

This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive record.

Case No. : 1284/5/7/18 (T) ; 1290/5/7/18 (T)

IN THE COMPETITION

APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London
EC4Y 8AP

2 March 2021

Before:

The Honourable Mr Justice Roth, The Honourable Mr Justice Fancourt, Hodge Malek QC

(Sitting as a Tribunal in England and Wales)

BETWEEN:

ROYAL MAIL GROUP LIMITED v DAF TRUCKS LIMITED & OTHERS

BT GROUP PLC & OTHERS v DAF TRUCKS LIMITED & OTHERS

*Transcribed by Opus 2 International Ltd.
(Incorporating Beverley F. Nunnery & Co.)
Official Court Reporters and Audio Transcribers
5 New Street Square, London EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital*

**Hearing (Expert Evidence and
Pleading Amendments) – Day 2**

Tuesday, 2nd March 2021

(10.00 am)

(Proceedings delayed)

(10.09 am)

Submissions by MR LASK

THE PRESIDENT: Good morning.

Mr Lask, I think at the end of yesterday you were just taking us to the disclosure that was being requested in relation to the complements issue.

MR LASK: Yes, sir. My proposal this morning was to come on to that if the decision of the Tribunal was to grant permission on complements. The comments we have are relatively brief but they are contingent on permission being granted.

THE PRESIDENT: Yes, well, we understand that if permission is not granted, the disclosure request does not arise, as we understand it. But I think we find it helpful to understand, as with the issue of the regression analysis and Professor Neven, that we decided yesterday to just understand what the disclosure implications are --

MR LASK: Yes.

THE PRESIDENT: -- if this matter is pursued, and if we give permission. So if you could just take us through that, as we had a brief look at it, and it did not seem to be a major issue of contention. It certainly does not

1 begin to compare with what was the PO7 category.

2 MR LASK: Yes, I think that is certainly fair, sir.

3 There are two schedules that I think Mr Beard gave
4 a reference to just at the end of the hearing. They are
5 in the D bundle. It may suffice for present purposes
6 just to go to one or the other.

7 THE PRESIDENT: Yes, I think I have the Royal Mail one.

8 MR LASK: Yes, which is at D4, tab 831, I think it begins on
9 page 3.

10 THE PRESIDENT: D4, is it?

11 MR LASK: It is file D4, tab 831, page 3. {D4/831/3}

12 THE PRESIDENT: Yes, there is a letter and then we have it
13 brought up. It is C3 and C4 are the two categories; is
14 that right?

15 MR LASK: For Royal Mail.

16 THE PRESIDENT: Yes.

17 MR LASK: There are two issues from our perspective. The
18 first concerns the C3 category, which requests details
19 of any trailer purchased by Royal Mail, and what they
20 seek is a (inaudible) the price and the type of the
21 trailer. The issue here in a nutshell is that we think
22 this data is likely to be very patchy indeed, and we do
23 have concerns as to the utility of any analysis that
24 relies on this data. There are some examples given in
25 the Royal Mail column, which is column 6, about why we

1 say the data is patchy.

2 If you look, for example, on page -- internal page
3 numbering 5, which I expect is Opus page 8 -- no,
4 that is correct, that is page 7, that is fine.

5 In the final column you will see it is explained
6 there that Royal Mail is missing data completely for the
7 years 1997 to 2002. So that is six of the 15 years for
8 which the data is requested.

9 THE PRESIDENT: Yes.

10 MR LASK: So that is the -- the main concern in relation to
11 this category. Similar issues arise on BT, namely that
12 there is missing data for the period 1998 to 2002, and
13 that for the period of 2002 to 2011, the potentially
14 relevant information has only been identified in
15 disaggregated form, which will need to be reviewed and
16 may well prove to be incomplete.

17 THE PRESIDENT: I mean, in a sense, that is, if I can put it
18 somewhat bluntly, not your problem. You can only
19 provide and disclose what you have, and you can make the
20 comment you think that will mean that the simulation
21 model is not going to be easily achieved or robust or
22 reliable, but that is a matter for -- if this is
23 a matter for Professor Neven to consider, and it may be,
24 if he does go ahead, it will be a matter on which you
25 can criticise it at trial and say, look, reliance cannot

1 be placed on this because there was no data for
2 a significant period.

3 But in terms of the actual disclosure obligation, as
4 I understand it, it is not suggested for the years for
5 which data is available, it is a problem providing it.
6 Is that right?

7 MR LASK: I accept that, sir, with one qualification, which
8 is that if permission were to be granted, we would not
9 want to be held to Mr Harvey having to conduct the same
10 analysis as Professor Neven. Mr Harvey has made clear
11 in his evidence that he does not consider a simulation
12 model to be appropriate. So, provided he had liberty to
13 conduct the analysis that he considers appropriate, then
14 I agree with that observation.

15 THE PRESIDENT: Yes, well, I mean he certainly is not
16 compelled to conduct any analysis which he thinks is
17 inappropriate.

18 MR LASK: Yes.

19 THE PRESIDENT: It may be, because clearly if
20 Professor Neven can put in expert evidence on this, it
21 seems to me -- and it must follow that so can
22 Mr Harvey -- then Mr Harvey's evidence may be purely
23 a critique of what Professor Neven has done rather than
24 doing his own independent analysis. That is a perfectly
25 permissible way for him to proceed.

1 MR LASK: Yes, although I should say, sir, that is not what
2 he would envisage doing. I mean, he would envisage
3 doing the analysis he could in the time available, and
4 with the information available, and he would be seeking
5 disclosure from DAF for that purpose.

6 THE PRESIDENT: Yes. You have not formulated that
7 disclosure request yet?

8 MR LASK: We have not. If necessary I can give the Tribunal
9 the headlines and we can propose a timetable for taking
10 that forward.

11 THE PRESIDENT: Yes. I mean, can you give us the headline,
12 just to get a feel of it?

13 MR LASK: Yes. So Mr Harvey would envisage undertaking
14 a form of regression analysis in relation to
15 complementary products. Essentially he would do the
16 best possible in the time available, which he thinks
17 would still be better than the simulation model.

18 THE PRESIDENT: Yes.

19 MR LASK: Much has been made of the available of cost data.
20 Mr Harvey does not consider the absence of third-party
21 cost data is a hard barrier to a regression analysis.
22 We know that DAF has costs data on the bodies it
23 supplied at least for the post-2007 period. So he would
24 be seeking data from DAF and, just in broad terms, that
25 would include the specification and the prices of the

1 bodies they sold or resold and the trailers that they
2 financed, the costs data pertaining to the bodies, and
3 price setting information in relation to the bodies.

4 There is, sir, an additional point, which is that it
5 may be that there is relevant data on bodies that is
6 tucked away in the disclosure already provided by DAF,
7 so we would be seeking an order that, when it provides
8 its additional disclosure, DAF also identify any
9 relevant information that is tucked away in the existing
10 disclosure.

11 Sir, I skipped over -- I do not know if you want me
12 to come back to the schedule but there was a second
13 issue on the disclosure being sought by DAF, which
14 arises on the -- what is called the C4 category in the
15 Royal Mail schedule. That is the category seeking
16 details of the key characteristics that the claimants
17 considered when purchasing.

18 THE PRESIDENT: Just a minute. Let us bring that up. That
19 is on page 6? {D4/831/6}

20 MR LASK: Page 6, yes.

21 Key characteristics considered when purchasing, the
22 number of third-party suppliers typically considered and
23 the average useful life of a trailer. The concern here
24 is around proportionality and part of the problem is
25 that because this request has only come in now, and was

1 not raised alongside the procurement and communications
2 disclosure that has already been given, the claimants
3 would now have to rereview some of the repositories and
4 documents reviewed previously.

5 To give you an example of that, sir, you will see in
6 this schedule, on pages 10 and 11 {D4/831/10}, there is
7 a description of the manual searches of documents
8 archived at the Postal Museum and the archive storage
9 facility in Winchester, and those repositories would
10 need to be re-searched, and I am told that is
11 challenging in the current environment with the various
12 restrictions in place. There we are. So there are
13 proportionality concerns.

14 Now, DAF's response to this is to suggest that one
15 way of dealing would be for us to give a pleaded
16 statement explaining the issues rather than giving
17 disclosure. We do not object to that or we would not
18 object to that in principle but it is unclear at this
19 stage without making further enquiries whether that way
20 forward would be more or less burdensome. It would
21 itself involve undertaking various searches, given the
22 level of detail requested in the period involved. So
23 what we would propose, if permission were granted, was
24 that we be given the option to elect either to provide
25 that statement or the disclosure.

1 THE PRESIDENT: Yes, because presumably there may be some
2 difficulties.

3 MR LASK: Yes.

4 THE PRESIDENT: As anyone who knows now what the position
5 was, because these issues may have changed --

6 MR LASK: Indeed.

7 THE PRESIDENT: -- significantly over the long period.

8 MR LASK: Yes.

9 MEMBER 3: Mr Lask, I presume you could do a combination of
10 both, could you not, that certain areas that you can
11 give disclosure of documents and others you may feel
12 that it is easier and simpler to do it by way of
13 a statement?

14 MR LASK: I expect that is right. I will be corrected by
15 those instructing me if it is not. I expect in
16 principle a combination approach may be possible.

17 MEMBER 3: Yes.

18 THE PRESIDENT: Yes.

19 MR LASK: But I am asked to emphasise -- I referred to the
20 disclosure that Mr Harvey will need to seek from DAF,
21 and I am asked to emphasise that that really underlines
22 the -- some of the practical implications of granting
23 permission on complements is that there is going to be
24 a significant further disclosure exercise and
25 significant further expert analysis.

1 THE PRESIDENT: Yes. I mean, was this the notion that
2 Mr Harvey would then wish to do a regression analysis?
3 That is not something I had picked up. That may be my
4 failing.

5 MR LASK: Well, he describes the issues he would want to
6 investigate, what he calls the minimum key points.

7 THE PRESIDENT: Yes.

8 MR LASK: At paragraphs 6.12 to 6.14 of Harvey 9, which is
9 {B3/17/21}. In fairness, he does not expressly describe
10 it as the regression analysis. But we have taken the
11 opportunity overnight to have a further discussion with
12 him, and that is what he would envisage doing.

13 THE PRESIDENT: Yes, he says it would require further -- he
14 says it would require further factual information and
15 disclosure from the claimants.

16 MR LASK: Yes, that is at 6.14.

17 THE PRESIDENT: Yes.

18 MR LASK: But what you see, sir, from 6.12, is that a key
19 part of his analysis would be seeking to establish
20 causation because that is the key emission from -- what
21 we say is the key emission from DAF's approach.

22 THE PRESIDENT: I understand that. I can understand --
23 I think one can understand the questions or issues that
24 he raises at 6.12(a), (b) and (c) and all the points, as
25 he puts it, and that it is necessary to consider that

1 and to consider whether they are external factors.
2 I just do not know at the moment, because it is not been
3 considered, whether in particular cost data relating to
4 bodies is an onerous and elaborate form of data
5 retrieval, given the long period we are talking about.

6 MR LASK: Yes, well --

7 THE PRESIDENT: It is not something that has been raised
8 before.

9 MR LASK: It is a long period. We would say that without
10 that data, one simply cannot assess causation. So it is
11 essential to have properly conducted analysis.

12 THE PRESIDENT: I can see that without that you cannot do
13 regression analysis. If you have not got one of the
14 most fundamental factors that can cause an increase in
15 costs, you cannot do it. Professor Neven says he is
16 not -- I think everyone can recognise that a regression
17 analysis is more robust and revealing than this sort of
18 simulation model.

19 The question is whether it can feasibly be done.
20 Professor Neven I think recognises that but says,
21 because of the lack of cost data and the problems with
22 cost data, he is not going to try and do it. That was
23 his position. He was, therefore, in a sense, falling
24 back, if you like, on the simulation model.

25 Mr Harvey has a lot of criticisms of the simulation

1 model, as Mr Beard says, whether or not they are valid,
2 and that ultimately, it seems to us, for trial. But if,
3 then, one goes back to doing the regression model, and
4 if he wants a regression model then maybe
5 Professor Neven wants a regression model, and we start
6 getting that data, and where does it end?

7 MR BEARD: Sir, might I make a couple of brief remarks?

8 THE PRESIDENT: Yes. I was going to (inaudible) in
9 a moment, because I was just going to turn to you about
10 this. Do you understand my concern? It is one thing to
11 say that this simulation model is really not going to be
12 of any use, it is not -- there are too many assumptions,
13 there is too much missing, it does not tell you the key
14 questions, it begs all these other points that Mr Harvey
15 has flagged and so on. It is a different thing to say
16 that, well, if that is going to be done, we now want
17 a regression analysis for which we need all this data.

18 MR LASK: Sir, I do see that those are different things, and
19 my primary submission is that is a very good reason not
20 to be granting permission on complements, because of the
21 extra disclosure and work it is going to generate, but
22 I also say that if permission were to be granted it
23 would be quite unfair, particularly in circumstances
24 where DAF says the burden of proof is on us in relation
25 to bundle complements, for us to be held -- or for us to

1 be placed in a purely defensive role where all we can do
2 is present a critique of Professor Neven's analysis
3 without having the opportunity to do our own.

4 THE PRESIDENT: Yes.

5 Okay, Mr Beard, you wanted to --

6 MR BEARD: Yes, if I may. I think, sir, you have the points
7 about the objections to disclosure. I mean, they are
8 not actually objections to disclosure. We recognise
9 that if people do not have documents, they cannot be
10 disclosed. That is just the way of these things.

11 We have tried to be flexible in relation to
12 statements versus disclosure, if it would be
13 disproportionate, as we have indicated in the schedules.
14 So actually there is no objection on the basis of the
15 material we are putting forward as disclosure
16 categories, and I think that was the core of the
17 question that was initially being asked.

18 We are now being led down a different and somewhat
19 garden path-ish strand of submissions by Mr Lask,
20 because Mr Harvey's witness statement does not suggest
21 that he wanted to do a regression analysis and did not
22 suggest he wanted data from DAF in relation to it. You
23 picked up precisely the point in 6.14, which talks about
24 how there would have to be further factual information
25 and disclosure from the claimants in order for Mr Harvey

1 to put into place his analysis, which -- I have referred
2 to it as negotiations analysis. Mr Lask took me to task
3 for that and said that is not what we are doing, that is
4 really about mitigation. But it is much closer to that
5 sort of analysis than it is to any sort of regression
6 being set out.

7 So the position the Tribunal is now being put in is
8 we have a legitimate argument in relation to
9 complements, we have put forward expert evidence in
10 relation to these things. There is not a real objection
11 to our disclosure on it. Mr Lask is now saying, "Oh,
12 but in order to respond to that, we would want to go
13 beyond critiquing Mr Neven's analysis, we'd want to put
14 in our own."

15 Well, we are not going to try to stop him doing
16 that. The evidence before you is that they would do
17 that on the basis not of a regression but on the basis
18 of the arrangements set out in Mr Harvey's statement,
19 and yet today it is said, "Oh, no, there will be a vast
20 degree of disclosure that will be required. I can on
21 the hoof set out what these disclosure categories would
22 be, they are terribly onerous and it will mean there is
23 an enormous exercise."

24 This is precisely what I referred to yesterday as
25 a sort of in terrorem submission. It is no proper

1 objection. Indeed, it is a remarkable submission to be
2 making today in circumstances where in fact disclosure
3 was provided to Royal Mail and BT of the materials
4 relating to bodies last week. So the disclosure process
5 that is rolling on in the background was actually
6 provided last week. So if there was --

7 THE PRESIDENT: Sorry to interrupt you, what was disclosed
8 re bodies?

9 MR BEARD: I do not have a full schedule in front of me, but
10 I understand it was details of the bodies that were sold
11 by DAF to Royal Mail, and it was also material in
12 relation to the costs of the bodies manufactured.

13 Mr Lask says, "Well, we would want lots and lots of
14 costs data". It is worth reminding The Tribunal that
15 DAF has only been making bodies since 2007, and it has
16 provided material in relation to that. It is not tucked
17 away, as Mr Lask says. We have been entirely clear
18 about what we have been providing in relation to these
19 matters. If Mr Harvey wants to come back and say,
20 "Well, actually, there is some further material I would
21 like in relation to that material", of course he is open
22 to do so. We cannot possibly prevent him from asking
23 those sorts of questions. But we have actually been
24 providing this material and what is being done today is
25 throwing up ad hoc attempts at obstacles to what is

1 otherwise a perfectly legitimate request to amend,
2 provide expert evidence, and seek what is entirely
3 legitimate and measured disclosure in relation to these
4 issues.

5 MEMBER 3: Mr Beard, if the other side seek permission for
6 their expert to carry out a regression exercise, do you
7 envisage you would be opposing that?

8 MR BEARD: I think I would have to take instructions
9 depending what was actually proposed. All I have to go
10 on at the moment is the evidence of Professor Neven, who
11 has clearly looked at these issues, and obviously he is
12 also the expert that is dealing with overcharge and
13 therefore does have quite a wide view of what is going
14 on in terms of data availability in this case.

15 Of course, as we saw in relation to his statement
16 I think it is at paragraph 31, if I remember correctly,
17 of his second statement -- of his first statement, I do
18 apologise. So yes, it is paragraph 31 of his first
19 statement, so it is tab 11 in bundle B3 {B3/11/7}. He
20 says, "Well, I do not think you are going to have enough
21 evidence to carry out a robust regression", and of
22 course in order to do a robust regression you need
23 sufficient data.

24 So one would need to see what Mr Harvey's proposing.
25 But if what he is proposing is something that frankly

1 our experts say, "No, you are not going to get a robust
2 answer out of it because you do not have sufficient data
3 in order to do it", then we may well oppose it. But
4 that is all I have got to go on, Mr Malek. I do not
5 have more at the moment. Part of the reason I could not
6 possibly give you an answer is because we do not have
7 a proposal before us. We have several witness
8 statements from Mr Harvey. He sets out what he says he
9 would do absent -- if the complements analysis is to
10 be -- amendment is to go ahead, and it is conspicuous
11 that he does not suggest any regression analysis there.

12 MEMBER 3: I understand that. But if there is going to be
13 a regression analysis, in the absence of non-party
14 disclosure from the actual manufacturers of the bodies
15 and the traders, it is going to be rather incomplete, is
16 it not?

17 MR BEARD: I think that is the basis on which
18 Professor Neven is saying that you will have incomplete
19 data, because he says precisely that there.
20 Unfortunately I cannot advance the matter further than
21 that, but I think, sir, that is precisely what he is
22 averting to, that you will have a big hole unless there
23 was to be a third-party disclosure exercise.

24 MEMBER 3: Well, that would be very difficult, because they
25 have got nothing to do with the proceedings, a lot of

1 them are outside the jurisdiction, you can only go back
2 so many years, and it is unlikely to be proportionate to
3 expect a non-party to go and do the same sort of
4 exercises that the parties have been doing in their own
5 interest.

6 MR BEARD: I must -- obviously I have to accept that,
7 because that is the evidence of my own expert,
8 impliedly. It is precisely for that reason we are
9 looking at the simulation model.

10 Now, as the president rightly said, the other side
11 can come along and criticise that and say, "Well, that
12 may be all you can do but it is not good enough", that
13 is the matter for trial. But we do not --

14 MEMBER 3: Either you have got an argument that has a real
15 prospect of success on complements, or not. If you do
16 have an argument that has got a reasonable prospect of
17 success, it would be a big thing to say, as a matter of
18 our discretion, we exclude that, because -- on the basis
19 that the other side may want to do an alternative
20 analysis to your simulation analysis, which would be
21 quite burdensome and probably incomplete.

22 MR BEARD: Well, I can but concur entirely with that, and we
23 say it is more than reasonably arguable. We spelled out
24 why it is that you would ordinarily, with these sort of
25 complements, expect that sort of waterbed effect, which

1 is precisely what we would then be testing for.

2 MEMBER 3: Okay, thank you.

3 MR LASK: Sir, may I come back on two very, very brief
4 points? The first is that we do not accept that any
5 criticism can fairly be levelled at Mr Harvey's witness
6 evidence. One sees in 6.12 the factors he says he is
7 looking at are concerned with the claimants' demand for
8 trucks and for bodies, and whether that fell, and you
9 will recall that one of the other points he raised, in
10 his ninth statement, was that it was completely unclear
11 whether what DAF were proposing to do was analyse
12 a claimant-specific fall in demand or a market-wide fall
13 in demand, and it was only yesterday that was clarified,
14 and it was in the light of that that Mr Harvey has been
15 asked to consider exactly what sort of analysis he would
16 envisage carrying out.

17 So we do not think he can be fairly criticised.

18 The second point is a wider point, which is that the
19 reason that Professor Neven is falling back on
20 a simulation model, or at least one of the reasons, is
21 because there is not time, or he does not consider there
22 to be time to do a proper regression analysis. That is
23 because this has been raised so late.

24 So, again, we do not think that should be held
25 against the claimants and certainly should not be used

1 as a reason for preventing the claimants from doing the
2 analysis they think is appropriate.

3 THE PRESIDENT: Yes.

4 Mr Beard, is there anything else you want to say?
5 I think you have replied on this whole point and I think
6 we will take just a few moments, then, to see where we
7 go, and whether we can resolve that straight away. So
8 we will rise for ten minutes.

9 MR BEARD: Yes, I do not think Professor Neven refers to
10 time, but that is another issue.

11 (10.37 am)

12 (A short break)

13 (10.51 am)^^

14 Ruling

15 THE PRESIDENT: There is, before the Tribunal, an
16 application to amend the defences in these two actions,
17 but linked to it is an application to adduce expert
18 evidence in the form of a report from
19 Professor Damien Neven, and to obtain the disclosure
20 necessary to supply material to found the analysis that
21 Professor Neven wishes to carry out.

22 It arises in this way: some trucks which the
23 claimants purchased over the relevant period were
24 purchased from DAF with the truck bodies, in particular,
25 since about 2007. In other cases, where the claimants

1 bought trucks from DAF, they separately bought bodies or
2 trailers to be used with the trucks from third parties.

3 Insofar as trucks and bodies were purchased together
4 from DAF, it is the claimants' case that the price they
5 paid went up as a result of the alleged overcharge
6 caused by the cartel. In other words, the price of the
7 bundle went up. Insofar as the body or trailer was
8 purchased separately, the defendants allege that the
9 claimants' loss, if there was an overcharge, was
10 mitigated in that the price they paid separately for the
11 body or trailer went down.

12 The defendants wish to contend that therefore if,
13 which they deny, there was an overcharge causing the
14 price of the truck to go up, then there was
15 a corresponding -- or perhaps not corresponding, but, to
16 a certain extent, the price which the claimants paid for
17 the body or trailer was reduced, and that reduction
18 should be taken into account in computing damages.

19 Professor Neven wishes to establish this, or at
20 least indicate what, in all probability, happened, by
21 constructing a simulation model.

22 The claimants' expert, Mr Harvey, has set out strong
23 criticisms of the robustness or application of such
24 a model, having regard to the facts and circumstances of
25 this case. A simulation model is a well recognised

1 technique, although it is more commonly used for mergers
2 rather than a cartel damages case. We can see some
3 force in the criticisms that Mr Harvey has set out, but
4 those are matters for trial.

5 We recognise that it is arguable as a matter of
6 economic theory that there might have been the
7 complement effect, if I can so describe it, which
8 Professor Neven set out, and we think that it is
9 appropriate, therefore, to allow the defendants to make
10 that amendment.

11 Therefore, we give them permission to put in an
12 expert's report employing a simulation model as
13 explained in Professor Neven's evidence.

14 As regards disclosure, there are two proposed
15 categories. One is described in the shorthand of C3 and
16 I will not read out what it involves. That is not
17 really contested but the defendants make the point that
18 some of the data sought is not available, or unlikely to
19 be available for part of this long period. Clearly the
20 claimants can provide only what can be produced by
21 reasonable and proportionate searches.

22 Insofar as such searches do not obtain the requested
23 data or documents, they do not have to provide them. As
24 regards the category described by the shorthand C4, the
25 claimants will have the option to provide either

1 a pleaded statement setting out the position, or to
2 produce the data and documents sought, or indeed, as
3 Mr Malek suggested in the course of argument,
4 a combination of the two.

5 For the claimants, Mr Harvey will have liberty to
6 put in a responsive report setting out his criticisms of
7 Professor Neven's simulation model, and commenting on
8 its implications.

9 Mr Lask says that Mr Harvey would wish to conduct
10 his own independent regression analysis, for which
11 further disclosure from the defendants would be
12 required. However, there is no application before the
13 Tribunal today for evidence of that kind to be adduced,
14 nor was it flagged in Mr Harvey's witness statements.
15 We do not think that is a matter to be decided today.
16 If the claimants wish to proceed in that way, they will
17 need to make a separate application, both for permission
18 to adduce evidence of that kind, and for any disclosure
19 that they seek.

20 We should simply comment that it does not follow
21 that because Professor Neven has been given permission
22 to produce a simulation model, that the claimants'
23 expert should have permission to introduce an expert
24 analysis on a very different basis.

25

Discussion re Ruling

1
2 MR BEARD: I am grateful to the Tribunal. Might I just
3 clarify one matter, sir?

4 THE PRESIDENT: Yes.

5 MR BEARD: You quite properly referred to categories C3 and
6 C4, which were from one of the two disclosure schedules
7 which Mr Lask took you to. I think, to be fair to
8 Mr Lask, he was making submissions in relation to both
9 C3 and C4 but also the equivalent categories in relation
10 to BT in C1 and C2. I do not think he was trying to
11 only focus on C3 and C4, but I take it that the
12 observations made by the Tribunal in relation to C3 and
13 C4 equally apply in relation to C1 and C2, just so that
14 we are absolutely clear before we move on.

15 THE PRESIDENT: Yes, Mr Beard, you are quite right. We
16 looked at the Royal Mail Redfern Schedule for
17 convenience but I think everything relates to the
18 equivalent provision of the other schedule, and when
19 I say C3 and C4, you can interpolate C3 and C4 of the
20 Royal Mail schedule and the equivalent, whatever it is,
21 C1 and C2, of the BT schedule.

22 MR BEARD: I am most grateful. Thank you very much.

23 MR LASK: Sir, may I raise two brief practical points
24 arising from the ruling?

25 THE PRESIDENT: Yes.

1 MR LASK: The first is the issue of the claimants'
2 undertakings given in 2019 that we discussed yesterday,
3 and I made the submission yesterday that if you did
4 grant permission to make the amendment, the fair and
5 appropriate course would be to lift those undertakings,
6 and then it would be for the claimants to decide whether
7 they wanted to make an application to amend the
8 particulars, so we do ask for an order lifting those
9 undertakings.

10 Then the second issue relates to the date for the
11 disclosure in C1 to C4 categories, and we would ask that
12 the disclosure be at the same time -- well, we are going
13 to come on, I suppose, later, to deal with the supply
14 parts from disclosure, but the current deadline in the
15 order that the Tribunal has made is 29 April for --
16 (overspeaking) -- to be completed, and we would ask for
17 that date to apply to this complements disclosure as
18 well, please.

19 THE PRESIDENT: Just on the date, Mr Beard, are you going to
20 push back from 29 April?

21 MR BEARD: Yes, we are, because this is material that -- the
22 29 April date was a long-stop date in relation to
23 disclosure. There are a number of categories of
24 disclosure that we would expect to be provided at least
25 in tranches before then. We do not want to have to wait

1 until 29 April. We are happy to discuss with Mr Lask if
2 there are subcategories within the four, C1 to C4, that
3 would be particularly problematic and therefore would be
4 dealt with later, and therefore April 29 might be
5 appropriate.

6 But the idea that it should all be left over to
7 April 29 we do object to. We do not think that is
8 necessary. You did not invite submissions on the
9 undertakings. Do you want any remarks on that?

10 THE PRESIDENT: No, but I will want to hear from Mr Lask on
11 dates because we are dealing with a long period. You
12 have already had the comments that it seems to be
13 unavailable, for some years, but they will no doubt have
14 to search further. They have also made the point that
15 some are in paper repositories and, even if it be dealt
16 with by a statement, anyone making the statement has to
17 satisfy themselves that the statement is accurate, so
18 they may need to look at what is there.

19 We are now on 2nd March. The end of this month is
20 Easter. So Mr Beard, I think, realistically, this trial
21 is in some -- what is it, April 2022 or something?

22 MR BEARD: It is, yes.

23 THE PRESIDENT: Yes. I see. But we have heard what you
24 have to say.

25 As regards the undertaking, Mr Lask, we are not

1 going to lift the undertaking now. We think -- we can
2 understand your position for the claimants but we do not
3 see any reason to separate lifting the undertaking from
4 granting you permission to make the amendment. If you
5 wish to apply to make an amendment to allege the price
6 increase in either form of these two complements, you
7 can apply to lift the undertaking at the same time. We
8 do not see any particular reason to deal with them
9 separately. You are certainly not precluded, as we
10 understand the undertaking, and you can take this as
11 a clear indication from the Tribunal, from applying to
12 make an amendment at the same time as you apply to lift
13 the undertaking.

14 MR LASK: I am grateful, sir.

15 THE PRESIDENT: So I do not think -- as obviously we cannot
16 deal with an amendment today, we do not have one -- that
17 your clients are in any way handicapped by the fact that
18 we are not going to lift the undertaking now.

19 As regards date for disclosure, I think what
20 Mr Beard is looking for, realistically, is for tranches,
21 and for something to come earlier. I think he
22 recognises that it would not be right to say everything
23 has got to come in three weeks or whatever. I do not
24 know if you want to take instructions, if there is
25 anything you think can reasonably be provided by the end

1 of this month for perhaps the later years.

2 MR LASK: I will take instructions on that, if I may, sir.

3 Do you want me to do that now, or shall we do it over
4 the next break?

5 THE PRESIDENT: Why do you not do it over the next break, as
6 long as we do not forget as that has to be dealt with.

7 Right. Where do we go next? Is it -- probably
8 mitigation, is it not?

9 MR BEARD: I think it is probably the logical next topic.

10 On our list we have got mitigation, tax, and then
11 disclosure, although, without getting into the how, whys
12 and wherefores, we have had some -- never mind the tone
13 but look at the content -- some progress overnight in
14 relation to some of the disclosure categories.

15 THE PRESIDENT: Right, let us turn to mitigation.

16 Submissions re Mitigation

17 MR BEARD: I am grateful.

18 If I may, with mitigation, I know the Tribunal will
19 be familiar with it, but I think it is sensible to start
20 with the Supreme Court judgment, if I may, which is in
21 {E/1}.

22 THE PRESIDENT: Yes. We have read the relevant passages in
23 preparation for this hearing, so you can draw attention
24 to anything you wish to highlight. I suspect it will
25 not come as a surprise to us.

1 MR BEARD: No, I do not anticipate I am going to say
2 anything surprising.

3 In some ways I hope I am not saying anything
4 particularly interesting, in the sense that our central
5 proposition is that the Supreme Court made it clear,
6 when it was analysing the whole nature of mitigation,
7 which it drew as a term fairly broadly covering matters,
8 including what we have been referring to as pass-on,
9 that mitigation including the impact of a putative
10 overcharge on the way in which other supplies provided
11 to a party that is claiming an overcharge were affected
12 has been recognised as a head of mitigation.

13 Allied to that, of course, is the position that in
14 considering all of these matters, there is a significant
15 asymmetry of evidence in relation to these issues. So
16 we say the plea is good in law, and, really, the
17 challenge comes in relation to factual matters, which we
18 cannot plead further to at the moment. We have set out
19 our position in relation to these issues and therefore
20 we say that plainly this is a case where an amendment
21 should be permitted.

22 The question really, then, is how does one go about
23 the proportionate disclosure exercise?

24 Obviously in relation to mitigation pertaining to
25 supplies, there are issues about the scope and extent of

1 potential relevant disclosure, but we have been
2 endeavouring to narrow that exercise and we will come on
3 to that separately. But what I want to focus on now is
4 just that basic proposition: Is it good in law? Should
5 the amendment be permitted? We say plainly the issue is
6 yes.

7 So if we could pick up the judgment of the Supreme
8 Court, it is exhibit {E/1/62}, I was going to pick it up
9 at, which is under issue (iv), the broad axe issue.

10 THE PRESIDENT: Bundle-page 62, judgment page 61?

11 MR BEARD: Yes, I am so sorry, you are quite right.

12 THE PRESIDENT: Yes, it is a mystery to me why judgments
13 that are paginated have to be repaginated for bundles,
14 but there we are.

15 MR BEARD: Perhaps another one for practice direction in due
16 course.

17 THE PRESIDENT: Yes. Issue (iv).

18 MR BEARD: I think actually the answer I may have is that
19 when you are preparing electronic bundles these
20 continuous paginations are actually useful for how they
21 are catalogued online.

22 THE PRESIDENT: Yes, I see.

23 MR BEARD: So, just picking it up at 175:

24 "The issue is concerned with the degree of precision
25 that is required in the quantification of mitigation of

1 loss where a defendant to a claim for damages arising
2 out of breach of competition law asserts that the
3 claimant has mitigated its loss through the passing on
4 of all or part of an overcharge to its customers."

5 You will recall that what was being argued about
6 here was the approach that had been adopted in the
7 tribunal and, slightly differently, in the Court of
8 Appeal about the level of precision of the passing on of
9 any loss or the quantification of any mitigation in the
10 process.

11 So the broad axe principle has been argued about.
12 Was it sufficient to operate a broad axe in relation to
13 mitigation issues, just as it was in relation to
14 overcharge issues?

15 Of course, that phraseology has been referred to in
16 a number of circumstances, but just picking up at 176
17 you see the quote from the Court of Appeal where it
18 articulates the submission that was made, and then talks
19 about:

20 "The broad axe principle is applicable where the
21 claimant has suffered loss as a result of the
22 defendant's culpable conduct but there is a lack of
23 evidence as to the amount of such loss. There is no
24 scope for the application of any such principle where
25 the burden lies on the defendant to establish a pass-on

1 of the unlawful overcharge in order to reduce the amount
2 recoverable by the claimant."

3 THE PRESIDENT: Yes, that was the only issue, really.

4 MR BEARD: Yes, it was.

5 THE PRESIDENT: On the appeal.

6 MR BEARD: Yes, it was. But of course in the Supreme Court
7 things widen out and actually the Supreme Court invited
8 further submissions in relation to issues pertaining to
9 burden of proof and these pass-on issues.

10 So in fact the Supreme Court judgment plainly goes
11 further than the Court of Appeal in terms of
12 articulating how this area of law should operate.

13 I will just skip on to 180 {E/1/63} which actually
14 makes that good:

15 "The scope of the issue expanded as a result of
16 exchanges with the bench ... On the invitation of the
17 court, [the parties] made further written submissions on
18 burden of proof."

19 THE PRESIDENT: Yes.

20 MR BEARD: (inaudible) the defendants and so on.

21 There were, therefore, further exchanges in relation
22 to these issues.

23 This is why we end up, if you see at 181 {E/1/64}:

24 "In addressing the issue in these submissions, we
25 examine, first, the requirements of EU law in relation

1 to the claims for damages which the merchants
2 advance ..."

3 So that is Sainsbury's et al.

4 "... secondly, (in order to determine whether there
5 is a question of mitigation of loss) whether the
6 merchants are entitled in law to use the overcharge
7 which is included in the MSC as the prima facie measure
8 of their losses ..."

9 Of course the Supreme Court says they do. Then:

10 "... thirdly, the burden of proof ... and, fourthly,
11 the question of the degree of precision required in
12 establishing the likely extent of any pass-on."

13 Those are the issues they ended up grappling with,
14 which were more extensive, sir, as you say, than were
15 dealt with by the Court of Appeal.

16 If we then move on to 189 {E/1/66}, what is
17 emphasised at 189, after having considered the European
18 law issues, is:

19 "... a question of fact in each case, which the
20 national court must resolve on the evidence adduced
21 before it, whether an overcharge resulting from a breach
22 of competition law has caused the claimant to suffer
23 loss or whether all or part of the overcharge has been
24 passed on by the claimant to its customers or otherwise
25 mitigated."

1 Then there is a reference to the operation, the
2 principle of effectiveness in European law.

3 Then some discussion of the damages directive.

4 Then, at 192 {E/1/67}, under the heading "The nature
5 of the claims", there is then the consideration of what
6 these claims amount to:

7 "The merchants' claims are for the added costs which
8 they have incurred as a result of the MSC, which the
9 acquiring banks have charged them, being larger than it
10 would have been if there had been no breach of
11 competition law."

12 So a counterfactual claim being made there.

13 Then at 194:

14 "It is trite law that, as a general principle, the
15 damages to be awarded for loss caused by tort are
16 compensatory. The claimant is entitled to be placed in
17 the position it would have been if the tort had not been
18 committed."

19 Then you have got Lord Blackburn from
20 Livingstone v Rawyards Coal.

21 THE PRESIDENT: Yes.

22 MR BEARD: If we go to 196, the bottom of 196 {E/1/68}, the
23 last four lines:

24 "In the legal systems of the United Kingdom pass-on
25 is an element in the quantification of damages rather

1 than a defence in a strict sense. But so long as the
2 UK's competition rules remain aligned to those of the
3 EU, the pass-on of an overcharge remains a relevant
4 factor in the assessment of damages."

5 Then 197:

6 "There are sound reasons for taking account of
7 pass-on in the calculation of damages for breach of
8 competition law. Not only is it required by the
9 compensatory principle but also there are cases where
10 there is a need to avoid double recovery through claims
11 in respect of the same overcharge by a direct purchaser
12 and by consequent purchasers in a chain, to whom an
13 overcharge has been passed on in whole or in part."

14 THE PRESIDENT: That is strict pass-on, is it not?

15 MR BEARD: That latter part is strict pass-on but I do
16 emphasise the compensatory principle references that are
17 being made here, because they obviously apply in
18 relation to issues of mitigation more generally --

19 THE PRESIDENT: Yes. Oh, yes.

20 MR BEARD: -- rather than strict pass-on. I am not
21 suggesting that these points are controversial
22 necessarily, but they are important in the sense that
23 they are making good the point that fundamentally we
24 have a good argument of law here.

25 203 {E/1/69}, just picking up:

1 "The effect of the breach on the overall
2 profitability of the claimant in each case was not the
3 relevant measure of damages."

4 So I am just picking up the interim conclusion the
5 Supreme Court was reaching, that when you assess
6 damages, you do not just look at the overall
7 profitability of a company and say, was it net improved
8 or reduced by the effect of the infringement; you look
9 more specifically at the impact alleged in relation to
10 the infringement in question.

11 THE PRESIDENT: The effect on overall profitability is not
12 relevant.

13 MR BEARD: Exactly. That is not the test to be applied.

14 One needs to look more forensically closely at the
15 arrangements involved in the alleged infringement or
16 found infringement, how they impact on the extent to
17 which specific losses were found in relation to that,
18 for instance, in the cartel overcharge, but also how
19 those particular alleged losses were mitigated.

20 Then at 204 {E/1/70}, there is a reference to
21 a comparison with, the position in the Thai Airways
22 case:

23 "... if a claimant incurs expenditure in replacing
24 items which a supplier had failed to deliver, it is
25 entitled to damages without having to show that the

1 breach of contract adversely affected its overall
2 profitability."

3 So they are illustrating the point there.

4 The key paragraph that I want to emphasise -- I will
5 go on to a couple of others but the key paragraph I need
6 to emphasise is obviously 205.

7 "In the present appeals, the merchants by paying the
8 overcharge in the MSC to the acquirers have lost funds
9 which they could have used for several purposes. As
10 sophisticated retailers, which obtain their supplies
11 from many suppliers and sell a wide range of goods to
12 many customers, they can respond to the imposition of
13 a cost in a number of ways, as the CAT pointed out in
14 [paragraphs] 434 and 455 of its judgment. There are
15 four principal options: [first of all] a merchant can do
16 nothing in response to the increased cost and thereby
17 suffer a corresponding reduction of profits or an
18 enhanced loss; or (ii)" --

19 THE PRESIDENT: Mr Beard, we have read it.

20 MR BEARD: Yes.

21 THE PRESIDENT: So you do not need to read it out line by
22 line.

23 MR BEARD: No.

24 THE PRESIDENT: Draw attention to the 205 and the four
25 options that the Supreme Court mentioned.

1 MR BEARD: Of course. The reason I read 205 through is
2 simply because the first point is we are dealing with
3 "sophisticated retailers" in this case.

4 THE PRESIDENT: Yes.

5 MR BEARD: And as we will come on to make good, obviously we
6 are dealing here with sophisticated companies who are
7 claimants.

8 THE PRESIDENT: Yes.

9 MR BEARD: So the same sorts of considerations arise in
10 relation to both.

11 THE PRESIDENT: Yes.

12 MR BEARD: The four considerations that -- the four options
13 that are set out, the do nothing, the discretionary
14 spending, and (iii) -- (iii) is critical:

15 "... the merchant can seek to reduce its costs by
16 negotiation with its many suppliers ..."

17 THE PRESIDENT: Yes.

18 MR BEARD: That is really what we are dealing with here.
19 Essentially, the amendments being put forward
20 essentially to say these are sophisticated companies,
21 Royal Mail and BT, and one of the ways they can respond
22 to a putative increase in their costs in relation to
23 trucks is to reduce their costs in negotiation with
24 their many suppliers.

25 Really, to suggest that that proposition is not

1 arguable is something that is simply not understood on
2 the part of DAF, because it is plainly arguable that in
3 these circumstances, that is one of the reactions that
4 was open to sophisticated claimants such as these, and
5 in those circumstances, a plea of mitigation is
6 legitimate.

7 Obviously the fourth --

8 THE PRESIDENT: What is being said is that you see an
9 increase in the cost of the truck price and therefore
10 that prompts you to go to some or several of the people
11 from whom you are buying things, and say, "We are
12 seeking for the same goods that we are buying, a lower
13 price."

14 MR BEARD: Yes.

15 THE PRESIDENT: It is not simply you are trying to reduce
16 your costs in all your purchasing; it is actually to try
17 to go to -- which you can do by switching sources and so
18 on, but you are actually then seeking to negotiate
19 a lower price on an input prompted by the increase in
20 the price of, in this case, the truck.

21 MR BEARD: Yes.

22 THE PRESIDENT: Otherwise it is looking at profitability.

23 MR BEARD: Yes, that is all absolutely correct. We have no
24 issue with that. That must be right because we are
25 dealing with that position, and indeed, your Lordship

1 then has the core point in relation to this. But before
2 I come back to the particular objections, I just
3 obviously confirm 206 {E/1/71}, where the Supreme Court
4 highlights that options (iii) and (iv) are legitimate,
5 and then we get into issues --

6 THE PRESIDENT: Rather oddly, to comment, they do not
7 actually -- they quote the CAT where the four options
8 were set out, it is taken from the CAT judgment, and the
9 CAT actually said that it is only option (iv) -- they do
10 not --

11 MR BEARD: That is why it is significant.

12 THE PRESIDENT: But they do not actually discuss that point.

13 MR BEARD: They do not discuss --

14 THE PRESIDENT: They seem to treat it as obvious.

15 MR BEARD: Yes, that is absolutely right, but it is the
16 salient difference between the CAT and the Supreme Court
17 that we place so much reliance on. If we had been
18 relying on CAT obviously we would not be in this
19 position, because the law as it stood at that time was
20 very different. We say we think the Supreme Court was
21 right; and, frankly, it does not matter whether we think
22 it is right or not, it is the Supreme Court.

23 In those circumstances it is plain that head 3 is
24 available.

25 Just to complete the points in relation to this,

1 obviously the Supreme Court then goes on to talk about
2 mitigation and burden of proof, since that was one of
3 the key issues that it was focused on to begin with in
4 the appeal, as we have already seen, and it picks up
5 these issues about who holds the legal burden and who
6 holds the evidential burden, and it concludes that the
7 legal burden lies on defendants who had raised these
8 issues, but if we could just skip through to 215
9 {E/1/73}:

10 "We are not concerned in these appeals with
11 additional benefits ... The issue of mitigation which
12 arises is whether in fact the merchants have avoided all
13 or part of their costs."

14 Then it is cited British Westinghouse. We do
15 emphasise this "in fact", because as we will come on to
16 illustrate in a moment, sire, you were quite right to
17 say what we are looking at is whether there is
18 a reaction to hypothetical heightened prices in relation
19 to trucks, but that does not mean that the process of
20 negotiation has to specifically advert to those prices
21 of trucks, nor that the supplier has to accede to
22 a request for lower prices on the basis that the request
23 has been made by reference to those higher prices of
24 trucks.

25 I will come on to deal with that in a moment. The

1 question is, in fact, as a matter of fact, have the
2 prices of supplies been reduced because of the alleged
3 higher prices of certain inputs?

4 MEMBER 2: You used previously, in the formulation you used
5 with the president, the words "prompted by" rather than
6 "because of" that you have just used. It is that
7 that that is the difficult area, is it not? Whether
8 there has to be a conscious adverting to, and adjustment
9 for, the increase in the trucks prices or, at the
10 opposite extreme, whether it is sufficient that that
11 simply feeds into a costs analysis which then feeds into
12 a budgeting exercise, which feeds into a general
13 business planning, and attempt to sustain profits. The
14 difficulty is, is that sufficient within the formulation
15 of the Supreme Court or does there have to be something
16 more specific addressing the increased costs of the
17 trucks in particular?

18 MR BEARD: Well, I, for my part, prompted by and because of,
19 in these circumstances, do not refer to something
20 different because it is because of the increase in price
21 that we are talking about. What you do not need to have
22 is anything explicit in that regard. It is for that
23 reason that one focuses on is how the costs and the
24 elevation of costs is fed through into the way in which
25 supplies are then priced to the putative claimant. So

1 I do not, for these purposes, think there is anything
2 different between the two. I will come on to deal with
3 the counter case that is put against us, which takes
4 "prompted by" or "because of" formulation that I have
5 been using and instead says that one needs some sort of
6 direct hypothecation and reference to these ideas,
7 because we say that is plainly wrong, it could not be --

8 THE PRESIDENT: I do not think it is said that there has to
9 be a reference in the sense that you go to your supplier
10 and say, "Well, we are now having to pay more for
11 a truck, so we would like to reduce the price of
12 switch gear", if you are BT, that you actually have to
13 refer to the truck effect --

14 MR BEARD: -- (overspeaking) --

15 THE PRESIDENT: No, I say I do not think it is suggested
16 that you do, and the Supreme Court clearly has not said,
17 and I do not think that is what Mr Justice Fancourt was
18 indicating.

19 MR BEARD: No, no, absolutely.

20 THE PRESIDENT: But it is a question of whether, in the way
21 in which you then seek to negotiate a reduced price with
22 your supplier, the direct motivation for that
23 negotiation is the fact -- the increase in the price of
24 the truck, not simply that all your costs of all your
25 inputs in the business are fed into business planning.

1 Somebody at a higher level looks at the business plan,
2 says, "Well, our total costs seem to be going up by X%
3 of -- derived from all sorts of things [of which the
4 truck might be one bit], so let us see where, with which
5 of our umpteen suppliers, we can get some reductions."
6 That is a very different thing.

7 MR BEARD: It depends on exactly what is done as a matter of
8 fact, I agree. It is certainly no part of our case to
9 say, well, the fact that businesses recover their costs
10 is sufficient to show that there is mitigation. That is
11 not the position that we are adopting and it is not the
12 position that Mr Bezant adopts. Mr Bezant has given
13 evidence very clearly. He sets out in his first
14 witness statement very clearly at {B3/10/3},
15 paragraph 13, that he is taking it as read that any
16 business that we are talking about here operated as
17 a rational business will want to recover its costs, and
18 that is the basis on which it operates.

19 The word he uses is "triggered": Are the changes in
20 supply prices triggered by the changes that are being
21 putatively seen in the costs of trucks?

22 Now, that is not "prompted to", that is not
23 "because of", and I am cautious to get into precise
24 discussions of whether or not there are differences in
25 the causation formulation here. Because, of course,

1 that may be said to be one of the legal issues that will
2 be raised against us in relation to these issues. Of
3 course, the fact --

4 THE PRESIDENT: Well, of course, that is the critical
5 question, isn't it? It is not -- one can play around
6 with different forms of words and the nuances and
7 different meanings between "triggered" or "prompted",
8 but it is actually what in fact, given the way all the
9 sophisticated businesses operate, is the requisite
10 causal connection. That, of course, feeds into, then,
11 what is the nature of the disclosure that you are
12 entitled to get.

13 MR BEARD: Yes, I think.

14 THE PRESIDENT: Because if it is simply there is an indirect
15 causal connection, as everyone recognises, every
16 business faced with an increase in the price of some of
17 its inputs will, as a result, try to reduce the costs
18 where it can of other inputs.

19 If that is mitigation that has to be taken into
20 account, every single commercial damages claim will
21 involve massive disclosure of how each claimant recovers
22 its costs across its entire activities. We do not think
23 that is what the Supreme Court was intending to open up.

24 MR BEARD: It may not have been intending to open that up.

25 One can see that there is an interpretation of the

1 Supreme Court's decision that in fact does open that up,
2 but I think it might give the Tribunal some comfort that
3 that is not the basis on which we are approaching these
4 issues. Indeed, the basis on which we are approaching
5 these issues is to say that one does need to have
6 factual evidence that it was the putative rise in prices
7 of the product that is said to be affected, the trucks,
8 that feed into and are causative of, materially
9 causative of, the rise in the -- the fall in prices
10 that is -- that are entered into with other suppliers.

11 We recognise that.

12 Now, precisely what potency of causation one needs
13 to identify as part of the legal issue in relation to
14 this, but that is why our expert is using language of
15 "triggered", and I think the important thing is that
16 this goes beyond a simple hypothecation. Sir, although
17 you say in relation to this that the position being
18 adopted by the claimants is that it is not necessarily
19 specifically to be referring to these matters, or you do
20 not need direct hypothecation between the identification
21 of a specific cost and the engagement with the supplier,
22 when we look at Mr Harvey's evidence in particular, his
23 third statement at paragraphs 5.7 to 5.15, in fact
24 that is broadly what is being put forward, and it is
25 replicated in the skeleton argument, at paragraphs 16

1 and 17, by the claimants.

2 I do not know if it is useful to go to Mr Harvey's
3 statement. It is {B3/17}.

4 THE PRESIDENT: Yes, I am looking at the skeleton now.

5 MR BEARD: Yes, the skeleton is easy.

6 THE PRESIDENT: You say paragraphs 16 and 17 of Mr Lask and
7 Ms Blackwood's skeleton?

8 MR BEARD: Yes. If we focus particularly on 17, the
9 criticism being levelled here is that the disclosure
10 being sought is essentially not broad enough, because
11 what is being said is: you, defendants, if you are going
12 to run this argument, actually need to seek disclosure
13 of all the negotiations material between Royal Mail or
14 BT, and their suppliers, if you are going to place
15 emphasis on this sense of mitigation.

16 Now, the reason they say that is embedded in the
17 material provided by Mr Harvey, who essentially says
18 that the only way one should identify price falls in
19 suppliers as being relevantly triggered by putative
20 price rises in relation, here, to trucks, is set out in
21 5.15 of his statement, to which reference is made in
22 this section of the skeleton argument.

23 I think we should perhaps go to that. So they are
24 saying you need much more disclosure in order to put
25 forward your case because you actually have to carry out

1 a granular assessment of particular negotiations.

2 THE PRESIDENT: Yes, if we look at 5.15, which in page 13
3 {B3/17/13} in the tab:

4 "... it would be necessary for the analysis to
5 identify:

6 "(a) whether truck price increases 'triggered'
7 greater scrutiny of costs ..."

8 You would accept that, as I understand it?

9 MR BEARD: Well, whether it is greater scrutiny of costs is
10 not actually the key question. It is whether the
11 putative price rise actually triggered the resulting
12 reduction in supplier costs. It does not have to be
13 greater scrutiny of costs.

14 THE PRESIDENT: The point he is making there is that if,
15 always, Royal Mail is looking to see where it can reduce
16 costs from its suppliers, and that is its standard
17 practice, year in year out, cartel or no cartel, then
18 that is not going to be sufficient. What he is saying
19 is whether the actual -- seeing that increase in truck
20 price led them to say, "Well, we have got to -- we are
21 facing this price increase, we have got to get costs
22 down from our suppliers to compensate it."

23 MR BEARD: Yes. If and insofar as that is what is being
24 talked about, there isn't a problem with the
25 proposition. But you asked me whether or not

1 proposition (a) is correct and --

2 THE PRESIDENT: Yes.

3 MR BEARD: The answer is no, because it is not actually
4 correct because it is not about greater scrutiny of
5 costs. Then (b):

6 "Whether the Claimants acted on those triggers ..."

7 So I do not think, with respect to Mr Harvey, he is
8 actually meaning the trigger of greater scrutiny of
9 costs, he is actually meaning the trigger of
10 scrutinising the increase in -- the putative increase in
11 costs, for example by attempting to renegotiate their
12 contracts with the suppliers.

13 Well, it does not have to be so bold as a full
14 renegotiation, it can just be part of a rolling process
15 with suppliers.

16 "... as a consequence of any increase in truck
17 prices ..."

18 That is the key issue {B3/17/14}.

19 "... (c) which suppliers the Claimants in fact
20 approached (if any) in order to request a reduction in
21 the costs of their supplies as a result of the increased
22 truck prices ..."

23 So the point we make is there may be a range of
24 reasons why you approach suppliers. You may be in
25 a rolling negotiation with suppliers about prices, and

1 there may be a range of reasons why you approach them
2 and seek to reduce the prices that suppliers put in
3 place.

4 So we are not saying that it has -- it cannot be the
5 case that it has to be the sole reason why you approach
6 the supplier in relation to those matters. It is not
7 clear what Mr Harvey is saying in relation to these
8 issues:

9 "(d) whether their suppliers acceded to any such
10 request for a price reduction and, if so, how and when
11 any such price reduction was implemented ..."

12 Now, (d) we do agree with. That is going to be
13 relevant in relation to these issues, because, as he
14 said, that is going to be needed to quantify the amount
15 of any mitigation.

16 What the suppliers reasons were for acceding to such
17 a request, for example were the suppliers --

18 THE PRESIDENT: Yes, I can see that.

19 MR BEARD: That cannot be right.

20 THE PRESIDENT: Yes.

21 MR BEARD: So, with respect, the problem is, and the reason
22 we see it in paragraph 17, we have effectively got
23 a proposal being put forward by the claimants that says:
24 You can only really run these mitigation arguments if
25 you have got a negotiation where you turn up and say,

1 "Look, I want my prices lower because I have got higher
2 truck prices."

3 And the supplier says: All right, well, in light of
4 the fact you have got higher truck prices, I see your
5 problem, I will reduce by prices by some margin, and
6 I will be doing it because of those truck prices."

7 Now, that just is not right. That particular aspect
8 of disclosure is not necessary for these purposes.
9 Because what we are interested in is whether or not the
10 change, the putative change in prices of trucks, impacts
11 the way in which other supplies are priced.

12 The reason why one looks at this through the lens of
13 carrying out a forensic analysis is because what one
14 does is looks at where the truck costs are taken on
15 board in the business, and then where those truck costs
16 are handed off to, effectively, to be recovered, and
17 whether, if there is an increase in those truck costs,
18 that has an impact on the way in which supplier pricing
19 is then dealt with.

20 To some extent, that will be indirect. It is not
21 simply a matter of looking at board papers on pricing.
22 Indeed, it is one of our criticisms of the disclosure
23 that has been offered, that it is at too high a level.
24 We do think it is important to be focusing on the
25 business units that actually do the truck purchasing,

1 what happens with the costs that they incur through that
2 truck purchasing, where truck prices rise -- not for
3 cartel reasons, just where truck prices rise -- one
4 looks at whether or not that impacts on other supplies
5 made.

6 Now we cannot simply say it is in relation to one
7 bit of business that that will be directly dealt with,
8 because these are complicated businesses who take in, as
9 we understand it, costs that they incur for instance in
10 relation to trucks. They incentivise people within that
11 business to try to recover those costs. They set
12 targets, they set forecasts. They then put pressure on
13 suppliers through the operation of those targets and
14 those strategies to reduce prices to them, so --

15 THE PRESIDENT: And they presumably do that all the time?

16 MR BEARD: They do do that all the time, but what we are
17 interested in identifying is how do they do that in
18 relation to rises in truck prices? That is what we are
19 concerned about here.

20 So yes, they do it all the time and, yes, they may
21 have broad policies in relation to it, but what we are
22 really interested in is: do they do that in relation to
23 truck prices? So that we can say: actually, it is the
24 rise in truck prices that has an impact on supplier
25 pricing. So it is not dealing with these things at

1 large; it is not looking just at whether or not they
2 recover their costs more generally. But equally, it is
3 not limited to some sort of direct interaction in
4 a face-to-face or email-to-email negotiation between the
5 business taking on board the costs and the supplier
6 supplying the services. That is not the right way of
7 looking at it.

8 It is for that reason that the criticism in the
9 skeleton at paragraph 17, that we should actually be
10 asking for lots more negotiations disclosure, is wrong,
11 because that is not the way that you would expect this
12 to work.

13 Those are not issues you would expect to be aired
14 between the negotiator on behalf of, say, Royal Mail,
15 with suppliers of other inputs that may be related to
16 transport matters or may in fact not be, because that is
17 actually what the Supreme Court is saying is the
18 relevant consideration to ensure that Royal Mail and BT,
19 if there is any overcharge, are not overcompensated in
20 relation to these matters.

21 MEMBER 3: Mr Beard, where you have a business like
22 Royal Mail, where comparatively the costs of the trucks
23 is not a huge percentage, let us say they notice that
24 their costs are up 10% in one year.

25 MR BEARD: Yes.

1 MEMBER 3: And 1% of that is in relation to trucks and 9%,
2 let us say, is staff costs, making it a very, very
3 simple example.

4 MR BEARD: Yes.

5 MEMBER 3: And they decide, actually, we are going to have
6 to have some costs reductions here, and they reduce
7 their costs by 5% by reducing the costs of their inputs
8 just across the board. Now, how does that work?
9 Because that may be more realistic than simply saying:
10 well, we have a 1% increase in costs, well, any 1%
11 reduction in costs is attributable to that.

12 MR BEARD: Well, the question will be: how is it that those
13 matters are actually dealt with, and is there sufficient
14 evidence to show that in fact it was that 1% that was
15 critical to the process of changing the supplier costs?
16 So it will be a matter of fact that has to be considered
17 in relation to those issues. But I think --

18 MEMBER 3: Why do you allocate that -- let us say you have
19 got the 5% reduction. Why do you allocate that 5%
20 reduction to the increase in price in trucks when you
21 have got a global increase in 10%?

22 MR BEARD: Well, I am not -- we are not -- I am not assuming
23 that you do or do not allocate that. I would be looking
24 at what the evidence was of how that process was entered
25 into. But I think it is slightly dangerous to think of

1 this at too high a level because our whole point is,
2 what you that have are people in the business -- it does
3 not matter what the scale of the business is -- I mean,
4 there is actually a perversity about some of the points
5 that are being raised against us by the claimants, that
6 says: well, it is a very big business, this is a small
7 part of their overall revenue, and therefore one would
8 not assume that there is going to be any impact.

9 That is a very strange submission because it would
10 mean that someone like Google was effectively immune
11 from a mitigation argument in these circumstances,
12 because --

13 MEMBER 3: That may explain why the mitigation argument is
14 quite difficult.

15 But what I am saying is, if you are running
16 a business and you have a -- you are facing a 10%
17 increase across the board, unless you have got documents
18 which say, ah, trucks have gone up 1%, "Because of that
19 increase, we are going to go to these other suppliers
20 and get them down", that is one possible scenario. But
21 another possible scenario is they look at it more
22 globally and say, "Actually, would an increase of 10%,
23 of which 9%, for example, is staff costs -- we are going
24 to have to see what cost cuttings we can make now in
25 order to balance the books and maintain profitability."

1 They start looking and seeing whether or not they
2 can shave stuff off, and let us say they shave off 5%,
3 I am just wondering how you deal with that situation --

4 THE PRESIDENT: I would have thought the scale of the
5 business is very relevant, Mr Beard, because each unit
6 will feed up its costs and profits to some central
7 management. They will review it overall. They may send
8 out directions to other parts of the business, having
9 looked at the totality, and say -- so that if it is BT,
10 where trucks -- I mean, Mr Malek has been quite generous
11 in saying it is as much as that, it might be a very
12 wells percentage, and there a whole load of other small
13 percentages. They take a global view. They then say,
14 "You are buying very expensive switch gear to maintain
15 our overall profitability, which we see as under --
16 being threatened by all these various matters, of which
17 trucks is just one part, we would like you to try to get
18 a 2% reduction in the price of switch gear."

19 How on other do you then say that is attributable,
20 in any way, to the -- the little bit of trucks?

21 MR BEARD: I can see there may be circumstances in which
22 that -- it may be difficult to attribute it to trucks,
23 in which case, it would not be held to be the relevant
24 trigger. But I think there is a real danger of dealing
25 with this at too high a level, and, with respect, sir,

1 I think it is not right to say it is a big business and
2 therefore it makes it harder.

3 Actually, within a large business, what one sees is
4 a concern for costs control at all levels. There are
5 going to be people within Royal Mail whose job it is to
6 minimise the costs in relation to trucks,
7 transportation, supplies in relation to transportation,
8 and all other relevant elements of that business.

9 Now, that is where this is most likely to be most
10 interesting, because what you are looking at there is
11 a situation where, from on high, it may be said, "Look,
12 you in transportation, you must make sure you are
13 driving costs down", to which they say, "Okay, well, we
14 understand that is our overall position", but the people
15 within the transportation department are looking at the
16 components of the costs that they actually are taking on
17 board. They are looking at it and saying, "Okay, well,
18 actually, if our costs of trucks is higher, that means
19 we are going to push down costs of X, Y and Z other
20 supplies, we are going to be renegotiating deals,
21 perhaps, or more exactly, when we are engaged with our
22 suppliers, we are going to be conscious that that we
23 need to make sure that our costs overall as a business
24 unit do not go up, or within a sub-business unit, do not
25 go up." Indeed, it is for that reason that one would

1 expect you have key performance indicators imposed on
2 individuals within those units, segments of the
3 business, which are requiring them to consider how it is
4 they deal with costs in that segment of the business.

5 Now, Royal Mail are very interested, and BT are very
6 interested in saying, "Well, you can only deal with it
7 at -- look at it at a global level", and at that point
8 one can see that you do exacerbate the difficulties in
9 a larger organisation with identifying whether or not
10 the costs increases in trucks are having an impact on
11 other supplies. But it is precisely for that reason we
12 say no, no, no, what we are really interested in is
13 actually that lower level analysis. Obviously we want
14 policies and indications of documentary material talking
15 about costs directions coming from on high, of board
16 consideration of these issues. Yes, that is all going
17 to be part of the context. But you cannot say that
18 that is the proper approach to this exercise. You need
19 to look at where the costs are going in and where the
20 most immediate effects are.

21 The irony of the argument being put against us is
22 that we do not like the idea that we should have to deal
23 with mitigation on the basis of indirect effects, but we
24 want to give you disclosure, particularly that relates
25 to very high levels, in circumstances where at a high

1 level, you are only ever going to be talking about
2 indirect effects.

3 THE PRESIDENT: I think that is very helpful from my
4 perspective because when I read the disclosure
5 categories I did not see them being necessarily directed
6 at the particular segment or unit of the business
7 dealing with transportation. If they are directed at
8 that, well, that narrows the disclosure requests quite
9 substantially, and then I understand the point you are
10 making.

11 MR BEARD: Yes, so this is the reason why during -- the
12 difficulty -- look, let us take a step back in relation
13 to disclosure.

14 The difficulty we have is that I am drawing on the
15 expertise of Mr Bezant and FTI in relation to these
16 matters. But of course, when they go into a discussion
17 with Royal Mail and BT or their experts, of course they
18 do not know the details of how the businesses work.
19 What they want to know is: how is it you take these
20 costs, and what do you do with them? We do not know
21 where you put them and how you deal with them in terms
22 of trying to recover them specifically so an increase in
23 these costs would impact on others.

24 The main thing we did last week was we went back and
25 said: look, in most of the disclosure categories it

1 already refers to truck costs, but that is what we are
2 really interested in. What we want to know is how do
3 you deal with those truck costs.

4 It is not just in relation to one supplier, it is
5 how you deal with them in relation to how you end up
6 engaged in negotiations. We envisage that it will be
7 primarily focused on the segments that are most engaged
8 with the costs, but one will need to see how those costs
9 are then treated through the business, and that will
10 involve some of the higher level documentation.

11 But it is starting at the bottom in relation to this
12 that we are most interested in disclosure, and it is
13 that focus that then informs the way in which one
14 carries out the analysis.

15 We are not trying to be -- reach a view, precisely,
16 about what level of legal causation has to be
17 identified, because that is a legal debate for
18 another day. What we are saying is: obviously we
19 recognise there has to be some sort of causal link; how
20 do we best go about analysing this? Well, where do the
21 costs come in? What happens to them? Who is it that is
22 dealing with them?

23 I am conscious actually of the time. I do not know
24 whether or not this will be a convenient moment for
25 a quick break?

1 THE PRESIDENT: Yes. Thank you very much. I think it
2 probably would.

3 If you -- you said there has been, because the -- as
4 so much in the CMC, one aspect is linked to another, so
5 just as the expert evidence was linked to disclosure,
6 similarly this amendment is linked to disclosure, and
7 you said there has been progress overnight on the
8 disclosure categories.

9 MR BEARD: Yes.

10 THE PRESIDENT: PO4, PO5. Is that -- we were just handed,
11 just before we opened the proceedings, a letter of
12 yesterday, and is that what we should be looking at to
13 understand? Or --

14 MR BEARD: I am not going to recommend that letter as
15 reading because it is highly tendentious, but there is
16 an annex to it, a schedule to it.

17 THE PRESIDENT: Right. The schedule --

18 MR BEARD: There is a schedule to it --

19 THE PRESIDENT: In the form of a --

20 MR BEARD: I think that is helpful.

21 So if you go to the schedule, that is a helpful
22 pointer in relation to this and identifies what remains
23 as disputes in relation to it.

24 MR LASK: Sir, I am sorry to interrupt, but just in case it
25 helps, whilst obviously the progress that has been made

1 on the supply pass-on disclosure categories is very
2 welcome, I do draw attention to paragraph 10 of the
3 supplemental note on disclosure that came in from DAF
4 yesterday morning, because what that indicates is that
5 one byproduct of the narrowing of the pass-on disclosure
6 categories is that they are now less suitable for the
7 mitigation plea. So the link you were drawing, sir,
8 between these arguments we are having at the moment and
9 the disclosure, is not quite as strong a link as it may
10 once have been.

11 THE PRESIDENT: Yes, they are saying that they might want
12 further disclosure?

13 MR BEARD: Yes, that is what we are saying.

14 THE PRESIDENT: Yes, well, that is for another day.

15 MR BEARD: Exactly.

16 THE PRESIDENT: Thank you.

17 Right, we will come back at five past 12.

18 MR BEARD: I am grateful.

19 (11.56 am)

20 (A short break)

21 (12.08 pm)

22 Submissions re the Amendment

23 THE PRESIDENT: Mr Beard, can we just turn to the actual
24 amendment that is proposed, which is --

25 MR BEARD: Yes, certainly.

1 THE PRESIDENT: -- in fact what we have to decide today.

2 MR BEARD: Yes.

3 THE PRESIDENT: Interesting though the analysis of the
4 implications of the Supreme Court judgment is, which is
5 in our bundle B3, we were looking at the Royal Mail
6 defence, and I assume the other one is the same.

7 MR BEARD: Yes, it is.

8 THE PRESIDENT: And it was paragraph 30(c).

9 MR BEARD: Yes.

10 THE PRESIDENT: "Further, or in the alternative, the app
11 contends the Claimant mitigated any overcharge by
12 reducing the costs which it paid to its suppliers.
13 Without limitation, DAF avers the Claimant will have
14 sought to mitigation any increase in its input costs by
15 virtue of any such overcharge by negotiating lower input
16 costs and/or otherwise reducing its costs of supply."
17 {RMBT-B3/1/1}.

18 We did wonder, in the light of what you were
19 explaining to us what DAF means by the plea it seeks to
20 run, what is meant by the words "without limitation",
21 because it seems to us that it is limited in that
22 certainly you have sought to limit it to us --

23 MR BEARD: Well ...

24 THE PRESIDENT: -- and secondly, why the words "any increase
25 in its input cost by virtue of".

1 It seems to us what you were saying would be
2 reflected in a second sentence:

3 "DAF avers that the Claimant will have sought to
4 mitigate any such overcharge by negotiating lower input
5 costs and otherwise reducing its costs of supply."

6 Because, as we understood it, you were saying it has
7 to be direct. You accept that. It is the overcharge
8 which therefore led them not to the knowledge of the
9 suppliers, we understand that, but was what led the
10 claimant to negotiate lower input costs and/or otherwise
11 reduce its costs of supply.

12 MR BEARD: I will take instructions on the sentence, sir,
13 you are suggesting. On the face of it, just reading it
14 on the transcript, I do not see that that would cause us
15 any difficulty, but can I just pick up a couple of
16 points you raised in the course of that suggestion?

17 THE PRESIDENT: Yes. I have to say of course we have to
18 hear from Mr Lask.

19 MR BEARD: Of course.

20 THE PRESIDENT: But -- just listen -- but with those
21 deletions, it seems to us, without yet having heard from
22 Mr Lask, that that amendment should be permitted,
23 because that does reflect the Supreme Court ruling in
24 the way that you have explained it.

25 MR BEARD: Yes. Well --

1 THE PRESIDENT: So if you want to take instructions,
2 because --

3 MR BEARD: I think I will need to take instructions on that.
4 Is it sensible for me to take -- I know you have just
5 risen and we have just come back, but I do wonder
6 whether it might be sensible -- we have this text on the
7 transcript -- if I took brief instructions. I have
8 a couple of remarks about your references to limitation
9 and direct causation and so on, but I can come back on
10 those, but I think it would be perhaps helpful because
11 then we can clarify where we are, and that would
12 perhaps -- I do not have many other remarks to make --
13 and then Mr Lask can proceed on the basis of potentially
14 a further amended version.

15 THE PRESIDENT: Yes. I think it would be helpful, and
16 I know you have appeared in the guise of Ms Edwards.
17 I do not know whether that means she is close by, or
18 whether she --

19 MR BEARD: She is.

20 THE PRESIDENT: -- or whether that means that -- how long
21 will you need? Ten minutes should be sufficient, should
22 it not?

23 MR BEARD: I think ten minutes should be sufficient. We
24 just need to track back through the transcript and make
25 sure we have got clear what is being referred to, but

1 I think ten minutes should be fine.

2 THE PRESIDENT: Yes.

3 MR BEARD: Would it be sensible to give 15, just in case,
4 because I do not want to have to come back and --

5 THE PRESIDENT: Yes, let us say 12.30.

6 MR BEARD: I am most grateful, sir. That is very kind of
7 you. Thank you.

8 THE PRESIDENT: Mr Lask, equally, can take instructions, we
9 having given that indication. We can see there is a lot
10 that can be argued about at trial of whether, first of
11 all, the claimants did it anyway, and secondly, quite
12 what meaning to give to the proximate cause. We
13 understand that. But we think those have to be matters
14 for trial. So that is where we are at the moment.

15 MR LASK: Thank you, sir. I am grateful for that
16 indication.

17 (12.17 pm)

18 (A short break)

19 (12.32 pm)

20 THE PRESIDENT: Yes, Mr Beard?

21 MR BEARD: I am very grateful. Thank you very much for the
22 opportunity to take instructions. I want to make one or
23 two brief comments, but the short answer to the question
24 posed by the Tribunal, whether or not we would be
25 content with those amendments, is yes.

1 If I may, just briefly, the use of the language
2 "without limitation" was included -- it is rather
3 reflective of the comparative levels of ignorance as to
4 the structure and arrangements of the business, and how
5 matters are dealt with, which was why that general
6 phraseology was used, but we are content for that to
7 move out of the text.

8 When it comes on to "DAF avers that the Claimants
9 will have sought to mitigate any increase in their input
10 costs by virtue of any such Overcharge", the focus there
11 is on the overcharge. Obviously, the overcharge is
12 part -- this putative overcharge is part of the input
13 costs for the business, and all that is being said there
14 is that it is the overcharge as part of those input
15 costs, what is it that the over -- is the overcharge
16 part of those input costs resulting in lower input --
17 other lower inputs costs or otherwise reducing its costs
18 of supply? So we have no difficulty with those words
19 being removed.

20 Obviously, it does not carry with it any sense that
21 the claimants could have known or that the mitigation
22 requirement is dependent on the claimants knowing that
23 there was some sort of alleged overcharge. Plainly that
24 could not be possible and that is no part of the
25 ingredients of the mitigation requirements imposed by

1 the Supreme Court.

2 But I did not understand the Tribunal's suggested
3 amendment to be interpolating any such requirement.

4 THE PRESIDENT: No, that is quite correct. I think it is
5 common ground that the -- well, you say there was no
6 charge, of course, but it is not part of the claimants'
7 case that if there was one, they knew about it.

8 MR BEARD: Yes. So that is all good.

9 I think the important thing to stress is that
10 obviously when we are talking about the evidence that
11 goes to prove this, then obviously the evidence that
12 goes to prove this will be looking at issues to do with
13 truck costs as a whole, inevitably. It does not just
14 try to focus on the notional overcharge. Indeed, that
15 could not possibly be the case where, as you say, sir,
16 our position is that there is no overcharge. But that,
17 I think, again, is read, and then it goes to questions
18 about scope of disclosure.

19 That, I think sets out our position on
20 the Tribunal's helpful suggestion as to how to amend
21 this to make sure the focus is clear.

22 I just had one or two brief remarks to make just to
23 finish my submissions in relation to this, just to
24 illustrate the position that I was actually averting to
25 in respect of the amendment, that we lack understanding

1 but we are interested in this focus where the costs come
2 in and how they are dealt with. Would it be possible
3 for the Tribunal just to turn up Mr Bezant's first
4 statement, which is found in bundle B3 at tab 10
5 {B3/10}.

6 THE PRESIDENT: We can. I am not sure what point it is
7 going to because we have an application by you to amend.
8 We have indicated that, with the changes you accepted,
9 subject to hearing obviously from the claimants, we are
10 minded to grant it, and then we come to the disclosure
11 categories, which we have not started. So we can look
12 at all sorts of things, but we have a lot to do.

13 MR BEARD: I completely understand. All I was going to
14 illustrate was one of the situations where Mr Bezant was
15 specifically saying it is these -- the specific
16 forecasts and KPIs related to these costs that --
17 (overspeaking) --

18 THE PRESIDENT: That might come into the disclosure
19 category.

20 MR BEARD: Yes, absolutely. I am happy to postpone that,
21 and, in the circumstances, I am happy to leave matters
22 for -- at this stage, given the Tribunal's indication,
23 unless I can be of further assistance.

24 THE PRESIDENT: Yes.

25 Now, Mr Lask, you have also had a chance to consider

1 THE PRESIDENT: Yes.

2 MR LASK: This falls within the broad axe issue, and this is
3 where the court turns to deal with the question of
4 mitigation and the burden of proof, and of course burden
5 of proof is the way in which the issues expanded during
6 the hearing.

7 THE PRESIDENT: Yes, 211 says it is clearly on the
8 defendants. Yes, pleaded proof.

9 MR LASK: 211, it is accepted that merchants were right to
10 say the burden was on the defendants.

11 Over the page, just at the end of 211 {E/1/72},
12 after the quote from The World Beauty case, the court
13 says:

14 "But in the context of these appeals, as we discuss
15 below, the significance of the legal burden should not
16 be overstated."

17 Then that takes us to -- I go straight to
18 paragraph 216 {E/1/73}, which is key for present
19 purposes, where the court says that:

20 "The legal burden lies on the operators of the
21 schemes to establish that the merchants have recovered
22 the costs incurred in the MSC. But once the defendants
23 have raised the issue of mitigation, in the form of
24 pass-on, there is a heavy evidential burden on the
25 merchants to provide evidence as to how they have dealt

1 with the recovery of their costs in their business.
2 Most of the relevant information about what a merchant
3 actually has done to cover its costs, including the cost
4 of the MSC, will be exclusively in the hands of the
5 merchant itself. The merchant must therefore produce
6 that evidence in order to forestall adverse
7 inferences ..."

8 So what we know is that the court is only dealing
9 there with the burden of proof. That is important in my
10 submission because it is not addressing, obviously, the
11 issue of permission to amend, because that was not
12 before it, it is not addressing the ordinary rules of
13 pleading, or indeed the test for summary judgment.

14 That is critical to understand in the meaning of
15 this paragraph and its effect, because the court says
16 that there is an evidential burden on the merchants once
17 the defendants have raised mitigation, but in its proper
18 context, in my submission, raising mitigation means
19 raising it by way of a properly pleaded defence.

20 What the Supreme Court is not doing is giving all
21 defendants in any commercial litigation carte blanche to
22 plead mitigation without any evidential basis for doing
23 so. It is not conferring on defendants immunity from
24 the established rules governing permission to amend.

25 Since the Supreme Court was not addressing these

1 issues, it is highly unlikely, in my submission, that it
2 intended to rewrite the well established principles on
3 permission to amend, summary judgment, and the rules of
4 pleading. Indeed, if that was what it had intended it
5 would have said so.

6 This is reinforced by the impact -- and this is
7 a point that the Tribunal alluded to at the outset, of
8 Mr Beard's submissions. It is reinforced by the impact
9 that such a rewrite would have on commercial litigation
10 and follow-on claims in particular. Because if
11 a defendant can plead mitigation without any evidential
12 basis, in any case where a business claims financial
13 loss, this will have a profound impact, in my
14 submission, on the cost and complexity of proceedings.
15 It will give rise to extensive disclosure and probably
16 expert evidence as a matter of course.

17 It would, I say, make follow-on claims more
18 difficult to pursue, which is contrary to the principles
19 that the Tribunal has recognised, for example in its
20 disclosure ruling.

21 So, in my submission, that is not -- it is clearly
22 not what the Supreme Court intended. It was simply
23 addressing burden of proof in the particular context of
24 merchants who are members of card payment schemes, and
25 it was recognising the particular information asymmetry

1 that exists in that context.

2 So that is what I say about the Supreme Court's
3 judgment in Sainsbury's. That forms the basis for the
4 submissions I want to make on the merits of --

5 THE PRESIDENT: Just before you go on, I see they are
6 addressing this situation of card payment schemes, but
7 the information asymmetry, is that not inherent in any
8 case where you are dealing with mitigation of this sort?

9 MR LASK: There is likely always to be some level of
10 information asymmetry. As I want to come on to explain,
11 we say the information asymmetry that existed in the
12 Sainsbury's case does not exist in this case to the same
13 degree, but also the information asymmetry does not mean
14 that there does not need to be some sort of evidential
15 basis. It may not be factual. It may be expert. But
16 if the only basis for the plea is an expert economic
17 theory, then there has to be some basis -- I made
18 a similar submission yesterday -- there has to be some
19 basis for thinking that the theory is likely to be --
20 likely to have occurred. It is not enough, in my
21 submission, to say, "Well, if it did occur, this clever
22 expert analysis we have will show that." Because that
23 does not tell you there is a real prospect of success.
24 All that tells you is that it is -- I repeat the
25 metaphor -- it is a fishing expedition with a really

1 high-spec rod, but it does not tell you you are going to
2 catch anything. If you cannot have confidence that
3 there is a real prospect of the theory being proven on
4 the facts, then it is not possible to say that there is
5 a real prospect of success.

6 THE PRESIDENT: Yes.

7 MR LASK: So I will come back to that point, but just to
8 take a step back for a moment from the detailed
9 arguments around expert analysis and disclosure, I do
10 say it is important to remind ourselves of the nature
11 and context of the proposed plea. Because the plea, in
12 essence, is that the claimants responded to the
13 overcharge by reducing the costs they paid to suppliers.
14 That is, of course, the third of the four ways in which
15 the Supreme Court said merchants might have responded to
16 the myth in Sainsbury's.

17 The first thing one notices is that even with the
18 amendment that the Tribunal proposed a little earlier,
19 the plea is extraordinarily broad and unspecified,
20 because it still applies, on its face, to all of the
21 claimants' suppliers, and has no limitation by reference
22 to categories of supplier or types of input. It still
23 applies to the whole duration of the cartel.

24 The next thing one notices is that the plea is
25 concerned with how the claimants may have responded to

1 the overcharge arising from the cartel. I emphasise
2 that because it highlights the heavy air of unreality
3 about this plea. That is obviously important when
4 considering its prospects of success.

5 Firstly, the cartel was conducted in secret. The
6 claimants did not know they had been wronged. Now, I do
7 not say that is a complete answer but it is an
8 inauspicious start for the proposed plea. It
9 immediately distinguishes the case from the classic
10 mitigation case like British Westinghouse, where the
11 claimants obviously knew the steam turbines were
12 defective because they were billowing out extravagant
13 amounts of steam. But it also distinguishes it from the
14 Sainsbury's case, because the payment of the merchant
15 service charge and every card transaction was
16 transparent in that case. It was specifically provided
17 for in the merchant services agreement.

18 So it is not obvious that a claimant can be expected
19 to have responded to a wrong it did not even know about.

20 For your note, Mr Malek made this precise point at
21 the CMC in February last year. I will just give you the
22 reference. It is {C3/3}, I think the transcript starts
23 on page 152, and it is internal page 38. We agree with
24 that and we adopt the point that Mr Malek made there.
25 So that is the first point, it is the secrecy of the

1 cartel.

2 The second is that the overcharge was a very small
3 proportion of the claimants' total annual expenditure.
4 We have given the figures in paragraph 12 of our
5 skeleton, but it was 0.08% for Royal Mail. It was
6 0.044% for the second BT claimant, and 0.3 for the
7 third BT claimant.

8 Now Mr Harvey's evidence is that even if detected,
9 an increase of this level is unlikely to have triggered
10 a successful business-wide cost reduction exercise.
11 That has not been contradicted, at least not by
12 evidence.

13 It is not enough, in my submission, to say, well, it
14 may have done so because "may have" is not the test.
15 The allegation must be more than arguable, it must have
16 a real prospect.

17 So what is there to support DAF's proposed defence?
18 We say very little indeed. There is no factual basis
19 for the plea. DAF has failed to adduce any evidence to
20 suggest that the claimants obtained cost reductions from
21 any of their suppliers. If they had, if the claimants
22 had done that, DAF may have known about it because DAF
23 itself supplied complementary products to the claimants,
24 as we heard yesterday.

25 So in my submission, DAF's own supply relationship

1 with the claimants is a bellwether for its mitigation
2 defence.

3 All we have is the most generic of economic
4 theories, that all businesses act to recover their costs
5 and make a return. But again, the uncontradicted
6 evidence from Mr Harvey is that whether a particular
7 cost rise is likely to trigger a successful cost
8 reduction exercise depends heavily on the particular
9 economic context. DAF has identified no feature with
10 the relevant context in this case to suggest that
11 mitigation by cost reduction is likely to have occurred.

12 So, in my submission, it is impossible to see how
13 DAF can establish a real prospect of success based on no
14 factual evidence and an entirely generic economic
15 theory.

16 The proposed plea is, at worst, wholly unrealistic
17 and at best, pure speculation. For that reason, the
18 amendment ought not to be allowed. Indeed, if the
19 mitigation defence is allowed in these circumstances, it
20 is very difficult to conceive of a cartel case in which
21 it would not be allowed.

22 Sir, what I wanted to do next was just deal with the
23 issues under the same four headings that I addressed to
24 you yesterday, but I will cut my cloth accordingly,
25 given that I prefaced some of those issues already in

1 that introduction.

2 The four issues are: the lack of any factual basis;
3 the inadequacy of the expert evidence; the practical
4 implications; and the delay.

5 Dealing firstly with the lack of factual basis, we
6 do say there must still be some evidential basis for the
7 pleading, and that would ordinary very be factual, but
8 it is common ground that DAF's case is advanced --
9 I mean, Mr Beard made this plain this morning: it relies
10 wholly on the Supreme Court's judgment in Sainsbury's.
11 There is no factual evidence.

12 DAF makes the obvious point that there is
13 information asymmetry, and it cannot know about the
14 claimants' internal operations, but in my submission
15 that misses the point. I emphasise that the position
16 here is very different from the position in Sainsbury's,
17 because in that case there is no reason why MasterCard
18 would have known about any efforts by Sainsbury's to
19 negotiate cost reductions with its dairy or meat
20 suppliers. That is what lay behind the Supreme Court's
21 observation at paragraph 216. The Supreme Court is not
22 referring there to claimants and defendants in general;
23 but specifically to the relationship in that case
24 between operators of the payment card scheme and
25 participating merchants.

1 But here, as we know, DAF was the supplier of
2 precisely the sort of input that, on its own case, the
3 claimants may have sought to reduce the costs of.

4 Just to illustrate that, DAF says in its skeleton
5 argument, at paragraph 63(a), it says in terms:

6 "[Royal Mail] and BT may have negotiated lower
7 prices for trailers/bodies in response to higher Truck
8 costs ..."

9 Well, if they did, you should know about it. We do
10 not know if you have investigated it, DAF, but if you
11 have, you have not told us the outcome. But if we did
12 not negotiate those cost reductions with you, we did not
13 try to, what basis is there for thinking we did it with
14 anyone else?

15 That point is supported not only on DAF's own case,
16 but in Mr Harvey's evidence. If I could ask you to turn
17 up Harvey 9, please, at tab 17, B3. He makes the point
18 at paragraph 5.21 on page 16 {B3/17/16}:

19 "I also note that if and to the extent that the
20 overcharge did in fact 'trigger' the Claimants to
21 proactively seek costs reductions from their suppliers
22 in order to mitigate this increased cost, then one place
23 that this could have occurred would be in the
24 negotiations with the Defendants themselves for the
25 purchase of any other related goods and services."

1 Then just moving towards the end of that paragraph:

2 "If Royal Mail had, in fact, sought to negotiate
3 down the costs of its trucks and trailers ..."

4 It should probably read "bodies".

5 "... with the Defendants in this period, then this
6 would be something that the Defendants should be able to
7 confirm. If this did not occur then this would support
8 the Claimants' position that it is unlikely that any
9 increase in the purchase price for their trucks as
10 a result of the cartel in fact resulted in any attempts
11 by the Claimants to negotiate down the price of other
12 goods and services from their suppliers."

13 That has not been contradicted either.

14 The point we make is a simple one: if the claimants
15 did not achieve costs reductions for products or if
16 there is no evidence that the claimants achieved cost
17 reductions for products that were closely related to
18 trucks, they are less likely to have done so for other,
19 unrelated goods and services. That is why I say
20 that DAF's own supplier relationship with the claimants
21 is a bellwether for its mitigation defence.

22 Where that takes us is that the lack of any factual
23 basis means that the onus falls entirely on DAF's expert
24 evidence. So that is where the evidential basis for its
25 mitigation plea has to be found. I turn to that now.

1 Again, as with the complements plea, the expert
2 evidence comprises two elements: a theory and a proposed
3 analysis.

4 I made the point yesterday that DAF needs to
5 establish that both are good in order to have a real
6 prospect of success. It is not enough to have one or
7 the other.

8 So dealing first with the theory, may I ask you to
9 turn up Bezant 1 at paragraph 12, which is B3, tab 10,
10 page 3. {B3/10/3}.

11 I say paragraph 12, it is actually 13. In the
12 second sentence:

13 "As a matter of economic principle, and hence
14 observed standard commercial practice, a business acts
15 to recover all of its costs and make a suitable return
16 on its activities (which return is necessary over the
17 longer term for its continued existence). As a result,
18 when faced with an increase in any of its costs (such as
19 an overcharge) - a business will have to consider
20 whether to:

21 "a. increase its prices ...

22 "b. control its expenditure ...

23 "c. absorb the increase in costs and earn lower cash
24 profits ...

25 "d. adopt a combination of (a), (b) and (c)."

1 In my submission, it is clear that is expressed at
2 a very high level of generality. What is important is
3 that Mr Harvey explains that the likelihood of
4 mitigation -- you will see that Mr Bezant does not
5 really elaborate on which of those options he thinks
6 would have been likely in this case and whether he
7 thinks mitigation would have been likely and if so, why.

8 What Mr Harvey says, and this is going back to his
9 ninth statement, behind tab 17, pages 10 to 11
10 {B3/17/10}, he deals with this at 5.6, he says, well,
11 the likelihood depends on the economic context.

12 Again, that is uncontradicted.

13 As I say, 5.6, he refers to the "fundamental
14 economic principle" in the first sentence, and then he
15 makes the point which, again, I think the Tribunal made
16 this morning, because big businesses are always seeking
17 to cover their costs and maximise their profits:

18 "I would therefore expect businesses to pursue cost
19 reductions as a 'business as usual' activity. I would
20 not expect businesses to 'wait' for the price of one
21 input (such as trucks) to rise, before pursuing cost
22 reductions on other inputs."

23 Then he says, therefore there is:

24 "... no reason in economic theory to expect that
25 'mitigation by cost reduction' would necessarily

1 occur ... Rather, for the reasons given ... [it] depends
2 on the economic context."

3 He says at 5.7 {B3/17/11}:

4 "I recognise, of course, that an increase in the
5 price of one input could in some cases 'trigger'
6 a business to scrutinise the rest of its costs more
7 thoroughly ... However, I understand that truck
8 expenditure accounted for a negligible proportion ..."

9 That is the point I made at the outset. This is the
10 end of paragraph 5.7:

11 "... I therefore consider it unlikely that an
12 increase in truck prices of the level that allegedly
13 occurred as a result of the cartel would trigger a
14 'business-wide' increase in scrutiny of the type that
15 I understand Mr Bezant wants to investigate ..."

16 Then he make the point, at 5.8, this is reinforced
17 by the fact that it was conducted in secret.

18 At 5.9:

19 "Even if the Claimants had identified an increase in
20 the price of the trucks ... and even if the Claimants
21 had subsequently decided to use this as a reason to seek
22 to negotiate a reduction ... it would be necessary for
23 one or more of the ... suppliers to agree to reduce
24 their prices off the back of a request ..."

25 Then he says {B3/17/12}:

1 "Aside from the arguments that Professor Neven
2 raises in respect of trailers and bodies ... there is no
3 reason to believe that the Claimantss' suppliers would
4 have agreed to reduce [their] costs ... Indeed, there
5 may be many factors that would lead a supplier to refuse
6 any such reduction ... margin on the product ... general
7 market conditions", et cetera.

8 So what Mr Harvey is doing is saying well, this --
9 the likelihood of this having occurred depends on the
10 economic context, and there are reasons to believe it
11 was unlikely to have occurred. Mr Harvey is engaged
12 with some of those factual elements of the economic
13 context.

14 There is no attempt by Mr Bezant to identify any
15 features of the present context to suggest that the
16 alleged mitigation was likely to have occurred.

17 In my submission, that fatally undermines the
18 application, because there is no factual basis, and in
19 the absence of any analysis by Mr Bezant to suggest that
20 this would have been likely to have occurred, there is
21 no basis for the Tribunal to conclude that there is any
22 real prospect of success.

23 I note that Mr Bezant does not say that he was
24 unable to investigate likelihood due to a lack of
25 available information. He simply does not address, just

1 does not address the point. But we would say that he
2 could have looked at similar things to Mr Harvey. He
3 could have looked at the claimants' annual expenditure
4 compared to the overcharge, as Mr Harvey did. He could
5 have looked at factors indicating whether any attempts
6 by the claimants to negotiate on bodies would have
7 succeeded. So he could have looked at DAF's margin and
8 alternative suppliers for bodies in contractual terms.

9 He could have sought to identify other complementary
10 products which were likely targets for any cost
11 negotiation exercise. He has done none of those things.
12 As I say, what we do know about the economic context,
13 the matters identified by Harvey, they all point in one
14 direction, which is that this mitigation is unlikely to
15 have occurred.

16 MEMBER 3: Mr Lask, do we have any feel for what the
17 relative cost is for the truck purchases in any year and
18 the fuel purchases, because when you look at fuel, that
19 is something that quite commonly will fluctuate 25%,
20 sometimes more in any one year. So you have one major
21 cost input which fluctuates a considerable amount, and
22 another cost input which probably does not fluctuate in
23 the same way up and down. Do we have any idea what the
24 relative size is, in those two inputs?

25 MR LASK: Sir, I do not know the answer to that offhand but

1 we will look into that over the break, if we may, and
2 let you know if there is any evidence.

3 MEMBER 3: I just want to have a feel for it.

4 MR LASK: Yes, thank you for that.

5 But, standing back, we have a proposed mitigation
6 plea advanced without any factual basis at all, and an
7 economic theory that is so generic as to be utterly
8 uninformative as to the likelihood of mitigation in this
9 case. In substance, the plea rests entirely on DAF's
10 hope that something will turn up in disclosure, and that
11 Mr Bezant will, via his analysis, be able to turn it
12 into a plausible mitigation story.

13 THE PRESIDENT: Sorry -- just a moment, sorry. I think
14 Mr Beard may have dropped off. Could we -- can you
15 pause a moment.

16 MR LASK: Sorry if my submissions have had that effect.

17 MR BEARD: No, I have been listening attentively. There was
18 a slight glitch but I saw the text on the transcript so
19 Mr Lask can rest assured I have heard all of his wise
20 words.

21 THE PRESIDENT: We can hear you, Mr Beard. We have been
22 deprived of the pleasure of seeing you at the moment in
23 any guise, whether as Mr Beard or one of your other
24 aliases.

25 MR BEARD: Yes, I am sorry that --

1 THE PRESIDENT: You are back.

2 MR BEARD: -- that has happened. I will try to rectify it
3 over the short adjournment.

4 THE PRESIDENT: No, you are back. With a new name, I think,
5 but yes.

6 Yes, Mr Lask go on.

7 MR LASK: So I was making the point that standing back, the
8 plea is advanced without any factual basis, and an
9 economic theory that is so generic as to be utterly
10 uninformative. It does, I say, rest entirely on the
11 hope that something will turn up in the disclosure, and
12 that Mr Bezant will turn it into a plausible mitigation
13 story.

14 DAF's submission, the way in which Mr Beard put the
15 case this morning, in my submission, what that comes
16 down to is that if mitigation occurred as a result of
17 overcharge, Mr Bezant's analysis and the disclosure we
18 have requested will show it. But in my submission, that
19 is not good enough. In fact, it is the very definition
20 of a fishing expedition. That is the very thing the
21 authorities say is not good enough.

22 Sir, I was going to come on to Mr Bezant's proposed
23 analysis. I know we have had couple of breaks this
24 morning, but I am conscious of the time, and I am in
25 your hands as to whether you want me to carry on or wait

1 until after the break?

2 THE PRESIDENT: You have made some comments on that already.
3 This is obviously a very important part of this hearing.
4 To make comments on his analysis, how long will that
5 second point take, which is I think of your four points,
6 it is the second one?

7 MR LASK: Yes, this would complete the second of my four
8 headings, yes.

9 THE PRESIDENT: Why do you not complete that?

10 MR LASK: Okay, very well. Thank you, sir.

11 So given that the submissions I have just made, we
12 say that in the circumstances, it does not matter how
13 sophisticated or suitable Mr Bezant's proposed analysis
14 is, because until that analysis is carried out, the
15 defence remains pure speculation.

16 But in case we do need to go further, we do say that
17 the proposed analysis is fundamentally flawed, because
18 it is common ground that causation is an essential
19 ingredient of mitigation. Mr Beard I think accepted
20 this morning that there has to be a direct causal link,
21 which we would say is right. Mr Harvey explains why
22 Mr Bezant's proposed analysis is unsuitable for
23 establishing causation.

24 We looked this morning at I think it was
25 paragraph 5.13 onwards. It is probably just worth

1 having that open. So this is {B3/17/12} and it is
2 starting on page 12.

3 The first point Mr Harvey makes at 5.13 is the key
4 omission is any mechanism for establishing causation.
5 He says:

6 "Without analysing this, I cannot see how
7 Mr Bezant's analysis can assist the Tribunal in
8 establishing whether the Claimants in fact chose to seek
9 a cost reduction as a result of the overcharge."

10 Then at 5.14 he draws a contrast which is not
11 something you have heard from Mr Beard on, but he draws
12 a contrast with Mr Bezant's proposed approach to supply
13 pass-on. Because his analysis on supply pass-on
14 appears, as we understand it, to be geared to try to
15 trace a link between the overcharge and a decision by
16 the claimants to increase their prices.

17 We are saying that is the sort of thing you need to
18 do in mitigation. You need to trace the link. Then
19 that is reflected in the five steps that Mr Harvey sets
20 out at 5.15. Those are the steps that he says are
21 necessary in order to establish causation in a case like
22 this.

23 Just to be clear, Mr Harvey does not say, and we do
24 not say, that it would need to be shown in any
25 negotiations or any evidence of negotiations that the

1 claimants specifically mentioned truck costs as a reason
2 for seeking to reduce the costs of their other supplies.
3 We do not say that is required, but we do say that the
4 five steps identified by Mr Harvey are required. He
5 makes the point that the trigger that Mr Bezant wants to
6 examine is only one part of the causal connection.

7 Now, because of the way that the timetable works for
8 this hearing, we do not have a response from Mr Bezant
9 to that. But we do have DAF's submissions, and the
10 essential argument that is made by Mr Beard is that
11 Mr Bezant's analysis would be able to establish
12 causation.

13 I would like to take you to what Mr Bezant says
14 about this, if I may. This is back in his first
15 statement, tab 10 of B3, page 18, paragraph 71.

16 {B3/10/18}

17 As we understand it, this is all of it. This is his
18 explanation of how he is going to do it, and this is as
19 close as he gets to explaining how he will establish
20 causation.

21 I am going to pause so the Tribunal can read it, but
22 the initial observation I make is, if nothing else, the
23 explanation is compressed. We say it is striking that
24 Mr Bezant does not explain his approach to causation
25 more clearly when it was being very clearly ventilated

1 on the correspondence. I will just pause there, if
2 I may, so you can read it, sir. (Pause)

3 THE PRESIDENT: Yes.

4 MR LASK: Sir, as we understand it, Mr Bezant proposes to
5 look at firstly whether truck price increases were the
6 sort of thing to trigger greater costs scrutiny, and
7 then whether the claimants in fact achieved costs
8 reductions. But there is no indication of how he will
9 identify whether the claimants in fact acted on those
10 triggers, or whether such efforts were successful.

11 There is no indication that he will be able to trace
12 the link between a rise in truck costs and any reduction
13 in other costs; so he will not be able to say whether
14 one was caused by the other.

15 Just to illustrate and pick up on a point that
16 Mr Malek discussed with Mr Beard, suppose trucks costs
17 do typically trigger costs reduction efforts within the
18 claimants' businesses? Suppose that Mr Bezant spots
19 a cost reduction in a particular area of the business.
20 How will he be able to say that that particular cost
21 reduction arose out of the efforts triggered by an
22 increase in trucks prices? Cost reduction may have
23 arisen, for example, as a result of competition in the
24 market for the supply of that input.

25 I raise the question, how will he establish that

1 causal link? We say it is totally unclear, because he
2 does not say. General cost-cutting measures arising
3 across a business may be very difficult to link causally
4 to the overcharge. As you put it, sir, in your exchange
5 with Mr Beard: how on earth do you attribute it to
6 trucks? All he is proposing to look at, as we
7 understand it, is overall cost and price trends.

8 We do say that actually, what you need to do if you
9 are going to do this, is you need to look at the
10 negotiations. Just as the parties will be looking at
11 the negotiations on trucks, to see whether an increase
12 in list prices is fed through to the transaction prices
13 paid by the claimants. It is common ground that that is
14 very relevant in the context of overcharge, and we say
15 it is just as relevant in this context.

16 Just for your reference -- for your notes, sir,
17 there is a letter on this in the bundle. I do not need
18 to take you to it. It is in the Inner Confidentiality
19 Ring so it is {D/IC30/1}. It is a letter that
20 acknowledges that this is an issue that needs to be
21 looked at in that context.

22 THE PRESIDENT: In the context of the overcharge?

23 MR LASK: Of the overcharge.

24 THE PRESIDENT: Yes.

25 MR LASK: DAF says --

1 THE PRESIDENT: I follow a lot of what you say, but I do not
2 quite understand how looking at the negotiations with
3 suppliers is going to help. I mean, in no
4 circumstances, I would have thought, or it would be
5 exceptionally rare, even if a purchaser knew it was
6 being subject to a particular overcharge and it wants to
7 mitigate that increase by reducing the costs of
8 something else, it will negotiate with that other
9 supplier to try to get the costs down. It will know
10 that it has an overcharge. It will know that it is
11 seeking to mitigate that specific over -- but it is not
12 necessarily going to tell the supplier, "Well, look, our
13 truck costs have gone up, so ..."

14 I think you have just recognised that.

15 MR LASK: Yes.

16 THE PRESIDENT: "... and therefore we want a corresponding
17 reduction."

18 Most suppliers will say, "That is your problem. Go
19 and negotiate with your truck supplier."

20 In any event, it is not the kind of exchange you
21 would expect. I do not, for myself, see how to looking
22 at the negotiations will help.

23 MR LASK: Sir, I say it is necessary to look at the
24 negotiations, but it is not sufficient on its own.

25 THE PRESIDENT: Why is it necessary?

1 MR LASK: Because the first thing you look at is you need to
2 look at whether the claimants in fact sought a costs
3 reduction. If you can establish that by looking at
4 evidence of their negotiations with their suppliers,
5 then you can start trying to trace back, through the
6 claimants' evidence, to see whether that can be linked
7 to a recognition or a detection of an increase in trucks
8 costs. That is how you try and trace the link from
9 the -- you almost start at the end. You trace the link
10 from the cost reduction effort and you trace it back
11 through the claimants' internal processes to see whether
12 it can be linked to a detected increase in truck prices.

13 THE PRESIDENT: Well, you could start either way. There is
14 no magic way you start.

15 MR LASK: I accept that.

16 THE PRESIDENT: Because equally, looking at negotiations,
17 you might find that in every negotiation, the claimants
18 try and seek a cost reduction.

19 MR LASK: Yes. Well, you might, but if you do not see that
20 at all, if you do not have any evidence of that, it
21 becomes very difficult to see how you get a case on
22 causation off the ground.

23 Just a final point under this heading, sir, is --
24 I mentioned previously the byproduct of the narrowing of
25 the supply pass-on disclosure categories. As you saw

1 from DAF's supplemental submission, it is apparent now
2 that the disclosure being sought may well not be
3 sufficient for Mr Bezant's analysis, and for the
4 mitigation defence. That has two implications, in my
5 submission: the first is that it becomes even more
6 difficult to see how Mr Bezant's analysis could
7 establish the mitigation defence, because now the
8 disclosure is simply not there for him.

9 The second is that if permission is granted, there
10 is a good chance that there will be further disclosure
11 requests coming from DAF. In my submission, it cannot
12 be right, at this stage in the litigation, to be seeking
13 permission for an amendment that on any view will not be
14 sustainable on the disclosure currently being sought.

15 THE PRESIDENT: Yes.

16 MR LASK: That brings me to the end of the second heading.

17 The third and fourth headings I can pick up after the
18 adjournment, and may not take as long as the first two.

19 THE PRESIDENT: Yes. I would hope they do not, or we will
20 be in some difficulty. We will come back at five past
21 two. So we will take slightly shorter break.

22 MR LASK: Thank you, sir.

23 (1.16 pm)

24 (The Short Adjournment)

25 (2.05 pm)

1 THE PRESIDENT: Yes, Mr Lask? Mr Lask, I think you are on
2 mute.

3 MR LASK: Thank you, sir. Apologies. Just before I restart
4 my submissions, Mr Malek asked a question before the
5 break about whether we had any information on the
6 relative cost difference as between trucks on the one
7 hand and fuel on the other. We are exploring that with
8 our clients but we do not have an answer yet, I am
9 afraid.

10 Coming on to the third heading in my submissions,
11 which concerns the practical implications of allowing
12 the amendment, and in particular prejudice, as
13 I submitted yesterday, if the Tribunal -- if I have
14 persuaded the Tribunal that DAF has failed to establish
15 a real prospect of success, that is the end of the
16 matter and the amendment should be disallowed.

17 But even if I have not, I do say it is necessary to
18 weigh up still the prejudice to the claimants in
19 allowing the amendment compared to the prejudice to DAF
20 in disallowing it. We do submit that allowing the
21 amendment would cause substantial prejudice to the
22 claimants because it would result in a very large
23 increase in the work and the costs involved, and
24 a potential diversion of resources.

25 That would be exacerbated by the fact that the

1 Tribunal has granted permission to run the complements
2 defence, so it is not just one additional defence now,
3 it would be two.

4 Just to make the point good, and I can take this
5 point briefly, sir, but going back to Mr Harvey's
6 statement in {B3/17/14}, we have looked at the five
7 steps that he says would be required in order to do what
8 he regards as a robust forensic accountancy analysis,
9 and then he says at 5.19, at the bottom of page 14:

10 "Whilst my view is that each of the five steps set
11 out in paragraph 5.15 above are necessary in order for
12 any forensic accounting mitigation analysis to properly
13 assess the question ... this would require detailed
14 factual analysis and further information from the
15 Claimants. This is particularly the case given the
16 absence of any limitations being placed upon the
17 suppliers that Mr Bezant proposes to investigate as he
18 and the Defendants appear to consider that an analysis
19 of the whole of the Claimants' supplier base is
20 necessary in order to determine whether any of those
21 suppliers' prices were decreased. I do not, therefore,
22 share [his] view that a probative and reasonable
23 mitigation analysis can be conducted in these
24 proceedings without requiring significantly more
25 disclosure from the Claimants than has been requested in

1 the PO4 and PO5 ..."

2 Just pausing there, sir, that needs to be seen in
3 the context of what Mr Bezant was saying in Bezant 1
4 about the scope of his analysis. If I can ask you to
5 turn up Bezant 1 at {B3/10/3}, you will see
6 paragraph 11:

7 "In this statement I address three issues which are
8 relevant to the determination of certain aspects of
9 DAF's application ..."

10 (a) supply pass-on, (b) PO4 and PO5 disclosure, and:

11 "(c) My proposal to assess the extent to which any
12 alleged increase in the price of Trucks would have been
13 successfully mitigated ... This analysis is based on
14 paragraph 205(iii) of the [Sainsbury's decision] ..."

15 Then this is an important sentence:

16 "I note that my proposed Mitigation Analysis is
17 limited to negotiations with suppliers other than those
18 suppliers from whom the Claimants purchased goods and
19 services alongside the Truck (ie non-complements
20 suppliers)."

21 So Mr Bezant says his analysis is only looking at
22 the effects on the prices of non-complements inputs.

23 There are a number of implications to that. First,
24 that appears to be the intention with the submission
25 made in DAF's skeleton, at 63(a), where it says that:

1 "[Royal Mail] and BT may have negotiated lower
2 prices for trailers/bodies in response to higher Truck
3 costs: this point is covered by the Mitigation Plea,
4 addressed above."

5 That is 63(a) of DAF's skeleton.

6 At the very least, there is uncertainty about the
7 scope of the mitigation plea. I do not know, sir, if
8 that has any impact on the amendments to the amendment
9 that you were discussing with Mr Beard this morning. We
10 have looked back over the transcript of that exchange,
11 and to be frank, we are not entirely clear on what the
12 Tribunal's thinking is behind the amendments and what --
13 in what way, if any, the amendment narrows the scope of
14 the plea.

15 As I say, I do not know whether this has any impact
16 on that, but at the very least it is a lack of clarity,
17 we say, in DAF's mitigation case that would need to be
18 sorted out. But also, Mr Harvey said that, you know, he
19 would need to do a significant additional factual
20 analysis and seek additional further closure from the
21 claimants. But if DAF is saying that the mitigation
22 defence does cover complements as well as
23 non-complements, then it may -- and I lay this down as
24 a marker -- it may well be that Mr Harvey needs to seek
25 disclosure from DAF, because if the mitigation plea is

1 being expanded to cover potential negotiations with DAF
2 and other suppliers of complements, then at the very
3 least the claimants may want to seek disclosure
4 from DAF.

5 Before we get to that, I do say that that needs to
6 be clarified, and as I say, it may or may not have an
7 impact on the amendments you were discussing, sir, with
8 Mr Beard earlier.

9 THE PRESIDENT: I do not think the amendment that -- the
10 revision of the draft amendment impacts on the point at
11 paragraph 63(a). That would be within the scope of
12 a revised paragraph 13(c). So I do not think there is
13 any knock-on effect on the point at 63(a).

14 MR LASK: Very well. But, at the very least, in my
15 submission, there does need to be some clarity from DAF
16 as to whether complements are in or out. I accept your
17 point, which is that it would be permissible on the
18 amended pleading, but we need to know for the purposes
19 of expert analysis and disclosure whether they are in or
20 out.

21 The other point I wanted to make from Mr Harvey's
22 statement is at -- this really goes to the scale of the
23 additional work that this amendment will give rise to or
24 would give rise to. It is 5.20 of Mr Harvey's statement
25 where he describes the additional work involved simply

1 in responding to Mr Bezant's analysis; never mind doing
2 his own, simply in responding to Mr Bezant's analysis.
3 Perhaps I could ask the Tribunal to just read over
4 paragraph 5.20, please.

5 THE PRESIDENT: That is at page 15?

6 MR LASK: Yes, I am sorry.

7 THE PRESIDENT: Tab 17, yes.

8 MR LASK: {B3/17/15}.

9 (Pause)

10 Sir, has the Tribunal read that?

11 THE PRESIDENT: Yes. Thank you.

12 MR LASK: Thank you.

13 If one reads those paragraphs of Mr Harvey together,
14 5.15 to 5.20, it is clear, in my submission, that
15 allowing this plea would give rise to significant
16 additional work and significant additional costs, and
17 indeed raise the spectre of significant wasted costs,
18 and importantly, a diversion of the claimants' resources
19 that are required for the preparation to trial. In my
20 submission, those points militate strongly against
21 allowing the amendment even if you accept that it has
22 a real prospect of success, which we say it does not.

23 Finally, I will deal with this briefly, the question
24 of delay. We do say there has been a significant delay
25 in DAF raising these amendments over three years, in the

1 case of Royal Mail, two-and-a-half years in the case
2 of BT. We do not accept it can be justified by
3 reference to the Sainsbury's litigation. I am not going
4 to take you to the Tribunal's judgment but we do say
5 that the rejection of MasterCard's mitigation defence
6 was a decision on the facts, and it was not something
7 that was significantly changed by the Sainsbury's --
8 sorry, by the Supreme Court's judgment in the same case.

9 It is noticeable that the Tribunal rejected
10 MasterCard's pass-on defence on much the same basis as
11 it rejected the mitigation defence. Yet DAF felt
12 perfectly well able to plead pass-on from the outset.
13 So we do not think there is any merit in the submission
14 that Sainsbury's justifies their delay.

15 We do say the delay is not only significant but it
16 has a practical implication, because if the amendment
17 were now to be allowed, there is much less time
18 available in which to do the necessary work, and it
19 causes the claimants a much greater headache than it may
20 have done if it had been raised earlier.

21 THE PRESIDENT: Yes. I thought that this Tribunal, having
22 set out the four categories of potential "recovery" in
23 the broadest sense that a business can use, or resort
24 to, faced with an increase in costs, which are the four
25 categories that the Supreme Court repeated and adopted

1 in its judgment, I thought that the Tribunal had said
2 that it is only category 4, namely pass-on, that is
3 legally permissible. So on legal grounds they excluded
4 category 3.

5 MR LASK: Sir, your recollection may well be right. That is
6 not my recollection of the judgment, and I was not going
7 to take you to it but -- I was focusing on
8 paragraphs 475 onwards, where the Tribunal rejects
9 MasterCard's mitigation defence on what we say is -- on
10 the evidence, and on the facts. But if there is
11 a passage somewhere -- I mean, it is a very long
12 judgment -- if there is a passage in there somewhere
13 where they say it is impermissible as a matter of law,
14 then I stand corrected.

15 THE PRESIDENT: Yes, I do not want to take time, we can look
16 into that, but that was my understanding of it. They
17 talk about passing on as a form of mitigation, and ...

18 MR LASK: 475 to 478 are the paragraphs I focus on.

19 MR BEARD: It is paragraph 461 as well, the relevant
20 consideration starts at 459 and does run right through
21 to 478.

22 THE PRESIDENT: Perhaps we will have a look at it
23 afterwards. As you say, it is a long judgment. That
24 was my recollection, and it may be, but I am not
25 suggesting that that is in any way infallible.

1 They set out the four options a number of times, and
2 I think at some point they draw a distinction between
3 what is legal mitigation, as it were, and what an
4 economist would regard as litigation.

5 MR LASK: They do draw that distinction specifically in
6 relation to pass-on, which they deal with separately
7 from mitigation. I am just trying to find where
8 that is. I cannot immediately find it.

9 THE PRESIDENT: We will look at that later. Yes. Thank
10 you.

11 MR LASK: Sir, unless I can assist you further?

12 THE PRESIDENT: Mr Beard, would you like to respond, please.

13 Submissions in reply by MR BEARD

14 MR BEARD: Certainly.

15 Taking it in stages, we have seen the position in
16 relation to Sainsbury's --

17 THE PRESIDENT: Mr Beard, you have suddenly muted.

18 MR BEARD: Am I back now?

19 THE PRESIDENT: You are.

20 MR BEARD: Thank you.

21 Just taking it in stages, in relation to Sainsbury's
22 in the Supreme Court, we have the clear position that
23 this is arguable as a matter of law, and in those
24 circumstances, the idea that an amendment should not be
25 permitted where it is plainly arguable ...

1 I am sorry, Mr Williams was indicating I may have
2 dropped out again.

3 The Supreme Court clearly indicated it was arguable
4 as a matter of law. That is the position here. In
5 those circumstances, it is plain an amendment should be
6 permitted. The countervailing considerations I will
7 come back to but they clearly do not outweigh the
8 appropriateness of this matter being aired.

9 Indeed, it would be the first case potentially in
10 which these issues were tested, albeit that the remitted
11 matters in relation to interchange are back before
12 the Tribunal. Nonetheless, in relation to these
13 matters, there isn't an extant judgment following on
14 from the Supreme Court, and it is plain in those
15 circumstances that we should be permitted to proceed in
16 relation to this matter.

17 Obviously, there are limits as to what we can plead
18 given the asymmetry of information in relation to these
19 issues. I am not going to rehearse the submissions
20 I made in relation to complements yesterday, but the
21 points being made again about how we could somehow have
22 identified from either the bundle sales we made or the
23 sales with bodies from third parties that we made,
24 somehow, an indication as to how they dealt with costs
25 and how they negotiated in relation to changes in truck

1 prices, in any way, is simply not tenable.

2 I go back to the points I made about controlling for
3 those prices and costs and trying to identify trends.
4 But I add to that, in relation to mitigation, the fact
5 that what we are talking about is their reaction to the
6 higher truck costs, which plainly we cannot have any
7 indication is. What we do see is not some clever,
8 clever economic analysis from an expert being put
9 forward by Mr Bezant. What he is seeking to do
10 identify, in recognition of the fact that companies such
11 as Royal Mail and BT will be seeking to drive down
12 costs, how you make the enquiry as to whether or not
13 there is a sufficient causal link between any putative
14 overcharge and supply prices, and in that regard, he is
15 looking at where truck costs would be identified, the
16 types of conduct, direction, documentation that one
17 would expect to see that might indicate why it was that
18 companies such as these would react to higher truck
19 costs, and how they would react at a business unit
20 level, and how those impacts at a business unit level
21 could then carry through into the way in which they
22 interacted with their suppliers.

23 Indeed, all of the narrative he is giving in
24 relation to the various disclosure categories is
25 articulating this, because broadly speaking, what we are

1 looking at, taking the Supreme Court's framework, is if
2 there were to have been an overcharge here, what did the
3 claimants do with it? Did they absorb it? Did they
4 pass it on to customers? Did they put further pressure
5 on their suppliers?

6 That is why Mr Bezant looks at these things,
7 particularly the customer pass-on and the mitigation
8 issues, as part of almost a single exercise. Obviously
9 he is separating out how he approaches these two things
10 but, as we will come on to see in relation to the
11 disclosure schedule, that disclosure schedule is
12 primarily to do with the pass-on categories, and there
13 have been some additions in relation to mitigation. But
14 a lot of those additions in relation to mitigation we
15 have said: look, rather than having a fight about that
16 now, let us have the pass-on material, that will provide
17 us with instruction in relation to many of the
18 mitigation issues, and if we need to ask you for more,
19 we will do.

20 But it is all to be considered in the round. The
21 idea that we should not be able to come forward and say,
22 "Well, there are two ways the Supreme Court has
23 identified you might have mitigated customer pass-on or
24 supplier mitigation, and you should only be able to
25 plead to one of them", is just not a tenable position.

1 The idea that we should have particularised more, as
2 I say, is not something that we could have done.

3 Mr Lask started talking about the types of input and
4 the duration of these arrangements. I do not understand
5 how that could ever inform the sort of evidence we are
6 supposed to have put forward to support the position in
7 relation to this plea.

8 He again went back and resorted to decimalised place
9 figures saying, "Well, look, these are tiny amounts in
10 the overall revenues of these businesses." Well, I hope
11 in opening this issue I explained why that is not the
12 germane consideration here. What you are asking
13 yourself is: when these costs get taken into the
14 business, how are they then dealt with? So that if they
15 are higher than they would otherwise have been on this
16 assumption, what would have been the reaction in
17 relation to passing on to customers or here in relation
18 to mitigation in respect of deals with suppliers?

19 Saying that they are a small part of the business
20 overall just is no answer to that. That is no more than
21 trying to draw a veil over what is plainly a very
22 significant issue.

23 MEMBER 3: But, Mr Beard, is that right? Because where you
24 are dealing with something which is a small part of the
25 overall costs, and there are other, very substantial

1 variables such as fuel, which will be going up a lot, up
2 and down throughout the year, and staff costs, which are
3 probably much higher as well, there is no evidence
4 before us, apart from the economic theory, that as
5 a result of overcharge that the claimants put pressure
6 on suppliers to reduce their prices and hence reduce the
7 claimants' costs.

8 You are a supplier of trucks. You -- for part of
9 the period at least, you were a supplier of bodies.
10 I am sure you were a supplier of accessories, et cetera.
11 But you put before the Tribunal no evidence of actual
12 pressure on you to reduce the costs of other items.

13 I understand the theory, I understand what
14 Sainsbury's is saying, but I am trying to get to grips
15 with how likely it is that what you are seeking, which
16 is a causal link, is going to appear. I think it is
17 a highly speculative plea and it is a contingent plea.
18 Because your case is there has been no overcharge. It
19 is saying: well, if there has been an overcharge, then
20 they will have tried to deal with it a number of ways.

21 MR BEARD: Yes.

22 PROSECUTION 3: The pass-on is relatively straightforward
23 and easy to understand. But when you are talking about
24 the other side, a reduction of costs, in the context of
25 a complex business with other costs inputs which are

1 much, much larger, and a large number of items going
2 into that, trying to pin down a reduction of one item to
3 the increase in trucks is going to be extremely
4 difficult as a matter of fact. Even if you do have
5 access to the documents.

6 Now, there is another aspect of this, which is that
7 you are saying, "No, what I need to do is to look at the
8 data, let us say on a fleet level, see what is going on,
9 and until I have that, I will not know whether this is
10 a good point or not." So I honestly do not know whether
11 this is a good point or not as a matter of fact, and you
12 probably do not know either.

13 You are trying to say, "Well, let me look at -- have
14 enough of a plea so I do get disclosure, so I can see
15 whether this theory actually works and I can show
16 causation." That is where I am at the moment. You
17 know, I am not convinced that you are going to be able
18 to do that and how realistic that is going to be as
19 a possibility.

20 MR BEARD: I cannot give you a guarantee that we are going
21 to be able to do that. Can I say it is a realistic
22 possibility? Yes, I can. Because what I can point to
23 is in the analysis being put forward by Mr Bezant,
24 that is not seeking to deal with this all at the level
25 which you, sir, start off dealing with it, at the

1 overall business level. What we are looking at is the
2 particular costs centres. It was for that reason
3 I talked earlier about the truck costs and the
4 transportation costs, because it is going to be in
5 relation to that sort of consideration, at that level of
6 the business, that one anticipates that you are most
7 likely to find that actually, parameters as to how that
8 cost centre operates and whether or not it keeps its
9 costs under control drive its interaction with suppliers
10 such that the supplier prices are driven down because of
11 the impacts of the cost there.

12 There we are not talking about 0.08 or whatever it
13 is, we may be talking about very substantial parts of
14 the business. If we are talking about BT Fleet, one
15 imagines that the clue is in the name and it is running
16 the vehicle fleet and therefore trucks are going to
17 be -- truck costs are going to be a significant part of
18 its overall costs. Therefore, insofar as it takes on
19 board other supplies, it might well be expected that
20 that business segment or unit has a number of costs
21 requirements imposed on it. It imposed key performance
22 indicators on its staff in order to drive down costs, as
23 a whole, and in doing so, one can immediately see that
24 if there were to be a rise in truck prices for that
25 costs centre, for that segment, it would have

1 ramifications for other supplier prices, and it is for
2 that --

3 THE PRESIDENT: I thought we were told -- sorry to interrupt
4 you -- that BT Fleet, specifically, truck costs, are
5 0.3%?

6 MR BEARD: No. I --

7 THE PRESIDENT: Do I misunderstand that? I thought that
8 was -- and that is why it was higher than the other --

9 MEMBER 3: My understanding is that it was across the board,
10 rather than --

11 MR BEARD: Yes, I do not think it is BT Fleet, sir.

12 I think --

13 THE PRESIDENT: It was the third claimant in the BT action.
14 Mr Lask, just a simple point of fact.

15 MR LASK: Yes?

16 THE PRESIDENT: Is that right or wrong? I think it is in
17 your skeleton.

18 MR LASK: Yes, the point we have made in the skeleton,
19 I think it is paragraph 12, is that the proportion is
20 0.3% in the case of third claimant, which is BT Fleet
21 Limited.

22 THE PRESIDENT: Yes, that is what I was referring to. Thank
23 you.

24 MR BEARD: One moment, if I may.

25 I do not think that is right, with respect. I have

1 just lost my copy of the skeleton.

2 THE PRESIDENT: It is also in a witness statement somewhere.

3 That is where it has come from.

4 MR BEARD: I will just read it {B3/25/5}:

5 "The Claimants were unaware of the cartel, which was

6 conducted in secret, and the claimed overcharge

7 represents a negligible proportion of their total

8 expenditure during the cartel period (... 0.3% in the

9 case of the Second and Third BT Claimants)."

10 So it is not the truck costs --

11 THE PRESIDENT: No, 0.004% in the case of the second

12 claimant?

13 MR BEARD: Yes, and 0.3 in third.

14 THE PRESIDENT: Yes, so 0.3%. Yes, the claimed overcharge.

15 Yes, 0.3%.

16 MR BEARD: Yes, only the overcharge, not the overall truck

17 costs.

18 THE PRESIDENT: Yes, but that is the bit you are saying

19 would have been so significant that they would have

20 sought to mitigate it.

21 MR BEARD: Well, we are saying that in relation to those

22 elements of that business, in relation to those cost

23 centres, because there will be further cost centres

24 within BT Fleet as well, because that is what we are

25 seeking to identify. The truck costs and the overcharge

1 that is claimed is very substantial. It is a very large
2 amount of money. In those circumstances, what we are
3 dealing with is how are those costs -- when they are fed
4 into that part of the business where inevitably they are
5 going to be a significant cost, how are they dealt with
6 at that point?

7 In those circumstances, we do not consider it in any
8 way speculative to suggest that, in relation to that
9 exercise, in relation to those parts of the business --
10 which we cannot identify because inevitably they are
11 internal -- yes, Mr Williams points out -- no, I am
12 sorry. I am not sure that is right.

13 That in relation to BT Fleet we do not have the
14 information in relation to the subgroups with which we
15 would be concerned in relation to these matters. So
16 simply giving those headline figures do not give us an
17 insight into this, because there is a point within
18 a business where, if you are incurring what they claim
19 is a very significant increase in cost, you will take
20 that into account in your decision making.

21 What we are trying to do is identify where that
22 would be and look at how that is dealt with. That is
23 the best we can do because we do not understand the
24 breakdown of these businesses externally.

25 Now, if that means that the disclosure requests have

1 to be more refined in order to target those relevant
2 entities and how they pass those costs through, then we
3 accept that that may well be right. But we do not have
4 the insight in order to be able to do it.

5 But the key point here is that in order to say, "Is
6 there a legitimate issue here?", it is not good enough
7 to say it is a small part of the overall costs of any
8 business. Because as I say, what you would end up with
9 is a contention that a mitigation claim was less and
10 less plausible the larger and larger the business was
11 that we were concerned with, and because we cannot
12 identify the breakdown of that business, we cannot take
13 matters any further.

14 What is being said against us is: well, you should
15 have been able to hypothesize, from other data that you
16 have, information that could indicate whether or not
17 there was a reaction by another business in respect of
18 a cost component for that business when it dealt with
19 you.

20 I have explained how that is simply impossible.
21 Since we cannot do that, we cannot provide any sort of
22 other meaningful particulars, it is necessary that there
23 is some disclosure in order to be able to test this.

24 Now there are two issues here. One is, is it
25 arguable as a point of law and as an amendment? It

1 plainly is. The points, sir, Mr Malek, you raised,
2 clearly go to the factual assessment of these matters.
3 We cannot take those matters further without insight
4 into the business that we are talking about here. That
5 necessarily requires some sort of disclosure or
6 provision of information. That is what we do not have.
7 We cannot progress the matter further at this stage.

8 MEMBER 3: So you put together what the Supreme Court says
9 in Sainsbury's, where it says it is a high evidential
10 burden on the other party to produce the evidence that
11 you need once you have raised the legal plea, and the
12 passage in Clarke, where they say that there are certain
13 circumstances where you can make a plea, even though you
14 do not have the facts and you do not actually know what
15 the answer is, because you are just not in a position to
16 know. But what you are putting forward is a number of
17 possibilities, and you say that the possibility that you
18 want to put forward is one that is capable of being
19 found on the evidence once it has been reviewed.

20 MR BEARD: Well, it is more than that, because it is
21 obviously applying the reverse summary judgment test of,
22 is it self-contradictory or implausible? There we say,
23 no, we have done our best to look at what it is are the
24 sorts of things one would anticipate would be relevant
25 to this, how a business would consider these sorts of

1 issues. We cannot take it further because this is
2 material that is exclusively on the other side.

3 So to that extent, yes, we do rely on Clarke, yes,
4 we do rely on the Supreme Court, and in those
5 circumstances, we should not be kept out of that as
6 a plea. Because plainly, as a matter of the summary
7 judgment test, it is not self-contradictory. To the
8 contrary, it is actually one of the two parts of the
9 mitigation analysis the Supreme Court is putting forward
10 in this circumstances.

11 What would be extremely unfortunate is, whilst
12 I take, sir, your point that on the face of it pass-on
13 to customers seems more straightforward, if you ended up
14 with a situation where this Tribunal was only
15 considering that element and was to conclude that,
16 actually, what the evidence showed was that costs were
17 dispersed elsewhere, but that there was no plea in
18 relation to those matters, that would be a very
19 unsatisfactory outcome and would be precisely ending up
20 in a situation of a risk of overcompensation, which in
21 fact the Supreme Court counsels against. It does not
22 want undercompensation or overcompensation, which is why
23 it was explicitly advertent to categories 3 and 4 being
24 relevant categories that you can rely on in these
25 circumstances.

1 MEMBER 3: Which are not mutually exclusive because
2 a company may try to deal with the increase in price in
3 more than one way.

4 MR BEARD: Precisely.

5 MEMBER 3: It may recover it, some on your input side, and
6 then --

7 MR BEARD: Yes.

8 MEMBER 3: -- some on your output side.

9 MR BEARD: Exactly.

10 MEMBER 3: So we have to take a view, looking at it
11 globally, as to whether or not it is plausible that the
12 outcome that the economic theory indicates is
13 a possibility.

14 MR BEARD: Yes. I think that is undoubtedly right, because
15 that is the application of the summary judgment test in
16 circumstances where we are dealing with these particular
17 situations.

18 I think just to reinforce that, when we come on to
19 look at the disclosure issues, as I say, what the
20 disclosure categories in PO 4 and PO5 are focused on are
21 primarily pass-on issues, but they are the same
22 documents, in the main, that one will be using for
23 mitigation analysis. Therefore, it is not that you have
24 got two entirely separate exercises going on in relation
25 to pass-on and mitigation. You have the expert looking

1 at this material to consider how this separation of
2 distribution of any putative increased costs might have
3 occurred.

4 So it is considering it in the round. So there is
5 an extent to which, although the nature of the exercise
6 may be different in relation to mitigation, nonetheless,
7 one can see this as two sides of that coin in relation
8 to distribution of costs subsequently.

9 So, yes, plausible. Yes, legally founded. No, we
10 do not have detailed evidence. Yes, we do have an
11 evidential account from our expert as to the sort of
12 material that would be germane, and, yes, it is a factor
13 one takes into account when one considers the
14 proportionality of disclosure. Which is precisely what
15 we have done by trying to focus the disclosure
16 categories down such that we are not asking for lots
17 more material in relation to mitigation; we're focusing
18 on the stuff that we think is going to be relevant for
19 pass-on and will inform us in relation to mitigation.

20 MEMBER 3: So there is one possibility that if you do not
21 get permission to amend now, that your expert looks at
22 the material in any event for the pass-on, and comes up
23 with some evidence, saying, "Now I have looked at it,
24 I can see exactly how they have sought to reduce their
25 costs as a reaction to an increase in price."

1 MR BEARD: Well, it is possible. It is possible that is
2 exactly what would happen. But what we are saying is,
3 in circumstances where you have -- I mean, as very
4 clearly explained by the Supreme Court, these options
5 for a sophisticated business as to how it lays off its
6 increases in costs, that the sensible thing to be doing
7 here is recognising the plausibility of mitigation and
8 ensuring that proportionate disclosure is provided
9 following permission to amend. But there isn't a good
10 reason not to permit amendment here. As I have dealt
11 with when I was talking in relation to the complements
12 matters, in circumstances where we are over a year from
13 trial, and in circumstances where it is a plausible not
14 self-contradictory plea, the idea that we should be kept
15 out of the amendment is one that we think is just --
16 would be plainly unfair and unjustified on the relevant
17 legal tests given the Supreme Court.

18 Then the question is one of what disclosure is
19 appropriate in these circumstances. With respect to
20 Mr Lask, that is not something that should act as a bar
21 to any sort of amendment, because the prejudice he talks
22 about here is not real prejudice in the sense that is
23 referred to in all those cases about very late
24 amendments, where you just cannot deal with it. The
25 prejudice he is referring to is the risk that his expert

1 actually has to deal with these things. But as Clarke
2 itself made clear, that is not real prejudice. That is
3 simply engagement with the litigation process, and you
4 are not at a disadvantage by this amendment being put
5 forward; you are simply ensuring that these issues are
6 properly aired.

7 It is for that reason we say that there is no good
8 reason to refuse the amendment, and -- as amended by --
9 following the discussion earlier, but on the other hand,
10 one should not -- one then looks at how disclosure is to
11 be dealt with.

12 There are a couple of other brief points, if I may,
13 just to pick up.

14 Mr Lask looked at Mr Harvey's evidence, in
15 particular at paragraph 5.21 in his third statement, and
16 referred there to issues to do with the level of
17 disclosure that he would want to take on and review.
18 I should say, sir, just for reference, that the
19 preceding paragraph, 5.20, which sets out what the
20 nature of the prejudice would be to Mr Harvey, actually
21 culminates in a statement in 5.20(d) {B3/17/16} from
22 Mr Harvey saying: well, if I had to deal with both
23 pass-on and mitigation, I might need to "unwind" the
24 analysis when I came to reply in relation to it.

25 Well, that may well be absolutely right, but that

1 does not amount to prejudice to Mr Harvey. That is
2 exactly what the Supreme Court was envisaging might well
3 be needed given the potential heads of mitigation.

4 In 5.21 {B3/17/16}, there are issues again being
5 raised about evidence, further evidence being required,
6 particularly from the claimants, and particularly in
7 relation to negotiation. In relation to those matters
8 we say well, look, it is a matter for Mr Harvey and the
9 claimants how they want to react to these matters. We
10 have made clear that we do not think negotiation
11 evidence is relevant. If they want to pursue those
12 matters, we will deal with them in due course.

13 But again, not prejudice and not something creating
14 problems for the overall process.

15 Perhaps the last couple of points I should make in
16 relation to these issues. The criticisms of Mr Bezant
17 not trying to conjure up imagined relationships from
18 incomplete data that would not tell you about
19 relationships, and how costs might move between
20 different sorts of products and supplies, is no proper
21 criticism of Mr Bezant. Mr Bezant has set out
22 a dispassionate analysis of how it thinks cost
23 recovering companies work and, through his account of
24 why it is that certain disclosure categories would be
25 relevant, explains how he would carry out the analysis

1 that would show whether or not there was a causal
2 relationship through the various entities in relation to
3 these matters.

4 There was a reference to it being a direct causal
5 link. Well, it needs to be a sufficient causal link but
6 if it does not need to be simply costs into one entity,
7 and it is that entity that negotiates the prices
8 directly. But again, that is an obvious point in
9 relation to these issues.

10 So, in conclusion, we end up with a situation where
11 the argument that somehow there has been a gross delay
12 in relation to these matters is just not fair. Whether
13 or not one reads the Tribunal judgment as saying, "As
14 a matter of law you cannot have mitigation", or "The
15 factual circumstances in which mitigation can ever be
16 considered are so limited as to render it vanishingly
17 implausible as a plea", it does not matter. The point
18 is that the Supreme Court clarified that situation. It
19 was perfectly sensible and indeed recognised by this
20 Tribunal on previous occasions that it was sensible to
21 wait until the outcome of that Supreme Court judgment
22 before we proceeded to make amendments in relation to
23 such matters, or pursue cases in relation to these
24 issues.

25 That is what we have done. There has not been

1 substantial delay, there would not be substantial
2 prejudice, and we can deal with disclosure issues in due
3 course.

4 I will just check, if I may, whether or not any of
5 those near me have any other additional points.

6 I do not have any further submissions, unless I can
7 assist the Tribunal further on any matters arising?

8 MEMBER 2: Can I ask you, Mr Beard, about the direct or
9 sufficient causal link that you just referred to.

10 MR BEARD: Yes.

11 MEMBER 2: In connection with the reverse summary judgment
12 test of plausibility or implausibility.

13 MR BEARD: Yes.

14 MEMBER 2: Is it your case that what is required is a causal
15 connection between the putative overcharge, as you call
16 it, and some cost reduction at some stage by the
17 claimants as part of their business, provided that, at
18 an earlier stage, at a lower level, the putative
19 overcharge has been fed in, in some way, to an analysis
20 of costs? Is that what you call a sufficient causal
21 link or does it have to be something as a direct -- more
22 direct response to the particular overcharge?

23 MR BEARD: I am slightly concerned that -- I recognise that
24 there can be a number of situations here, for instance
25 you could have a situation where the initial costs go

1 into a regulated entity, which is engaged in regulated
2 activities, and that there the cost is baked in very
3 clearly and the increase in cost is baked into the
4 prices that are then fed through, and that feels like
5 a very direct causal connection, and that would be
6 relatively straightforward.

7 You might have a situation where that sort of
8 regulated entity actually deals with another internal
9 entity and then that internal entity simply transfers
10 those costs onwards. Again, that would feel like it was
11 a fairly clear situation, albeit I suppose, in those
12 circumstances, one would say it was indirect.

13 Once you have moved out of that and into unregulated
14 activities, where you have not necessarily got the
15 direct reliance on the regulator taking increases in
16 forecast costs into account, then it is right that one
17 would have to look at how those heads of costs were
18 taken into account and where they were then dealt with,
19 and it is possible -- and I completely recognise -- that
20 the chain that those costs pass through mean that they
21 are far too diffused, such that the end interaction with
22 the customer is sufficiently indirect that one cannot
23 see causal potency.

24 But I think, as the president indicated before the
25 short adjournment precisely where one draws the line on

1 the extent of causation in cases like this, it remains
2 a live legal issue. What we say is that there are
3 clearly instances here and examples we are dealing with
4 here where it appears to us that, whatever causal
5 mechanism you are talking about, there is good reason
6 and plausibility dealing with these entities that you
7 will have sufficiently approximate causation. But we
8 also recognise that there may well be arguments about
9 how approximate those causes have to be and then factual
10 issues about where the proximity lies.

11 I know that is perhaps not an entirely satisfactory
12 and complete answer, but I think that, to some extent,
13 it is anticipating some of the legal issues that may
14 well arise in relation to this issue in this case, and
15 potentially others, about the mitigation head of claim
16 or head of -- mitigation head under paragraph 205.3 that
17 the Supreme Court has set out.

18 Sir, I recognise that is not a "yes" or "no" answer.

19 MEMBER 2: Thank you.

20 MEMBER 3: I think Mr Lask's hand is up, if you look at

21 his --

22 THE PRESIDENT: Mr Lask, your hand is up.

23 MR LASK: Thank you, sir.

24 My virtual hand was up. It was really just to raise
25 one brief point, which is that I mentioned in my earlier

1 submissions that there was a lack of clarity about DAF's
2 case, and Mr Beard's most recent submissions have, in
3 our view, exacerbated that lack of clarity, because
4 Mr Beard was focusing on BT Fleet and talking about the
5 need to see whether things such as BT Fleet's KPIs drove
6 its interaction with suppliers.

7 The question that begs is: well, is the proposed
8 mitigation defence concerned only with cost reductions
9 achieved by BT Fleet, which are going to involve inputs
10 such as complements -- and as I mentioned earlier, it
11 seems that complements is off Mr Bezzant's menu -- or are
12 DAF saying that they are going to be looking at the
13 costs reductions achieved by the BT business as a whole,
14 with suppliers of stationery and electricity and things
15 like that?

16 That is a huge difference in terms of the scope of
17 the proposed plea, and I do say that is something we
18 need some clarity on.

19 MR BEARD: If it assists at all in relation to the question
20 that was raised about Mr Bezzant's evidence at 11(c),
21 I think the clarification is that what Mr Bezzant was
22 referring to at 11(c) was the exclusion of bundled
23 complements, which is what we have been referring to
24 complements, as in strict complements, and that those
25 would be dealt with differently. So I think -- if that

1 THE PRESIDENT: Mr Beard, are you back in the hearing?

2 MR BEARD: I can hear. Unfortunately I have just lost
3 video. I am just going to change screens. I can hear
4 what is going on. I apologise.

5 THE PRESIDENT: We can pause a moment.

6 This is obviously an important question. You have
7 both given us a lot to think about and we are going to
8 take time to consider our ruling, and it will be handed
9 down in writing in due course.

10 So we now move on. I think we have to come back to
11 the question of timing for the disclosure that was
12 raised before lunch. Would that be a sensible thing to
13 wrap up now?

14 I think, Mr Lask, you were going to take
15 instructions. That is the complements disclosure.

16 MR LASK: Yes.

17 THE PRESIDENT: The question was whether some of it could be
18 given earlier --

19 MR LASK: Yes.

20 THE PRESIDENT: -- (overspeaking) -- 29 April.

21 MR LASK: We have investigated and we would be able to
22 provide C1 and C3 disclosure by the end of March, and
23 then C2 and C4 by the end of April.

24

25

Ruling Order

1
2 THE PRESIDENT: So C1 and C3, 31st March, and C1 and C4 by
3 29th April.

4 Mr Beard, are you going to push against that?

5 MR BEARD: No, I am not. I am grateful for the instructions
6 being taken, so thank you very much.

Discussion re Tax Issue

7
8 THE PRESIDENT: So that is the order we will make. Thank
9 you.

10 If we go then next to the question of the tax issue
11 which arises only in the Royal Mail proceedings, where
12 it is DAF that would like to adduce expert evidence.
13 I think at the moment they have put it as being either
14 from Mr Bezant or Mr Pritchard. They are not seeking
15 both on tax. They have explained or Mr Pritchard has
16 explained some of the tax issues involved.

17 Mr Lask, it did seem to us there are some real tax
18 issues here, and that it does, on what we have read,
19 seem there appear to be good reasons why expert evidence
20 might assist, even if the underlying questions are to
21 some extent factual. But the analysis of that in terms
22 of the applicable tax and how it might have been done is
23 the sort of thing that a tax accountant would deal with.

24 So that is where our provisional view is on that.

25 So perhaps you would like to explain why it is that

1 you are opposing the tax evidence. It is quite
2 a distinct part of the Royal Mail case, I think.

3 MR LASK: Yes, if I may, I will give you Royal Mail's
4 position in a nutshell. We say that whether expert tax
5 evidence is required depends on the correct approach to
6 accounting for tax.

7 Our position is that the correct approach is to make
8 adjustments to the claim based on Royal Mail's actual
9 tax position in each year of the relevant period, and
10 that has been described as approach 3. Whether the
11 adjustments are correct is a matter of fact, we say,
12 that can be tested by reference to the contemporaneous
13 documents and the factual witness evidence and that does
14 not require expert tax evidence at trial because, as
15 I say, it depends on Royal Mail's actual position at the
16 relevant time, which is a matter of fact. It does not
17 depend on issues of expert tax judgment.

18 Just to be clear, our concerns about DAF's proposal
19 to appoint a tax expert are driven by a concern as to
20 the approach that it may be seeking to adopt, and the
21 concern is that it may be seeking to adopt a detailed
22 counterfactual analysis examining what Royal Mail ought
23 to have done, had it not suffered the overcharge.

24 That is our essential concern.

25 Now, DAF previously insisted that expert tax

1 evidence would be required in any event, but it has now
2 modified its position, as you say, sir, and it now
3 acknowledges in its skeleton that it may be possible to
4 address tax issues through Mr Bezant. So the issue for
5 the Tribunal is whether DAF should have permission to
6 adduce tax evidence from either Bezant or Pritchard at
7 its election, or whether there should be a structured
8 process for resolving the issue, either by agreement or,
9 if necessary, by the Tribunal.

10 We would be very happy for the Tribunal to indicate
11 today that Royal Mail's proposed approach is the
12 appropriate one to tax. But, failing that, we submit
13 the Tribunal should adopt the approach we have set out
14 in the draft order at paragraphs 7 to 11. That is an
15 approach that essentially requires DAF, in the first
16 instance, to explain what issues it thinks expert tax
17 evidence is required on.

18 THE PRESIDENT: This is, just so we look at it, this in B3
19 at tab 18, I think. Page --

20 MR LASK: Yes, page 5.

21 THE PRESIDENT: Page 5, yes. {B3/18/5}

22 Sir, you will see that we are proposing that there
23 be a tax statement produced in short order addressing
24 the issues that they contend have to be resolved in
25 order to determine the case on tax, whether and to what

1 extent those issues are matters which are capable of
2 being verified by reference to factual evidence, and, to
3 the extent that they cannot be determined by reference
4 to factual evidence, what, if any, expert evidence they
5 say is necessary.

6 I would say that to appoint a tax expert before
7 understanding what it is he would propose to address is
8 putting the cart before the horse. In relation to all
9 the other experts that the parties have been discussing,
10 the parties have only consented or sought the Tribunal's
11 permission once an explanation has been provided of what
12 the evidence will consist of.

13 Granting DAF open-ended permission to instruct a tax
14 expert would, it seems to us, give it liberty to adopt
15 any approach it wants, including the counterfactual
16 approach that we strongly oppose.

17 It would also allow the issue to drift, because
18 there is no indication from DAF as to when we would have
19 any clarity as to what sort of approach it was proposing
20 to adopt. That is why we have proposed a structured
21 process that provides for the swift resolution of this
22 matter according to a strict timetable.

23 Once it is clear what DAF's position on expert
24 evidence concerning tax actually is, then we can try to
25 resolve the matter between us, or, if necessary, we will

1 come back to the Tribunal. That is the position in
2 a nutshell, sir.

3 What I was not proposing to do was take you through
4 the evidence explaining in detail the approach that
5 Royal Mail has adopted to assessing tax.

6 THE PRESIDENT: Yes. I mean, Mr Pritchard in his latest
7 statement suggests that he should meet with Mr Harvey to
8 discuss the appropriate approach, to try to agree --

9 MR LASK: We would be very happy with that, but we say that
10 should be part of the process we propose rather than for
11 him -- for DAF to be given permission to call him as an
12 expert witness at trial before they have had that
13 discussion.

14 THE PRESIDENT: I mean, I can see the desire for a -- to
15 have a common approach, if that is possible. But even
16 if it is -- I mean, if you say they are just questions
17 of fact, the factual computations are to be carried out,
18 no doubt it could be present by counsel, and then
19 various schedules of calculations could be produced and
20 explained to the Tribunal by counsel.

21 It is often more convenient if it is done in the
22 form of an expert's report and then, insofar as there
23 are differences between -- if there are different ways
24 of handling, for example, capital allowances -- I have
25 no idea what the difference might be -- for that to be

1 explained through the experts rather than by counsel
2 addressing the Tribunal.

3 MR LASK: Indeed, sir, and we are proposing to have
4 Mr Harvey do that.

5 THE PRESIDENT: Yes, well, that is fine. But, I mean, if
6 Mr Harvey does it -- clearly, you can have your own
7 accounting tax expert, but what DAF is saying, they want
8 to have their own accounting tax expert to do that. It
9 seems to me a slightly different issue from the question
10 of, well, what will be the correct approach.

11 MR LASK: But sir, Mr Harvey does not hold himself out as
12 a tax expert as such, but someone who can -- who is well
13 placed to do the calculations and to verify the approach
14 that has been taken to the calculating of Royal Mail's
15 claim. So that is an approach we have no difficulty
16 with. If DAF were to appoint an expert to do the same
17 approach, there would not be a problem. But the concern
18 is that appointing a tax expert such as Mr Pritchard
19 will inevitably mean that DAF's approach evolves into
20 precisely the sort of counterfactual, detailed
21 counterfactual analysis that we say is inappropriate
22 and, as we have mentioned in the skeleton, we say is
23 contrary to authority.

24 The concern is, as I say, the concern about the
25 appointment of a tax expert, which DAF now accepts is

1 not essential, but the concern is driven by the concern
2 about the approach that will end up being adopted.

3 THE PRESIDENT: Well, is it not -- there seem two actually
4 slightly distinct aspects to there is. One is whether
5 both sides should have permission to have a tax expert,
6 and then it is up to each of you to decide, within
7 limits, who it should be. If you feel confident and
8 Mr Harvey feels confident, and he is an experienced
9 accountant, that he can do it, so be it. If Mr Bezant
10 is confident he can do it, equally, and if he says "No,
11 this is getting into complexities of tax calculations
12 that I am not comfortable with", then one would have
13 thought it should be undertaken by someone else.

14 That is one aspect. The other aspect is, well, what
15 is the right approach to adopt to calculating the tax
16 position? That is a quite separate point. I do not
17 think we are in a position to decide that now. The
18 question is then, should it be decided before trial, so
19 they go off in the same way, or is it something that is
20 to be argued out at trial? If it is to be decided
21 before trial, that might have to be in the form of some
22 sort of preliminary issue, where we hear argument about
23 which approach is, as you say, permitted by authority or
24 contrary to authority.

25 That is clearly not something we can address at the

1 moment.

2 MR LASK: No, sir. I am not inviting the Tribunal to rule
3 now on what the correct approach is. What I am inviting
4 the Tribunal to do is adopt the process we have
5 proposed, which would provide for DAF to indicate to us
6 what approach it proposes to adopt, for us to try to
7 reach a measure of agreement on that, by which time it
8 should be clear whether, indeed, a tax expert is
9 required or not. Because, as I say, DAF says it may not
10 need a tax expert.

11 THE PRESIDENT: Well, what I think it says is it will want
12 expert evidence but it might not have to be a separate
13 expert. It could be the same expert as it is using for
14 other aspects of the case. He would still be giving
15 evidence on tax.

16 MR LASK: The distinction I am drawing is between an expert
17 such as Mr Bezant and a tax expert such as Mr Pritchard,
18 who, as we say, we fear, would be seeking to adopt this
19 approach for counterfactual analysis.

20 THE PRESIDENT: Yes.

21 MR LASK: All we are really asking for is to put the horse
22 before the cart, which is to -- let us establish that
23 the correct approach and then work out whether -- what
24 sort of expert is needed.

25 THE PRESIDENT: Yes. I see.

1 I think we will -- sorry, we have to keep breaking
2 off, but that is the nature of a CMC with a lot of
3 issues, and we obviously have not heard from Mr Beard,
4 but let me just have a word with the two other members
5 of the Tribunal. So we will withdraw for just a few
6 moments.

7 (3.22 pm)

8 (A short break)

9 (3.24 pm)

10 Ruling

11 THE PRESIDENT: Subject to anything Mr Beard may wish to
12 say, it does seem to us that the proper course is that
13 both sides should have permission to call expert
14 evidence on the -- dealing with the Royal Mail tax
15 computation, we will not specify who those two
16 individuals should be, that we should direct that they
17 should meet, without prejudice, to discuss what approach
18 should be adopted, to see if they can agree on the
19 approach. If they cannot, and they each file
20 a statement explaining why they think their approach is
21 the correct one, there can then be, if necessary,
22 a short hearing before the Tribunal to decide which is
23 right.

24 They can then proceed on that basis; so that is, as
25 it were, resolved early on. But we do not think -- as

1 I say, that is a distinct question from the permission
2 to call an expert to deal with Royal Mail's tax
3 computations.

4 It may be, as a result of the ruling, if there is
5 a dispute, one side or the other or both will say, well,
6 in the light of that, the expert we actually need is X
7 and not Y.

8
9 Further Discussion

10 THE PRESIDENT: So Mr Lask, I will go back to you. It is
11 not quite the proposal that is in your paragraph 7, but
12 it seems to us to flow from what you have been
13 submitting. Is that something that you find
14 problematic?

15 MR LASK: Sir, may I just mute for 30 seconds to take
16 instructions on that?

17 THE PRESIDENT: Yes, and Mr Beard likewise. We have not
18 heard from you, but I think you can see the logic of it.
19 So you both may want to mute while you take instruction.

20 (Pause)

21 Mr Lask, have you been able to take instructions?

22 MR LASK: I have, sir. We are broadly content with the
23 proposal, subject to one possible wrinkle, which is
24 this: we would hope that, following a meeting between
25 Mr Harvey and whoever is appointed by DAF, some

1 agreement could be reached on the proposed approach.
2 But if DAF do opt for Mr Pritchard, and Mr Pritchard and
3 Mr Harvey are unable to reach agreement and then
4 statements have to go to the Tribunal, and the Tribunal
5 rules that a detailed counterfactual analysis proposed
6 by Mr Pritchard is the correct approach, it may be in
7 those circumstances that Mr Harvey is not able to give
8 evidence for us because we are now into expert tax
9 territory. So we would need the option, in those
10 circumstances, to appoint a tax expert instead of
11 Mr Harvey.

12 THE PRESIDENT: Yes. I think that was implicit in what
13 I was indicating.

14 MR LASK: I am sorry.

15 THE PRESIDENT: No, that would be understandable.

16 Right, Mr Beard?

17 MR BEARD: Yes. Thank you. We are content to proceed on
18 that basis. I am not going to get into the fact that
19 there are plainly expert matters here. There is just
20 one point I think it is worth emphasising.

21 Mr Lask keeps referring to the analysis his expert
22 is proposing to put forward and a counterfactual
23 analysis. There will only ever be a counterfactual
24 analysis in these circumstances. The facts have passed.
25 We are dealing with counterfactual issues now. The

1 question is how you deal with them. We think that is
2 paradigmatically a matter of expertise and in particular
3 tax expertise.

4 We think the claimants have got themselves into
5 a very odd position suggesting that on tax questions
6 they have a non-tax expert, but that is something that
7 they have chosen to do and this process will deal
8 with it.

9 THE PRESIDENT: Yes, well, we are not directing who the
10 expert may be, and the claimants have the option to
11 reconsider. They have seen what Mr Pritchard said. So
12 we shall say that both sides have permission to adduce
13 evidence from an expert dealing with -- in the
14 Royal Mail proceedings, dealing with the tax position as
15 regards any damages. The two experts -- that the two
16 experts should meet on a without-prejudice basis to
17 discuss what approach should be adopted insofar as they
18 do not agree. They should file statements with the
19 Tribunal. The Tribunal will then decide, which will
20 leave open the question of whether it needs an oral
21 hearing, and, depending upon the decision, the claimants
22 have permission to appoint a different individual as
23 their tax expert.

24 MR BEARD: Can I just interpolate one point? Would it be
25 sensible to set a date by which the experts meet?

1 THE PRESIDENT: Yes, I was about to do that.

2 MR BEARD: I am sorry, sir. Right.

3 THE PRESIDENT: I wanted to get the -- I just want to be
4 clear, there is no disclosure required for any of this
5 now, is there? We have not detected there is
6 a disclosure application that is related --

7 MR BEARD: I think not now. We have a great deal of the
8 relevant material, which is why Mr Pritchard has been
9 able to point out various (inaudible) in the expert --

10 THE PRESIDENT: Right, okay. So that can then proceed.

11 So if we say a date by which there should be -- I do
12 not know if we have to do each step, but if we say
13 a date for the meeting and a date for any statement to
14 the Tribunal, that will be sufficient. What would be
15 a reasonable time for a date for a meeting? Can it be
16 done before Easter? By 31st March? Is that reasonable?

17 MR LASK: Sir, we would certainly hope so. On our proposal,
18 we were proposing the parties write to the Tribunal
19 setting out their respective positions by 23rd March,
20 and we would be retaining that date as the date for the
21 filing of the statements that you envisage, and so the
22 meeting -- the without-prejudice meeting would need to
23 be before that.

24 MR BEARD: I am sorry, that is simply not going to be
25 feasible. We got the tax disclosure from the claimants

1 very recently. We are still in the process of reviewing
2 it. There is no point in having this meeting to discuss
3 the approach until that has been digested. I think the
4 sensible course would be to be setting a meeting before
5 the end of April, and then any statements two weeks
6 thereafter would seem to be the sensible course.

7 If there is a convenient date during April by which
8 time we have digested the disclosure and our expert is
9 able to join the meeting, then obviously we will do
10 that, and try to bring things forward. But it is
11 obviously sensible that we are entitled to review that
12 disclosure. It may be that Mr Harvey has sought to just
13 be reviewing it in the background, but there has been
14 a long delay in disclosure of tax returns and --

15 THE PRESIDENT: Well, it is not a pressing urgency for the
16 trial, but I would have thought that -- I mean, he does
17 not -- Mr Pritchard does not have to get on top of
18 every -- all the information. He has got to understand
19 the general approach and therefore the general approach
20 he wants to adopt.

21 MR BEARD: Yes.

22 THE PRESIDENT: He is not going to have to produce any
23 calculations.

24 MR BEARD: No.

25 THE PRESIDENT: So if we were to say it should be, for

1 example, 16 April, it would ensure that there is --

2 MR BEARD: Yes, I am sure --

3 THE PRESIDENT: -- plenty of time and that any --

4 MR LASK: Sir, I am so sorry to interrupt, but may I remind

5 the Tribunal that the deadline for witness statements is

6 29th April, and the scope, certainly on our side -- oh,

7 sorry, May. So the scope of our factual witness

8 evidence will depend in part on the outcome of this tax

9 process, because we are going to be adducing factual

10 witness evidence on tax. So that does have to be built

11 in to the timetable, and we need to have enough time for

12 the expert process, the outcome of the expert process,

13 to feed into our factual witness evidence. So we are

14 concerned about the current time frames being

15 considered.

16 THE PRESIDENT: Well, it may be that the witness statements

17 purely on tax matters -- which is a rather discrete

18 aspect, is it not, of the factual evidence -- can be put

19 back, because you have got a lot of evidence dealing

20 with everything else that we have been talking about,

21 and I do not think that would cause any disruption to

22 the trial if we were to revise that date, because if

23 the Tribunal has to meet and rule and so on -- and if

24 they were to have the meeting on 16th April, then they

25 could produce their statements, could they not, by

1 30th April?

2 MR BEARD: That seems entirely feasible, yes.

3 THE PRESIDENT: At that point the Tribunal will have to
4 decide what to do. I would have thought that the
5 sensible course is not to change the date now, but if it
6 turns out -- and you will know this from your expert
7 following the meeting -- that there is material issues
8 on the correct approach to tax which affect your factual
9 evidence, and therefore you will await the Tribunal's
10 ruling, that both sides should write in saying they
11 suggest that specifically any factual evidence that
12 relates to the tax matters should be put back to several
13 weeks after the Tribunal has ruled, and deal with it
14 that way.

15 MR LASK: Sir, thank you. I think, subject to any contrary
16 indication from those instructing me, I think we would
17 agree that any amendment to the timetable for factual
18 witness statements should await further -- should allow
19 for the process to run at least part of its course.

20 Just to flag up that any movement on the deadline
21 for factual witness statements will have a knock-on
22 impact on the deadline for expert reports, at least
23 insofar as they relate to tax.

24 THE PRESIDENT: Yes. I mean, it is only the -- it will only
25 affect any experts' reports on tax, of course. Not on

1 anything else. We are not generally extending time for
2 factual witnesses. It is only insofar as they concern
3 the Royal Mail handling of its tax affairs.

4 MR LASK: Yes. Subject to there may be some overlap with
5 expert evidence on financing because there is
6 a financing aspect to the tax claim.

7 THE PRESIDENT: Yes. Well, you can look into that if
8 necessary.

9 MR LASK: Thank you.

10 THE PRESIDENT: But it is not going to affect the -- any of
11 the main part of the claim?

12 MR LASK: No.

13 THE PRESIDENT: Namely overcharge, pass-on --

14 MR LASK: No.

15 THE PRESIDENT: -- loss of volume and so on. Yes.

16 Well, if that can be put into the order. Would that
17 then be a sensible moment to go back to the question we
18 left you with, which is the truck leasing financing
19 expert issue, where you both seem to want two experts?

20 MR BEARD: We indicated in correspondence that we would
21 stick with Mr Delamer. We have received a letter
22 overnight indicating that it is possible that the
23 claimants want to maintain two experts. Even in the
24 face of that, we are content to be using Mr Delamer,
25 albeit that if something is raised specifically by

1 Mr Harvey that Mr Delemar aware cannot cover in reply,
2 we might have to use Mr Bezant for those purposes. I am
3 sorry, Professor Neven.

4 MR BEARD: I apologise. I misspoke. Professor Neven in
5 relation to that. But our intention is just to use
6 Mr Delamer for those matters. We do not fully
7 understand the claimants' position.

8 THE PRESIDENT: Yes.

9 Mr Lask?

10 MR LASK: Yes, sir. Thank you.

11 We note the letter that came in overnight indicating
12 DAF's change of position. Prior to that, both parties
13 were agreed that it may be necessary to have two.
14 I will explain why, from the claimants' perspective.

15 Just by way of context, a relatively small number of
16 lease trucks are involved in the claims, but they do
17 raise specific issues in relation to assessing the loss,
18 and, broadly speaking, there are three questions. The
19 first question is: what is the relevant value in the
20 value of commerce for least trucks? We take it to be
21 the rental instalment payments less any maintenance
22 charges.

23 The second question is: well, how do you assess the
24 point in time at which the overcharge was incurred,
25 where rental payments would have been paid over a number

1 of years? That is the second question. It is those
2 first two questions that we propose Mr Harvey will deal
3 with.

4 Then there is a third question, which is whether
5 there was a specific financing cost associated with
6 renting leased trucks. Because obviously if the rental
7 payments were higher, then it is possible that the
8 financing costs may have been higher too.

9 It is that question we envisage Mr John Earwaker
10 potentially dealing with if it is necessary to do so.
11 So there certainly would not be any duplication. It is
12 just a feature of the specific issues that arise in
13 relation to assessing the loss on leased trucks.

14 THE PRESIDENT: Yes, I see.

15 So it is -- Mr Earwaker is on the financing costs
16 associated with leased trucks?

17 MR LASK: Yes.

18 THE PRESIDENT: Harvey is on the value to be attributed to
19 leased trucks --

20 MR LASK: Yes.

21 THE PRESIDENT: -- and the assessment of the point in time
22 when the overcharge was paid?

23 MR LASK: Yes, well, the overcharge, the overcharge on the
24 leased trucks. The way you articulated it, sir, which
25 reflected the way I articulated it, just explains why

1 categories, I think, as the remaining issue, where there
2 has been some movement, and I think we have been sent
3 a revised schedule.

4 MR BEARD: Yes, I was going to refer to the schedule you
5 asked about over the short adjournment, since that is
6 the schedule that deals with matters that essentially
7 are not agreed. Obviously we have the longer Redfern
8 Schedules, but they cover matters that are agreed, and
9 I was --

10 THE PRESIDENT: Am I looking at the right -- I have an
11 annex 1 to Royal Mail BT's letter dated 1st March?

12 MR BEARD: That is right, and it should have --

13 THE PRESIDENT: Is that the schedule I should be looking at?
14 The column is in red. The entry is in red.

15 MR BEARD: That is right. At the bottom it should have in
16 the middle of the page "01/03/21".

17 THE PRESIDENT: Yes.

18 MR BEARD: In very small writing. Yes.

19 So this is essentially abbreviated in the sense that
20 there are a number of categories of disclosure that are
21 effectively agreed in relation to these issues.

22 I think we can go through this relatively quickly,
23 because I think in the main, we can identify where the
24 issues lie, and where in fact further agreement can be
25 reached.

1 In relation to the red, these are changes that are
2 being suggested by DAF and respectively Royal Mail/BT in
3 the second and third columns in relation to these
4 matters.

5 So DAF --

6 THE PRESIDENT: Well it starts on --

7 MR BEARD: It starts with definitions, yes.

8 THE PRESIDENT: And previously -- yes, I see.

9 MR BEARD: So I think the only issue that really arises in
10 relation to this is that -- well, I want to make just
11 a brief introduction to it, because this Redfern
12 Schedule was initially put forward dealing with pass-on,
13 and in doing so, would also deal with any request for
14 disclosure in relation to mitigation.

15 Now, as you will have heard and realised from seeing
16 the correspondence, what DAF has sought to do is try and
17 narrow the categories in the light of concerns and
18 objections raised by Royal Mail and BT, and what it has
19 done is sought to do so to ensure that it continues to
20 be able to have sufficient material coming forward in
21 order to deal with supply pass-on; but also that process
22 will ensure that we obtain, we hope, material in
23 relation to mitigation, albeit we have left the caveat
24 that in relation to mitigation there may be further
25 requests that would follow up. But in the main, we

1 would hope that these categories would also cover the
2 gist of the mitigation disclosure that would be needed.

3 Indeed, it would be more than the 'gist of'. We
4 think that it is likely the mitigation disclosure --
5 that the principal mitigation disclosure that will be
6 required will be covered by these categories. As I say,
7 I think it is going to be feasible to identify
8 relatively small differences in relation to these
9 issues.

10 So the first issue that actually arises is in
11 relation to definitions, but I am going to pick that up
12 in relation to P05(a) and (b) categories in due course,
13 because we think that it is likely only to be in
14 relation to those. There are particular definitional
15 issues as to the scope of the disclosure in those
16 categories. So we are content to use these definitions
17 all the way down to P05(a) and (b).

18 Then in relation to P04(e), there is a broad
19 agreement in relation to DAF's amended category. There
20 are some clarifications that are being made by
21 Royal Mail and BT in relation to the right-hand column,
22 but in relation to those, we are content to proceed on
23 the basis of that definition. So I think we have
24 agreement in relation to that row.

25 THE PRESIDENT: So P04(e), the comments of Royal Mail and BT

1 reflect the point about the definitions, do they?

2 MR BEARD: No. Well, in part. They are slightly different

3 issues, but mostly they reflect definitions, yes.

4 That is how we understand it.

5 In relation to this category, we are not taking

6 issue with the definitions. I think that, in practice,

7 that means there is no issue here.

8 THE PRESIDENT: Yes.

9 Mr Lask, I think we will take them point by point,

10 is probably the easiest.

11 Mr Lask, is that right from your understanding of

12 PO4(e), if it is accepted that for Royal Mail it

13 excludes Royal Mail relay services, and for BT it

14 excludes BT Retail Global Services and TSO?

15 MR LASK: Yes. That was the only point we were making in

16 that column. So that is agreed.

17 THE PRESIDENT: Yes. Can you just help me? I probably

18 should know, what is "TSO"?

19 MR BEARD: If it helps, I think it is Technology Services

20 and Operations.

21 THE PRESIDENT: Thank you.

22 MR LASK: Thank you. Those instructing me confirm that is

23 correct.

24 THE PRESIDENT: Right. That is PO4(e). PO4(g)?

25 MR BEARD: There is one thing I should mention. The terms

1 "business units" and "segments" that is used, obviously
2 we are not entirely sure what is being said by Royal
3 Mail and BT about how they are defining those units and
4 segments, but we are not going to get into arid
5 discussion at this stage about what is precisely being
6 defined. I think it is one of those ones where we have
7 explained where we are coming from in relation to those
8 matters. BT and Royal Mail will have their own
9 organisation in relation to these issues, and no doubt
10 they will conscientiously look at these points.

11 THE PRESIDENT: Yes, well that is just a shorthand.

12 MR BEARD: Yes, it is.

13 THE PRESIDENT: -- as I understand it, for the parts of your
14 client's business for which truck costs etc, etc?

15 MR BEARD: Yes, that is how we understand it.

16 THE PRESIDENT: That is what you mean.

17 MR BEARD: Yes, exactly.

18 THE PRESIDENT: That is what the definition is.

19 Now PO4(g)?

20 MR BEARD: PO4(g) is in relation to profit margins. Again,
21 we think there is no issue here.

22 We understand the reference in the right-hand column
23 to "contemporaneous documents" simply to mean that the
24 claimants are not expected to generate new documents in
25 relation to this category. It is only pre-existing

1 documents that they would gather. If we are wrong on
2 that, we would like to understand what is being referred
3 to as "contemporaneous documents", but we imagine
4 that is just a matter of clarification of language and
5 that otherwise, again, this row can be agreed.

6 THE PRESIDENT: Yes. Mr Lask?

7 MR LASK: Mr Beard is not wrong. That is what was intended.

8 MR BEARD: We are happy. That is on the transcript. As
9 long as we both understand what we are talking about,
10 that is a happy place.

11 THE PRESIDENT: Pre-existing contemporaneous documents.

12 Yes.

13 PO4(h)?

14 MR BEARD: PO4(h), the first concern -- it says "not
15 agreed". The first concern is in relation to the
16 addition of the words "metrics and targets" rather than
17 "performance indicators".

18 For reasons we are not entirely clear about,
19 Royal Mail and BT want "metrics and targets" removed.
20 Frankly, we do not think that makes any difference to
21 the scope of this disclosure category, because key
22 performance indicators is not some sort of defined term.
23 We were just trying to be clear about what we were
24 talking about, but if they want those words out, we are
25 entirely happy to take them.

1 We are also happy to make sure that this category --
2 which does not, we recognise, specifically refer to
3 trucks or categories of costs including trucks --
4 includes such words. So where it is saying,
5 "Information and explanations in respect of the key
6 performance indicators reached by each claimant or
7 relevant business unit to measure performance insofar as
8 applicable to a relevant business unit or segment in
9 relation to trucks costs or categories of costs
10 including trucks, including information as to targets
11 for those key performance indicators", now we think that
12 by including that language, we would be dealing with the
13 concerns that Royal Mail and BT are raising, and should
14 be able to reach agreement in relation to this category.

15 MR LASK: Sorry, I am just taking instructions, if I may.

16 MR BEARD: I am grateful. I understand we are trying to put
17 forward, in the light of the schedule, what works.

18 I mean, obviously key performance indicators are an
19 important category of disclosure. I do not think there
20 is actually any dispute about that. I think the concern
21 is about the phraseology. There is a statement by
22 Royal Mail and BT. We do not consider Mr Bezant's
23 suggestion that KPI information is important in the
24 context of organisations which operate business units
25 and segments as cost centres.

1 I think the concern there is it is not sufficiently
2 focused. It is not that KPIs are inherently irrelevant,
3 and that is why we have included the focus words.

4 MR LASK: I am told -- and this may just be necessary for
5 the record -- that we do take an issue on the relevance
6 of this category, but in light of the amendment that
7 Mr Beard has described, we are content with it.

8 THE PRESIDENT: Thank you.

9 MR BEARD: Then I think we get into PO4(i), and I think we
10 are willing to agree to the minor modifications that
11 Royal Mail and BT are putting forward in relation to
12 that category.

13 THE PRESIDENT: So that is then agreed. Yes, PO4(k).

14 MR BEARD: PO4(k). I think the concern here, as we
15 understand it again, is rather like the situation in
16 relation to PO4H: that there is not a specific reference
17 to truck costs or categories of costs concerning truck
18 costs. So this is "concerning a representative sample
19 of documents or information setting out financial
20 budgeting methodologies and process for each claimant in
21 each relevant business unit or segment separately for
22 regulated and non-regulated business activities."

23 But we do see that it would be right, given what we
24 have indicated previously, that it should refer there to
25 "each claimant and each relevant business unit or

1 segment concerned with truck costs or categories of
2 costs including truck costs."

3 So we understand that that needs therefore to be
4 narrowed, and we think that that actually captures
5 broadly what has been suggested in the right-hand column
6 by Royal Mail and BT.

7 You will see the third paragraph down, they propose
8 that "the category be limited to budgeting methodologies
9 and processes in respect of truck or vehicle costs."

10 I think we are capturing the same sentiment. It is
11 slightly different wording, but I am not sure it matters
12 for these purposes.

13 THE PRESIDENT: Yes, it is the wording that has been used
14 before.

15 MR BEARD: Yes, exactly.

16 THE PRESIDENT: So Mr Lask, that is the wording you have
17 used in PO4(i)?

18 MR LASK: That is right, sir.

19 What we were seeking to essentially exclude were
20 methodologies that did not relate to trucks, which is
21 why we drafted it as we did. I do not think Mr Beard's
22 modification had a different effect, but if it is
23 intended to then perhaps he can --

24 THE PRESIDENT: No, I do not think it is. It is the way he
25 explained it. It is just following through, and it

1 might not be exclusively trucks.

2 MR BEARD: No, it is truck costs or cost centres involving
3 truck costs.

4 THE PRESIDENT: So that concludes PO4.

5 MR BEARD: That does conclude PO4. Then we get into PO5.

6 So PO5(a):

7 "In respect of each of the Claimants' products and
8 services where price lists exist, documents showing
9 a description of how prices are set or agreed with the
10 Claimants' customers by references to those price
11 lists."

12 So initially, what was being envisaged was some sort
13 of description or statement. The proposal that is being
14 put forward is modified by Royal Mail.

15 "In respect of each of the claimants' products and
16 services where price lists exist, price lists, generic
17 non-customer specific documents containing a description
18 of how prices are set and agreed with the claimants'
19 customers by reference to those price lists ..."

20 And then "board papers", talking about prices as set
21 for specific customers.

22 "This description should include, insofar as it is
23 recorded in pre-existing documents can be identified,
24 information on the policies regarding the setting of
25 customer prices and any authority limits. For example,

1 of discounts that can be given against price lists."

2 So I think in relation to this, we are content to
3 move over to the Royal Mail/BT approach here, subject to
4 a couple of issues. In B, you see there is this
5 reference to "generic non-specific customer documents".

6 Now we are only concerned about essentially how this
7 definition is going to be approached. What we do not
8 want is if a document talks about things generally but
9 refers to customers, that somehow it is excluded,
10 because obviously that would be unfortunate and wrong.

11 Equally, if, when searching for these things, you do
12 actually come across documents that are customer
13 specific, although we do not want a search to be carried
14 out, again, it would be wrong to just exclude those
15 documents if you had actually encountered them.

16 So we have just a concern about this phraseology,
17 "Generic non-customer specific documents", and we would
18 want to just make sure that it was covering those
19 matters.

20 Otherwise, the particular threshold that they are
21 applying that is set out in number 2, which is
22 a threshold of 5 million for Royal Mail -- that we have
23 no objection to, given the circumstances that are
24 spelled out there, because that is an internal threshold
25 that is used within Royal Mail.

1 When we come to BT, we have a couple of additional
2 issues. In relation to --

3 THE PRESIDENT: Sorry.

4 MR BEARD: I am so sorry.

5 THE PRESIDENT: So there is a qualification, because we need
6 to be clear for the purpose -- and I think we will leave
7 it to you to draw up the order, which will append the
8 schedule -- I am not clear where the 5 million threshold
9 is incorporated in the second column here with the
10 Royal Mail.

11 MR BEARD: To be fair to Royal Mail's drafting, I do not
12 think in fact it is. It is just the definition of board
13 papers I think, in C, implicitly imports that threshold
14 because only deals above a particular value would fall
15 within it, if I understand the language of Mr Lask's
16 comments correctly.

17 THE PRESIDENT: Yes, I see. So it is an -- (overspeaking)
18 -- of what you will get, an explanation of what will be
19 in the board papers that you will get on the scene.

20 MR BEARD: That is right. Yes.

21 THE PRESIDENT: I see. So that is fine.

22 So for Royal Mail on that basis, that is agreed, is
23 it?

24 MR BEARD: Yes. Subject to that point about generic
25 non-customer specific documents that I raised. I mean,

1 it may be useful, before I move to BT, for Mr Lask to
2 just clarify that when they talk about "generic
3 non-customer specific", if these documents concerning
4 price lists and price setting include generic material
5 but also customer material, they are not going to be
6 excluding those documents. Equally if, when searching,
7 they come across material relating to customers -- this
8 is the second point -- we can see a benefit in those
9 being disclosed as well. But we are not asking them for
10 search separately for them. It would just be odd
11 exclude them, I think is the point we would put it,
12 actively to exclude such documents when you had
13 encountered them.

14 MR LASK: Sir, we will not exclude those documents.

15 MR BEARD: I am grateful. That makes life a lot easier.

16 MEMBER 3: I think that should be reflected in the order,
17 though.

18 MR BEARD: Yes, we will make sure that the definitions used
19 pick that up, and that we are not imposing a further
20 search obligation.

21 MEMBER 3: Yes, okay.

22 THE PRESIDENT: Yes, then BT?

23 MR BEARD: Then BT.

24 So in relation to BT there are just a couple of
25 issues. It is phrased in very much a similar way. So

1 in C it says, "Any available documents relate to deals
2 with specific customers value 5 million and over."

3 Now we do not understand why that threshold is
4 taken. We understand it in relation to Royal Mail
5 because it is spelled out that that is what pricing
6 strategy board papers will cover. But we were just
7 slightly concerned this felt like a slightly arbitrary
8 cut-off point being used here.

9 Obviously it is the same point in relation to
10 generic non-customer specific documents arises, but
11 there is a further point here, and this is where the
12 issue just in relation to definition arises.

13 If we go back to the front page of this schedule,
14 you will recall that there is an exception in relation
15 to BT Retail Global Services and TSO.

16 THE PRESIDENT: Yes.

17 MR BEARD: The reason this arises here is because we are
18 talking about price setting to customers, we think this
19 needs to cover BT Retail and Global Services.

20 I think TSO, that we referred to earlier, that is an
21 internal business, and it will only really engage in
22 transfer pricing, as we understand. But BT Retail and
23 BT Global Services, which we stand to be corrected, but
24 we understand is the business focus retail part of BT,
25 will obviously be setting prices to customers. In those

1 circumstances, it would be very odd to exclude those
2 entities from the consideration in P05(a). We say they
3 should not be, because obviously businesses like
4 Openreach, they are selling wholesale and they are not
5 necessarily selling anything retail.

6 Since we are here talking about supply pass-on, and
7 therefore pass on through to external customers, and we
8 also say mitigation issues, but particularly in relation
9 to supply pass-on, we say that it is obvious that those
10 entities should be included for these purposes. But as
11 I say --

12 THE PRESIDENT: Is not BT Global Services just dealing with
13 customers abroad?

14 MR BEARD: I thought that, sir. That was my understanding.
15 Then I was corrected. If I am told that in fact my
16 initial understanding was right, and it was only
17 overseas, then I think there may well be reason to
18 revisit what I have just said; but we are not clear on
19 that. The concern I have just articulated is if we are
20 talking about passing on to customers in relation to
21 various cost centres where the flow of business will
22 involve trucks, effectively, then we think that this
23 price list category needs to cover that.

24 Now if Mr Lask tells me --

25 THE PRESIDENT: Is BT Retail what consumers -- deals with

1 consumers?

2 MR BEARD: Yes, it deals with consumers in the UK.

3 THE PRESIDENT: Phonelines and --

4 MR BEARD: Yes, exactly.

5 THE PRESIDENT: -- and all the tariffs that BT charges?

6 MR BEARD: Yes, that is right. That is what BT Retail does,
7 as I understand it.

8 I am not in a position to give more detailed
9 evidence in relation to that, but obviously when we are
10 talking about prices to customers, we want some sort of
11 handle on that.

12 THE PRESIDENT: So, I mean, does that mean you are looking
13 to see if the price of trucks might have been passed on
14 in the phone tariff that consumers pay?

15 MR BEARD: Well, it is not going to -- given the level, the
16 number of tariffs, what we are really interested in is,
17 as can be seen here, "In respect of each of the
18 claimants' products and services where price lists
19 exist, documents showing a description of how prices are
20 set and agreed."

21 So it is the question of whether or not any of these
22 costs are taken into account in those price settings.
23 So we are trying to look behind it. We are not trying
24 to --

25 THE PRESIDENT: But you are trying to get all the price

1 lists as well. So you wanted all the tariffs all the
2 time.

3 MR BEARD: Yes, well, we asked for a description in relation
4 to this, and the response from Royal Mail and BT has
5 been "We will give you price lists."

6 Now, if what we will be talking about here is going
7 back to some sort of description of these issues, then
8 obviously that is something we could consider. The
9 reason it arises is because at the same time as we have
10 shifted to price lists on Royal Mail BT's proposal, they
11 have also excluded BT Retail and Global Services, and
12 that is what we are concerned about.

13 THE PRESIDENT: Yes.

14 MR BEARD: We will move to their approach, but we cannot
15 then just carve out BT Retail in its entirety from this
16 exercise. That is the issue that arises here.

17 THE PRESIDENT: Mm. Yes.

18 So two points, Mr Lask: the 5 million and the
19 business units.

20 MR LASK: Yes, they are both proportionality points. The
21 5 million threshold is identified essentially by analogy
22 with Royal Mail, where there is a 5 million threshold
23 for these issues to go to the board.

24 We applied that analogy to BT in order to ensure
25 proportionality but if, on further enquiry, we identify

1 that there is an internal BT threshold such as there was
2 in Royal Mail, but at a different level, then we would
3 be content to apply that. But at this stage, based on
4 our current knowledge, we have to try to identify some
5 measure for avoiding disproportionality, and we have
6 done it by using the 5 million threshold from
7 Royal Mail.

8 THE PRESIDENT: Yes.

9 MR LASK: That is the first point.

10 Then the second point is really explained on the
11 first page of this schedule under the definitions
12 section. Again, it is about proportionality. You will
13 see in the third -- sorry, the fourth column, under the
14 heading "BT", second paragraph, refers to the fact that
15 only around 5% of the trucks in BT's claim were used by
16 Retail Global Services and TSO.

17 So again, it is a proportionality issue. You will
18 see in the final paragraph that BT Global Services used
19 only seven trucks during the relevant period, against
20 net operating costs of a lot.

21 So in the context where we are looking to see
22 whether truck costs were passed through to supplies,
23 non-truck supplies made by BT, we do think it would be
24 disproportionate to have to search for documents within
25 those entities, given the very small proportion of

1 trucks that they were responsible for.

2 Can I deal with --

3 THE PRESIDENT: Just a minute. The total number of trucks
4 in the BT claim is about 1,800, is it? Is that right?

5 MR LASK: We think that is about right, but we are just
6 checking.

7 THE PRESIDENT: That is a figure I picked up from something.

8 MR BEARD: I think that is probably right, yes.

9 THE PRESIDENT: So when you say 5%, it is about 90 trucks
10 out of the 1,800, yes?

11 MR LASK: Yes, that is right.

12 THE PRESIDENT: Yes, I see.

13 Can you just tell me, BT Retail, is that right --
14 that is the arm of BT that sets all the phone and
15 broadband tariffs to consumers; is that correct?

16 MR LASK: We think so, sir, but we are just checking on
17 that.

18 THE PRESIDENT: Right. I thought you would be an expert on
19 BT by now, Mr Lask. Yes.

20 MR BEARD: Can I just deal with a couple of those points?

21 THE PRESIDENT: Yes.

22 MR BEARD: We understand, in relation to 5 million, we
23 understand the imposition of a proportionality threshold
24 of some sort. It is disappointing that the knowledge
25 the claimants appear to have of BT's business about

1 where this threshold is set is not as per Royal Mail,
2 and we are slightly concerned that it is arbitrary. But
3 if there is no better way of doing that, it may be
4 that is what we have to live with at the moment. But we
5 do think that it would be appropriate for them to look
6 as to whether or not there is a relevant threshold for
7 board papers for BT in the way that there is for
8 Royal Mail, because it seems to us a much better way of
9 doing these things than merely on the basis of carrying
10 one price threshold across.

11 More importantly, in relation to the BT Retail
12 issue, it is not just a matter of the 90 trucks we are
13 talking about. What we are talking about here is
14 whether or not in relation to trucks that, for instance,
15 go into the regulator business, for instance if they go
16 into Openreach, and Openreach, as you know, is the part
17 of BT that is providing wholesale services -- so
18 substantial access to telecommunications routes -- it
19 does that to a number of people, including BT Retail.
20 Indeed, that was the purpose of the separation of
21 Openreach and BT Retail within the BT group when Ofcom
22 did it.

23 The concern we have is that Openreach may well take
24 on board a large quantity of truck costs. It may well
25 be essentially re-charging BT Retail, and BT Retail is

1 then re-charging customers for those costs.

2 Now, as I picked up in exchanges with
3 Mr Justice Fancourt, one of the issues that may arise,
4 albeit we were talking about it in terms of mitigation,
5 a similar issue arises in relation to pass-on. If you
6 have regulated businesses taking on board costs setting
7 prices and then those prices being taken by an internal
8 BT company, strictly speaking, it may be said by BT,
9 "Well, that is not passing on; that is just one of our
10 other businesses taking this notional loss on itself."

11 At that point, we need to understand what that
12 business is doing with those costs, in terms of
13 potentially passing them on to customers.

14 What we are trying to do is identify a proportionate
15 way of assessing that. It may well be that it is
16 provision of price lists. They may be readily
17 available. It may well be that it is, by some means,
18 a description or statement. But the idea that one
19 should simply eliminate BT Retail from this because it
20 directly takes a limited number of trucks is not the
21 right way of analysing this. It is for that reason we
22 say you cannot simply eliminate BT Retail, as is sought
23 to be done.

24 As I say, if I am wrong about Global Services and
25 Global Services are all overseas, then I recognise that

1 that may well not be a germane submission in relation to
2 Global Services.

3 If, on the other hand, it is involved in actually
4 retailing to business, the same issue arises in relation
5 to Global Services.

6 THE PRESIDENT: But it would involve a huge number of tariff
7 lists over this long period, which we all know was
8 consumers, that BT has a range of tariffs, it changes
9 its tariffs.

10 MR BEARD: Well, I accept that, sir. I am not going to
11 demur that there are lots of tariffs. It was for that
12 reason we started with the description process.

13 THE PRESIDENT: Yes.

14 MR BEARD: So all we are saying is that we started with
15 a description we thought was the proportionate way of
16 dealing with this. We understand why Royal Mail and BT
17 have come back with this alternative suggestion, but we
18 cannot have a situation where you lose that bit in the
19 middle, effectively. That is really what I am dealing
20 with, because the Royal Mail BT response does not deal
21 with it.

22 If the order is that Royal Mail/BT have to provide
23 a description in relation to these matters, then that
24 may well be the best way of dealing with it in the first
25 instance. In other words, to retain some part of what

1 we had suggested previously just in relation to them.
2 We are content to proceed on that basis, but we cannot
3 just leave a hole there. The Tribunal is not going to
4 want a hole there, given that we all know the pass-on --

5 THE PRESIDENT: The description was what sort of description
6 that you were looking for previously?

7 MR BEARD: Let me just ...

8 If one looks at column 1, you can see the sorts of
9 issues that we are looking at.

10 This, I should say, is a further iteration, because
11 it was initially completely a description. It is
12 information on the policies regarding the setting of
13 customer prices and any relevant authority limits.

14 I mean, to be clear, as it sets out at the start, it
15 is relating to the claimants' products and services and
16 describing how prices are set and agreed with customers.
17 Normally we would see prices accompanying that and one
18 would expect it, but we just cannot leave a hole there.
19 That is the difficulty.

20 THE PRESIDENT: Yes. I mean, where they are regulated
21 businesses, they are not really agreed with customers,
22 are they?

23 MR BEARD: Well, no, that is true.

24 THE PRESIDENT: Except by regulation.

25 MR BEARD: Well, yes, certainly the amount they are allowed

1 to charge is set by regulation, and since they will
2 charge up to the regulated cap, that is obviously true.
3 Therefore that element will be more straightforward.
4 I can see that. At the moment, we do not have any of
5 this covered.

6 I am so sorry, Mr Malek.

7 MEMBER 3: Mr Beard, is the idea that BT is going to, for
8 example, provide that information in any event as part
9 of its -- and so Royal Mail -- as part of its witness
10 evidence? Because it says that "Royal Mail does,
11 however, confirm that it intends to address Royal Mail's
12 approach to pricing during as much of the period of '96
13 to 2018 as possible" in its witness evidence.

14 MR BEARD: Yes.

15 MEMBER 3: And they say the same in the other.

16 MR BEARD: Yes. The problem we have --

17 MEMBER 3: Yes, but you need to have the disclosure earlier,
18 do you not?

19 MR BEARD: Yes, that is exactly it. It is a timing issue at
20 that point.

21 MEMBER 3: I am sympathetic that you should have that
22 description, but that is subject to what the other
23 members say.

24 THE PRESIDENT: Yes, yes. You are content to have it by
25 description rather than, in the case of BT Retail, by

1 price list?

2 MR BEARD: Yes. As I say, I am just trying to fill in that
3 gap. I am not trying to monkey with what Mr Lask and
4 his clients have put in in the remainder of it for the
5 other entities. It is just in relation to BT Retail,
6 and, as I say, Global Services if that relates to stuff
7 in the UK. If it is just overseas then we understand
8 this may be a different issue.

9 THE PRESIDENT: Yes.

10 Well, Mr Lask, I think what is being said is that
11 they will accept the 5 million for the moment, if you
12 find there is an internal threshold, then they will
13 expect you to vary that.

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

15 THE PRESIDENT: As far as BT Retail, they are content,
16 instead of price lists, to have the descriptive
17 statement as to how prices are set. I think it can only
18 be -- in this case, it is presumably a non-regulated
19 price list that you are concerned with. Is that right,
20 Mr Beard? I mean, regulated prices you will see from
21 the various statements --

22 MR BEARD: No.

23 THE PRESIDENT: No?

24 MR BEARD: I am not sure whether -- I mean, there may be
25 a difference between what is set out in a regulator

1 statement as to what the price cap is for a basket of
2 prices and what is actually charged by the regulated
3 business.

4 THE PRESIDENT: Right.

5 MR BEARD: So I do not want to say yes, and recognise that
6 actually, it could vary.

7 THE PRESIDENT: Well, it might --

8 MR BEARD: It may not matter, but I am just concerned I am
9 not --

10 THE PRESIDENT: It might be easier anyway than in the
11 statement.

12 MR BEARD: It should certainly be easier, yes.

13 THE PRESIDENT: Yes, that you provide a statement on
14 BT Retail.

15 Mr Lask, is that something that --

16 MR LASK: Sir, the concern we have is that providing that
17 sort of statement, particularly given the time frame at
18 issue, which I understand is over 20 years, is itself
19 going to be a very onerous task, and may not be much, if
20 any, less disproportionate than providing the disclosure
21 itself.

22 Mr Beard explained his concern that there may be
23 some interrelationship between a unit such as retail and
24 other business units within the BT business, such that
25 even if retail was only responsible for a small number

1 of trucks, there may be passed through the business.

2 That is what I understood his submission to be.

3 Our current understanding is that there was not that
4 sort of interrelationship between these carved-out units
5 and the rest of the BT business. But we would be,
6 I think, happy to look into that further so that we can
7 confirm that. Because if that is right, it seems to us
8 that Mr Beard's concern falls away.

9 MR BEARD: No, I am sorry; that is not going to be feasible.

10 I do not understand what it is that Mr Lask is
11 suggesting could be done by way of an investigation and
12 assurance that costs are not passed through in relation
13 to a business.

14 That is the very issue that is being tested by this
15 court in relation to pass-on. So I am sorry, that is
16 not going to be sufficient. It needs to be
17 a description of the factual matters.

18 If Mr Lask is saying, "I would like to break this
19 down so that I do the most recent 10 years of the claim
20 by X date and the preceding 15 by Y date", that is one
21 thing. I mean, it is his claimants that have set the
22 parameters of the total claim. If they are going to
23 come forward with these things, it must be expected that
24 we are going to make enquiries in relation to these
25 issues. It is entirely proper that those are

1 investigated. If there is a way of doing it that breaks
2 it down into sections, we are willing to listen.

3 THE PRESIDENT: What is it you intend to do, Mr Lask, in
4 your witness evidence? Because you say you intend to
5 address the approach to pricing during as much of this
6 period as possible in your factual witness evidence. So
7 at some point you are going to produce a statement of
8 how you dealt with pricing.

9 MR LASK: I am sorry, sir; could you just give me 30 seconds
10 to answer that, please?

11 THE PRESIDENT: Yes. Yes.

12 (Pause)

13 MR LASK: Sir, as far as the interrelationship between the
14 units are concerned, we would envisage in the witness
15 evidence for trial explaining the extent, if at all, to
16 which Openreach and wholesale sold goods and services to
17 the other units, the units that we are intending should
18 be carved out from the disclosure exercise. But if that
19 has to be done sooner, if that explanation has to be
20 given sooner in order to ensure a proportionate approach
21 to disclosure, then we will endeavour to do that.

22 MR BEARD: I think we will need to set some deadlines in
23 relation to it, and it is -- just to be clear, it is not
24 just about the sale by those units to BT Retail. It is
25 what BT Retail does in relation to setting its prices.

1 So it is those two elements.

2 So if it was intended to put forward witness
3 statement evidence without that material, that would
4 have been a gaping hole in the relevant evidence in
5 relation to these matters, which lies only within the
6 knowledge of BT, and it is something that it is good
7 that has been identified at this stage and needs to be
8 rectified extremely quickly.

9 THE PRESIDENT: Can I then ask you -- we will come back to
10 that -- about BT Global Services? Do they supply
11 businesses in the UK under UK contracts?

12 MR LASK: Sir, we are still in the process of trying to find
13 an answer to that. The member of the team who is on
14 that point is not with me. That is why it is taking
15 a bit of time.

16 THE PRESIDENT: Well, I think what is sensible and pragmatic
17 at the moment is we will keep the definition in this --
18 in the disclosure that we ordered, and the 5 million.
19 That is accepted for now. But we will ask you to liaise
20 with DAF for BT regarding what you propose by way of
21 statement on BT Retail and to clarify the position from
22 BT Global Services. We hope you can reach agreement.
23 If you cannot, that is a classic matter for a Friday
24 application. I think it really does not make sense to
25 take up time on a small matter like that now.

1 We are running into -- we can try to do one other
2 item, but we have not determined, or is that agreed, the
3 date by which the agreed categories or the categories we
4 have decided will be provided. Is that in issue or is
5 that agreed? The PO4 categories, for example.

6 MR BEARD: The difficulty at the moment is that although
7 Royal Mail and BT have said they will give us tranches
8 of disclosure prior to the long-stop date of the end of
9 April, they have given no indication of what those
10 tranches will be. They have suggested that they could
11 provide material by the end of March, and that is
12 excellent. But we do not have any sense of what that
13 material will be and, frankly, we are concerned about
14 leaving the CMC without an indication of what those
15 categories of disclosure would be by the end of March,
16 even if, best endeavours, it turns out that actually,
17 they cannot hit all of the material by 31st March.

18 But we do think that some sort of indication of what
19 is going to be provided by that date should be provided
20 today so that it can be put in an order even if it is on
21 a best endeavours basis. Because what we are gravely
22 concerned about is that by focusing only on the
23 long-stop date of the end of April, what is actually
24 happening is that we are going to get, at most, dribs
25 and drabs before then, and in the end we will only get

1 all of this material towards the end of the period or,
2 indeed, on the long-stop date.

3 So we want to have -- we are willing to be
4 reasonable, we are willing to be flexible about what it
5 is, but we do want material so that we can start our
6 process in dealing with it sooner rather than later, and
7 we do not think this in any way unreasonable given the
8 length of gestation of this discussion.

9 MR LASK: Sir, just to be clear, what we have agreed to do
10 is provide the disclosure in three tranches. The first
11 tranche is as early as 5th March. It is the second
12 tranche that is by the 31st, and the final tranche by
13 the end of April.

14 We cannot today give an indication of what is going
15 to be in the 31st March tranche, not least because --
16 and this is no criticism of DAF -- but not least because
17 the categories have been changing over the last few
18 days -- this is a moving feast -- and we are not in
19 a position to say which of those modified categories are
20 going to be supplied when.

21 But we are doing our best. We have agreed to give
22 it on a rolling basis, and they are going to get the
23 first tranche in three days.

24 THE PRESIDENT: I do not think, Mr Beard, that realistically
25 we can take that further forward today.

1 We now have for all but I think, is it, three
2 categories, a position that has been determined. There
3 is PO5(b), (k) and (o) that are still to be resolved.
4 They have now been qualified and there has been a lot
5 of, no doubt, late night work to get to the compromised
6 position.

7 I think you have got to, both sides, go away now and
8 look at what has been finally agreed or determined.

9 I think that the claimants should then write by the end
10 of this week, or -- to clarify what of these -- they are
11 proposing to give. They will obviously know by
12 5th March what they intend but what they can do by
13 31st March and what by 29th April.

14 If you are dissatisfied with that, then you should
15 write to the Tribunal and say, no, you think further
16 material should come by 31st March. Otherwise -- you
17 are on mute, Mr Beard -- otherwise, you know, we can be
18 here until 6 o'clock trying to work out which category
19 can come by which date, and which subcategory could come
20 earlier.

21 MR BEARD: No, no, it is a beautiful prospect to spent the
22 evening discussing those, but I think that is
23 a temptation to be resisted, and we are very happy with
24 the idea of a letter by the end of this week to
25 accompany the first tranche of disclosure setting out

1 ten minutes, at which point I have to go to a meeting.

2 But we hope that might be just enough so we can
3 complete PO5(b), and we think it sensible to sit with
4 the two of us to try to wrap this up.

5 MR LASK: Thank you, sir.

6 THE PRESIDENT: So we are looking at PO5(b). You said,
7 "a reasonable and proportionate search", and again,
8 the 5 million threshold for specific customers,
9 guidelines, and then for BT, it is again the issue about
10 the business segments, I think. So there are two
11 qualifications.

12 So, Mr Beard, on the -- well, any search for
13 documents for disclosure is limited to reasonable and
14 proportionate --

15 MR BEARD: Yes.

16 THE PRESIDENT: -- search. The 5 million, I think you know
17 the reason for that, for Royal Mail.

18 MR BEARD: Yes.

19 THE PRESIDENT: As I understand it, you accepted that.

20 BT you were less happy about because it is simply
21 taken on the basis of equivalence, and made the point,
22 well, if they have actually a threshold for
23 customer-specific pricing or guidelines, they should
24 apply that threshold and not simply this figure. But
25 subject to that, as I understood it, you accepted that

1 qualification?

2 MR BEARD: Yes.

3 THE PRESIDENT: So we are left with the business unit
4 segment issue as regards BT.

5 MR BEARD: Yes. We have the issue in relation to BT Retail
6 and Global Services, which arises again in relation to
7 PO5(b). The only other issue that arises in relation to
8 BT particularly, and this is a query that probably can
9 be dealt with by Mr Lask when considering these things
10 further, is what is actually intended to be done in
11 relation to BT Fleet rather than BT PLC in relation to
12 the statements, because obviously we want to make sure
13 BT Fleet is covered.

14 I think that may be a matter for clarification
15 rather than a specific piece of wording. But yes, sir,
16 you have exactly the points there. The same points
17 essentially as arose in relation to PO5(a).

18 THE PRESIDENT: So it is a question, Mr Lask, of how we are
19 going to deal with BT Retail?

20 MR LASK: BT Fleet I thought was the query that Mr Beard
21 raised.

22 THE PRESIDENT: There was a query about BT Fleet.

23 MR LASK: Yes.

24 THE PRESIDENT: There is a query, yes.

25 MR LASK: BT Retail I envisage we will deal with in the same

1 way as we are under P05(a).

2 THE PRESIDENT: Via statement.

3 MR LASK: Yes.

4 THE PRESIDENT: BT Fleet probably is a relevant business
5 unit, is it not?

6 MR BEARD: That is what we envisaged, which is why I thought
7 it was probably only going to be a clarification that
8 was required. It was very difficult to see why that
9 would not be the case.

10 MR LASK: I do not think we would quarrel with the
11 proposition that BT Fleet is a relevant business unit.

12 THE PRESIDENT: Yes.

13 MR LASK: Sir, can I raise one point before I risk
14 forgetting it, which is that under the Royal Mail
15 heading, you will see it refers to the "Claimants'
16 products". That ought to have been amended in the same
17 way as under the BT heading, which is -- I was going to
18 say I thought that that was done on 5(a) but I see that
19 that not be done on 5(a). But I think it ought to have
20 been done and that was just an oversight on our part.

21 MR BEARD: That is fine. We take no issue with that.

22 THE PRESIDENT: So that will happen for both.

23 MR LASK: Thank you.

24 THE PRESIDENT: So then have we in fact reached
25 a compromised position on 5(b)?

1 MR LASK: From our perspective, yes.

2 MR BEARD: I agree, yes. As I say, it is very similar.

3 The last one is 5(e), but that is actually agreed,
4 and --

5 THE PRESIDENT: Yes, it is agreed --

6 MR BEARD: -- although it says only -- "Royal Mail only",
7 there is an equivalent in relation to BT, which
8 I understand there is some query arises in relation to
9 it, but we can leave that for today. That then
10 resolves, so far as we are concerned, the presently
11 outstanding issues in relation to supply pass-on and
12 indeed, we would say, in relation to mitigation, were
13 you, for the reasons we have already articulated, to
14 grant us permission in relation to the amendment.

15 THE PRESIDENT: Yes.

16 MEMBER 3: Just one point if I could just raise it.

17 Mr Lask, in relation to the draft order at
18 paragraph 15, you have a provision of the disclosure
19 statements by reference to rule 31.10(vi), et cetera.
20 What we have been doing on all the cases and orders is
21 setting out what the requirement is following
22 paragraph 47 of the disclosure ruling of last year. So,
23 instead of that wording, just follow the wording that we
24 have used for all the other orders.

25 MR LASK: Thank you, sir. We will.

1 MEMBER 3: Thank you.

2 THE PRESIDENT: If you can draw up the order, obviously you
3 will not be able to include the question of the
4 amendment as regards the mitigation, and that will be
5 done separately.

6 Good. Is there anything else we need to deal with?

7 MR LASK: Sir, I had one other matter, which was just to
8 respond briefly to the question Mr Malek raised before
9 the lunch adjournment on the relationship between fuel
10 spend and truck spend.

11 THE PRESIDENT: Yes.

12 MR LASK: We do have an answer but what we have not
13 established yet is whether the information is
14 confidential. So, rather than ask the Tribunal to
15 switch into a closed session, I would propose that we
16 write to the Tribunal, copied to the defendants, with
17 that information.

18 THE PRESIDENT: Yes. That seems very sensible.

19 Thank you.

20 MR BEARD: We have nothing else. Thank you very much.

21 THE PRESIDENT: Well, thank you both, and to all those
22 assisting you, on what has been quite a demanding CMC,
23 I think, for all involved.

24 We will let you know when our ruling is ready on the
25 amendment, and it will, I think, be in the same

1 judgment, the reasons for the refusal to allow
2 Professor Neven to give a separate report on pass-on.

3 MR BEARD: Grateful. Thank you.

4 MR LASK: Thank you, sir.

5 THE PRESIDENT: Thank you.

6 That concludes this hearing.

7 (4.45 pm)

8 (The hearing adjourned)

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25