-evident -- that
14 a person who might be buying a truck with 350,000 miles
15 on it at auction is hardly in the market for a new
16 truck, even if, as Professor Neven would say, they both
17 represent a stock of transport services. Indeed we have
18 noted in DAF's closing that it is common ground that
19 there is no direct substitutability here and, that is
20 paragraph 63 of volume 2 of their closing.

21 So what we are looking at, then, is much more
22 indirect effects. If there is going to be a connection
23 between brand new trucks and these rather elderly and
24 run-down vehicles, it has got to be something more
25 indirect. On the demand side, the argument is that

1 there is a chain of substitution and, of course, the
2 starting point is it would have to be very long and
3 unbroken if there is going to be a ripple effect at the
4 top of the chain, where shiny new trucks cost a lot more
5 money, all the way down to people at auctions bidding on
6 trucks for £2,500 with 350,000 miles on them. There is
7 certainly no direct evidence for that and indeed this is
8 the core intuition behind Mr Harvey's rejection of this
9 argument.

10 So the only evidence we have is Professor Neven's
11 regression, which I am going to come on to, and
12 similarly, on the supply side, in other words what
13 effect might the overcharge have on the supply of
14 potential used trucks, the argument is higher prices
15 mean fewer new trucks are sold and fewer used trucks are
16 available. Mr Harvey makes the point, "Well, there is
17 an awful lot of potential used trucks out there", and he
18 thought it was rather unlikely that an overcharge on new
19 trucks would actually make a difference to the prices on
20 these trucks given the scale of supply.

21 It gets us into the question of what is the
22 elasticity of demand for new trucks. You will recall
23 a discussion in the hot tub about Ivaldi and Verboven
24 and the Commission numbers that were in their study, and
25 it is fair to say neither expert was willing to adopt

1 those numbers.

2 Mr Harvey did some analysis of his own on this, but
3 in his own report I think he accepts the position is
4 uncertain. So DAF has no robust number here that it can
5 apply and, again, Mr Harvey's intuition is, well, demand
6 for new trucks might be expected to be relatively
7 inelastic, given how important they are to the
8 businesses that use them.

9 But all this means is that, once again, all we have
10 here is Professor Neven's regression analysis. Now, as
11 you know, Mr Harvey did not do a regression analysis
12 here and he explained that there were significant
13 problems of the adequacy of the data. In our respectful
14 submission, this is indeed a very, very serious problem
15 for Professor Neven. The first point is, of course, we
16 only have new truck data for DAF, but other
17 manufacturers' new truck data is obviously going to
18 matter if we are going to establish if new truck prices
19 have any impact on the used market.

20 What Professor Neven said was, "Well, you would
21 expect DAF to be the closest substitute for used
22 DAF Trucks", but that is essentially just untested;
23 untested and it seems unlikely that buyers in, say, the
24 level we are talking about would be very fussy about
25 which brands they were buying. On the used truck side,

1 all we have is a really small sample of Royal Mail
2 trucks and Professor Neven does not even use the data
3 from BT. But, importantly, we also have no data at all
4 on the intermediate steps in the chain of substitution.
5 We have new trucks at one end; we have Royal Mail and BT
6 at the other. As we have explained in our closing, this
7 is of obvious relevance if you are trying to test for
8 chains of substitution.

9 Now, part of DAF's answer to this in their closing,
10 which is at page 27, paragraph 80, is, "Well, this is
11 just a local estimation which is valid for Royal Mail".
12 But of course that does not help with BT, which we will
13 come back to, and it really just begs the question about
14 whether this is adequate to assess even in the case of
15 Royal Mail.

16 Against that background we do turn to the
17 regression, and it may be helpful here now to pick up,
18 please, our written closing, where we deal with this at
19 page 302. This is {S/9/302}. We summarise, at 759, how
20 this regression actually worked and, as you know, it
21 uses two models: a main model and an auxiliary
22 regression model. The auxiliary regression is used to
23 calculate the average price of new trucks having similar
24 characteristics to Royal Mail's used trucks. We will
25 look at it in a moment. But Professor Neven controls

1 for five different truck characteristics: the model
2 family; number of axles; cabin type; horsepower; and
3 whether the truck is tractor or trailer. These were
4 referred to as the "time invariant characteristics"
5 because they are the same on a truck whether it is new
6 or old. Then in his main model, where he tries to
7 assess the influence of the price of new trucks on used
8 trucks, he does not control for those characteristics at
9 all.

10 Now, the basic problem in Professor Neven's approach
11 that Mr Harvey has identified --

12 THE CHAIRMAN: Can I just ask, so the auxiliary regression
13 feeds into the main model?

14 MR WARD: Exactly.

15 THE CHAIRMAN: So that provides you with some --

16 MR WARD: Truck price information for the main part.

17 THE CHAIRMAN: New truck price?

18 MR WARD: Exactly so. We will look at it in a moment.

19 But the basic problem here that Professor Neven is
20 facing is the obvious intuition that a truck with high
21 horsepower, say, that cost more new will also cost more
22 when it is second-hand compared to a truck with lower
23 horsepower or, as Mr Harvey put it, a Ferrari might cost
24 more new and used than a Ford. The objection Mr Harvey
25 has to this model is the problem of conflating this

1 effect, that certain types of trucks are going to be
2 worth more new and used, with any effect that might flow
3 from the overcharge which is affecting the price of the
4 new trucks.

5 This is where it does get a little bit more
6 technical. We explain the issue at 760 of our closing
7 at {S/9/302}, which is the problems of bias and
8 multi-collinearity. The problem of bias arises where
9 relevant variables are omitted and their effect is
10 wrongly attributed to other variables. Here the issue
11 is the so-called time invariant characteristics are
12 included in the auxiliary regression but not in the main
13 model. They are not controlled in the main model. So
14 it raises the problem that these used trucks may be just
15 more expensive because they have these characteristics.

16 But then in the Scylla and Charybdis of
17 econometrics, the next problem is multi-collinearity.

18 THE CHAIRMAN: Now, that is getting a bit complicated.

19 MR WARD: Well, damned if you do, damned if you do not, sir.

20 So you have the problem of bias if you do not
21 include them, but then, if you do include them, you have
22 another lovely problem, which is multi-collinearity.
23 That arrives where you have two or more variables in the
24 model which are highly correlated with each other, so if
25 you have the time invariant characteristics in the

1 auxiliary model and the main model, you have got the
2 risk of multi-collinearity.

3 Now, happily, this is actually an area of common
4 ground that these are problems. Professor Neven
5 acknowledged them in his report. We give the reference
6 in paragraph 761. Then, at 762, {S/9/303} -- this is
7 a quote from the transcript:

8 "If you are introducing the characteristics in the
9 regression and you are using the same characteristics in
10 the auxiliary regression that is predicting the new ...
11 prices you have a problem of multi-collinearity."

12 THE CHAIRMAN: So is this why he did not include it in the
13 main model --

14 MR WARD: Exactly.

15 THE CHAIRMAN: -- but in the auxiliary?

16 MR WARD: Then the problem with that, though, as he also
17 acknowledged, is that that gave rise to an issue of bias
18 because those characteristics are not being controlled
19 for in the main model.

20 THE CHAIRMAN: Right.

21 MR WARD: It is our case, as explained in Mr Harvey's
22 reports, that this is an insuperable problem for
23 Professor Neven. If you introduce these time invariant
24 characteristics to the main model, you tackle the
25 problem of bias but you have a problem of

1 multi-collinearity. If you leave them out, you have
2 a problem of bias but not multi-collinearity.

3 THE CHAIRMAN: So which is the worse problem?

4 MR WARD: Well, we essentially say they are just both
5 problems and there is no way to square the circle. That
6 is where we get into rather a battle of sensitivities,
7 and I have a feeling that Mr Ridyard might be best
8 placed to get any enjoyment out of this. I am going to
9 just try and offer some very -- I am sure relatively
10 simple points about this, but it is obviously all
11 developed -- it was discussed in the hot tub to some
12 extent and it is developed in the expert reports and the
13 closings.

14 There is also, I should say -- at annex 4 to DAF's
15 closings, they have produced a sort of summary of the
16 sensitivities and what they say about them. But we
17 have, in an effort to be helpful, taken their table and
18 added an additional column which says what we say about
19 them and we are going to hand that up. Perhaps we will
20 do it at the break because I am not planning to take you
21 through it at all. It will go on to Opus but just in
22 order to tell the story.

23 What I will do for now, though, is just focus on
24 what we say is the most important of Professor Neven's
25 sensitivities, which is at {E/13/65}. This is the main

1 model but it is a sensitivity because, as you can see
2 towards the bottom -- I will take you through it in
3 a moment -- this is the main model, but the truck
4 characteristics are actually added in in an effort to
5 address the question of bias.

6 We can see -- if we scroll just slightly further,
7 please, you can see five in a row just above the line:
8 "LF", in other words "family"; "Horsepower"; "Number of
9 axles"; "Cabin type"; and "Tractor...", tractor trailer.
10 So these are the same five characteristics that were in
11 the auxiliary regression, but what Professor Neven does,
12 if we go to the previous page, {E/13/64}, table 16, is
13 he flexes the auxiliary regression so he has only
14 family, "LF" or "XF", "Horsepower" or "Tractor". So he
15 takes out "Axles" and "Cabin type".

16 So where you end up is you have all five of the
17 characteristics in the main model but only three in the
18 auxiliary regression. So it is a way of trying to
19 address bias while reducing the problem of
20 multi-collinearity, but you still have three
21 characteristics which are shared in both models. What
22 Mr Harvey says is, "Well, then, you still have a
23 real problem of multi-collinearity".

24 When we look at the coefficients, the changes are
25 quite dramatic. So if we look, please, at the top of

1 page 65, {E/13/65}, these are the coefficients in this
2 sensitivity and we can see in gamma 1, which measures
3 the supply effect, the two SLS coefficient has gone to
4 1.678 and in the main model it was 0.851. The alpha 2
5 coefficient has only changed a little bit, but the
6 effect of all of this is that the combined coefficient
7 has gone to 2.016 from 1.153.

8 So Mr Harvey's view is, "Well, that just shows that
9 you have tried to address the question of bias but what
10 you have introduced is multi-collinearity". We
11 discussed this with Professor Neven and we can pick this
12 up, if we may -- we are now done with that and we can go
13 back to the written closing under S/9, and at page 304,
14 paragraph 766, {S/9/304}, we note these results that
15 I have just shown you. Over the page, {S/9/305}, we
16 quote from some of the transcript with Professor Neven.
17 He said there in paragraph 766:

18 "I am not denying the fact that there is
19 a trade-off."

20 Then he said:

21 "When you have multi-collinearity... small changes
22 in the sample will dramatically change the coefficient,
23 and I do not see this."

24 Then I had a memorable exchange, at least for me,
25 with him where I pointed out, "Well, it seems to

1 double", and he said well -- I said, "Is that a small
2 change?", and he said:

3 "Yes. But look at what I estimate, which is the sum
4 of the two. The sum of the two is not affected to the
5 same extent."

6 Indeed we have just seen that it was.

7 He said in his answer that, well, yes, it is
8 affected but it is doubling, but it is less than
9 doubling.

10 My short point really is that this, among the many
11 sensitivities that are available to you for your
12 leisure, is one that really shows why there is a problem
13 here. It is just not robust at all.

14 The other sensitivity that we say is very important
15 is dealt with on page 306, {S/9/306}, of our closing --
16 we can go back to that -- which was Mr Harvey's split
17 sample. So he split the model into -- this is just
18 Professor Neven's model and he split it into LF and CF,
19 in other words, the families. Professor Neven agreed
20 that this could, as he put it at least, potentially
21 reduce problems of bias and multi-collinearity because
22 the trucks in the sample at least have the family in
23 common. But the problem is that this also gave rise to
24 completely unsustainable results, and we summarise them
25 again in paragraph 770, but we are actually getting

1 negative coefficients in some respects which implies
2 that the increase in purchase price is actually
3 associated with a decrease in the resale price.

4 We have set out in the closing the sort of argument
5 that went back and forth over this and indeed
6 Professor Neven said, "Well, look, these results may not
7 hold for the CF trucks because there are only 2,000 of
8 them in the sample", and we do not know why he does not
9 think that is enough. But for the LF trucks we have
10 5,000-odd out of a total of 7,000 and there is just no
11 reason at all to think that somehow 7,000 was enough in
12 his model but 5,000 is not enough in our sensitivity.

13 So our respectful submission is that this is a very
14 telling and difficult sensitivity for Professor Neven's
15 model.

16 Now, just briefly, we also refer, at 308, to
17 Mr Harvey's further sensitivities which are addressed in
18 DAF's table and we have added our point to them. But
19 the purpose of those sensitivities is to demonstrate
20 just how sensitive the model is to the selection of time
21 invariant characteristics; in other words, which ones go
22 into the auxiliary model in the first place.

23 Just for the transcript, they are explained at
24 {E/31/47-57}. What Mr Harvey did is reduce the number
25 of time invariant characteristics even further to 1 or

1 even 0 and they gave rise to highly counter-intuitive
2 results. Some coefficients doubled, some halved, some
3 became negative. But, broadly, the more the
4 sensitivities are structured in a way that in fact
5 eliminates problems of bias and multi-collinearity, the
6 more counter-intuitive the results get.

7 Then there is just one other topic I want to deal
8 with on resale pass-on, which is BT, the position of BT.
9 I would like, if I may, to pick this up at page 311 of
10 our closing, {S/9/311}, and here, in our respectful
11 submission, the case properly ought to be abandoned.

12 Starting at 782, as I mentioned before,
13 Professor Neven's model was solely based on the
14 Royal Mail used trucks because he thought there were too
15 few BT trucks for which there was data. That is
16 confirmed at 783:

17 "My baseline empirical analysis relies only on
18 [Royal Mail] data. I was not able to conduct a separate
19 analysis ... because there was not a sufficient number
20 of data points."

21 He nevertheless concluded, on the basis of
22 a sensitivity which we will see in a moment, that it was
23 "reasonable to apply my baseline results to BT". So it
24 was a Royal Mail model, but he says, "Well, I will just
25 apply it to BT anyway", even though, as I showed you

1 a few minutes ago, the BT trucks are much older, 12 and
2 a half years old, and in fact they often have
3 specialised bodies on them, like pole erection units
4 that Mr Ashworth talked about in his evidence at {D/22},
5 paragraph 164.

6 This position did start to unravel in the hot tub
7 because you will see there he said:

8 "I would not be confident, to put it in those terms,
9 to extrapolate that relationship for trucks that would
10 be very, very different, for instance, for trucks that
11 would be much newer than trucks that are resold by
12 Royal Mail."

13 Well, BT trucks are not newer but they are certainly
14 much older, so that rather disclosed a lack of
15 confidence in the approach he had taken. But the
16 sensitivity that he conducted is summarised at 785,
17 {S/9/312}, which is essentially he combined the BT and
18 Royal Mail data, but, of course, he had a lot of
19 Royal Mail data and only a little bit of BT data. But
20 he concluded:

21 "The main estimates obtained from this robustness
22 check are consistent with the main regression results,
23 largely because the observations of BT trucks constitute
24 a small share of the sample."

25 Mr Ridyard explored this with Professor Neven and

1 said:

2 "So you would expect it to be dominated by the
3 Royal Mail?"

4 Professor Neven said:

5 "Exactly."

6 Then Mr Ridyard says:

7 "But you are making a positive argument that the
8 results do carry over ..."

9 Professor Neven said:

10 "I am making the argument that this is all I can say
11 about BT, okay?"

12 Mr Ridyard said:

13 "That is not the same [thing] as saying you think we
14 should rely on the RM results --

15 "PROFESSOR NEVEN: I am saying that I really caveat
16 this extension of the estimation to BT given the
17 characteristics of the data and given the relative
18 significance of the sample.

19 "MR RIDYARD: Okay."

20 Then over the page, {S/9/313}, he says:

21 "So I am not sort of positively saying we should
22 really use it for BT. I think this is indeed a source
23 of concern."

24 Well, he had said it should be used. It is a source
25 of concern. Indeed, the case ought to be abandoned.

1 DAF's closing just says that these problems should be
2 regarded, but we respectfully submit that
3 Professor Neven has in effect brought the supply pass --
4 the resale pass-on claim for BT to an end.

5 THE CHAIRMAN: Are you saying that when he refers to
6 "a source of concern", that that is the criticisms that
7 you had of his approach to BT trucks?

8 MR WARD: Yes, and the point put by Mr Ridyard that this
9 sensitivity he has which he draws comfort from is merely
10 showing that, when you take a small number of BT trucks
11 and add them to a larger number of Royal Mail trucks,
12 nothing much changes, and that does not tell you
13 anything other than they are a small part of the overall
14 sample.

15 Indeed Mr Harvey had a yet further sensitivity --

16 THE CHAIRMAN: They are very different. Because they are
17 older BT trucks, they are sold much later and more
18 specialised --

19 MR WARD: They have exotic bodies on them for pole erection,
20 of which Mr Ashworth has a nice photograph.

21 THE CHAIRMAN: -- which you would think there is probably
22 less of a market for.

23 MR WARD: One might well think so. In any event, all I am
24 really saying in short is that Professor Neven has
25 essentially conceded rightly that the analysis cannot be

1 extended in this way.

2 Now, that was all I was going to say about resale
3 pass-on and I am going to spend more time now on supply
4 pass-on. This is the claim that the overcharge was
5 passed on through the prices charged by BT and
6 Royal Mail to its customers. So to succeed on this
7 claim, DAF has to show that the overcharge actually
8 caused those prices to be higher by the amount they are
9 claiming indeed. So they need to show that a cost
10 increase of, say, 0.05%, say, actually caused final
11 prices to be 0.05% higher. Our headline, which I am
12 sure is very familiar to you by now, is that --

13 THE CHAIRMAN: Do they actually have to show the exact --
14 that it is higher by that exact amount?

15 MR WARD: Well, they are claiming 100%, so if the overcharge
16 represents, say, 0.05% of the costs of, say, a broadband
17 product, then they have got to show that or more. If
18 they can show more, that would get them there.

19 But it is not enough to say that, well -- as we will
20 see -- higher costs tend to lead to higher prices. That
21 is just not good enough. I am going to develop all of
22 this in a lot more detail, but that is the essence of
23 their case. But for it to be true, price setting would
24 have to be almost entirely mechanically driven by
25 precise levels of cost. But the problem is that the

1 evidence just does not support that.

2 Entirely unsurprisingly, price setting involves
3 a range of factors, whether commercial judgment about
4 setting price points or regulatory judgment, and DAF has
5 not been able to show that the scale of changes we are
6 talking about actually make a difference, and we submit
7 the case fails on both the law and the facts. It fails
8 on the law because DAF has not demonstrated proximate
9 cause and it fails on the facts because they cannot show
10 factual causation either.

11 In order to develop the submissions on the law,
12 I want to go through part of what is in our written
13 closing, which reflects some of the submissions made in
14 opening in fact. So if this proves to tax your
15 patience, I hope you will say so. I am sure you will.
16 It is page 317 of the written closing, {S/9/317}.

17 I will try to take this at a little bit of speed
18 because we did discuss much the same points, albeit
19 eight weeks ago. So in fact we start at page 317 and
20 you will remember perhaps that we showed you some
21 passages -- some observations of Mrs Justice Rose and
22 Mr Justice Roth talking about this argument in this very
23 case. I am not going through them in any detail now,
24 but the essential concern was there was a disjunct
25 between the trucks, on the one hand, and the actual

1 products being sold, namely stamps or telephone line
2 rentals. So the case is not at all like a cartel case
3 where, for example, a television manufacturer buys LCD
4 screens that are subject to a cartel, as was in fact the
5 case in the 1990s, and then incorporates those screens
6 into the TVs and sells the TVs. The trucks are not in
7 any sense incorporated into the stamps or the phone
8 lines. That raises at least a question about legal
9 causation about whether the trucks are sufficiently
10 proximate to the stamps.

11 MR RIDYARD: Is the distinction you are drawing there
12 a physical -- in a TV case, when I buy a TV, I am buying
13 a TV but it embodies the actual physical product,
14 whereas, when I am buying a postage stamp, obviously
15 I am not buying a truck, although I am buying,
16 I suppose, the transportation service that went there.

17 MR WARD: So I am not drawing a bright line distinction
18 between physical -- otherwise there could never be
19 pass-on in services, which is certainly not my case.
20 That was a starting point for my Lady Mrs Justice Rose,
21 as she then was, and for Mr Justice Roth, and it is part
22 of the tapestry that goes to the question of causation
23 which I am going to come to. So it is at the very least
24 an indicia that any line of causation here is going to
25 be, to put it mildly, complicated, and that is indeed

1 the case. But I am not relying on this pure abstract
2 proposition as a straightforward knock-out blow, but it
3 is an important part of the context and it helps to
4 explain how we got to where we are today.

5 Since then what we have had is the Supreme Court's
6 judgment in *Sainsbury's v Mastercard*, and we pick that
7 up, please, at 805, {S/9/318}, where we explain what
8 that was about, well known to all competition lawyers.
9 It was about an anti-competitive charge known as
10 a "MIF", an interchange fee, levied by *Mastercard* and
11 *Visa* on each transaction paid for using a card. So the
12 retailers or large numbers of them sued the credit card
13 companies to recover these charges which had in fact
14 been passed on to them by an intermediate bank. The
15 defendants alleged, "Well, you pass that
16 anti-competitive charge back on to your own customers".

17 The Supreme Court case is a landmark in this area
18 and it confirms that pass-on is just an aspect of the
19 ordinary law of mitigation. We can see that over the
20 page on 319, bullet point (a):

21 "Pass-on is a species of mitigation, a 'element in
22 the calculation of damages and the normal rule of
23 compensatory damages applies to claims for breach of
24 statutory duty'."

25 Then they quote, at (b), the principle of

1 effectiveness, which we talked about last week. Bottom
2 of the paragraph:

3 "Effectiveness requires that the rules of domestic
4 law 'do not make it practically impossible or
5 excessively difficult to exercise rights guaranteed by
6 European law'."

7 Then they make clear that the burden is not on the
8 person suffering the overcharge; rather, the persuasive
9 burden is on the defendant.

10 Then, at 807, they distinguish four ways a retailer
11 could respond to the imposition of a cost. Number 1: do
12 nothing; number 2: reduce discretionary expenditure;
13 3: reduce its cost by negotiation with its many
14 suppliers; or 4: pass-on by increasing the prices. They
15 said the latter two options might reduce the merchant's
16 loss and give rise to a question of mitigation, and of
17 course DAF's case is category 4.

18 THE CHAIRMAN: In that paragraph they were talking about the
19 ways in which a retailer could respond --

20 MR WARD: To increasing costs.

21 THE CHAIRMAN: -- and of course in that case the retailer
22 knew about the charge.

23 MR WARD: Exactly, and we are coming to that, sir,
24 absolutely. That is a really important point which we
25 are shortly going to come to.

1 THE CHAIRMAN: It is a positive response to that charge.

2 MR WARD: Yes. So you are getting these bank charges
3 through and you say, "What are we going to do about
4 this?", because the MIF was completely explicit. It was
5 public; it was part of their published charges and so
6 forth. It was not a secret cartel.

7 THE CHAIRMAN: Yes.

8 MR WARD: Then we get to the passage at 215, {S/9/320},
9 which is undoubtedly important in this argument, where
10 they say:

11 "We are not concerned with additional benefits
12 resulting from a victim's response to a wrong which was
13 an independent commercial decision or with any...
14 failure to take reasonable commercial steps ... The
15 issue of mitigation which arises is whether in fact the
16 merchants have avoided all or part of their losses. In
17 the classic case of *British Westinghouse* ...
18 Viscount Haldane described the principle that the
19 claimant cannot recover for avoided loss in these terms:

20 "'When in the course of his business [the claimant]
21 has taken action arising out of the transaction, which
22 action has diminished his loss, the effect in actual
23 diminution of the loss he has suffered may be taken into
24 account ...'."

25 That is, of course, a very familiar test.

1 Then they say on the facts that, well, here the
2 question of legal or proximate causation arises, but it
3 is straightforward in the context of a retail business
4 in which a merchant seeks to recover its costs in annual
5 or regular budgeting. The relevant question is factual.
6 Has the claimant, in the course of its business,
7 recovered the cost the MSC?

8 Now, in the course of this litigation, the tribunal
9 considered this in relation to a CMC. This was a CMC
10 which arose out of an attempt by DAF to introduce
11 a category 3 type claim as well, which was responding to
12 the -- reducing its cost by negotiation with other
13 suppliers. The CAT refused permission, but it also made
14 some very important observations about causation which
15 are applicable in this case. We see, if we can, just
16 picking it up at 35, {S/9/321} -- we have quoted
17 paragraph 35 of the judgment:

18 "Accordingly, it seems to us that it cannot be
19 enough for a defendant to plead that a claimant's
20 business input costs as a whole were not increased, or
21 that as part of the claimant business' ordinary
22 financial operations and budgetary control ... expenses
23 were balanced against sales so that profits were not
24 reduced. There must be something more to create
25 a proximate causative link between the Overcharge and

1 a reduction in other input costs, so as to constitute
2 mitigation. This can be inferred from the
3 Supreme Court's citation from ... *British Westinghouse*
4 ... [and the underlying words] ... '... arising out of
5 the transaction', and its comment that 'a question of
6 legal or proximate causation arises'."

7 THE CHAIRMAN: This only arose then in relation to
8 category 3?

9 MR WARD: It did, but the critical thing, in our submission,
10 is what was suggested -- sorry, what the tribunal is
11 talking about here is the meaning of the
12 *British Westinghouse* case cited by the Supreme Court in
13 that passage which applies to categories 3 and 4. That
14 is absolutely --

15 THE CHAIRMAN: But they were not considering 4, which is
16 what we are arguing about now here, category 4.

17 MR WARD: The CAT was not, no, but the Supreme Court --

18 THE CHAIRMAN: No, the CAT was not. Why? Because that was
19 accepted that that was a valid point to run.

20 MR WARD: Yes, but in the Supreme Court this dictum is
21 applicable to both.

22 THE CHAIRMAN: I follow that, but does that mean that at an
23 early -- this was always pleaded, was it?

24 MR WARD: Pass-on, yes -- oh, yes. So this was an attempt
25 to introduce an additional plea.

1 THE CHAIRMAN: A category 3 --

2 MR WARD: A category 3 plea.

3 THE CHAIRMAN: But the category 4 plea was always there --

4 MR WARD: Yes.

5 THE CHAIRMAN: -- and was not challenged? You did not try

6 to strike it out?

7 MR WARD: No. There was discussion about whether to have

8 a preliminary issue in front of the tribunal, but, in

9 the end, no.

10 THE CHAIRMAN: It is your point that the same principles

11 apply?

12 MR WARD: Yes, absolutely, because this is all derived from

13 the *British Westinghouse* judgment. What Mr Justice Roth

14 is doing here is interpreting *British Westinghouse* and

15 *British Westinghouse* applies generally. The

16 Supreme Court has explained that pass-on category 4 is

17 just a species of mitigation. So we rely on the way

18 that Mr Justice Roth has interpreted

19 *British Westinghouse*, which we respectfully submit is

20 correct and evidently correct, even in this category 4

21 case. There is still a test of proximate causation.

22 THE CHAIRMAN: So it is still in general terms part of the

23 claimant business' ordinary financial operations and

24 budgetary control processes?

25 MR WARD: Indeed.

1 THE CHAIRMAN: I mean, businesses always try to cover their
2 costs.

3 MR WARD: They do, and what the judgment says is that that
4 is not enough and that is, sir, exactly right.

5 If I may, I will just take you through a little bit
6 more of the judgment, where at 812 we say, {S/9/322}:

7 "The CAT went on to explain that 'broad economic or
8 business theory' was not sufficient to raise this
9 defence, and what was required was [more] ...

10 "' ... the claimant would in the particular case
11 have sought to mitigate its loss and that the steps
12 taken were triggered by, or at least causally connected
13 to, the Overcharge in the direct manner required by the
14 *British Westinghouse* principle.'"

15 Then we quote from paragraph 41, where it says:

16 "As a matter of law, DAF contends that, in reliance
17 on *Sainsbury's* ... the defence has a realistic prospect
18 of success. It does, however, accept that there must be
19 a causative connection ... As Mr Beard put it in the
20 course of argument: 'one does need to have factual
21 evidence that it was the putative rise in the prices ...
22 that is said to be affected ...'"

23 Then there is a part we put emphasis on:

24 "... and that it is insufficient to allege that all
25 input costs of the business feed into business planning

1 and that businesses recover their costs."

2 You still need to satisfy this test of proximate
3 causation.

4 The tribunal went on to say what type of evidence
5 would be needed to satisfy the test, again, talking
6 about category 3:

7 "In our judgment, before a purely general plea of
8 mitigation through business cost reduction processes can
9 be pleaded, in the way that DAF seek permission to do,
10 there must be something identifiable in the facts of the
11 particular case that gives rise to a prima facie
12 inference that there may well be a direct causative link
13 between the Overcharge alleged and the prices paid ...
14 What is sufficient to give rise to such an inference
15 will vary from case to case, but it may be found in
16 facts such as a claimant's knowledge of the nature and
17 amount of the Overcharge (such that it is inherently
18 likely that a claimant would seek to address it), the
19 gross amount of the Overcharge as a proportion of the
20 claimant's relevant expenditure (the higher the
21 proportion, the more likely it is that some step would
22 have been taken to mitigate ...), the relative ease with
23 which the claimant's business could be expected to
24 reduce certain ... costs [and so forth] ...

25 "What is needed is some plausible factual foundation

1 for the application of the broad economic theory ... to
2 satisfy the *British Westinghouse* test ... and for there
3 being a causative connection ..."

4 So we come back every time to *British Westinghouse*.
5 That applies in a category 4 case.

6 THE CHAIRMAN: The underlined bit in 42 at the top:

7 "... may be found in facts such as
8 a claimant's knowledge of the nature and amount of the
9 Overcharge ..."

10 MR WARD: Yes. We say that is very important. Of course we
11 did not know and the overcharge was very small.

12 THE CHAIRMAN: Yes.

13 MR WARD: There is also an important passage which we quote
14 at paragraph 818, {S/9/323}, where the court -- the
15 tribunal actually contrasted the position in
16 *Sainsbury's*:

17 "In *Sainsbury's*, it was plausible that a merchant
18 facing a transparent service charge much between 2% and
19 3% of income from the majority of retail sales ... would
20 have sought to recoup that significant cost by seeking
21 to reduce the costs of supplies and/or passing it on to
22 customers. Here, on the other hand, where the
23 Overcharge was not only covert but a tiny fraction of
24 Royal Mail's and BT's expenditure, it is inherently
25 unlikely that it would have been specifically addressed,

1 but rather fed into the overall expenditure ... As DAF
2 accepts, that general principle that all costs of all
3 inputs are fed into business planning is insufficient to
4 establish the necessary causative connection for a plea
5 of mitigation of loss."

6 We respectfully agree, and if one just turns ahead
7 for a moment, this was also endorsed in a Court of
8 Appeal case called *Stellantis*, which we quote on
9 paragraph 822, {S/9/324}, where I think it was
10 Lord Justice Green who said there was nothing secret --
11 sorry, 819. I was actually jumping ahead to the next
12 place where this is quoted in fact, if I may, just
13 another page to 822. There we are, {S/9/325}:

14 "There was nothing secret about the imposition of
15 a MIF. It was a transparent, known, charge and it was
16 recognised industry practice that acquiring banks passed
17 it on to retailer in the MSC ... The MIF was a systemic
18 and troublesome cost that any major [retailer] would,
19 inevitably, have had to confront. The facts therefore
20 contrast with those of a typical, secret, price fixing
21 cartel."

22 THE CHAIRMAN: Just remind me, in *Stellantis* the issue was
23 ...?

24 MR WARD: That was another attempt to introduce a category 3
25 type defence.

1 THE CHAIRMAN: That was rejected?

2 MR WARD: Yes.

3 THE CHAIRMAN: You say there is no real distinction between
4 3 and 4?

5 MR WARD: Not for this purpose where we are just talking
6 about -- the test of proximate causation applies as
7 identified in *British Westinghouse* and as applied in the
8 Supreme Court. There obviously are differences between
9 the two types of cases but the broad principle of
10 proximate cause does apply.

11 I just wanted to say one more thing --

12 THE CHAIRMAN: So that is -- sorry -- that 48 is quite
13 clearly relying on knowledge of the MIF?

14 MR WARD: Yes.

15 THE CHAIRMAN: That is Court of Appeal.

16 MR WARD: Yes, because, had you done something that could
17 amount to proximate cause rather than what we have here,
18 which is a very, very small charge, a secret cartel --
19 Mr Bezant himself relies on the fact that the claimants
20 knew nothing about it.

21 MR RIDYARD: But the smallness of the charge and whether the
22 incremental charge is visible are two separate points,
23 are they not?

24 MR WARD: Yes.

25 MR RIDYARD: Can you help me on why -- obviously Royal Mail

1 did know what its truck costs were and arguably they --
2 I mean, that was part of the cost of the business that
3 they were seeking and you could say it was part of the
4 marginal costs of supplying a service. So if the
5 overcharge had been big enough and had really led to,
6 you know, a 20% -- a 30% increase in truck costs or
7 something that would have started to appear on their
8 scale, the fact they would not have known whether it was
9 due to a cartel or due to a microchip shortage or
10 something else, why would that particular aspect make
11 a difference?

12 MR WARD: What would matter, then, is you had a big enough
13 charge that you were aware of it and you were starting
14 to think about it.

15 MR RIDYARD: Right.

16 MR WARD: So your example is just very, very far removed
17 from where we are in this case.

18 MR RIDYARD: Yes, I know that, but is it far removed because
19 of the size or because of knowing what was causing it
20 because you might think that -- truck prices have gone
21 up massively, let us say, because of a global supply
22 shortage and some crucial thing that makes trucks and
23 then everyone would know about that. But let us say in
24 reality that would be for a cartel but we did not know
25 it was a cartel, we thought it was a genuine supply

1 difficulty, why would that make a difference to the --
2 the knowledge of what was causing the cost increase make
3 a difference?

4 MR WARD: Possibly not in that example, sir. The point that
5 really the Court of Appeal is making in *Stellantis* is
6 here was this fee that people were aware of and would
7 have to know that some -- to do about. Nobody knew
8 there was an overcharge. Nobody was thinking about it
9 at all. There is no suggestion that the increment,
10 which is what we are interested in, somehow engaged
11 people's attention in a way that made them act
12 differently. That is the issue.

13 MR RIDYARD: I see the point about the smallness of it might
14 make a difference, but, yes, okay.

15 MR WARD: I accept the point it is not that the truck costs
16 are unknown in the way that the MIF fee might have been
17 completely unknown.

18 I just want to make one further observation, if
19 I may, about the passage that is quoted at 818, where
20 you will see that Mr Justice Roth -- this is back on
21 page {S/9/323}. On 323 he says that:

22 "... a merchant facing a transparent service charge
23 of between 2% and 3% ..."

24 When I looked at this again over the weekend,
25 I thought those figures may overstate the level of the

1 MIF. My recollection of it is that it was much more in
2 a range up to about 1%, but I do not think this really
3 matters. The gist of what we are talking about here is
4 unaffected. We are still talking about an overcharge
5 that was very small and indeed certainly there was no
6 knowledge of the overcharge itself.

7 THE CHAIRMAN: Well, he elides both the smallness and the
8 covertness in the next sentence.

9 MR WARD: Yes.

10 THE CHAIRMAN: The trouble with these cases and in a sense
11 why they are different to the *British Westinghouse*
12 principle is that that is mitigation in contract law and
13 provides for some sort of reduction in the damages that
14 can be claimed. It is not being passed on to other
15 people who could possibly claim, so in these sorts of
16 cases the effect of a successful pass-on defence, if we
17 can call it that, is that the people who it is passed on
18 to have a potential claim. That is, as I understand it,
19 what is happening in the *Sainsbury's* case with *Merricks*.

20 MR WARD: Yes.

21 THE CHAIRMAN: So that assumes that -- I assume, for
22 *Merricks* to succeed means *Sainsbury's* will not succeed
23 in avoiding the pass-on defence.

24 MR WARD: In a perfect world, where all these cases were
25 litigated simultaneously and given a single resolution,

1 that would follow. In fact what happens is everything
2 tends to happen out of sync. So the retailers'
3 litigation was started a very long time ago and the
4 *Merricks* litigation is only just getting started.

5 THE CHAIRMAN: I know, but the defendants in both aspects
6 will be arguing, obviously, completely inconsistent
7 positions.

8 MR WARD: As has been noted.

9 THE CHAIRMAN: Yes, so in this case, in theory, if it is
10 correct, then the purchasers of postage stamps would
11 have a claim.

12 MR WARD: In theory, yes.

13 THE CHAIRMAN: How would that work?

14 MR WARD: Well --

15 THE CHAIRMAN: Would they have to prove pass-on? If they
16 started their own proceedings without Royal Mail having
17 begun its own proceedings, they would have to show that
18 in some way it was passed on through Royal Mail's
19 pricing?

20 MR WARD: Indeed. Indeed. They would be proving DAF's case
21 for them here.

22 THE CHAIRMAN: So the consequence of accepting the pass-on
23 defence means maybe you set up another claim, but it is
24 difficult to see how either they could run in tandem
25 together or that the customers' -- ultimate customers'

1 claim could go first.

2 MR WARD: Actually, in the *Trucks* litigation, these were
3 among the issues -- the case management issues the
4 tribunal has been grappling with because in the
5 so-called next wave of claims there are some indirect
6 claimants and it is just undeniably a very complicated
7 problem. Here we have got end users who have, if it is
8 true, actually suffered potentially extremely small
9 losses as we are going to come on to in a moment.

10 THE CHAIRMAN: But this feeds into the sort of practical
11 difficulty as well of enforcing the effect of an
12 overcharge.

13 MR WARD: It does. The points you are adverting to, sir,
14 have been obviously litigated and debated for many years
15 in this forum and that is why it ended up in the
16 Supreme Court.

17 THE CHAIRMAN: As you know, I am rather new to this forum,
18 so I am beginning to understand that.

19 MR WARD: I would not have thought so!

20 But, in any event, that is why it went to the
21 Supreme Court and we are all picking up the pieces after
22 the Supreme Court and trying to work out what the
23 implications here.

24 But here the other point that is very important,
25 when we think about proximate cause, is it is not just

1 that it is a very small sum. It is that that sum has to
2 pass somehow through a whole series of internal steps
3 and judgments and regulatory intervention, and we are
4 going to look at that in a little more detail in
5 a minute.

6 But what we do say is that, even if DAF is right
7 and, as a matter of forensic accountancy, you really can
8 trace the truck to the stamp or the truck all the way to
9 telephone line rentals or whatever it is, that is not
10 direct or proximate enough to satisfy the
11 *British Westinghouse* case.

12 I am going to develop that a little bit more in
13 a moment, but before I do, sir, I was going to leave
14 that sort of high-level proposition and now descend to
15 a bit more into the detail.

16 It is important that there is an issue here about
17 how this resale pass-on -- supply pass-on case has been
18 litigated. We know that -- in fact, let me come to this
19 in a minute. I was going to embark on something which
20 was a bit of a detour, but I want to carry on now,
21 I think, with the points that -- I want to develop these
22 high-level points a bit more because what we have done
23 through our approach to this case is to try to assess
24 these high-level points, and I explored them with
25 Mr Bezant and I want to go through some of the points

1 that we identify in our closing, starting on page 327,
2 {S/9/327}.

3 The first one is at paragraph 831. It is important
4 because it is stating the obvious, but it is important.
5 Both experts agree and it is common ground between the
6 parties that what matters is a counterfactual analysis,
7 whether the overcharge caused prices to be higher in the
8 factual world than they ever would have been in the
9 counterfactual. Then we make the point, "Needle in
10 a haystack", which has been cruelly described as
11 "hyperbolic" by my friends in their closing, but it is
12 entirely apt.

13 It is our submission that their case has largely
14 ignored or minimised this point. Paragraphs 834 and
15 835, I remind you of some of the figures you have
16 already heard in the course of this litigation, that for
17 the Royal Mail brand the overcharge never exceeded 0.05%
18 of its relevant value in any year and was as low as
19 0.001. In the footnote there we note, {S/9/328}, that
20 for Parcelforce it varied, but peaked at 0.13.

21 "If the entire Overcharge for a given year was
22 allocated to the price of a stamp [it should say
23 'a million price points', I am told, not 'millions'] ...
24 the entire Overcharge would be 0.014p on the price of
25 a stamp."

1 That is if the entire overcharge went into that one
2 product. So the person buying that stamp has not got
3 much of a claim.

4 In the case of BT the overcharge is even smaller.
5 The total overcharge over the entire period of the claim
6 is 4.7 -- I think it is 4.9 now. In the case of
7 Openreach, which the experts agree is the most important
8 part of BT, it had annual revenues in 2015, for example,
9 of 5.2 billion. Mr Harvey estimated the overcharge was
10 worth less than 0.003% of its revenues over those
11 periods. He also broke it down -- I talked to Mr Bezant
12 about all of this. He broke the estimates down,
13 apportioning them into different markets and so forth.
14 Then, in the case of WLA, which we talked about, local
15 loop unbundling, it was annual estimates of about
16 £23,000, even though for some years he explained that
17 was only external sales. In the year 2009, which was
18 the focus of the discussion we had, it was £21,000.

19 Then, in closing, DAF says that this sort of
20 high-level comparisons of this kind are misleading --
21 they say. They say it is misleading. But, in our
22 respectful submission, this is absolutely fundamental to
23 the case because there is a great deal of emphasis in
24 their case about process -- about how costs feed into
25 process and cost stacks and how vehicle costs can end up

1 in cost stacks. But scale matters here because the
2 question is whether these price increases -- these cost
3 changes are actually big enough to make a difference to
4 the level of the price. That is true whether we are in
5 regulated pricing or unregulated pricing. It is just so
6 small it does not show up.

7 Then we make the related point at 836 that we also
8 are looking at a very large number of different products
9 with very high volumes. In 2003/2004 Royal Mail saw
10 22 billion different products and services. Even an
11 overcharge of 10 million in that year, which would be
12 vastly in excess of the true figure, would have a cost
13 impact on each product of 0.05p. BT, of course, also
14 has millions of customers for its products, which is why
15 we say that this emphasis on cost allocation is just not
16 very informative.

17 It is also true in the case of Royal Mail, when it
18 was regulated, in PC2 and PC3, it was regulated on
19 a basket of products, so it had to set individual prices
20 in a way that would achieve the overall basket return
21 and were also priced at sensible price points, not
22 stamps to the 0.014p.

23 This is why we say that all of this emphasis on
24 process just does not answer the question. There is
25 a related point they make in their closing about the

1 so-called fallacy of small effects, which is
2 paragraph 118 of their closing. The idea is that large
3 effects are just small effects added together. That is
4 obviously true, but it does not help in any way because
5 the question is whether this particular very small
6 increase actually caused any price increment.

7 Now, going back to the written closing, things get
8 more complicated now. This is at 838 on page 329,
9 {S/9/329}, which is about the chain of cost allocation
10 within the business. In the case of Royal Mail, trucks
11 were purchased by Royal Mail fleet. Internal charges
12 were raised against other business units. There was
13 a category of vehicle costs used in cost allocation
14 models. The vast majority of this was vans. It
15 included depreciation, fuel and maintenance, so there
16 was no way of knowing precisely how much of the charges
17 in any costing model or cost stack related to the
18 capital cost of the vehicle. So there was a lot of
19 energy on this, but, at the end of the day, we just are
20 not able to say. DAF's case needs to go to a level of
21 granularity that is just not present in the information.

22 In BT the position is similar. The trucks were
23 purchased by BT Fleet. Credit hire charges, as they
24 were called, were levied to different business units.
25 BT recorded a category of motor transport costs, which

1 included depreciation and non-capital costs such as
2 maintenance and fuel. They estimate that the trucks
3 were just 10% of the fleet -- the trucks in this claim.
4 In each business, to make things worse, there were
5 multiple steps of internal pass-on.

6 So in the case of BT, a truck may be purchased by
7 BT Fleet, a cost allocated to BT Supply Chain and then
8 services provided to Openreach, say, by BT Supply Chain,
9 then services provided by Openreach to BT Retail and
10 then BT Retail eventually to end customers.

11 Even in Royal Mail the same thing happens, where
12 trucks are purchased by Royal Mail Fleet, charges are
13 levied to Royal Mail operations or to Parcelforce and
14 then to end customers. A very important but unavoidable
15 concession, if you like, or obvious observation at 842,
16 {S/9/330}, Mr Bezant accepted cost allocations do
17 involve judgment. So what we are saying here is that,
18 even if one applies this forensic accountancy approach
19 and somehow concludes at the end of the day that there
20 must be some trucks in there somewhere and the trucks
21 must bear some overcharge somewhere, this is not good
22 enough to satisfy any tests of proximate causation.

23 THE CHAIRMAN: In a sense you are in a worse position with
24 the regulated businesses, that you have probably much
25 more information than would be available in an

1 unregulated business to see how costs were dealt with.

2 MR WARD: We are going to come to that because undoubtedly
3 that is the case, but, even so, it does not give the
4 answer.

5 Then we talk about the general principle of cost
6 recovery, which I talked about with Mr Bezant, where at
7 various points in his many reports he makes observations
8 such as, "Royal Mail successfully set its prices so as
9 to recover all of its costs and to earn a profit in
10 total [as read]".

11 Then he uses expressions like "strong relationships
12 between costs and prices", but, of course, he accepted,
13 as he had to, that the mere fact a business recovers its
14 cost does not prove that a particular cost caused prices
15 to be higher.

16 Then, at 846, {S/9/331}, we observe he nevertheless
17 resisted the proposition that cost recovery on its own
18 tells us nothing about whether prices were increased.
19 He said:

20 "Cost recovery as an objective and as a basis for
21 the way that you organise your affairs and set your
22 prices, and cost recovery as an outcome through profits
23 can tell you something about the extent to which you
24 were trying to recover your costs and, over the long
25 haul, you have recovered your costs. It is not

1 determinative, but I think it is informative."

2 But we do respectfully submit that this does
3 exemplify the central flaw in his approach. Just
4 because the trucks are in the cost somewhere, it does
5 not mean prices were actually higher, and that is the
6 critical issue.

7 Now, as you say, sir, there is an awful lot of
8 regulation here, but unregulated price setting is also
9 important and these are the kind of considerations that
10 went into Mr Bezant's approach to unregulated prices.
11 If we pick this up at 334, we make some observations
12 about this where we say, 853, {S/9/334}:

13 "Insofar as unregulated prices are concerned, the
14 witness evidence adduced by BT and Royal Mail is
15 consistent, and unsurprising: costs were a factor in
16 pricing. But so too were a range of other commercial
17 considerations. To the extent that prices were set to
18 recover costs, or taking into account costs, this
19 nevertheless falls far short of [showing] that the
20 actual prices charged were higher because of the
21 Overcharge [increment]."

22 Then we observed, just as before, that his response
23 to this issue, Mr Bezant's response, has been largely to
24 identify the kind of broad link between costs and prices
25 discussed above, which will not suffice. This is very

1 much true of the Royal Mail Government period, 1996 to
2 2001, and indeed the first regulated period, which was
3 a price freeze.

4 But just pausing there, I wanted to show you how
5 this is put in the defendants' closing, which is at
6 {S/11/50}, volume 2. I am sorry, I think I only have
7 half a reference here. Yes, this is the point. If we
8 look at 179 and 180, they complain:

9 "Mr Harvey's analysis for the Government Period
10 focusses on the prices of stamps. However, in
11 cross-examination he agreed that Royal Mail had many
12 other products ... where small changes in pricing could
13 generate revenues around the size of the overcharge.
14 There was, therefore, ... ample scope for pass-on ..."

15 That is obviously completely speculative. Then what
16 is said at 180 again exemplifies the problem:

17 "Against that background, Mr Bezant estimates
18 pass-on of 75% in the Government Period based on the
19 broad relationship between change in operating costs and
20 revenues [and he] extends these conclusions to PC1 ..."

21 Well, in our respectful submission, that is simply
22 not enough to show what is required here, whether as
23 a matter of law or fact.

24 But that does take me now to regulation, if I may.
25 As you said, sir, of course, there is a lot of

1 regulation here and the position of Royal Mail -- I am
2 now at 335 of the written closing, {S/9/335} -- the
3 position of Royal Mail was in some ways simpler, and
4 that is because it only had -- there was three periods
5 of different regulatory instruments although there was
6 a lot of variety within them. But the problem for
7 Royal Mail was rather a different one, as we say at 860,
8 {S/9/336}. The market it was operating in was changing
9 very dramatically. There was competitive entry and
10 e-substitution and it suffered dramatic and unexpected
11 loss of volumes, undermining its ability to recover the
12 projected revenues in the PC3 period.

13 In BT there was a different issue, which is the
14 various different forms of business unit within BT and
15 a large number of different instruments; different price
16 controls at different periods on different products. We
17 do say that DAF has made no systematic attempt to
18 address this and I am going to come on shortly to what
19 they have said about this in their closing.

20 Now, we say at 862 that Mr Bezant has proceeded
21 essentially on the basis that you carry out detailed
22 cost modelling, you overlay regulatory judgment and, at
23 the end, you have a price which is cost stack plus
24 regulatory judgment equals price. Very importantly, the
25 prices would so precisely reflect the cost that the very

1 tiny increments of cost we have been talking about will
2 cause a tiny increment of price increase, so that little
3 tiny bit will poke through the regulatory judgment and
4 mean that the final price is actually higher. That is
5 the Mr Bezant analysis, which focuses on pure matters
6 of -- treats this as a mechanical matter.

7 We do want to say something about the nature of
8 regulation, which is at 863, because regulation is
9 a public law function. Ofcom and Postcomm were under
10 statutory duties to take into account a wide range of
11 public interest considerations, and it is worth just
12 turning up, by way of a sample, the Communications
13 Act 2003, which is authorities bundle 24 {AU/24}. This
14 is section. 3 which is the "General duties of OFCOM".

15 "It shall be the principal duty of OFCOM, in
16 carrying out their functions:

17 "to further the interests of citizens in relation to
18 communication matters; and

19 "to further the interests of consumers in relevant
20 markets, where appropriate by promoting competition."

21 Then there is a whole series of things that they are
22 required to secure, including, for example:

23 "The optimal use for wireless telegraphy ...

24 "The availability throughout the United Kingdom of
25 a wide range of electronic communications services."

1 Then at (3), towards the bottom of the page:

2 "In performing their duties ... [they] must have
3 regard ... to:

4 "the principles under which regulatory activities
5 should be transparent, accountable, proportionate,
6 consistent and targeted ...", and so forth.

7 There are various other sub-duties, if we can turn
8 the page, {AU/24/2}, at (4). They must have regard to
9 the following, eg (b):

10 "the desirability of promoting competition ...

11 "the desirability of promoting and facilitating ...
12 effective ... self regulation.

13 "(d) the desirability of encouraging investment and
14 innovation ...

15 "(e) the desirability of encouraging the
16 availability and use of high speed data ...", and so on
17 and so forth.

18 There is a long list of them.

19 The obvious point here is that these duties, they
20 actually require a trade-off between the promotion of
21 competition, say, and then ensuring the availability
22 throughout the United Kingdom of a wide range of
23 services. So what it does is it carries out
24 consultations, so the views of third parties, whether
25 competitors or customers or others, can be weighed. It

1 may end up striking a balance or expressing things
2 explicitly in terms of its judgment.

3 Of course, when it does all of this, it is engaged
4 in an essentially forward-looking exercise because it is
5 starting off with a cost stack and then it applies
6 a whole series of judgments to that, even as to cost
7 allocation or future costs or volumes, and then it
8 imposes an efficiency challenge, if this is an RPI-X; in
9 other words, it basically says that you are going to
10 have to reduce your costs if you are going to get the
11 regulatory return. Even the cost assessment itself
12 involves a matter of judgment.

13 Of course, it is highly uncertain, and on the
14 matters such as a volume forecast for Royal Mail and
15 Postcomm, there were dramatically different views. So,
16 as we say at 866, {S/9/337}, Mr Bezant confirmed that
17 while he considered in principle that Postcomm is trying
18 to match costs and revenues, in practice he could not
19 say what would have happened.

20 So, again, we say at 338, {S/9/338}, when we look at
21 this exercise, we have to again keep in mind the scale
22 of the overcharge. It does matter. We took -- you may
23 remember, we took Mr Bezant through two examples, a new
24 pricing framework for Openreach and wholesale line
25 rental. These were the two that we worked through with

1 him. We go through some of the detail in the
2 transcript.

3 We make a number of points, though. These are
4 really illustrative points. First, in neither case is
5 it possible to say how much truck cost, if any, has been
6 allowed. In the Openreach pricing framework there was
7 a price for fleet but we could not tell whether that was
8 vans or trucks or how much of it was capital cost of
9 trucks. In the WLR charge control, it did not identify
10 costs with that degree of granularity at all.

11 But, secondly, we nevertheless can see how much
12 overcharge might be involved, and for the Openreach
13 charge control we looked at MPF, metallic path facility,
14 and the total overcharge we were talking about was about
15 £5,000 out of 106 million in costs. For WLR, in a year
16 that was very shortly before the one in question,
17 Mr Harvey estimated 0.006%.

18 Now, these figures are only estimates. They are not
19 intended to be precise, but they give a sense of scale.
20 Indeed Mr Bezant accepted for a given product the effect
21 may be nil; for a given product, the effect may be more
22 than nil. But the problem is, as we say, DAF has to
23 actually show it made a difference.

24 Our point is really this: there is a whole series of
25 adjustments going on here, to the cost stack itself and

1 then to all of these other things that go into the
2 formal projection. All of that is going to affect
3 whether -- if there is some overcharge in the bottom of
4 the cost stack somewhere, how much of it is actually
5 recovered. DAF effectively just assumes that, despite
6 all of this, 100% of the overcharge is captured in the
7 eventual price, but our point, again about proximity as
8 much as causation, is by the time you have applied all
9 of these judgments, you cannot possibly conclude the
10 overcharge has somehow survived in tact even if it is in
11 the cost stack in the first place.

12 THE CHAIRMAN: So you say, even if mechanistically they can
13 show that the cost fed into the price calculation,
14 because there is so many other judgments going on by the
15 regulator, that breaks the chain of causation?

16 MR WARD: I am saying that. How can you actually say that
17 whatever it is, that tiny amount, £5,000, say, in that
18 example of MPF -- is it £4,000, £5,000? Is it only
19 £2,000 of it left? It is just impossible to say.

20 THE CHAIRMAN: So whenever there is an element of judgment
21 in pricing, in both the regulated and unregulated
22 environment, you say that that breaks the chain?

23 MR WARD: Well, I do say in the context of the kind of scale
24 issues that we are talking about here, all of DAF's case
25 would certainly make a lot more sense if these were very

1 large sums relative to the cost stack. When you are
2 talking about £5,000 out of 100 million and you do not
3 even know if that even contained any trucks, it is fleet
4 charges. They could be vans -- they could be the
5 Openreach vans that we all see on the street.

6 THE CHAIRMAN: Well, we know it contains some trucks.

7 MR WARD: No, not in that product -- not in that product.

8 We certainly accept that fleet charges contain trucks at
9 a high level of generality. In the case of BT, though,
10 DAF has not actually advanced any arguments here on the
11 basis of these individual charge controls. Its closing
12 is completely silent on that topic and its
13 cross-examination was completely silent. We will come
14 back to that in a minute.

15 What I am really saying, though, is there are all of
16 these layers of judgment and what DAF needs to establish
17 is that there is a cost stack with a tiny bit of truck
18 and, as a result, the eventual price was higher by that
19 tiny little amount. That is what it cannot do. We are
20 going to look at the Royal Mail charge controls in a bit
21 more detail. I see the time and possibly we will have
22 a break, but after that I am going to look at those in
23 a bit more detail because they are slightly different
24 but, in our respectful submission, the same problem
25 essentially arises.

1 SIR IAIN MCMILLAN: Can I just ask one question, if I may,
2 just to be sure? So it is also your argument that the
3 different cost between the factual and counterfactual as
4 a proportion of the size of these businesses, that even
5 if you run that through to the prices charged to the
6 consumers, there would be such a small fraction of
7 a penny that it would not have been plausible to
8 actually increase the prices accordingly?

9 MR WARD: Exactly. Exactly that, sir.

10 SIR IAIN MCMILLAN: Thank you.

11 MR WARD: I am going to turn next to this question of how
12 prices are actually set. But in my MPF example I talked
13 about, you have about 5,000 quid, you have a product
14 price which, if I remember, was £80 and something to
15 a penny, but against the cost stack of 100 million.
16 I mean, these are approximate numbers but the detail is
17 all in our closing. It is just not viable. There has
18 not even been a serious attempt to argue it is made out
19 that that actually would lead to a higher price point.
20 A price point that has to be set with a degree of
21 commercial reality as much as anything.

22 THE CHAIRMAN: I think their argument is that eventually you
23 get -- or at some point you get to a tipping point where
24 it does.

25 MR WARD: That is more or less my next topic, sir.

1 THE CHAIRMAN: Shall we have a break then?

2 MR WARD: Thank you.

3 (11.47 am)

4 (A short break)

5 (11.58 am)

6 MR WARD: Thank you. Where we had reached was the
7 all-critical issue of actual price setting that Sir Iain
8 had anticipated where I was going in my submissions on
9 that.

10 THE CHAIRMAN: We have been handed up the --

11 MR WARD: Yes. This is our version of table 4 -- annex 4
12 with our own column added.

13 THE CHAIRMAN: Thank you.

14 MR WARD: Thank you, sir. Sorry.

15 So where I was going was, even if you accept for
16 a moment that the truck cost could be traced through all
17 of these exercises and judgments, so it is in the stack
18 somewhere, it comes through in tact through the volume
19 forecast and so on and so forth, the next problem you
20 have is the actual setting of the price itself at either
21 a commercial level or a regulated level because, of
22 course, on a commercial level there are going to be all
23 sorts of other factors, including whether you want your
24 stamp priced to .0014 of a penny, but even for
25 regulators -- even for regulators -- prices are not set

1 at the maximum possible level of granularity. They are
2 going to be set in whole pounds or pence or, in the case
3 of Postcomm, it applied an overall RPI-X across a whole
4 basket of products, leaving it to Royal Mail to try and
5 actually achieve the revenue that had been allowed.

6 We will come on to the probability analysis in
7 a minute, but, again, just taking a step back -- you
8 raised the point, sir, that in theory downstream
9 purchasers might bring claims, and we are envisaging
10 purchasers of stamps or telephone services suing truck
11 manufacturers in respect of a forensic exercise of
12 tracing these prices through the third party to them,
13 charge controls imposed by Postcomm and Ofcom. It is
14 quite a formidable exercise.

15 THE CHAIRMAN: Is that not the logic of their argument --

16 MR WARD: It is the logic.

17 THE CHAIRMAN: -- that they would then have such a claim?

18 MR WARD: It is the logic, but one has to consider what the
19 probability is of it ever materialising because there is
20 always a danger that pass-on arguments succeed in
21 extinguishing claims without there being a realistic
22 threat of any action from further down the chain.

23 THE CHAIRMAN: Would it be the case that those purchasers of
24 stamps would have the burden of proving pass-on?

25 MR WARD: They would have a burden of proving --

1 THE CHAIRMAN: They would be claiming in effect. They would
2 have to show that the overcharge -- that they paid --
3 they suffered the loss from the overcharge.

4 MR WARD: They would indeed. Then if they were businesses,
5 you could imagine the next thing they would hear from
6 DAF is they passed it on to their own customers.

7 THE CHAIRMAN: But I assume DAF -- assuming the pass-on
8 defence is successful, say, in this case, they could not
9 sort of revert and say, "Oh, no. So far as you are
10 concerned, there was no such pass-on"?

11 MR WARD: I hazard there is a risk assessment that goes into
12 the decision to help run these defences.

13 MR RIDYARD: In terms of the legal arguments, do you think
14 we should therefore -- because we might be fearful that
15 it might not be possible for the end claimants to claim
16 their money back -- that we should give it to your
17 client instead, just to sort of even up the balance? Is
18 that what you are suggesting?

19 MR WARD: No, I am not suggesting that at all, sir, but
20 thank you for the opportunity to clarify. I am just
21 merely observing, on the point that the chairman made,
22 that those are the realities of the situation. It does
23 not affect the legal analysis at all.

24 SIR IAIN MCMILLAN: Just to be clear, if I may, is your
25 point there that, whatever may happen as a result of

1 this judgment, actually it is not a matter for this
2 court?

3 MR WARD: Well, that is certainly true, sir, yes.

4 SIR IAIN MCMILLAN: Thank you.

5 MR WARD: So I was talking about price setting. This is
6 indeed where we get to the only point of substance that
7 DAF have run in their closing on BT, which is the
8 cumulative probability of rounded value of X, the
9 probability analysis.

10 What DAF says is it is common ground between the
11 experts that a probability analysis should be used to
12 assess the likelihood of supply pass-on, and I am not
13 sure I would quite go that far. What we do say, anyway,
14 is that Mr Harvey does not accept that this actually
15 demonstrates supply pass-on. It is important to be
16 clear about that, even though he certainly engages with
17 this argument and makes criticisms of the way that DAF
18 has advanced it. But we explain the argument in our
19 closing at page 340, {S/9/340}, just to remind you. We
20 have done our best to summarise it, and Mr Bezant's view
21 was:

22 "... whilst 'the probability that the rounded value
23 of X of each of the Regulator's glidepath charge
24 controls calculations would differ in the absence of the
25 alleged Overcharge is relatively low', nevertheless 'the

1 probably of at least one of the calculations changing
2 (and therefore resulting in some SPO across all of the
3 Regulator's glidepath charge [controls] ...) is
4 relatively high'."

5 We set out in four propositions how we understand
6 the argument. Firstly, the argument is it is possible
7 that the overcharge could be the difference between
8 being on the lower step in an RPI-X control in the
9 counterfactual and a higher step in the factual, so it
10 just might be what made the difference between going to
11 2.1 and 2.0. But this is unknown because of lack of
12 access to the detailed models required to confirm this,
13 although Mr Harvey did look at one or two which he
14 thought did not help to show this.

15 In theory, this could happen even if the overcharge
16 is a tiny amount of money, such as the kind of £5,000 we
17 were just talking about, but, if it does happen, it
18 would give rise to a jackpot, as it was described in
19 a cross-examination, because it would cause recovery of
20 the entire amount of money implied by the charge control
21 being on a higher step. Then Mr Bezant's argument,
22 DAF's argument, is that the jackpot can be treated as
23 a form of recovery of the overcharge for the purpose of
24 other charge controls and other periods because you
25 would have effectively over-recovered.

1 It is important to appreciate, though, that this
2 argument is being deployed precisely because DAF does
3 not know if it actually happened. As Mr Bezant
4 accepted, he does not have access to the detailed models
5 to test how big the unrounded value of X was or how
6 close the charge control was to the rounding step. So
7 it is completely hypothetical in that regard.

8 So what we have is a probability analysis being used
9 to predict what would have happened in the past and, as
10 we explored with Mr Bezant, the internal logic of the
11 argument does have remarkable features. It requires the
12 tribunal to accept that the proceeds of a jackpot that
13 might have been struck in 2021 on, say, leased lines
14 could be applied to different products in earlier time
15 periods, such as wholesale broadband. Equally, if the
16 jackpot was struck in 1997 on products available then,
17 the proceeds of that could be applied to future trucks
18 not even purchased, and future charge controls for
19 products not even on the market. It is a kind of
20 pass-on across products, across charge controls and
21 across time because DAF --

22 THE CHAIRMAN: Is that really the way he said it would work?

23 MR WARD: Well, that is the logic of it. We explored this
24 in cross-examination. He takes all of these RPI-X
25 controls over time, at the last minute he bundled in

1 some extras on ancillary services, which most of them
2 were in the 2020s, and says, "Well, one day, it is more
3 likely than not that you will hit the jackpot", to use
4 my words, not his, "on some RPI-X control or other and
5 there you are, then. You will have over-recovered and
6 let us call that supply pass-on".

7 THE CHAIRMAN: But you hit the jackpot in 1997 and that is
8 effectively carried forward for future --

9 MR WARD: We think it is the logical example. He does not
10 know which charge control will tip, if any, or when it
11 will tip or, if it tips, how much money will be
12 unleashed. But this is being used to support an
13 argument of 100% cost.

14 It is really important, as we say at 879, {S/9/341},
15 that it is just not possible to say which price control
16 may have tipped, so it is not possible to know how large
17 the jackpot would be and it could be as little as £100.

18 Now, one thing that is said in DAF's closing
19 submissions which we were a bit surprised by is that
20 they say this is consistent with the overall objective
21 of the regulatory regime. We do not need to go to it,
22 but that is {S/11/55}, paragraph 191. But the reality
23 is completely the opposite, which is that Ofcom applies
24 six principles of cost recovery and one of them is cost
25 causation, that costs should be recovered from those who

1 caused the cost to be incurred. That is set out in our
2 annex to our closing at page 115, paragraph 294, or Opus
3 {S/9/577}. But it is no part of any explicit agenda of
4 Ofcom to allow a sort of jackpot to be struck and used
5 on some other occasion on some other products.

6 Now, what we say about this in short is at 881, page
7 {S/9/341}. This does not discharge the burden of proof.
8 DAF cannot show this actually happened. Even if it is
9 more likely than not that one or even more than one
10 charge control tipped, DAF does not know which; it does
11 not know when. But even if that could be identified or
12 retrospectively predicted by probability analysis, it
13 still does not constitute supply pass-on. It is not
14 recovery of the overcharge that was used for different
15 products in different periods or trucks that were bought
16 now and not bought later. It is just a jackpot. It is
17 just a jackpot caused by the regulator's use of rounding
18 and characterising it as SPO, supply pass-on, is just
19 arbitrary. You might spend it on going out for lunch or
20 purchasing sports rights. It is just unintelligible --

21 THE CHAIRMAN: Presumably the regulators use rounding
22 because they think that anything that would be
23 unaffected -- would be affected by the rounding is too
24 small to have to take into account.

25 MR WARD: Well, of course. It is a level of granularity

1 that they go to, and the problem that DAF has is they
2 are trading on a level of granularity of overcharge that
3 is smaller than the level of granularity the regulator
4 action implies.

5 MR RIDYARD: It is the same as -- menu pricing, is it not --
6 is it not used for this? I mean, you get it -- I am
7 sure *Sainsbury's* will get it eventually on the Visa or
8 *Mastercard* case that they have got price points for
9 selling a can of beans, you know, and they are not going
10 to change it from 49p to 49.5p or 50p, even, because
11 they think that is important. But there is all sorts of
12 imperfections in the way that firms price products.

13 Is not another way of characterising Mr Bezzant's
14 argument here just to say, "Well, it will come out in
15 the wash one way or the other. It will not come out
16 perfectly to a fraction of a penny, but because it is
17 happening in enough cases, sooner or later it will come
18 through"? I appreciate you do not think that is good
19 enough because you think we should identify exactly
20 where it comes through and when, but the idea -- I guess
21 he would say the idea that it will come through sooner
22 or later is approximately the same as saying -- it is as
23 if the prices are being adjusted by 0.001 of a penny.

24 MR WARD: Well, with respect, sir, that is what he is saying
25 and we do not accept it because "it will all come out in

1 the wash", which is not an unfair way of characterising
2 it, is just not good enough to show causation or
3 discharge the burden of proof here.

4 The logic of this case, it is so peculiar, they do
5 not know if it happened at all, never mind, well, if it
6 did, we can apply these proceeds across time and across
7 products and across charge controls. It is inherently
8 a speculative argument.

9 THE CHAIRMAN: You say the burden of proof. The
10 Supreme Court says that broad axe applies to this
11 aspect.

12 MR WARD: It does. Absolutely it does. So once you get
13 into quantifying it, what I am suggesting here, what
14 I am submitting, is that this is all so speculative that
15 it just simply cannot suffice to discharge the burden of
16 proof, even to get into broad axe territory. That would
17 be a question of how much.

18 THE CHAIRMAN: So you say this is the prior question of
19 causation -- actual causation rather than quantum?

20 MR WARD: Yes, completely. I do say that. There are
21 obviously quantum problems as well, but the reality is
22 this is just based on a hypothesis that is not in any
23 way demonstrated. What lies beneath this is an attempt
24 to escape from the problem that -- as Mr Ridyard was
25 really alluding to, we have just got the problem that

1 there is obviously imperfection in the regulation
2 process. Even with a degree of assiduousness that Ofcom
3 applies to it, there is a level of granularity beyond
4 which it just does not go, so it does not set the price
5 of MPF rental to £80.63.23759. It settles for £80.60.
6 That is the problem.

7 THE CHAIRMAN: That is a consequence of the size argument,
8 is it not --

9 MR WARD: Yes.

10 THE CHAIRMAN: -- that it is just too small to properly take
11 into account?

12 MR WARD: Yes. But that is why we end up with DAF resorting
13 to this argument, that there is this probabilistic sense
14 in which somehow it will all come out in the wash. But
15 we are dealing here -- BT Openreach is the only place
16 this argument is being applied and we are dealing with
17 specific charge controls with specific products in
18 specific periods. It is not just one giant whole
19 matter, where you can say, "Well, you know, after
20 20 years of pricing, somehow along the way you would
21 have picked it up". That is just not good enough.

22 THE CHAIRMAN: This probability argument does not apply to
23 Royal Mail?

24 MR WARD: It is only being advanced specifically in respect
25 of Openreach, not even the whole of BT, although, in

1 fact, as I am going to come on and say, there is an
2 element of their Royal Mail case which implicitly rests
3 on the same approach.

4 In fact we can pick that up now if it is convenient,
5 it is at page [sic] 886 of the closing, {S/9/342}, where
6 they say -- as I showed you earlier this morning, they
7 are essentially summarising their case as being 100%
8 pass-through for Royal Mail, but actually Mr Bezant has
9 different estimates. He has 50% in the PC1 period, 75
10 in the Government period and around 140 for PC3 for
11 trucks classified as capex. So the 100 is a sort of
12 attempt to average out across all of those, but, again,
13 they are all very different time periods and, of course,
14 the trucks being used would have been very different in
15 each one.

16 THE CHAIRMAN: So, what, they use an average and they -- is
17 that on the basis that, what, the overcharge is an
18 average over the whole period?

19 MR WARD: Sir, that is what they are saying; "Well, our
20 average pass-on is 100 across the whole period, so we
21 will have 100, please, even though we only have 50 in
22 the PC1 period and we have a bit more in the PC3
23 period". But that is just totally impermissible. It
24 completely disregards the requirement for causation.

25 It is also worth saying this argument has very

1 peculiar implications for any interest claim. When was
2 the loss incurred? When did it come to an end? I mean,
3 it is mind-boggling.

4 THE CHAIRMAN: You say the size is a critical factor, the
5 fact that it is so small?

6 MR WARD: It is a critical factor because, when we talk
7 about this rounding argument -- that is how we get into
8 this rounding argument because it is a way for DAF to
9 try to circumvent the problem. But the size of the
10 overcharge is very likely far too small or they do not
11 even know how it stands next to the size of the step.
12 That is the problem.

13 THE CHAIRMAN: Even if it was a much larger amount, you are
14 still saying, as I understand it, that there are
15 sufficient other judgments that go into it that would
16 effectively break the chain of causation?

17 MR WARD: I am saying that. When you imagine all of the
18 steps that come from when BT Fleet or Royal Mail Fleet
19 buy a truck to a price point on a -- whether it be
20 a stamp or a telephone line, there are just so many
21 steps in that, it cannot possibly be proximate cause.
22 In fact we do not think it is even factual causation for
23 the reasons that I have been discussing this morning.

24 MR RIDYARD: Can we unpick that a little bit because it is
25 I think quite interesting. So even if the overcharge

1 was 100%, it would still be -- there would still be very
2 small numbers in terms of the price of a postage stamp,
3 so that is not necessarily that interesting. But even
4 if we had a different set of facts -- you said earlier
5 just before the break that if the amounts involved were
6 much bigger, then DAF would have a stronger case. So
7 let us say, if the cost of trucks was more important in
8 total costs of Royal Mail than it actually is, say, and
9 therefore even the 10% overcharge on trucks -- then it
10 would be very material to the costs of the business,
11 then you suggested that DAF would have a stronger case
12 on pass-on. But it would still be the case, then, that
13 you would have to track through the impact of that truck
14 cost on, because consumers do not buy trucks, they buy
15 stamps.

16 MR WARD: I did not intend to be making a concession there
17 that that would make it easier. It is just obviously
18 true, though, that if you have a product that cost
19 a pound and the main price input for it is 50p and that
20 50p becomes 75p, that is going to make it easier to see
21 if there is a price effect.

22 MR RIDYARD: Yes, but -- well, maybe I am not doing it very
23 well, but what I was trying to disentangle was the size,
24 the issue and the complexity because you can have
25 a big -- an important cost increase but it could still

1 be complicated to trace through how an increase in the
2 cost of trucks then affected the price of a stamp
3 because it would require breaking it down between
4 different parts of the business and then making
5 a judgment about how it impacted this, that or the
6 other. So are you saying both of those things are
7 important to you? Are you saying you think your
8 arguments would -- I think you said your argument is
9 stronger because it is small.

10 MR WARD: Yes.

11 MR RIDYARD: But how strong would it be if it was not small?

12 MR WARD: Do you mind if I slightly sidestep that question
13 because I would say it all depends. But if you had all
14 these changes in the causation, the argument for my
15 clients could be just as strong. The reason we came
16 back to scale at the end of this discussion is, when we
17 thought about it against the price point setting, so the
18 regulatory setting of these RPI-X to one decimal
19 place -- and we are going to see this in a moment when
20 we go on to Postcomm. Even in Postcomm, where there are
21 these very seemingly precise-looking revenue
22 forecasting, it is still the case that this is too small
23 to actually matter in the price control that they
24 actually set.

25 THE CHAIRMAN: So it is possibly easier on the facts to show

1 pass-through but it does not really help on the legal
2 question?

3 MR WARD: It might be easier on the facts. It does not help
4 on the legal. I am trying to be a bit evasive because
5 I think it would all depend on looking at it properly
6 and the world we are in is certainly not that world. We
7 are in the world of extremely small amounts.

8 I wanted to, before I go on to Royal Mail in
9 a little bit more detail, just to show you a bit about
10 what they say -- they, DAF, I am sorry -- about BT in
11 their closing. If we could pick that up, please, it is
12 {S/11/56}. This is after they have developed their
13 argument on the probability analysis that we have just
14 been talking about, and at 209 they say:

15 "In the interests of proportionality, the Tribunal
16 is invited to extend these conclusions to the remaining
17 putative overcharge incurred by Openreach, which was
18 allocated to products (i) subject to other forms of
19 price controls; or (ii) not subject to price controls."

20 In fact RPI-X controls are only 55% of Openreach and
21 there were a whole series of other types of controls
22 used about which DAF has said nothing and which we do
23 address in our closing, and indeed for the other
24 business areas of BT they say almost nothing. There is
25 a short couple of paragraphs on wholesale and retail and

1 global and nothing at all about supply chain. But no
2 case has ever been developed on these at all, either in
3 opening or closing or cross-examination. We have set
4 out our position on this in our closing, at least in
5 brief, anticipating what may or may not have come from
6 DAF. But our primary position is that, with respect,
7 none of that is good enough to make good their case.
8 They have only developed very narrow elements of the
9 supply pass-on case and they should not be permitted to,
10 as it were, just vaguely generalise it out partly just
11 by references to their expert reports.

12 We see the same approach in Royal Mail, albeit to
13 a lesser extent, and I will just give you the
14 references. Actually I can just show you. We are in
15 the same document, page 46, paragraph 161, {S/11/46}.
16 They say -- this is after discussing PC3. At 161 they
17 say:

18 "For reasons of proportionality and in circumstances
19 where Postcomm included Royal Mail's regulated
20 but non-price controlled products in its financial
21 modelling ... the Tribunal is invited to adopt the same
22 approach ..."

23 Then we see the same thing at 171, {S/11/49}, extend
24 to the small amounts of -- I am so sorry, that was PC2.
25 Now PC3, extend it to unregulated products.

1 With respect, that is not good enough because what
2 we faced here was allegations of extreme breadth and
3 complexity and at the end DAF has actually developed
4 really quite limited points. That is fair enough as
5 a litigation choice but not one that can be side-stepped
6 by vague appeals to proportionality.

7 Now, we can keep that document open because the next
8 point I am going to go to is in there. I wanted to just
9 spend a little bit of time on PC2 and PC3 of Postcomm.
10 We have dealt with this in detail in our written
11 closing, but I want to, if I may, just try to emphasise
12 some key points. Here, again, the themes are the same
13 as in my earlier submissions, that really what this
14 requires is imposing on the price setting process as
15 well as the cost evaluation process a higher degree of
16 precision than is supported by the evidence.

17 We can see the difficulty if we look at page 47 of
18 DAF's closing in paragraph 163(f), {S/11/47}. This is
19 talking about Postcomm PC2, which is the first period
20 I am going to talk about:

21 "In principle, all else being equal, lower costs
22 would result in the output of Postcomm's model being
23 a lower level of X."

24 That indeed is a fine formulation that begs all of
25 the questions. What I want to do is just remind you by

1 going firstly just to primary documents of some key
2 features of PC2, which explains in a nutshell why this
3 is a level of precision that one cannot discern in
4 Postcomm's approach.

5 If we could please turn up {I3/374}. This is the
6 final proposals document. I think I said at some
7 earlier stage in this trial that the final proposals
8 were effectively the decision. That is not right.
9 There is a decision later, it is just that they contain
10 the actual reasoning. I want to show you things you
11 have seen before.

12 Can we go to page 70, please, {I3/374/70}, because
13 we can see immediately one of the problems with this
14 approach. In 7.44:

15 "In setting the level of the control, Postcomm has
16 set the allowed revenues so that on Postcomm's central
17 view of volumes, operating, capital and renewals ...
18 Royal Mail will be broadly cash neutral ..."

19 So that is a broad ambition, not an absolutely
20 precise guarantee, that every kind of small sum of money
21 will be recovered and precisely reflected in the charge
22 control.

23 But what we are talking about here is approximately
24 8 million overcharge over the life of this control and
25 indeed the total revenues projected were about

1 17 billion. So the question is whether that 8 million
2 is really going to make a difference.

3 We can assume in DAF's favour that, when you have
4 been through all of the cost modelling and these various
5 judgments on forecasting, you can still find the
6 overcharge somewhere. We address some of those cost
7 issues in the closing. But let us assume that that is
8 right, that the forensic accounting work takes you
9 there, well, the key point, though, is that this is
10 still set in a way that is broad and replete with
11 regulatory judgment. We can see this at 7.45:

12 "... having established revised cash projections ...
13 Postcomm must assess the level of required revenues ...
14 In Postcomm's October 2002 proposals, the initial
15 increases in average prices were intended to increase
16 average revenues by about £170 [million] in the first
17 year."

18 Pausing there, that about 170 million was what
19 Royal Mail actually requested. We can see that if we
20 just leave this document very briefly and go to the
21 previous proposals document of Postcomm, to {I3/375/53}.
22 At the bottom of the page, 6.4:

23 "Consignia has recently asked Postcomm to set the
24 level of the revised price control on the basis of
25 it being allowed to raise regulated revenue by about

1 £170 [million] (equivalent to 1p on First and Second
2 Class ...) no later than 1 April 2003 ..."

3 Then over the page, {I3/375/54}, 6.5:

4 "Consignia's rationale is based on it needing ... to
5 demonstrate a commercial case for borrowing ... for the
6 upfront costs necessary for restructuring ..."

7 Then 6.6, it was supported by DTI.

8 So we go back now, please, to where we were, which
9 is {I3/374/70}, the Postcomm final proposals -- back to
10 7.45:

11 "In Postcomm's October 2002 proposals, the initial
12 increases in average prices were intended to increase
13 average revenues by about £170 [million] [a] ... year.
14 This was equivalent to a nominal increase of 3% ... and
15 equivalent to 1p/1p on the ... first ... class ...
16 tariffs ... Subsequent price adjustments were to be
17 subject to a limit of RPI-2.5 ..."

18 So it was giving Royal Mail exactly what it had
19 asked for.

20 Then on the next page, {I3/374/71}, 7.48, it
21 contemplated three options and option 2 was increase
22 average prices by 3% while imposing an X factor of 1%,
23 which is in fact what it ended up doing.

24 "This option is consistent with increasing the
25 prices of ... basic ... steps ... by 1p ..."

1 Then over the page, {I3/374/72}, at 7.14, we have
2 a table which shows the logic of these different
3 increases. What we see -- the financial logic, that is.
4 Option 2 is the one it adopted. At 7.50, it says:

5 "Against this background, Postcomm is of the view
6 that retaining the initial price increase of 3%
7 and relaxing the X factor from the initial proposals of
8 2.5% to 1.0% would best achieve the discharge of its
9 duties ..."

10 So that reference to "discharge of its duties" is to
11 its public law duties. It is saying it is making
12 a judgment in the exercise of those duties about the
13 kind of X factor that would be best and, in 7.51, there
14 is a discussion of efficiencies, and then it says at the
15 end of the paragraph:

16 "This would amount to efficiency gains of
17 approximately 6% over the three years of the price
18 control."

19 So what we see here, then, is detailed cost
20 modelling, but, ultimately, a broad based judgment about
21 how to give Royal Mail the approximate revenue it
22 wanted. What DAF says in its closing is there are good
23 reasons to think a regulator would have reached
24 a different conclusion if the cost base had been
25 8 million lower -- 8 million out of 17 billion. Our

1 respectful submission is actually to the contrary. It
2 is inconceivable how that could have made
3 a difference -- given the broad options that were
4 actually under consideration, it is just inconceivable
5 that they could have come to a different result.

6 MR RIDYARD: Can I just test that a little bit? If the
7 170 million was not just dreamt up, it must have been
8 based on lots of accountants doing lots of things, so in
9 the counterfactual would they have been asking for about
10 160 million and could that have led to a different
11 result?

12 MR WARD: Well, all I can tell you is it was about renewals.
13 It does not say it was about buying more trucks. But
14 I think the way I would test it, sir, is when you look
15 at this table, table 7.14, in fact this option 2 is
16 showing 17.008. Is it really plausibly the case that
17 the option would be different if there were 8 million
18 less trucks -- 8 million less truck costs in it? In our
19 respectful submission, it is just completely speculative
20 to suggest that it might be.

21 MR RIDYARD: But do you think it is plausible to say that
22 that request could have been for about 160 million if it
23 had not been for the cartel?

24 MR WARD: Well, I -- but there is no suggestion that the
25 trucks were what was driving that request. DAF has

1 certainly not put any case that that would be so. So
2 one can speculate, but the truth is we do not know, and
3 where we are coming to again is another one of my themes
4 about this. There is a limit to the granularity of what
5 the experts can see in these documents. It goes back
6 a long time and Postcomm is a third party. So we just
7 cannot say, "But this is where it does matter that DAF
8 bears the burden of proof. It is asserting that this 3%
9 RPI 1 would have actually been different because of this
10 very small sum", and, in our respectful submission,
11 there is just nothing to suggest that that is actually
12 true.

13 THE CHAIRMAN: Can I just check? That 160 million and
14 170 million that you were just discussing, what is that
15 figure?

16 MR WARD: It is the request that Royal Mail has made. They
17 want approximately 170 million to fund a renewals
18 programme, and that is the equivalent of a penny on
19 first and second class products.

20 Now, there is another argument that Mr Bezant tried
21 here, which is so-called headroom, where we deal -- with
22 this in a great deal of detail in our closing but let me
23 just try to give you the flavour quickly. You see there
24 that the cashflow forecast comes out at positive
25 21 million, and the idea is that that is somehow

1 a deliberate choice, so in the counterfactual costs
2 would have been that little bit lower.

3 His argument is, "Well, Postcomm would never have
4 allowed a bigger headroom than 21 million. It would
5 just have reduced the price". But the problem with this
6 is there is nothing to tell us that this 21 million was
7 actually deliberate, as Mr Bezant accepted, or that it
8 was even the maximum that they would accept. It just
9 falls out of the arithmetic of doing a 3% increase and
10 an RPI minus 1 and it is just pure assertion to say,
11 "Well, actually that change of headroom itself could
12 have made a difference to the price control".

13 For your note, when Postcomm first consulted, their
14 favoured option had a headroom of 46 million and they
15 did not seem bothered by that. That is {I3/375/75},
16 table 6.9.

17 I will leave that there, if I may, and go on to PC3.
18 Sorry, it has come up on screen. We might as well see
19 it. You see option B, "Base Case Volumes" in the
20 middle, 46, so there was positive 46 million.

21 I am running out of time and I want to go on to PC3
22 and say a little bit about that too. But before I do,
23 sir, if you have a question about this, I did not mean
24 to discourage it in any way.

25 So starting with PC3, the first thing to say is that

1 PC3 was a failure. It was adopted in this period of
2 huge turbulence for Royal Mail, where there was a lot of
3 new competitive entry and e-substitution. This is all
4 explained in the witness statements. The volume
5 forecast turned out to be fundamentally if not
6 disastrously wrong and this ultimately led to Postcomm's
7 demise. Indeed the price control was repeatedly
8 adjusted with various extensions and changes to the
9 so-called rebalancing thresholds which limit the
10 movement of prices within the charge control. We talked
11 to Mr Bezant about this and how, after a couple of
12 years, there had to be change because of the problems
13 they were causing Royal Mail. All this is explained in
14 our closing around page 44.

15 So we do start from the point of view that it is
16 a bold submission that this was sufficiently fine-tuned
17 that it was set at a level that actually reflected these
18 very small elements of costs that were actually incurred
19 during the period of this charge control. In fact, if
20 we turn it up, we can see the difficulty Postcomm was
21 faced with in terms of generalised uncertainty. Can we
22 go to {I3/113}, which is the final proposals document
23 for PC3. If we turn to page 198, {I3/113/198}, there is
24 a series of projections against cashflow in various
25 scenarios.

1 You can see a base case net cashflow of 257 million
2 forecast for 2009/2010 and then it looks at various
3 scenarios, including "Entrants price to target achieving
4 15% market share", and then other matters about what
5 Royal Mail might or might not do. So it is a very, very
6 difficult situation.

7 If we could turn now to {E/19}, please, Mr Bezant's
8 first report, he there acknowledges some important
9 uncertainty. Page 112, {E/19/112}, it is
10 paragraph 11.32 and it takes us back to the topic of
11 headroom, where he says at 11.32:

12 "As with PC2, Postcomm's discretion likely resulted
13 in it providing Royal Mail with a headroom (although
14 I have not been able to identify whether, and the extent
15 to which, Postcomm provided any headroom)."

16 We do not criticise him for that, but, again, it is
17 a sign of what the level of granularity is really here.

18 Now, the important point from our point of view,
19 which provides a short-cut through this complications of
20 PC3, is the sculpting point that we discussed with
21 Mr Bezant. To save time, if I may, I will take this
22 from our closing, but the essential point is there is
23 great emphasis both in Mr Bezant's report and in DAF's
24 closing on the fact that the eventual price control was
25 set to 4% but with an RPI-X to two decimal places. So

1 that looks like something highly granular in a context
2 where one is trying to recover very small sums of
3 overcharge, but the problem is this is based on
4 a misapprehension about what actually happened.

5 If we go to annex 2 of our closing, please, at
6 {S/11/501}, or page 39, if anyone is reading the hard
7 copy, what we see, if we turn to page 39 -- sorry,
8 {S/9/501}.

9 So paragraph 93 -- we traced through the regulatory
10 documents and at paragraph 93 the final proposals were
11 a decision on various aspects of the price control:

12 "... [the] average price control for all [the]
13 products will be equivalent to [minus 0.1%] per year
14 compared to [RPI minus 2.5] in the initial proposals."

15 So at that stage that was an overall judgment that
16 that would be the average effect of the charge control.
17 But then, at 95, they considered a request to sculpt the
18 price control to let BT recover more revenue -- sorry,
19 Royal Mail -- in the first year because of a large
20 increase in pension costs. You see it made final
21 proposals at 9.106, again to one decimal place,
22 {S/9/502}:

23 "Postcomm is proposing that for the 'captive' basket
24 ... an increase of 6.2% in nominal terms followed by
25 [RPI of minus 1.5] ...For the 'non-captive' ... an

1 increase of 6.2 ... followed by RPI [minus 3.5] ..."

2 Then what happened is that they considered
3 representatives both from -- all sorts of third party
4 representatives and said:

5 "... Postcomm notes that ... it welcomed views on
6 whether it [should] adopt a different pricing profile,
7 provided that the net effect was ... revenue neutral in
8 present value terms ... over the ... price control ..."

9 So it did not mind altering this, but they were not
10 departing from what they had already specified or its
11 level of granularity.

12 Then it says what it decided to do:

13 "Given that customers sought a lower initial price
14 increase, Postcomm has decided to limit overall average
15 revenue increases to 4% ... This gave rise to the
16 revised X factor adjustments ... [of 0.14 and 1.96] ..."

17 So a really short point here is that these decimal
18 places do not represent some extremely fine-grain
19 calculation where tiny sums of overcharge might make
20 a difference. They just represent a rebalancing against
21 an overall judgment that they started with, that there
22 would be these fairly broad alterations to RPI.

23 So we submit that, even without any more, this is
24 a clear indication that the charge control is not
25 granular enough for DAF to be able to conclude that it

1 really would have been different in the absence of the
2 overcharge.

3 THE CHAIRMAN: They were rebalancing in order to maintain
4 revenues at the same level?

5 MR WARD: Yes, the same level, calculated effectively to one
6 decimal point, but to give BT a lump sum at the
7 beginning to help it with its pension costs and
8 therefore a different level of RPI so that it was
9 neutral overall over the charge control.

10 So it is an attempt to impose a kind of spurious
11 accuracy to say that these two decimal places somehow
12 prove that small sums like the overcharge would make
13 a difference.

14 THE CHAIRMAN: So you are saying that the rebalancing was
15 not based on any difference in costs?

16 MR WARD: No.

17 THE CHAIRMAN: It was just --

18 MR WARD: Just profile.

19 THE CHAIRMAN: -- to cover some miscalculations that had
20 been made --

21 MR WARD: Not even that. Just altering the profile so that
22 BT got more money upfront because it was obviously
23 facing a pension deficit problem.

24 THE CHAIRMAN: Royal Mail.

25 MR WARD: I am so sorry, Royal Mail.

1 Now, beyond that there was a great deal of technical
2 debate about the various cost inputs. We did address
3 this in our closing and one particular point that was of
4 contention was cost forecasting. Again, just because
5 I am running out of time, I will take this, if I can,
6 please, from our closing which is page 53 or Opus
7 {S/9/515}, I think. I will just try and take this very
8 shortly, if I may, because I need to also take loss of
9 volume. It is 133. You may recall, but all the
10 references are here. There was a forecast of
11 484 million for vehicle expenditure put forward by
12 Royal Mail and then LECG, the cost consultants, made
13 some significant downwards adjustments to 380, with
14 a round figure of 95 million for each year. Both
15 Mr Harvey and Mr Bezant were cross-examined on the
16 significance of this and whether this represented a form
17 of rounding. But we can pick it up at 134, where
18 Mr Beard put to Mr Harvey:

19 "LECG [are] explaining that ... they are actually
20 carrying out a very acute and precise analysis using
21 historical lease payment data and calculating pretty
22 exactly, what they think that means ..."

23 In fact we can see above there, in the previous
24 paragraph, three lines from the bottom, LECG did what
25 they said was an estimate of the point at which two

1 options were financially equivalent in terms of either
2 leasing or purchasing the trucks.

3 Mr Harvey gave the answer at 135, {S/9/516}:

4 "In terms of the process that you have just
5 articulated, it says 'based on the data provided', so it
6 is on historical lease payments ... So there is a lot
7 going on inside this calculation that we just cannot
8 see. What we do know is that they departed from the
9 figures ..."

10 I asked Mr Bezant about this as well and he said, at
11 the bottom of the page, he had "no reason to believe
12 [LECG's adjustment] was not done precisely". Indeed
13 that passage is quoted by DAF in its closing at
14 {S/11/44}, paragraph 149. But he also carried on and he
15 said, well, he does not know how Postcomm got to the
16 numbers, nor how the analysis was done.

17 I am not criticising Mr Bezant in any way for that,
18 but this is just another good example of how there is
19 actually just too much uncertainty here to actually
20 trace through with the level of granularity you really
21 need in order to make good DAF's case.

22 Now, there is much more detail in our written
23 closing, but I wanted to give you at least the capsule
24 view of the problem here. There are two other aspects
25 of Royal Mail but I am going to deal with them in

1 a sentence each because of time. They are much more
2 developed in our closing.

3 For the Ofcom period, after 2012, it is basically
4 deregulated. With Parcelforce, the big debate was about
5 the use of some cost models, which you might remember
6 had an arrow on saying, "To get this, put in this".
7 Mr Cahill was very clear that the price was an input,
8 not an output, for those models, and we have been
9 through the detail of that in our closing. Since then
10 DAF noted that the disclosure contained other cost
11 models which very much supported what Mr Cahill was
12 saying, but I was not going to go further with that now.

13 I want to turn to loss of volume and try to dispatch
14 that by 1 o'clock.

15 THE CHAIRMAN: It is your choice as to how to spend your
16 time.

17 MR WARD: Of course it is, sir, of course it is, but that is
18 what I am going to do, otherwise Mr Lask will not
19 forgive me.

20 Now, we deal with this in our closing at page 343,
21 {S/9/343}. As we say, this claim is entirely premised
22 on the assumption that DAF's supply pass-on defence is
23 made good so in that sense it is a purely reactive plea.
24 Royal Mail's case is there is no supply pass-on so there
25 is no loss of volume either. It starts with a quite

1 simple idea -- perhaps it turned out to be deceptively
2 simple -- but if prices go up, sales are lost and the
3 value of those losses can be calculated using the
4 elasticity of demand and the margin over variable costs.
5 Actually, that much is common ground, including the
6 measure of elasticity. Indeed, I think the existence of
7 such a loss of volume is itself accepted in principle by
8 DAF.

9 There are then -- we have dealt with in our closing
10 some relatively minor areas of disagreement. One is
11 about the level of marginal costs, and the essential
12 point is Mr Harvey thinks that very few costs are likely
13 to be marginal because of the kind of changes of volume
14 we are considering here and the nature of Royal Mail's
15 business. But the key issue is infra-marginal sales.

16 This is DAF's case, that Royal Mail and/or its
17 regulator would have set prices so that the tiny volume
18 loss that we are talking about here would have been
19 reflected in a tiny increase in the prices charged on
20 the remaining sales, so, that way, any loss of volume
21 claim that Royal Mail might have had is actually
22 extinguished because it is compensated by increased
23 prices on remaining sales.

24 As far as we can see, if DAF is right about this,
25 there could never be a loss of volume claim because this

1 argument is advanced on the basis of regulation, but
2 also, at least by Professor Neven, to the unregulated
3 prices. So that would be a surprising outcome as these
4 are entirely orthodox features of competition damages
5 claims, but the question is: is it right?

6 Now, the first thing to say is that DAF accepts in
7 principle there would be a loss of volume effect, as we
8 understand it. As I have said, there is a large measure
9 of agreement about that. But what they are arguing in
10 substance is that there is a set-off that would arise in
11 respect of the pricing of remaining sales -- products.
12 We set out at 347 observations from Professor Neven
13 which make clear this is a positive averral, even though
14 it is in fact not one that has been pleaded {S/9/347}.
15 Professor Neven observes, at 898:

16 "I find that RMGL would have experienced
17 a significantly lower (possibly zero) reduction in its
18 profits as a result of pass-on."

19 Then we quote his oral evidence as well which makes
20 it clear that this is a positive assertion. That has
21 a consequence for the litigation because, whilst of
22 course we bear the burden of proof on loss of volume, if
23 DAF is asserting there is this offsetting effect through
24 infra-marginal sales, they bear the burden of
25 demonstrating that that effect arose.

1 THE CHAIRMAN: It goes backwards and forwards.

2 MR WARD: Well, there is a supply pass-on claim argument
3 that they raise. Royal Mail responds and says, "Well,
4 we would have lost volumes then because elasticity of
5 demand means we would have lost some sales". It is
6 a very small increase but that is the logic of
7 elasticity of demand. DAF comes back and says, "No, you
8 would not because actually you would have got a price
9 increase on your infra marginal sales which just
10 extinguishes it". That is how the argument has worked.

11 THE CHAIRMAN: It is all part of the mitigation defence, is
12 it not, really?

13 MR WARD: If you like, yes.

14 THE CHAIRMAN: Working out how much was actually passed on?

15 MR WARD: Yes, exactly. Well, if that is true, that makes
16 it their case as well, but it is just two ways of
17 looking at exactly the same thing. But, either way, the
18 burden is on them.

19 Now, picking up the closing, I come back to what
20 I fear is one of my points that is overfamiliar but we
21 are back to scale. We see it at 901 on page {S/9/348},
22 we say in the case of assumed supply pass-on of 50%, the
23 volume change in issue is around 0.01% or up to
24 2 million items a year out of 2 billion.

25 THE CHAIRMAN: 20 billion.

1 MR WARD: So sorry, 20 billion.

2 So Mr Harvey's analysis is, well, the price
3 increases that would have to be given effect to recover
4 the overcharge are so small, it is highly unlikely the
5 regulator would be able to fine-tune prices to take into
6 account these reduced volumes as well. So it is really
7 a fortiori to his concern about supply pass-on as well.

8 But this is where we ended up being engaged in
9 a game of pass the parcel with DAF's experts on this
10 because the only written evidence on this infra marginal
11 sales argument came from Mr Bezant [sic], but he was
12 very clear, as we see if we can turn to {S/9/352}, that
13 he was relying entirely on Mr Bezant's analysis for
14 this. So we see at 908:

15 "During oral evidence, Professor Neven made clear
16 that he based his assessment of the 'infra-marginal
17 sales' issue on the work of Mr Bezant. He had carried
18 out no independent assessment of the regulatory or
19 pricing framework. As to the question whether in fact
20 regulation would reflect to a price increase that would
21 compensate for the loss of volume, he made
22 clear: 'I rely on Mr Bezant ...'"

23 Then there is some further questioning from you,
24 sir, which expresses the same view. He did not do his
25 independent analysis. I do not criticise him for that,

1 I should say; he is just saying, "This regulatory
2 analysis is nothing to do with me".

3 Then the parcel was passed to Mr Bezant and we did
4 ask him about it and we can see at paragraph 910 he did
5 not address the loss of volume claim or infra marginal
6 sales points expressly in his expert reports. He
7 initially said, "Well, I would expect the regulator and
8 Royal Mail for that matter to appreciate the interaction
9 between volumes, prices and costs when thinking about
10 the composite outcome". But the problem is, when the
11 scale of this was put to him, he said at 911, {S/9/353}:

12 "In practice I cannot tell you because I do not know
13 what they would have done with their models."

14 Then, similarly, {S/9/354}:

15 "If volumes fall ... They had detailed econometric
16 models, they had external consultants ... but I cannot
17 tell you what they would have done ...", and so on.

18 There are a series more quotations to the same
19 effect.

20 In fairness to him, that is consistent with his
21 written evidence which we quote at 916 which does touch
22 on volume effects. At the top of page {S/9/355}, we
23 quote from his report, and this is in relation to PC2:

24 "The extent to which Postcomm accounted for
25 anticipated volume effects in determining the price caps

1 depends on whether, and the extent to which, Postcomm
2 adjusted the mail volumes for different price caps. It
3 is not possible to know with certainty how Postcomm
4 acted as: (i) I do not have information on Postcomm's
5 internal decision-making processes at the time; and (ii)
6 it might depend on the size of price changes and volume
7 effects."

8 He used exactly the same words in respect of PC3.

9 So Mr Bezant did not know the answer because the
10 point is too granular. We are back in this world where
11 DAF is trying to impose an element of spurious accuracy
12 on to this regulatory process that would require it to
13 delve -- even though there was vast amounts of
14 disclosure given, they would need to delve even further
15 to get these answers.

16 Professor Neven, in his report, really just relied
17 on some broad propositions which we quote at 918, one in
18 respect of PC2, that we already read out this morning,
19 that Royal Mail will be broadly cash neutral. In PC3 he
20 said the cost would be broadly equivalent to revenues,
21 and then again confirmed he did not really know for
22 himself.

23 Then finally, at 922, he deals with unregulated
24 prices and just says:

25 "I have therefore assumed for the purpose of my

1 analyses in this report that the approach to RMGL's
2 price setting was consistent with ... PC2 and PC3 ..."

3 With respect, that is totally lacking in reality
4 because the suggestion is that commercial price setting
5 might be so fine-grain, to use Mr Harvey's term, that it
6 would pick up these very, very small-scale problems.

7 Then, finally, I think finally, when we look at
8 DAF's closing, if we could turn that up now, please, at
9 {S/11/62}, if we go down to paragraph 240, they say:

10 "DAF recognises that the arguments advanced by
11 Mr Bezant and Professor Neven apply in the first place
12 to any finding of pass-on in relation to PC2 and PC3.
13 Professor Neven extends the approach to other periods on
14 proportionality grounds, and DAF invites the Tribunal to
15 conclude that this is a reasonable approach."

16 Well, in our respectful submission, it is a totally
17 unreasonable approach because it would require very
18 careful analysis of those periods. So we do invite you
19 to allow the supply pass-on claim. I should remind
20 you --

21 THE CHAIRMAN: I do not think you are inviting us to do
22 that, are you?

23 MR WARD: I am not! Loss of volume, sir. Sorry.

24 Thank you, sir. Loss of volume. What I was going to
25 say is Mr Harvey provides a range. It goes without

1 saying that we think you should go for the upper end of
2 the range which is dependent upon both assumptions about
3 elasticity of demand, which are actually now common
4 ground, but also an assumption about the level of
5 variable cost, which is contested but is one of the
6 issues which is dealt with in the closings.

7 THE CHAIRMAN: Is the argument of DAF that the regulator
8 would have taken into account loss of volume from its
9 increase in prices of certain goods/products --

10 MR WARD: Yes.

11 THE CHAIRMAN: -- and would have taken that into account by
12 increasing the prices on other goods, on other products?

13 MR WARD: Rather I think, if I may -- I do not think that is
14 the argument. It is that the modelling would have
15 allowed the regulator to calculate sufficient
16 specificity that the passed-on costs, which are in the
17 cost stack, imply a higher price which implies a reduced
18 volume of sales which itself implies that the price has
19 to go higher. It is something like that. It is all in
20 one step.

21 THE CHAIRMAN: The price of the same thing?

22 MR WARD: Yes, but it is all done in one -- I need to be
23 clear. It is not necessarily done in separate steps but
24 it is all in the model. The problem is that Mr Bezant
25 was not able to say whether the process was fine-tuned

1 enough, to use Mr Harvey's expression, to actually pick
2 up an effect as small as the one we are talking about.

3 THE CHAIRMAN: But it is another example of the regulator
4 having to exercise a fairly broad sort of judgment on
5 all of this?

6 MR WARD: Or even -- yes, and also just that there are
7 limits to what we can work out happened given the level
8 of granularity that we have here. If we were dealing
9 with something really big and fundamental, it might be
10 easier to go back to Mr Ridyard's point earlier. But,
11 unfortunately -- and DAF do not like this -- but we are
12 dealing with something extraordinarily small in the
13 scheme of the cost base of these two vast enterprises,
14 and that is the problem. That is why this claim is so
15 ambitious and why Mr Justice Roth and Mrs Justice Rose,
16 as she then was, expressed doubt about all of this right
17 at the outset.

18 Sir, that, at 1 minute to 1.00, is all I was going
19 to say before handing over to Mr Lask, unless you have
20 any further questions.

21 THE CHAIRMAN: All right. So we have financing and tax.

22 MR WARD: And timelines -- as if that was not exciting
23 enough.

24 THE CHAIRMAN: All right. 2 o'clock then.

25 (12.59 pm)

1 (The short adjournment)

2 (2.00 pm)

3 Closing submissions by MR LASK

4 MR LASK: I am going to address the tribunal on timelines,
5 financing losses and tax, in that order.

6 Starting then with timelines, the tribunal will
7 recall that Mr Beard handed up three timelines on Day 2
8 of the trial as part of his opening submissions. It
9 seems a long time ago now. But he stressed that he was
10 not seeking to engage in a bottom-up exercise, although
11 he did rely on them in an effort to demonstrate that
12 individual examples of collusion were not reflected in
13 price increases for the claimants.

14 Similarly, in DAF's written closing submissions, it
15 goes as far as to contend that the timelines show that
16 the infringement did not cause any increase in the
17 claimants' transaction prices, and that is
18 paragraph 3.19 of DAF's closing.

19 Now, we say the timelines do nothing of the sort.
20 On the contrary, they suffer from a number of
21 fundamental limitations, which mean they are ultimately
22 uninformative on the issues of causation and quantum
23 that the tribunal has to decide. What they do not and
24 cannot do is show that the claimants somehow escaped the
25 overcharge established by Mr Harvey's regression

1 analysis.

2 Now, we have addressed the timelines in detail in
3 annex 1 to our closing submissions and I invite the
4 tribunal to read it in full at its convenience, but
5 I want to pick up some of the key themes from annex 1 in
6 the submissions.

7 Starting with the procedural background to this, the
8 starting point is what the tribunal said in its
9 disclosure ruling in January 2020, and it is important
10 because it helps explain why the factual and expert
11 evidence adduced by the parties took the form that it
12 did and it is also important because it anticipates the
13 kind of difficulties involved in trying to use the
14 contractual documentation to identify a link or the
15 absence of a link between specific acts of collusion and
16 the evolution of prices, which is exactly what the
17 timelines seek to do.

18 Now, the tribunal was shown the disclosure ruling
19 I think by Mr Ward last week, so I will take this
20 briefly and I will do it by reference to annex 1,
21 please, which is at {S/9/438}.

22 THE CHAIRMAN: What is the internal page number?

23 MR LASK: The internal page number is page 7.

24 You will see here, at paragraph 13, we set out some
25 key passages from the tribunal's disclosure judgment.

1 Just picking up at 13.3:

2 "These actions seek damages for loss on many
3 hundreds of transactions, involving a very large number
4 of vehicles, carried out over an extensive period, and
5 in some of the cases by a very large number of
6 claimants. Further, the Infringement involved contacts
7 and communications between the participants over
8 a 14-year period, with different involvement on the
9 particular occasions. The approach to proof of
10 causation and quantification, both as regards any
11 overcharge and as regards pass-on, will therefore be
12 very different from that which can apply where the claim
13 is for loss on one or two very large transactions ..."

14 Then there is a citation of *BritNed*, {S/9/439}:

15 "It is unlikely to be realistic in these cases for
16 the issues to be approached by examining each price
17 charged for each transaction subject to the claim and
18 seeking to ascertain how any antecedent exchange of
19 information or coordination between the OEMs may have
20 influenced that price (whether directly or by reference
21 to a gross price) ... Accordingly, it is important to
22 establish how in practice the issues at trial will be
23 approached, and to do so before and not after vast time,
24 effort and expense is devoted to yet further
25 disclosure."

1 Then at 13.4, the tribunal says it would wish to
2 hear submissions at the next CMC:

3 "... but our present view is that we doubt that the
4 issues can be approached from the 'bottom up' on the
5 traditional evidential basis of witness statements from
6 the various key employees regarding the numerous
7 contemporary emails, notes of meetings and telephone
8 conversations, and so forth ... Instead, it seems to us
9 that the issues will probably have to be approached by
10 the analysis of large amounts of pricing and market
11 data, using established economic techniques to determine
12 what, if any, was the effect of the infringement on
13 prices and any pass-on through ... That is not to say
14 that evidence of witnesses of fact would be
15 irrelevant but we anticipate it will be of a more
16 general nature ..."

17 You see there in paragraph 13.3 the tribunal drew
18 the contrast with *BritNed*. Now, I am not going to take
19 you to *BritNed* because it is a very detailed judgment,
20 but, in my submission, one only has to flick through the
21 judgment to appreciate the level of detailed evidence
22 that was before the court in that case regarding the
23 negotiations surrounding what was one contract and in
24 particular --

25 THE CHAIRMAN: They had the actual witnesses who were

1 involved in the negotiation.

2 MR LASK: Indeed. The defendant in that case put forward
3 a witness who had been directly involved in the cartel
4 and both sides had witnesses who had been directly
5 involved in the negotiations. There was much greater
6 scope for a bottom-up exercise.

7 Just for your note, *BritNed* is at {AU/7.1} and
8 sections F and G are particularly illuminating.

9 Then back to my annex 1, now on internal page 9,
10 page {S/9/440} of Opus -- sorry, if you could keep going
11 on Opus, it is paragraph 15 I am looking for. Thank
12 you.

13 So this is what happened after the disclosure
14 judgment, where the tribunal asked the parties to put in
15 three-page statements explaining their proposed approach
16 to the evidence and how to address the issues of
17 overcharge. At 15:

18 "The Claimants' statement in response explained that
19 'the Claimants' expert considers that there are good
20 reasons to favour an econometric pricing analysis,
21 using data from before, during and after the cartel
22 period ...' Further, in discounting a simple price
23 comparison exercise, the Claimants' Statement explained:

24 "'There is a material risk that a simple before,
25 during and after comparison of prices may understate or

1 overstate the overcharge percentage. This is because,
2 in the absence of statistical techniques for
3 disentangling the different factors, it is likely to
4 conflate the effects of changes that other factors had
5 on Truck prices with the effect of the cartel ...'"

6 Then at 16 we have set out some extracts from DAF's
7 statement, {S/9/441}. 16.1:

8 "DAF agrees with the Tribunal that any overcharge
9 cannot sensibly be estimated via a 'bottom up'
10 analysis."

11 16.2:

12 "It is imperative that the regression analysis is
13 conducted using data that covers DAF's transactions
14 across the market, rather than specific customers ...",
15 because of statistical precision purposes.

16 Then 16.3, {S/9/442}:

17 "In order to isolate any infringement effect, the
18 regression analysis seeks to control for the influence
19 of relevant factors affecting transaction prices that
20 are unrelated to the infringement."

21 So one sees there, there is a broad measure of
22 agreement between the parties that an econometric
23 approach was appropriate, with DAF itself emphasising
24 that the analysis should be market-wide and that any
25 overcharge could not sensibly be estimated via

1 a bottom-up analysis.

2 Now, I reiterate a point that Mr Ward made last
3 week. We are not saying that this somehow precluded DAF
4 from producing timelines in the way it did. It would
5 have been helpful to receive them before Day 2 of the
6 trial, but there you go. But the point is that the
7 witness and expert evidence produced by both parties
8 reflected the strong steer given by the tribunal in its
9 judgment. It was all geared towards facilitating
10 a top-down rather than a bottom-up approach. So, for
11 example, the claimant's procurement witnesses, Mr Peatey
12 and Mr Giles, gave evidence of a general nature on the
13 claimants' procurement processes and the relationship
14 with DAF, but what they did not do is give chapter and
15 verse on the negotiations with DAF or the evolution of
16 prices across the cartel period, let alone before and
17 after the cartel period.

18 Similarly, for DAF, Mr Ashworth gave evidence of
19 a general nature on DAF's pricing processes and its
20 relationship with the claimants but it did not address
21 the negotiations on a contract-by-contract basis.
22 Indeed, as we have made clear, as we have emphasised,
23 DAF did not call the actual account managers who had
24 day-to-day responsibility for the claimants. Similarly,
25 the experts, as you are well aware, produced market-wide

1 regression analyses using transaction data rather than
2 contract prices and they were not instructed to consider
3 the parties' contractual arrangements.

4 THE CHAIRMAN: There was no actual ruling in the end, was
5 there, about this?

6 MR LASK: There was not. You had the disclosure judgment,
7 then you had the three pages from the parties and then
8 the tribunal -- the tribunal does not go on to make
9 a specific ruling on what approach needs to be taken.

10 THE CHAIRMAN: It just goes on to deal with the sort of
11 shape of the expert reports --

12 MR LASK: Yes.

13 THE CHAIRMAN: -- rather than -- it does not rule out
14 a bottom-up approach?

15 MR LASK: It does not rule it out, no. That is why I say
16 that we are not saying that DAF are precluded from
17 taking the approach that they did, but we emphasise the
18 procedural background because, as I say, it explains why
19 the evidence took the shape it did in this case and also
20 because it anticipates the sort of difficulties that we
21 say the timelines suffer from.

22 THE CHAIRMAN: Yes.

23 MR LASK: Because there was a broad measure of common ground
24 between the parties, it was not necessary for the
25 tribunal to issue a specific ruling on the appropriate

1 approach.

2 THE CHAIRMAN: You say that shaped DAF's evidence as well?

3 MR LASK: Yes.

4 THE CHAIRMAN: Mr Ashworth was only giving general evidence
5 about the UK prices.

6 MR LASK: Exactly. As we see it, the evidence on both sides
7 followed very closely the approach envisaged by the
8 tribunal. Now, I will come back to this, but it bears
9 emphasis that both Mr Harvey and Professor Neven agreed
10 that simply looking at how prices evolved before, during
11 and after the cartel period would be uninformative. But
12 DAF's timelines, as I will show you, do not even attempt
13 that much. They focus much more narrowly on certain
14 periods within the infringement so they are even less
15 informative than the sort of pricing analysis deprecated
16 by the experts. As I say, I will come back to that.

17 Now, we cannot say what the evidence would have
18 looked like if the tribunal had given a different steer.
19 We expect it would have been very hard to produce the
20 evidence required to carry out a proper bottom-up or
21 timeline exercise properly because even the most recent
22 transactions were a decade ago and the oldest ones were
23 25 years ago. That is what happens with a long-running
24 secret cartel. That is why the analysis has been
25 approached in the way it has, by reference to

1 transaction data and market-wide analysis.

2 Now, against that background I would like to outline
3 three key problems with DAF's timelines which we
4 highlight in annex 1. The first point is a short but
5 fundamental one and it is one that Mr Ward touched upon
6 last week. It is that the very most DAF's timelines can
7 do is show the contract prices for certain models in the
8 actual or, more specifically, in certain parts of the
9 actual. But the timelines do not attempt to compare
10 those prices with the prices before or after the
11 infringement period and they do not attempt to control
12 for the various factors that may affect how prices
13 evolve. It is those factors that the experts controlled
14 for, so things such as costs, transaction
15 characteristics, economic conditions. It may seem an
16 obvious point but it is very important, in my
17 submission, not least because of the conclusions DAF
18 seeks to draw from its timelines.

19 If I could ask you to turn up, please, DAF's closing
20 at paragraph 319, which is {S/11/114} -- S/10, I am
21 sorry, {S/10/114}. If you could just scroll up, please.
22 It might be the previous page, {S/10/113}. Yes, thank
23 you. So you will see at 318 DAF refers to its two
24 Royal Mail timelines and sets out some points that it
25 makes some timelines.

1 Then if we continue on to 319, {S/10/114}, this is
2 a submission it seeks to make based on the timelines:

3 "This demonstrates that even if DAF's list prices
4 were set higher because of the Infringement -- or,
5 indeed, DAF sought generally to raise its transaction
6 prices above the competitive level through any other
7 mechanism -- it did not cause any increase in the
8 transaction prices paid by [Royal Mail]. [Royal Mail's]
9 transaction prices did not increase. They remained the
10 same, or fell."

11 The answer to that point, in my submission, is
12 elementary. The mere fact that certain prices for
13 certain models may have remained the same over certain
14 periods does not begin to imply that they would not have
15 decreased or decreased further in a counterfactual world
16 without the cartel, let alone that any conclusions can
17 be drawn as to other models in other periods.

18 The tribunal may recall Mr Ashworth's evidence,
19 where he said that the claimants' prices were
20 rock bottom, but he explained that what he meant was
21 that they were lower than other customers, with one
22 exception. He did not suggest they were as low as they
23 could ever go. For your note, that is Ashworth,
24 paragraph 98, which is at {D/22/27}.

25 So the point is that the timelines are simply not

1 set up to permit the sort of conclusions reflected in
2 paragraph 319 to be drawn. As I prefaced a moment ago,
3 there was a large measure of agreement between the
4 experts on this.

5 If I could ask you, please, to turn up
6 Professor Neven's first overcharge report at {E/11/85},
7 one sees here that this is annex D to his first report.
8 He sets out detailed result tables for the following
9 regression specifications, one of which, (a), is
10 "Excluding some or all control variables". Then he
11 elaborates on this under the next subheading and he says
12 at D.5 -- I do not need to show you the tables. It is
13 just the explanation he gives that is important:

14 "The results of Table 15 indicate that when
15 excluding all control variables from the pricing
16 regression, the infringement effect is highly negative
17 and significant. This suggests that without accounting
18 for other factors that can determine the evolution of
19 truck prices, the model would deliver the misleading
20 result that the infringement decreased prices
21 substantially. This result is very imprecise since it
22 only considers the evolution of prices over time, which
23 had generally increased after the infringement period,
24 and ignores other factors that could have affected them,
25 such as costs."

1 Then at D.6, {E/11/86}, he refers to column 2 of
2 table 15:

3 "... once accounting for the evolution of costs and
4 price differences ... the infringement effect gets close
5 to zero. This result highlights the importance of
6 controlling for the cost and other determinants of
7 prices."

8 Now, of course we have various criticisms of
9 Professor Neven's approach, but we agree with the basic
10 point made here, which is that if you exclude all
11 controls, you end up with very imprecise and potentially
12 misleading results.

13 Just to develop this point a bit further, if we
14 could look at the claimants' closing submissions,
15 please, at {S/9/156}, you see at paragraph 401, quoting
16 Professor Neven:

17 "In order to make a meaningful comparison of invoice
18 prices between these periods, determinants of truck
19 prices that are not related to the infringement need to
20 be controlled for."

21 At 403, if you could scroll down, please,
22 Professor Neven stated:

23 "... it is impossible to identify the effect of the
24 infringement if you do not control for what needs to be
25 controlled for, and, you know, the overcharge exercise,

1 you know, we spend a lot of time and effort controlling
2 for the right thing ..."

3 Then there are some further relevant points at 408
4 where the experts agree that the available data did not
5 allow for a robust analysis of a claimant-specific
6 overcharge. Professor Neven made plain that he did not
7 think a claimant-specific overcharge could be estimated
8 empirically. He accepted that it was sensible to
9 estimate the overcharge on a market-wide basis and to
10 apply the results to the claimants.

11 At 410, {S/9/158}, Mr Harvey explained there was no
12 reason to believe that the overcharge for the claimants
13 would be systematically higher or lower than for the
14 rest of the market. Professor Neven said that the
15 intuition that larger customers might have more
16 bargaining power was only a soft intuition and not one
17 he was very comfortable with.

18 At 411, Mr Harvey explained that in principle
19 a large customer could be just as likely to be more
20 affected by the infringement than less affected.
21 I showed you previously what the claimants said in their
22 three-page statement, which was reflecting Mr Harvey's
23 views about the need to control for all these factors;
24 very similar in approach to Professor Neven's.

25 The point is that a bare pricing analysis does not

1 allow one to draw any meaningful conclusions about
2 whether prices were or were not affected by the cartel.
3 That is even if you are comparing before, during and
4 after, which the timelines do not even seek to do.

5 THE CHAIRMAN: It does not actually tell you anything about
6 the counterfactual.

7 MR LASK: Exactly, exactly.

8 MR RIDYARD: Just thinking through the way the cartel had
9 effect was through the information about -- starting
10 from list price information primarily, so is it not
11 relevant to look to see whether actual prices changed
12 when list prices changed? Is that still not a useful --
13 I take what you are saying about controlling for other
14 factors, I understand that point fully, but is it not
15 nevertheless useful to sense-check to see whether actual
16 prices changed when list prices changed?

17 MR LASK: Well, we say the first answer to that is really
18 the failure to control point because you may see that
19 the list price went up and the contract price did not
20 change, but that, in itself, cannot tell you what would
21 have happened in the counterfactual and whether, for
22 example, the contract price might have gone down because
23 you are not seeing what is going on under the bonnet.
24 You are not seeing what is happening with costs,
25 transaction characteristics, economic conditions. That

1 is why we say it is just uninformative to seek to draw
2 any conclusions by looking at the link or absence of
3 a link between list price changes and contract price
4 changes. I am going to come on to deal with another
5 point about why contract prices themselves are not
6 properly informative, but the first and most fundamental
7 point is the failure to control.

8 The second problem is that the timelines are highly
9 selective, both in terms of the time periods they cover
10 and the truck models. I want to illustrate this by
11 reference to some examples, but I do emphasise these are
12 examples only and their purpose is to illustrate the
13 selectivity that DAF has taken in its approach to the
14 timelines. Now, we have not produced our own timelines
15 because firstly we think the whole exercise is
16 misconceived for the reasons I have given but also
17 because the documentary record is so incomplete.

18 I have addressed the first of those points. Before
19 I take you to the examples, I would like to touch
20 briefly on the second, which is the fragmentary nature
21 of the documentary record. If we could go back, please,
22 to annex 1 to our closing submissions, {S/9/456}, if you
23 could just scroll down, please. So we have set out here
24 some of the problems -- some of the gaps in the
25 documentary record, and paragraph 61:

1 "Any attempt to understand what prices the Claimants
2 paid for DAF's *Trucks* using the contracts is, at the
3 outset, hindered by the documentation being incomplete."

4 At 62:

5 "Despite the Claimants and DAF providing disclosure
6 of contractual documents, there remain significant gaps:

7 "Some initial contracts are known to be missing
8 because they are referenced in disclosed documents."

9 Then over the page, {S/9/457}:

10 "There are contract amendments that are known to be
11 missing, again because they are referenced in disclosed
12 documents;

13 "There may be further contracts amendments, not
14 referenced in disclosed documents, that are also
15 missing."

16 Then footnote 60 elaborates:

17 "In the case of BT, there are 210 *Trucks* (... 11%
18 ... [of the] Value of Commerce) ordered outside of
19 a period covered by [any] known ... final ... contract."

20 Then 62.4:

21 "Some of the contracts/amendments are unsigned or
22 only partially signed, or are clearly drafts, and
23 therefore may not represent the terms agreed between the
24 parties."

25 At 63:

1 "There are also examples in the ... documents of
2 mistakes with respect to pricing being identified in ...
3 contracts and clarifications and rectifications being
4 requested informally at ... meetings or through email
5 correspondence."

6 At 64:

7 "... there are several examples of contracts having
8 been marked up in manuscript where it is unclear what
9 the annotation means and whether it was in fact agreed."

10 Then an example is given of an annotation that
11 Mr Beard discussed with the tribunal on Day 2.

12 Then paragraph 66, please, {S/9/458}, this is
13 a quote from a letter from Travers Smith in August 2021
14 where it identifies some of the same problems with the
15 contractual documentation:

16 "Several of the contracts overlap in time, such that
17 there are instances where more than one contract could
18 potentially govern the sale of the same Truck model
19 during the same period, and whilst some of the contracts
20 include estimated sale volumes, these are described as
21 'estimates' or being 'for guidance only'. Further, the
22 parties have not disclosed a complete set of contractual
23 documentation for the entire infringement period: for
24 example, certain amendments to contracts have not been
25 located or disclosed by either party. In addition ...

1 it is not feasible to determine systematically from
2 DAF's transaction data precisely which products and
3 services, including which body and tail-lift options,
4 were selected by Royal Mail for a given transaction ..."

5 I am going to come back to that point, but for
6 present purposes the point is simply that both parties
7 have recognised that there are challenges presented by
8 the state of the documentation and we say those
9 challenges make it very, very difficult to piece
10 together what happened based on the contractual
11 documentation which provides only a partial record of
12 what was agreed. By contrast, the transaction data used
13 by the experts tells us the volume and the prices of all
14 the trucks actually purchased by the claimants or at
15 least those that are included in the claims.

16 Again, I emphasise, the fact that the documentary
17 record is incomplete is unsurprising given the duration
18 of the cartel and the passage of time, but it bears
19 emphasis that, even in terms of the contractual
20 documentation we do have, DAF has not sought to present
21 more than a partial account.

22 By way of overview -- I am going to take you to the
23 examples I promised, but by way of overview, DAF's
24 timelines deal with five Royal Mail contracts and nine
25 amendments in total, whereas Royal Mail in fact entered

1 into 11 initial contracts with at least 49 amendments
2 over the infringement period. For your note, we deal
3 with that at paragraph 70.1 of annex 1.

4 So if we could turn now, please, to the first
5 timeline, which is {S/9/453} -- sorry, it is not. That
6 is our closings. It is {S/6/1}. This is the first of
7 two Royal Mail timelines and it is dealing with the
8 LF 45.130 model. It is dealing with the time period
9 October 2002 to December 2006. So we see it is a single
10 model within the LF series. It only covers four years
11 and indeed you see on the first row there is
12 a seven-month gap. Then if we could turn, please, to
13 our annex 1, which is {S/9/453}, if you could scroll
14 down, please, we deal with this timeline at 54.1. We
15 say the timeline only deals with the period October 2002
16 to December 2006, during which 1,414 LF 45.130s were
17 ordered by Royal Mail. This is despite the fact that
18 the majority of orders -- yes, this is despite the fact
19 that the majority of orders for LF 45.130 trucks during
20 the infringement period were made outside the period
21 2002 to 2006. Royal Mail also ordered 787 other LF 45
22 series trucks from DAF with different brake horsepower
23 ratings during the infringement period that are not
24 covered by the timelines at all.

25 So we have other LF 45 models that are not covered

1 by the timelines at all and, even with this model that
2 DAF purported to deal with in this timeline, a large
3 number of these model trucks were purchased outside the
4 period covered by the timeline under contracts other
5 than those cited in the timeline, so the timeline does
6 not tell us what was happening to those prices.

7 By way of example, could we look, please, at
8 {I1/34.1}? As you see at the top of this page, this is
9 contract VEH398010, so this is not dealt with in DAF's
10 timeline. You will see the initial term of the contract
11 is March 1998 to March 2000, so that is before the
12 period dealt with in DAF's timeline.

13 If we could scroll, please, to page 3, {I1/34.1/3},
14 you see there that it is only signed by one party, so
15 that is just an illustration of one of the points I was
16 making a moment ago about the gaps in the documentation.

17 Then page 6, please, {I1/34.1/6}, we see here the
18 contract price for the chassis cab FA45.130 -- you see
19 there that for the first month the price is 18,205 and
20 then it rises to 18,651 for the next year.

21 Then there is an amendment to this contract shortly
22 afterwards in June 1998. I will not take you to it.
23 For your note, it is at {I1/50}. That is amendment 1
24 but I want to take you to amendment 2, which actually
25 reflects what happened in amendment 1. So in

1 amendment 1, which was in June 1998, the price went down
2 a bit to 18,434. If we go to amendment 2, we can see
3 that. It is at {I1/105.1}.

4 So again we see at the top the contract is
5 VEH398010. This is amendment number 2, dated
6 31 January 2000. You see that it relates to the same
7 trucks, FA45.130. You see that towards the bottom of
8 the screen. If we could just scroll down to the bottom,
9 there we see the new price, the cost per unit: 18,995,
10 plus RFL and DVLA charge.

11 If we go to page 2, please, {I1/105.1/2}, you can
12 see there a comparison between the previous item price
13 and the new item price, 18,434, increasing to 18,995.
14 So the 18,434 was where we ended up after amendment 1.
15 We are now at amendment 2, 18,995, so it is a 3%
16 increase.

17 Now, we know from Mr Ashworth's evidence,
18 paragraph 122, that DAF's annual list prices were
19 typically between 1% to 3%. But we are not saying,
20 "Aha, look, there is the cartel having effect", because
21 we do not think you can draw those sorts of conclusions
22 on the contractual documents. In particular, what is
23 happening here -- what I am doing here is comparing
24 a cartel price with a cartel price, and that is one of
25 the key problems with the timelines. So a 3% increase

1 between 1998 and 2000 does not tell us that the
2 overcharge was only 3%. Similarly, when DAF's LF 45
3 timeline purports to show a 0% increase between April
4 and November 2005, it does not tell us that the
5 overcharge was zero because you need to be comparing
6 these prices to untainted prices and you need to be
7 controlling for the various factors that the experts
8 identify.

9 But what this example does do is illustrate the
10 danger in DAF's approach of relying on timelines that
11 are incomplete.

12 DAF's other Royal Mail timeline is at {S/7}.

13 THE CHAIRMAN: DAF's timelines were based purely on the
14 contract prices --

15 MR LASK: Yes.

16 THE CHAIRMAN: -- not what they were actually sold for?

17 MR LASK: That is right, sir, and that is actually the third
18 of my three points which I am going to come on to, but,
19 yes, that is right. So at the moment I am dealing with
20 the second point, which is selectivity.

21 THE CHAIRMAN: Yes.

22 MR LASK: Yes. So this is the timeline for the CF85.380.

23 This was the one I think on the big A3 sheet. You will
24 see it dealing with the time period June 1997 to
25 December 2006, so it is longer than the previous one but

1 it is still missing a big chunk of time at the end. DAF
2 actually relies on this timeline at paragraph 345 of its
3 closings in relation to Mr McDonagh and it says, "Well,
4 look, this timeline shows that prices did not actually
5 increase during Mr McDonagh's time as M&S director". If
6 one looks at the timeline -- it will probably need
7 zooming in, please --

8 THE CHAIRMAN: I can see why they provided A3 --

9 MR LASK: A3, yes.

10 THE CHAIRMAN: -- which we still have somewhere.

11 MR LASK: Yes, one sees at the beginning of the time period
12 it is Euro 2 -- you can see in the purple text within
13 the light blue boxes. These are Euro 2 trucks. Then if
14 one moves down the page, one sees there in the middle
15 line, 2001, there is a change from Euro 2 to Euro 3. Do
16 you see that? It is much easier to read on the paper.
17 But, yes, so in 2001 you see the step up from Euro 2 to
18 Euro 3. DAF, in fairness, does not seek to draw
19 a comparison between the prices. It just notes it is
20 a new Euro standard model. But it is tracing the
21 evolution from Euro 2 to Euro 3, seeking to tell us what
22 happened. Do you have that now, sir?

23 THE CHAIRMAN: I have it, thanks.

24 MR LASK: If one goes to the end of the timeline, just
25 scroll right to the right-hand side, please, one sees

1 that it finishes abruptly in December 2006 and the last
2 contractual document is amendment 5 to TC02012. It may
3 be that it ends there because from 2007 Royal Mail is
4 ordering Euro 4, which is -- I think the model was
5 CF85.410 rather than CF85.380, so it was Euro 4 and
6 a slightly higher horsepower. But in ending the
7 timeline there, it is missing out an important part of
8 the story, particularly in circumstances where
9 Mr McDonagh was still M&S director after December 2006.

10 Just to illustrate this, can I show you, please,
11 annex 2 to DAF's skeleton, which is at {S/5/3}. Can you
12 see in the first row contract number TC02012 and you
13 will see in the third column it covers a number of
14 different trucks, including CF85.380.

15 Then if one clicks on extension 3, please, which is
16 in the final column at the end of that row, {I2/23/1}.
17 So you will have seen the timeline ends at amendment 5
18 and then you see this is amendment 6 -- yes, it is
19 amendment 6, highlighted in purple.

20 Now, there is a slight oddity here because you will
21 see that the contract number given is TC02011B rather
22 than 2012, but DAF's table, the one we just clicked
23 through from, suggests that this amendment does relate
24 to the same contract, the 2012. I would tend to agree
25 because it is dealing with CF85 trucks whereas the 2011

1 contract is dealing with LFs. But, anyway, so this is
2 amendment 6, the next one in the series, and you see it
3 is dated January 2007 so it is just after DAF's timeline
4 ends. You will see:

5 "Please note the following amendments."

6 Just about halfway down.

7 "Euro 4 engine LF55 £2,380 per vehicle, CF 85 £3,580
8 per vehicle."

9 So that seems to be the premium for Euro 4 engines.
10 So what one sees -- and I think this is common ground --
11 is that the step up from Euro 3 to Euro 4 involves
12 a price increase. Of course, we know that emission
13 standards were an important part -- or emission
14 standards collusion was an important part of the
15 infringement.

16 THE CHAIRMAN: I thought their timeline was intended to
17 cover the same truck effectively --

18 MR LASK: Yes, but --

19 THE CHAIRMAN: -- so that you are comparing like with like.

20 MR LASK: Well, true, but the timeline, as I showed you,
21 covers the evolution from Euro 2 to Euro 3, no doubt
22 because there was not a price increase. So it looked
23 okay but it does not cover the evolution from Euro 3 to
24 Euro 4.

25 The simple point is that, in missing that out, it

1 omits an important part of the story, particularly where
2 it is relying on this timeline to say, "Look, prices did
3 not go up during Mr McDonagh's time as M&S director".

4 MR BEARD: Sorry, if it helps, we are not saying that prices
5 did not go up in relation to new emission standards
6 whether Mr McDonagh was there or not so that is no part
7 of our case.

8 MR LASK: Well, that is a helpful clarification.

9 MR BEARD: Well, I think it has been common ground
10 throughout.

11 MR LASK: Perhaps in the excitement of drafting written
12 closings, there has infelicitous drafting, but there you
13 go. The point is that ending the timeline in
14 December 2006 does omit an important part of the story.

15 Just for your note, a similar issue arises on the
16 first timeline, the LF 45 timeline, which also stops in
17 December 2006. If you are interested, the corresponding
18 amendment that shows the premium for those trucks is at
19 {I2/197}.

20 If we could just go back, please, to annex 1 at
21 {S/9/454}, just to finish off on this timeline. If you
22 could just scroll up, please -- yes, 54.2, so this is
23 dealing with this timeline. We make the point here
24 that, in addition to the 1,000 or so trucks covered by
25 the timeline, Royal Mail also ordered 1,449 other CF85

1 trucks from DAF with different brake horsepower ratings
2 during the infringement period that are not covered at
3 all by DAF's timelines.

4 Then the final example I wanted to draw to your
5 attention is at 54.3, which you still have in front of
6 you, relating to LF 55 trucks. DAF did not produce
7 a timeline for LF 55, although I note that the amendment
8 we were just looking at does cover to some extent
9 LF 55s.

10 Before I go on, there is a typo in 54.3 that I would
11 like to -- I would just like to read out the correction
12 for, if I may, and we can certainly issue an updated
13 page if that helps. 54.3 under (ii), it says "74 x
14 CF85"; it should say "74 x CF75". Then the model
15 numbers should be -- we need to cross through the model
16 numbers in the brackets, the CF85 model numbers. It
17 should be CF75.250, 75.300 and 75.320.

18 But I want to actually focus on the LF 55 trucks
19 and, if DAF had produced a timeline for these trucks
20 covering the same period as its CF85 timeline,
21 so June 1997 to December 2006, it would have had to
22 include contract VEH397015. I would like to show you
23 amendment 6 to that contract, please, which is at
24 {I6/83}. So amendment 6, the contract was
25 from January 1997 to March 2001, and this amendment is

1 dated April 2000. I think one sees that from the bottom
2 of the page -- yes, at the bottom, in brackets,
3 "(Amendment No 6 01.4.2000)".

4 Then if we go to page 6, please, {I6/83/6} -- sorry,
5 page 7, the top of page 7, please, {I6/83/7}, one sees
6 the price schedule, and the new price for the chassis
7 cab is 33,007. Then if one just scrolls up, please, to
8 page 5, {I6/83/5}, one sees quite helpfully a register
9 of amendments. So these are the previous amendments to
10 this contract and you see in the first column amendments
11 1, 2, 3 and 4. You see amendment 4, 14 April 1998,
12 a 2.5% price increase. Then if we could scroll down,
13 please, {I6/83/6}, amendment 5, "Price Increase (1.5% on
14 Chassis Cabs)". Then amendment 6, which is this one, is
15 a price increase on bodies.

16 So the short point is it is obviously very nice for
17 DAF to produce timelines in which the prices stay the
18 same or even go down, but, in my submission, it is
19 highly superficial because, once you start to look at
20 the documents a bit more closely, you see the position
21 is much more complicated.

22 Just briefly in relation to the BT timeline, which
23 is at {S/8/1}, please -- just three short points on
24 this. This covers -- I cannot quite see the time
25 period. Yes, it starts in the beginning of 1999, so you

1 have two years missing from the beginning, then it
2 finishes again in December 2006, so five years missing
3 from the end, and there is at least one BT contract not
4 covered by this timeline. We make that point at
5 paragraph 70.1 of annex 1.

6 Just finally on this issue, as Mr Beard acknowledged
7 I think in his submissions on the timelines, the
8 timelines do not purport to identify all of the
9 collusion. So we have actually included in an annex to
10 our closing submissions a sort of timeline -- nothing
11 like this, but a timeline that just maps all the
12 examples of collusion that we have pleaded onto
13 a timeline. I am not going to ask you to turn it up
14 because it has confidential material, but I just make
15 the point that one can see there that the timeline
16 starts to get pretty crowded when one puts on all the
17 pleaded examples of collusion, and they are only
18 examples so it does not even represent an exhaustive
19 account.

20 That was my second issue, selectivity.

21 Then the third issue is the one you anticipated,
22 sir, which is that the timelines focus on the chassis
23 contract prices. So if one is going to attempt any kind
24 of bottom-up exercise, we say one needs to at least take
25 account of the prices actually paid by the claimants and

1 the timelines do not do that or at least not
2 systematically because they are based on the contractual
3 documentation and, in particular, on the chassis price
4 as recorded in the contracts, but it is the transaction
5 data that one needs to look at to identify the prices
6 actually paid. Neither party has sought to reconcile
7 the invoice prices recorded in the transaction data with
8 the contractual documentation. We make this point at
9 annex 1, 68 to 69.

10 Now, Professor Neven attempted a limited matching
11 exercise -- this arises in the context of the value of
12 commerce debate -- but even leaving aside Mr Harvey's
13 concerns about the robustness of that exercise,
14 Professor Neven only sought to isolate the body price.
15 He did not seek any more general reconciliation. We say
16 it would indeed be very, very difficult to do. Now, one
17 reason is because the documentary record is incomplete
18 and I have already explained that, but another is that
19 the contractual documents are like menus recording the
20 agreed prices for a basic chassis configuration and then
21 numerous options.

22 I would just like to show you, if I may, what
23 Professor Neven said about this in annex 1,
24 paragraph 47, at {S/9/450}. So this is from the
25 cross-examination, and Professor Neven says:

1 "There is an answer in terms of the observation that
2 we have because, in the context of Royal Mail purchases,
3 not all trucks are the same. I mean, they may be part
4 of the contract but if you have seen this contract,
5 there are menus. So actually, when they actually make
6 the purchase, they will change different
7 characteristics, different options. There may be
8 different bodies. So actually you do not have exactly,
9 you know, the same price for different trucks as part of
10 the same contract."

11 Then at 48, {S/9/451}, we say:

12 "DAF leveraged changes to specifications and
13 options -- 'off menu' orders -- made following the
14 conclusion of contracts to its own advantage, as noted
15 in DAF's internal communications."

16 Then we have given an example of an internal DAF
17 memo that says:

18 "As ever with the Royal Mail, history shows that
19 once the business has been awarded there have been
20 opportunities to re-discuss specifications which have in
21 the past lead to higher margins."

22 So the price actually paid depends on the particular
23 combination selected. I am going to show you an
24 example, but what one adds to the basic chassis
25 configuration can make a significant difference. This

1 is illustrative --

2 THE CHAIRMAN: The contract only provides for the chassis
3 price, does it?

4 MR LASK: No, I am going to show you an example actually.
5 It provides for a -- that is why I say it is like
6 a menu. That is why Professor Neven described it that
7 way, the chassis price and then various options. I am
8 going to come on to an example very shortly.

9 But firstly just to show you what Mr Ashworth said
10 about this at {D/22/13}, paragraph 47:

11 "The customer could also specify various further
12 options for the truck concerning factors such as the
13 braking system, suspension, paint colour, cab features,
14 steering, wheels and tyres, and body/trailer
15 equipment -- for Royal Mail and BT these options might
16 make up around 20% of the cost of the truck. The
17 ability to specify these various further options gives
18 rise to vastly more possible configurations than
19 indicated in paragraph 43 above."

20 If we can scroll down, please, to the following
21 paragraph:

22 "With all upgrades from the basic vehicle
23 specification and/or additional options, DAF UK would
24 attempt to charge the customer more. Ultimately though,
25 especially with Royal Mail, the negotiation would always

1 come down to the price the customer was willing to pay
2 for the whole truck ..."

3 Then if we could go, please -- and this is the
4 example I was talking about -- to {I2/21}. This is just
5 to show you how detailed the menus are. This is
6 a Royal Mail contract from January 2008, so this is
7 after DAF's timelines. If one goes to page 21, please,
8 {I2/21/21}, this is the start -- this is the first of
9 six separate price matrices for different trucks, models
10 and possible configurations.

11 Could we scroll, please, to page 36, {I2/21/36}?
12 This is for a 26-tonne rigid and this is the menu of
13 options. Then one sees in the first line "Base Chassis
14 £43,947.44". Then if one scrolls down, if you just cast
15 your eye over the list, you see a very large number of
16 options with individual prices. Some options are
17 included in the base price but many are not.

18 If one keeps going, please, some of the options are
19 quite small in price, some of them are very big. You
20 see there --

21 THE CHAIRMAN: The early contracts did not include any of
22 this, did they, I do not think --

23 MR LASK: I think the early contracts that we have looked at
24 this afternoon did not. I am not sure whether that was
25 a timing point and whether they became more

1 sophisticated and the menus were introduced later or
2 whether it was just a feature of the particular
3 documents I went to with you. I am not sure about that.

4 MR RIDYARD: So for this contract you are saying that the
5 options were pre-specified at the time when the
6 contract -- specified at the time the contract was
7 signed but they are just not included in the timeline.

8 MR LASK: That is right.

9 MR RIDYARD: So it was not as if the options were subject to
10 negotiation or being made up as he went along
11 afterwards. They are already laid down in the
12 contracts, they just were not visible from the timeline?

13 MR LASK: That is my understanding, that they were laid down
14 in the contract. As we have seen, there were
15 contractual amendments and it may well be that within
16 the documentation there are amendments which deal with
17 options as well as the chassis price. But, as
18 Mr Ashworth says, the negotiation was on the whole
19 body -- sorry, the whole truck. I cannot say whether he
20 is referring there to only the initial agreement for
21 contract or whether there is further negotiation when it
22 comes to actually ordering trucks. I do not know the
23 answer to that, I am afraid. But you see that the
24 prices, certainly for bodies and tail-lifts, are very
25 significant.

1 It is not just bodies and tail-lifts that have
2 significant prices. You see there that the colour, the
3 red, is £500, and if one scrolls back up, please, one
4 sees some quite significant items. Again you've got
5 a body at 14.9 £7,000 and then, higher up the page,
6 you've got climate control for £703. So, as I say,
7 there is a wide range of pricing points.

8 Of course there is a dispute about whether bodies
9 are included in the infringement, we say they clearly
10 are, but there is no dispute over whether all the other
11 options are included in the value of commerce. It is
12 just this -- the bodies are the only issue there and
13 that, in my submission, is consistent with the decision
14 at Recitals 28 and 46, which makes plain that
15 factory-fitted option were covered by the collusion.

16 So, of course, as we have seen, the timelines are
17 based on the chassis price as recorded in the contracts,
18 no doubt for ease of comparison, which is what DAF was
19 no doubt seeking to do. But what they do not tell us --
20 what the timelines do not tell us is how the prices
21 actually paid for the complete trucks evolved because
22 even if you assume that the chassis price recorded in
23 the contract is the chassis price actually paid, there
24 is no attempt to trace through numerous options and we
25 say it would be impossible to do. Again, that is why

1 the experts use the transaction data.

2 Just to conclude on the timelines, DAF no doubt
3 hoped its timelines would have at least some forensic
4 force, but the reality is that, for the reasons I have
5 given, they are uninformative on the issues the tribunal
6 has to decide. They certainly, certainly, do not
7 provide a basis for concluding that the claimants
8 somehow escaped the market-wide overcharge altogether
9 but nor do they provide any basis for concluding that
10 the claimants benefitted from a lower overcharge than
11 everyone else. As you heard, no alternative
12 claimant-specific overcharge has been advanced.

13 THE CHAIRMAN: All the trucks covered by the timelines are
14 all obviously taken into account in the econometrics.

15 MR LASK: Of course.

16 THE CHAIRMAN: All the actual prices paid for them --

17 MR LASK: Of course, to the extent that --

18 THE CHAIRMAN: -- and so that led to the average overcharge
19 if there was one.

20 MR LASK: Yes, to the extent that they were actually
21 purchased.

22 THE CHAIRMAN: Yes.

23 MR LASK: Yes. Sir, that is all I have to say on timelines
24 and I was going to move next to financing losses.

25 I will make my submissions on financing losses by

1 reference to section K of our written closings, which
2 begins at {S/9/358}.

3 Royal Mail claims compound interest based on the
4 WACC, and that is the WACC as agreed between the
5 experts. Alternatively, Royal Mail claims compound
6 interest based on its cost of debt and forgone returns
7 on short-term investments. The starting point for the
8 analysis is obviously *Sempra Metals*, and we have set out
9 the key paragraphs at 933 on page {S/9/360}. I am going
10 to come back to --

11 THE CHAIRMAN: Can I just ask -- maybe you will come back to
12 it -- but why is there such a different approach for
13 Royal Mail and BT on this?

14 MR LASK: Well, BT are only claiming simple interest.

15 THE CHAIRMAN: Why?

16 MR LASK: Why? I do not know the answer to that, sir.

17 THE CHAIRMAN: Presumably they suffered financing losses in
18 the same way as Royal Mail would have done.

19 MR LASK: Well, you may have seen that where we have come
20 out on BT's claim for simple interest following the
21 objection DAF raised in its skeleton argument, we have
22 actually gone away and looked at BT's cost of debt and
23 asked that simple interest be granted on that basis.

24 MR BEARD: I am sorry, we do object to a new plea in
25 relation to cost of debt being brought forward in

1 relation to BT, if that is where Mr Lask is going on
2 this next, because that has never been put forward
3 previously.

4 THE CHAIRMAN: It would bring the percentage down, would it
5 not, to 6.9? Is that right?

6 MR LASK: Yes, it brings it down to 6.3 from 8.

7 THE CHAIRMAN: It is probably in their interests, but --

8 MR LASK: Yes -- well, you would have thought so.

9 MR BEARD: No, we maintain an objection in relation to that
10 because it has not been put before the experts. The
11 experts were not able to consider cost of debt and the
12 initial indications we have had are that -- we have real
13 concerns about the way in which that has been calculated
14 by BT.

15 THE CHAIRMAN: Well, you can obviously make those points.
16 My point was the broader one: why is there such
17 a divergence of approach if we are -- as between the
18 two?

19 MR LASK: I can only speculate.

20 THE CHAIRMAN: Well, you are acting for both.

21 MR LASK: I am acting for both, but I -- if it is something
22 that the tribunal wants me to investigate with those
23 instructing me, I can, but I do not have the answer.

24 THE CHAIRMAN: All right. But those were your instructions,
25 to only claim simple interest?

1 MR LASK: Yes.

2 THE CHAIRMAN: Okay.

3 MR RIDYARD: Just to follow up, if we decided that we liked
4 compound interest, are we only able to apply that to the
5 Royal Mail case and not the BT case?

6 MR LASK: Well, that is an enticing question.

7 THE CHAIRMAN: I think they are probably bound by their
8 pleaded case, are they not?

9 MR LASK: I think we may have difficulty accepting that
10 invitation, given that BT has only pleaded simple
11 interest. It is common ground that one needs to plead
12 compound interest to get compound interest. I hope that
13 I will not have --

14 THE CHAIRMAN: I think economists can only think in terms of
15 compound interest.

16 MR RIDYARD: Well, I will not comment on that! No doubt.

17 MR BEARD: The economists always think the lawyers do not
18 understand maths, and that may well be true!

19 THE CHAIRMAN: They are probably right!

20 MR LASK: I am told by those instructing me that it was
21 based on proportionality. That is why BT claimed simple
22 interest, because of the investigations that would have
23 had to be undertaken to claim compound interest.

24 So, as I was saying, the starting point of
25 *Sempra Metals*, we have set out the key passages on

1 page 360 of our closing, {S/9/360}. I am going to come
2 back to those in response to one of DAF's arguments, but
3 if I can go for present purposes, please, to page
4 {S/9/361}, where you see -- you may recall this from our
5 opening submissions -- we rely on the distillation of
6 the *Sempra* principles by Mr Justice Males, as he was
7 then, in *Equitas*.

8 I highlight the quote at 935.1, {S/9/361}, where the
9 judge said:

10 "Unless there is some positive reason to do
11 otherwise, the law will proceed on the basis, at any
12 rate in the commercial context, that a claimant kept out
13 of its money has suffered losses as a result. This
14 represents commercial reality and everyday experience.
15 Specific evidence to that effect is not required and,
16 even if adduced, may well be somewhat hypothetical and
17 thus of little assistance ... 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 Now, in its closing DAF, in a footnote, 334, has
21 sought to cast some doubts on *Equitas* by reference to an
22 academic article, but Mr Justice Males' analysis has
23 never been doubted or overruled as far as we are aware.
24 Indeed it was applied by the tribunal in the *Sainsbury's*
25 case, which I am going to take you to shortly, and

1 expressly adopted by Mr Justice Stuart-Smith in the case
2 of *Peacock*, which is in the bundle -- we do not need to
3 go to it -- it is in the bundle at {AU/7.03}. The
4 relevant paragraph is 143.

5 Now, what one sees from *Equitas* and indeed other
6 cases is, perhaps unsurprisingly, when the court comes
7 to deal with this question of compound interest, drawing
8 appropriate inferences from the available factual
9 evidence. That is what *Sempra* envisages and that is
10 what the court does in practice. Inferences are
11 necessary, in my submission, because the nature of the
12 inquiry is to some extent at least hypothetical.

13 We have dealt with some of the cases at
14 paragraphs 938 to 939 of our closing on page {S/9/362}
15 and over. Just to summarise, in *Equitas* -- again,
16 I took you to this in opening -- in *Equitas* the court
17 held that the claimant was in principle entitled to
18 compound interest by reference to the actual investment
19 returns achieved.

20 In *Sainsbury's* the tribunal drew broad axe
21 inferences as to the appropriate measure based on
22 factual evidence of how the claimant monitored its costs
23 in practice. I will come back to *Sainsbury's* because,
24 whilst the tribunal rejected the WACC in *Sainsbury's*,
25 which was pleaded as a further alternative and for which

1 there was no factual evidence that we are aware of, the
2 judgment does support Royal Mail's case in a number of
3 other respects.

4 Then if we could just go over the page, please,
5 {S/9/363}. In *Multi Veste*, another case I took you to
6 in opening, the court accepted the WACC as a measure of
7 finance costs and relied on the claimant's actual
8 cashflow calculations as a strong pointer for the
9 correct method to adopt.

10 Now, of course, in that case you may recall that the
11 WACC was being used to measure the financing costs which
12 had been deducted from the claim because it was a claim
13 for a development project that never went ahead, and the
14 question was: well, how much would it have cost the
15 claimant --

16 THE CHAIRMAN: The WACC had been used in relation to the
17 specific transaction in question?

18 MR LASK: I think so, yes.

19 I see Mr Beard is agreeing with that so I anticipate
20 what will be said, but, yes, I think that is right.

21 But applying that approach, applying the approach
22 that has been taken by the court in cases like *Equitas*,
23 *Sainsbury's*, *Multi Veste*, we say the WACC is clearly the
24 best available measure of Royal Mail's financing losses.

25 We have four key points which we summarise at 941 of

1 our closing on page {S/9/363} and which we develop over
2 the following pages. The first point is at
3 paragraph 943 at page {S/9/364}. It says:

4 "As a matter of fact, Royal Mail's expenditure on
5 *Trucks* (and therefore the Overcharge) was financed
6 through a funding mix of debt and equity."

7 That is explained by Mr Jeavons in his evidence. In
8 accordance with *Equitas*, therefore, the question is how
9 best to measure the costs that Royal Mail incurred in
10 using those sources of finance.

11 I am going to come back to *Sempre*, but what one sees
12 from *Sempre* and Lord Nicholls' judgment is that the
13 potential measures, the potential ways of measuring
14 costs, are not closed. He gave examples such as the
15 cost of borrowing, the loss of opportunity, but also
16 made clear that the loss flowing from the late payment
17 may take some other form. So that is the first point:
18 how was the overcharge in fact funded? It was funded
19 through a mix of debt and equity.

20 The second point is at paragraph 946 on page
21 {S/9/365}, and it is that we have the benefit of
22 a readily available and well-established method for
23 measuring the costs incurred by a company using debt and
24 equity, and that is the WACC. Indeed the experts agreed
25 that the WACC was a standard textbook measure of

1 a firm's cost of capital. But, to be clear, the WACC
2 does not just reside in the hidden depths of corporate
3 finance literature. It is a practical tool used in the
4 real world as a measure of a company's financing costs.

5 THE CHAIRMAN: As a measure for what? For what purpose?

6 MR LASK: In some contexts it is used for investment
7 appraisal purposes, but I want to show you another
8 context pleaded which is referred to by Mr Earwaker in
9 his third report at {E/IC60/21}. If we go to the
10 beginning of this paragraph, 2.39, please, {E/IC60/20}:

11 "As a final concluding remark, I note that the
12 approach that I am advocating in my expert reports is
13 commonly applied in other situations where a company
14 accrues an entitlement to a payment in one year but
15 receives that payment several years later. My main area
16 of expertise as a professional economist is the economic
17 regulation of utility and infrastructure industries, and
18 I can say that it is normal practice for regulators to
19 provide for entitlements to roll up with financing costs
20 calculated in line with the estimated WACC. In case it
21 is helpful to the Tribunal to see how this is typically
22 addressed ..."

23 He gives some references to some regulatory
24 materials. The point he is making there is it is not
25 just used for investment appraisal purposes, which is

1 how Royal Mail used it. It is also used by the
2 regulators to help with assessing costs, costs that need
3 to be covered when prices are being set -- price
4 controls are being set.

5 THE CHAIRMAN: Does that help with our situation?

6 MR LASK: Well, I refer to it simply to illustrate the point
7 that the WACC is a real world tool used in a range of
8 practical contexts for measuring financing costs. That
9 is all I can seek to draw from it.

10 The third point of my four is at paragraph 948 of
11 the closing, page {S/9/365}. We say:

12 "Crucially, Royal Mail in fact used the WACC as
13 a practical measure of its financing costs throughout
14 the majority of the relevant financing period."

15 If we go over the page, please, {S/9/366}, we have
16 summarised here Helen Bradshaw's evidence, at least some
17 of the extracts -- we have set out some extracts from
18 her evidence. You will see there, for example, at
19 948.1:

20 "The WACC is 'a financial measure that describes the
21 company's overall costs of funding business assets and
22 activities, and therefore represents the minimum return
23 that the company must earn in order to meet those
24 financing costs'."

25 Then:

1 "Royal Mail's WACC was used in investment appraisal
2 and capital planning because by discounting the
3 projected cash flows of an investment under
4 consideration by the Hurdle Rate (of which the WACC
5 [was] a key element ...) one can understand whether the
6 investment is projected to produce a return, taking into
7 account the company's cost of financing. In other
8 words, an investment would need to achieve a return
9 sufficient to meet the Hurdle Rate in order to 'break
10 even'."

11 Then at 948.3:

12 "The identification of the WACC ... first occurred
13 in around the year 2000 'and was part of a wider
14 transition towards a more sophisticated investment
15 appraisal function ...'."

16 THE CHAIRMAN: It is very much tied to investment
17 appraisal --

18 MR LASK: It is.

19 THE CHAIRMAN: -- which I think is what Mr Delamer's point
20 was really.

21 MR LASK: It is, but the point is that it is being used in
22 that context as a measure of the financing costs that
23 the company needs to cover -- that it considers it needs
24 to cover in order for its investments to be feasible, in
25 order for them to break even.

1 So I appreciate the evidence does not show it being
2 used in an assessment of -- specifically an assessment
3 of the costs of purchasing trucks because, as Mr Jeavons
4 says, there were no specific debt or equity allocations
5 made for the purchase of trucks. They can have
6 a funding mix. So I appreciate the evidence only goes
7 so far, but I still say it is highly significant that at
8 the time in question Royal Mail was in fact using this
9 WACC as a measure of its financing costs,
10 notwithstanding that it was investment appraisal
11 purposes. They were obviously very important because
12 they were potentially big investments, so it needed to
13 know what the costs were -- what the costs were that it
14 needed to cover. The point is that it considered the
15 WACC -- the business considered it to be an appropriate
16 measure of its financing costs and indeed attached great
17 importance to it.

18 MR RIDYARD: But if we accept that, that that was the way
19 Royal Mail looked at things, does that mean that we
20 should use that interest rate when we decide what -- how
21 to convert between damage suffered in the past and
22 present value? How does it tie in with, if you like,
23 the legal question that we have to answer?

24 MR LASK: I am going to come on to the legal arguments
25 raised by DAF. The tribunal obviously has to reach

1 a view for itself as to whether the WACC is an
2 appropriate measure. It is not bound to accept the
3 measure used by Royal Mail during the relevant period.
4 But I do say that the measure used by Royal Mail during
5 the relevant period is highly significant evidence,
6 particularly when one thinks of previous cases, the ones
7 I summarised a few moments ago, where the courts attach
8 weight to how costs were being measured in practice.

9 THE CHAIRMAN: You still have to look at the purpose for
10 which it is being used.

11 MR LASK: Yes, I do not hide from that at all. It is being
12 used for investment appraisal purposes. *Trucks*, I would
13 say, are a form of investment. It was not being used
14 specifically to measure the costs for trucks but it was
15 being used in the context of investment appraisal as
16 a measure of financing costs, as a measure of the cost
17 of using debt and equity and, as Mr Jeavons' evidence
18 makes clear, trucks were funded out of debt and equity.
19 So it tells us what Royal Mail thought was an
20 appropriate approach to measuring the costs of using
21 those particular sources of funding.

22 THE CHAIRMAN: Is that not because any investment
23 opportunity or decision will have to -- inevitably will
24 involve some sort of return to the shareholders?

25 MR LASK: Hopefully.

1 THE CHAIRMAN: Yes, so that is a cost of equity.

2 MR LASK: But the same would apply throughout the business.

3 So when Royal Mail is conducting its day-to-day
4 operations, as Mr Earwaker's evidence explains, it is
5 internalising its investors' opportunity costs. So it
6 is not just when it is considering specific large-scale
7 investments that the cost of equity is important. It is
8 important throughout the business because it is
9 internalising those costs in everything it does.

10 You will recall that I explored in cross-examination
11 with Mr Delamer, you know, the notion that a company is
12 striving to satisfy its investors' expectations, and
13 that is why it matters to the company that it can make
14 the terms that can -- you know, whether deliver
15 dividends or by way of capital appreciation.

16 THE CHAIRMAN: Well, you have got an unusual shareholder
17 involvement in --

18 MR LASK: We have for part of the period, yes.

19 THE CHAIRMAN: We should probably have a break. I assume
20 that was...

21 MR LASK: If I could carry on for another maybe two or three
22 minutes. I am nearly at the end of this section.

23 THE CHAIRMAN: Yes, of course.

24 MR LASK: Yes, I showed you Ms Bradshaw's evidence and in
25 our closing at paragraph 950 on page 367, {S/9/367}, we

1 have also set out some key passages from Mr Jeavons'
2 evidence, where he explains how important it was to
3 Royal Mail that it calculated the WACC accurately. We
4 have made the point in our closing that none of this
5 evidence was challenged. Ms Bradshaw was not
6 cross-examined at all.

7 We do say that the fact that this was used for
8 investment appraisal purposes by Royal Mail is highly
9 relevant. Indeed it provides a strong indication, in my
10 submission, that it is the best measure for assessing
11 the financing losses in this case.

12 Then the fourth point is at paragraph 954, page 368,
13 {S/9/368}. The tribunal will recall hearing quite a bit
14 about this during the tax cross-examination. The point
15 is simply that the WACC rates are agreed between the
16 financing experts. So, taken together with my previous
17 three points, it means the tribunal has
18 a straightforward answer to the issue before it because
19 Royal Mail financed the overcharge through a mix of debt
20 and equity. It used a standard textbook method to
21 measure its costs of using those funding sources and the
22 experts have agreed the calculations. It all adds up to
23 the strongest possible case for using the WACC.

24 I am going to come on now to --

25 THE CHAIRMAN: It might make the calculation a bit easier

1 for us but it does not -- I do not see why that impacts
2 whether it is the appropriate --

3 MR LASK: No, it is just to complete the picture. It is an
4 appropriate measure, we say, and the calculations are
5 there and agreed, but I take your point, sir.

6 I was going to come on to deal with some of DAF's
7 objections but that might be a convenient moment.

8 THE CHAIRMAN: Yes, sure. All right. Ten minutes.

9 (3.14 pm)

10 (A short break)

11 (3.27 pm)

12 MR LASK: Thank you, sir. I have got quite a bit more
13 material to get through so I hope you will forgive me if
14 I take it at a relatively brisk pace.

15 So dealing now with DAF's objections to the WACC,
16 DAF has raised both legal and economic objections to the
17 use of the WACC. I want to deal with a key objection of
18 DAF's that has elements of both. This has that the use
19 of equity capital to fund an unlawful overcharge does
20 not represent an actual loss to the company because it
21 does not involve any cash outflow. That is a summary of
22 DAF's objection and that really goes to the heart of
23 DAF's case on the WACC. We say that argument is wrong
24 from both the legal and from an economic perspective.

25 Dealing first with the legal perspective, if we

1 could go, please, to our closing submissions at
2 paragraph 933, page {S/9/360}. This is where we set out
3 the key passages from *Sempra*.

4 My submission in summary is that recoverable
5 interest losses are not limited to cash outflows.
6 *Sempra* does not say they are and it is not a necessary
7 implication of the judgment in that case.

8 Could I ask the tribunal just to cast its eye,
9 please, over paragraphs 94 to 96 of *Sempra* which we have
10 set out there. (Pause)

11 So DAF relies on the reference to actual interest
12 losses in paragraph 94. In my submission, one needs to
13 read the three paragraphs together and, when one does,
14 one sees that "actual interest losses" means damage that
15 has been particularised and proved. That is what
16 Lord Nicholls is saying here. The common law does not
17 assume that the withholding of money in itself causes
18 damage. You have to particularise and prove it. That
19 is what is meant by "actual interest losses". There is
20 no suggestion -- there is no explicit or implicit
21 suggestion that it has to be cash outflows.

22 In particular, one sees in paragraph 95 that
23 Lord Nicholls envisages that the claimant can claim
24 interest for a loss of opportunity but a loss of
25 opportunity does not equate necessarily to a cash

1 outflow. It is the loss of a chance to make a return
2 and that loss can be quantified. Similarly, the equity
3 component of the WACC reflects the loss of a chance or
4 reduction in ability to satisfy investor expectations,
5 which, again, can be quantified.

6 Now, I do not say they are exactly the same because
7 if an investment comes to fruition, it may involve
8 a cash inflow, but, equally, if a company satisfies
9 investor expectations, as we heard from Mr Earwaker, its
10 value may increase.

11 But at their core, the two types of loss, loss of
12 opportunity and the WACC, they both represent the loss
13 of a chance to do something with withheld funds that may
14 or may not produce a benefit for the company. Of course
15 Lord Nicholls also says that the losses may take some
16 other form. So *Sempra* does not limit recoverable
17 interest losses to cash outflows.

18 If we could go next, please, to the *Sainsbury's*
19 judgment, which is at {AU/6.1}. In the hard copy
20 bundles, it is volume 3. We have explained in some
21 detail in our written closings why the judgment in
22 *Sainsbury's* does not preclude the WACC -- does not
23 preclude the use of the WACC as a measure of interest
24 losses and indeed why it is a judgment on its facts --
25 on its evidence.

1 If I could ask you to turn, please, to page 300 of
2 the judgment, {AU/6.1/300}. That is the Opus reference.
3 Yes, so it is paragraphs 541 and 542 where the tribunal
4 explains its reasons for rejecting the WACC in that
5 case. It starts at 541:

6 "It may well be that the WACC has its place in the
7 assessment of what would be an appropriate price for the
8 raising of large scale future capital for a firm. But
9 it is a wholly inappropriate measure in the present
10 case."

11 Just pausing there, the only point I make is that
12 that observation is incompatible with the submission
13 that the WACC is somehow precluded as a matter of law
14 and can never be an appropriate measure.

15 Then it goes on to explain its dislike for the
16 Modigliani-Miller theorem, being "based on assumptions
17 that do not pertain in the real world ... fundamentally
18 unsuited to an assessment of damages".

19 Then 542:

20 "We consider that an assessment of the appropriate
21 rate of interest must be based on the specific facts as
22 we have found them to be."

23 I have been emphasising the factual evidence and how
24 in my submission the factual evidence points strongly
25 towards the WACC in this case.

1 "The cost of capital is the minimum expected rate of
2 return that an investor will require to invest in
3 a firm. *Sempra Metals* requires that the court
4 quantifies the actual losses suffered by a firm. As
5 noted above, in this case, *Sainsbury's* did not raise any
6 equity during the claim period. An increase in the
7 theoretical cost of equity does not equate to any actual
8 loss paid out by the company in real life."

9 To understand what the tribunal means there, one has
10 to look at the evidence it was responding to, in my
11 submission, which is set out at paragraphs 530 to 532,
12 on page 296, {AU/6.1/296}. If we could scroll up to
13 paragraph 530, please, this is dealing with the evidence
14 of *Sainsbury's* expert, Mr Reynolds. In the second
15 sentence of 530, {AU/6.1/295}:

16 "Mr Reynolds' evidence was that the *Sainsbury's*
17 damages should be uplifted at the WACC rate irrespective
18 of which of *Sainsbury's* particular funding sources were
19 directly affected ... In other words, the actual rate at
20 which *Sainsbury's* was able to borrow money was not
21 decisive at all. His opinion was based on an
22 application of the Modigliani-Miller theorem."

23 Then it goes on to explain what that theorem
24 involves at 531. Then at 532, {AU/6.1/296}:

25 "Mr Reynolds quite properly made clear that his

1 opinion was based on an explicit assumption that
2 a company such as *Sainsbury's* could be expected to have
3 optimised its mix of financing ... If *Sainsbury's* paid
4 the overcharge by raising cheap external debt, this
5 would have increased the gearing ... of the company.
6 Increasing gearing would in turn lead to *Sainsbury's*
7 equity ... becoming more risky and in consequence this
8 would:

9 "Increase the cost of raising any further debt ...
10 [and]

11 "Increase the cost of raising further equity
12 finance."

13 So what was being suggested there was it does not
14 matter which source of funding you use because, if you
15 use cheap debt, the cost of equity goes up. You may
16 recall that Mr Earwaker says in terms in the joint
17 statement that he is not suggesting that the cost of
18 equity went up. There is no claim related to that in
19 this case. The claim in this case is there was a cost
20 of using equity and the cost of equity expressed as
21 a percentage may have been X% before the cartel, X%
22 during the cartel, X% after. There is no argument here
23 that it changed. It is just that we incurred that cost.
24 So it is a different argument from the one that was put
25 in *Sainsbury's*.

1 THE CHAIRMAN: Well, the issue in our case is whether the
2 use of retained earnings involves a cost of equity.

3 MR LASK: Yes, that is right. I entirely agree with that
4 and I am merely seeking to draw a contrast between what
5 the tribunal was concerned with in *Sainsbury's* and what
6 we are dealing with here. Essentially the concern in
7 *Sainsbury's* was that the evidence put forward by -- the
8 only evidence, it seems, that *Sainsbury's* had was
9 entirely theoretical; entirely theoretical. Not
10 grounded in the facts at all.

11 THE CHAIRMAN: It is quite amazing that *Sempra Metals* is now
12 15 years old and there are so few authorities -- it is
13 not a peculiarly competition law issue, it affects all
14 claims to damages and yet it does not seem to have been
15 worked out by the authorities as to, you know, how you
16 are meant to calculate financing losses.

17 MR LASK: No, there are relatively few.

18 THE CHAIRMAN: It is amazing really.

19 MR LASK: We obviously say *Equitas* is very helpful in that
20 respect. Yes, I accept that, sir.

21 But the point with *Sainsbury's* is the WACC was
22 rejected on the facts and the evidence. The tribunal
23 did not rule it out as a matter of principle.

24 THE CHAIRMAN: So on the facts they found it wholly
25 inappropriate?

1 MR LASK: Wholly inappropriate in that case on the facts,
2 yes.

3 The next case is *BritNed*, which is at {AU/7.1}. The
4 relevant section begins at page 192, {AU/7.1/192}.

5 THE CHAIRMAN: Both of these cases involve Mr Justice
6 Marcus Smith, do they not?

7 MR LASK: That is right, yes. He clearly does not like the
8 WACC.

9 THE CHAIRMAN: That is fair to say.

10 MR LASK: In terms of *BritNed*, in my submission, what is
11 important to appreciate is the nature of the evidence
12 before the court. Again, as with *Sainsbury's*, there is
13 no suggestion, as far as we can tell from the judgments,
14 that the claimants in either case used the WACC as
15 a measure of their financing costs. So in both cases it
16 seems the claims were based solely on the expert
17 evidence and we do say that is an important distinction
18 with this case.

19 At paragraph 546 one sees an extract from the
20 defendant's written closing submissions, where they
21 quote the claimants' expert evidence. If we could just
22 scroll down, please, at the top of that page you see the
23 evidence from the claimant's expert, Dr Jenkins,
24 {AU/7.1/193}:

25 "To see this more clearly, without the overcharge,

1 the equity investors would have invested a smaller
2 amount in *BritNed* ... As a result, the equity investors
3 would have been able to invest the savings ... in other
4 projects to earn returns from them. As a result, the
5 overcharge reduced the profits of the equity investors
6 (or shareholders)."

7 At 547 we see there was not any cost of debt in that
8 case. That is another point of distinction.

9 Then at 548 we see Dr Jenkins' evidence again:

10 "From an economic point of view, the interests of
11 *BritNed* cannot be easily separated from those of its
12 shareholders. [It] ... has been constituted to
13 represent the interests of its shareholders."

14 Then she engages in some debate with the defendant's
15 expert.

16 Then the court's conclusions are at 549, and DAF
17 relies particularly on 549(6), {AU/7.1/194}, where the
18 judge says:

19 "... there is, in this case, an essential
20 distinction between debt finance arranged by *BritNed* ...
21 and an equity injection by *BritNed*'s shareholders. The
22 equity stake of National Grid and TenneT involves no
23 cost to *BritNed*, save in an obligation to account for
24 its profits to its shareholders. The cost of the equity
25 injection is one borne by the shareholders, and one

1 which, in principle, ought to be recoverable by them.

2 But they are not party to these proceedings ..."

3 So, in my submission, the WACC claim failed in that
4 case because the only cost identified in *BritNed's*
5 evidence was the cost borne by the shareholders in
6 injecting --

7 THE CHAIRMAN: Was there an actual injection of equity then?

8 MR LASK: Yes, it was a joint venture that was funded
9 entirely through an equity injection. That is why there
10 was no debt. It was all equity.

11 THE CHAIRMAN: Right.

12 MR LASK: But the evidence -- the only cost identified in
13 *BritNed's* evidence was the cost borne by the
14 shareholders. They obviously had a separate legal
15 personality and were not party to the proceedings.

16 In the present case, Mr Earwaker has specifically
17 considered the argument that the use of equity financing
18 is free from the perspective of the business, ie that it
19 only entails a cost to investors, and has explained why
20 he disagrees with that view. I will come on to show you
21 the way in which he put the point. But, again, the
22 essential point is that the judge's conclusions were
23 based upon the particular evidence before him. He did
24 not purport to hold as a matter of law that the claimant
25 could not recover the costs of equity financing in any

1 case.

2 THE CHAIRMAN: Mr Earwaker was putting forward the same
3 point as Dr Jenkins in this case?

4 MR LASK: No, I say he was explaining why the cost -- why
5 there was a mirror image to the cost to equity
6 shareholders and how that opportunity cost was
7 internalised by the company and therefore represented
8 a cost to the company as well. He supported that view
9 with the various references to corporate finance
10 textbooks.

11 THE CHAIRMAN: I think, yes, that is pretty much what
12 Dr Jenkins was saying, was it not, that you cannot
13 easily separate the company and the shareholders in this
14 respect?

15 MR LASK: If I may, I will show you how he puts it. All we
16 can see of the evidence in *BritNed* is that which is set
17 out in the judgment and, as far as I can tell, the point
18 was not put in the way that Mr Earwaker puts it and that
19 is why I say it is a difference in the evidence
20 available.

21 Just briefly, DAF refers in its closing to the
22 Deutsche Telekom case in the EU general court, where the
23 general court did not like the WACC either, but even
24 before Brexit the relevant rate of interest was a matter
25 for national law; see *Sempra*, paragraph 68. So the

1 general court's view on the WACC does not assist in my
2 submission.

3 So turning to the economic arguments, the core of
4 the disagreement between Mr Earwaker and Mr Delamer was
5 whether the use of equity capital involved a cost to the
6 business. But ultimately, in my submission, there was
7 a sense of ships passing in the night because
8 Mr Delamer's position was that the use of equity capital
9 did not involve a cost to the business in that it did
10 not involve any additional cash outflow from the
11 company's perspective. Mr Earwaker did not demure from
12 the proposition that it did not involve a cash outflow,
13 but he gave what, in my submission, was a cogent account
14 of why it nevertheless involved a cost in the broader
15 sense.

16 If I could ask you to look, please, at our closing
17 submissions at page {S/9/373}, we have summarised the
18 key evidence at paragraph 970 onwards. I would just
19 like to pick it up, if I may, at 975, which is on
20 page 375, {S/9/375}:

21 "Mr Earwaker made clear that it was simply wrong --
22 and contrary to basic principles of corporate finance --
23 to regard this opportunity cost of capital as a cost to
24 the investors alone. To do so involved treating equity
25 financing as a form of free money from the perspective

1 of the business, which [he] described as untenable ...

2 "On the contrary, the opportunity cost to investors
3 had a 'mirror image' in a cost to the firm. Companies
4 internalised its investors' opportunity costs as an
5 ongoing cost to the business through various actions and
6 decision-making."

7 Then at 977, {S/9/376} -- this is summarising
8 Mr Earwaker's evidence:

9 "Thus, it was the possibility that retained earnings
10 could otherwise have been paid out as distributions
11 had Royal Mail not had to pay the Overcharge that
12 gave rise to an additional equity financing requirement
13 and, consequently, an additional cost of equity
14 financing ..."

15 Then we have set out, at 978, some of the extracts
16 from the literature that Mr Earwaker cited and with
17 which Mr Delamer generally agreed, which described the
18 cost of equity as a cost to the company. So the first
19 extract:

20 "... the cost of the company's financing
21 resources -- its cost of capital -- is none other than
22 the rate of return required by investors ...

23 "It is important to stress the symmetry between the
24 expected return to shareholders and the cost of capital
25 to the firm", and so on.

1 At paragraph 980 it quotes Mr Earwaker's oral
2 evidence, and I emphasise this because it is a neat
3 encapsulation of why he says that it is a cost to the
4 business:

5 "So the reason why there is this corporate finance
6 literature, the reason why people are very keen to
7 stress that there is a cost to equity is that the value
8 of the company can change, either in a positive way or
9 a negative way, depending on whether shareholder money,
10 either in the form of equity injection or
11 retained earnings, is used in a responsible and
12 appropriate way ...

13 "I think it matters to a company that they do not
14 put themselves in a -- it matters to a company that it
15 does not destroy value, it does not needlessly give
16 shareholders a return that is far below the [equity]
17 cost."

18 It goes on and I invite the tribunal to read the
19 whole of this section that deals with the evidence, but,
20 as I say, the key point is that Mr Earwaker explained,
21 very clearly in my submission, why, notwithstanding that
22 it did not involve a cash outflow, the use of retained
23 earnings was a -- involved a cost to the business.

24 THE CHAIRMAN: You say Mr Delamer agreed in principle but,
25 as you say in paragraph 979, he was saying: of course

1 you use the WACC for investment appraisal and that is
2 treated as a cost for that purpose.

3 MR LASK: For those purposes, but it begs the question: why?
4 Why does the company care about covering its investors'
5 opportunity costs when it is making investments? In my
6 submission --

7 THE CHAIRMAN: Well, for some of the reasons that
8 Mr Earwaker set out.

9 MR LASK: It cares because it matters to the company, and
10 that is why we say it is a cost to the company, because
11 it matters to the company whether it can satisfy its
12 investors' expectations. As soon as it starts using
13 investor equity capital to do things such as pay an
14 unlawful overcharge, it is risking not meeting its
15 investors' expectations, and that is where the cost
16 of --

17 THE CHAIRMAN: We are interested in whether this is an
18 actual loss suffered by the company.

19 MR LASK: Yes, I accept that. As you have heard, my
20 submission is that actual loss does not necessarily
21 require a cash outflow. What we have in this case, if
22 I can put it this way, is a form of detriment that is
23 capable of quantification, and that, in my submission,
24 qualifies as an actual loss.

25 So can I turn to the issue of dividends, please,

1 really moving on to another of DAF's objections. We
2 have addressed Mr Delamer's analysis of Royal Mail's
3 returns, which is a sort of prior issue, at
4 paragraph 991 on page 383, {S/9/383}, but I wanted to
5 move straight on to the issue of dividends which we
6 address at paragraph 994 on page {S/9/384}. You will
7 recall this received a fair bit of airtime in
8 cross-examination.

9 Now, it is common ground that Royal Mail has in fact
10 paid dividends since the 2013 IPO and indeed it is
11 common ground this must be taken into account in
12 deciding whether the WACC is appropriate. But there was
13 controversy over the pre-2013 period. We have addressed
14 this in some detail at paragraph 995 and onwards.
15 I just want to highlight two points. Firstly,
16 Royal Mail does not say it paid actual dividends during
17 this period but it regarded the payments that it had to
18 make under the EFL and Mails Reserve as akin to
19 dividends. In my submission, it acted accordingly, at
20 least from around 2000, when it began to use the WACC.
21 Mr Delamer agreed that using the WACC was the behaviour
22 of a company that was striving to meet shareholder
23 expectations and was expecting to pay dividends or at
24 least something akin to them.

25 Now, that is the first point. The second point is

1 that DAF places great weight in its closing submissions
2 on Mr Jeavons' evidence, oral evidence, that in the
3 absence of the overcharge, in the counterfactual --
4 sorry, the absence of the overcharge in the
5 counterfactual is unlikely to have made a difference to
6 the payment of dividends. But we do say that the weight
7 it seeks to place on that evidence is misplaced because
8 Mr Jeavons was there giving evidence in the context of
9 a discussion about the EFL and Mails Reserve, so it
10 certainly does not apply to the later period, but,
11 moreover, it is very difficult to know what Royal Mail
12 would have done differently in the counterfactual.

13 That is precisely one of the points made in *Equitas*
14 at paragraph 123, where the court recognised that a
15 businessman may well be unable to say what he would have
16 done differently in the counterfactual and any such
17 evidence would be hypothetical.

18 Mr Earwaker makes a similar point in his third
19 report at 3.13. I do not need to take you to it, but
20 for your note it is {E/IC60/25}. Again, for your note,
21 DAF says in its closing at paragraph 303 that
22 Mr Earwaker agreed with Mr Jeavons that the dividends
23 would not have changed in the counterfactual, and we do
24 not accept that that is a reasonable interpretation of
25 the transcript but DAF has given the reference in its

1 footnote 393 and I invite the tribunal to read that.

2 In any event, in my submission, Royal Mail does not
3 have to show that it would have paid higher dividends in
4 the counterfactual. That is to set the bar too high.
5 The cost of equity, as described by Mr Earwaker, arises
6 from the possibility that retained earnings that were
7 used to fund the overcharge could otherwise have been
8 paid out in distributions. What matters is the impact
9 on its ability to do the very thing it strives to do.

10 Two further points of detail. DAF says, at 292 of
11 its closing, that payments made under the EFL remained
12 on Royal Mail's balance sheet, and we have explained at
13 paragraph 996.6 of our closing, {S/9/388}, that the
14 amounts originally allocated were eventually placed in
15 the Mails Reserve and then the Mails Reserve funds were
16 ultimately deployed or distributed in accordance with
17 Government directions.

18 DAF also says in its closing that, unlike true
19 dividends, the relevant shareholder during the Mails
20 Reserve period, so the Government, was not free to use
21 the funds as it saw fit. But Mr Earwaker explained that
22 in fact -- this is at 996.5 of our closing -- in fact
23 the Government could use the Mails Reserve fund for the
24 purpose of its choosing.

25 Actually one sees that from the Commission state aid

1 decision that we have cited at 996.6 and in particular
2 Recital 61.74 of that decision, where the Commission
3 explains the money in the Mails Reserve was under the
4 control of the UK Government.

5 So whilst it is true that in fact the Government
6 decided to use those funds for purposes related to
7 postal services, there is no suggestion it was obliged
8 to do so.

9 Sir, I would like to turn now, please, to the
10 alternative interest rate, so Royal Mail's alternative
11 case. I would like to start, please, by asking you to
12 look at *Sainsbury's* again, {AU/6.1/293}.

13 In fact, it might be -- I think it would be quicker,
14 given the time, if I take you to where we have
15 summarised it in our closing submissions. This is at
16 {S/9/390}, paragraph 1000.

17 We have summarised here how -- having rejected the
18 WACC, how the tribunal in *Sainsbury's* alighted upon an
19 appropriate rate for compound interest. What it did is
20 that it estimated that 50% of the overcharge was passed
21 on and then it drew broad brush assumptions from the
22 factual material as to what would have happened with the
23 other 50% in the counterfactual. It assumed that, of
24 the remaining 50%, 20% would have resulted in higher
25 cash balances and 30% in lower borrowing. We have

1 summarised that at paragraph 1000.

2 We invite the tribunal in this case to take
3 a similar approach if it is not attracted to the WACC.

4 Now, there was a good measure of common ground
5 between the experts on this, and we see at
6 paragraph 1001 of the closing submissions, just over the
7 page, please, {S/9/391}, where we have quoted
8 Mr Earwaker's entry in the joint statement where he
9 says -- he thinks a focus on short-term investment and
10 debt is unduly constraining, but he agrees with
11 Mr Delamer that it is reasonable to contemplate the
12 possibility that the claimant could have funded any
13 overcharges it paid by drawing down on short-term
14 investments or borrowing additional debt. However, it
15 is necessary to consider which possible approach is
16 likely in practice to apply, having regard to the
17 claimant's treasury management policies and the
18 behaviours one would expect. So that is explaining why
19 he was prepared to have a look at the alternative
20 measure as a next best measure to the WACC.

21 Then, at paragraph 1004.3, {S/9/392}, we have quoted
22 Mr Delamer's evidence on this and he said:

23 "But for an overcharge, the Claimant would have had
24 additional funds. These funds could have been used to
25 increase the actual investments in short term

1 investments ... or to reduce the amounts of debt the
2 Claimant has actually held in the past ... As such, the
3 potential relevance of short-term investments and debt
4 when estimating the financing costs the Claimant could
5 have avoided in the counterfactual scenario is
6 self-evident to me."

7 So, in my submission, Mr Delamer endorsed an
8 approach that involved looking -- that involved using
9 the cost of debt -- a combination of the cost of debt
10 and short-term investments as an appropriate measure
11 instead of the WACC.

12 Then at 1005, {S/9/393}, you will see that the
13 experts agreed the estimates of the returns made by
14 Royal Mail in short-term investments and they agreed
15 Royal Mail's cost of debt from 1997 until the end of
16 2012/2013.

17 Now, there is not witness evidence in this case
18 claiming that Royal Mail would have used the additional
19 funds in the counterfactual to supplement its
20 investments or reduce its borrowing, but that is
21 unsurprising, in my submission, because Royal Mail's
22 primary case is that its losses comprise the actual cost
23 of using the funding mix of debt and equity; not what it
24 would have done with the funds in the counterfactual.

25 So the primary claim -- and one sees this from

1 Mr Jeavons' evidence at 22.5 -- but the primary claim is
2 simply that in the counterfactual it would have avoided
3 those costs. But that is not to say there is not
4 factual evidence before you to support the alternative
5 measure. So Mr Jeavons has given evidence --

6 THE CHAIRMAN: Would not that factual evidence have been
7 relevant to that issue as well?

8 MR LASK: Sorry?

9 THE CHAIRMAN: Would not that factual evidence have been
10 relevant to the issue of whether the WACC is appropriate
11 or not?

12 MR LASK: The factual evidence as to what --

13 THE CHAIRMAN: What it would have done in the counterfactual
14 with the extra money it had.

15 MR LASK: Well, the claim for the WACC is simply based on
16 the proposition that it would have avoided the costs of
17 using debt and equity, and Mr Jeavons has given
18 evidence -- he has said that in his evidence. He said
19 he would have avoided the cost of using debt and equity
20 or words to that effect at 22.5. What he has not gone
21 on to do is to speculate precisely as to what it may
22 have done with additional funds in terms of its debt and
23 short-term investments. We have seen from *Equitas* that
24 actually that sort of evidence often is not very helpful
25 because it is pure speculation; it is hypothetical.

1 But what he does do is he explains how trucks were
2 financed, he explains how Royal Mail's cash balances,
3 working capital and debt financing were used. You also
4 have detailed factual evidence on Royal Mail's actual
5 cost of debt and actual returns on short-term
6 investments and the actual scale of its -- the actual
7 relative scale of its short-term investments and
8 borrowing over the relevant financing period.

9 So what Mr Earwaker has done is drawn on all this
10 evidence to make assumptions about how the overcharge is
11 likely to have impacted on Royal Mail's short-term
12 investments and levels of debt. Mr Delamer has done
13 something similar. He has drawn on the factual evidence
14 to make assumptions about how Royal Mail would have
15 deployed the additional funds in the counterfactual;
16 a similar exercise but coming at it from another end of
17 the telescope.

18 The approach that they have taken is, in my
19 submission, similar to the tribunal's approach in
20 *Sainsbury's* and, just for your note, you will see that
21 the witness evidence that was before the tribunal in
22 *Sainsbury's*, which it cites at paragraphs 522 to 524,
23 made clear that it was very difficult for the witnesses
24 to say what they would have done with the additional
25 funds in the counterfactual. That is why the tribunal

1 made broad brush assumptions as to what would have
2 happened.

3 So I submit that if the tribunal is not with me on
4 the WACC, they should take a similar approach in this
5 case to the one the tribunal took in *Sainsbury's*.

6 Now, there were two relatively narrow areas of
7 dispute between the experts on this alternative measure,
8 and they were weighting as between debt and short-term
9 investments and then the cost of debt for the later
10 period, from 2013 onwards. We have addressed the
11 weighting issue at paragraph 1008 and we have explained
12 why Mr Earwaker's approach is preferable to
13 Mr Delamer's, as you will see at paragraph 1010,
14 {S/9/394}. We say Mr Earwaker's approach was plainly
15 the better one.

16 "In particular:

17 "Mr Delamer's approach was blunt and oversimplistic.
18 As he accepted, it assumed that, but for the Overcharge,
19 Royal Mail would have deposited the additional funds in
20 short-term investments and/or used them to reduce its
21 debt in proportions that corresponded precisely to the
22 relative proportions of short-term investments and debt
23 that it held at any given time."

24 Then we say that assumption was an unrealistic one.

25 At 1010.4, {S/9/395}:

1 "The more reasonable and realistic approach was to
2 consider how Royal Mail may have deployed its additional
3 funds in the counterfactual, based on the available
4 factual evidence ... That was ... what Mr Earwaker did.
5 Mr Delamer ... made no such attempt."

6 We have set out there why Mr Earwaker's approach to
7 weighting is more appropriate and then we address the
8 dispute on the cost of debt at paragraph 1014 onwards.

9 THE CHAIRMAN: You say that Mr Earwaker followed what they
10 did at the time, but he is assuming that they would have
11 taken a decision once -- I cannot remember what the
12 reasons were -- but once interest rates turned or
13 whatever in 2008, they would have switched 100%
14 short-term investments to 100% debt.

15 MR LASK: Yes.

16 THE CHAIRMAN: But that is not what they actually did.

17 MR LASK: No, I was not intending to submit that he --

18 THE CHAIRMAN: I mean, that might have been a rational thing
19 to do because of what was going on.

20 MR LASK: To be clear, both experts made assumptions as to
21 how the additional funds would have been deployed in the
22 counterfactual, but based on the factual material --
23 they reach different assumptions based on the same
24 material. My submission is that Mr Earwaker's approach
25 was preferable because he attempted to assess what was

1 likely to have happened and how Royal Mail was likely to
2 have -- what it was likely to have considered sensible
3 to do with the additional funds, whereas Mr Delamer
4 simply looked at the relative proportions of debt and
5 short-term investments and assumed that additional funds
6 would have been deployed in precisely corresponding
7 proportions. That is why we say "blunt and
8 oversimplistic".

9 THE CHAIRMAN: That is their opinion as an expert as to what
10 would have happened?

11 MR LASK: Yes. They are drawing assumptions in a similar
12 way to what the tribunal did in *Sainsbury's*, and that is
13 what we are inviting the tribunal to do in a non-WACC
14 world. You will see from the *Sainsbury's* judgment --
15 I have not taken you back to it just in the interests of
16 time -- but you will see from the references we have
17 given the tribunal explaining that it has taken a broad
18 brush approach, drawing assumptions based on the factual
19 evidence.

20 So turning to the issues on debt which we address at
21 paragraphs 1014 onwards, page 397, {S/9/397}, the
22 differences only related to the later period and they
23 were attributable to Mr Delamer's -- you will recall
24 this from the cross-examination -- attributable to
25 Mr Delamer's partial exclusion of a £500 million

1 Government loan, he excluded it from the year 2013/2014,
2 and then the complete exclusion of the two parent
3 company loans, the two big loans, totalling 935 million.

4 THE CHAIRMAN: He comes out largely at 0%, does he not, for
5 the final years?

6 MR LASK: Yes, and we have emphasised that -- the lack of
7 reality in that in our closing submissions. Yes, zero
8 or close to zero for most of the relevant period.

9 Now, it is not entirely clear if the Government loan
10 issue is still disputed. I do not think DAF mention it
11 in their closing, but, in any event, we explain at
12 paragraph 1021 why there is no justification for
13 excluding it.

14 Then as to the two parent company loans, we say the
15 position is very clear. The relevant section begins at
16 1024 on page 400, {S/9/400} -- sorry, if we could start
17 on page 398 {S/9/398}, we explain here that in
18 calculating Royal Mail's cost of debt, both experts were
19 looking to identify financial debt instruments which
20 they described in very similar terms. So you see
21 Mr Delamer at 1016:

22 "The Claimant's claim for interest is therefore
23 determined by what actual financing costs incurred on
24 the amounts it 'did' borrow during the relevant period
25 would have been avoided if it had not paid the

1 overcharge."

2 Then he says at 1018:

3 "When considering a company's cost of debt, I think
4 the appropriate focus should be on financial debt,
5 namely structured debt instruments with ... defined
6 repayment schedules or maturities [amongst other
7 things]."

8 He says Mr Earwaker appears to share this
9 definition.

10 Then Mr Earwaker's definition is at 1019:

11 "In the case of debt financing, the company will
12 agree a fixed repayment schedule with the lender. This
13 schedule will be written into a legally enforceable
14 agreement, will usually specify the date(s) on which
15 borrowing are to be repaid to the lender, the annual
16 rate of interest payable to the lender and any
17 restriction or covenants which are to be placed on the
18 company's conduct ..."

19 So they both described financial debt in similar
20 terms.

21 If we could now go, please, to 1024 on page 400,
22 {S/9/400}, the simple submission is that, on the
23 evidence before the tribunal, the two parent company
24 loans clearly satisfied this definition. As we explain
25 at 1024:

1 "Royal Mail Plc issued interest paying bonds of 500
2 [million euros] and 550 [million euros] in 2014 and 2019
3 respectively. On each occasion, the proceeds were
4 immediately loaned to Royal Mail. These loans bore all
5 the hallmarks of financial debt as described by both
6 Mr Earwaker and Mr Delamer. Both of them were enshrined
7 in written legal agreements; both of them provided for
8 specified repayment dates; and both of them required
9 Royal Mail to pay interest at a specified rate ... Thus,
10 Royal Mail was contractually obliged to repay both the
11 principal sum and interest thereon, just as one would
12 expect with a loan. On any view, these loans gave rise
13 to an actual financing cost and a 'tangible cash
14 outflow' on the part of Royal Mail."

15 We have set out the cross-examination of Mr Delamer,
16 {S/9/401}. This is me:

17 "Well, your approach is to focus on actual financing
18 costs. Your approach is to focus on tangible cash
19 outflows. That is precisely what we have here, is it
20 not?"

21 He says:

22 "Absolutely."

23 Then he says:

24 "Yes. You have a cash outflow --"

25 In my submission, that really ought to have been the

1 end of it, but DAF has put up a quite extraordinary
2 fight to keep these loans out of the debt calculations
3 and I will just deal briefly, if I may, with the key
4 points, all of which are addressed in more detail in the
5 closings.

6 Firstly, it says, well, the loans are recorded under
7 the trade and other payables section in Royal Mail's
8 accounts, but that is a very formalistic approach, as
9 was observed during Mr Delamer's cross-examination. It
10 cannot detract from the substance of the position. The
11 substance of the position is what matters. The loans
12 are actually described as loans in the accounts and the
13 agreements themselves have been disclosed. As I have
14 just pointed out, they bear all the hallmarks of
15 financial debt.

16 Secondly, DAF says that the provisions for repayment
17 on demand with five days' notice means the loans are not
18 financial debt but a potentially short-term internal
19 arrangement. In my respectful submission, that argument
20 goes nowhere because that term for repayment on five
21 days' notice has not been invoked. It just has not
22 been. So, in practice, Royal Mail has continued to pay
23 interest on these loans and it has incurred an actual
24 cost of debt on them.

25 THE CHAIRMAN: The most important thing about them is that

1 they are basically back to back with third party
2 bonds --

3 MR LASK: Yes, exactly.

4 THE CHAIRMAN: -- which is obviously a commercial rate of
5 interest that Royal Mail was basically paying.

6 MR LASK: Precisely, sir. Frankly, to describe them as
7 "short-term arrangements" where they have been paying
8 interest on them for eight and three years respectively
9 is a tad unrealistic.

10 DAF's third point concerns what it calls "other
11 intra-group arrangements". You may recall this was
12 Mr Delamer's fall-back position; his -- what I described
13 as "You shoot the deer and the ducks".

14 What DAF says is that you have to imply an interest
15 rate based on all of the intra-group arrangements if you
16 are going to include the two parent company loans.
17 There has, in my submission, been a vigorous attempt by
18 DAF to muddy the waters on this, both in
19 cross-examination of Mr Earwaker and in DAF's closing,
20 but there is a short answer to it. We deal with it at
21 paragraphs 1041 to 1044, page 406, {S/9/406}. The
22 simple fact is there is no evidential basis for treating
23 these other amounts as financial debt. On the contrary,
24 Royal Mail has confirmed in correspondence that they are
25 not. That is the letter of 27 April, {J4/IC367}. We do

1 not need to go to it now. But also that is consistent
2 with Mr Delamer's own position, which is that one would
3 not normally expect to see financial debt recorded as
4 trade and other payables.

5 Now, we have explained why, with the two parent
6 company loans, you know, there is a clear evidential
7 basis for departing from Mr Delamer's starting position,
8 but there is no evidential basis for including
9 everything else. Now, in its closing, DAF refers
10 specifically to two other intra-group arrangements
11 involving Royal Mail Investments Limited and Royal Mail
12 Estates Limited. That is at paragraphs 327 to 330. The
13 tribunal may recall that the accounts for those other
14 companies were put to Mr Earwaker in cross-examination,
15 having been added to the bundle the night before. You
16 can see what Mr Earwaker said about them in our closing
17 submissions at paragraph 1046 onwards.

18 But the bottom line is that the terms of these other
19 arrangements are not before the tribunal. They are not
20 set out in the accounts and DAF itself accepts that
21 Mr Delamer has not taken a view on whether these other
22 arrangements constitute financial debt. That is DAF's
23 closing, paragraphs 329 to 330. So beyond mere
24 speculation, there is no basis at all for including them
25 in the cost of debt calculations.

1 Now, there has been a lot of discussion already
2 about how the two loan agreements came to be disclosed
3 and I do not want to take up time with the procedural
4 history. The position is set out fully in our letter of
5 27 April, but just to highlight one or two points. The
6 two loan agreements were disclosed in January 2022
7 because there was an issue between the experts on how
8 the bonds should be factored into the cost of debt
9 calculations. The bonds were referred to in the
10 I9 tables and in the accounts, which is what the experts
11 were relying on, and, as I say, this issue arose as to
12 how to treat those. You can see the issue summarised --
13 I will not take you to it, but you can see it summarised
14 in Mr Earwaker's second report at paragraph 4.12 of
15 {E/IC32/24}. But that just -- it gives you a flavour of
16 how the loans came to be disclosed. Both experts had
17 ample time to consider them. There was obviously no
18 prejudice.

19 Just to emphasise, if DAF had reason to believe
20 there were other agreements that may be relevant, it
21 really was for DAF to ask for disclosure of them and it
22 did not. It is quite wrong, in my submission, for DAF
23 to say that Royal Mail has been selective in its
24 disclosure. So, in my submission, all the tribunal can
25 do now is decide the point on the evidence before it.

1 That evidence, in my submission, requires the two parent
2 loans to -- parent company loans to be included in the
3 cost of debt and it does not begin to justify the
4 inclusion of any of the other arrangements.

5 Just one brief point. DAF says in its closing
6 submissions at paragraph 331 that Mr Earwaker was
7 inconsistent because he included a loan relating to
8 a German acquisition, thereby undermining his evidence
9 that he was only looking at debt that could have been
10 used to finance the overcharge. That is misleading,
11 I am afraid, because if one looks at his first report,
12 6.15 -- we do not need to go to it, but he expressly
13 excluded that loan from his calculations precisely
14 because it related to the German acquisition. So that
15 is the cost of debt.

16 Then compound interest, compounding generally, which
17 we deal with at paragraph 1053 onwards, page {S/9/410}.
18 Royal Mail's position is that, whichever rate of
19 interest is used, it should be calculated on a compound
20 basis. As we have explained here in the closing
21 submission, this is consistent with the authorities, the
22 factual evidence and the expert evidence. The chairman
23 may recall asking Mr Delamer if he could see any
24 credible economic basis for adopting a simple interest
25 approach and suffice to say he did not identify one.

1 DAF nevertheless argued that only simple interest should
2 be awarded on the basis that Royal Mail's pleadings and
3 evidence do not justify damages by way of compound
4 interest. We say that is obviously wrong.

5 Given the time, I am not going to take you to the
6 authorities but I will just give you the reference and
7 make my submission on them, if I may. There is
8 a case -- there is the *JSC Bank* case, the judgment of
9 Mr Justice Teare, which DAF relies on, and that is an
10 example of where the compound interest claim was
11 rejected on the basis that the pleading was inadequate.
12 That case is at {AU/3.5.1}. We simply say it is a good
13 example of an inadequate pleading for a compound
14 interest, but, contrary to DAF's submission, it is a bad
15 analogy for the present case because it really was just
16 a bare pleading in the prayer, I think. There is no
17 identification of the losses suffered. It is a bad
18 analogy.

19 A good example of an adequate pleading is in the
20 *Sainsbury's* case before the tribunal, {AU/6.1/287}. The
21 tribunal sets out *Sainsbury's* claim for compound
22 interest as pleaded and then finds at paragraph --
23 sorry, the pleading is set out at paragraph 511 and the
24 tribunal concludes at 522 that it was sufficiently
25 pleaded. That is why it felt able to award compound

1 interest. One sees the award of compound interest
2 summarised at paragraph 546.

3 Then, again -- I will just give you the reference if
4 I may -- Royal Mail's pleading is at {B/1/46},
5 paragraphs 34 to 37, and you will see that actually it
6 is quite similar to the pleading in *Sainsbury's* which
7 was accepted as adequate. It is nothing like the
8 pleading in the *JSC Bank* case which was rejected.

9 Now, you will also see from the pleading that
10 obviously the primary claim is the WACC claim, and there
11 is a pleading in the alternative for cost of debt or
12 such other rate as the tribunal considers appropriate.
13 I have to acknowledge that the pleading does not
14 expressly claim foregone returns on short-term
15 investments so that is the other half of the alternative
16 interest rate. But BCLP did write to Travers Smith
17 in March of this year confirming that, in light of the
18 expert reports, Royal Mail was adopting the alternative
19 interest rate as calculated by Mr Earwaker, so the
20 position was made abundantly clear.

21 Now, DAF also complains that Royal Mail's witness
22 evidence does not explain how it would have used
23 additional funds in the counterfactual, and I have
24 addressed that point and I explained to you that, whilst
25 it is true that the witness evidence does not speculate

1 on what would have happened, there is ample factual
2 material before the tribunal that allows the tribunal to
3 draw the sort of broad brush assumptions as to what
4 would have happened in the counterfactual, just like the
5 tribunal did in *Sainsbury's*.

6 THE CHAIRMAN: Is this a broad axe question as well?

7 MR LASK: It is, and that is how the tribunal in *Sainsbury's*
8 dealt with it. I can take you to it if it is helpful.
9 I am just conscious of time.

10 THE CHAIRMAN: Do you refer to it in your closings?

11 MR LASK: Yes, I do.

12 THE CHAIRMAN: You do. We will pick it up.

13 MR LASK: Then BT interest which I will address you on
14 briefly. You have heard a bit about this already. The
15 tribunal obviously has a broad discretion as regards
16 simple interest, the aim being to identify a fair rate
17 to compensate the claimant using a broad brush and
18 proportionate approach, and one sees that from the
19 *BritNed* supplemental judgment, paragraph 17. That is
20 {AU/7/101}. In an effort to -- sorry, sir, I should
21 have said I am now at page 412 of the closing
22 submissions, {S/9/412}. Now, in an effort to reflect
23 this approach, BT's pleaded claim is for simple interest
24 at 8% or such other rate as the tribunal determines.
25 For your note that is {B/4/47}.

1 Now, DAF pleaded a bare denial of the simple
2 interest claim, which we assumed to be the corollary of
3 its denial that there was any overcharge, but it took no
4 specific point on this until its skeleton argument for
5 trial.

6 As I flagged up in opening submissions, BT therefore
7 reflected on this and what we have done is we have
8 submitted in the closing submissions that a fair and
9 appropriate rate would be 6.3%, which is the average of
10 BT's cost of borrowing over the relevant financing
11 period based on its disclosed accounts.

12 MR BEARD: Sorry. This is a point that we object to because
13 this is material that has been submitted after all the
14 evidence has been --

15 MR LASK: Sorry, sir. Mr Beard has already made clear his
16 objection and I am going to deal with it as best I can,
17 but it is on the transcript. We are aware of the
18 position.

19 As you pointed out, sir, DAF objected to 8% so BT
20 reflected on it and has sought to ground its claim for
21 interest in the evidence that is already before the
22 tribunal.

23 THE CHAIRMAN: The claim for interest under section 35A does
24 not have to be pleaded out in the same way as a claim to
25 compound interest or anything like that.

1 MR LASK: Precisely, and we have said 8% or such other rate
2 as the tribunal thinks fit. The evidence is already
3 there. It is disclosed. What has happened is we have
4 calculated the cost of debt based on the disclosed
5 accounts and we have set it out in a letter -- we have
6 set out the calculations in a letter, we sent it to
7 Travers Smith and we invited them to agree the
8 accuracy -- not to agree the rate but to agree the
9 accuracy.

10 Now, they did not want to. They neither confirmed
11 nor disputed the accuracy, but simply contend it was
12 a matter for expert evidence.

13 THE CHAIRMAN: When was the letter sent?

14 MR LASK: It was sent -- it was quite recently. It is at
15 {J4/454/1}. I think it was last week or maybe the week
16 before.

17 MR BEARD: No, I think it was last week.

18 MR LASK: 16 June. I have lost track of time. Maybe
19 16 June was last week. But, anyway, there it is. We
20 wrote to them; we set out the calculations; we asked
21 them to confirm the accuracy; they do not want to; they
22 say it is an issue for expert evidence. We do not
23 accept that because actually it is a matter of simple
24 arithmetic based on the disclosed accounts. As we have
25 set out in closing submissions, it does suggest that

1 a rate based on the Bank of England base rate would
2 under-compensate BT. But that is all I propose to say
3 on the issue. The tribunal has the figures and we
4 invite it to adopt 6.3% as a fair rate to compensate BT.

5 Sir, I think I have just about left myself enough
6 time to deal briefly with tax. This is addressed fully
7 at section L of our closing submissions, page 416,
8 {S/9/416}. The tribunal will recall that this came down
9 to two issues: firstly whether Royal Mail's equity
10 financing losses should be run through the tax modelling
11 despite having been calculated on a post-tax basis and,
12 secondly, if so, what method and tax rate should be used
13 to gross up those losses before they are run through the
14 modelling.

15 THE CHAIRMAN: This is all on the basis that we adopt the
16 WACC?

17 MR LASK: Yes, it only arises --

18 THE CHAIRMAN: It would not arise if we adopt some other
19 basis?

20 MR LASK: It does not arise under the alternative interest
21 rate that I have been addressing you on.

22 The short answer to the first issue is this: the
23 relevant financing experts agreed the figures for
24 Royal Mail's equity losses and agreed that those figures
25 represented the post-tax position, so, in other words,

1 the equity losses have already been reduced on account
2 of tax. So in my submission it is simply unnecessary to
3 gross them up into pre-tax figures just so they can be
4 run through the tax model to generate new post-tax
5 figures.

6 Now, DAF's expert, Mr Pritchard, his core concern
7 was that, although the equity losses were post tax, they
8 did not sufficiently reflect the specific effects of
9 Royal Mail's tax position. We say that concern was
10 overstated because Royal Mail's tax position is baked in
11 to its equity losses via the beta component of the CAPM
12 formula.

13 Now, we of course recognise that the beta will only
14 reflect Royal Mail's tax position at a general level
15 but, in my submission, it does come at a point when the
16 search for ever more accurate modelling has to stop.
17 That is why the tribunal has its broad axe and that is
18 certainly the position here because, as Mr Pritchard
19 himself accepts, it is actually quite difficult to
20 produce an even more precise representation of
21 Royal Mail's post-tax losses in circumstances where
22 Royal Mail's tax position is, as he put it, very
23 complicated.

24 So we say the post-tax equity losses agreed between
25 the financing experts are more than good enough and it

1 is simply unnecessary to unpick and reconstruct them.
2 To be clear, it is certainly not the case that the
3 equity losses have fallen between two stalls, as DAF
4 argues in its closing submissions. They were agreed by
5 the financing experts on a post-tax basis and Mr Singer
6 rightly treated that as sufficient. DAF's argument to
7 the contrary, which was not put to Mr Earwaker, ignores
8 the basis on which the losses were calculated.

9 Then turning to the second issue, it is common
10 ground --

11 THE CHAIRMAN: This is all at stage 1 of the tax issue, is
12 it not?

13 MR LASK: Yes. The reason that I refer to grossing-up --
14 sorry, I should have backed up a bit. The reason
15 I refer to grossing-up, which is obviously also
16 a stage 2 term, is because it was common ground between
17 the experts that, if you are going to run the equity
18 losses through the tax model, you need to gross them up
19 first because they have been calculated on a post-tax
20 basis. So you need to gross them up into pre-tax terms
21 so that you can run them through the model to produce
22 a new post-tax calculation.

23 So the second area of dispute between the experts,
24 still related to the first stage -- the first step in
25 the tax analysis, because there was no dispute over the

1 second step -- the second step is grossing up the
2 overall damages award to reflect what Royal Mail will
3 have to pay on its damages.

4 THE CHAIRMAN: That is all agreed?

5 MR LASK: That is all agreed. This is all first stage. But
6 it is agreed -- within the first stage, it is common
7 ground that if you are going to run these losses through
8 your tax model, you have to gross them up first. That
9 is why we have this -- that is why I had this debate
10 with --

11 THE CHAIRMAN: You have to gross them up to get to a pre-tax
12 figure?

13 MR LASK: Yes, so that you can then run them through the
14 model to generate a new post-tax figure.

15 THE CHAIRMAN: To work out what the tax would be on that?

16 MR LASK: Yes, gross them up and gross them down, which is
17 clearly not the right term, but that is how I think of
18 it.

19 THE CHAIRMAN: Okay. You say the experts are agreed that
20 that is necessary to do?

21 MR LASK: Yes, they are agreed you have to do that. That is
22 why I had this whole debate with Mr Pritchard --

23 THE CHAIRMAN: You say it had already been done in terms of
24 the equity costs?

25 MR RIDYARD: Sorry, that has confused me. Can you answer

1 that question again because the experts do not agree, do
2 they, that you have to --

3 MR LASK: They do not agree on how you do it but it is
4 common ground that you had to do it. So Mr Singer said
5 you do it -- you gross up at a statutory rate and
6 Mr Pritchard said you gross up at the effective tax
7 rate. Do you recall that -- does the tribunal recall
8 that debate? I think it was had with both experts.

9 SIR IAIN MCMILLAN: Mr Singer at some point, did he not say
10 that that could lead to the company being double-taxed?

11 MR LASK: Double-taxed if you do not gross up. Mr Pritchard
12 I think recognised that in one of his reports. He said
13 that if you are going to run it through the tax model,
14 there is a risk that you double-tax, therefore you have
15 to gross it up into a pre-tax figure first.

16 THE CHAIRMAN: I thought Mr Singer disagreed with that and
17 said you do not gross up --

18 MR LASK: Let me back up. So Mr Singer's primary position
19 is you do not need to worry about any of this because
20 these losses have been calculated on a post-tax basis.
21 That is Mr Singer's position.

22 MR RIDYARD: So you do not need to run it through the tax
23 model because it is already net of tax?

24 MR LASK: Exactly. You exclude it from the model.

25 Mr Pritchard says, "No, that is not sufficient, it does

1 not sufficiently reflect Royal Mail's tax position, so
2 you do have to run it through the model". So then
3 Mr Singer says, "Okay, well, I do not agree, but, if you
4 do, we are going to have to gross it up first".

5 Mr Pritchard says, "Yes, I accept that". That leads on
6 to the second area of --

7 THE CHAIRMAN: Obviously, if you are going to run it through
8 the model, then you need pre-tax figures to go in there.

9 MR LASK: Yes.

10 THE CHAIRMAN: Okay.

11 MR LASK: The debate between them at this stage is what rate
12 you use to gross it up --

13 THE CHAIRMAN: Okay.

14 MR RIDYARD: -- if you have to run it through the model at
15 all --

16 MR LASK: Yes.

17 MR RIDYARD: -- which Mr Singer says you do not because it
18 is already net of tax.

19 MR LASK: Mr Singer says you do not. You can just take the
20 figures as they are, as agreed between the financing
21 experts. But then he says that if you are going to run
22 them through the model, you need to use a statutory rate
23 to gross them up, and Mr Pritchard says, "No, you need
24 to use the effective tax rate".

25 Have I -- sorry, I think I went too fast but have

1 I helped?

2 THE CHAIRMAN: They are taxed on the same basis, are they?

3 If you are just looking at the financing losses in
4 the -- before they are put into the model, I mean,
5 are you saying you are effectively doing the same thing,
6 you are just grossing up and then coming up with
7 a figure for tax which then has to be applied to the
8 figure that comes out of the model?

9 MR LASK: I think you are going to end up with a different
10 figure than the one you started with otherwise --

11 MR RIDYARD: Let us hope so.

12 MR LASK: I think Mr Pritchard agreed with that in
13 cross-examination because otherwise what is the point?

14 THE CHAIRMAN: Exactly.

15 MR LASK: So I think it is a quest for greater precision.

16 That is how I would put it. As I was going to come on
17 to submit and perhaps as this exchange has illustrated,
18 it does add a whole extra layer of complexity to the
19 calculations.

20 THE CHAIRMAN: It does have quite an impact on the figures
21 as well.

22 MR LASK: Yes, it does. I think that was illustrated at one
23 point during the --

24 THE CHAIRMAN: I remember asking -- I think I asked, yes.

25 MR LASK: So Mr Singer sought to minimise this complexity by

1 grossing up at the statutory rate, which we say has the
2 obvious attraction of being objective and readily
3 ascertainable. I do submit that is an appropriate
4 approach and should be adopted by the tribunal if it
5 ends up here.

6 By contrast, in his seemingly endless quest for
7 greater precision, Mr Pritchard used an effective
8 tax rate calculated from Royal Mail's accounts, but,
9 as he accepted -- and we have set this out at 1103 on
10 page {S/9/424} -- as he accepted, his effective tax rate
11 in fact turned out to be a blunt tool because he lacked
12 the necessary information about Royal Mail's tax
13 affairs.

14 In my submission, "blunt" is an understatement and
15 we have set out why at paragraph 1108 at {S/9/426}:

16 "In short, the purpose of this element of the tax
17 modelling is to gross-up Royal Mail's equity losses by
18 the rate of taxation which would have applied to those
19 profits had they been available to Royal Mail in the
20 counterfactual. The experts agreed that the equity
21 losses were to be treated as taxable trading income, and
22 this was reaffirmed during cross-examination. Thus, if
23 one is going to use an [effective tax rate], one must
24 identify the [effective tax rate] that would have
25 applied specifically to Royal Mail's equity losses.

1 Including non-taxable items which attract a 0% rate of
2 tax, as Mr Pritchard did, has the effect of artificially
3 deflating the relevant ETR for these purposes."

4 Now, there is no dispute between the parties that
5 Mr Pritchard's ETR factored in non-taxable income. That
6 is DAF's closing at paragraph 267. But what DAF fails
7 to appreciate is that, as a result, it was unfit for
8 purpose because it was artificially low. We have
9 explained at paragraph 1109 onwards that, when Mr Singer
10 corrected Mr Pritchard's error, the results reinforced
11 the suitability of the statutory rate because when he
12 stripped out Royal Mail's non-taxable profits and
13 calculated an ETR based on its taxable profits only, the
14 resulting rate was in fact similar to the statutory
15 rate.

16 DAF have highlighted Mr Pritchard's complaint that
17 the figures in Mr Singer's calculations could not be
18 verified, but they were taken from the audited accounts
19 so they had been verified.

20 THE CHAIRMAN: I seem to remember Mr Singer being a bit
21 inconsistent in his use of the statutory rate.

22 MR LASK: In what way, sir?

23 THE CHAIRMAN: I cannot remember!

24 MR LASK: There was a suggestion in the cross-examination
25 that he had been inconsistent, which we have dealt with

1 in our closing submission --

2 THE CHAIRMAN: Okay.

3 MR LASK: -- so I am not going to take up time trying to
4 find it, but we have addressed that.

5 Could I ask you just briefly, please, to turn to
6 DAF's closing at paragraph 373? Actually, if we could
7 go to 366 first? This is volume 2 so I think this is
8 {S/11}. It is 93 internal, {S/11/95}. If we just
9 scroll up a little to 366, {S/11/93}. Yes, I think
10 I only need the first sentence. So DAF says:

11 "... Mr Pritchard's view is that the statutory rate
12 does not reflect [Royal Mail's] actual cash tax position
13 during the Third Period."

14 As I have submitted, the benefit of the statutory
15 rate is that it is objective and readily ascertainable.
16 Of course Mr Singer's own effective tax rate that I have
17 just described does take into account this issue because
18 these are matters that are reflected in the accounts
19 that it is based on. The similarity between his
20 effective tax rate and the statutory rate, in my
21 submission, demonstrates that the statutory rate is
22 appropriate.

23 THE CHAIRMAN: I think that was the inconsistency I was
24 thinking of in paragraph 369 referred to.

25 MR LASK: Yes. Well, I think we have dealt with that, sir,

1 but I will try to find the reference after the hearing,
2 if I may.

3 Yes, and then paragraph 373 of DAF's submissions,
4 {S/11/95}, it is said here:

5 "In circumstances where Mr Singer's ETR Calculation
6 suggests an effective tax rate over the period from
7 [2013 to 2021] of 22.56% which is greater than
8 [Royal Mail's] average statutory rate over the period of
9 20.0% at a time that the marginal cash tax rate paid by
10 Royal Mail was either 0% or 50% of statutory rate, it is
11 self-evident that Mr Singer's approach is substantially
12 flawed and Mr Pritchard's method should be preferred [as
13 read]."

14 Now, we do not think that point was ever put to
15 Mr Singer. Presumably that is why the submission is
16 that it is self-evident. But because it was never put
17 to him, he never had an opportunity to address whether
18 it undermines the position or not. So in those
19 circumstances I submit that that submission has to be
20 disregarded and, if it is not, then we ought to have an
21 opportunity to ask Mr Singer what he makes of it. We
22 would be very happy to do that and to write in
23 accordingly. But, certainly, assuming I am right -- and
24 we have looked -- if I am right that it was not put to
25 him, it should not be relied on.

1 Then, finally, BT's tax calculations, these are all
2 but agreed. The only wrinkle is what rate should be
3 used to gross up the damages award. So that is step 2
4 of the tax analysis and the parties agree that that rate
5 depends on timing and BT's position. It may be that DAF
6 do not disagree with this, but BT's position is that the
7 damages should be grossed up at the prevailing rate of
8 corporation tax at the time the judgment is handed down.
9 The reason it is relevant is because the corporation tax
10 rate is anticipated to change shortly.

11 Unless I can help further, those are my submissions.

12 THE CHAIRMAN: Okay. Thank you very much, Mr Lask. So that
13 is the end of your closing submissions and we start with
14 Mr Beard tomorrow.

15 MR BEARD: That is right, yes.

16 THE CHAIRMAN: You have two and a half days.

17 MR BEARD: I have.

18 THE CHAIRMAN: All right. Thank you very much. 10.30.

19 (4.35 pm)

20 (The hearing adjourned until
21 Tuesday, 28 June 2022 at 10.30 am)

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25

INDEX

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

Closing submissions by MR WARD1

(continued)

Closing submissions by MR LASK98

1

2