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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

Thursday 30 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 Clíodhna Kelleher (On behalf of RM/BT)
Daniel Beard QC, Daisy Mackersie and James Bourke (On behalf of DAF)

Thursday, 30 June 2022

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(10.15 am)

THE CHAIRMAN: Good morning.

MR BEARD: Good morning.

THE CHAIRMAN: We have got there! One way or another.

MR BEARD: Finally.

Closing submissions by MR BEARD (continued)

MR BEARD: I am going to turn to causation and quantum next, but before I do, I am going to pick up some of the homework points from yesterday. In very broad terms, where I said I would double-check things, we have double-checked and the answers I gave remarkably appear to be correct, so I am not going to go back through those.

Just a couple of references. There was a reference to publicity in relation to a 7% price increase and I had the wrong reference in my notes. That was in connection with Mr Ashworth and an SMMT meeting in 2009. That is {I2/125.1}.

In relation to all the timelines material, just for your notes, all of the materials referred to I think come from -- are referred to in annex 2 to our skeleton, which is at {S/5}.

Then there was a question raised about selectivity in relation to -- or potential bias in relation to the

1 Oxera report. There are two places where this has
2 specifically been picked up. One is actually the
3 Commission's own practical guide at paragraph 141, and
4 just for your notes that is {I5/150/44}. Broadly what
5 it is saying is cartels that do have an effect on the
6 market receive much more attention in empirical studies
7 than those that do not, which is perhaps not surprising
8 but it gives rise to that overall concern.

9 But it is also something that was picked up in the
10 consideration by the court in Oviedo. I referred to
11 that judgment in a different context, but the
12 consideration there is at paragraph 179 of the judgment,
13 which is authorities {AU/12.5.3/79}. Since I am just
14 touching on that judgment, I also referred to it
15 yesterday in the context of the why question and the
16 consideration given there. That is actually at
17 paragraph 85 of the judgment, so that is {AU/12.5.3/81}.

18 THE CHAIRMAN: I did try to have a look at that judgment.

19 It is not the easiest thing to read.

20 MR BEARD: Well, no, it is not, but --

21 THE CHAIRMAN: In the English.

22 MR BEARD: Well, some of it is not.

23 THE CHAIRMAN: Yes, that was a claim just by one -- in
24 relation to one customer.

25 MR BEARD: Well, it was a similar sort of claim. It was the

1 same sort of claim, but different procedure. There was
2 not the sort of econometric interrogation in the same
3 way, but what the judge did there was -- it is a matter
4 of the Spanish process. They do not have the same sort
5 of cross-examination process we do. But what you see in
6 that judgment is a very extensive consideration of
7 a much wider range of economic literature than has been
8 considered even in this case.

9 THE CHAIRMAN: It was quite a small claim, was it not?

10 MR BEARD: Yes, yes.

11 THE CHAIRMAN: A very small claim.

12 MR BEARD: No, no, I think it may have been -- I am not sure
13 how many have actually been heard in Spain, what the
14 enthusiasms of the judges were and so on, whether this
15 was seen as a salient instructive case for further
16 benchmarks in Spain, but anyway, as I say, there is just
17 an awful lot of consideration of an awful lot of
18 economic literature in there. I will leave it there
19 because, obviously, I do not want to start opening up
20 some of the discussions in that case which have not been
21 traversed here about signalling and reference pricing
22 and theories of that sort, those sorts of behavioural
23 economics. We have been spared that.

24 Right. Causation and quantum, if I may. I am going
25 to need to speed along obviously today.

1 I dealt with in opening to a great extent the legal
2 issues in relation to causation and quantum, but if we
3 could, I think, when we are thinking about the causation
4 test, it is worth just turning back to the pleadings
5 that we looked at yesterday, {B/1/43}. I am not going
6 to go through them because I read them yesterday, but it
7 is 26 and 26(a) of the re-re-re-amended particulars of
8 claim. So that is under the "Causation and loss" head
9 and that is actually very general. The only causation
10 story that is really set out is 26(a) that I took you to
11 yesterday.

12 Now, we say it is plain and obvious that what is
13 pleaded here is a monetary loss claim due to higher
14 prices. Now, one of Mr Ward's heads of causation is,
15 "Well, we meet causation on the balance of probabilities
16 in relation to monetary loss". Now, we accept that is
17 the relevant legal test. We just do not accept he has
18 met it and I will come back to that. But, as he said in
19 both opening and again in closing, I am assuming, due to
20 the concerns he has about that causation and monetary
21 loss story, he now seeks to back a different causation
22 horse in addition from the one that is set out here.
23 They rely on *BritNed* and say they do not need to prove
24 monetary loss on the balance of probabilities, only some
25 broader notion of consumer detriment. Mr Ward's case is

1 that, by carrying out the tender processes against the
2 backdrop of the infringement, they have suffered an
3 obvious consumer detriment.

4 Now, that is not what is pleaded here at all. This
5 is obviously pleaded as a monetary loss claim. The
6 second point is that the concept of consumer benefit
7 that was identified in *BritNed* was rather specific to
8 the facts of that case or, rather, the consideration of
9 the need to consider consumer benefit separately from
10 monetary loss was rather specific to the facts of that
11 case. So if we could just call up *BritNed*, {AU/7.1}.

12 I am not going to go through all the detail here,
13 obviously, but the position is that this was
14 a market-sharing cartel. Members would allocate
15 projects between themselves and not tender for certain
16 projects, thereby allowing the co-cartelists to win the
17 project, so you just would not bid in to a tender. The
18 claim actually concerned a single particular project,
19 which is why they ended up doing that sort of bottom-up
20 analysis of the negotiation which we are not concerned
21 with here. It was in the context of that pleading that
22 the judge referred to the notion of the "gist of
23 damage".

24 Now, the "gist of damage" is a concept that was
25 actually developed by Professor Jane Stapleton in

1 various -- in a couple of seminal articles she wrote
2 about the nature of tort damages, particularly concerned
3 with asbestosis claims, where you could not identify
4 which particular defendant over the lifetime of an
5 employee's work in asbestos-laden environments was the
6 cause of the damage. That was the central issue that
7 was being discussed in a lot of that. But she talked
8 about the gist of the damage being needed in order to
9 complete the breach of statutory duty tort. It is right
10 that it depends on the nature of the case and what is
11 pleaded. So if we could just look at paragraph 17(1) in
12 *BritNed*, {AU/7.1/16}. I took you to various paragraphs
13 in *BritNed* to begin with:

14 "Paragraph 5D of the Particulars of Claim pleads
15 some of the characteristics of the Cartel, including the
16 fact that the *BritNed* project was allocated to ABB [who
17 was the defendant] by the other cartelists, and that the
18 other cartelists would either refrain from bidding or
19 else submit uncompetitive bids."

20 So that was the essential nature of the claim there.
21 Then, obviously, they contended that that meant that
22 they paid a higher price for the contracted cabling.
23 This had been what had been found by the Commission
24 a core part of the infringement.

25 The contrast with this case is obvious. You have

1 not got a market allocation infringement and you have
2 got no finding that other manufacturers would submit
3 uncompetitive bids to any customer; certainly no
4 specific findings in relation to Royal Mail and BT.
5 Here we are sort of drifting back into Mr Ward's rigged
6 market story, but a rigged market in relation to the
7 transaction prices. As I pointed out yesterday, that is
8 not what is pleaded and it is also effectively
9 a bootstrap story because it is assuming that all of the
10 other participants in a tender have raised their prices,
11 which is precisely the issue that we are testing here.

12 So the situation we have is that this approach was
13 not pleaded and, furthermore, it is based on -- trying
14 to draw the analogy is based on a very different
15 circumstance. If we go on to paragraph 422 in *BritNed*,
16 which is at {AU/7.1/144}, Mr Ward went to various bits
17 of this, but the key point is to pick it up at 427,
18 {AU/7.1/145}, and the articulation of the actionable
19 harm and the consideration of the gist or actual damage.

20 What the judge is there saying is you do not --
21 because you are dealing with a cartel and you are making
22 a claim in relation to money, that does not mean that
23 the gist is always going to be met by showing monetary
24 harm. What you have got to show is the gist of damage,
25 and it is that, {AU/7.1/146}, "the unlawful conduct of

1 the defendant has, on the balance of probabilities, in
2 some way restricted or reduced the level of the
3 claimant's consumer benefit".

4 But here the only consumer benefit that is being
5 been identified is an elevated price and this story of
6 rigged tenders forms no part of the pleaded case. So
7 you have a marked contrast from the situation in
8 *BritNed*, and you see that over the page:

9 "Such a restriction or reduction of consumer benefit
10 might take the form of an increased price payable [yes,
11 that is exactly what we are dealing with here], but
12 equally it might take the form of a reduction in the
13 reduction of a number of suppliers properly
14 participating in a tender process."

15 Well, this is Mr Ward's rigged market story that
16 does not form part of his pleaded case. So we say that
17 is not the right way to analyse causation. You need to
18 focus on the monetary loss causation story.

19 MR RIDYARD: When you talk about rigged markets, are you
20 talking about agreeing not to participate in a -- is
21 that what a rigged market --

22 MR WARD: Well, what Mr Ward seems to be saying is that --
23 I mean, there is a degree of ambiguity about the term
24 because of course it is not pleaded, but what he seemed
25 to be saying is, yes, there is obviously the collusion

1 at the level identified in relation to -- in the
2 decision, but what he seemed to be saying in relation to
3 the rigged market is that the other manufacturers were
4 not properly participating in any tender; in other
5 words, they were offering higher prices than they would
6 otherwise have done.

7 MR RIDYARD: Yes.

8 MR BEARD: That was his approach. But the problem, as
9 I identified yesterday, is that if that is the story,
10 you are basing that on a presumption as to whether or
11 not those other manufacturers had in fact imposed higher
12 prices in any tender exercise in circumstances where,
13 when we are participating in a tender exercise, the
14 precise question we are asking ourselves and the precise
15 question we spent the last eight weeks scrutinising is
16 whether or not we were actually imposing higher prices,
17 and you cannot therefore assume a rigged market at that
18 level, as Mr Ward does, and therefore assume you have
19 met some other consumer benefit threshold. That is what
20 we are saying.

21 THE CHAIRMAN: There is no suggestion that the other
22 manufacturers were just sort of clearing the way for DAF
23 in the UK.

24 MR BEARD: No, there is no market allocation story. So that
25 is why it is completely different from *BritNed*.

1 THE CHAIRMAN: What do you say, if they wanted to run this
2 argument, they ought to have pleaded?

3 MR BEARD: Well, they would certainly have had to have
4 pleaded that the pricing operated by the other
5 manufacturers was elevated as well because that would be
6 important -- that would have been important not only for
7 what evidence you would have had here, but also
8 potentially for the case management of this case
9 because, of course, if you make an allegation that all
10 the other manufacturers were raising their prices, then
11 in those circumstances the other manufacturers might
12 well say, "Well, hang on a minute. This idea that DAF
13 on its own is going to be heard is just the wrong way of
14 approaching it".

15 THE CHAIRMAN: But are you saying that they would have had
16 to have pleaded that, in relation to these contracts
17 with these claimants, the other manufacturers were
18 bidding much higher than they otherwise would have done,
19 that there was some sort of collusion in relation to
20 these specific contracts?

21 MR BEARD: I am not saying they would have to separately
22 identify specific collusion, but they would have -- so
23 you would not have to turn this into a bid-rigging
24 allegation, but they would have to allege that the other
25 manufacturers had elevated their prices and that that

1 had affected the prices in relation to these contracts.
2 So, yes, to that extent they would have had to have done
3 so and that is just not what we see here at all in the
4 pleading.

5 THE CHAIRMAN: I am not really sure that is what they are
6 actually saying.

7 MR BEARD: I am sorry?

8 THE CHAIRMAN: I am not really sure that that is actually
9 what they are saying and what they are relying upon for
10 the purposes of establishing their gist of damage point.

11 MR BEARD: No, no, I am sure they are trying not to do that
12 because that is not how they pleaded it.

13 THE CHAIRMAN: Right.

14 MR BEARD: The point I am making is the pleading is DAF
15 raised its prices in relation to these contracts and
16 then we have annexes that refer to the contracts and say
17 that DAF had moved these prices upwards. What they do
18 not say is that the other manufacturers who were
19 competing had moved their prices upwards. That is no
20 part of the pleaded allegation.

21 Now, they are able to say, "Our claim is DAF moved
22 its prices up". We say, "Fine, you have then got to
23 prove on the balance of probabilities that is what
24 happened". That is fine. That is the legal test. They
25 come back and say, "Ah, yes, but there is a different

1 story on gist of damage which is not just about the
2 monetary loss that we suffer by reason of you moving
3 your prices up. We also say that the market is rigged
4 effectively", and that is saying the other manufacturers
5 had raised their prices as well and then had moved DAF's
6 prices up.

7 MR RIDYARD: That is a necessary condition of any
8 coordinated effects theory?

9 MR BEARD: Yes, I can see that it may be a necessary
10 condition of a coordinated effects theory, but then we
11 get back into the debate about what the theory of harm
12 is here. So I am not sure that that solves the problem
13 for them. The point I am making is that, if you had
14 pleaded a story that says, "All of the manufacturers
15 raised their prices and because we bought from DAF, it
16 had the effect in these contracts that we have listed
17 out in the annex of them being higher", then the
18 position would have been different.

19 So the point I am making here is Mr Ward, rather
20 than just going with what we had understood to be the
21 orthodox approach to the gist of damage, which is
22 monetary loss in relation to these DAF contracts, he is
23 now telling a broader story about consumer detriment.
24 As soon as he starts telling that story, he is talking
25 about the position of other OEMs implicitly. He does

1 not want to. He wants to say, "No, no, no, I do not
2 need to do that", but implicitly that is exactly what he
3 is doing. He tries to draw support for that from
4 *BritNed*, but of course what *BritNed* is talking about is
5 precisely an allegation that was pleaded that the
6 different OEMs were sharing out the contracts between
7 themselves. So that is why we say you need to focus on
8 the causation story in relation to the monetary loss
9 allegation that is pleaded in paragraphs 26 and 26(a).

10 So I was just going to move on to deal with the
11 ingredients for that because Mr Ward obviously says,
12 "Well, if I do not have this sort of broader consumer
13 detriment story, I do still have a monetary loss story
14 and in relation to the monetary loss story [he says],
15 I make out causation". We say, "On what basis do you do
16 that?", and he says, "Well, there are four points
17 essentially. I rely on the decision; okay? I rely on
18 a presumption that information shared, as identified in
19 the decision, was taken into account -- okay? -- and
20 I try and draw on some other adverse inferences. Then
21 I rely on Mr Harvey's potential, possible, plausible
22 theories of harm and then I rely on the econometric
23 analysis". This is all set out, just for your notes, in
24 paragraph 28 of the claimants' closing submissions,
25 {S/9/10}. Those are the four elements they rely on to

1 say that, well, on the balance of probabilities there
2 was monetary loss.

3 Now, I can deal with the last two, given the
4 submissions I have been making over the last couple of
5 days, briefly. We say the econometric analysis is just
6 not anywhere close to showing this monetary loss because
7 of the significant fundamental flaws in the way it has
8 been carried out. So we say that is not showing, on the
9 balance of probabilities, monetary loss.

10 Then we go to the theories of harm and I am not
11 going to rehearse the criticisms we made of those, but
12 we take it in two stages. First of all, at its highest,
13 Mr Harvey's theory of harm is, "Well, it is possible
14 that these things happened", and that is in part why
15 that cross-examination was gone through as to what
16 actually Mr Harvey was saying in relation to theories of
17 harm. He confirmed he was only talking about it being
18 possible. So we say, on those two key elements, they do
19 not get anywhere close to crossing a story of on the
20 balance of probabilities and, as I say, we criticise
21 both for the reasons we have given over the last couple
22 of days.

23 Just for your note, we set out in our closings,
24 {S/9/98} [sic], some observations from Professor Neven
25 about what you can actually draw from economic

1 regression at the best of times, a matter that was
2 considered in *BritNed*. What Professor Neven emphasises
3 is that, even to inform causality from an econometric
4 model, so draw inferences about causation from the
5 correlation that you might identify in the regression
6 model, you need to be confident about the identification
7 strategy and have any theory of harm validated by the
8 data. We say Mr Harvey has a fundamental problem with
9 his identification of the infringement here and he
10 really has not validated his approach by reference to
11 the data.

12 So that then takes us back to the other two
13 elements. I will go back to the decision first. Now,
14 obviously, we are not taking issue with anything in the
15 decision, but the decision does not show that the
16 claimants suffered any loss, whether on the balance of
17 probabilities or otherwise. That is because, as we
18 explored previously, the decision is not concerned with
19 making a finding about effects. I am just going to go
20 back to one of the cases I referred to in opening. I am
21 not going to repeat the submissions I made in opening
22 about the difference between object and effect. But if
23 I can just go back to Advocate General Kokott in the
24 *T-Mobile* case. This is authorities 2.16, picking it up
25 at page 6, {AU/2.16/6}. This is a case -- it is an

1 object case, it is not an effects case, and the standard
2 approach to considering object is set out at
3 paragraph 42; object and effect are not cumulative.

4 In opening, sir, I think you asked about whether or
5 not it should be "and/or". It is not "and/or", it is
6 "or". The regulator picks one or the other. They can
7 pick both, it is possible to pick both, they do in some
8 decisions, but they are not in this case that we are
9 looking at and they are not in the case that we are
10 dealing with in relation to settlement.

11 Then there is a reference at paragraph 43 why it is
12 you have this object category, and it is a sort of
13 per se prohibition because of the concerns that we have
14 about the harmful consequences for society of these
15 types of practices and it creates legal certainty.

16 If we just go on to 46, just further down the page,
17 you see there she says:

18 "... it goes too far to make the finding of an
19 anti-competitive object dependent on an actual
20 determination of the presence or absence of an
21 anti-competitive impact in an individual case,
22 irrespective of whether that impact relates to
23 competitors, consumers or the general public. Instead,
24 for the prohibition of ... 81(1) [which is now 101(1)]
25 ... to be triggered it is sufficient that a concerted

1 practice has the potential -- on the basis of existing
2 experience -- to produce a negative impact on
3 competition. In other words, the concerted practice
4 must simply be capable in an individual case, that is,
5 having regard to the specific legal and economic
6 context, of resulting in the prevention, restriction or
7 distortion of competition within the common market.
8 Whether and to what extent, in fact, such
9 anti-competitive effects result can at most be of
10 relevance for determining the amount of any fine and in
11 relation to claims for damages."

12 That is exactly what we are dealing with here.

13 Then she goes on at 47, {AU/2.16/7} -- and I took
14 this to you in opening:

15 "Ultimately, therefore, the prohibition on
16 'infringements of competition by object' resulting from
17 Article 81(1) ... is comparable to the risk offences
18 (Gefährungsdelikte) known in criminal law: in most ...
19 systems, a person who drives a vehicle when
20 significantly under the influence of alcohol or drugs is
21 liable to a criminal or administrative penalty, wholly
22 irrespective of whether, in fact, he endangered another
23 road user or was even responsible for an accident. In
24 the same vein, undertakings infringe European
25 competition law and may be subject to a fine if they

1 engage in concerted practices with an anti-competitive
2 object; whether in an individual case, in fact,
3 particular market participants or the general public
4 suffer harm is irrelevant."

5 So I am not trying to question the fact that object
6 cases are identifying types of conduct that are
7 generally assumed to have adverse effect. That is
8 absolutely clear. But you cannot derive from that
9 general proposition and the categorisation any
10 presumption that there was an actual effect because that
11 is precisely what you do not do here. That is the
12 reason why we have this trial. You have an object case,
13 it does not identify effects, you then have to consider
14 those issues. So that is dealing with the matter at
15 a level of generality.

16 Then, of course, we can look at the Commission's
17 findings themselves in the decision. Do those mean that
18 you must conclude that infringement caused monetary loss
19 to these claimants? Again, because it is an object
20 case, because of it being structured as it has been, we
21 say clearly not and certainly nothing of course in
22 relation to these claimants, as you would expect.

23 Just so that we have tidied these issues up, it is
24 perhaps just worth going back to the tribunal's judgment
25 on the preliminary issue. That is in {AU/8.3/58}, if we

1 go to page 58, because this is the conclusion of the
2 court and this sets out the binding findings. I know
3 there are issues about the rest of the decision, you
4 cannot criticise it, you cannot go against it because of
5 abuse of process, but it is just instructive what, after
6 an awful lot of argument and an awful lot of analysis,
7 the court found was the essence of the infringement,
8 distilling it out. I just ask you to read that.

9 (Pause)

10 If we can just scroll down to 148, please. (Pause)

11 Then just for completeness, we should go down to (b)
12 and (c) and so on. (Pause).

13 Then if we could just go down again. (Pause).

14 So those are the core findings. But the point
15 I want to make is a very simple one. As you can see
16 from the distilled text that the court had pulled
17 together in relation to that paragraph, the infringement
18 at its core is identifying an infringement primarily
19 concerning list prices and what the judge is very
20 cautious to do is not make any suggestion that the
21 decision tells us whether or not that infringement had
22 effects on transaction prices. Indeed, you have the
23 point at (a), sub (b), that there is a reference there
24 by the court to a discussion of net prices occasionally
25 for some countries, and that is the limits of what has

1 been identified, summarised in these circumstances.

2 So although Mr Ward refers to various recitals,
3 including Recital 27 and 47, that have all been, you
4 know, digested, particularly Recital 47 here --

5 THE CHAIRMAN: I think we have pretty much traversed all of
6 this, have we not, quite thoroughly?

7 MR BEARD: Yes, the point is you have not got anything that
8 is getting you into this position of saying that on the
9 balance of probabilities there are effects from the
10 decision.

11 So that then takes me to the fourth limb of
12 Mr Ward's approach, which is presumptions and
13 inferences. The key presumption he relies on is what is
14 known as the "*Anic* presumption", and that is from the
15 *Anic* case, which says that, for the purposes of finding
16 an infringement, the Commission -- and this would apply
17 also to court -- are entitled to presume that the
18 information exchange was taken into account, unless the
19 participants prove otherwise.

20 Now, Mr Ward said, "Oh, this was a huge concession
21 that we accepted this". It has been the binding law
22 that applies for decades in relation to competition law.
23 We have never suggested anything to the contrary. We
24 accept that the information exchange was taken into
25 account. The question is what effect taking into

1 account those materials had in relation to it.

2 Indeed, this was a matter I think that was touched
3 on in a case which Mr Ridyard will be familiar with,
4 authorities bundle {AU/11.8}. It is the *Lexon* case.
5 I will just pick it up at page 62, {AU/11.8/62},
6 a summary of principles from authorities.

7 If we could just move down to paragraph (5),
8 {AU/11.8/63}, (5) is a discussion about object and
9 effect. Then if we go to (6), you will see there, just
10 over the page, page 64, {AU/11.8/64}:

11 "Subject to proof to the contrary, which the
12 economic operators concerned must adduce, it must be
13 presumed that the undertakings taking part in the
14 concerted action and remaining active on the market take
15 account of the information exchanged with their
16 competitors in determining their conduct on that market.
17 Such a concerted practice is caught by ... 101 ...
18 without the need to establish the existence of
19 anti-competitive effects on the market ..."

20 So what is being captured there in that summary of
21 the jurisprudence is the simple point that, yes, you
22 take it into account, but the fact that you take the
23 material into account is not telling you whether it has
24 an adverse effect. You have still got to go through
25 that process.

1 So the point I am making here is that was the key
2 presumption he relied on. It is his fourth limb to
3 support the causation story; so econometric regression,
4 theory of harm, decision and this presumption. We say
5 actually this presumption is not telling you anything
6 about effects and it is the monetary effect that you
7 have got to show on the balance of probabilities.

8 Then there was another presumption that was referred
9 to which was the *Prest v Petrodel* presumption or
10 inference -- adverse inference in relation to what
11 witnesses are being called. In relation to that,
12 I think the accusation is, "Well, you did not call
13 witnesses that were going into the details of what was
14 going on in relation to the cartel". We do not
15 understand how that possibly helps him with this
16 causation point, but could we just go back to the
17 statement made by Mr Justice Roth that we have quoted in
18 our closings, {S/10/5}, paragraph 17. I actually showed
19 you this yesterday briefly. This was about, "Look, we
20 are going to use econometric evidence".

21 "That is not to say evidence of witnesses of fact
22 would be irrelevant but we anticipate it will be of
23 a more general nature, for example explaining how the
24 OEMs priced their trucks and the nature of the
25 relationship between gross and net prices, the

1 significance of configurators, and so forth."

2 The witnesses that have been put forward by DAF
3 precisely fulfil those criteria. They are the people,
4 at the UK, at the Dutch level, who have been involved
5 and could explain how DAF priced their trucks and the
6 nature of the relationship between gross and net prices.
7 That is precisely the evidence that has been put
8 forward.

9 So the first point we make is the evidence that we
10 have proffered is precisely in line with what was being
11 anticipated as would be appropriate for testing these
12 issues at a trial of this sort. So the criticism is
13 misplaced to begin with. The second point I make is
14 that, going to *Prest* itself, we are just not in adverse
15 inferences territory at all.

16 If we could just go to the *Prest* case, {AU/3.5/24}.
17 So that is paragraph 44, and you have the *BRB v*
18 *Herrington* case from Lord Diplock. Then you see the bit
19 at the bottom under that quote. This is Lord Sumption
20 saying they have recoiled from "some of the fiercer
21 parts". Then we have Lord Lowry being quoted with
22 approval by Lord Sumption. If we just go on down
23 through that, it says at the bottom, {AU/3.5/25}:

24 "Thus, depending on the circumstances, a prima facie
25 case may become a strong or even an overwhelming case.

1 But, if the silent party's failure to give evidence (or
2 to give the necessary evidence) can be credibly
3 explained, even if not entirely justified, the effect of
4 his silence in favour of the other party may be either
5 reduced or nullified."

6 Now, we say that this was not in any way necessary
7 evidence. There has not been a failure to give evidence
8 here. But in any event we have explained the position
9 in relation to the marketing and sales individuals that
10 Mr Ward says are so critical here. People who could
11 speak to these issues, he says, they have long left, and
12 given the penalty that has been paid, as I have said
13 previously, mutual warmth is not going to be expected
14 between DAF and them.

15 Then there is a third point here. I do not want to
16 lose the context of this. This is all in the context of
17 him saying, "Well, look, you should afford us the
18 benefit of the doubt in relation to causation". There
19 has to be a proper consideration of the extent to any
20 gap in this evidence because that informs the extent of
21 this notional adverse inference and of course Mr Ward
22 hugely over-reaches on this. He says, "Well, the
23 infringement continued for 14 years and you can
24 presume -- you can infer that it enabled DAF to sustain
25 higher prices in the individual instances, higher than

1 they would have been because of this issue". We say you
2 cannot do that. You cannot possibly do that.

3 We say, that, look, the effects on transaction
4 prices is obviously not a matter on which DAF has failed
5 to adduce evidence. Far from it. There is
6 a significant amount of evidence and there is no basis
7 for the breadth of inference that he is seeking to draw
8 in circumstances where he is seeking to draw that to
9 fill gaps in the basis for his causation story and then
10 try to suggest that somehow dispassionate econometrics,
11 which assesses these matters, and the contemporaneous
12 material I have gone to should somehow be coloured by
13 this, and we say that is all wrong.

14 So we say the causation threshold is not met. But
15 if it is, for the reasons we have canvassed in relation
16 to all of the evidence in relation to overcharge, any
17 quantum must be very low. Now, there has been talk of
18 wielding broad axes. We accept the case law that refers
19 to the possibility of wielding a broad axe, but it is
20 important to bear in mind two things. First of all, the
21 broad axe is to be wielded where the claimants lack
22 evidence to prove their quantum case. I am not going to
23 go back through all of the comments I made about
24 disclosure, the extent of data that has been provided
25 and indeed the evidential base that is available, the

1 tens of thousands of documents here. One needs to be
2 extraordinarily careful about Mr Ward standing up and
3 saying, "Well, we could not really prove our case so
4 just wield a broad axe". You have detail here,
5 particularly in relation to the detailed data that has
6 been the subject of econometric analysis.

7 The second point to bear in mind when broad axes are
8 being discussed is the concern that you must avoid
9 over-compensation. Now, it is not a bias one way or
10 another, under-compensation, over-compensation, but
11 there is no bias in favour of a presumption of greater
12 compensation where there is doubt here. That is not the
13 position in relation to the assessment of quantum.

14 THE CHAIRMAN: You similarly try to avoid
15 under-compensation.

16 MR BEARD: Yes, I said it is symmetrical. Absolutely. I am
17 not suggesting otherwise. That is not the point I am
18 making. But what you cannot do is swing the broad axe
19 and say, "Well, I like these claimants, we will swing it
20 firmly in their favour".

21 So just so recap a couple of points then on main
22 overcharge issues and to sum up a little bit, I am just
23 going to go through some of the numbers to get back to
24 some context here. On the issues that I worked through
25 in relation to the econometrics, just to refresh the

1 tribunal -- I think I went through all of these as
2 I made my submissions -- when we are thinking about
3 these issues in relation to quantum, the exchange rate
4 and currency issue, as I outlined at the time, in
5 relation to Mr Harvey's before/during model, if we are
6 right in relation to that exchange rate issue, which we
7 say we plainly are, then in relation to that
8 before/during model there is no overcharge.

9 Now, I will also pick up the fourth point I made in
10 relation to these matters at the time, which is we say
11 the before/during model in any event, standing alone, is
12 just not fit for purpose. Actually, if you use the
13 before/during/after model, which is a significant
14 improvement on the before/during model when looking at
15 these matters, the results are effectively an overcharge
16 of zero during that period.

17 Now, going back to the exchange rates in relation to
18 the during/after model, even using Mr Harvey's own
19 approach, when you do the exchange rate and currency
20 issue correctly in Mr Harvey's approach, his own
21 overcharge drops from 6.7% to 4.2%, but I should stress
22 that when Professor Neven runs the model but still
23 including Mr Harvey's financial market dummies and so
24 on, but using pounds, he actually gets a lower figure of
25 2.8% for the during/after model. So that is keeping the

1 global financial crisis dummies in but correcting for
2 the exchange rate issue in his model. That, just for
3 your notes, is Professor Neven's second report, table 5,
4 which is {E/35/34}.

5 Now, I should say that as soon as you add [sic] the
6 global financial crisis dummies alongside the exchange
7 rate issue, then in relation to the during/after
8 analysis you get no overcharge identified.

9 THE CHAIRMAN: As soon as you take them out?

10 MR BEARD: I am sorry. As soon as you remove the dummies.

11 Ms Mackersie has corrected me in the same way that, sir,
12 I think your quizzical look was implying that I had
13 misspoken. I had misspoken.

14 THE CHAIRMAN: Can I just ask, in relation to exchange rate,
15 let us say we were with Professor Neven on turning into
16 pounds but against him on budget rate, do you know how
17 that affects the figures?

18 MR BEARD: Well, I am not sure I can give you a precise
19 figure, but when we go back to those sensitivities, if
20 what you mean is including the actual exchange rate as
21 an additional control variable alongside the budget
22 rate, of course that was column (c) in his sensitivities
23 analysis so we would be able to estimate that. If you
24 were to replace budget rate completely with the exchange
25 rate, that was column (d). So I will be able to do that

1 by reference to that, but I will have to come back to
2 you. But the answer is yes.

3 Sorry, Ms Mackersie and Mr Bourke are well ahead.
4 The answer would be for (c), which is using the budget
5 rate, which is the internal rate for transferring costs,
6 but including the exchange rate as a control variable,
7 you get a range between minus 0.3% and 0.07%, depending
8 on those three demand variables you could use. So order
9 board is 0.7%, average delivery lag as the demand
10 variable is 0.1% and tonne per kilometre gets you
11 minus 0.3%. If you are using the market rate
12 throughout, you get slightly negative numbers for all of
13 the coefficients. So the answer would be approximately
14 zero and zero, sir.

15 THE CHAIRMAN: Yes, okay.

16 MR BEARD: So let me go to the second fundamental error,
17 which was the financial crisis. Even if we were to
18 leave the regression of Mr Harvey in pounds -- euros,
19 sorry. I am being completely back to front -- if we
20 leave Mr Harvey's regression in euros but then remove
21 the GFC dummies that he imposes, we know from
22 Mr Harvey's own exposition that when he first did it, it
23 was a 1% to 2% overcharge that we were talking about.
24 Professor Neven actually has tested that in somewhat
25 more detail and that is -- in his second report,

1 table 3, {E/35/26}, he gets 1.3% running that,
2 Mr Harvey's regression, but removing the GFC dummies.

3 So those are two fundamental issues.

4 Then we have the emission standards fixed effects,
5 obviously only for the during/after period. For Euro 4,
6 Mr Harvey's calculation of the emission standards fixed
7 effects premium for that model, as above Euro 3, is
8 2.2%. But, obviously, he is there attributing all of
9 that premium to the infringement and we say that is
10 obviously not justifiable.

11 For Euro 5 it is 1.1% and for EEV he ends up with
12 a remarkable 8%. I mean, leaving aside the EEV, which
13 is a number that actually illustrates that something is
14 going wrong with his approach -- leave that to one side,
15 what you are dealing with there are comparatively
16 smaller numbers in relation to the particular models,
17 and we have explained why Mr Harvey does not have the
18 basis for moving all of that percentage to the
19 infringement variable.

20 But just running the hypothesis and saying, "Well,
21 you know, some of it -- let us treat some of it as part
22 of an infringement impact", and even if you were to be
23 so generous as to go to 50/50, what you would be doing
24 is looking at around 1% in relation to Euro 4 and 0.5%
25 in relation to Euro 5. Now, I should stress that

1 Mr Harvey adds those numbers on to his overall
2 overcharge percentage, so in the during/after period
3 that is 6.7% and then he adds these numbers. But we
4 say, for the reasons we have given, that is obviously
5 wrong, that 6.7%.

6 But I think the point to make here is, even looking
7 at those sorts of numbers, 0.5% or 1% in relation to
8 those trucks, you are still looking at very large
9 numbers overall. Even if you use simple interest you
10 end up with millions of pounds in relation to this
11 claim. Of course, whilst in this case we recognise that
12 it is only the Royal Mail and BT trucks that are at
13 issue, of course in the UK there are 50,000 trucks sold
14 by DAF that are -- in the relevant period, 300,000 new
15 and used trucks across all the OEMs and that have been
16 identified in other matters, and of course we have got
17 a much larger population across the EU.

18 So, as soon as we start looking at those sorts of
19 numbers, you are looking at substantial sums overall.
20 I know those matters are not before the court today, but
21 I just want to give you some sort of context in relation
22 to it. Of course, all of this is before we reach the
23 point of considering whether or not there is a different
24 level for these claimants, and I have been through the
25 material yesterday showing how, in relation to these

1 claimants, focusing on those gross list prices and
2 information exchanges relating to them, which are so
3 heavily emphasised in the binding findings judgment,
4 actually the prices did not shift for these large
5 entities. Of course there are obvious reasons for that,
6 including those given by Professor Neven, that of course
7 the greatest incentive to compete and win business will
8 be in relation to the largest contracts, which of course
9 is what these entities are.

10 So just to briefly sum up on overcharge, we are in
11 a situation where, of course, DAF has admitted that it
12 should not have exchanged the information and it has
13 paid a substantial fine. But the question we have to
14 grapple with is: did Royal Mail and BT actually suffer
15 in the form of higher prices? They have to show that
16 and then what the level would be, even if a broad axe is
17 to be wielded.

18 I suspect that all of us at first instance probably
19 think, well, look, there must be some sort of harm to
20 customers. Professor Neven explained how he was highly
21 sceptical when first confronted with these matters and
22 the fact that it is an object infringement obviously is
23 identifying behaviour that is of significant concern
24 within the pantheon of European and domestic competition
25 law. Now, the tribunal has been very clear that it

1 comes at it, by its questions, from that perspective.
2 But even when we all come at it from that perspective,
3 we cannot simply work with the assumptions in relation
4 to damages claims or ignore the clear evidence. There
5 is far too much at stake in relation to this and we are
6 in the fortunate position to have an awful lot of data
7 as well as the other material.

8 Now, we can do things like assessing whether or not
9 monitoring was possible. We can see that that is not
10 the case. We are in the position to run very robust and
11 thorough during and after analyses in particular and in
12 doing that robust analysis we just do not find an
13 overcharge.

14 Now, even if we think it is counter-intuitive, that
15 is just not contradicted by any theory of harm and
16 therefore it means that, even if you start working from
17 those assumptions, the assumptions are not made out,
18 particularly in relation to these large and powerful
19 customers. I recently saw that a book had been
20 published entitled "Don't Trust Your Gut", which is
21 a catchy title, but in fact the theory it came forward
22 with was much more nuanced than that. We all have
23 instincts and intuitions, we make assumptions, we need
24 to, but we can test those intuitions and assumptions
25 using evidence, particularly in circumstances where

1 there is rich data to do so. The data may well tell us
2 that our initial instinct was wrong and we need to
3 listen to that data, and that is what the data is
4 telling us here.

5 So that is the position in relation to overcharge.
6 I am going to move on to volume 2, but I do need to pick
7 up, before I do, the allegations of breaches of the
8 rules on expert evidence pertaining to Professor Neven,
9 if I may, because Mr Ward has made allegations that
10 there has been non-compliance with the rules on expert
11 evidence by Professor Neven and indeed those instructing
12 him.

13 Now, we can understand, obviously, as we have said,
14 why he has done this because the economic criticisms of
15 Mr Harvey's approach are so fundamental and they are,
16 frankly, clearly right. Mr Harvey's analysis is plainly
17 flawed and, insofar as it is necessary to make choices,
18 Professor Neven's approaches are clearly to be
19 preferred. But we do take it in those stages. We look
20 at the problems with Mr Harvey's approaches and we say
21 that they are fundamental. Then we also look at the way
22 in which Professor Neven has done these things. But
23 when we look at that analysis, it has been repeatedly
24 stated, the econometric analysis has been undertaken by
25 Professor Neven applying well-accepted economic

1 principles and applying the scientific method, trying to
2 falsify theories. It is no criticism of him that he
3 tries to falsify theories. That is what he is charged
4 with doing as an independent economist.

5 Indeed it is Mr Harvey in fact who does the strange
6 things, the radical and unjustified things, imposing the
7 rigidities on that left-hand side of the equation,
8 switching off years of data in relation to the global
9 financial crisis, just assuming that all emissions
10 premia are caused by the infringement. Those are not
11 assumptions based on economics, they are not findings
12 based properly in economics and nor, as I have
13 explained, are they justified by the evidence.

14 Now, when we move on to the theory of harm analysis,
15 as I think we have made clear in relation to the
16 coordination matters and the theory of harm in relation
17 to unilateral issues, what Professor Neven is using is
18 actually -- are actually tediously orthodox economic
19 principles in testing the theories. It is Mr Harvey who
20 in fact is grabbing at rather more novel accounts, like
21 Professor Harrington's, and then actually trying to
22 expand them beyond their real scope. So we say all of
23 that material the tribunal can and should assess on the
24 substance. There is no scope for any jaundiced
25 prejudice or changing weight on the basis of the

1 ad hominem attacks that Mr Ward has brought in relation
2 to Professor Neven.

3 Indeed it is notable, to be fair to Mr Ward, that
4 amongst all of these extensive attacks, there is nothing
5 suggesting that actually Professor Neven was using the
6 wrong econometric or economic principles. He disagrees
7 with the substance of them, but actually that is not, as
8 I understand it, the submission. To adopt a phrase from
9 Professor Neven himself, the proof of the pudding really
10 is in the eating of these somewhat large meals in
11 relation to econometrics that we have to digest.

12 So let me just deal with Mr Ward's two allegations.
13 First of all, he suggests that Professor Neven's work
14 for DAF gave rise to a potential conflict of interest
15 which he said ought to have been disclosed because
16 Professor Neven was so enmeshed with DAF. The summary
17 answer to that is Professor Neven is not enmeshed with
18 DAF any more than Mr Harvey is enmeshed with Royal Mail.
19 Mr Harvey has been working for Royal Mail for a long
20 time. Professor Neven has been working on various cases
21 for DAF for a long time. But Professor Neven clearly
22 understood his duties and in fact Royal Mail was well
23 aware that the Compass Lexecon team was working on cases
24 in a multiple range of jurisdictions from some time ago.

25 THE CHAIRMAN: Why did he not mention in his report that he

1 had been working for them since 2013?

2 MR BEARD: The footnote is in his plausibility report, sir.

3 It does refer to him working on these matters, so I am
4 not sure -- but more than that, the position is, as I am
5 going to come to -- I am going to come to some of the
6 history.

7 THE CHAIRMAN: You would expect it not to be something just
8 tucked away in a footnote. It would be in your CV or
9 whatever.

10 MR BEARD: Well, look, I am going to just show a little bit
11 more of the background in relation to some of the CMC
12 process because I think it is important to see the
13 context here, that actually what was going on was it was
14 clear that Compass Lexecon were engaged throughout the
15 process that we are talking about, Compass Lexecon
16 were -- the claimants were well aware of the involvement
17 of the Compass Lexecon team and actually it was only
18 later that it was decided that Professor Neven was going
19 to be the person that would specifically be the
20 testifying witness.

21 THE CHAIRMAN: He was involved before he was at
22 Compass Lexecon, as I understand it, in 2013.

23 MR BEARD: He was. He was involved at CRA, which was back
24 in 2013. We accept that.

25 THE CHAIRMAN: Yes.

1 MR BEARD: So let me just deal with the two stages, the
2 enmeshment and the other point that is being made, that
3 he had information from DAF that ought to have been
4 disclosed. That is really to do with this -- when he
5 answered Mr Ward's questions and was told he had been
6 given sort of ex post rationalisations for the cartel,
7 and I will come back to that in a moment.

8 There is also an allegation that he did not have
9 access to all relevant information from DAF, that he had
10 not asked enough questions, but I think that goes
11 nowhere. He clearly carefully and critically considered
12 what he thought was relevant and then looked at the
13 empirical data, so I do not think that assists in
14 relation to this.

15 There are some other criticisms that are levelled.
16 I think it is worth noting, Mr Chairman, you observed
17 last Thursday that both Professor Neven and Mr Harvey
18 had come out with results that support their clients'
19 case, and on key issues that is obviously right, looking
20 at it overall, but it is not right to say that
21 Professor Neven has shown no willingness to amend his
22 conclusions or consider these matters in the course of
23 the expert process. That is actually perhaps evidenced
24 most clearly in relation to complements, where he
25 actually reviewed Mr Harvey's response and changed the

1 methodology that he applied in relation to complements,
2 as he made clear in the evidence.

3 The other point that was raised as a criticism last
4 week -- this was from Mr Ward in closing. Just for your
5 notes {Day21/108:3} -- was that his approach to many of
6 Mr Harvey's points has been to run more and more
7 analysis and we heard on two occasions during the trial
8 that he had done some additional sensitivities that were
9 not even included in his reports.

10 Well, it is a funny criticism of an economist that
11 they would listen to things and test things further.
12 The fact that in the course of preparing for the
13 concurrent evidence and so on he thought further about
14 these matters is hardly a criticism of Professor Neven.
15 It is not that those additional sensitivities are then
16 being relied upon. He is just explaining what was being
17 done and his thinking in relation to these matters. It
18 just reflects the rigour with which he dealt with
19 matters.

20 So let us just pick up on the conflict of interest
21 point. Now, Mr Ward in closing, in his written closing,
22 has cited an awful lot of cases about conflict of
23 interest issues, although he did not actually refer to
24 them in his oral closings. Actually, when you go
25 through them -- and I am not going to in these oral

1 closings -- when you actually look at them, what you see
2 very obviously from them is just how far away on the
3 facts they are from the particular position that we are
4 dealing with here. All of them are very, very distant
5 in the sense that the involvements were obvious
6 conflicts of duties, personal connections, financial
7 benefits from the outcome of cases and so on that are
8 just worlds away.

9 The one point that I think is worth picking up is
10 just there is a reference in one of the cases actually
11 to a useful sort of rubric of the consideration of
12 conflicts of interest, and it is at paragraph 30 of the
13 *Bux* case. I do not need to go to it but I will give you
14 the reference. It is authorities bundle {AU/11.8.1}.
15 At paragraph 30 there is actually a reference to the
16 *Rowley v Dunlop* case. In *Rowley v Dunlop*, three broad
17 categories, three broad heads -- I am not saying these
18 are exhaustive as to the basis for conflict of interest
19 findings, but they are useful. The three were an expert
20 with a financial interest in the outcome of the
21 litigation, an expert with a conflicting duty or an
22 expert who has a personal or other connection with the
23 party which might influence his evidence.

24 Now, if we could just call up the claimants' closing
25 submissions, {S/9/81}, we see there at 211.1 and 211.2

1 the key allegations that are being made.

2 "[He] has been working for DAF since 2013 and began
3 his work on a consultancy basis in respect of the
4 Commission investigation ...

5 "[He] has worked ... on an extraordinary number of
6 cases and has the prospect of many more years of work to
7 come ..."

8 Those are the essential points that are being held
9 against Professor Neven in relation to these matters.

10 Now, I will come on and deal with them in a moment
11 but, quite rightly, they are not suggesting there is any
12 sort of personal connection. They are not suggesting
13 that there is any sort of conflicting duty to another
14 organisation. They are really focused in the *Rowley v*
15 *Dunlop* terms on the financial interest point here. With
16 respect, that is obviously a bad point because there is
17 no -- he does not have an interest, he is not on
18 a conditional fee basis, he does the work and carries
19 on.

20 THE CHAIRMAN: The same applies to Mr Harvey so, I mean, it
21 is not --

22 MR BEARD: Yes, we are not taking these --

23 THE CHAIRMAN: So it is a flaw in the system perhaps.

24 MR BEARD: Well, I am not sure that is fair. I am not sure
25 that pro bono economic litigation consultancy is

1 necessarily going to be a growth industry, sir. I am not
2 sure. Perhaps a discussion with Mr Ridyard later might
3 be instructive on these matters.

4 The allegation, then, is that he is working on
5 a large number of cases for DAF. As we have set out and
6 as he explained in evidence, at a high level, yes, and
7 completely understandably because DAF is facing multiple
8 claims of a similar type, so high-level input from
9 someone of Professor Neven's standing obviously makes
10 sense and I think, as you observed, sir, at one point,
11 not very surprising about a client wanting that sort of
12 input in those circumstances. It just does not give
13 rise to any sort of conflict.

14 Actually, we do know from the witness evidence, the
15 cross-examination that Mr Ward engaged in of
16 Professor Neven, that although he has been involved in
17 various cases at a high level, he has actually been
18 involved in the production of a relatively limited
19 number of reports and at the moment, as he testified, he
20 is a testifying witness here and apparently in a case in
21 Norway.

22 Now, Mr Ward did actually ask Professor Neven about
23 the amount of time he spends working for DAF. Just for
24 your notes -- we do not need to go to it -- it is
25 {Day10/106:18-20}. Mr Ward asked:

1 "Are you working more or less full-time for DAF at
2 the moment?"

3 "Answer: No, not at all."

4 Now, that question and answer did not quite make it
5 into the 600 pages of Mr Ward's closing submissions but
6 if we could go to paragraph 217 of his closing
7 submissions, so this is {S/9/83}, one might be forgiven
8 for misreading the final sentence:

9 "Professor Neven himself described this work as
10 being 'of a constant nature' since 2016."

11 Suggesting that somehow, actually, he is working
12 continuously and more or less full-time for DAF. I am
13 sure that is not what was intended because, in relation
14 to that, what the full quote says is -- and this was in
15 response to questions from Mr Ward -- the full quote
16 was, {Day10/89:17}:

17 "... in terms of substance, the work that I have
18 done since 2016 has been of a constant nature."

19 That is {Day10/89:14}. In other words,
20 Professor Neven has, in all of his work for DAF, been
21 providing independent objective opinions in relation to
22 assessment of overcharge and possible theories of harm.
23 That is what he is talking about.

24 I am sure the tribunal will have realised from the
25 CV that he appended to his report -- if we could just

1 pick that up, {E/11/124}. If we just go down the page,
2 if we could, you will see there that Professor Neven is
3 actually the Professor of Economics and head of
4 department at the Graduate Institute of International
5 and Development Studies at the University of Geneva. In
6 relation to that, it is obvious that he is not working
7 full-time for DAF.

8 Now, Compass Lexecon, which is a large consultancy,
9 has a team of around 20 to 25 people working on
10 DAF Trucks litigation across Europe, but Compass Lexecon
11 is a very big organisation. He certainly does not do
12 all of the work himself and indeed he explained how he
13 had teams assisting him and indeed different teams
14 assisting with different parts of his work. So this
15 idea that somehow he is subject to some sort of
16 financial distortion or is dependent on DAF for his work
17 and therefore that skews the way in which he approaches
18 these matters is just not fair.

19 So there is also the issue of Professor Neven's
20 understanding of his duties to the court and the work he
21 did prior to the decision. Professor Neven, as, sir,
22 you said, has made clear that, back in 2013, he had
23 provided economic input in relation to the matters that
24 were being raised by the Commission investigation.
25 Professor Neven said that he recalled one meeting with

1 DAF in April 2013. If we could just actually go to the
2 transcript here, {Day10/79:14}, picking it up at
3 line 14:

4 "Question: So ... Just a single meeting?

5 "Answer: There was a meeting in April 2013, yes.

6 "Question: Is that the only meeting you had at that
7 stage?

8 "Answer: Yes.

9 "Question: So you received no instructions at all
10 at that stage?

11 "Answer: I had a meeting and then they asked me to
12 consider the type of conduct that -- or the type of
13 evidence that the Commission was likely to have
14 uncovered and to consider indeed potential theories of
15 harm and potential empirical evidence."

16 Now, Mr Ward sought to make something out of this,
17 saying "Well, this is him advising on how to defend",
18 but that description is just not correct. He is being
19 asked for his objective view on these matters and the
20 sorts of empirical evidence that will be relevant to
21 address them. That is what he is referring to there.
22 It is not a fair reading of that transcript or indeed
23 the Travers Smith letter that later came along after it
24 that I will be coming back to.

25 THE CHAIRMAN: How does he consider potential theories of

1 harm without knowing what DAF says happened or how the
2 cartel operated? I mean, he must have had some insight
3 into that at that stage in order to come up with
4 potential theories of harm.

5 MR BEARD: Well, there must have been a discussion at that
6 meeting. I am not disputing that.

7 THE CHAIRMAN: Yes, but are you saying that -- because he
8 gave evidence that there was only one meeting in 2013,
9 that that was the only interaction that he had prior to
10 the decision?

11 MR BEARD: No, because I am just going to come on to, he
12 also had an interaction at the time of the statement of
13 objections.

14 THE CHAIRMAN: Right.

15 MR BEARD: We know that because he has given evidence in
16 relation to it. I will perhaps come to that because
17 I think that is also -- it is right to go to that.

18 THE CHAIRMAN: I hesitate to interrupt you, Mr Beard, and
19 we have tried not to ask too many questions, because we
20 have spent 90% of your time now on overcharge and this
21 issue, and I am just very concerned that there are some
22 other big issues.

23 MR BEARD: Yes, I am conscious of that. I am just trying to
24 skate through this and deal with these. But I think it
25 is important, given that there are these concerns for

1 him --

2 THE CHAIRMAN: No, I know there is an attack on his
3 independence so you have to deal with it but --

4 MR BEARD: -- and therefore it matters.

5 So, as I say, after April 2013, he assisted; after
6 the publication of the SO in 2014, he said that. What
7 he did was he said that he was asked by DAF to consider
8 theories of harm and what evidence might validate or
9 invalidate them. Mr Ward cross-examined. He actually
10 asked the question, {Day10/84:23}:

11 "Sorry, you said 'think about evidence that might
12 invalidate' --"

13 Professor Neven was very clear that he was saying
14 that actually it was "validate or invalidate". Sorry,
15 just for your notes, that is Day 10, page 84, lines 12
16 onwards, through to page 85, line 4.

17 So he explained the situation in relation to 2004
18 [sic] and then he explained there was complete silence
19 from DAF until they contacted him after the decision in
20 2016, and that is where we get the instruction letters
21 where there was cross-examination.

22 If we could just go to that letter, {J4/354/5}, you
23 will see there -- this was the letter you will recall
24 Mr Ward cross-examining on:

25 "Damien Neven and Enrique Andreu [who were both at

1 Compass Lexecon] will lead this engagement and provide
2 expert consulting services to Client at Client's
3 request."

4 We have seen that the claimants seem to make
5 something of this consultancy services language.

6 "The services to be rendered on this engagement may
7 include providing expert testimony."

8 He did not actually put this next sentence to
9 Professor Neven:

10 "Expert understands that Client is interested in
11 obtaining Expert's objective and independent analysis in
12 connection with this matter. Experts will report to
13 Client verbally from time to time, and at Client's
14 direction ..."

15 If we could go down to page 7, {J4/354/7}, you just
16 see at 2 -- this is the terms and conditions of
17 business:

18 "Compass Lexicon [because this is engagement of the
19 firm] will act with independence and objectivity in
20 conducting the Engagement and, in the event of
21 a conflict between its duties to the Client and its
22 duties to the Court, will hold its duties to the Court
23 paramount."

24 So from the time of engagement, even for the firm as
25 a whole, there was emphasis in relation to these

1 matters.

2 Then of course the next stage we need to look at is
3 an addendum letter to this effectively, {J4/453/4}. If
4 we could just go to the second page {J4/453/2}.

5 THE CHAIRMAN: These were general letters not specifically
6 related to these proceedings, were they? Is that right?

7 MR BEARD: Sorry, let me be clear. The first letter was
8 a general engagement letter in relation to
9 Compass Lexecon.

10 THE CHAIRMAN: Yes.

11 MR BEARD: If we could go to page 4 in this document,
12 {J4/453/4}:

13 "We refer to Compass Lexecon's appointment as an
14 expert adviser ... to assist in its representation of
15 PACCAR ... [and] DAF ... in relation to certain matters
16 arising out of the European~Commission's Decision ...
17 This letter constitutes an addendum to the Engagement
18 Letter."

19 Then if we scroll down:

20 "Dear Professor Neven and ... Andreu ...

21 "As you are aware, legal proceedings [this is second
22 paragraph] have now been issued against DAF in the
23 English High Court by certain claimants, and further
24 claims are expected to be issued in due course ... At
25 this stage in the English proceedings, pursuant to the

1 Engagement Letter, the role of Compass Lexecon is that
2 of an expert adviser to De Brauw, namely to provide
3 De Brauw and its legal advisers with such advice as they
4 may require for ... any of the proceedings.

5 "As yet, the English court has not made any order
6 for ... expert evidence ... However, such order(s) may
7 be made in due course and [Professor] Neven and/or
8 Enrique Andreu may be asked at some point after such an
9 order has been made to act as an expert witness ... If
10 in due course De Brauw wishes to engage Professor Neven
11 and/or Mr Andreu as an expert witness ... [there will
12 be] a separate letter of instruction ... at that stage."

13 If we go over the page, {J4/453/5}:

14 "In the meantime, we draw your attention to the fact
15 that, as you may already be aware, there are specific
16 rules ..."

17 So, yes, the first letter that Mr Ward
18 cross-examined on, yes, that was the general engagement
19 letter, but there was actually an addendum to it that
20 dealt with these specific situations.

21 MR WARD: Which you produced afterwards.

22 MR BEARD: I am not disputing that, but it was in reaction
23 to the attack that was brought that this is being put
24 forward.

25 Now, the question is, once it became clear that

1 claims had been issued here and that, in those
2 circumstances, you were going to need a testifying
3 expert and they would be subject to English rules, an
4 additional specific letter was then sent. So
5 Professor Neven has throughout, as he emphasised, been
6 acting objectively and independently as reflected in the
7 initial engagement letter, but once these other claims
8 had been issued, he was specifically put on notice
9 through this that English rules would specifically apply
10 in relation to these matters, so he is well aware of his
11 duties.

12 THE CHAIRMAN: Did that change anything in terms of his --

13 MR BEARD: No, no, it did not.

14 THE CHAIRMAN: It did not change anything in terms of his
15 relationship with DAF?

16 MR BEARD: No, because he has had an independent
17 relationship with DAF throughout. But the point that is
18 being made here is he has had this independent
19 relationship, he is not dependent on DAF for his seat on
20 the table and, in those circumstances, an entirely
21 proper process has been followed that, once these claims
22 have been issued in the UK, a specific letter is sent
23 indicating English rules will apply in relation to
24 testifying experts.

25 Mr Andreu gave some witness evidence in 2017 and at

1 a CMC in 2018 -- and this was whilst the -- this was
2 only Royal Mail actually at that stage, when the claim
3 was still in the High Court -- counsel for DAF explained
4 that Professor Neven was the proposed expert, but, in
5 doing so, he referred to the situation in relation to
6 the Compass Lexecon team being involved in multiple
7 claims across multiple jurisdictions.

8 So if we could just go to {G/29/13}, starting with
9 line 25:

10 "... happy to reveal ...".

11 Then we just have to scroll down:

12 "... proposed expert is [Professor] Neven."

13 Then if we go to line 6 on page 51, which is the
14 next page down here, {G/29/14}:

15 "There are a number of complicating features with
16 this litigation, including the fact that, for example,
17 our clients are being sued in a number of jurisdictions.
18 They are instructing Compass Lexecon [so the firm of
19 Professor Neven who has just been referred to] in
20 relation to all of those jurisdictions, and merely by
21 way of example, it wouldn't be appropriate for data
22 which is not ultimately relied upon by them in these
23 proceedings, because it relates, for example, to
24 proceedings in other jurisdictions, to be provided to
25 the defendants ..."

1 So there was a discussion about the material going
2 across. But at the hearing where it was said that
3 Professor Neven is going to be the testifying expert, it
4 was also made abundantly clear that the firm he was
5 working in and is part of was advising across all these
6 jurisdictions in relation to these matters.

7 So this is the point where we say, "Look, hang on,
8 the history of the involvement in this has been clear in
9 relation to this, the CMC -- the role of
10 Compass Lexecon". Once the matters are on foot in
11 English proceedings, then these matters have been
12 explained and, yes, it is right that there was a period
13 before Professor Neven was confirmed as being the
14 testifying expert here, but there is no suggestion that
15 anything he did in 2013, 2014 or subsequently is
16 anything other than independent in these circumstances.

17 So we say, in these circumstances, there is just
18 nothing to see here. I mean, Mr Harvey's first
19 statement in these proceedings says, "I am acting as an
20 economic adviser to Royal Mail". He did not spell out
21 all the other cases he was involved in. He did not talk
22 about the fact that his firm was advising others at that
23 time or that they had provided advice to Royal Mail in
24 the past, which they obviously had done, because they
25 have a long relationship with Royal Mail. Now, I am not

1 criticising Mr Harvey for that, but, actually, there is
2 a remarkable similarity in relation to those positions.

3 So in those circumstances we say there is nothing in
4 the conflict of interest issues. In relation to the
5 other information not disclosed, if we can just pick it
6 up in the claimants' closing at paragraph 229, which is
7 {S/9/86}, the first sentence of 229 is just wrong:

8 "Professor Neven also initially denied that he had
9 been given access to any Commission file documents or
10 factual instructions from his clients."

11 That is not correct. What was actually said by
12 Professor Neven was that he had not had the Commission
13 file at the time that he was responding to their queries
14 at the time of the SO. But that is not the same thing.
15 He did not initially deny he had had it. He said he had
16 not had it initially. That is a different proposition.

17 He got the file materials later. We quite
18 understand that. Then we see in 230 through to 233 the
19 points about the fact that, when asked by Mr Ward,
20 Mr Ward said he had got answers he would never forget.
21 Well, the answer that was given, as I think was
22 articulated rather neatly in a question from Mr Ridyard,
23 was that someone came along and said, "Well, there might
24 be a rationalisation for the way in which this cartel
25 operated which could be positive for competition". Now,

1 Mr Ward said he would never forget it, but, I mean, I do
2 not know whether he should get out more or stay in more
3 because, obviously, in relation to information
4 exchanges, we know from all sorts of material, the
5 Commission's horizontal cooperation guidance or indeed
6 Professor Harrington's articles, that there are all
7 sorts of considerations about circumstances where
8 information exchanges can have positive effects.

9 But the critical thing here is that that is not the
10 way that Professor Neven dealt with anything. It did
11 not affect anything to do with the econometric analysis,
12 nor did it affect anything to do with his theory of harm
13 analysis because, of course, we know from all of that
14 that at no point was he saying, "Oh, no, this actually
15 had positive effects on competition". He constantly
16 said, "I am taking the decision at face value". Indeed,
17 when it came to the theory of harm matters, he was
18 specifically saying, "Well, actually, I will treat the
19 decision as actually suggesting that there could be
20 coordination at a transaction level which is taking the
21 matter further".

22 So the fact that someone at DAF was speculating
23 about these matters does not suggest it was somehow
24 information that should have been disclosed. It was not
25 material that was relied upon, this certainly was not

1 instructions and, as we know, the position of
2 Professor Neven explained was that he had started with
3 scepticism about these things and then tested it. So
4 there is nothing here in relation to these matters.

5 THE CHAIRMAN: It is just always better to be as open as
6 possible, particularly if you are trying to demonstrate
7 your independence and --

8 MR BEARD: I completely understand that.

9 THE CHAIRMAN: -- if he has been instructed in 2013 about
10 certain things, it just would have been better if he had
11 put in a paragraph in his report to say that.

12 MR BEARD: With the benefit of hindsight, I am not going to
13 in any way disagree. Does it make any difference? No.

14 There are all sorts of criticisms that are levelled
15 in closings at 237, talking about the fact that he
16 discussed data issues with DAF. Well, you know, if
17 economists do not discuss data issues with their
18 clients, it is all going to be totally hopeless. They
19 then talk about him raising issues about understanding
20 of law, asking about complements effects. The last
21 point they raise actually appears from Professor Neven's
22 testimony to be concerned with information that he
23 actually took from the decision itself.

24 Now, none of this was actually relied on, none of
25 this changed the way in which Professor Neven approached

1 are fundamental flaws in it, but of course our position
2 on overcharge is such that it would have a significant
3 effect on any of the -- almost all of the issues in
4 relation to what we have in volume 2 as well because, of
5 course, with no overcharge or in fact with a minimal
6 overcharge, in fact, one ends up not needing in practice
7 to deal with many of these issues.

8 But let me deal with them swiftly. Value of
9 commerce first. There are two points that the claimants
10 have put up about value of commerce which you recall is
11 only in relation to Royal Mail, and they say bodies
12 should be included in the value of commerce and they say
13 you should interpret the decision as meaning that trucks
14 included trucks and bodies -- not trailers but trucks
15 and bodies -- so far as rigid trucks are concerned and
16 second is that bodies sold to Royal Mail were tainted by
17 infringement because they were sold as part of a bundle.

18 I will deal with the second of those matters first.
19 It is just not right on the facts. The suggestion came
20 from Mr Harvey, who accepted he had not looked at the
21 documents. He says, "Well, I relied on Mr Ashworth's
22 evidence", but I am just going to give you some
23 references to Mr Ashworth's statement. Paragraph 51 --
24 just for your notes that is {D/22/51} -- when DAF was
25 actually providing a body rather than the customer

1 providing it themselves, DAF engaged the third party
2 bodybuilder and that cost was included in the invoice;
3 in other words, DAF gathered together the third party
4 cost. The fact that it was on a single invoice in those
5 circumstances does not mean that somehow they should be
6 treated as affected by any putative infringement when
7 they are being provided by third parties.

8 Paragraphs 72 and 73 of Mr Ashworth's evidence
9 explained how DAF, when it was providing parties with
10 bodies, would engage in negotiations with third party
11 manufacturers who were part of a separate market. We
12 have seen and we have set out how these elements were
13 passed on at cost or with a very small margin attached
14 to them. So the picture that emerges from Mr Ashworth's
15 evidence, as we say in our closing submissions, is
16 consistent with the contemporaneous evidence that the
17 bodies were treated separately from the truck. They
18 were negotiated separately with third parties even when
19 they were being provided to Royal Mail.

20 But let us not lose sight of the fact that, for most
21 customers -- for most customers -- bodies were not being
22 provided by DAF. They are being provided by third
23 parties entirely separately. So, in those
24 circumstances, the idea that they should be treated as
25 subject to the finding of infringement does not make any

1 sense on the basis of the factual material.

2 But then we actually look at the decision itself and
3 Mr Ward tries to say, "Well, "trucks" means trucks and
4 bodies". Now, it is right that the decision covers
5 factory-fitted options, but factory-fitted options are
6 very different from bodies. Apart from the fact that we
7 are dealing with separate manufacturers engaged in
8 a separate process in relation to body production, not
9 the OEMs, we have --

10 THE CHAIRMAN: The bodies that were provided by a third
11 party, were they added to the front bit by DAF?

12 MR BEARD: In relation to some of Royal Mail's acquisitions,
13 yes, they were. That is what --

14 THE CHAIRMAN: So they provided the whole truck, the truck
15 and body?

16 MR BEARD: The answer is generally not. Royal Mail is very
17 much the exception here, so generally not. Generally,
18 we provided what has been referred to as the "naked
19 truck", which obviously has all the options, you know,
20 whether it has a sleeper cab or not on it.

21 THE CHAIRMAN: Then the body was fitted by someone else?

22 MR BEARD: Yes, by the third party body manufacturer.

23 THE CHAIRMAN: Was it? Not for Royal Mail and we are
24 concerned with Royal Mail.

25 MR BEARD: Not for Royal Mail. So Royal Mail is very much

1 the outlier here. It is the outlier in so many ways.
2 It is the outlier between Royal Mail and BT because
3 ironically, of course, BT bodies were really expensive,
4 and if this story were correct, it is bizarre that BT is
5 putting in this claim because BT bodies were actually
6 more valuable than the trucks on many occasions.

7 MR WARD: BT bodies were entirely separately sourced. They
8 were not sourced through DAF.

9 THE CHAIRMAN: They were sourced by BT.

10 MR BEARD: Yes, but that is because they are just like the
11 vast majority of bodies in the market. But that is the
12 point. Royal Mail are trying to focus on what is an
13 exceptional situation and say, "Oh, no, no, our
14 exceptional situation is what is being covered in the
15 decision and that is how the evidence works in relation
16 to it", and we say no.

17 THE CHAIRMAN: In relation to the decision -- and obviously
18 I do not want you to disclose anything that should not
19 be disclosed -- but in terms of the fine that was
20 levied, presumably that is based on some sort of
21 assessment of the value of commerce or the overall
22 revenues?

23 MR BEARD: Yes, I mean, the sales affected in the market is
24 one of the parameters that is used but I would have
25 to --

1 THE CHAIRMAN: So did that include bodies -- a value for
2 bodies provided?

3 MR BEARD: I would have to go back and look at those sorts
4 of things. The reality is, if you take the universe of
5 DAF Trucks and therefore sales affected in the market as
6 it would be put for the purposes of the assessment of
7 fine, of course Royal Mail would be a tiny, tiny, tiny
8 part of that and therefore the basic answer is
9 absolutely not.

10 THE CHAIRMAN: But if we are trying to interpret the
11 decision, then presumably there will be some consistency
12 between whether bodies were taken into account in the
13 decision and therefore the fine.

14 MR BEARD: Well, I can see that. I think one has to be
15 a little bit careful with settlement decisions,
16 particularly because it is around those sorts of numbers
17 that there can be discussions and therefore identifying
18 precisely what --

19 THE CHAIRMAN: That is why I said not to disclose anything.

20 MR BEARD: No, no, I completely see that.

21 The decision itself on the fines matters only just
22 refers to trucks, so it is not talking about this.

23 The truth is that for the other OEMs -- in fact the
24 irony is, so far as we are aware, in amongst the panoply
25 of claims that are being brought across the UK, only

1 Royal Mail is bringing a claim in relation to bodies
2 being part of value of commerce. That kind of reflects
3 that it is the outlier. I do not think Royal Mail is
4 denying that, but it just makes it all the more bizarre
5 that it then suggests, actually, this was all part of
6 the same infringing -- affected infringing value of
7 commerce.

8 We certainly say, for the purposes of interpreting
9 the decision, that is informative because the idea that
10 the Commission was considering applying the infringement
11 to bodies as well as to what are referred to as "naked
12 trucks", but with the options in them, does not make any
13 sense in that context. Mr Ward talked about, "Well, the
14 bodies are options". They are not really actually.
15 They are not actually optional because a rigid truck
16 does not have any value unless there is a body attached.
17 They are optional in the sense that you can choose
18 different bodies you can attach to them, but you
19 actually need a body in relation to it, so they are not
20 like factory-fitted options in an ordinary sense.

21 What is also bizarre about it is that there is not
22 really a principal difference between bodies and
23 trailers in this regard because both of them have strict
24 complements you need to make the trucks usable for truck
25 services.

1 THE CHAIRMAN: Are bodies on the gross price lists?

2 MR BEARD: Are bodies on the gross price lists? No. Only
3 the DAF ones that were provided -- built by DAF towards
4 the end of the period, but, no, not in relation to any
5 of the third party bodies. So then you would be looking
6 at even a subset of the bodies that are now being
7 claimed for in relation to this value of commerce.

8 Again, it just illustrates why the fact that DAF
9 exceptionally did include bodies for Royal Mail does not
10 suggest that it is part of the infringement. Mr Ward's
11 other point, which was to refer to the
12 Advocate General's opinion in the *Landkreis Northeim*
13 case actually goes against him here because what was
14 being said by the appellants in that case was -- so they
15 were people --

16 THE CHAIRMAN: Dustcarts.

17 MR BEARD: Dustcarts, exactly. But what they were coming
18 along and saying, "No, no, no, you ..." -- the
19 defendants there were saying, "No, you cannot bring
20 a claim in relation to any part of the value because
21 this is a specialist truck effectively because of the
22 specialised nature of the body" and the Advocate General
23 says, "No, no, you still can". That is what is going on
24 there.

25 What she is saying -- I think it was she. I may be

1 wrong. It was she -- is that, "Look, I am not going to
2 say that you cannot bring a claim in relation to the
3 infringement pertaining to the value of the truck just
4 because they are specialised trucks involving
5 specialised bodies", and that is not taking Mr Ward
6 anywhere frankly in relation to this.

7 Indeed, what it is illustrating is that what goes on
8 in relation to the body is immaterial here, and indeed
9 one of the points that is made at paragraph 72 of that
10 opinion is that the truck chassis were being bought from
11 the defendants and the rest were being fitted by someone
12 else, which is the normal course in relation to bodies.
13 So whether factually or in terms of the interpretation
14 of the decision, the idea that you should add bodies to
15 the value of commerce just does not make sense.

16 Let me then deal briefly with the complements issue.
17 Now, I recognise that the complements matters are
18 extremely complicated in terms of the modelling, but let
19 me just deal with it in two parts. First, the
20 criticisms about causation because Mr Ward said the
21 modelling that has been done by Professor Neven is not
22 sufficient to prove causation. But, in saying that, he
23 is ignoring the basis on which you move to operate in
24 a calibration model.

25 There are very clear economic principles about the

1 relationship between complementary products. As we have
2 set out in our submissions -- and I will give you the
3 reference. Paragraph 35, {S/11/13} -- we know that
4 there is an inverse relationship. Economic theory and
5 principle tells you that the price of a strict
6 complement will fall when the primary -- if and when the
7 primary rises. We have also got the situation where it
8 is accepted that trucks and bodies, as with trucks and
9 trailers, are strict complements. That is not
10 contentious and that is what essentially provides the
11 causal basis for the story in relation to complements,
12 because the only time when that relationship does not
13 apply, as I think Mr Harvey explained in questioning to
14 Mr Ridyard, is it does not work where the market is
15 inelastic and you have got perfect competition, and
16 no one suggests that is the case here.

17 So that economic approach does apply in the market,
18 so you do see this in relation to the strict
19 complements, and in those circumstances it is plain that
20 you do have this causal link. Now, lest it be said that
21 Mr Harvey's trends analysis in relation to margins of
22 bodybuilders undermined any of it, it did not. We say
23 that information is completely uninformative.

24 So we are then really in the territory of
25 a quantification exercise and Professor Neven completely

1 accepted there were limitations to what he could do in
2 relation to this. But the criticisms levelled at his
3 calibration exercise just are not fair because it -- one
4 of the things said is, "Well, it is all just theory and
5 it is not about reality". Well, that is not true
6 because actually his calibration model is taking into
7 account lots and lots of actual data in order to try and
8 model the complements effect.

9 It is real data about bodies and trailers, about
10 trucks and trailer volumes and annual margins from body
11 and trailer manufacturers. Now, it is not a regression
12 and we recognise that, but the fact that it is not
13 a regression is not a criticism in the sense that you do
14 not have the data to do the regression. You are doing
15 your best with the information available. One of the
16 criticisms that was made was a sort of conceptual one,
17 which is, "Well, this seems to be making predictions
18 about the past". Well, with respect to Mr Ward, that is
19 what you are doing in any counterfactual exercise in
20 fact. You are assessing predictions effectively about
21 the past. That is exactly what the calibration model is
22 seeking to do.

23 There is another misplaced criticism, which is,
24 "Well, he runs his test to calibrate on data from 2013
25 to 2015". It is not a criticism. What he was doing was

1 trying to assess the nature of the complements effect
2 outside the infringement period using the relevant data
3 and then applying that backwards into the infringement
4 period. It is the nature of the calibration exercise
5 that you are doing here.

6 One of the other criticisms is --

7 THE CHAIRMAN: You say, I suppose, the complements effect is
8 there always.

9 MR BEARD: Yes.

10 THE CHAIRMAN: It is not related to the infringement at all.

11 MR BEARD: No, it just exists. I mean, that is the causal
12 story. Then the question is to what extent -- how
13 do you best capture that in quantification terms?
14 Rather than just sort of saying, "Well, you can lick
15 your finger and stick it in the air", Professor Neven
16 has gone away, looked at the post period, done
17 a calibration exercise of what the complements effect
18 looks like in the post period by reference to actual
19 data and then said, "Well, let us take that back and
20 apply that to the period of the infringement and think
21 about, if there were an overcharge of X on trucks, what
22 does that mean in terms of changes in prices for ..." --

23 THE CHAIRMAN: You are not actually looking at the
24 counterfactual in any of this, are you?

25 MR BEARD: Well, you are not specifically, but what you are

1 testing is what would have happened if there had not
2 been the -- no, you are not testing the counterfactual
3 because you are asking what the impact was.

4 THE CHAIRMAN: Because you are assuming there was an
5 overcharge and what effect that would have had on the
6 complements.

7 MR BEARD: Exactly. Yes, you are testing that. But, as
8 I say, the only point I was making about predictions
9 about the past is that you are always doing this sort of
10 thing in relation to this sort of exercise. You are
11 just doing a different model here.

12 THE CHAIRMAN: Maybe it is the use of the word "prediction".

13 MR BEARD: Yes, I know "prediction" -- obviously the first
14 three letters do I think suggest forward. I completely
15 take that point. I like the linguistic idea but it does
16 not make any difference for this.

17 Another of the criticisms is that it is structured
18 and stylised. Professor Neven just holds his hands up
19 to that. That is what is going on there. You do make
20 particular structural changes. That is why you have the
21 segments because you have got different types of trucks
22 and it is recognised that more expensive trucks will
23 have different potential complements effects in relation
24 to the relative price of bodies and trailers.

25 He also makes other simplifying assumptions, like

1 using two symmetrical suppliers of bodies, but he
2 explained how that did not make any difference to the
3 way in which it operated. Just for your notes, that is
4 {Day19/98:6-21}.

5 Similarly, the fact that he simplified to five
6 manufacturers rather than six, of course it is
7 a simplification, but, as he said, there were data
8 limitations which made that a sensible assumption in
9 order to make the calibration model function.

10 The key thing that he kept emphasising was his
11 estimate of complements was the minimum he got out of
12 the calibration exercise. Mr Ridyard very sensibly
13 asked the question, "Well, you may have confidence in
14 the existence of the complements effect, but what about
15 the levels, your confidence in the levels?".

16 Professor Neven is saying, "Well, I am actually taking
17 the lowest level that I get predicted out of my
18 complements model", and that is what should give you
19 confidence in relation to the levels being predicted by
20 his modelling.

21 Yes, he makes assumptions in relation to the costs
22 of other manufacturers, yes, there is a battle about
23 various sensitivities which, obviously, I am not going
24 to get into here, but because you are using the most
25 conservative approach that Professor Neven can provide,

1 in those circumstances we recognise you are applying
2 a broader assessment here. But to ignore the reality of
3 the complements effect which exists and to say there is
4 nothing there would be wrong and Professor Neven has
5 endeavoured to provide the best approach available in
6 relation to it. He recognises its limitations, he sees
7 those points and that is why he has adopted such
8 a conservative approach.

9 MR RIDYARD: So you are saying economic theory is good
10 enough to say that there must be an effect and therefore
11 you are just talking about how much and Professor Neven
12 has done as good a job as he can do and as conservative
13 a job as he can do to estimate how much?

14 MR BEARD: Because here the economic theory is very clear.
15 There is no dispute about how you have that economic
16 theory driving effect. It is very different, for
17 example, from the contested issues of theory of harm
18 here. That is exactly the position.

19 So if I can move on then to used trucks. I will
20 touch briefly on the theory and then on
21 Professor Neven's empirical analysis because, of course,
22 this is another area where Mr Harvey did not do his own
23 empirical analysis. Obviously, we know there are two
24 routes to the passing on of any putative overcharge in
25 relation to used trucks. One is the immediate effect.

1 New truck prices are likely to be affected by used truck
2 prices because they are substitutes. We can see that
3 from our submissions; just for your notes, paragraph 64,
4 {S/11/21}. But again I am just working my way through
5 volume 2 at this point.

6 The fundamental intuition is, of course, that they
7 both provide transportation services and there is
8 concrete evidence that in the case of Royal Mail,
9 Royal Mail also actually chose to extend the lives of
10 trucks after the financial crisis in place of buying new
11 trucks. So in those circumstances that is further
12 evidence of the chain of substitution that applies here.

13 Now, we are not saying that a brand new truck and
14 a truck that is five to ten years old are direct
15 substitutes. This is about the chain of substitution
16 issue. Mr Ward said in his closings it would have to be
17 long and unbroken if there is going to be this sort of
18 ripple effect. But we recognise that you do have this
19 chain of substitution, but we do not -- and we recognise
20 that temporally it can get long when you are looking at
21 trucks five to ten years later, but it is hard to
22 understand why it is that it would be broken at any
23 point along that chain. We frankly do not understand
24 why that would actually -- there would actually be
25 a particular breaking point or an overall attenuation

1 that means that there is zero effect.

2 The second route is obviously the inter-temporal
3 effect. That is the idea that the putative overcharge
4 decreases the initial supply of new trucks which
5 decreases the supply of trucks in the future. Now, we
6 think this is all pretty well established by economic
7 theory and we do not think it is in dispute. Mr Ward
8 suggested this led to questions of elasticity of demand.
9 He took Mr Harvey in that direction, but that is not the
10 way that Professor Neven thought it was necessary to go.

11 That is set out in paragraph 75 of our statement.
12 Claims in relation to used trucks are frankly not
13 surprising -- it is not surprising that these things
14 might exist. Indeed it is just worth having a moment of
15 reality check, that we have just had the certification
16 of the class action in relation to a broader claim in
17 relation to trucks by the Road Haulage Association and
18 one of the issues there was that the class included both
19 new truck purchases and used truck purchases. One of
20 the arguments was, "But surely these two groups are at
21 odds with one another", and the tribunal said, "Well, we
22 can deal with that on a case management basis in due
23 course".

24 But what is important about that is the recognition
25 that, of course, there are people who are used trucks

1 buyers who are also bringing claims, and the predicate
2 of that is of course that you are having this sort of
3 pass-on effect.

4 Now, of course the tribunal at this certification
5 stage is not making an assessment as to whether or not
6 it actually exists, I recognise that, but of course it
7 is important to bear that issue in mind and I will maybe
8 come back to that in relation to the supply pass-on
9 points in a moment.

10 So we say it is clear that you have these two
11 effects and you do not have a good reason for suggesting
12 that either there is a break in the chain of
13 substitution or an immediate effect. Insofar as these
14 effects are attenuated, then of course that will be
15 a matter of the quantification of the extent of this
16 resale pass-on.

17 Here we have a situation where the regression --
18 a regression analysis has been applied by
19 Professor Neven and there are two main criticisms of it.
20 The first is that he does not have data for other
21 manufacturers or customers to enable a market-wide
22 assessment, which is correct, but then in some ways that
23 is a virtue because he is generating a local estimate
24 for Royal Mail trucks using Royal Mail data in
25 particular. The reason I say it is a virtue is it

1 actually deals with Mr Ward's criticism that
2 Professor Neven does not use data to try and calculate
3 used trucks effects between the initial new truck being
4 purchased and a used truck being sold. So he is not
5 assessing used truck values two years in or three years
6 in because that is not when Royal Mail actually sold
7 them. So the localised nature of the effect is
8 important and deals with some of the criticisms levelled
9 at Professor Neven.

10 Now, there were other points that were raised
11 against him, for instance: what was the closest
12 substitute for new DAF Trucks? Was it really to be
13 treated as used DAF Trucks? Well, obviously, a very
14 recently new DAF truck will potentially be a very close
15 substitute for a new DAF truck and then a slightly older
16 DAF truck will be a very close substitute to a nearly
17 new DAF truck and so on. So the intuition that they are
18 very close substitutes makes sense.

19 Some questions were raised about that, but, just
20 picking this up for your notes at paragraph 82 in our
21 submissions, which is {S/11/27} and {S/11/28},
22 Professor Neven actually carries out sensitivities to
23 give himself comfort that his modelling would be robust
24 to changing the closest substitute to being other
25 manufacturers' trucks rather than DAF Trucks.

1 Now, the second major criticism that is levelled at
2 Professor Neven is that there is a bias or
3 multi-collinearity problem that Mr Ward articulated in
4 his closing submissions because effectively
5 Professor Neven uses a main regression and an auxiliary
6 regression. Now, what Professor Neven does is he
7 recognises both of those concerns. He acknowledges
8 those. They are dealt with -- just for your notes, it
9 is in his first report, {E/13/25}. But it is very
10 important that, although he recognised these problems,
11 he then considered these issues and thought about how
12 they could be dealt with.

13 The extent of the potential problem -- and I think
14 this is important -- is that the premium for certain
15 characteristics, the bigger or more powerful truck, the
16 more sophisticated truck -- the real multi-collinearity
17 problem is whether the premium for being bigger or more
18 powerful is proportionately the same or different
19 between new trucks and used trucks. That is the nature
20 of it. So it is quite a limited multi-collinearity
21 problem and he has carried out sensitivities to test
22 this, and we have described that in relation to our
23 submissions at paragraph 93.

24 From a non-economist point of view, it seems rather
25 intuitively unlikely that they would be different in

1 proportion. Higher horsepower you would expect also to
2 have a higher price and one would -- there is no reason
3 to think that you would be dealing with
4 a proportionately lower price when it was used.

5 But the other important thing is that, apart from
6 carrying out the sensitivity analyses, apart from
7 looking at this trade-off between bias and collinearity,
8 what Professor Neven specifically identifies is that, if
9 and insofar as his modelling does contain a bias, it
10 contains a bias downwards. Therefore, again, he is
11 adopting a conservative approach.

12 Mr Ward sought to make play of the fact that, under
13 one of these sensitivities, the combined value of the
14 coefficients moves upwards. Professor Neven dealt with
15 those issues and he dealt with a number of the
16 sensitivities that Mr Harvey put forward. They are
17 actually addressed in our annex 4 to our pleadings and
18 I am not going to go to those now.

19 That then takes me to supply pass-on. Now,
20 obviously, supply pass-on is a huge exercise given the
21 nature of the expert reports. There is obviously
22 a great deal of detailed expert analysis. It is almost
23 sort of a trial in and of itself and it is never going
24 to be possible in these closings to deal with it. So,
25 instead, in the interests of time, I am just going to

1 make some simple points on the law and then point the
2 tribunal to some of the core points of fact that are
3 material to the consideration of the supply pass-on
4 analysis and then touch on loss of volume.

5 Now, Mr Ward has shown the tribunal the judgment of
6 the CAT in *Sainsbury's* on the law in relation to it, but
7 we say obviously it is the Supreme Court judgment that
8 is critical. He did also refer to the Supreme Court
9 judgment. Sorry, I did not want to suggest he had not.
10 Sorry, I heard muttering. I was not sure it was
11 a criticism.

12 THE CHAIRMAN: We are well aware of the Supreme Court
13 judgment by now.

14 MR BEARD: The point to highlight in relation to it is of
15 course there was emphasis on the nature of the MIF. But
16 the MIF, of course, was a cost like any other for
17 *Sainsbury's* in relation to the way that it considered
18 how it carried out its pricing. It is impossible of
19 course for someone like *Sainsbury's* to say what part of
20 a particular product would be -- or the price of
21 a particular product that it was selling was
22 attributable to the MIF or indeed the incremental
23 increase in the MIF, which is what is actually being
24 criticised in the findings that the MIF was unlawful.

25 Now, at times it sounded like, from Mr Ward, he was

1 suggesting that DAF needed to track through the precise
2 level of the overcharge, but that is precisely what is
3 not required by *Sainsbury's* in the Supreme Court. This
4 idea that you had to know what was the unlawful
5 overcharge effectively in the MIF and therefore be
6 thinking about that specifically, that is not part of
7 the Supreme Court's reasoning at all in relation to
8 these matters. Yes, there are references to the fact of
9 knowledge of the MIF itself, but of course what you are
10 talking about is not just the MIF itself. You are
11 talking about the increment on the MIF.

12 So the equivalent here is you know about truck
13 costs. The question is: do you know about this putative
14 increment on truck costs and where it is from? Where it
15 is from just does not matter for these purposes. So the
16 knowledge issue that is being raised and the idea that
17 you have to track through the increment is just not
18 something that forms part of or indeed could form part
19 of the logic of the Supreme Court's judgment in relation
20 to this sort of --

21 THE CHAIRMAN: The Supreme Court was not getting involved in
22 any sort of definition as to how the pass-on could be
23 proved or would need to be proved.

24 MR BEARD: No.

25 THE CHAIRMAN: It was merely, as I read it, opening the door

1 to that sort of argument.

2 MR BEARD: Yes.

3 THE CHAIRMAN: Its real decision was as to whether broad axe
4 applies to the pass-on. I mean, that is how the issue
5 got to the Supreme Court, was it not, because -- as to
6 whether a broad axe applies to both assessment of the
7 overcharge but also any mitigation.

8 MR BEARD: Yes, that is broadly right. There were
9 contentions about whether or not you could do these
10 sorts of things as well.

11 THE CHAIRMAN: Right.

12 MR BEARD: But, yes, broad axe is broadly right because, in
13 relation to the CAT, there had been concerns about these
14 things. I think it is really important to bear in mind
15 what is said in paragraph -- I think it is paragraph 215
16 in the Supreme Court judgment, that the legal causation
17 issue here is said to be straightforward.

18 THE CHAIRMAN: Are you taking us to that?

19 MR BEARD: I am just trying to find my reference to the
20 Supreme Court. {AU/11.3}, please. It is
21 paragraph 215 -- sorry, we are just finding the
22 reference. I do not have the page reference,
23 I apologise. Page 74, if we could, {AU/11.3/74}. If
24 you just look below the quote in relation to
25 *British Westinghouse*:

1 "Here also a question of legal or proximate
2 causation arises as the underlined words show. But the
3 question of legal causation is straightforward in the
4 context of a retail business in which the merchant seeks
5 to recover its costs in its annual or other regular
6 budgeting."

7 So, yes, it is about broad axe but I think the
8 important prior is to say, "Yes, but we accept that the
9 legal causation issue here is straightforward".

10 THE CHAIRMAN: They emphasise the words from *Westinghouse*,
11 "arising out of the transaction".

12 MR BEARD: Yes, but it is always going to be arising out of
13 the transaction because it has always got to be the
14 overcharge being generated by -- well, it is not the
15 transaction, obviously, it is the infringement here.
16 But what is being said -- if you are just comparing and
17 contrasting, what is being said here is you have got an
18 infringement between the card companies by moving this
19 MIF upwards by a degree. That is a charge that these
20 retailers have to bear. In relation to the supply
21 pass-on question, is it a proximate cause? This is
22 straightforward in relation to retailers who carry out
23 this cost recovery. That is what is being said here.

24 So you are right, sir, that the Supreme Court is not
25 going as far as spelling out all the modalities, but it

1 is giving us a very, very clear indication here as to
2 how we go about thinking about the legal causation
3 issue. Of course it is only the legal causation burden
4 that falls on us. Mr Ward quite properly put it in
5 those terms I think in his submissions. I do not think
6 it has been put higher than that. Once the legal
7 causation burden has been passed, then we are into these
8 evidential questions.

9 THE CHAIRMAN: Right.

10 MR BEARD: So there is no dispute that truck costs form part
11 of the costs that both Royal Mail and BT were seeking to
12 recover. We will come back in a moment to the route by
13 which that fed through, but we are saying the legal
14 causation issue is straightforward. The issues about
15 known costs are just not relevant here. That is
16 a distraction in relation to it all.

17 Just a couple more brief points in relation to this.
18 The smallness of an overcharge, that is not -- just as
19 the knowledge of the overcharge is not critical, the
20 smallness of the overcharge, that may be an argument
21 against factual causation but it is not an argument
22 against legal causation, and we are into a broader
23 evidential consideration at that point at the very
24 least.

25 Just two other points. Mr Ward has obviously been

1 referring to the Supreme Court. He also then refers
2 back to Mrs Justice Rose and Mr Justice Roth's comments
3 on supply pass-on. It is important to bear in mind that
4 those were made before the Supreme Court judgments and
5 therefore should not be -- undoubtedly, from those that
6 had been before Mr Justice Roth at around that time, he
7 had a degree of scepticism about how all of this should
8 be permitted, but, obviously, the Supreme Court said it
9 has to and therefore one needs to be a little cautious
10 about his observations beforehand.

11 THE CHAIRMAN: But then he dealt with it afterwards in the
12 disclosure, did he not?

13 MR BEARD: Yes, he dealt with it in the disclosure. Then we
14 also had the issue on category 3 which we have dealt
15 with.

16 THE CHAIRMAN: Yes.

17 MR BEARD: Yes, he said, "No in relation to category 3; yes
18 in principle you can proceed with category 4".

19 THE CHAIRMAN: But the Supreme Court do not seem to be
20 distinguishing really between 3 and 4 in terms of legal
21 causation, do they?

22 MR BEARD: I am not sure that they are necessarily dealing
23 with them -- if we just go down --

24 THE CHAIRMAN: They do not really distinguish between them
25 and identify --

1 MR BEARD: I think that is broadly right.

2 "If the court were to conclude on the evidence that
3 the merchant had by reducing the cost of its supplies or
4 by the pass-on of the cost to its customers (... (iii)
5 or (iv) ...) transferred all or part of its loss to
6 others, its true loss would not be the prima facie
7 measure of the overcharge ..."

8 So I cannot move away from that, but that does not
9 solve the issue here in Mr Ward's favour because we say,
10 actually, it does not matter whether you are thinking
11 about 3 or 4, here we have legal causation in relation
12 to 4 in relation to the supply pass-on.

13 THE CHAIRMAN: I seem to remember in *Stellantis*, was it,
14 that the Court of Appeal seemed to consider that
15 knowledge was --

16 MR BEARD: They mention knowledge -- they did mention
17 knowledge, but the logic of how that could possibly work
18 in relation to the consideration of these issues and
19 being material is very difficult to understand because
20 in most circumstances -- well, even going back to the
21 MIF case, you know you have got a MIF, you do not know
22 whether or not the MIF is being overcharged to you. So
23 since what you are talking about is the overcharge, not
24 the existence of a cost, it is very difficult to
25 understand what those references to knowledge are

1 actually doing there.

2 So, with respect to the Court of Appeal, it is not
3 clear how that should affect anything because you cannot
4 possibly have a situation where you say, "Well, you have
5 got to know that there was some sort of unlawful
6 increment". It equally cannot be the level of the
7 particular charge because you cannot tell from the level
8 of a particular charge whether or not it is good, bad or
9 indifferent. That just does not work.

10 THE CHAIRMAN: You say they knew their truck costs --

11 MR BEARD: Yes.

12 THE CHAIRMAN: -- and they were passing them on at whatever
13 level --

14 MR BEARD: Yes, we will come on to the factual story briefly
15 but, yes, exactly. That is right.

16 THE CHAIRMAN: I am not sure I can just ignore what the
17 Court of Appeal have said.

18 MR BEARD: No. If we go to -- I do not know if I have the
19 reference to *Stellantis* here. I will come back to it.
20 But I do not think that *Stellantis* -- what is being said
21 there is that it is not a statement that, unless you
22 know about the overcharge, you cannot apply supply
23 pass-on. It just is inconsistent with the logic of what
24 is actually being said by the Supreme Court in those
25 circumstances.

1 Let me come back to that.

2 MR RIDYARD: Are you saying you just do not agree with the
3 Court of Appeal and so we should disagree with it as
4 well?

5 MR BEARD: No, it is not that, but I will come back to --
6 I am just finding the reference to it. But I think the
7 language that is actually used by the Court of Appeal is
8 not saying you actually have to know. It is saying that
9 might be something that you would take into account in
10 relation to these matters, but it is not a predicate of
11 whether or not you can have supply pass-on.

12 The point I am making is that, actually, when you
13 think about that, it is difficult to understand what the
14 Court of Appeal is actually referring to as
15 a requirement in those circumstances because, as soon as
16 you are in the territory of any assessment of the
17 unlawful increase in charges, which is what you are
18 always doing in relation to competition law, then it is
19 very difficult to understand how it is you have to know
20 that that is problematic because it is the increment
21 that matters here, not the fact. If it is just the fact
22 of the charges, then, well, of course, in those
23 circumstances, we do know about them because you know
24 about trucks, just as you knew about the MIF.

25 So if we can go to authorities bundle, {AU/17},

1 picking it up at page 18, I think, {AU/17/18} -- if we
2 just scroll down slightly:

3 "It was a transparent, known, charge and it was
4 a recognised industry practice that acquiring banks
5 passed it on to retailers in the MSC ... All of this was
6 clearly relevant to the burden facing a defendant in
7 this sector seeking to raise a realistic case of
8 mitigation. The MIF was a systemic and troublesome cost
9 that any major retailer would, inevitably, have had to
10 confront. The facts therefore contrast with those of
11 a typical, secret, price fixing cartel."

12 But if we read the whole -- the entirety of the
13 paragraph, the fact that it is secret in a price-fixing
14 cartel, with respect, cannot turn us from a situation
15 where you can apply -- seek supply pass-on and
16 a situation where you cannot. The fact of that contrast
17 does not actually make a material difference.

18 THE CHAIRMAN: You might not like what he says, but he is
19 contrasting it with our type of cartel, is he not?

20 MR BEARD: Yes, he is. I am not demurring from the fact,
21 but it is what does that mean in terms of how you
22 actually carry out this exercise given what the
23 Supreme Court has said.

24 THE CHAIRMAN: Well, I think everyone is trying to work out
25 what the Supreme Court meant.

1 MR BEARD: Of course we are trying to work out what the
2 Supreme Court meant. I am not demurring in relation to
3 that. But the point I am making here is that, when you
4 think about the logic of what is actually going on here
5 and you are talking about the increment that is unlawful
6 in relation to MIF, the fact that the MIF is
7 a troublesome cost -- I mean, in a way one can see all
8 business costs as troublesome costs. All businesses
9 want to have fewer of them. On the other hand,
10 retailers want to have access to credit cards and debit
11 cards as means that their customers can pay. So to that
12 extent it is very difficult to understand why this
13 contrast that is drawn at the end has the putative
14 significance that Mr Ward is attaching to it.
15 Certainly, we do not understand on what basis it can be
16 said that one can ignore the question of whether or not
17 it arises from the transaction because the knowledge of
18 the person in question cannot affect the
19 *British Westinghouse* test here, which was of course what
20 the Supreme Court was debating.

21 THE CHAIRMAN: But *British Westinghouse* is obviously
22 a breach of contract case and it is about -- and the
23 person knew that there was a breach of contract and it
24 was responding to that by buying other machines or
25 whatever it was.

1 MR BEARD: Yes, exactly. They bought another turbine that
2 was more efficient and then that was seen as an offset.
3 Yes, I completely understand that. So there is
4 obviously a transition from the contract case to
5 a competition case.

6 THE CHAIRMAN: Yes, and these are all sort of overlaying
7 with policy issues, and I understand in America there is
8 no pass-on allowed as a defence.

9 MR BEARD: No, at a federal level that is right. Certain
10 states have exceptions to that, yes.

11 No, that is right. So in the US, the combination of
12 Hanover Shoe and Illinois Brick cases say, if you are
13 a direct purchaser, you can buy and you can make a claim
14 and you get the whole of the loss and there is no
15 pass-on defence. The concomitant is that no indirect
16 purchasers can claim.

17 Now, here we have come up with a completely
18 different situation, where the Supreme Court has
19 confirmed that you can run these defences and, more than
20 that, we actually have a legislative structure now with
21 these class actions that has been --

22 THE CHAIRMAN: That sort of endorses that.

23 MR BEARD: It is more than endorsing it. It is effectively
24 saying, "We recognise that when you apply what the
25 Supreme Court says is effectively a straightforward

1 legal causation test, the likelihood is you are going to
2 get these things". Now, from a policy point of view
3 that is perfectly understandable because what, from
4 a policy point of view, you are saying is, "Well, where
5 does this putative overcharge stick in the end? We do
6 not just want the people who are conduits in the middle
7 getting a windfall in relation to it". That is
8 perfectly legitimate, but that is also consistent with
9 what we are saying about how you approach the legal test
10 in relation to supply pass-on because, if you set the
11 test very high and say, "Oh, well, you have got to know
12 that the increment was actually unlawfully imposed or
13 was a separate and discrete amount of money", then you
14 are going to undermine that.

15 Now, I recognise that that is a policy argument, not
16 a legal point, but we rely on the Supreme Court in
17 relation to these matters and that is why we find the
18 observations and the weight placed on knowledge by
19 Mr Ward difficult to understand, because if knowledge
20 were right, then in relation to any competition case it
21 is actually quite hard to work out how supply pass-on
22 would work.

23 With respect to the Court of Appeal, it is actually
24 quite hard to work out how it works in relation to the
25 MIF because you can be having an argument about, "Well,

1 I would like the MIF to be X% or Y% between retailers
2 and banks", but you cannot actually tell whether or not
3 it is a good or bad thing. That is no different from
4 customers like Royal Mail coming along and saying,
5 "Well, we would like our trucks to be cheaper rather
6 than more expensive". It is the same debate. The fact
7 that Royal Mail complains that it thinks it would like
8 to get trucks cheaper does not suddenly mean that it
9 knows about this putative overcharge any more than
10 actually the retailers knew --

11 THE CHAIRMAN: But the logic of your case is that the
12 purchasers of stamps would have a claim, a potential
13 claim?

14 MR BEARD: Well, yes. I think in reality we get hung up
15 with purchases of stamps, but actually it would be much
16 more likely to be large users of Royal Mail services.
17 But in principle "yes" is the answer -- in principle,
18 yes. That is how the whole legislative structure is
19 built effectively now, to recognise this.

20 I was going to deal with some policy points.

21 I think we have probably dealt with those.

22 Now, I am going to very briefly touch on some of the
23 key points that inform Mr Bezzant's approach in relation
24 to these matters and just one or two of the key issues
25 that arise here. The first point is we focus on the

1 regulatory regimes, and the reason why we focus on the
2 regulatory regimes, so that is PC2 and PC3 particularly
3 for Royal Mail, is, given the scale of the exercise that
4 is required in relation to SPO beyond those periods and
5 given that the amount of supply pass-on is very
6 significant in those periods, we think that those are
7 the areas to focus on. More particularly, we recognise
8 that where you have got a regulatory scheme, identifying
9 the fact that costs are taken into account in the
10 regulatory scheme, a price cap is then put in place that
11 the entities price up to, makes it clearer how the costs
12 are being fed through into the claims for prices. So we
13 do unapologetically focus on the regulatory regime
14 periods.

15 What we notice in particular when we look at
16 Royal Mail but also in relation to BT, although it is
17 more complicated, is it is clear that all of the truck
18 costs, including any putative overcharge, were being
19 reflected in the relevant costing systems that these
20 entities have, very large sophisticated entities -- they
21 clearly have relevant costing systems -- and they
22 reflected the costs that those systems were generating
23 in any costs forecast they put into the regulators.
24 Mr Bezant, using his expert forensic accounting skills,
25 was looking at all of these issues and has provided the

1 evidence in relation to it.

2 The second point to recognise -- sorry, the third.
3 So regulatory, second is the costs being baked in. The
4 third point is that it is wrong to look at this by
5 asking yourself how would the regulator have responded
6 to a small change in costs ex post. That is not the
7 right way to look at this. We are not coming along to
8 them and saying, "Well, actually costs have gone up by
9 X million so can you adjust the level of the cap?".
10 That is not the right way to look at this, as Mr Bezant
11 repeatedly explained. What you need to do is look at
12 how the regulator set its modelling and its structures
13 and then ask yourself, "Once those structures are in
14 place, if you have a different input into those
15 structures, do you get a different output?". That is
16 what we are talking about.

17 That is very important and takes me to the fourth
18 point because, obviously, Mr Ward has two points. One
19 is lots of regulatory judgment and it is a small
20 percentage compared to our overall revenues, but the
21 regulatory judgment point does not assist him, as
22 Mr Bezant explained, because the regulatory judgment is
23 used to set the models, to set the structures in place.
24 Once you set those structures in place, the question is
25 not, "Will you tinker if there is a small change?"; it

1 is, "When an input that comes in that is different, will
2 you get a different output?". There is no suggestion
3 that, if there was an alteration in relation to the
4 costs modelling, that there would be some sort of just
5 tinkering around the edges using regulatory judgment.
6 That is not what is going on here, as Mr Bezant
7 articulated.

8 The truth is, then, when you are looking at this
9 smallness issue, you need to look at the granularity of
10 the modelling and the structures that were put in place
11 and how tightly were those structures being set. Just
12 to illustrate one very quickly, if we could go to
13 {I3/374/72} -- so this is the PC2 table that Mr Ward
14 referred to on a number of occasions -- what this
15 actually shows in relation to PC2 is the level of
16 granularity that the regulator is working to because
17 these are three options that it was considering.

18 But just look at the figures that it is using. It
19 is taking very detailed assessments, it is calculating
20 the cost, the revenues, cash flows and the totals over
21 the price control and the relevant headroom that exists
22 over total price control right down to the last million.
23 That is how it is carrying out its analysis. It is
24 carrying out a fine-grained analysis. Really it chose
25 option 2 where it calculated the total to be recovered

1 over -- recoverable over the price control at
2 17.008 million -- thousand million, so 17.008 billion,
3 and gave Royal Mail only 21 million potential headroom
4 in relation to that huge revenue. So it is looking at
5 these things on a very granular basis and you see
6 actually, in relation to that other headroom, that they
7 are very small numbers as well.

8 The reason is this is not just them setting some
9 arbitrary measure. They are considering these things
10 carefully. Yes, these are the products of the
11 calculations that are using the percentages that are set
12 out in the options, but they are very carefully
13 calibrating their answers by reference to the particular
14 figures which Mr Bezant in his report carefully
15 explained.

16 When we look at PC3, PC3 was actually an even more
17 detailed analysis. I am not going to go through the
18 details of it, but the position in relation to PC3 is
19 a fortiori PC2. The point that is now made by the
20 claimants is, "Oh, well, this was kind of sculpted, the
21 final outcome in relation to PC3", but the irony about
22 the submission is that the sculpting was done to move
23 the price control to a different calibration of two
24 decimal places in relation to the X factor that is used
25 in the price control.

1 Now, this argument had not reared its head before
2 written closings and it is not something that Mr Harvey
3 refers to --

4 MR WARD: It is in our skeleton actually.

5 MR BEARD: Well, Mr Harvey had not referred to it in any
6 reports, but it certainly got emphasis in the written
7 closings in a way it had not before. The point about
8 referring to two decimal places is ironically somewhat
9 illustrative of the fine-grained nature of these price
10 controls. So what is happening and what Mr Bezant says
11 is, "Look, when we analyse what was done, there was
12 a careful calibration of the outturn of these price
13 controls, yes, using regulatory judgment, but once you
14 had that in place, what you had was a situation where,
15 if you had a different input, you would have had
16 a different output in relation to both PC3 and PC2".

17 So we say that, in relation to these, both of these,
18 then in the circumstances we have very clear reasons for
19 considering that, actually, there would be supply
20 pass-on, significant supply pass-on, in relation to any
21 putative overcharge and therefore, in circumstances
22 where what we are asking ourselves is "Is there any
23 loss?", if you put in lower cost levels, you would have
24 got a lower price cap which you would have priced up to
25 and in those circumstances you would have made lower

1 profits and there is supply pass-on~--

2 THE CHAIRMAN: So it is purely mechanistic? A different
3 number goes in and a different number goes out?

4 MR BEARD: Essentially that is right. Now which number it
5 is changes and how it changes depends on PC2 and PC3.

6 THE CHAIRMAN: Yes, but you accept that there are regulatory
7 judgments that are made, even once the figures come out?

8 MR BEARD: Well, those regulatory judgments, when they come
9 out -- we do not accept that when you are considering
10 whether or not the analysis -- whether the output would
11 have been different, of course there would be a residual
12 regulatory discretion, but there is not any basis to
13 think that the regulator would have changed the
14 mechanical way in which its calculations worked.

15 THE CHAIRMAN: So it has the figures with the inputs and the
16 output and then it applies some further judgment as to
17 whether -- you know, how much efficiency they want to
18 see there and how much they want to force Royal Mail to
19 make those efficiency savings, et cetera, and that comes
20 into the calculation of the X.

21 MR BEARD: Absolutely. The point we are making is they do
22 all of that, they build the structure, saying, "Well,
23 look, this is how we are going to calculate these
24 things". If, which is what we are dealing with, there
25 were to have been a lower cost going through with the

1 output, after that regulatory judgment having been
2 exercised to build the structure, would it have been
3 different? We say, yes, that is what Mr Bezant is
4 explaining. Yes, it would, because you would have used
5 your regulatory judgment to build those structures and
6 then, when you have put lower costs through, you would
7 have got different outputs.

8 THE CHAIRMAN: You actually rely on the smallness in that
9 respect because you say that the smallness means that
10 the regulatory judgment would not be different in the
11 factual to the counterfactual.

12 MR BEARD: Yes, in broad terms that is right, yes, because
13 you have exercised it all in building the system
14 beforehand. Yes. That is right.

15 In relation to BT, the situation is complicated by
16 the fact that we are dealing with this probabilistic
17 analysis. I think there is agreement that, because of
18 the way that rounding works on these multiple glidepath
19 controls, that overall it is more likely than not that,
20 if there had been an overcharge, certainly at the level
21 that Mr Harvey posits it, that in those circumstances
22 one or more of those glidepath controls would have, as
23 it was put, flipped in such a way that, by having the
24 overcharge imposed on you, you actually benefitted
25 overall in relation to the regulatory settlement.

1 Therefore, conversely, if you had not had the overcharge
2 in the counterfactual world, you would not have got that
3 benefit. It is accepted that it is more likely than not
4 that one or more of those glidepaths would have flipped.

5 In those circumstances, we say it is obvious there
6 must be some degree of supply pass-on. We then ask
7 ourselves how one assesses that, and Mr Bezant has very
8 carefully done that and recognises that different
9 glidepaths give different levels of outcome. But when
10 you take it all in the round and given the overall
11 nature of the regulatory process and focus in relation
12 to BT, which was to match costs with revenues overall in
13 the price control, he says -- in very, very loose terms
14 I am now putting it -- "It will come out in the wash";
15 in other words you will get, over the time period,
16 a situation where you would have benefitted from the
17 overcharge changing one of these rounding numbers which
18 you effectively would lose in the counterfactual world.

19 He is saying it does not precisely matter what date
20 that occurs on because we are looking at the overall
21 impact of the infringement and it is entirely
22 reasonable, going back to the sort of "Does it arise
23 from the transaction or the infringement?" question, is
24 there effectively a benefit being obtained through the
25 overcharge? Yes. If you do not have the overcharge,

1 do you lose that benefit? Yes.

2 MR RIDYARD: You may well have explained this already and
3 I apologise if I am going back, but can you explain why
4 you have to do this probabilistic analysis with BT but
5 you do not have to do it with Royal Mail. Why does the
6 same thing not apply when you are looking at Royal Mail?

7 MR BEARD: I think -- I would have to go back precisely to
8 the distinctions that were drawn by Mr Bezant, but
9 I think the difference is that, in relation to the
10 Royal Mail price control, what they did not do was
11 operate the multiple glidepaths in relation to different
12 categories of products over time, where -- in Royal Mail
13 you had these price control periods that had, as
14 compared to BT in some ways, although they are very
15 complicated, more simplistic approaches to these things.

16 When you have got the multiple glidepath controls as
17 exist in relation to BT, you do need to think about how
18 each one changes in the circumstances. So it is the
19 multiplicity of the possible changes that become
20 significant, as I understand it from Mr Bezant's
21 approach, and that is why you look at it
22 probabilistically. If Royal Mail had had multiple
23 glidepaths for multiple baskets of products, then
24 I think you would be looking at that in relation to
25 Royal Mail, I think is the simple answer.

1 So we recognise that there are certain limitations
2 in relation to the data that you have here and we
3 recognise -- and we are entirely frank that, in relation
4 to Royal Mail, we do talk about extrapolating out from
5 PC2 and PC3, we have set that out in our submissions,
6 and in relation to BT, from Openreach outward into the
7 other entities, but I am not going to rehearse how
8 Mr Bezant dealt with those issues.

9 If I can just then move briefly to deal with loss of
10 volume. I am just going to refer to section 5 of our
11 closings in relation to the loss of volume point.
12 Essentially, the key point is, if the regulator is
13 carrying out an analysis that enables it to pick up the
14 supply pass-on issues, which we say it plainly is, it
15 will also be picking up the loss of volume issues.
16 Professor Neven explained that by reference to the
17 relevant diagram that he had used in his reports. We
18 have reproduced it at paragraph 225 in our submissions,
19 {S/11/60}, which show the interactions between prices
20 and volumes and the way in which a regulator would look
21 at both in order to identify how you calibrate prices to
22 volume effects, because there is no real dispute about
23 volume effects.

24 In terms of magnitude -- because again what is said
25 by Mr Harvey and Mr Ward is, "Oh, yes, but these are too

1 small", you have to have this in proportion. Where we
2 are thinking about a situation where the regulator has
3 made changes in relation to supply pass-on, what we are
4 asking ourselves is: are these volume issues of the same
5 sort of order of magnitude? The answer is absolutely
6 yes. Just for your notes, you can see that in the loss
7 of volume table at {E/1/185}.

8 So I am going to now move to finance losses and
9 interest very briefly in relation to the WACC because
10 I think the points can be dealt with quickly and are
11 tolerably clear, but there is one matter that I just do
12 need to pick up before I do that.

13 If we just look at footnote 478 in the claimants'
14 submissions, which is {S/9/133}, although I am not going
15 to criticise Mr Ward for not going to this in oral
16 submissions, there is actually a very small claim
17 proportionately, compared with the remainder of the
18 claims, about maintenance rentals of trucks leased from
19 DAF's leasing company. Now, this small claim we just do
20 not understand. We do not understand why these
21 maintenance payments, maintenance rental payments, are
22 being maintained as a claim. It is a small amount of
23 money, but we say it should plainly be excluded from the
24 value of commerce because maintenance is, on any view,
25 outside the scope of the decision and that the argument

1 that is deployed here is entirely speculative.

2 So, in those circumstances, we say it should be
3 rejected. The only reason I highlight this is it is the
4 only -- it is the hook that is used to bring a claim
5 against an entity called PACCAR Financial, and we have
6 not needed to get into any discussions about
7 non-addressee defendants. We have avoided all of that.
8 But this small claim is hooked on them particularly. It
9 was not an addressee of the decision; it is a defendant.
10 We say this claim should be got rid of. It means that
11 we do not need, in those circumstances, to get into
12 arguments about the role of non-addressee defendants
13 because we are not taking issues in relation to any of
14 the others; it is only in relation to PACCAR Financial.
15 That is, because it is a financial entity, if there were
16 to be judgments made against it, that has ramifications
17 for its position. So we object to this claim. We want
18 PACCAR Financial to be out.

19 There are further arguments that relate to this that
20 get into more technical points of European law about
21 non-addressee defendants. We would rely on those as
22 well, but I just need to deal with that because it is
23 a groundless claim but it actually matters for an
24 institution within the PACCAR environment.

25 So now I am going to --

1 THE CHAIRMAN: Five minutes on finance.

2 MR BEARD: Yes, I will do my absolute best. I have got four
3 sections. I have got two minutes on each perhaps.

4 THE CHAIRMAN: All right.

5 MR BEARD: The WACC, simple interest, alternative rates,
6 cost of debt. We know the position in relation to the
7 WACC. It is just not an appropriate measure because it
8 does not represent actual losses. *Sempra Metals*
9 explained very fully and clearly that you have got to be
10 looking at actual losses. The *Sainsbury's* case was
11 actually -- where the claim was rejected for the WACC
12 made clear that it should be actual losses that are
13 brought. In relation to *Sainsbury's*, Mr Lask said, "Oh,
14 that case is different because there were references to
15 the Modigliani-Miller theorem". That is all about the
16 efficient operation of capital. What that was actually
17 being deployed for was saying, as *Sainsbury's*, "We do
18 not care whether it was cost of debt or cost of equity
19 that funded the overcharge", the MIF overcharge in that
20 case.

21 The fact that that was deployed as an argument does
22 not detract from the clear finding of the CAT that the
23 WACC there was not an actual measure. In particular, it
24 was noted, just for your notes at paragraph 542, that
25 *Sainsbury's* did not raise any equity during the relevant

1 claim period. The same is of course here. So the cost
2 of equity is not an actual cost. It does not appear as
3 a cost in any of the accounts. I will come back to
4 returned earnings in a minute.

5 *Sainsbury's* said it was not part of the scheme.
6 *Sainsbury's* did not raise any equity. The same is here.
7 It is not actual loss. So Mr Lask's reading of the
8 ratio of *Sainsbury's* is wrong and that was reinforced
9 then by *BritNed*, where it had been argued that the WACC
10 was an appropriate measure. I am not going to repeat
11 the submissions on that. In fact, sir, you observed
12 that the points being made by Dr Jenkins had a sort of
13 similarity to the sort of arguments that have been
14 raised by Mr Ward and Mr Earwaker here. The reality
15 was, as per paragraph 549 of that judgment, that you do
16 not calculate interest damages by reference to hoped-for
17 profits, which is essentially what is going on.

18 Of course what we know is that Royal Mail treated
19 the WACC as aspirational. That is what Ms Bradshaw said
20 in her evidence. She did not treat it as the actual
21 measure of loss. We also note that, earlier this year,
22 in the *Deutsche Telekom* case, the general court rejected
23 the use of the WACC on the basis that the WACC was not
24 a relevant rate of interest in relation to a penalty
25 that *Deutsche Telekom* was recovering because it was not

1 actual loss. Mr Lask's attempts to distinguish Deutsche
2 Telekom on the basis that interest is a matter for
3 national law, that is just not relevant.

4 Mr Lask also referred to that *Multi Veste* case.
5 That was completely different. It was all about future
6 cash flows being measured by reference to the WACC. So
7 the clear answer in relation to the WACC is the law says
8 no because the cost of equity is not an actual loss. It
9 is very straightforward.

10 We then get into the economics issues and we also
11 say that treating the WACC as an actual cost in
12 economics is wrong. The cost of equity is not an actual
13 cost for Royal Mail. Mr Earwaker said, "Well, it is an
14 opportunity cost for investors". Yes, we see that, but
15 that does not turn it into a cost for the entity that is
16 being invested in, referring to the fact that entities
17 list retained earnings does not change matters. We are
18 not ignoring retained earnings because, of course, if
19 you are going to move to some sort of compound interest
20 measure, what you would look at is what the investment
21 returns on retained earnings were that you had
22 effectively foregone. That is the short-term
23 investments element of any claim. But it does not turn
24 it into a cost of equity capital amounting to a cost of
25 the company.

1 I have dealt with the point that there was no equity
2 capital raised.

3 In relation to dividends, I just provide a note of
4 the transcript from Mr Jeavons, {Day22/165:6-10} [sic].
5 He was specifically asked whether or not in
6 a hypothetical world --

7 THE CHAIRMAN: Is it Day 22?

8 MR BEARD: I am sorry, Day 4, page 62, {Day4/62}. I am
9 sorry, I misread my own notes. He said that the
10 overcharge would unlikely have been remotely material to
11 any questions of payments of dividends. Mr Lask then
12 said, "Well, the monies went into the Mails Reserve and
13 the EFL and those were dividends-like". We actually
14 know that none of those monies were paid out. They were
15 all re-invested either in Royal Mail pension or other
16 matters. Of course, that was the position that
17 Mr Jeavons himself adopted, {Day4/59:22}, when he
18 explained all the money was used for investments in
19 Royal Mail or the Post Office.

20 As I said, we have explained how WACC was used for
21 essentially investment assessment. That does not change
22 matters. Mr Earwaker's arguments based on corporate
23 finance theory do not assist in relation to this. It is
24 a different way of thinking about matters. It does not
25 amount to an overcharge. It is not trying to suggest

1 that there is a free way of funding an overcharge.

2 As I say, when one refers to retained earnings, one
3 is referring to a pot of money that a company has that
4 can invest. If it had less of that money, then it will
5 be able to invest less. If you are looking at
6 compounding issues, that may be one of the relevant
7 measures. I will come back to that shortly.

8 In fact -- and the suggestion from Mr Earwaker that
9 the value of a company can be impacted by what it does
10 with the equity it receives, that is accepted, but (a)
11 it is a loss for investors and (b) we do not have any
12 indication that it has made any difference in relation
13 to these companies' value.

14 In fact, apart from the WACC, we say that the
15 situation should be simple interest. In fact, although
16 Mr Lask said the pleading is sufficient in relation to
17 these matters -- I will not take you to it, but just
18 referencing {B/IC1/46} -- there are references to debt
19 and equity, but at your leisure you may want to compare
20 it to the pleading in *Sainsbury's*, which is authorities,
21 {AU/6.1/287}, where there is a very detailed pleading
22 set out which sets out why it is and on what basis
23 *Sainsbury's* was entitled to claim debt or equity.

24 We say -- yes, thank you very much. That is the
25 pleading there. I am not going to go through it given

1 time. But that is in stark contrast to the brevity of
2 the pleading here, and we say in those circumstances
3 actually it is not properly pleaded and furthermore it
4 is not properly proved in relation to these matters
5 because we have no factual evidence about how Royal Mail
6 would have used any additional financing in the
7 counterfactual. To be fair to Mr Lask, he accepted this
8 in closing, {Day22/169:17}.

9 THE CHAIRMAN: Right. Well, we have got pretty full
10 explanations of your position in the written closings.

11 MR BEARD: Yes, two issues I just want to touch on. In
12 relation to cost of debt, you have the submissions in
13 relation to the treatment of the two loans and we say
14 that, if you are going to go to a compounding approach,
15 obviously the alternative measure that Mr Earwaker put
16 forward of just a binary split does not make sense and
17 that the alternative measure put forward by Mr Delamer
18 is eminently more sensible in weighting these matters
19 and, of course, he says in cost of debt, if you are
20 going to bring in these odd loans that were not part of
21 financial accounts as financial debt, then you should
22 actually bring in all of the relevant trade receivables.

23 Just two points on tax, if I may. Obviously,
24 nothing arises in relation to tax on the basis of -- if
25 we are right on WACC and it all falls away. I will just

1 provide you with a reference that I am sure you have in
2 mind, that Mr Earwaker said that his calculation of
3 vanilla tax measure made no allowance for
4 Royal-Mail-specific corporation tax payments. It
5 effectively assumes that tax does not exist and was
6 neutral as to tax. That is {E/IC9/48} and {E/IC9/49},
7 paragraphs 6.62 and 6.65.

8 It is accepted, therefore, that there is not
9 a proper Royal Mail claimant-related tax treatment in
10 relation to these matters and, in those circumstances,
11 to suggest that it is a post-tax measure that does not
12 require any consideration by the tax modelling is just
13 the wrong way of doing things.

14 The final point is, in relation to effective tax
15 rates, it cannot be the statutory rate. We heard from
16 Mr Goldring how Royal Mail structured its arrangements
17 in relation to these matters and ensured that, in fact,
18 it was paying nowhere near the statutory tax rate in
19 relation to its marginal tax. In fact, it was around
20 50% of the statutory tax rate. That is broadly what
21 Mr Pritchard says. Ironically, Mr Singer's effective
22 rate is even higher than the statutory rate. We say
23 that is plainly wrong. In relation to BT, we have set
24 out our position that the 8% is clearly the wrong simple
25 interest measure. You should be using Bank of England

1 plus 1, which is the standard approach and which was
2 referred to as the starting point at least in *BritNed*.

3 There was I think nothing else I was going to add at
4 that point.

5 THE CHAIRMAN: Well, I am pleased we did actually get
6 reference to the Earwaker vanilla WACC. Yes, all right.
7 Thank you very much.

8 MR BEARD: Thank you for the indulgence.

9 THE CHAIRMAN: All right. 2 o'clock then, final instalment.
10 (1.07 pm)

11 (The short adjournment)

12 (2.00 pm)

13 MR WARD: Thank you. The graveyard slot is mine. I will be
14 as quick as I can. I have got a lot to cover.

15 Reply submissions by MR WARD

16 MR WARD: I am going to start with theory of harm, then talk
17 about causation, then overcharge, then defences and then
18 Mr Lask is going to do his usual rearguard action.

19 Starting with theory of harm, we do not have to
20 prove the theory of harm on the balance of
21 probabilities. Its function is to help confirm the
22 overcharge identified in the regression is attributable
23 to the infringement, and that is all in our closing at
24 page 97. So it is part of our story on causation and
25 that has a number of other strands which I will come to.

1 But Mr Beard's attempts to argue it is not even
2 plausible that the infringement caused harm should be
3 rejected. It is an example of four serious flaws that
4 run through the defendant's whole case. Firstly, it
5 fails to engage with the decision. We accept it is an
6 object infringement, although you have our submissions
7 on that in the written closing, but it provides a clear
8 and obvious foundation as to why it is likely that this
9 particular infringement caused harm. It is not just the
10 persistence of the conduct for, well, a number of years,
11 but it is the actual content of the decision because it
12 tells us why the collusion was actually useful and what
13 the purpose of it was.

14 I will not go back through the decision because you
15 have seen it so many times, but if you do not mind,
16 I will just tick off the most important recitals. So we
17 have Recital 27 that says pricing starts from gross list
18 prices. That of course is important because gross list
19 prices were one of the targets of the collusion. We
20 will see later Mr Ashworth has now confirmed that, even
21 for DAF, list prices were used to drive transaction
22 prices.

23 Recital 30, the collusion removed one of the
24 remaining uncertainties in a market that was otherwise
25 highly transparent.

1 Recital 47, the cartelists were better able to
2 calculate approximate net prices, depending on the
3 information available to them. That includes DAF and
4 Mr Beard has not persisted with his arguments that
5 Recitals 27 and 47 are not fully binding upon them.

6 Then we have Recital 71, which is that the aim of
7 all of this was to remove uncertainty regarding the
8 behaviour of addressees and, very importantly,
9 ultimately the reaction of customers on the market.
10 That means buying trucks.

11 Then Recital 75, this put them in a better position
12 to understand each other's European price strategy.
13 Then, very importantly, the aims of the cartel which are
14 in Recital 71 and 81, DAF does not tell us what its aim
15 was but the decision gives us an important piece of
16 information. It was -- the admitted aim was restricting
17 price competition. So we do not know exactly how it was
18 done but it is common ground that that is why it was
19 done.

20 So the question is: was it at least plausible that
21 it was a success? Was it at least plausible? Well,
22 Mr Harvey's answer is that it was. There may be no
23 visibility of precise transaction prices, but there is
24 masses of information here that the cartelists can use
25 and clear economic incentives over time to maintain the

1 high prices. So that is the first flaw.

2 The second flaw is that, instead of engaging with
3 the facts, what you are faced with from DAF and
4 Professor Neven is a large amount of detailed argument
5 about economic theory. Could it be unilateral, could it
6 be coordinated, could it satisfy the conditions of the
7 Harrington model? All good questions.

8 The third point is there was no attempt to try and
9 ground that theoretical approach in the facts. As we
10 have said, Professor Neven showed a startling lack of
11 curiosity. He could of course have found out how the
12 cartel operated. He could have asked what mechanisms
13 DAF had by way of feedback. He could have asked whether
14 and how it achieved its aims of the cartel. He could
15 have asked whether implementation was really a problem
16 because the difficulties of implementation and
17 monitoring were at the heart of his objections. They
18 are not peripheral. They are at the heart of it. So
19 why on earth did he not actually ask for them? The
20 answer is, of course, because he preferred theory.

21 Then, I am afraid there will be rolling of the eyes
22 on the other side of the court, but we do now get to the
23 big gap in DAF's position. It is says it is implausible
24 the cartel had any effect, but it has given no account
25 to the tribunal of how it operated the cartel or what

1 benefits it was obtaining from it. Now, it is quite
2 instructive to compare the *BritNed* case because, in that
3 case, there was a Mr Jönsson, and he gave four witness
4 statements on the cartel, he gave evidence for three
5 days and Mr Justice Marcus Smith described him as
6 a "self-confessed carteliser". You can find all of that
7 at paragraphs 42 to 44 of *BritNed*.

8 Well, in this case, we have got no witness.
9 Professor Neven had no convincing rationale. Even
10 yesterday Mr Beard was reduced to speculating. We do
11 say that, in the circumstances, in the absence of any
12 account from DAF, the tribunal should infer that it
13 carried on the collusion precisely because it enabled it
14 to maintain higher prices. We made those submissions in
15 detail last week and in writing, and despite what
16 Mr Beard said, *Prest v Petrodel* is directly on point
17 here. Now, he said, "Well, we have given lots of
18 disclosure". Well, so they have, and he says, "Well,
19 but we had reasons for doing this. We do not have the
20 M&S directors anymore. We did not part on good terms
21 with them". But what is conspicuous is that DAF has not
22 come to this court to say, "There is nobody at all in
23 our organisation or contactable by us who can answer
24 these questions". So we do respectfully submit that
25 inference is appropriate.

1 Now, we deal with the expert issues in more detail
2 in our written closing so in the interests of time I am
3 not going to deal with that now, but we do submit that
4 the criticisms of Mr Harvey are hugely overblown. As
5 Mr Ridyard said, on the question of whether the theory
6 is unilateral or coordinated, as you put it, sir, he was
7 backing both horses and not apologetic about that; nor
8 should he be because the infringement involved both
9 information exchange and actual agreements, and while
10 the decision makes clear that the information was useful
11 and the cartel was sustained, it does not tell us the
12 precise mechanism. So Mr Harvey, like the rest of us,
13 was hampered by a lack of information.

14 But in Professor Neven's case there was a big debate
15 about whether or not there is a -- the issue is there is
16 no evidence of any mechanism to disincentivise cheating
17 and Professor Neven was worried about incentives to
18 deviate. But we are not trying to predict the
19 consequences of a merger here. We are asking what his
20 client, DAF, did do in the past, and that was something
21 he should have asked about.

22 Now, if the cartel really had unleashed a bloodbath
23 of price-cutting, then nobody would have stayed in it
24 following the first few meetings. They would have left
25 immediately and refused to ever give their competitors

1 any information again. That is not what happened.

2 Then Professor Neven's empirical analysis of
3 implausibility. You will recall the vertical bars on
4 the graph. The first point -- we deal with this in
5 detail, I should say, in our closing at pages 125 to
6 128 -- but our first point is that Professor Neven's
7 results are entirely at variance with Mr Ashworth's
8 professional experience.

9 Now, Mr Beard yesterday said, "Well, Mr Ashworth is
10 just wrong about this", so he is asking you to prefer
11 some modelling done by Professor Neven with a range of
12 fairly complex assumptions to a whole career spent in
13 DAF; a whole career of successive promotions to managing
14 director, no less. But it is not just Mr Ashworth who
15 was wrong, according to this, Mr van Veen was wrong as
16 well, because when he set list prices for emission
17 standards, he set them at a level to generate desired
18 net prices after discounts were given. That is
19 page 253, paragraph 619 of our closing, {S/9/253}. So
20 according to Professor Neven, he was wasting his time,
21 and it also means that DAF NV was wrong when it used
22 list prices to generate increased transaction prices.

23 Just for your note, at page 32 of our closing,
24 {S/9/32} we set out three strong examples which we
25 explored with Mr Ashworth where DAF NV was doing exactly

1 that; "We do not want this to be a cosmetic exercise",
2 one of them said.

3 Yesterday, Mr Beard cited to you the *Peugeot* case.
4 I am not going to turn it up but I am going to read
5 a sentence from it. For the transcript it is
6 {AU/6.2.1/11}, and this is Mr Justice Green, I think at
7 that stage in his career. Let me read out the sentence
8 that we think is helpful:

9 "It is also commonplace that the very best experts,
10 and those most versed in market knowledge, are the
11 middle and senior managers employed within the affected
12 companies who on a daily basis live with the intricacies
13 of their markets."

14 Well, that would be Mr Ashworth.

15 This case is not only at odds with Mr Ashworth,
16 Mr van Veen and DAF NV, but it is also at odds with
17 Recital 47, because what Recital 47 says is all the
18 cartelists were better able to calculate approximate net
19 prices depending on the market intelligence at their
20 disposal. There is more detail in our closing about why
21 we reject this exercise and why we reject the highly
22 stylised mystery shopper exercise.

23 Now, just a quick word about Professor Harrington's
24 model. There was a lot of debate about this in the hot
25 tub. It was highly refined. But what we emphasise is

1 it is just a stylised mathematical model, albeit one
2 designed precisely for this cartel. There was debate
3 about the Goldilocks zone, but we explained why, quoting
4 Mr Harrington's paper, this was much wider than DAF
5 liked to suggest. But we do not need to prove DAF fits
6 precisely within it. It is just further support for
7 ways in which this cartel could have effects on prices,
8 even if it is stylised.

9 From that, I am going to turn to what Mr Beard calls
10 "mechanisms", and he focused on IKP, margin targets and
11 the mandate structure. We deal with these at length in
12 our closings. I suppose we have dealt with everything
13 at length in our closing, but there is plenty of detail
14 on this.

15 Now, of course, the decision tells us that the aim
16 of the cartel was distortion of price competition, so
17 that would have needed a mechanism to make that happen.
18 Recital 47 is part of that mechanism. Beyond that we
19 are hampered by DAF's decision not to explain, but the
20 starting point is the list prices. Mr Beard did not
21 spend too much time on this. But the critical point is
22 that it is now accepted by DAF that there is a link
23 between list prices and transaction prices and
24 Mr Ashworth accepted list prices were used to drive
25 transaction price increases and this applied to BT and

1 Royal Mail.

2 Now, despite what Mr Beard tried to suggest
3 yesterday, this really was something entirely new that
4 emerged at trial. Their pricing statement that he
5 referred to talks about prices being used in
6 negotiations and there were some disclosed documents
7 that made that inescapable. But here we have something
8 much more fundamental. We have been at loggerheads for
9 years in this litigation with whether Recital 27 applied
10 which showed the connection between list prices and
11 transaction prices. I want to just show you the
12 transcript where Mr Ashworth accepted this. It is
13 {Day8/30:14}, starting at line 14. I am questioning him
14 after we have been through various of the documents:

15 "... the picture that emerges from these documents
16 that we have been looking at is that DAF NV was placing
17 big demands on DAF UK to get higher prices. Would you
18 agree with that?

19 "Answer: DAF NV was placing big demands on DAF UK
20 to get high prices because that was my job, yes.

21 "Question: ... We have seen that we have the list
22 price increases, we have the margin targets, we have the
23 use of IKP to disguise the true level of costs from the
24 sales units. All of these, would you accept, are ways
25 of putting pressure on you to achieve higher prices to

1 keep the central management happy?"

2 He answers on the next page, {Day8/31:1}:

3 "It is part of the job. I would not say it is
4 pressure but it was part of the job.

5 "Question: We know that, of course, Royal Mail was
6 your second-largest customer and that BT started out as
7 a big one, even if its significance tailed off.

8 "Answer: That is correct.

9 "Question: So these were big sales volumes, were
10 they not, then?

11 "Answer: They were, yes.

12 "Question: So the prices that you were going to
13 achieve on those contracts are going to be important,
14 are they not, to both your results and to DAF NV?

15 "Answer: Yes, they would be.

16 "Question: So what I am suggesting to you is that
17 these instructions that are coming down from DAF NV to
18 achieve price increases or higher prices are just as
19 important for these very big customers as any [others]?

20 "Answer: I would say that is a fair comment, yes.

21 "Question: That would be the case whether or not
22 they were actually referred -- whether or not the list
23 prices, say, were actually referred to in a negotiation
24 in the way we have looked at a moment ago?

25 "Answer: I think that is also a fair comment, yes."

1 So this is an important passage because Mr Ashworth
2 is accepting these so-called mechanisms did create price
3 pressure upon him and that pressure did apply to BT and
4 Royal Mail. Now, Mr Beard's submissions on these
5 mechanisms simply did not engage with this point and
6 this is why talk about the need for an elaborate
7 economic framework is wide of the mark.

8 What we know is firstly DAF NV participated in the
9 cartel with the admitted aim of restricting price
10 competition. It agreed gross list prices, it exchanged
11 gross list price information, present and future.
12 Mr Beard concedes that it took gross price information
13 it received from its competitors into account and he
14 said this morning, "Well, of course we had to concede
15 that. It is the law". Well, he did, but it is still
16 very, very significant because it is only a presumption.
17 The so-called *Anic* presumption that it was taken into
18 account is just that. So if they had a case that they
19 did not take it into account, they were free to come to
20 the court and explain that.

21 Then we have the M&S director, who we will come back
22 to, who was the ultimate decision-maker in setting the
23 list prices. Then, as Mr Ashworth accepts, we have
24 a whole range of mechanisms to drive the local
25 subsidiary to higher prices, including the gross list

1 prices. We know that Mr Ashworth at least thinks his
2 career was a success, so it is hard to see, actually,
3 how DAF is even resisting plausibility or even our
4 overall case on causation on this basis.

5 As to the M&S director, we do find he has a pivotal
6 role in pricing. We have summarised it in our closing,
7 if we could go to it, please. {S/9/54}, paragraph 138.
8 The supporting detail is all in the closing -- sorry,
9 that is a completely wrong reference. Just give me
10 a moment. I think I am wrong and the reference is
11 right. It is me. I have got a wrong reference! So we
12 summarise it:

13 "The M&S Director was the ultimate decision maker in
14 relation to ... list prices. As Mr Ashworth explained,
15 DAF NV used its list prices to drive transaction
16 [prices] ...

17 "The M&S Director was closely involved in the
18 setting of IKP and ... margin targets ..."

19 Which was explained to us by Mr Habets and
20 Mr van Veen.

21 "... both of these [were used] as tools [to drive]
22 higher transaction prices ...

23 "The M&S Director played a key role in the mandate
24 structure, through which DAF UK transactions were
25 referred to DAF NV ..."

1 Indeed Mr van Veen explained that all Royal Mail
2 transactions went up to PACCAR via the M&S director.

3 Then over the page, {S/9/55}:

4 "The M&S Director was ultimately responsible for
5 signing off the price increases ... for emission
6 standard trucks ..."

7 Then:

8 "The Managing Director ... reported (only) to the
9 M&S Director."

10 I have spent a lot of time on the M&S director
11 because that is the person that DAF identified as having
12 participation in the cartel and also being a UK
13 director. But he is not the whole cartel. We are just
14 doing our best with what we have.

15 SIR IAIN MCMILLAN: May I ask a question, Mr Ward?

16 MR WARD: Of course.

17 SIR IAIN MCMILLAN: You have taken us through this process,
18 you have demonstrated or attempted to demonstrate the
19 link between the list price and the transaction price
20 and the pressure, if I can use that word, that
21 Mr Ashworth was under to achieve better prices. I am
22 thinking of that alongside the timeline that Mr Beard
23 showed us yesterday, where there was a gap between the
24 list price and the actual transaction prices. Is it
25 your case to the court that in fact that gap would have

1 been wider and that the transaction prices would have
2 been even lower had it not been for the infringement?

3 MR WARD: It is our case because the timelines -- there are
4 two problems with them. One is they cannot tell us
5 anything about the counterfactual, but the other is they
6 of course do not control for factors such as exchange
7 rate or demand that might influence prices. That is
8 what the regression is for. Mr Harvey's regression
9 demonstrates an overcharge. Mr Lask is going to talk
10 more about those issues, but that is the short answer to
11 the question, sir.

12 SIR IAIN MCMILLAN: Thank you.

13 MR WARD: So those are all important elements on our case on
14 causation, but there is more to it. Mr Beard said we
15 had four elements this morning, but actually there are
16 eight and I would just like to show you briefly where
17 they are summarised. There is more detail than you will
18 ever want in our written closing but there is also
19 a summary. It is {S/9/10}.

20 If we can just pick it up, please, I will just run
21 through them very, very briefly. 28.1, it was an object
22 infringement. We do not say that is enough on its own,
23 we understand the difference, but it means it consisted
24 of conduct so likely to have anti-competitive effects
25 they did not need to be proved.

1 Secondly, the aim was to distort price competition,
2 so all we are saying is it seems to have been effective.

3 Then of course there is, in 28.3, a whole range of
4 complementary means to achieve that restriction of price
5 competition.

6 Four, it was of real practical value. That is the
7 point I have been developing already this afternoon.

8 Five, Mr Beard confirmed it was taken into account
9 and we do say you can draw a further adverse inference.

10 Six, there were these various mechanisms which we
11 have been talking about.

12 Seven, we have a theory of harm that is plausible.
13 We had lots of fun debate about "possible",
14 "potentially" and "plausible", but Professor Neven, in
15 the end, came out accepting that it was at least
16 possible.

17 Then the final element of course is the regression
18 itself.

19 So we do not rely on the regression on its own but
20 *BritNed* tells us that you can infer causation from
21 a regression. It is just that we have much more.

22 Now, very quickly I want to talk about the rigged
23 market, which was an expression I put to Mr Ashworth and
24 he agreed with. If you remember, he was a bit upset
25 when he found out about the cartel. Mr Beard says,

1 "Well, you cannot make that submission without suing all
2 of the manufacturers and proving that they all were in
3 fact putting in bids that were influenced by the
4 cartel". Well, we did not really want to sue them all
5 because our claim is actually only for DAF Trucks. We
6 are not making a claim that DAF is jointly and severally
7 liable for Mercedes trucks, say.

8 But we do not have to do that. What we can do is
9 rely on the admitted facts contained in the decision
10 because they are admitted by all the addressees, both
11 the collusion and the value of the collusion.

12 Now, Mr Ridyard said yesterday that most cartel
13 theories do proceed on the basis there is more than one
14 firm involved and there are horizontal competitors and
15 they are all raising prices. Well, obviously that is
16 true, but actually we do not even need to go as far as
17 that because this is a strand in our case which goes to
18 the plausibility of there being an overcharge and, like
19 DAF, one is bound to ask why on earth were these other
20 manufacturers in this EEA-wide cartel other than to
21 achieve an increase in the prices.

22 We do not know for sure that they did, but, when you
23 are assessing whether it is plausible the cartel had an
24 effect and whether you are assessing one of DAF's
25 defences, which is, "Well, there was a competitive

1 tendering exercise", this is why you cannot conclude the
2 existence of a tendering exercise was a cure.

3 Ordinarily you would say a tendering exercise ought to
4 achieve a competitive price, but they were bidding
5 against a range of manufacturers who were all in the
6 cartel. That is why the market was rigged.

7 THE CHAIRMAN: But do you actually allege that?

8 MR WARD: Do we allege it? What we have pleaded -- I will
9 give you the reference -- is that part of our case is
10 that the collusion caused an overall softening of
11 competition, is how we put it. Just for the transcript,
12 that is {B/1/42}, paragraph 21(1). But we partly mount
13 this as a responsive plea to the idea that the tender
14 process is some kind of cure-all.

15 Now, this does all link to the *BritNed* point where,
16 obviously, the case is very different from *BritNed*. Of
17 course it is. That was a bid-rigging case. I am happy
18 to confirm we are not alleging bid-rigging. But our
19 point is really a simple one. The question is: is there
20 consumer detriment in the language of *BritNed*? Is there
21 a different commercial environment in the language of
22 *BritNed*? Here, you have buyers carrying out a tendering
23 exercise.

24 The whole point is to get independent bids. In fact
25 it is admitted that all of the manufacturers are part of

1 an EEA-wide cartel with the object of restricting price
2 competition. Well, that is a detriment. It undermines
3 your commercial strategy because, even if you do not
4 know for sure that they are actually using the
5 information in the bids you are submitting, you suddenly
6 find out that Mercedes, Volvo, DAF, all of these people
7 you have bidding, are in fact in this cartel.

8 Of course, in fact, it was secret, so Royal Mail,
9 Mr Peatey, BT, they did not know that any of this was
10 going on, any more than Mr Ashworth did, so they were
11 proceeding on a false premise. If they had known, if
12 they had known, is it imaginable that they would have
13 said, "Oh, well, that is okay. With a bit of luck, the
14 guys at Daimler who are actually carrying out this
15 transaction or Mr Tyler at DAF, maybe they do not know
16 anything about the cartel. It will be fine. Let us
17 just proceed"?

18 THE CHAIRMAN: I suppose you could have produced evidence as
19 to what other bids there were in relation to these
20 particular contracts and that might indicate what sort
21 of behaviour was going on within the cartelists.

22 MR WARD: Not really, sir, because again one would have to
23 do a very complex counterfactual analysis of exactly
24 what they would have bid, and that indeed is Mr Beard's
25 point. He is saying that unless you want to do the

1 exercise we have just done times five -- I am sure you
2 are feeling this trial has been long enough, but
3 Mr Beard's invitation is that you should do it times
4 five -- then we would find out all about exactly what
5 the overcharge was on Daimler or the overcharge on Iveco
6 and so forth. But we do not need to go that far because
7 what we are looking at here is a company letting a
8 contract innocently in a market it thought involved
9 independent competition, whereas in reality this
10 cartel -- the market is totally cartelised, just as the
11 decision says. That is the consumer detriment.

12 If one finds out that the roofing contractor one has
13 just engaged was really in a bid-rigging arrangement
14 with some other roofing contractors, it is not a happy
15 feeling. One does not think, "Oh, that is fine. Let us
16 just carry on". One says, "Let us do something
17 different. Let us not take the risk. Let us get
18 someone from somewhere else".

19 MR RIDYARD: Unless Mercedes or Volvo were putting in higher
20 prices to these contracts than would otherwise have been
21 the case, is there any reason to think that DAF's prices
22 would have been higher?

23 MR WARD: Well, of course not, because of that --

24 MR RIDYARD: So you depend --

25 MR WARD: Of course we have two different routes here. We

1 have DAF itself and what it is doing as a result of
2 collusion. The rigged market is simply to say all these
3 other manufacturers were in the cartel, we do not know
4 exactly what they were doing, but that is why it is not
5 a defence for DAF to say, "Oh, there is a competitive
6 tender here". It is at least plausible that the other
7 bids were also influenced by the cartel.

8 I am not asking you to make a positive finding they
9 were. Mr Beard is right, you cannot possibly do that,
10 but you do not need to.

11 MR RIDYARD: We saw some of the mechanics of how a tender
12 works, we saw that you scored on pricing and non-pricing
13 factors and everything else and you can certainly see
14 from that that, you know, in the negotiations with DAF,
15 Royal Mail was saying or implying or sort of saying
16 that, "Well, if you do not reduce your price, we will
17 threaten to switch to Mercedes instead".

18 MR WARD: Sure.

19 MR RIDYARD: So the credibility of that threat must depend
20 on the price that Mercedes, for example, is putting in.
21 But if Mercedes was not putting in a price that was
22 changed because of the cartel, then how can the outcome
23 of this process be any different from the competitive
24 process?

25 MR WARD: If one could be confident that they were not and

1 that their prices were not influenced, then you would be
2 right, but the problem is -- I accept we do not know --
3 I do not push this point to the limit. I push it as far
4 as saying it is plausible that there was cartel
5 influence in these tender exercises so we just do not
6 know what the counterfactual price for Mercedes or Iveco
7 would have been.

8 MR RIDYARD: It has to be -- unless those competitor prices
9 are different because of the cartel, then it cannot have
10 an effect on DAF's price, can it?

11 MR WARD: I entirely accept that, and the point is only that
12 it is plausible that it would have been because of the
13 cartel, because just like DAF, they were not in this for
14 fun. They were not taking these vast-scale legal risks
15 for no reason. That is the point.

16 MR RIDYARD: So does that mean your case is that they would
17 need to be higher but you cannot prove they were higher
18 but then the other side cannot prove that they were not?

19 MR WARD: Exactly. It is just at least plausible. Mercedes
20 were not doing this for funny any more than DAF were.

21 Can I move on from there and talk about the
22 overcharge? I am just about on schedule. I am going to
23 start with currency, then do GFC, then emissions and
24 then before/during/after.

25 Currency. The experts had a choice to make. The

1 model needs a single currency to work in but costs and
2 prices are in different currencies. Both experts
3 converted a portion of the costs so both control for the
4 impact of exchange rates to that extent. As DAF and
5 Professor Neven eventually conceded, this means
6 Mr Harvey is not imposing 100% exchange rate
7 pass-through. I will come back to that because it is
8 important.

9 Professor Neven's model only allows for the impact
10 of exchange rates to affect prices through costs. He
11 accepted this. He is using the budget rate to do it,
12 which is a year out of date, and, as he said on
13 {Day14/108:13}:

14 "... the exchange rate of today in the main model
15 never has an impact on the price of today, only on
16 prices in a year's time."

17 If semantics matter here -- and it sounds from
18 Mr Beard as though they might -- he also accepted this
19 was a restriction in his model. We gave the references
20 in paragraph 442 of our closing. That is the only way
21 Professor Neven's main model controls for currency. But
22 the problem with this is that it ignores the role of
23 DAF NV. DAF UK is just the local sales subsidiary. Its
24 business is to make profits for DAF NV, the cartelist.
25 DAF NV wanted euros. Its only interest in pounds was

1 the amount of euros it could get.

2 Professor Neven cuts it loose. He has a UK-centric
3 model, but the evidence, unsurprisingly, is DAF UK had
4 to keep DAF NV happy. We just saw that from the
5 transcript for Mr Ashworth. We have talked about the
6 range of methods by which DAF NV controlled prices,
7 margin targets, IKP, transaction approval, using
8 real-time exchange rates. By the time we get to the
9 GFC, DAF NV is reviewing them all.

10 THE CHAIRMAN: I think at the initial stage the mandate
11 structure was not even in place until 1998 --

12 MR WARD: Well, that is right, but from 1998 it was in place
13 in what Mr van Veen says is broadly the same form. The
14 reference for that is {D/24/12}, paragraphs 47 and 48.

15 We also have Mr Ashworth's evidence that is entirely
16 general, that he was concerned with exchange rates when
17 setting prices, and Mr van Veen has explained that
18 Royal Mail prices always went up to PACCAR via the M&S
19 director, and that is {Day7/30:16}. So although DAF's
20 pricing statement that Mr Beard relied on says there was
21 no formal requirement by way of mandate structure, what
22 we see is that, for almost the entire period of the
23 cartel, this was in place. Mr Ashworth has not
24 qualified his evidence by saying, "In the early years
25 I did not care at all about what DAF NV were receiving

1 or what euro revenues they were receiving", and it would
2 be bizarre if Mr Ashworth, in 1997, were able to say,
3 "Oh, it does not matter about DAF NV. They are only the
4 paymasters".

5 Now, the key difference of course between the models
6 is that Mr Harvey's model accounts for this dimension
7 and it does so by converting the prices into the
8 currency in which DAF NV actually booked its revenue.
9 Now, Mr Beard called this a "straitjacket" and he said
10 that 11 times, as he strives to catch up with my
11 14 years! We make four points about that.

12 MR BEARD: I will concede on that one. I am never going to
13 match that! He wins on that.

14 MR WARD: I thought we had a few more weeks to go of this
15 case!

16 Now, there are four points about this. I will be as
17 brief as I can. The first is Professor Neven's approach
18 simply does not capture this effect on DAF NV's revenues
19 at all so the debate about how to do this is much less
20 fundamental. But, secondly, Mr Harvey did it this way
21 using the weekly exchange rate because that is exactly
22 what DAF's original version of its guidance note on
23 interpreting the data had actually said.

24 Can we please bring up {H/71.1}, "Guidance note
25 for the examination of the data disclosed by the

1 defendants ..."

2 Paragraph 1:

3 "This note provides guidance on how the data
4 disclosed on ... 9 March 2018 ... is to be examined ..."

5 Then under the bullet point (iii):

6 "This note is intended to describe:

7 "each data set and the data fields within them; and

8 "(ii) the manner in which some of the key data

9 fields related to truck-specific sales value and

10 production costs need to be modified using information

11 ... in other data fields ... to allow for a proper

12 examination of the data."

13 Then if we turn on, please, to page 11, {H/71.1/11},

14 "Currency Conversions":

15 "The truck-level revenue contained in the MI data

16 expressed in DAF's internal single currency ... and not

17 in local currency. It is converted to the single

18 currency from GBP using the budget rate at the time of

19 the order."

20 Then if we look at the third bullet point:

21 "To convert the revenue from single currency into

22 Euro, which is the relevant currency considered by DAF

23 when approving an order, one needs to (i) multiply the

24 revenue by the budget rate to [achieve] the original

25 revenue figure ... in GBP, and (ii) convert the revenue

1 from GBP into Euros using the actual GBP/EUR exchange
2 rate at the time of order."

3 Then there is a little equation and then it says,
4 $\{H/71.1/12\}$:

5 "Information on the average weekly GBP/EUR ... rate
6 at the time of order ... can be obtained from the
7 European Central Bank."

8 So it is a bit simple-minded, perhaps, but what
9 Mr Harvey did is what DAF suggested.

10 Then, secondly, much of the criticism of
11 Mr Harvey --

12 THE CHAIRMAN: Sorry, this document is a what?

13 MR WARD: Sorry, it is provided by DAF's solicitors to the
14 claimants and their experts to help them interpret the
15 data sets. That is the point. Sorry, I did not make
16 that clear.

17 THE CHAIRMAN: Okay.

18 MR WARD: My short point is Mr Harvey was only doing what
19 they suggested.

20 THE CHAIRMAN: Sorry, this is explaining how they should go
21 about the regression, is it?

22 MR WARD: No, no, just how to interpret the data that had
23 been provided. Regression is obviously up to Mr Harvey.
24 It is not recommending he does his model in euros and
25 I do not want to suggest that for a minute.

1 MR RIDYARD: This calculation is updating from the budget
2 rate to the actual rate?

3 MR WARD: Yes.

4 But then a lot of the debate has been about whether
5 Mr Harvey was right to use the market rate rather than
6 the budget rate. But what he explained is the key
7 driver is not the speed, which that would be entailing,
8 but the decision of whether to conduct the model in
9 euros or pounds. We explain this in our closings at
10 page 177, paragraph 455, and it is in the transcript on
11 {Day12/132} to {Day12/136}.

12 Now, I mentioned a moment ago that Professor Neven's
13 position originally was that Mr Harvey's pass-through
14 was immediate and full, but it is now common ground that
15 this is wrong. On Tuesday Mr Beard said this was true
16 but uninteresting -- as the philosophers say, he says.
17 That was page 54, line 12, {Day23/54:12}. But that is
18 an important misconception because this is why it is
19 wrong to say Mr Harvey attributes all the exchange rate
20 movement to the infringement. It is only partial
21 pass-through.

22 In fact we just say for the note that DAF still
23 maintains this false understanding in its closing at
24 {S/10/29}, but in the interests of time I will not go to
25 it.

1 Now, one of the key criticisms of Professor Neven --
2 of Mr Harvey, that is -- is that he attributes at least
3 some of the increased margin from the gain in the pound
4 to the infringement. It is not all the margin because
5 Mr Harvey also controls for a range of factors including
6 demand. But this is where, again, the tribunal faces
7 a stark choice. Professor Neven's model assumes all the
8 benefit that DAF NV obtained through these increased
9 margins would have been enjoyed in the counterfactual.
10 In fact, he accepted that he would have expected pound
11 prices to fall as the pound strengthened, but they did
12 not. This is dealt with at paragraph 490 of our
13 closing.

14 Mr Beard accused Mr Harvey of being engaged in what
15 he called a sort of "eyeballing" of what he called
16 "wiggly lines". That is {Day23/53}. But that is not
17 right because the wiggly lines were interesting but
18 Mr Harvey also carried out a margin regression. That is
19 a regression that tests for the impact of the
20 infringement on DAF's margins. It does that while
21 controlling for other factors that could affect the
22 prices.

23 For the transcript, the detail of how that was done
24 is at {E/2/74}, paragraphs 2.104 to 2.109, and the
25 margin regression can be seen in table 12 at {E/2/82}.

1 This margin regression is also an answer to two other
2 points Mr Beard made earlier in the week, that Mr Harvey
3 took no account of variation in margin. But they are
4 actually taken into account as an input into the margin
5 regression. He also said Mr Harvey does not know the
6 level of competitive margin, but again the margin
7 regression tells us the level.

8 Then the other criticism that was made or, rather,
9 the only real criticism was the margin regression
10 imposes a fixed one-to-one relationship between prices
11 and costs, and of course it does. That is what a margin
12 is. But it does not mean the regression is
13 uninformative, particularly so because in fact, as the
14 tribunal knows, Mr Harvey's price regression identified
15 an actual relationship between DAF's prices and costs as
16 around one to one in the during/after period.

17 Then the final thing I want to say here about
18 margins is that Mr Beard suggested that Mr Harvey was
19 somehow relying on the assumption that DAF's margins
20 would be held at a constant rate. With respect, we did
21 not really understand why he thought that. The price
22 regression analysis makes no assumption in that regard.
23 It is measuring the effect of other variables on DAF's
24 prices in euros. As indeed Mr Harvey puts it at
25 {E/28/74}, the model detects the increase in prices

1 relative to costs.

2 Then I want to turn now to another topic, which is
3 Professor Neven's sensitivities.

4 THE CHAIRMAN: Sorry, just stopping you there, so the point
5 about constant margins is because the price in pounds
6 stays the same; is that right?

7 MR WARD: Well, I am not absolutely sure what the point was,
8 but if the point was that it imposes constant euro
9 margins, that is just not right. That is all. So we
10 have done our best with that.

11 MR BEARD: I am sorry, that is just wrong.

12 MR WARD: Well, you will have to do your best as well, sir.

13 Can I turn to Professor Neven's sensitivities
14 because this is the only way he took account of any
15 exchange rate movements beyond the budget rate in his
16 cost conversion. I would like to just very quickly show
17 you why this is problematic. Unusually, it is
18 Professor Neven, not Mr Harvey, saying why it is
19 problematic.

20 If we go to {E/11/81}, this is his first report. He
21 explains what the problem is with trying to control for
22 exchange rates in his own model. We can see, if we take
23 paragraph C.2:

24 "Considering exchange rate models other than only
25 considering DAF's budget rate ... ie alternative

1 approaches that allow for a more flexible exchange rate
2 pass-through, might introduce a problem of
3 identification of the potential ... infringement ..."

4 Then at the bottom of the paragraph:

5 "In such a case, there could be a difficulty in
6 separating the effect of changes in the exchange rate
7 from the effect of the infringement ..."

8 Then at the bottom of the page, C.4:

9 "One issue that arises is that both the GBP market
10 exchange rate and DAF's budget rate only change over
11 time and do not differ across truck sales ... This
12 implies that these exchange rates can potentially be
13 correlated with the infringement dummy, and possibly
14 with other control variables."

15 Then if we go to page 83, {E/11/83}, C.8:

16 "... the inclusion of the exchange rate variable can
17 be also problematic."

18 Then at the bottom of that paragraph:

19 "... it would be a challenge to disentangle the true
20 effect of exchange rate on prices from the effect of the
21 infringement."

22 Then C.10:

23 "... the figure above shows that the exchange rate
24 tends to be lower for the period in which Euro 5 trucks
25 were sold, while it is higher after the introduction of

1 the Euro 5 EEC and Euro 6 ... This can affect the
2 interpretation of the coefficients for emission standard
3 fixed effects ..."

4 These are the reasons why he did not include
5 a control. We can see that if we turn to page 90,
6 {E/11/90}, D.15:

7 "In the benchmark specification, the MLO cost is
8 converted into GBP using DAF's budget rate. The
9 benchmark model does not include any additional exchange
10 rate variable as this could be problematic for the
11 identification of the infringement effect."

12 Of course, as you know, Mr Harvey agreed. But what
13 was remarkable was that Professor Neven had a sort of
14 change of heart about all of this and by the time he was
15 in the hot tub he was basically saying his sensitivities
16 were the answer to all his problems.

17 MR BEARD: I do not think that is very fair. I think you
18 should read on to D.16.

19 MR WARD: So, in our respectful submission, he was right to
20 say there were these problems and they had not gone
21 away.

22 There is one further point we make about this
23 sensitivity which links to the point I made a moment
24 ago. These sensitivities can tell us nothing about how
25 DAF would have reacted to exchange rate movements in the

1 counterfactual, what might it have done differently.
2 What Mr Harvey's approach has done is sought to capture
3 that by its acknowledgement that there were these
4 sustained euro margins arising out of the appreciation
5 of the pound at the beginning.

6 Now, ultimately then what we would submit is that
7 the tribunal faces a choice between two different
8 approaches, albeit there are shades of difference
9 between them as well. Mr Ridyard said, on Day 23, there
10 may not be a single right answer, and that is why we
11 would remind the tribunal that Mr Harvey has considered
12 the issue of speed and level of pass-through and has
13 provided some sensitivities on this at page 200. But we
14 fully accept there may be other alternatives which could
15 be derived using a broad axe. But none of that
16 justifies Professor Neven's approach which simply
17 disregards the European dimension.

18 THE CHAIRMAN: What do you mean by that? Are you saying
19 that there is no right answer necessarily to this?

20 MR WARD: Yes, there is no sort of mathematical answer.

21 THE CHAIRMAN: So we need to look for what best captures
22 what the overcharge might be?

23 MR WARD: To be more concrete, Mr Harvey has provided some
24 sensitivities which provide for lower rates of pass-on
25 and slower rates of pass-on, recognising that that was

1 some of the criticism of his approach. We just pose
2 them as illustrations for you to consider and he
3 explains how the infringement coefficient is altered by
4 those sensitivities. But I am frankly acknowledging the
5 lack of a single right answer and the scope for some
6 broad axe application.

7 THE CHAIRMAN: So you are saying that on one extreme you go
8 one way, Professor Neven, all into pounds, with
9 Mr Harvey you go into euros, and that they produce
10 wildly different results for a reason that I am
11 struggling to understand, but it does seem to be so. So
12 we can apply a broad axe and say, "Well, there are good
13 reasons for one and there are problems with one and the
14 same on the other side, so we go somewhere in the
15 middle"; is that what you are saying?

16 MR WARD: Well, I am sure that is a far cruder caricature of
17 any judicial reasoning one can imagine and I would never
18 suggest --

19 THE CHAIRMAN: I am trying to understand what "broad axe"
20 means.

21 MR WARD: I am suggesting, for example, the speed of
22 pass-through in Mr Harvey's model or the degree of
23 pass-through are both things which obviously could be
24 changed and Mr Harvey frankly acknowledged that, which
25 is why he did the sensitivities. I am not just saying,

1 "Here we are, go down the middle, it is somewhere
2 between 1 and 9 and therefore the answer must be 4.5".
3 I am not suggesting that.

4 THE CHAIRMAN: Right.

5 MR WARD: May I move on?

6 I was going to talk about the global financial
7 crisis. Stepping back from this for a moment, DAF's
8 case on this is quite extreme. We know from the data
9 and indeed the evidence that the GFC was quite an
10 unprecedented event. DAF's business, like much of the
11 economy, was put into freefall. But according to
12 Mr Beard and Professor Neven, nothing in its general
13 approach to pricing would have changed at all. It
14 simply responded to lower demand in the same way as any
15 other change in demand, so it can all be captured by
16 a standard demand control that applies in other periods.

17 So, for example, Professor Neven uses tonne
18 kilometres as one of his demand controls, which is
19 a measure of road-based transport use in Europe. But
20 the problem is that the GFC was a dramatic departure
21 from normal conditions and it raises at least the
22 possibility that, as Mr Ridyard put it, the response was
23 different in kind to the response to a typical change in
24 demand. There was something more than a typical
25 response to a demand fluctuation. If that is correct,

1 it is important to identify and control for it,
2 otherwise we have a bias.

3 Now, Professor Neven and Mr Beard's position is
4 there is nothing to even justify testing for this, but
5 if that is wrong, then Professor Neven's model will not
6 pick it up. He accepted this, and this is set out in
7 closing, page 22, paragraph 534. On Tuesday, Mr Beard
8 said a number of times that you would need to cross
9 a high threshold before attempting to test for it. He
10 said you would need the most compelling evidence, and
11 that is {Day23/54:9}.

12 MR BEARD: Not to test for it. That is not what I said.

13 MR WARD: Well, you can look at the transcript at your
14 leisure.

15 But we do not have to prove fraud to the civil
16 standard. He is setting the bar remarkably high. There
17 was clearly sufficient evidence to justify at least
18 testing for it.

19 What actually happened when Mr Harvey tested for it
20 is they were highly statistically significant. Now, we
21 do not say that justifies the conclusion on its own,
22 but, taken with a strong rational for their inclusion,
23 they were well justified. But Professor Neven and
24 Mr Beard's position is still to say it should be
25 ignored. I want to just deal briefly with Mr Beard's

1 points on this.

2 The first one was about the data in the model. It
3 is common ground that the effect of the dummies is all
4 of the trucks stay in the model but the trucks subject
5 to the dummies are not used to estimate the infringement
6 directly, they are only used to identify the effect of
7 other variables. But even without these trucks to
8 estimate the infringement, there are still 12,000 during
9 the infringement and 22,000 afterwards. That is
10 paragraph 546.2 of our written closing. Mr Harvey
11 thought this was ample. He obtained results that were
12 statistically significant to the 99th percentile and
13 that is why we say there seems to be a problem in theory
14 but not in practice.

15 Yesterday or Tuesday, I think it was, Mr Beard said,
16 "No, but this reduces the degree of variability in the
17 model". Can I ask you to now please turn up {E/1/81}?
18 This is a graph from Mr Harvey's first report, where you
19 can see the number -- this is DAF sales volumes year on
20 year and it is part of his thinking that went into
21 testing for this in the first place. You can see the
22 three years that he has dummied out have 6,000, 3,000
23 and 7,000 trucks respectively and then the other years
24 which remain in have between 9,000 and 20,000 trucks
25 being sold. Well, the short point is there is plenty of

1 variation left in the model.

2 Now, the other thing we say is that, if in fact the
3 GFC observations are not representative, then it is in
4 fact important to remove them so they do not distort the
5 sample. This was a point that Mr Ridyard put that we
6 respectfully agree with. As to the evidence, we set it
7 all out at page 209, paragraph 534, of our closing. It
8 is cumulative and we submit it plainly justifies
9 Mr Harvey's approach.

10 I wanted just to pick up one point only on it which
11 relates to the cancellations that DAF had. You will
12 recall DAF was a build-to-order company but suddenly
13 found itself with unwanted trucks. Mr Beard said there
14 was no sense at all of the scale of this and indeed in
15 his written closing he criticised us for not asking
16 Mr Ashworth. But if we could now turn up our closing at
17 {S/9/212}, you will see why there was actually no need
18 for more questions. This is after he had asked
19 Mr Ashworth about the competitor meeting he attended
20 where, you can see from the italics above the quote:

21 "They openly stated that they are on a mission to
22 liquidate current UK stocks ... they are in 'dealer
23 protection and survival mode'. DAF and Iveco confirmed
24 openly that they have made funds available and offered
25 ... financial support."

1 Then Mr Ashworth said:

2 "... at the time, as I have just explained, DAF was
3 a build to order company so we took orders and we built
4 trucks. Prior to the financial crisis what was
5 happening is customers started to cancel ... Another
6 point ... was ... I think we have seen before -- lead
7 times were becoming excessive so we had orders which
8 were placed for trucks with extended lead times. So ...
9 we were getting ... long lead times with confirmed
10 orders that we were planning to build and then suddenly
11 what we had is cancellations at an exponential rate so
12 we ended up building lots of trucks with no homes to go
13 to, hence the reason for stock, which is very unusual in
14 our business ..."

15 I think that more than gives the flavour.

16 I would also just point out, again for the note,
17 there is clear evidence that demand was not the only
18 factor. Mr Ashworth, at paragraph 194 of his statement,
19 says {D/22/50}:

20 "During the financial crisis ... due to the exchange
21 rate fluctuations, all deals had to be proved by
22 DAF NV."

23 Now, I want to just move on to Professor Neven's
24 alternative approach, which is the famous red and blue
25 dots at {E/35/50}.

1 THE CHAIRMAN: That does not prove that they actually went
2 about the approval process any differently --

3 MR WARD: No, no, but the crucial point about it is that the
4 truck deals were being considered further up the chain
5 with real-time exchange rates and MLO and not IKP. It
6 raises at least the possibility that senior managers,
7 dealing with a situation of global financial crisis,
8 might have responded in a way which, as Mr Ridyard said,
9 was different in kind. This was more than a normal
10 response to demand. That is the point. So focusing on
11 the form rather than the substance does not take us
12 anywhere.

13 Can I go to the famous red and blue dots, please,
14 which is at {E/35/30}. I might be at risk of
15 reiterating a point I made last week. How this works is
16 that all the blue dots are treated as high demand and
17 all the red dots are treated as low demand. Then
18 Professor Neven gets coefficients that he says are,
19 shall we say, unsupportive.

20 The point I made last week that Mr Beard has not
21 really addressed is that, when one looks at what
22 happened in 2008/2009, there is a vertiginous drop in
23 demand as the GFC gets going, but those first series of
24 blue dots are actually treated as high demand. So you
25 have got demand in freefall but treated for the purposes

1 of the coefficients as high.

2 So if we look now to page 32, {E/35/32}, we can
3 see -- if you look in the middle of this table, so the
4 first row is Mr Harvey and then the third and fourth
5 rows are different versions of Professor Neven's demand
6 control, but the one that we have been looking at is
7 order board, which is column 3. Order board p75 in the
8 middle is the high and the coefficient he gets is 0.004.
9 But if you look in column 1 -- that is his high
10 demand -- if you look at column 1 which is Mr Harvey's
11 model, the coefficient Mr Harvey has for UK sales
12 volume, which is his demand coefficient, if you like his
13 residual demand coefficient, is also 0.004.

14 There is another peculiar effect here as well, which
15 is -- sorry, I have lost my place now. Anyway, the
16 short point simply being that the way that
17 Professor Neven has constructed this blunts the
18 coefficients or blurs them, if you like, so it is not
19 surprising if the results are not very satisfactory,
20 although a high-level point on this is it is just not
21 well motivated because it is treating any old period of
22 high or low demand, by which he means half of the time,
23 25 plus 25 being 50, as just entirely equivalent to the
24 financial crisis.

25 So you can see, for example, a period in 2006 is

1 treated as equivalent to the financial crisis as is
2 a period in 2014. There is even a month between the
3 blue and the red dots, right in the middle of the
4 financial crisis, which he treats as normal. So this is
5 all entirely informative.

6 Emission standards, if I may. Sorry to rattle.
7 I am just keeping an eye on the time. The issue here is
8 about the attribution of what we have called the
9 "emission standard premia". But this is another area
10 where it is helpful to step back for a moment because
11 there is no doubt there was collusion over costs, timing
12 and price of emission standards and the tribunal has
13 evidence that truck buyers did not want them and it
14 would be expensive to develop them. So there was an
15 industry-wide problem of how to maintain margin.

16 It is our case that the cartel was the solution,
17 but, according to DAF, the cartel had no effect at all.
18 The last time this came around, sir, on the deck of
19 cards of this case, you raised the question again to
20 Mr Beard, "Why were you doing this then?", and Mr Beard,
21 as usual, could not answer the question. But what the
22 emissions premia represent is actually increased margins
23 over all of the costs.

24 So you have the costs of the emission standards that
25 the customer did not want, they pay the costs of the new

1 features that DAF added to sweeten the pill and there is
2 still a higher margin overall. Emission standard after
3 emission standard, it keeps climbing up because the
4 baseline is always used as Euro 3 in the modelling.

5 Well, this is a magic money tree. Every few years
6 you devise new expensive technologies, you have to
7 persuade customers to buy them, you keep getting bigger
8 and bigger margins on these trucks. Now, Mr Beard said,
9 I think yesterday, that overall DAF margins were not
10 rising, but they were on these trucks, that is what the
11 econometrics shows, and you managed to do all of that
12 despite the fact that all your competitors are in the
13 same boat. As Mr Beard accepted, all the other
14 manufacturers were presumably doing the same thing, and
15 that is {Day23/176:12}.

16 Now, it is our submission that the plain and obvious
17 inference is the cartel did have an effect. It was not
18 a magic money tree. It is just the fruits of collusion.
19 Now, one of the criticisms of Mr Beard is that Mr Harvey
20 treats the entire emission standard premia as
21 overcharge. I make two points about that. The first is
22 the model is actually conservative in two ways. I made
23 this point last week. Forgive me for recapping it. The
24 first is this: even though the cartel included collusion
25 over the recovery of cost of emission standards, the

1 premium does not include money paid to cover those
2 costs. The second way it is conservative is the premia
3 are all measured over and above the margin for Euro 3.
4 But Euro 3 is cartelised, it is explicitly said so in
5 the decision, so DAF is getting the big benefit of the
6 doubt precisely because we do not have the detailed cost
7 information we would need to actually identify the
8 premia over and above the cost.

9 It is worth pointing out that this conservative
10 approach has important consequences for the quantum of
11 the claim -- this is set out in paragraph 567 of our
12 written closings -- but these are modest elements in the
13 claimants' claim. For Royal Mail it is a total of just
14 under 1.4 million, with 1 million being the Euro 4
15 premia, against its total overcharge, including this, of
16 30 million. BT is claiming £251,000 against a total of
17 around 4.9 million. So that is the first point.

18 The second one is that there is just no evidence
19 that the features which DAF relied on actually would
20 have driven these higher margins in the competitive
21 counterfactual. There is just a vague appeal by DAF to
22 the general idea that quality improvements have this
23 effect. But there is no analysis to make that good. So
24 both Mr Beard and Professor Neven used the example of
25 increased horsepower, but that cannot be the answer

1 because Professor Neven controlled for it in his model
2 and still found an emission premia.

3 We discussed last week a sensitivity by Mr Harvey
4 which controlled for a range of substantial features
5 like cabin type, and he found they made no difference to
6 margins. That is page 245, paragraph 603. Now, DAF's
7 objection to this is it does not address quality
8 improvements in the features. Professor Neven accepted
9 that neither he nor -- there was no way to test for
10 that. But the point is simply this: if a change from,
11 say, a day cab to a sleeper cab makes no difference to
12 margins, it is hard to see how an improved sleeper cab
13 could drive margins so hard that they overcome the cost
14 of all of this unwelcome emission technology so you end
15 up not just level-pegging but actually ahead by the
16 amount of the emission standard premia.

17 We make essentially the same point about fuel
18 efficiency gains. It is dealt with in detail in our
19 closing. This is another cost. It is not a benefit of
20 the emission standards themselves, it is a mitigation
21 action. So it adds a benefit but it comes with a cost.
22 Again, what we have is pure assertion that customers
23 might like this enough not only to pay for it but to pay
24 for all this other green stuff that they do not actually
25 want.

1 Now, where this leads us, after all of this
2 argument, is a sensitivity by Professor Neven which
3 I will turn up. It is at {E/35/45}. This is the
4 sensitivity that he did where he removed the euro
5 emission standards and he says, "Well, there we are
6 then. You would expect the infringement coefficient to
7 increase", and in fact it does slightly, but not very
8 much. It goes from minus 0.7 to plus 0.7, we can see.
9 This is his model, of course.

10 We make three points about this. Firstly, there is
11 the issue of admitted variable bias and it is dealt with
12 in the joint experts statement at {E/78/64},
13 paragraph 7(d). I warmly commend it to at least
14 Mr Ridyard. There was criticism that we did not
15 cross-examine on this, despite the fact that all of this
16 was dealt with -- these general issues were dealt with
17 in the hot tub. But if there is any validity in that
18 complaint, which we do not think there is, it is a point
19 raised by Mr Harvey that perhaps Mr Beard should have
20 cross-examined.

21 But, secondly, Mr Harvey made what was thankfully
22 a much more straightforward point in the hot tub, which
23 is that there were other variables more likely to pick
24 this up than the infringement. This is summarised at
25 page 262 of our closing at paragraph 654. The point is

1 that the infringement is a blanket variable for the
2 whole period but other variables are more granular.

3 Mr Ridyard discussed with Mr Beard the possibility
4 it could be the cost variable. If we look at table 8,
5 what we can see is in fact the cost variable does
6 increase significantly from column 1, which is
7 Mr Harvey's -- sorry, this is all Professor Neven. MLO
8 cost in column 1 with the euro coefficients is 0.591 and
9 then in column 2, where they come out, it goes up to
10 0.658.

11 We also see an oddity about this model --

12 THE CHAIRMAN: I am not sure we have it on the screen.

13 MR WARD: I am so sorry. I just assumed it was. My fault.

14 I am so sorry. I must have given the wrong reference.
15 {E/35/45}. There we are. Thank you so much. I have
16 been talking to myself, but never mind.

17 THE CHAIRMAN: We have been listening.

18 MR WARD: Going back to the point I was trying to make is we
19 can see -- and this is Professor Neven's
20 before/during/after model, and the first point I made
21 was the column for -- sorry, the row for MLO cost, we
22 can see it goes up from 0.591, where the coefficients
23 are in, the euro fixed effects, to 0.658, when they come
24 out.

25 I was about to say there is also another odd feature

1 of this sensitivity which tells an amateur like me that
2 something here is wrong, which is to say that tonne
3 kilometres, which is the demand measure, the coefficient
4 goes from 0.002 to some quite strongly negative numbers.
5 The point we make is that this coefficient cannot
6 prove -- this sensitivity cannot prove the measure that
7 Professor Neven seeks to -- the conclusion
8 Professor Neven seeks to draw from it.

9 The other point we made was the lack of a clean
10 period because of the fact that either Euro 5 or Euro 6
11 trucks remain in the model. Like Professor Neven,
12 yesterday Mr Beard said, "What can I do?", and we say,
13 well, we did not really set this problem.
14 Professor Neven set this problem. We can see that if we
15 please turn back to {E/35/41}, where -- paragraph 2.78
16 is where Professor Neven sets up this sensitivity. He
17 says:

18 "To conduct this test in a rigorous way I need two
19 conditions to be verified: (i) first, I need to control
20 for changes in production costs and technical
21 characteristics ... (ii) secondly, I need to ensure that
22 the reference category over which the emission premia
23 are calculated is unaffected by the infringement. The
24 second requirement stems from the need to have a clean
25 counterfactual for the emission premia, ie, to estimate

1 the emission premia in relation to trucks that are not
2 tainted ... This will ensure that the hypothesis that
3 I intend to test, ie, whether the emission premia are
4 associated with the effect of the infringement, is
5 correctly specified."

6 Well, the short point is only, having set himself
7 that test, he failed it.

8 My final topic on emission standards is Euro 2, EEV
9 and 6. What do they tell us, if anything? So firstly,
10 Euro 2 and 6 are sort of relied on -- possibly being
11 relied on as a demonstration you get a premium even
12 without the cartel. But on Euro 2 the problem is, as
13 Mr Ridyard said, there is no truck-specific cost data,
14 so you can identify the price but you cannot identify
15 whether there is a premia over the cost. That is
16 actually common ground between the experts and it is in
17 the joint experts' statement at {E/68/69},
18 paragraph 7(e).

19 On Euro 6 Professor Neven accepted they could not be
20 used to identify how much of the premia should be
21 attributed to the infringement. We give the reference
22 at page 266, paragraph 653 of our closing. Part of the
23 problem is that we just cannot be sure they are clean
24 because the collusion included Euro 6, even though they
25 came on the market after the Commission came knocking on

1 the door.

2 Then on EEV there are three points. The first is
3 that the decision, in its operative -- in Article 1,
4 which is the operative clause, refers to collusion over
5 the standards of Euros 3 to 6, and EEV was a standard
6 between 5 and 6. Secondly, we have pleaded specific
7 evidence of collusion during the cartel on EEV. This is
8 particulars of claim {B/1/22}, paragraph 8(n). I am
9 told that in our closing we gave a wrong example, for
10 which apologies. I gather a corrected version has been
11 sent to the tribunal.

12 But I want to show you the correct document here,
13 which is {I2/209T}, please. This is an email chain.
14 I would like to go to the bottom of the chain, please,
15 and it is just an example of the kind of collusion that
16 we enjoy so much of in this cartel. This is an email --
17 in fact can you just go to the very bottom of the
18 previous page and then we can see who it comes from?
19 There we are. Thank you. It is from Ilona Rothacker at
20 Daimler and it is addressed to addressees at Scania,
21 DAF, MAN and Iveco. The subject is, "Extension EEV
22 query", and she says over the page, {I2/209T/2}:

23 "Hello and good morning,

24 "On the topic of EEV, which Jurgen has already asked
25 about, I have a few further questions (from when, where

1 applicable, price).

2 "I would be grateful if you could get back to me by
3 the end of the week. I have already compiled the data
4 I received from the last emails I received.

5 "As usual I'll then send the collected words to all.

6 "Many thanks in advance and best wishes from rainy
7 Berlin ..."

8 Rather magnificently she says --

9 THE CHAIRMAN: I notice that she says "Competition
10 Monitoring".

11 MR WARD: Yes. It is impressively formalised, as Mr Beard
12 said yesterday.

13 MR BEARD: You are allowed to monitor the competition. That
14 is a legitimate business --

15 THE CHAIRMAN: An actual office for competition monitoring.

16 MR WARD: So you are allowed to monitor the competition. It
17 just depends what you are asking. Then there is price
18 information given from the competitors. I am told that
19 the -- I said it was paragraph 8(n) of our pleading. It
20 is actually 18(n). So that is just a good example of
21 collusion in action.

22 Then I had a third point about this, which is
23 that -- I am reminded from behind -- including sharing
24 by DAF. I am sorry. We can probably see that if we go
25 to the next page while it is still up. The other way,

1 I am told -- no, further up. Yes, there we are. There
2 is an answer given by DAF, {I2/209T/1}.

3 I had a third and final point on this, which is,
4 even if these standards were -- these standards were
5 voluntary -- it is not even if -- they were voluntary,
6 EEV, but it was also subject to this longstanding
7 pattern of collusion, so you would need a positive
8 account from DAF about why this aspect of collusion was
9 somehow different, but instead you have the usual
10 silence.

11 Sir, it is 3.15. I am happy to -- I am just
12 entirely in your hands. I have actually one more short
13 topic on overcharge, so perhaps I should deal with that
14 and then consider a break if that is convenient.

15 THE CHAIRMAN: You are not going to go to Truck of the
16 Year -- Euro 4 Truck of the Year? I am very
17 disappointed.

18 MR WARD: I was going to say something about that but then
19 in the interests of time I took it out. I can summarise
20 my submission on that in two words. Marketing puff.

21 THE CHAIRMAN: Right, okay.

22 MR WARD: So let us go now to something a bit more
23 substantive, which is before, during and after. The
24 problem here is the AS/400 data set covers half the
25 cartel but is not very granular on cost, but because it

1 is half the cartel, even though it was not perfect, it
2 was of critical importance to test it. Mr Harvey did
3 and he obtained results that were robust, even without
4 the benefit of truck-level MLO data, and probably mostly
5 for the entertainment of Mr Ridyard we summarise the
6 various tests he did at pages 145 and 146 of our written
7 closing.

8 I wanted just to deal with a couple of points about
9 this. The first one is -- made yesterday by Mr Beard,
10 "Well, there is something questionable about the fact
11 that Mr Harvey estimated a higher overcharge for this
12 period and he made a last-minute attempt to argue that
13 the cartel itself might have had different levels of
14 effect in different periods because it was run out of
15 Germany in the second half". But, of course, in the
16 earlier years, it was run from headquarters and it is
17 quite hard to follow the argument that a headquarters
18 cartel has less effect. But I do also want to say that
19 this German point has been -- he has been sort of
20 teasing us with it a bit from time to time, but the
21 decision says that the German subsidiaries reported to
22 headquarters, albeit to differing degrees, which is
23 Recital 56, it remained an EEA-wide cartel and, of
24 course, as usual, DAF has not come forward with any
25 evidence to say, "Well, actually, by the time it was all

1 in Germany, that had nothing to do with the UK market,
2 even though we have admitted that the cartel was
3 a single and continuous infringement covering the entire
4 EEA".

5 So there is nothing at all in this point and, given
6 the duration of the cartel, it is not actually
7 surprising if average coefficients for the first half
8 look different from average coefficients in the second
9 half.

10 Now, the second point, which is a bit more
11 technical, is about the lower cost coefficient in the
12 before/during model. Well, Mr Harvey's point is that
13 this is to be expected because of the data. The cost
14 coefficient is measuring the relationship between DAF's
15 annual cost and its individual truck prices, rather than
16 the truck-level costs and truck-level prices in the
17 during/after model. So it is not surprising it is
18 lower; it has less explanatory power. But his view is
19 that the combination of the truck-level features and the
20 average truck costs gives high explanatory power and,
21 again, he has a series of sensitivities and tests that
22 show that.

23 So -- forgive me if I give the references without
24 going through them, just because of time -- there is
25 a sensitivity on the during/after model where he

1 replaced the truck-level cost data with truck
2 characteristics and achieved a very similar result to
3 the main model. That is {E/1/106}, paragraph 4.94(1).
4 He had carried out a further sensitivity which showed
5 truck characteristics picked up most of the variation in
6 truck-level MLO, and that is {E/2/44}, paragraph 254.
7 He also found that the R squared of the before/during
8 model is almost as large as the R squared in the
9 during/after model, and that of course measures the
10 proportion of variation that is explained.

11 Now, against that is put Professor Neven's
12 sensitivity which he says shows adding truck
13 characteristics does not materially affect the size of
14 the cost coefficient. But Mr Harvey's point is the
15 truck characteristics may not alter the cost coefficient
16 but they account for the otherwise unexplained variation
17 in prices, so the so-called acid test does not really
18 tell us anything informative.

19 Then my final point on the before/during/after is to
20 do with the question of whether Professor Neven's
21 before/during/after model is preferable. We do not
22 agree and it is dealt with at page 152 of the closing.

23 I just want to make a couple of points. Firstly,
24 despite what Mr Beard says, combining the two data sets
25 cannot somehow solve the limitations of the

1 before/during data. You end up with something that is
2 neither fish nor fowl. So you end up with an average
3 cost coefficient which is too low for during/after and
4 too high for before/during. That is particularly
5 problematic for Professor Neven because, of course, the
6 only way he controls for exchange rate is through the
7 cost coefficient. On this approach, you end up with
8 something that is totally fudged rather than anything
9 useful.

10 It is a more general disadvantage of the
11 before/during/after model that, of course, it includes
12 the period of the GFC. On any view, that adds
13 complexity to the situation. As to the idea that you
14 get the benefit of two counterfactual periods, because
15 the before, during and after includes the after period,
16 we also have the problem that we just cannot be
17 confident that this is clean.

18 So those are the submissions on the overcharge.
19 Just for the note, in terms of how they interrelate and
20 how much they are all worth, these points, I just give
21 you some references, if I may. Harvey 1, {E/1/9},
22 table 1, contains a breakdown of the different
23 coefficients he attaches for different periods and
24 emission standards; Harvey 2, {E/28/50}, contains
25 a table that you have seen which shows you perhaps a bit

1 of harm, right back in 2013, in the era of the
2 Commission's investigation.

3 Secondly, he has obtained information that we have
4 not, and the most glaring example is, please, if we can
5 go to {S/9/86}, which is our closing submission, we
6 quote from Professor Neven's evidence at 230:

7 "They explained to me, I mean, what they thought
8 this -- what the Commission had uncovered did not lead
9 to anti-competitive effect, so I heard, you know, from
10 the very beginning why they thought that there was no
11 effect, that the conduct uncovered by the Commission did
12 not lead to anti-competitive effect ... this narrative
13 has been constant throughout."

14 That is the narrative that we have not had access to
15 and Mr Beard said, bullishly, "Well, Professor Neven has
16 not relied on that". But the problem is we are in the
17 area here where appearances matter as much as anything.
18 It is obviously a concern that he has had this
19 narrative. This is much more of a concern than his
20 seemingly freelance and spontaneous obtaining of
21 information on an informal basis from the client. He is
22 being fed a line here by the clients.

23 THE CHAIRMAN: Are you saying that he should have set this
24 out in his reports?

25 MR WARD: Well, at the very least we ought to have known

1 something about it. It is very hard to deal with
2 because of course Professor Neven is not terribly
3 precise when he is talking about these things. But that
4 is obviously -- as he says, he has been fed this
5 constant narrative offering this one side of events. It
6 is all very well for Mr Beard to say, "Oh, well, but he
7 is testing it all due to the scientific method", but
8 what we are hearing is DAF in his ear saying, "No
9 effects, no effects, no effects". How can we say that
10 this has had no influence?

11 THE CHAIRMAN: I am sure they are constantly saying that.

12 MR WARD: Well, that is what he seems to say. This
13 narrative has been constant throughout -- well, not
14 constantly, but constant

15 So this is a concern, as well as the fact that we
16 give these various examples of where he had contact with
17 them. When Mr Beard was, I hope, good-naturedly teasing
18 me when I said it was something I will never forget, the
19 answer he gave me, it was not the content of the answer.
20 It was when I said to him, "So you do not know -- you
21 have not asked your clients why they did this?",
22 inferring from the absence of any reference to that in
23 his witness evidence and the fact that I had already
24 asked him if he had ever had instructions, and he said,
25 "Yes, I have". It is all set out on the next page,

1 paragraph 233, {S/9/87}. That is what I will never
2 forget, is being ambushed.

3 "But you have never asked DAF any questions about
4 why it carried out this cartel --"

5 After I had been very careful to ask him, "Have you
6 received any instructions from them?", Answer, "No":

7 "Answer: I did.

8 "Question: Oh you did?

9 "Answer: I did, and actually I have had ... answers
10 ..."

11 That is what I will never forget. I do not
12 really care what he said by way of the content.

13 THE CHAIRMAN: Do you say that that sort of over-influenced
14 his theory of harm or whatever?

15 MR WARD: I just do not know but neither do you. That is
16 the real problem here. As *Ikarian Reefer* tells us, this
17 is an area where appearances really matter.

18 What we submit is that there is a whole series of
19 these instances where he has obtained this information
20 from DAF informally. It only crept out during
21 cross-examination where I asked him questions about
22 various things and he said, "Oh, well, I have been
23 talking to DAF about that". What that shows, in our
24 respectful submission, is a blurring of the lines and
25 a failure to respect the rigour of the expert process

1 which is intended to create a level playing field.

2 THE CHAIRMAN: I suppose Mr Harvey has been speaking to
3 Royal Mail and BT over the years?

4 MR WARD: Yes, but that does not mean he has been getting
5 instructions of what happened in the cartel because they
6 do not know anything about it. When it comes to the
7 theory of harm, which is at least the starting point for
8 this, it all is asymmetrically concerned with DAF. They
9 are in the cartel, not BT and Royal Mail.

10 THE CHAIRMAN: Well, that is what he was first asked to
11 consider, so it seems from his --

12 MR WARD: Indeed. Right back in the day when he was
13 effectively advising them how to devise a defence.

14 THE CHAIRMAN: We have never had that engagement letter,
15 have we, from 2013?

16 MR WARD: No. In fact I think the latest correspondence
17 was -- we asked them if they would obtain it from
18 whoever it was, the first set of consultants, CRA, and
19 they said no. We link this with what we call his
20 "enmeshment" because it is all very well for Mr Beard to
21 say, "Oh, well, Mr Harvey has done a case for Royal Mail
22 too", but, you know, Professor Neven is acting in
23 respect of 1,700 cases. It is quite extraordinary. He
24 is not instructed yet as formal expert. As he said
25 himself, that might depend on how well he does in this

1 case, which is not the most encouraging answer, to be
2 frank. It is just completely out of the ordinary. We
3 have become a bit numb to this figure, but in my
4 respectful submission it really is quite eye-popping.

5 We do also rely on -- sorry, sir.

6 SIR IAIN MCMILLAN: May I ask a question, please? Is the
7 point you are making to the court that, as an expert
8 witness to the court, he is compromised and that we must
9 treat his evidence with some caution?

10 MR WARD: Yes.

11 SIR IAIN MCMILLAN: Is that what you are telling us?

12 MR WARD: Yes, that is what I am saying. I possibly would
13 not have used the language "compromised", but that is
14 the gist of it. We have been more careful to put it in
15 the legal tests in our submission. But we do say this
16 all goes to weight, in fact, because we are unsure about
17 this. We do think it is all a feature of his enmeshment
18 with DAF. I am not suggesting, as Mr Beard tried to put
19 it earlier, he is doing this for financial gain. Of
20 course we have not put our case that high and we do not
21 need to. We are just talking about what is essentially
22 a matter of appearance. That does not make it --

23 THE CHAIRMAN: But if we think he has got the econometrics
24 right and we think he has come to the right conclusion
25 on, say, exchange rates, are you saying we should be

1 extra cautious about that because we know where he is
2 coming from?

3 MR WARD: Well, not necessarily. You obviously put an
4 example to me of something that is highly concrete and
5 it is obviously for you, if at all, to consider where
6 this might affect marginal cause(?). Most obviously,
7 the biggest concern in a sense is what seems to be
8 a direct route between work as a consultant at the one
9 end and producing this argument that it is not even
10 plausible that there was an effect from this cartel,
11 coupled to which -- I have made this criticism of his
12 lack of curiosity about any of the facts.

13 There is only one other thing I wanted to say before
14 moving on to perhaps more substantive matters. You
15 know, it is in the famous footnote, all of this
16 information, but none of it was disclosed at the point
17 when he was being put forward as expert. Mr Beard dug
18 out a piece of an old CMC where on one page Mr Pickford
19 said that Professor Neven is the appointed expert and
20 then a few pages later he said, "Oh, and Compass Lexecon
21 are acting on a range of cases". He did not say, "By
22 the way, Professor Neven is acting in respect of 1,700
23 cases". I do not think it would have gone quite so
24 smoothly for him that morning if he had.

25 THE CHAIRMAN: I do seem to remember that Professor Neven

1 made the same point a few times about the cartel sort of
2 shifting to the German subsidiary as though that was
3 quite an important factor so far as he was concerned.

4 MR WARD: Yes.

5 THE CHAIRMAN: I know it is in the decision but it rather
6 looked as though he was reading quite a lot more into it
7 than anybody else.

8 MR WARD: It was more than that. If you wanted to look at
9 it, we have given the reference at 237.2, because that
10 is where he said he had essentially specific factual
11 information about this. As I said earlier, DAF has not
12 put forward any case on this. They have not chosen to
13 call witnesses to say that it was all Germany, it had
14 nothing to do with the UK. So this was really another
15 strong example of Professor Neven then, as it were,
16 spontaneously offering information that was apparently
17 material, material enough to him to make him mention it,
18 but it was all news to us. We have made the point that
19 obviously you cannot rely on it given its provenance.

20 MR BEARD: It is in the decision.

21 MR WARD: Well, let us look at what is in the decision --

22 THE CHAIRMAN: It is not -- I do not think you mean it was
23 not news to you. I mean it was --

24 MR WARD: It was news. What is not news to us is what is in
25 the decision, but it is very limited. It certainly says

1 that the cartel was run out of Germany and then it
2 says -- sorry, I am turning it up. There is sadly no
3 choice at this point. Then what it says is --

4 THE CHAIRMAN: Is it 56?

5 MR WARD: Thank you, sir. You are ahead of me. It says:

6 "In later years, the meetings involving German level
7 became more formalised [as read] ...", and so forth.

8 Then at the bottom of that paragraph it says:

9 "Information on intended future gross price
10 increases exchanged at the level of German subsidiaries
11 was in varying degrees forwarded to respective
12 headquarters [as read]."

13 If DAF wanted to make a case that for us, for DAF,
14 the varying degrees were extremely low and did not
15 involve anything remotely useful in the UK, they could
16 have done, but that would have broken the omerta over
17 what actually was going on in this cartel. So it is not
18 saying --

19 THE CHAIRMAN: This is all the addressees here.

20 MR WARD: All the addressees, admitted by all, admitted by
21 DAF. No positive case ever advanced and anyway it would
22 have been an abuse of process according to
23 Mr Justice Roth.

24 MR BEARD: Obviously Mr Ward can have lots of goes at the
25 decision. He can use his time as he will. The only

1 point I was making was that Professor Neven, when he
2 talked about this, had actually specifically referred to
3 the decision. Just for your notes it is
4 {Day11/119:5-16}. That is the only point I am making.
5 I am not trying to deal with anything else.

6 MR WARD: What I do say, though, is that this is all
7 important. The 2013 work is important because he was
8 a consultant by then. I do not say it only goes to
9 theory of harm, I can see that some issues are more
10 technical than others, but that you should keep this in
11 mind when assessing the weight of Professor Neven's
12 evidence. That is really it. We do say that if we had
13 known all this at the beginning, we would have objected,
14 is frankly it.

15 THE CHAIRMAN: Really?

16 MR WARD: It would have been an interesting day in court but
17 that is certainly -- I think we would have.

18 MR BEARD: I am sorry I missed that.

19 THE CHAIRMAN: We are beyond that anyway.

20 MR WARD: I want to go back now, please, to the substance,
21 and I can be brief, as Mr Beard was brief.

22 The first one is value of commerce and the issue
23 here is bodies. Something that was totally absent from
24 Mr Beard's submissions this morning is that DAF itself
25 manufactured bodies. It was not just the third party

1 ones which it procured for Royal Mail and Morrisons, but
2 it made, in the cartel period, 7,000 bodies in its
3 Leyland plant. The reference for that is somewhere in
4 the pricing statement. Someone will give it to me on
5 the screen in a moment. When it did so, they were
6 options on the trucks it was selling.

7 THE CHAIRMAN: So is that all the bodies that you are
8 intending to include in the value of commerce --

9 MR WARD: No.

10 THE CHAIRMAN: -- were manufactured by DAF?

11 MR WARD: No, because we do rely on additionally the fact
12 that they supplied bodies which they had procured from
13 third parties to Royal Mail. Royal Mail drove off in
14 the truck with a body.

15 THE CHAIRMAN: But some of them were manufactured by DAF,
16 some of them Royal Mail --

17 MR WARD: I am not sure if Royal Mail bought any of the
18 manufactured --

19 MR BEARD: None.

20 MR WARD: But we are dealing here with a matter of
21 interpretation, you see. That is why this is important.
22 It is not irrelevant. Because you put yourself back in
23 DAF's shoes, it is facing what is likely to be a tidal
24 wave of claims, as indeed is the case. It is settling
25 the case. It is looking at the language of the

1 decision. We do not know, we cannot go into the black
2 box of whatever they were doing or told the Commission,
3 but apparently they were not worried about this point.
4 The first we heard of it in this case was 2021, by when
5 we had been merrily going along for nearly five years
6 and somebody had a brainwave, "Let us get the bodies out
7 of the case. It will knock a chunk off the value of
8 commerce". But even in the case of the Royal Mail
9 bodies --

10 THE CHAIRMAN: What, it was not part of their original
11 defence, you are saying?

12 MR WARD: No, no, no, it was all pleaded in. The
13 complements defence was pleaded in some time in the
14 middle of 2021 and at some point during that year they
15 also wrote us a letter -- I think the details are
16 actually in our written closing -- but it was years into
17 this litigation before this point broke the surface.

18 THE CHAIRMAN: You have had your chance, Mr Beard.

19 MR BEARD: We did not know they were claiming for bodies.

20 MR WARD: Actually it was completely apparent. It was
21 completely apparent we were. It was no secret. I mean,
22 it is just apparent on the face of the pleading.

23 Anyway, in the case of Royal Mail, what we do rely
24 on is Mr Ashworth's statement -- witness evidence, no
25 less, {D/22/13}, paragraph 48. It came down to the

1 price that they were willing to pay on the whole truck.
2 Ultimately, especially with Royal Mail, the negotiation
3 would always come down to the price the customer was
4 willing to pay for the whole truck.

5 Then just finally on this topic, there is a debate
6 about the *Landkreis* case that Mr Beard referred to. He
7 says it supports his position. It is an ambitious
8 submission. We deal with it in our written closing and
9 we invite the tribunal to consider it.

10 Complements. Again, I am going to deal with these
11 points as quickly as I possibly can. Economic theory is
12 not proof of causation without actual evidence.
13 Mr Beard said it just exists. Great. That just assumes
14 the point he needs to prove.

15 The problem with the complements analysis is that
16 Professor Neven himself admitted to the inadequacy of
17 the data in various quotes we gave at paragraph 689 of
18 our closing. He has no truck manufacturer data except
19 DAF, he has no direct data about trailer body
20 manufacturers, he has no specific margin data and the
21 key problem with that is that the margins are not
22 robust, but for exciting mathematical reasons, they are
23 the crucial elements in the complements analysis.

24 Now, Mr Beard said, "Well, it is all conservative
25 because we rely on the lowest level of complements

1 effect in Professor Neven's model". But that all just
2 depends on whether the model is robust. In our
3 respectful submission it is not, for the very detailed
4 reasons in the evidence and the submissions, and it is
5 just not good enough to say that it is the best
6 Professor Neven could do with the data. The question is
7 whether it is sufficient to prove their case and, again,
8 our submission is it plainly is not.

9 On used trucks --

10 THE CHAIRMAN: Sorry, you accept as a matter of pure
11 economic theory it makes sense?

12 MR WARD: We accept that, as a matter of theory, if a price
13 of a complement goes up, the other one will go down.
14 Whether it happens and the extent to which it happens is
15 empirical and everyone agrees there is no proper way to
16 test it empirically. Instead we have this simulation
17 analysis of which we have a multitude of concerns, but
18 it is lack of data, it is oversimplification, it is not
19 in the cartel period. Mr Beard says that is a virtue,
20 but the problem is all the data is different in the
21 cartel period; again, points made by Mr Harvey and
22 developed in our closing submissions. So you have to be
23 confident it really was accurately predicting what would
24 happen and you simply cannot be.

25 Used trucks. Again, just a few very short points

1 dealt with at more length in our closing. Mr Beard
2 said, "Well, we do not understand why there would be
3 a break in the chain of substitution", but, of course,
4 it is for his clients to prove that there is a chain of
5 substitution and in our closing we set out from the
6 evidence a whole set of reasons why it is improbable.

7 But the main argument here, of course, is about
8 Professor Neven's regression and we have two key
9 concerns about that. One is the adequacy or inadequacy
10 of the data that he has because, of course, he only has
11 DAF data on the one hand and he only relies on
12 Royal Mail used truck data on the other. He said, as
13 Mr Beard did this morning, "Well, it gives us a local
14 estimate for Royal Mail". But of course it is just
15 question-begging whether that so-called local estimate
16 is actually robust if you have not got the wider market
17 data to test it.

18 Then we get on to the delightful topic of bias and
19 multi-collinearity. Well, I will be as brief as I can.
20 The first thing is Professor Neven acknowledged that
21 this was a problem in his model and we give the
22 references to where he rightly fessed up to this in his
23 report. Then, mostly for the enjoyment of Mr Ridyard,
24 the sensitivities show you just cannot square the
25 circle. In the end, the model does not control properly

1 for the truck characteristics and you cannot just
2 assume, as Mr Beard says, that the bias is downwards.

3 I would also observe that we made the point in our
4 closing, both written and oral, that Professor Neven
5 basically gave up the game on BT and this resale pass-on
6 effect and we did notice Mr Beard did not find time to
7 comment on that just now.

8 THE CHAIRMAN: He extrapolates -- he uses the Royal Mail
9 data to estimate BT.

10 MR WARD: Yes, even though they are completely different
11 trucks and he has no useful sensitivity that can show
12 him that this is robust, and under some questioning from
13 Mr Ridyard he basically said, "Well, all right.
14 I cannot really rely on this". Those are not quite his
15 words, but that was the gist of it. We set it out
16 verbatim in the written closing.

17 Now, I was going to go on to supply pass-on where
18 a rather long topic was boiled down to not very much by
19 Mr Beard, to my eternal gratitude, but I want to just
20 deal with the legal points a little bit. It is set out
21 comprehensively in our written closing. I went through
22 it with you. I do not intend to do it all again but
23 I want to just highlight a few points.

24 The first one is the legal question. It was
25 straightforward in Sainsbury's; it is not

1 straightforward here. That is not just our view, that
2 is the view of the CAT and it is the view of the Court
3 of Appeal. Both of them distinguish the Sainsbury's
4 case and both of them considered that it was relevant
5 that it was a known charge in the *Sainsbury's* case.

6 I want to just remind you of what is said about
7 that. If we could open up our closing at 323, so that
8 is {S/9/323}, a little bit further down, please --
9 sorry, I said "323" and I meant 322. It is my fault,
10 {S/9/322}. This is back in the CAT's May 2021 judgment.
11 Paragraph 42:

12 "In our judgment, before a ... general plea of
13 mitigation through ... cost reduction processes can be
14 pleaded ... there must be ... a direct causative link
15 between the Overcharge alleged and the prices paid ...
16 that reduced the amount of the loss resulting ..."

17 Over the page, please, {S/9/323}:

18 "What is sufficient to give rise to such an
19 inference will vary from case to case, but it may be
20 found in facts such as a claimant's knowledge of the
21 nature and amount of the Overcharge (such that it is
22 inherently likely that a claimant would seek to address
23 it) ..."

24 Then if we go on to *Stellantis* -- sorry, no, go to
25 the bottom of the page. This is where he distinguishes

1 the *Sainsbury's* case and it says in the emphasised
2 part -- he says:

3 "In *Sainsbury's*, it was plausible that a merchant
4 facing a ... charge ... would have sought to recoup [it]
5 ... Here ... the Overcharge was not only covert but
6 a tiny fraction ..."

7 Then if we can go on to page 324, {S/9/324}, we say
8 at the bottom of paragraph 822:

9 "... the Claimants were entirely unaware of the
10 Overcharge and of the secret cartel ... DAF does not
11 suggest otherwise. This is far from the position of
12 *Sainsbury's* (where the pass-on defence nonetheless
13 failed on the basis that the defendant could not
14 establish a causal link ..."

15 I am going to show you that in a minute. The Court
16 of Appeal said in *Stellantis*, {S/9/325}:

17 "... There was nothing secret about the imposition
18 of a MIF. It was a transparent, known, charge and [in]
19 a recognised industry practice ... a systemic and
20 troublesome cost that [a retailer] would, inevitably,
21 have had to confront."

22 Now, I just want to make the -- Mr Beard said, well,
23 yes, but in *Sainsbury's* they did not know about the
24 increment on the cost, but, actually, in the *Sainsbury's*
25 judgment of the Supreme Court, it makes clear that the

1 challenge was to the entire MIF, the entire fee, and
2 that is paragraph 42, which makes clear the
3 counterfactual was zero MIF.

4 Now, Mr Beard does not like this case law. He
5 wishes it was wrong, but unfortunately it is the case
6 law and, in our submission, it is right.

7 THE CHAIRMAN: The CAT was dealing there with a category 3.

8 MR WARD: Type 3, case, yes, of course. But as you put to
9 Mr Beard and as we have submitted, they are the same.

10 THE CHAIRMAN: What they are saying in the CAT is that they
11 did not know about it and therefore they could not
12 address it.

13 MR WARD: That is right.

14 THE CHAIRMAN: It is sort of looking at a way to address
15 something you know about.

16 MR WARD: Exactly. But we say exactly the same is true
17 here.

18 If you would not mind just not mumbling "No", that
19 would help.

20 Why does this matter is the question. Why are these
21 judgments actually right? The answer is the
22 Supreme Court judgment requires the claimant to have
23 taken action arising out of the transaction or in this
24 case the overcharge.

25 In our submission it makes no sense to say, "Well,

1 they took action resulting from something they did not
2 even know about and which required 1,000 pages of
3 Mr Bezant's reports to even try and find". So --

4 THE CHAIRMAN: Your argument -- if your argument is correct,
5 in a secret cartel case you could never have supply
6 pass-on.

7 MR WARD: I do not need to go as high as that, actually,
8 because I accept that what Mr Justice Roth -- the CAT
9 says is what is sufficient "may be found" in such
10 features as "knowledge of the nature and amount of the
11 Overcharge". That is at the top of 323 of our closing,
12 {S/9/323}. So he does not say it is an absolute bright
13 line test in absolutely all cases, but it is relevant in
14 our case.

15 THE CHAIRMAN: Well, the Court of Appeal in *Stellantis*
16 seemed to be contrasting it with a typical secret
17 price --

18 MR WARD: Well, it is, it is. All I am saying is I do not
19 need to go that high. I would rather not put my case
20 higher than I need to.

21 THE CHAIRMAN: You understand we might be interested in
22 whether it has that effect?

23 MR WARD: Well, I am quite content for you to rule on the
24 facts in my case. My interests are rather narrower.

25 THE CHAIRMAN: Okay, because you did not know about it, it

1 does not work and it is very small.

2 MR WARD: We did not know about it, it was extraordinarily
3 small, it required hours and hours of the finest minds
4 to even try and trace it through. How can it seriously
5 be said that my clients took action resulting from that?
6 Okay, it went in the cost stack -- it took action
7 resulting from the cost stack, of course it did. But it
8 does not mean that it took action, mitigating action, on
9 the basis of the overcharge.

10 THE CHAIRMAN: You would expect any business to take action
11 on its costs?

12 MR WARD: Absolutely. One of the things these judgments say
13 is that is not enough.

14 THE CHAIRMAN: Yes.

15 MR WARD: So, sir, that is --

16 THE CHAIRMAN: I think I put to you a while ago that we are
17 in the unusual position that we have all this regulatory
18 material which we do not have in a normal unregulated
19 business case where they are always trying to recover
20 their costs.

21 MR WARD: Yes, and our respectful submission is that does
22 not help, it actually makes it worse, because of course
23 it makes the chain of causation even more complex
24 because it has to go through all of these (overspeaking
25 - inaudible).

1 MR RIDYARD: At least the chain is written down, is it not?

2 MR WARD: Some of it is, but one of the things we have come
3 up against here is the limitations of that, despite the
4 vast amount of effort that has been put in here and no
5 stone left unturned by DAF.

6 That actually takes me to the more broad point
7 I wanted to deal with next, which deals with Mr Beard's
8 high-speed submissions at 12.45, which is -- in fact we
9 can just take this by quoting from their closing. We do
10 not need to turn it up, but it is {S/11/35},
11 paragraph 115.

12 What they say -- perhaps we will actually, if that
13 is okay. They say -- if you look at paragraph 115,
14 starting on line 3:

15 "The Tribunal's starting point should ... be that,
16 in principle, if the Claimants were faced with higher
17 costs as a result of the putative overcharge, then the
18 regulator would have permitted them to charge higher
19 prices (and the Claimants would have taken up this
20 opportunity)."

21 In our respectful submission, that begs all of the
22 questions. The critical issue is whether it would have
23 actually made a difference. The reason why DAF takes
24 this broad approach is it cannot actually prove such
25 a link. Instead, in our submission, what we get instead

1 is a series of leaps in the dark. So on BT we have this
2 cumulative probability in the next rounding, and this
3 approach is used by Mr Bezant precisely because he does
4 not know if it ever happened or, if it did, when or how
5 much or on which products. It is really not good enough
6 to say, as Mr Beard did, "Oh, well it all comes out in
7 the wash". It just does not suffice to prove proximate
8 cause any more than factual cause.

9 Then, on Royal Mail, they make assumptions about how
10 the regulator would have behaved in the counterfactual
11 in the face of tiny changes in the cost stack. So to
12 give an example -- again, we dealt with all of this
13 earlier -- we do not know how -- Mr Bezant says he does
14 not know how much headroom the regulator would have
15 allowed in either PC2 or PC3, but he seeks to say,
16 "Well, a really small change in headroom would have
17 affected the price control". But again it is
18 question-begging.

19 In PC3 we learned that the real issue here was we
20 had an RPI-X to one decimal place and then the regulator
21 shaped it so BT would get more money for its pension and
22 the sums came out to two decimal places. But that was
23 not a sort of ultra-refined form of granularity. It was
24 just shaping the control. So what Mr Beard conceded
25 eventually this morning is, well, it all depends on --

1 what you put to him, sir, was that this was purely
2 mechanistic, but it is not. There are mechanistic
3 elements, for sure, spreadsheets containing vehicle
4 costs, and then there is a plethora of judgments laid
5 across that, volume forecasts and so on and so forth.
6 Then right at the end, even if you are clinging on to
7 that tiny bit of overcharge that has been through all of
8 this, you trace it like a diligent forensic accountant
9 and you say, "There it is, it is still in there
10 somewhere", you then have a judgment about price setting
11 which, as much as anything, only goes to a certain level
12 of granularity, so it is one decimal place or it is plus
13 3% or something of that kind or a whole pound or down to
14 whole pennies, and the sums we are involved with are
15 very, very small relative to the size of these two giant
16 businesses and at the end of the day, what is required
17 is a leap of faith.

18 THE CHAIRMAN: You say, yes, you can show it goes as an
19 input, but you cannot necessarily see where it comes
20 out?

21 MR WARD: Yes, that is one way of putting it. So if the --

22 THE CHAIRMAN: It might not come out immediately. There
23 might be another penny on stamps in a few years' time.
24 But at some point, Mr Beard is saying, it will cover the
25 overcharge. But you are saying, "Well, that is too far

1 down the line"?

2 MR WARD: No, I am not even sure I would say it just happens
3 eventually. The problem is it is just so small relative
4 to what we are talking about. The insurmountable
5 obstacle for the defendants is actually showing it made
6 a difference -- that a penny in one's bank account
7 really made a difference. I mean, it is not even
8 a penny. You saw the figures. I do not need to go back
9 over them. That is the problem. So this
10 super-exhausting and exhaustive forensic accountancy
11 approach ends up at a brick wall, and the brick wall
12 is: did it really make a difference? Did it cause
13 prices to be higher?

14 Now, it is all very well to say, "Well, we are not
15 looking at it incrementally. It is just one cost
16 stack", which is one of Mr Beard's points this morning.
17 Okay, but the cost stack is only a tiny bit higher, and
18 did that tiny bit make the difference between price
19 point A and price point B? That is what they have got
20 to prove.

21 One of the ways the authorities talk about this
22 problem is in the difference between legal pass-on,
23 which is what we are talking about, and economic
24 pass-on, which is just this question of cost recovery
25 and so forth. We quote from Mr Justice Roth in our

1 closing, talking about this on page 318, {S/9/318},
2 where he says at the top of the page -- this is part of
3 his dialogue about trucks into stamps. We can see he
4 says -- he is arguing with Mr Pickford, who at that
5 point had the honour of acting for DAF:

6 "... it is a question of law. I mean as a matter of
7 fact a business will absorb its costs. That's exactly
8 the issue that arose in the *Sainsbury's* case. The
9 question for the court is a matter of what is legal
10 pass-through, not what an economist would say or what
11 the business actually did."

12 What he is talking about there is a passage in the
13 *Sainsbury's* judgment of first instance that was upheld
14 by the Court of Appeal. I might, if I may, just show
15 you that because it really is key to why the *Sainsbury's*
16 case failed. I am just looking for the reference. I am
17 sorry. Oh, yes, it is {AU/6.1/271}. In fact 270,
18 {AU/6.1/270}. Can we go to the bottom of the page,
19 please?

20 Right, something is wrong here. Can we go on
21 a little bit? I am looking for 484(4). {AU/6.1/278}.
22 There we are, thank you so much. We just pick up from
23 (4):

24 "We have already noted that whilst the notion of
25 passing-on a cost is a very familiar one to an

1 economist, an economist is concerned with how an
2 enterprise recovers its costs, whereas a lawyer is
3 concerned with whether a specific claim is or is not
4 well-founded. We consider that the legal definition of
5 a passed-on cost differs from that of the economist in
6 two respects.

7 "(i) first, whereas an economist might well define
8 pass-on more widely (ie to include cost savings and
9 reduced expenditure), the pass-on defence is only
10 concerned with identifiable increases in prices by
11 a firm to its customers.

12 "(ii) secondly, the increase in price must be
13 causally connected with the overcharge, and demonstrably
14 so."

15 The *Sainsbury's* Supreme Court judgment in a sense
16 puts this through the lens of mitigation but this
17 articulates this distinction between legal and economic
18 pass-through.

19 I should say we do not accept there is even economic
20 pass-on here, we do not agree the overcharge gets
21 through the stage of forecasts and frameworks and so
22 forth, but it certainly does not amount to legal pass-on
23 for the reasons that we have developed.

24 THE CHAIRMAN: They were sort of looking at pass-on in terms
25 of unjust enrichment in that -- in *Sainsbury's*, were

1 they not?

2 MR WARD: Yes, they are, but this point that --

3 MR BEARD: (Overspeaking - inaudible)

4 THE CHAIRMAN: That is another layer of complexity which --

5 MR WARD: I mean, as ever, Mr Beard said this morning --

6 THE CHAIRMAN: I suppose that has been clarified by the
7 Supreme Court looking at it and saying it is mitigation
8 here.

9 MR WARD: Exactly.

10 I think I am coming to the end. I am sure that is
11 popular. I was going to say actually, on supply
12 pass-on, I made a point last week that DAF did not
13 really argue large parts of the case on supply pass-on
14 and I thought it might be helpful to have some
15 approximate figures of what percentage of the claim is
16 represented by what. I have to emphasise approximate
17 because the experts do not entirely agree on this, so
18 I hope you will treat this as indicative rather than an
19 attempt to be definitive.

20 So in terms of BT, it is only RPI-X that has
21 actually been argued and that is for Openreach. RPI-X
22 is 55% of the overcharge for Openreach. Openreach is
23 something like 75% of the BT total claim but the experts
24 do not agree on exactly how much. 55% of 75 -- sorry,
25 75 and 55 I should say is 41%.

1 For Royal Mail the only figures I have are -- sorry,
2 I am told that excludes residual value.

3 THE CHAIRMAN: The pass-on defence is only related to
4 Openreach for BT?

5 MR WARD: Well, it is not pleaded that way. I am just
6 saying this is the only part that has really been
7 argued.

8 Then for Royal Mail we have only had arguments about
9 the regulated prices for PC2 and PC3, so I do not have
10 an actual figure for the regulated prices. But for the
11 whole of the PC2 period it is about -- 26% or 27% of the
12 overcharge is PC2, of which about 10% is unregulated.
13 PC3 is 31% to 33% of the overcharge, depending on which
14 time period, and I am told it is 10% to 16% unregulated.

15 The Government period, which is unregulated, is 7%
16 to 9%. PC1, the figure I have is 14. Ofcom period, it
17 is 6 to 7. Parcelforce, it is between 5 and 12.5,
18 depending on which expert you prefer, and of course none
19 of this involves the residual value. But we do
20 strenuously resist the argument that you can just
21 extrapolate out from what Mr Beard has addressed the
22 things that he has not addressed.

23 The loss of volume -- sir, sorry. I thought you
24 were going to ask --

25 THE CHAIRMAN: I thought it was put forward as 100%.

1 MR WARD: It is, but what I am saying is that is actually
2 just unjustified because it has not been argued that
3 way. It was not --

4 THE CHAIRMAN: So where do you get these figures from?

5 MR WARD: These are the figures that are the percentages of
6 the overcharge which these various aspects of the claim
7 represent, indicative numbers.

8 Mr Beard has tried to mount a case that he should
9 have 100%, but my objection that I made in the -- I was
10 going to say "opening" -- but closing last week is not
11 in the opening, not in the cross-examination, not in the
12 written closing do they actually engage beyond some of
13 these very core areas. That does not give them a blank
14 cheque to just claim -- even if you agree with them on
15 those things, which we do not think you should, but that
16 does not allow them to scoop the pool by a vague
17 reference to proportionality.

18 As Mr Beard said this morning, it would have taken
19 a very long time to litigate this issue properly. We
20 did not ask them to bring the claim, we spent a lot of
21 time and energy explaining why ultimately we think it is
22 really misconceived, but even if you disagree with me
23 about that, we think the scope of their success should
24 actually be confined to what they have actually argued.

25 THE CHAIRMAN: Those figures are from Mr Bezant's --

1 MR WARD: Well, they came from behind me. I think they are
2 based on Mr Harvey and I have tried to give ranges where
3 we understand there is a bit of a dispute. If it really
4 matters, I am sure solicitors' letters can be written.

5 MR BEARD: If it helps, I am not going to say that
6 every per cent is right, but in terms of the broad
7 apportionment, those are correct.

8 MR WARD: Consensus breaks out in the last hour of the
9 claim! Marvellous. Demob-happy.

10 MR BEARD: Not that much consensus.

11 THE CHAIRMAN: I am pleased you are!

12 MR WARD: Then loss of volume, only two points to make. DAF
13 bears the burden of proof on infra-marginal sales.
14 Neither of its experts were able to say this actually
15 made -- the loss of volume actually made a difference to
16 the pricing.

17 With that I am going to hand over to Mr Lask,
18 subject to just one thing. You will recall we handed up
19 a table which was a version of DAF's annex 4 which
20 contains sensitivities to do with resale pass-on and we
21 had added a column of our own. Just to say what our
22 argument was. We have done the same thing with annex 1,
23 which contains other sensitivities of Professor Neven.
24 We are going to hand it up but it contains no argument
25 whatsoever. It only contains cross-references. So we

1 hope that is not objectionable.

2 MR BEARD: If it is just cross-references, then --

3 MR WARD: It is literally just --

4 MR BEARD: If Mr Ward is promising that and it is an
5 undertaking to the court, of course I do not object.

6 MR WARD: I am promising that is what I understand. I am
7 not sure -- someone will tell me very quickly if it is
8 wrong.

9 THE CHAIRMAN: It saves us going through it orally, so ...

10 MR WARD: Exactly. That is coming out now, but no doubt
11 someone will tell me very quickly if I have got that
12 wrong. But subject to that and subject to any
13 questions, I was going to hand over to Mr Lask. (Handed)

14 THE CHAIRMAN: It looks like there are lots of references
15 there anyway.

16 MR WARD: Oh, yes.

17 MR BEARD: Yes, I think the temptation is to say "Do enjoy".

18 Reply submissions by MR LASK

19 MR LASK: Good afternoon. I am conscious I really do have
20 the graveyard slot so I will be as brisk as possible.

21 Firstly, timelines. Mr Beard relied on his
22 timelines and the underlying material for two key
23 purposes yesterday. First, to submit that even if the
24 tribunal accepts the overcharge established by
25 Mr Harvey's regression analysis, then that overcharge

1 does not apply to the claimants, and this was referred
2 to as his "second bite of the cherry" point. Secondly,
3 to submit that it was not even tenable that the
4 mechanisms by which DAF NV influenced DAF UK's
5 transaction prices, particularly via the use of list
6 price increases, applied to the claimants. I will
7 address each of those in turn.

8 To be clear, contrary to Mr Beard's submissions
9 yesterday, we obviously do not say that one cannot look
10 at the contemporaneous material. Indeed, we have relied
11 extensively on contemporaneous material in our closing
12 and we say that it strongly supports our case. But the
13 question is: what conclusions are you seeking to draw
14 from that material? The fundamental problem with DAF's
15 approach is that the contemporaneous material cannot
16 sustain the conclusions that it seeks to draw from that
17 material via its timelines.

18 So, second bite of the cherry. Now, we say
19 Mr Beard's first argument fails for the reasons I gave
20 on Monday, when explaining why the timelines are
21 uninformative. Mr Ridyard alluded to these yesterday in
22 his exchanges with Mr Beard. The short point is that
23 the timelines do not control for the various factors
24 that may affect how prices evolve and which the experts
25 did control for, for example costs, transaction

1 characteristics and economic conditions.

2 As such, they do not allow any conclusions to be
3 drawn as to what prices would have looked like in the
4 counterfactual. The tribunal will recall that the
5 timelines do not even attempt to compare prices during
6 the cartel with those outside the cartel, let alone
7 control for other factors. So borrowing Mr Ridyard's
8 language from yesterday, we say the timelines cannot be
9 used to trump a bad econometric result for DAF.

10 I would note that Mr Beard did put one of the
11 timelines to Mr Harvey during cross-examination and
12 Mr Harvey made precisely the same point I am making. He
13 said, {Day10/27:2}:

14 "The issue is ... I cannot tell from this what the
15 transaction prices would have been without the
16 infringement."

17 That is {Day10/27:2-4}. Now, in an effort to answer
18 this yesterday, Mr Beard took the tribunal to Mr Habets'
19 MLO margins table. I do not need to take you to it. It
20 is at {D/IC23/18}. Mr Beard submitted that, since DAF's
21 margins for Royal Mail and BT deals were in some cases
22 negative, it was simply not plausible to suggest that
23 prices could have been lower in the counterfactual.
24 But, with the greatest of respect, that is an evidential
25 point and DAF has never given evidence on it. Neither

1 DAF's factual witnesses nor Professor Neven suggested
2 that prices could not plausibly have been lower in the
3 counterfactual and nor did they seek to identify or even
4 estimate the lowest point to which prices could
5 plausibly have fallen.

6 Now, you will recall Mr Ashworth described the
7 claimants' prices as "rock bottom", but he made very
8 clear that this simply meant they were lower than for
9 most other customers. He did not suggest they were as
10 low as they could go for the claimants. Equally
11 Mr Habets commented on this at paragraph 83, and it
12 would be helpful to turn this up, please. It is at
13 {D/IC23/22}. Thank you, paragraph 83. You will see
14 there he says:

15 "My understanding at the time (and now), based on
16 discussions at the time, is that there were several
17 reasons why we accepted deals with Royal Mail at
18 consistently low and even negative ... margins.
19 Royal Mail is highly visible on the UK roads and we
20 considered that retaining them as a customer was
21 valuable for DAF's brand image in the UK market. We
22 also regarded Royal Mail as being important for DAF's
23 overall market share ... because of the high truck
24 volumes they purchased. Royal Mail would always
25 challenge us on price, they would tender every deal, but

1 we chose to hold on to them as a customer even in the
2 years where we made losses, because of their importance.
3 Of course, if the losses had become crazy it would have
4 been necessary to turn down deals and risk losing them
5 as a customer."

6 So we take two points from that. One, Mr Habets
7 actually explained there were very good reasons why DAF
8 wanted to retain Royal Mail as a customer, which we say
9 illustrates the plausibility that these prices were not
10 as low as they could plausibly go, but also it is
11 notable that he makes no attempt there to identify what
12 would have been a crazy price and there is no suggestion
13 by Mr Habets that the prices were as low as they could
14 plausibly go. Just for your note, we do address
15 Mr Habets' margins analysis further at paragraph 412 of
16 our closing, which is {S/9/158}.

17 Also for your note, Mr Ashworth also gave evidence
18 on the importance of Royal Mail as a customer to DAF and
19 the reasons it was in DAF's interests to do what it
20 could to retain the business. That is at paragraphs 24
21 to 25 and 100 of Mr Ashworth's statement, {D/IC22/6} and
22 {D/IC22/28}.

23 THE CHAIRMAN: You are saying it is not sufficient for them
24 to say, "Look how low the margins were anyway, we would
25 never have gone down further", without adducing some

1 evidence to support that?

2 MR LASK: Absolutely. The fact that DAF's witnesses did not
3 go as far as to say that the claimants' prices were as
4 low as they could go is telling. That cannot have been
5 inadvertent and it is not for Mr Beard to improve the
6 evidence or fill in the gaps.

7 Stepping back, an overarching submission made by
8 Mr Beard yesterday was that the claimants had to show
9 that the econometric analysis was applicable to the
10 claimants. You, sir, asked, "But how do you actually do
11 that?", and that does highlight, in my submission, what
12 we say is an attempt by DAF to set an impossibly high
13 bar for the claimants. On the one hand, the witness and
14 documentary evidence is necessarily limited in what it
15 can show. Neither side has been able to put forward
16 a full record of the transactions or negotiations, which
17 is unsurprising when the cartel began 25 years ago and
18 ended over a decade ago, and the evidence that has been
19 adduced is, by its nature, unable to show us what would
20 have happened in the counterfactual. On the other hand,
21 it is common ground that a robust claimant-specific
22 regression simply is not possible so we have
23 a market-wide regression instead. But the answer is not
24 that the claimants therefore fall between two stalls,
25 which would seem to be the implication of DAF's

1 submissions. I make two points in this regard.

2 Firstly, the principle of effectiveness is it important
3 in this context despite Mr Beard's submissions to the
4 contrary.

5 We have cited *Stellantis* in our closing at paragraph
6 25, {S/9/9}, and I will just read out the relevant
7 passage from *Stellantis*. It is paragraph 29 of the
8 Court of Appeal's judgment. They say:

9 "The principle of effectiveness also applies. Under
10 this principle which is derived from EU law, procedural
11 and evidential rules must not make it practicably
12 impossible or excessively difficult for a claimant to
13 vindicate its justiciable rights. The common law is
14 very much to the same effect. The rules should not be
15 applied in the way that the very right sought to be
16 enforced is undermined [as read]."

17 We do say it is necessary to bear this in mind when
18 considering the nature of the evidence required.

19 Then my second point is that, against that
20 background, the evidence you do have, both from the
21 experts and the factual evidence, is more than
22 sufficient to show that the overcharge did indeed apply
23 to the claimants. The overarching point, of course, is
24 that this was a market-wide overcharge. This is
25 a market-wide overcharge that has been investigated and

1 the claimants were part of the market.

2 The evidence supporting this is all set out in our
3 closings. So far as the experts are concerned, they
4 agreed that it was sensible to apply the market-wide
5 regression results to the claimants. That is
6 paragraphs 408 to 411 of our closing, {S/9/157}, and
7 neither expert, not even Professor Neven, felt able to
8 say, at least with any conviction, that the claimants
9 had some sufficient bargaining power that the overcharge
10 would have been negated.

11 Then the factual evidence shows that the claimants
12 were not in a position of such special privilege that
13 they would somehow have escaped DAF's overcharge.
14 Mr Ward took you to Mr Ashworth's evidence, where he
15 confirmed that the pressure on DAF UK from DAF NV to
16 achieve higher transaction prices was just as important
17 for the claimants as for any other customer. We have
18 dealt with this in our closing at paragraphs 140 to 158
19 and 161 to 175, which is at {S/8/55} and {S/8/63}.

20 Now, at one point in his submissions yesterday
21 Mr Beard said, "We are not saying that these timelines
22 disprove effects on Royal Mail and BT", and, with
23 respect, he was right to recognise their limitations at
24 that point because the timelines cannot disprove the
25 effects on the claimants for the reasons I have given.

1 So that was Mr Beard's first argument.

2 Then the second argument in relation to the
3 mechanisms, he said, "According to the timelines, the
4 mechanisms by which DAF NV influenced DAF UK's
5 transaction prices, particularly the use of list price
6 increases, did not apply to the claimants". He said it
7 was not even tenable. Now, we say that is very, very
8 hard to reconcile with all the rest of the factual
9 evidence because that evidence shows that DAF's list
10 prices were indeed relevant to its negotiations with the
11 claimants.

12 Again, this is all set out in the closing but just
13 to give you a flavour, I am going to ask you to turn up,
14 please, {S/9/55}. We see there paragraph 141:

15 "... Mr Ashworth accepted in cross-examination that
16 DAF NV's use of list prices to exert pressure on DAF UK
17 to achieve higher transaction prices was relevant to
18 direct customers like Royal Mail and BT as well as to
19 customers who purchased via dealers."

20 Then if we go forward, please, to paragraph 147,
21 {S/9/57}:

22 "Second: DAF's list prices were an important factor
23 in DAF UK's negotiations with the Claimants. Indeed,
24 Mr Ashworth explained that Royal Mail and BT were among
25 those customers who 'always asked for a list price

1 included in their tender'."

2 Now, Mr Beard said yesterday there was no basis for
3 this proposition in the evidence but we have set out the
4 evidence in the following paragraphs, 148 onwards. If
5 I could just draw your attention particularly, please,
6 to paragraph 152, {S/9/59}. There we are dealing with
7 Royal Mail and we point out that Mr Ashworth accepted in
8 cross-examination that the documentary evidence showed
9 DAF UK using changes in list prices to make its case on
10 transaction prices. The example at 152.1 is pertinent.
11 This is an email from Andy Shadwell to Royal Mail, where
12 he says:

13 "Essentially our realignment of market list prices
14 for our competing products ... has allowed me to review
15 the nett price we had requested for the supply of
16 Vehicle Services 17tonne requirements. For the contract
17 extension, as discussed, we will hold our nett selling
18 price ..."

19 Then:

20 "As Mr Ridyard suggested, this showed Mr Shadwell
21 using an increase in list prices to argue that it was
22 giving Royal Mail a good deal by holding the sales
23 price."

24 I draw your attention to that because it shows that
25 a list price increase need not result in a contract

1 price increase in order for it to have an effect on the
2 negotiations. The list price increase may be used to
3 justify maintaining the current contract price. So
4 showing, as DAF sought to do with its timelines, that on
5 occasion contract prices remained the same in the face
6 of list price increases does not mean the latter had no
7 effect.

8 Then going on through the closings, at 154 to 156 we
9 deal with IKP, margin targets and the mandate structure,
10 which Mr Ward addressed you on.

11 Then the conclusion at 158 is important, {S/9/61}:

12 "... as Mr Ashworth accepted, the evidence showed
13 that DAF NV was placing 'big demands' on DAF UK to get
14 high prices; that the instructions coming down from
15 DAF NV were 'just as important' for Royal Mail and BT as
16 any other customers; and that this remained the case
17 whether or not list prices were always expressly
18 referred to in negotiations."

19 So for Mr Beard to say that it was not even tenable
20 that the mechanisms applied to the claimants is, in my
21 submission, inconsistent with the evidence and also
22 ignores the broader point that, however they were doing
23 it, DAF NV were putting pressure on DAF UK to get higher
24 prices from the claimants. Of course, they were doing
25 that in the shadow of the cartel.

1 So when you see a specific list price increase on
2 the timelines, when you see a specific list price
3 increase not being reflected in a contract price
4 increase for a specific model, you obviously cannot leap
5 to the conclusion that list prices were irrelevant for
6 the claimants. You have to set that evidence against
7 all the other evidence and also bearing in mind, as
8 I have said, that the timelines are highly selected.

9 Then just to sweep up some remaining points of
10 detail from Mr Beard's submissions yesterday. He said
11 that there was in fact a very full contractual record in
12 the disclosure, but we have identified the significant
13 gaps in the record in annex 1 to our closing. We do not
14 need to go to it, but just for the record, paragraphs 45
15 and 60 to 71, which is {S/9/449} and {S/9/456}.

16 Mr Beard emphasised that the 40,000 Commission file
17 documents were disclosed, but, of course, those
18 documents do not shed any light on what went on in
19 negotiations between DAF and the claimants.

20 Mr Ridyard asked Mr Beard yesterday whether it would
21 have been possible for DAF to effect a price rise
22 through raising the option prices whilst keeping the
23 chassis price the same. Just for your note, our
24 closings, annex 1, paragraph 48, which is at {S/9/451},
25 quote an internal DAF document on this point. The

1 document says:

2 "As ever with the Royal Mail, history shows that
3 once the business has been awarded there have been
4 opportunities to re-discuss specifications which have in
5 the past led to higher margins."

6 So we say that suggests the answer to Mr Ridyard's
7 question is yes.

8 Also on options, Mr Beard submitted that the only
9 big value options were bodies and trailers. Now, it is
10 true to say that these were the highest value often on
11 the price lists in the contracts, but there were plenty
12 of options that would, if selected, have added
13 a material cost to the basic configuration, particularly
14 when it is looked at cumulatively.

15 Again, just for the note, I took you to an example
16 which is helpful in this regard -- illustrative in this
17 regard. It is at {I2/21/36}.

18 On witnesses, Mr Beard suggested that there were
19 other individuals that the claimants could have called,
20 but we have addressed this issue in some detail at
21 annex 3 to our closing, which is {S/9/606}, and we have
22 explained that it was not possible to find witnesses who
23 were directly involved in the negotiations across the
24 entire period. So we put forward witnesses who could
25 speak to issues of a more general nature, as envisaged

1 by the tribunal in its disclosure judgment. Indeed
2 Mr Beard said this morning that they did exactly the
3 same with Mr Ashworth.

4 So that is all I wanted to say on the timelines.

5 Moving then on to the WACC, which Mr Beard obviously
6 dealt with quite rapidly. I do not intend to deal with
7 all his points. We say they are all addressed in our
8 written closings and in the submissions I made on
9 Monday, but just to pick up one or two of them.

10 Mr Beard said that the WACC was not an appropriate
11 measure because equity losses are not an actual loss.
12 Now, I explained on Monday that, in our submission,
13 actual loss is not to be equated with cash outflow and
14 that equity losses are an actual loss in the broader
15 sense because they represent a detriment to the company
16 that can be quantified with a well-established method.

17 Mr Beard also said that Royal Mail treated the WACC
18 as aspirational, not as an actual measure of loss. Now,
19 it is of course true that when Royal Mail is appraising
20 a potential investment opportunity, it is looking at
21 what returns it can hope to make on the investment, but
22 those returns obviously involve an assessment of
23 forecast revenue versus the cost of making the
24 investment. Ms Bradshaw's evidence is that the WACC was
25 used as a measure of the financing aspect of the costs

1 of the investment, part of the costs that needed to be
2 covered in order to break even. That is section 5 of
3 her statement, {D/IC2/11}.

4 Just on Ms Bradshaw's evidence, I want to clarify
5 a point I made on Monday about the purpose for which
6 Royal Mail used the WACC because I said I think in an
7 answer to a question from the tribunal that the evidence
8 did not show the WACC being used specifically to assess
9 the financing costs of purchasing trucks as opposed to
10 other forms of investment. That did somewhat undersell
11 the evidence.

12 If I could just ask you, please, to turn up
13 Ms Bradshaw's evidence at section 8, {D/IC2/23}. You
14 will see that at 8.1 she explains that funding for
15 investments was secured upfront through a budgetary
16 process, but it is important to understand that
17 budgeting for an investment and any appraisal of
18 investments are separate internal processes.

19 Then at 8.2:

20 "Accordingly, if you take a proposed vehicle plan
21 project including trucks (for example), you would expect
22 the overall budget 'funding envelope' for vehicles
23 overall (ie not just trucks but vans, etc) to have been
24 ascertained long before the business case is appraised
25 and authorised."

1 Then at 8.4:

2 "The vehicle capital plan is a special case, in that
3 it is an annual budget in and of itself. Special
4 procedures have applied with respect to how the budget
5 is approved and how authority is subsequently obtained
6 to drawdown against the plan before the business
7 proceeds to order vehicles. Until approximately
8 April 2008, the annual vehicle plan ... was approved at
9 the start of each financial year and drawdowns against
10 the approved budget were subsequently authorised as
11 investment cases as a matter of internal governance (ie
12 in accordance with the procedures described in this
13 witness statement) before the vehicles were ordered and
14 money was spent. This includes assessing the vehicle
15 plan as an investment case and conducting a financial
16 review, including assessing the vehicle purchases or
17 replacements using the Hurdle Rate."

18 I emphasise that because, as I say --

19 THE CHAIRMAN: The hurdle rate includes the WACC?

20 MR LASK: The WACC for part of the period was a key
21 component of the hurdle rate and then eventually it
22 became equivalent to the hurdle rate. The hurdle rate
23 equalled the WACC.

24 I do not need to take you to the document she refers
25 to from April 2008. It just shows that there was

1 a change in the process by which approvals were sought,
2 but no suggestion that there was a change in the use of
3 the hurdle rate. But the reference to the document --
4 the Opus reference is {I3/124/1}.

5 THE CHAIRMAN: Is this not the same -- we have got the
6 distinction, Mr Ward was saying, between legal pass-on
7 and economic pass-on. This is -- you know, economists
8 just look at this differently to lawyers.

9 MR LASK: It is not just economists. This is the business.
10 This is how the business was measuring financing costs
11 in the real world.

12 THE CHAIRMAN: In terms of assessing their actual loss?

13 MR LASK: Yes. Well, we say the actual loss is what it cost
14 Royal Mail to fund the overcharge. So what did it cost
15 Royal Mail to use the money that it had to use to pay
16 the overcharge? There is a debt component to that and
17 there is an equity component to that. The fact that
18 Royal Mail, when measuring its costs, was not just
19 looking at the debt aspect but was looking at the equity
20 as well as part of the costs it needed to cover we say
21 is very strong evidence that it is an appropriate
22 measure of those financing costs.

23 Then moving on to the alternative interest rate,
24 which is if you are not with us on the WACC. I think
25 the tribunal is aware of our case on that, but just to

1 respond to a submission made by Mr Beard, which was
2 that, well, we have not properly pleaded or proved the
3 case for the alternative rate. Our position in
4 outline -- I am not going to go back to the pleading
5 point which I have addressed you on on Monday. Mr Beard
6 showed you the pleadings in Sainsbury's. I will let you
7 read our pleadings against those pleadings in due
8 course, but we say actually there is not a stark
9 contrast, they are very similar. But in any event the
10 *Sainsbury's* pleadings are not the minimum that is
11 required. It is not as if, if you do not meet that
12 standard, you fail. It is just a good example of what
13 is adequate. But we say whether our pleadings are
14 exactly the same or not, they are adequate.

15 But, in any event, the point I wanted to focus on
16 was the evidential point, and our position in outline is
17 that there is ample evidence to support the drawing of
18 broad axe assumptions as to how Royal Mail would have
19 deployed the additional funds in the counterfactual. It
20 is the drawing of broad axe assumptions that both
21 Mr Earwaker and Mr Delamer have engaged in and it is
22 what we invite the tribunal to do, if it is not with us
23 on the WACC.

24 Now, given the time, I am not going to take you to
25 *Sainsbury's*, but what I emphasise -- and I will give you

1 the references -- what I emphasise is that you see in
2 *Sainsbury's* the tribunal adopting a very broad brush
3 approach to this issue based on quite limited evidence.
4 Again, just for your note, it is paragraphs 522 to 526
5 and then 453, so very much a broad brush approach and
6 based on quite limited evidence.

7 We say -- as I say, we say there is ample evidence
8 in this case to support a similar approach, at least as
9 good as the evidence in *Sainsbury's*. Firstly,
10 Mr Jeavons gave detailed evidence on Royal Mail's use of
11 debt and short-term investments during the relevant
12 period. This included the circumstances in which
13 Royal Mail utilised short-term investments instead of
14 longer-term investments, the considerations that
15 Royal Mail took into account in determining the cash
16 balances that it needed to maintain, the evolution of
17 Royal Mail's borrowing over the relevant period,
18 including the constraints it was under in its ability to
19 take on debt in the pre-IPO period, and also the
20 specific debt instruments held by Royal Mail in both the
21 pre- and post-IPO periods, including the two bonds that
22 have been the subject of much discussion. That is all
23 dealt with at sections 17 and 18 of Mr Jeavons' evidence
24 at {D/IC7}.

25 Secondly, there is detailed factual evidence beyond

1 the witness statements that supports this approach. In
2 particular there is evidence on the scale of
3 Royal Mail's debt and short-term investments over the
4 relevant period which is similar to the sort of evidence
5 they had in Sainsbury's. That evidence is set out in
6 Mr Earwaker's second statement, table 6. We do not need
7 to turn it up. It is at {E/IC32/29}. There is also
8 evidence, as you are aware, on the actual returns on
9 short-term investments which are agreed between the
10 experts -- that is at the joint statement, table J2,
11 {E/IC85/20} -- and, of course, evidence on Royal Mail's
12 actual cost of debt which is partially agreed. That is
13 in the same table.

14 I do reiterate that, despite DAF's objection to this
15 part of our case, it is expert evidence. Mr Delamer's
16 evidence was that the potential relevance of short-term
17 investments and debt on estimating Royal Mail's
18 financing costs or the costs that it could have avoided
19 in the counterfactual, he said that was self-evident --
20 the relevance was self-evident. That is in the joint
21 statement, D3 {E/IC85/13}.

22 So to sum up, there is ample evidence in my
23 submission to support the drawing of broad axe
24 assumptions, such as those drawn in Sainsbury's, and we
25 invite the tribunal to adopt the specific assumptions

1 adopted by Mr Earwaker for the purposes of his
2 alternative calculations if you are not with us on the
3 WACC.

4 Then just very briefly on BT interest, as you are
5 aware. We say it is obviously at the tribunal's
6 discretion, but we say 6.3% would be an appropriate
7 rate, but if you are not minded to adopt that rate,
8 then, in my submission, the tribunal does not have to
9 simply revert to base rate plus 1, which is what
10 Mr Beard suggested, and we have cited a number of
11 tribunal cases in our closing submission where the
12 tribunal offered base rate plus 2. That is in our
13 closing at paragraph 1066.5 at {S/9/414}.

14 Then just finally on tax, the chairman drew my
15 attention on Monday to paragraph 369 of DAF's closing,
16 where they submit that Mr Singer changed his position on
17 the suitability of using the statutory rate for
18 grossing-up. This was the inconsistency point that you
19 pointed out. I said that this was dealt with in our
20 closing, but actually I think I was thinking of
21 a different point because I could not find it dealt with
22 in our closing.

23 But, in any event, what is missing from
24 paragraph 369 of DAF's closing is any acknowledgement of
25 the fact that Mr Singer went on to explain under

1 cross-examination why he had come to prefer the
2 statutory rate and, in particular, he explained that it
3 was in his view the rate at which a hypothetical
4 investor would expect the business to pay tax. The
5 reference is {Day 20/17/20} of the private transcript.

6 Sorry, just very finally, on maintenance rentals
7 which Mr Beard went to at the end this morning, we
8 obviously invite you to read the footnote where we have
9 set out our case.

10 THE CHAIRMAN: We have read it.

11 MR LASK: You have read it. But just to say the fact that
12 PACCAR, from whom the 50 trucks were leased -- the fact
13 that it is not an addressee of the decision is nothing
14 to the point because there is no dispute that these
15 trucks are properly within the value of commerce, so
16 that point just goes nowhere.

17 MR BEARD: We are not objecting to the --

18 THE CHAIRMAN: Was that the only reason why PACCAR were
19 included as a defendant, for that purpose?

20 MR LASK: My understanding is they were included as
21 a defendant because we leased trucks from PACCAR
22 Financing -- PACCAR Finance.

23 THE CHAIRMAN: Right.

24 MR BEARD: Yes, I will not go back on that. It is clearly
25 more significant to us than it is to them on those sorts

1 of things. Sorry, Mr Lask.

2 MR LASK: Sorry, I was just reminded from behind that this
3 issue concerns 50 trucks, so a relatively small number
4 within the --

5 THE CHAIRMAN: Yes, I think the figure was about 140,000,
6 was it not?

7 MR BEARD: It is to do with the maintenance rental. It is
8 not actually to do with the main overcharge in relation
9 to it.

10 THE CHAIRMAN: Because this was the financing company; is
11 that right?

12 MR LASK: Yes.

13 MR BEARD: Yes. As I say, there are other arguments there,
14 but ...

15 MR LASK: Unless I can assist further.

16 THE CHAIRMAN: I hesitate to do this, but at the end of your
17 skeleton, opening skeleton, there is a reference to
18 limitation defence. Do we assume that is not a part of
19 any -- that is not a defence that you are running?

20 MR BEARD: Yes, I think in the current circumstances we
21 cannot press the limitation defence further in relation
22 to these matters, so I think -- that one you are saved.
23 It depended on certain issues in relation to
24 cross-examination as to what happened in relation to it
25 and so we have not pressed that in written closing.

1 THE CHAIRMAN: No, I did not think there was
2 cross-examination on that.

3 MR BEARD: No. Well, there were potentially issues that
4 might have come out through the other cross-examination,
5 but that is now left.

6 Reply submissions by MR BEARD

7 MR BEARD: I am very sorry to mention these issues. There
8 are a couple of documents, I think, that are not
9 strictly reply documents that were referred to. I am
10 not objecting to it, but the Shadwell email that Mr Lask
11 referred to, we deal with that in paragraphs 323 to 326
12 in our closings. The Bradshaw material that Mr Lask has
13 referred to, in relation to that I think it is important
14 to note that Mr Jeavons accepted there was no debt or
15 equity allocations made for the purchase of trucks.
16 That is his own witness statement at paragraph 22.4.

17 The last thing I do need to deal with is we do not
18 object to the fun of all the cross-referencing that has
19 been put in. We did notice that there is a new row that
20 has gone in as an additional overcharge sensitivity. It
21 looks like Mr Harvey's rather brief margins regression
22 is now becoming an overcharge sensitivity.

23 I dealt with that in my submissions, what the role
24 of that was. Of course it was not actually used by
25 Mr Harvey when he was carrying out what he referred to

1 as a graphical analysis of margins in his third report,
2 at all, and I dealt with the issues as to the
3 limitations of that in my submissions. But we say that
4 is not really an overcharge sensitivity. It is a little
5 cheeky to say it is a cross-reference but we are not
6 going to object.

7 Sorry, Mr Lask.

8 MR LASK: I am sorry to pop up --

9 THE CHAIRMAN: Who is going to have the last word then?

10 MR WARD: Probably Mr Beard because he is the defendant.

11 MR LASK: I do not insist on the last word, but just in
12 relation to the point that Mr Beard made about
13 Mr Jeavons' evidence. You will read it for yourself.
14 It is 22.4 of his statement. What he says is that there
15 were no debt instruments that were entered into
16 specifically to fund expenditure on trucks and no equity
17 injections specifically to fund expenditure on trucks.
18 What he is not doing is saying anything inconsistent
19 with Ms Bradshaw's evidence that I drew your attention
20 to.

21 MR BEARD: No, no, we are not suggesting an inconsistency,
22 Ms Bradshaw is all to do with aspirational rates.

23 I am going to have one last word, if I may, which is
24 actually to thank, if I may, the shorthand writer and
25 the Opus operators, who have been very patient,

1 enormously helpful throughout the process and we are
2 all, on our side, extremely grateful for all of their
3 efforts in relation to this.

4 THE CHAIRMAN: We would endorse that as well. The trial has
5 run very efficiently, I think, as a result of Opus and
6 the operators and the shorthand writers, so, yes, thank
7 you from us as well.

8 Thank you to all of you as well, not only the
9 advocates but your large teams who have no doubt
10 contributed greatly to the excellent written and oral
11 submissions. So we are grateful to you all for that,
12 for getting it done according to the timetable despite
13 all the hurdles in the way; Covid, rail strikes and the
14 like. I think, Mr Beard, you said that we have all been
15 on a bit of a journey. Well, I think our journey is
16 continuing and, unsurprisingly, we will take some time
17 to come to our decision. But thank you very much.

18 MR BEARD: Thank you, and enjoy your travel!

19 (4.48 pm)

20 (The hearing concluded)

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