

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.

**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No. : see below list

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

21 November 2018

Before:

**The President: The Honourable Mr Justice Roth**  
**The Honourable Mr Justice Hildyard**  
**Hodge Malek QC**  
(Sitting as a Tribunal in England and Wales)

**Royal Mail Group Limited v DAF Trucks Limited & Ors**

Case: 1284/5/7/18 (T) Royal Mail Group Limited v DAF Trucks Limited & Ors

Case: 1290/5/7/18 (T) BT Group PLC & Ors v DAF Trucks Limited & Ors

Case: 1291/5/7/18 (T) Ryder Limited & Another v MAN SE & Ors

Case: 1292/5/7/18 (T) Suez Groupe SAS & Ors v Fiat Chrysler Automobiles N.V. & Ors

Case: 1293/5/7/18 (T) Veolia Environnement S.A. & Ors v Fiat Chrysler Automobiles N.V. & Ors

Case: 1294/5/7/18 (T) Wolseley UK Limited & Ors v Fiat Chrysler Automobiles N.V. & Ors

Case: 1295/5/7/18 (T) Dawsongroup Plc & Ors v DAF Trucks N.V. & Ors

—————  
*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***

—————  
**CMC - Day 1**

1 Wednesday, 21 November 2018

2 (10.13 am)

3 CASE MANAGEMENT CONFERENCE

4 THE PRESIDENT: Good morning, everyone. I should  
5 say that the proceedings are being live streamed to court 2,  
6 so those who could not fit into this court, we hope can fit  
7 in the adjacent court. We will also need to take a break  
8 about 11.30 to help our transcribers because we have  
9 transcription as usual.

10 Thank you all for your skeletons. Our objective,  
11 of course, is to manage all of these cases in a sensible and  
12 proportionate manner. We are concerned to avoid, so far as  
13 possible, a succession of separate trials going over the  
14 same issues of fact or law. That is not an appropriate or  
15 proportionate use of the Tribunal's time. It also risks  
16 inconsistent outcomes, which of course then lead to appeals  
17 and the potential for remittal for rehearing.

18 Several of you in your skeletons have reminded the  
19 Tribunal of what happened in the interchange fee Litigation,  
20 not that I needed reminding of that, but I think everyone  
21 agrees that it was not a good model. We do appreciate that  
22 some of these cases are more advanced than others, but that  
23 is not a reason, in our view, to push ahead in a manner that  
24 we think will give rise to those sort of problems. At the  
25 same time, that does not mean that these cases which are

1 pending before the Tribunal are to be put back into some  
2 indefinite future just because there may be other cases  
3 still to be brought.

4 In that regard, we have had a letter from Edwin Coe  
5 Solicitors, who have clients who have just issued a case in  
6 the High Court with a request that they, by counsel, should  
7 be able to participate in these proceedings. I think is  
8 Mr. Bates here for that case? No.

9 MR GREENE: I am from Edwin Coe.  
10 I think he is in the other room, actually.

11 THE PRESIDENT: Well, the position is that we have  
12 seen your letter. You are obviously welcome to be here and  
13 to observe the proceedings. We have to say unless you wish  
14 to address us further, or Mr. Bates does, we do not think  
15 it is appropriate for you to participate in this case  
16 management conference. It is not a CMC in your clients'  
17 case. That is at a very early stage. No defences,  
18 obviously, have been served yet and frankly, we have quite  
19 enough to be getting on with without dealing with the case  
20 or hearing about a case that is not even before this  
21 Tribunal at all.

22 MR GREENE: Yes.

23 THE PRESIDENT: Thank you.

24 So, we will deal today, and over the two days that  
25 are allotted, with matters that, to a large part, cover more

1 than one group of cases and what we would like to do is, at  
2 an appropriate time, schedule for tomorrow matters that  
3 concern only an individual case or a smaller group of cases  
4 being heard together. So we will deal with Royal Mail's  
5 application for permission to amend tomorrow and that  
6 concerns only Royal Mail and DAF and we propose to deal with  
7 that first tomorrow. We will deal with any specific  
8 disclosure applications tomorrow and not today and that will  
9 become clearer as we go ahead.

10 We will also consider tomorrow what is raised in  
11 many of the cases, but it concerns disclosure, namely  
12 whether it is appropriate or possible to address economic  
13 disclosure, as it has been called, at this stage. What we  
14 would like to do, probably in the afternoon, is fix a rough  
15 timetable for tomorrow so that not everybody need attend the  
16 entirety of the day and that is why we propose to start with  
17 the Royal Mail application with the possibility of starting  
18 at 9.30, unless that causes any great inconvenience,  
19 tomorrow, because we must finish tomorrow at 4 o'clock  
20 sharp.

21 MR. PICKFORD: I hesitate to interrupt. The  
22 Royal Mail application will need to be heard, as matters  
23 currently stand, in camera. So just so that the Tribunal  
24 and all the other parties are aware, they are not in that  
25 ring and --

1           THE PRESIDENT: We understand that and that is why  
2 we would like to fix it at 9.30. We will consider later how  
3 long is needed, potentially two hours, which we think should  
4 be sufficient. I know someone says it takes much longer,  
5 but we are not persuaded of that. Then everyone else can  
6 come at 11.30 or, in some cases, possibly later.

7           MR. PICKFORD: Thank you.

8           THE PRESIDENT: Also, having considered all you  
9 have said in your written submissions, we are not minded to  
10 list any cases for trial. That is not, we emphasise,  
11 because of the collective proceeding order applications. We  
12 have noted what has been said about that, but we are not at  
13 the moment at all persuaded that these cases now before us  
14 should be held up because of the CPO applications, but we  
15 need not trouble you to address us on that, because, as  
16 I say, we decided that we are not minded to list anything  
17 for trial. Obviously, anyone is able to seek to argue  
18 against these provisional views if they want to, but we  
19 think that a staged but tight approach to case management,  
20 keeping an overview of all the claims together, is what is  
21 appropriate at this stage.

22           What we have in mind is to fix a further CMC in  
23 the New Year, by which date some, if not all, of the steps  
24 that may be directed today can be completed and we will see  
25 when that can be. What we had in mind is a date in late

1 February, but it may be said that is too early, but we hope  
2 that is achievable. If you bear that in mind when we  
3 consider, as we go through, the various issues that arise  
4 that there will be a further CMC in several months' time.

5 Secondly, we think that there are some individual  
6 issues that concern only a particular case that might be  
7 hived off from this hearing to be heard separately in  
8 December. In particular, we have in mind Wolseley's  
9 application to strike out the Daimler claim for a  
10 declaration. That concerns only two parties. It involves  
11 consideration of various points of law. It may take several  
12 hours and we think it can be heard conveniently with just  
13 those two parties present. We hope that a date in December  
14 can be found and we are thinking of the second-half of  
15 December, if the representatives in those two parties might  
16 consider overnight what their availability is and liaise  
17 with the Tribunal.

18 So, the first thing we want to address is the  
19 question of what claims might be heard together. We  
20 suggested that the Royal Mail and British Telecom's claims  
21 should be heard together and as I understand it, but please  
22 correct me if I'm wrong, that is not opposed by either  
23 Royal Mail, British Telecom or DAF, that they be heard  
24 together in one trial.

25 MR. PICKFORD: We do not oppose that, but we say

1 it is not yet necessary to order it as yet. What we suggest  
2 is that they are managed to keep that option open on the  
3 assumption that that may well be the appropriate course.

4 THE PRESIDENT: Why should we not do it now?

5 MR. PICKFORD: There have been some issues, that  
6 are not fully canvassed between the parties, on the  
7 ramifications of that. For example, the implications of  
8 evidence in one case standing as evidence in another on its  
9 face, that may be acceptable, but it has not yet been fully  
10 thought through.

11 THE PRESIDENT: What's the objection? What is the  
12 possible objection to that?

13 MR. PICKFORD: Well, the objection is that simply  
14 no-one has given any consideration yet to what the  
15 implications of that would be. There may be complications  
16 that arise from how one deals with evidence in one case and  
17 what its actual applicability is in another case.

18 There are also, potentially, confidentiality  
19 concerns that could arise. We are not saying these are  
20 barriers at all. We are saying they need to be properly  
21 considered and that there is no disadvantage in the Tribunal  
22 at the moment simply taking the position that it is quite  
23 feasible that those claims may be heard together and they  
24 should be case managed in a way that would allow that to  
25 happen.

1                   When it comes on to directions, we do not object  
2                   at all to directions which envisage such a joint hearing.  
3                   We are saying it does not need to be directed now because  
4                   there is no particular advantage or necessity to direct it  
5                   now and it might be appropriate for there to be flexibility.  
6                   That is all we are saying.

7                   THE PRESIDENT: Well, there might be considerable  
8                   advantages in dealing with it now in terms of issues of  
9                   disclosure and documents being seen by people in one case  
10                  and in the other case. The point has been made about the  
11                  complication of having so many different confidentiality  
12                  rings. That is a case where your clients are the defendants  
13                  in both cases. I think there may be one other company  
14                  within your group, but that does not make a difference and  
15                  the nature of the cases are very similar in terms of only  
16                  one Defendant, no part 20 Defendants, only trucks in the UK.

17                  MR. PICKFORD: Indeed, sir. We recognise the  
18                  strength in all of those points. I think the difference  
19                  between us and the Claimants is a relatively subtle one. We  
20                  simply say it need not be directed today. I have no further  
21                  submissions to add to those that I have made and it is not  
22                  strictly necessary to do it today and, therefore,  
23                  flexibility is the preferable option, but that is as far as  
24                  we take it.

25                  THE PRESIDENT: Yes, thank you.

1                   MR. JUSTICE HILDYARD: Is your concern as to evidence in  
2 one  
3 being evidence in the other or is it a more general anxiety  
4 and you have not thought about what the repercussions might  
5 be?

6                   MR. PICKFORD: That is the principal concern but  
7 it is also the more general point that no-one has really  
8 fully thought through what those implications of that would  
9 be, and whilst we can get all of the benefits, we would say,  
10 from envisaging that that is what will happen and taking  
11 appropriate case management steps that will enable that to  
12 happen without directing it that it will happen today. That  
13 is our only point.

14                  THE PRESIDENT: Thank you.

15                                 [The Panel conferred]

16                  THE PRESIDENT: Yes, thank you, Mr. Pickford. We  
17 think from what we have heard it is appropriate to make the  
18 order now that they be tried together and that the evidence  
19 in the one shall stand in the other, but there will be  
20 liberty to apply at the next CMC with reasons if you wish  
21 to, if DAF seeks to modify that order or indeed have it  
22 revoked.

23                  MR. PICKFORD: I am grateful.

24                  THE PRESIDENT: The next group of cases where we  
25 raise this is the Veolia Suez Wolseley, which I think has

1       been referred to as VSW and I shall use that abbreviation.  
2       I think, am I right, that there is no objection to those  
3       three being heard together. Is that right, Ms. Demetriou?

4               MS. DEMETRIOU: There may be cost implications if,  
5       for example, the evidence of one standing as evidence in the  
6       other leads to irrelevant material that is not relevant to  
7       one of the cases. So I think what we do not want is a  
8       process by which everyone goes away and looks at all of the  
9       evidence in all of the cases and then tries to claim costs  
10      in that respect. As long as that is noted, we do not  
11      object.

12              THE PRESIDENT: Yes. Equally, there may be cost  
13      benefits because they do not -- the same evidence does not  
14      have to be reviewed separately.

15              Yes, Mr. Harris.

16              MR. HARRIS: On behalf of Daimler, may I just also  
17      simply put down a marker that you will see that Daimler is  
18      not involved in the Veolia or Suez. So whilst we can see  
19      the wider -- we do take a picture here and we can see the  
20      wider benefits, but there will not only be cost  
21      implications, but it will need to be taken into account as  
22      the cases move forward that we are not involved at all in  
23      the Veolia or Suez.

24              THE PRESIDENT: That is a very fair point,  
25      Mr. Harris. Thank you. We bear this in mind.

1           MR. PICKFORD:  Sorry, we do not object to that  
2           order, but we did want to note that there is also a point  
3           that arises in relation to the Ryder and Dawsongroup claims  
4           that is related to the hearing of the Hausfeld claims  
5           together, namely that the various participants in those  
6           claims are at different levels in the supply chain and there  
7           are certain trucks, for example, which are the subject of  
8           the Ryder claim which are also the subject of the Wolseley  
9           claim.  So without again -- it is the same stance as  
10          I adopted previously.  We are not saying that Ryder and  
11          Dawsongroup should necessarily be heard with the Hausfeld  
12          claims yet, but the Tribunal should note that overlap and it  
13          may be appropriate that those five sets of proceedings shall  
14          be heard together.

15          THE PRESIDENT:  Thank you.  We have noted that,  
16          Mr. Pickford.  Indeed, you have anticipated what I was about  
17          to say.  We think on Ryder and Dawsongroup it is not  
18          appropriate to make any such direction today, but we will  
19          keep the position under review and keep the option open,  
20          partly for the reason that Mr. Harris has given, that  
21          there are some trucks which are then leased out in VSW and  
22          there is some tax for the cost of the leasing and one needs  
23          to take that into account, but the best way of doing that,  
24          we think, can be kept in reserve for later.

25          MR. BREALEY:  Obviously, that affects me.  As

1 I understand it, I think there are only two trucks, but I do  
2 not think that is such a big, big problem.

3 THE PRESIDENT: I do not know if that is agreed  
4 that there are only two trucks, but that is your position.

5 MR. BREALEY: Maybe we can deal with this at the  
6 next CMC. It is our position we should be heard at the same  
7 time as the others, so there should be one large trial.

8 THE PRESIDENT: What, when you say the others, you  
9 mean as --

10 MR. BREALEY: BT and Royal Mail --

11 THE PRESIDENT: All cases.

12 MR. BREALEY: All cases.

13 THE PRESIDENT: Wonderful.

14 MR. BREALEY: We echo what you said by way of  
15 introduction, that, essentially, we have got the grasp of  
16 the nettle and these cases should be jointly managed at the  
17 CMC and then there should be one single trial to avoid  
18 inconsistent judgments because if we are -- if we come next,  
19 or first even, there may be different overcharges.

20 THE PRESIDENT: Yes, we understand that. We are  
21 not going to determine that now.

22 MR. BREALEY: No.

23 THE PRESIDENT: There are various ways that one  
24 might have to tackle this. Thank you.

25 The next sort of point in that line is the part 20

1 claims in VSW. I think, is this right, that it has been --  
2 that there is no opposition to the proposal that they be  
3 heard together with the main claims, but that any claim for  
4 contribution as between the Defendants might be heard  
5 separately?

6 MS. DEMETRIOU: So that's correct, but we do lay  
7 down a marker because the Tribunal will have seen that in  
8 the Suez and Wolseley claims, the Claimants in those claims  
9 have chosen to proceed against two of the cartelists, two  
10 sets of Defendants and not all of them. So the Tribunal  
11 will have in mind that we are concerned about  
12 inefficiencies, both in terms of costs and delay, because --  
13 arising from the participation of the part 20 Defendants.  
14 We do not oppose -- we do not oppose an order that the  
15 part 20 claims be managed together with the part 7 claims,  
16 save as regards attribution, but we are applying for various  
17 case management measures. You will have seen that we seek  
18 an order that the Defendants share an expert, for example --

19 THE PRESIDENT: Yes.

20 MS. DEMETRIOU: -- to reduce costs.

21 THE PRESIDENT: We will come to that. At the same  
22 time, in the Veolia claim, you have sued four Defendants.

23 MS. DEMETRIOU: That is correct.

24 THE PRESIDENT: We have directed that the three  
25 will be heard together, so there will be four Defendants.

1 MS. DEMETRIOU: That is correct.

2 THE PRESIDENT: We can make an order that the  
3 part 20 claims be heard together with the main claims in  
4 those three cases, but the question of contribution as  
5 between Defendants is reserved.

6 Yes, Mr. Jowell. It might help us -- we have a  
7 cast list, but it would help us if you could identify when  
8 you first rise as to whom you represent. I know you are for  
9 MAN.

10 MR. JOWELL: I am for MAN. I am grateful. We  
11 entirely agree with the order that the Tribunal has just  
12 proposed, but we thought we should just be absolutely clear  
13 and precise about what we mean by the question of  
14 attribution or the question of contribution. By that, we  
15 understand that to mean the extent of contribution as  
16 between the various parties, not the principle that they are  
17 liable to -- that they too are liable or potentially liable  
18 as joint -- on a joint and several basis.

19 MS. DEMETRIOU: We do not accept that. We think  
20 it extends to both. We say it extends to both liability and  
21 to the question of attribution. Now, this only becomes --  
22 this is only a relevant material point when it comes to the  
23 Scania proceedings.

24 THE PRESIDENT: I thought, perhaps I misunderstood,  
25 that you accepted that the question of contribution should

1 be dealt with separately.

2 MS. DEMETRIOU: Yes.

3 THE PRESIDENT: What do you understand by the  
4 question of contribution?

5 MS. DEMETRIOU: We understand both the liability  
6 of the part 20 Defendants and the extent to which they are  
7 liable to make contribution.

8 THE PRESIDENT: Well, then how is the part 20 claim  
9 tried with the main claim, if it does not deal with  
10 liability?

11 MS. DEMETRIOU: Well, we recognise that the  
12 part 20 Defendants have the same interest as the main  
13 Defendants in, for example, demonstrating that the  
14 overcharge was at a particular level. We recognise that  
15 they will participate in the trial on those points and the  
16 findings will be binding on those part 20 Defendants who  
17 have participated in the trial, but we do not accept that  
18 part 20 Defendants who are not participating, that the  
19 finding of liability will be binding on them. So this goes  
20 to the Scania point, which we can deal with later.

21 [The Panel conferred]

22 THE PRESIDENT: Ms. Demetriou, we are a little bit  
23 puzzled. You say that the part 20 Defendants can take part,  
24 they can deal with the overcharge. Scania is one of the  
25 part 20 Defendants. You are alleging in your trial that

1 Scania was a participant in the cartel. If Scania takes  
2 part, it will deal with that matter and it will be able to  
3 lead evidence on it if it has not been determined elsewhere,  
4 as it were.

5 MS. DEMETRIOU: Yes, so we say that the part 7  
6 Defendants are obviously going to be bound by any finding of  
7 liability and that the part 20 Defendants can participate in  
8 the trial and they will be bound by the findings of  
9 liability made against the part 7 Defendants, so they will  
10 be bound to that extent.

11 Sir, in relation to Scania, there are -- it is  
12 rather complicated and it may be that we can deal with that  
13 separately rather than me make my submissions now. So would  
14 it be appropriate to lay down a marker that this is in  
15 dispute at this stage and we deal with it more fully when we  
16 deal with the Scania point?

17 THE PRESIDENT: Yes. Only it will not come on for  
18 trial until Scania's, at least, appeal will have been heard,  
19 probably in timing terms --

20 MS. DEMETRIOU: Yes.

21 THE PRESIDENT: -- whether it is a matter of law or  
22 not, just a matter of practicality. So, it may indeed  
23 evaporate as a distinct point. But I am just concerned of  
24 quite what we order now. We can order that the -- well, let  
25 us then simply order that the part 20 Defendants can

1 participate in the trial and that questions of contribution,  
2 that means apportionment and quantum of any damages as  
3 between them, will not be heard in the trial but separately,  
4 and that the question of whether liability of the part 20  
5 Defendants is determined in the main trial is reserved.

6 MS. DEMETRIOU: My Lord, we are grateful.

7 THE PRESIDENT: That will allow that to be argued  
8 later. We will need some persuasion of the position you are  
9 advancing, but it will save us getting side tracked now,  
10 given the number of parties involved. We want to deal with  
11 it at the next CMC. We do not want to reserve it for a long  
12 time.

13 MS. DEMETRIOU: My Lord, I am grateful.

14 MR. JOWELL: We are content with that, but I would  
15 put down a marker that we think the submissions they are  
16 adopting are simply not coherent.

17 THE PRESIDENT: We understand.

18 Right. We then floated with you various questions  
19 of whether there can be heard --

20 Just one moment.

21 No, the next thing I want to deal with, I am  
22 sorry, is confidentiality and the question of  
23 confidentiality rings. It is clearly desirable there should  
24 be a common form of confidentiality ring that applies in all  
25 cases. I think it has been sometimes referred to as the

1 parallel rings proposal.

2 It is not appropriate to have one all-embracing  
3 confidentiality ring at this stage. Whether that will ever  
4 be possible, we will see, because clearly there is going to  
5 be more disclosure which may at some point be confidential  
6 as between, for example, different Defendants.

7 We see there is a proposal of a quite elaborate  
8 exercise to try and arrive at this common confidentiality  
9 ring. We think it is very desirable that we should try and  
10 achieve this common form today so matters can then proceed.

11 I think Royal Mail, which has a confidentiality  
12 ring at the moment in its proceedings with DAF, wants to  
13 amend that form to permit the reclassification of documents  
14 with the consent of the Defendant or, if not, some procedure  
15 whereby reclassification can be determined. Is that a fair  
16 summary, Mr. Ward, of what you are seeking.

17 MR. WARD: We strongly support the proposal that  
18 confidentiality rings should be established today. There is  
19 obvious sense in there being one form of ring, albeit  
20 parallel rings. But this Tribunal has the advantage of the  
21 work that was carried out following the original order of  
22 Mrs Justice Rose, because her order provided for a process  
23 whereby all of the cartelists would be consulted on the  
24 terms of the ring. Suggestions were made and they were  
25 incorporated, so it would be wrong to see that as simply a

1       bilateral Royal Mail/DAF ring.

2               In our respectful submission, that does present an  
3       excellent starting point. There are then two types of  
4       refinement to that ring. There is the one that you just  
5       mentioned, sir, namely that within its mechanism, there is a  
6       process whereby an inner ring document can be reclassified  
7       as outer ring, but there is no mechanism where a document  
8       can be declassified altogether, save, of course, for  
9       applications to the Tribunal.

10              The other thing I would mention is that in  
11       bilateral discussions between my clients, BT and DAF, there  
12       has been an agreement to slightly strengthening the  
13       protection for Defendants in terms of the ring in that  
14       certain things that were probably implicit are now explicit.  
15       For example, that if pleadings contain confidentiality ring  
16       material, those documents are within the ring. If they are  
17       redacted, they are not within the ring and so forth.

18              THE PRESIDENT: Yes. Have those been shared with  
19       the other parties?

20              MR. WARD: I am not sure they have, to be frank.

21              THE PRESIDENT: Yes, have we got in the draft  
22       order, which I have not studied carefully, your proposed  
23       amended confidentiality ring, making those two changes?

24              MR. WARD: There is certainly a version which  
25       contains the changes proposed by DAF. I think it is in

1 Dawson bundle D.

2 THE PRESIDENT: Dawson bundle. Dawson B or D?

3 MR. WARD: D. It is correspondence. It came in  
4 correspondence.

5 THE PRESIDENT: We have certainly seen that.

6 MR. WARD: Bundle D in the Dawson group.

7 THE PRESIDENT: D for Dawson. What page?

8 MR. WARD: 323 is a clean version and behind it is  
9 a comparison version of the changes as against  
10 Mrs Justice Rose's ring as it was originally enacted --  
11 adopted.

12 THE PRESIDENT: Does the Dawson order correspond to  
13 the Royal Mail order?

14 MR. WARD: Order?

15 THE PRESIDENT: The confidentiality order.

16 MR. WARD: There is not one. This is all in  
17 draft. So, just to perhaps take --

18 THE PRESIDENT: Yes, there is not a ring in  
19 Dawson group.

20 MR. WARD: It is one thing we would like to  
21 achieve today. This draft is based on the Royal Mail ring  
22 and then the comparison version which lies behind it  
23 incorporates changes which were essentially proposed by DAF,  
24 which just make more explicit certain protections.

25 THE PRESIDENT: That is at page --

1           MR. WARD: 323 is the clean version and 341 is the  
2 amended version. I think it does not include the  
3 declassification process.

4           THE PRESIDENT: So we have got to look at both  
5 changes.

6           MR. WARD: Okay. So here -- would it help if  
7 I walked you through --

8           THE PRESIDENT: Well, we better get -- if it does  
9 not include the -- where do we find the first group of  
10 changes?

11          MR. WARD: So the other changes are, I'm afraid,  
12 in the Royal Mail bundle under bundle B, under tab 3.

13          THE PRESIDENT: B for bravo.

14          MR. WARD: B for bravo, under tab 3 --

15          THE PRESIDENT: Yes.

16          MR. WARD: -- is the proposed amendments to the  
17 Royal Mail ring dealing with declassification. That is  
18 marked up as against the existing order.

19          THE PRESIDENT: Well, let us start with that one,  
20 which is the Royal Mail one.

21          MR. WARD: You will see on page 11 --

22          MR. HOSKINS: Not all the parties have this  
23 bundle. For example, those of us who are not party to the  
24 BT action.

25          THE PRESIDENT: This is a Royal Mail bundle.

1 MR. HOSKINS: Or BT or Royal Mail have had it.

2 THE PRESIDENT: You do not have the applications.

3 MS. BACON: We do not have Dawsongroup either.

4 MR. WARD: Shall we circulate this overnight?

5 THE PRESIDENT: We better deal with this tomorrow.

6 These changes should not be contentious.

7 MR. WARD: We respectfully submit they will not  
8 be.

9 THE PRESIDENT: One is, as has been explained, a  
10 process for potential reclassification which was probably  
11 just omitted when these elaborate orders were drafted. The  
12 other is something that strengthens the protection of the  
13 Defendants and to which Royal Mail has agreed. So  
14 presumably, the other Defendants will not be concerned, but  
15 it is clearly important you should all see this. Can you  
16 circulate, I would have thought, the Dawson mark up at 341  
17 and your mark-up?

18 MR. WARD: We may produce --

19 THE PRESIDENT: If you can produce a composite and  
20 it will be much easier to be circulated to everyone  
21 overnight.

22 MR. WARD: We will do.

23 THE PRESIDENT: You will not all be here first  
24 thing tomorrow. Equally, if it is circulated overnight and  
25 people can indicate whether they object or not. If there is

1 no objection, we can make the orders without necessarily  
2 hearing from anyone. Is that satisfactory?

3 MR. PICKFORD: Sir, I am very happy to address  
4 this tomorrow. It is not agreed. There will be some  
5 submissions on that --

6 THE PRESIDENT: I see.

7 MR. PICKFORD: -- essentially because the European  
8 Commission and, where appropriate, the CMA need to be  
9 involved in a process whereby there is potentially wholesale  
10 declassification of documents that they consented to being  
11 provided or they made submissions on being -- the  
12 proportionality of which was provided into the  
13 confidentiality ring on the basis they would be protected --

14 THE PRESIDENT: But these are not leniency or  
15 settlement documents. They have not been -- because those  
16 have not been disclosed. They were excluded from  
17 disclosure.

18 MR. PICKFORD: That is correct, sir. But the  
19 entirety of the Commission file went into the  
20 confidentiality ring. That was the basis on which the  
21 European Commission and the CMA were told that there would  
22 be disclosure and they were asked to comment on the  
23 proportionality of that disclosure.

24 THE PRESIDENT: We are not dealing with  
25 proportionality of disclosure. We are dealing with

1 confidentiality, which is quite separate.

2 MR. PICKFORD: I would like to make some  
3 submissions on that because they are expressly linked in the  
4 relevant Damages Directive, Article 5(3). I can make submissions on  
5 that at the appropriate time.

6 THE PRESIDENT: You can do that when everyone has  
7 had a chance to consider it. We will hear you on that.

8 MR. PICKFORD: Secondly, whilst we agreed to these  
9 particular amendments, these amendments will not deal with  
10 various problems that arrive when we have multiple parties  
11 who are competitors against one another when it comes to  
12 economic disclosure. So there needs to be a third iteration  
13 of development of the order to deal with that issue.

14 THE PRESIDENT: Yes. Perhaps that can be postponed  
15 until, can it, economic disclosure?

16 MR. PICKFORD: Indeed. That is our submission,  
17 that it should be.

18 THE PRESIDENT: Yes.

19 MR. PICKFORD: Just so the Tribunal was not under  
20 any misapprehension that this was one ring to rule them all,  
21 as yet.

22 THE PRESIDENT: Yes. Well, given that -- I am  
23 concerned that we establish confidentiality rings -- we are  
24 concerned, I should say -- in every case, today or by the  
25 end of this CMC have a formal order that can deal with the

1 two points that have been raised.

2 There is a further point Mr. Pickford has raised  
3 which may arise once economic disclosure takes place, but  
4 that is not immediate and so we can postpone that, but we  
5 note that there might have to be some amendments at some  
6 point.

7 MR. PICKFORD: I am grateful.

8 MR. HARRIS: Can I just say very briefly: we share  
9 the concerns of DAF and are happy with that way of dealing  
10 with it.

11 Just so you know, there are two minor amendments  
12 that are put forward by us late last night, but we would  
13 hope that they are fairly uncontroversial.

14 THE PRESIDENT: Can you deal with that overnight,  
15 so we can get one -- we clearly will have to have arguments  
16 on it because of the point Mr. Pickford makes about the  
17 Commission. We will schedule that for tomorrow.

18 MR. HARRIS: I am grateful. Thank you.

19 THE PRESIDENT: The other change that has been  
20 proposed which we can consider, it seems to me, now is that  
21 VSW wants to change the time periods specified in the order,  
22 first, as regards objections to additional persons being  
23 added and to reduce that from seven days to two days and  
24 secondly, the time for the response, I think, to the request  
25 to redesignate it, instead of fourteen and fourteen days to seven and

1 seven days. Is that right, Ms. Demetriou?

2 MS. DEMETRIOU: Yes, that is right. You have seen  
3 the reasons for that in our skeleton argument. Essentially,  
4 it comes down to efficiency and ensuring that all of this  
5 works in an efficient way so that we can take instructions  
6 on these documents from our clients.

7 THE PRESIDENT: I mean, the point that has been  
8 made, as you've seen, by virtually everybody else is that it  
9 often is done in two days or three days and they do it very  
10 promptly, but there may be individual cases where they have  
11 to take instructions from clients abroad and so on, or if it  
12 involves someone who is not an external adviser where it  
13 takes longer and that really seven days is quite reasonable  
14 in the circumstances. That is the first point --

15 MS. DEMETRIOU: Yes.

16 THE PRESIDENT: -- which I think we have heard from  
17 quite a number of people.

18 Are you pushing this strongly? Is it really so  
19 important? It does seem to work in the context of the  
20 overall timescale of this litigation to hear everyone about  
21 the difference between seven days or a few days or something  
22 like this.

23 MS. DEMETRIOU: Sir, I've heard what you say. Can  
24 we consider that overnight and come back with a final  
25 position given that -- you have seen also that the main

1 change that we are seeking is a mechanism to allow  
2 declassification of the documents.

3 THE PRESIDENT: I think that is the same as the  
4 Royal Mail point. Well, that is an important point, but  
5 equally, the redesignation. I fully understand that  
6 sometimes having 28 days is a nuisance, but the complexity  
7 of these cases -- and one does not know what any individual  
8 document which might be subject to requests might involve  
9 and the need for solicitors to take instructions from people  
10 abroad and so on, that may be away, et cetera. In such  
11 large groups, it does it not seem unreasonable, 14 days,  
12 14 days.

13 MS. DEMETRIOU: Sir, let me take instructions  
14 overnight.

15 THE PRESIDENT: Thank you.

16 It has also been suggested that there might be a  
17 definition of "confidentiality". I have to say, we are not  
18 attracted by that. It would be unusual. It seems  
19 unnecessary. If there is a dispute as to whether a document  
20 is confidential, then we deal with it case by case. But  
21 I think that also originated with VSW.

22 Again, consider it, Ms. Demetriou, overnight, but  
23 we really do not think -- the moment you do that, we then  
24 get into long arguments about quite how it should be defined  
25 and what the wording is. They are conducted in the

1 abstract when the real issue is: is this document,  
2 particular document, confidential or not? It is often much  
3 better addressed, if there is a dispute, looking at the  
4 document rather than trying to carve out some quasi  
5 statutory definition.

6 Once the form is settled tomorrow, we then want to  
7 establish confidentiality rings in the BT and Dawsongroup  
8 cases where there is not one. I think that is something  
9 that all the parties in those cases are asking for.

10 MR. WARD: Yes.

11 THE PRESIDENT: So that will be done tomorrow.

12 That takes one then to some common issues of  
13 disclosure. First of all, the confidential version of the  
14 decision should be disclosed into this yet to be set up BT  
15 confidentiality ring and this yet to be set up Dawsongroup  
16 confidentiality ring. As we understand it, it is suggested  
17 that comes from DAF because DAF has provided it in the other  
18 cases and, therefore, has it readily available.

19 Mr. Pickford, that is not opposed, as I understand  
20 it.

21 MR. PICKFORD: Not opposed.

22 THE PRESIDENT: So that order can be made once the  
23 rings are determined tomorrow.

24 The next question is the Commission file of  
25 documents, which has been disclosed in redacted forms in

1       some of the proceedings. They have been disclosed to  
2       Royal Mail by order of Mrs Justice Rose.

3               Our present view is that they should be disclosed  
4       to BT in the same form as they were disclosed to Royal Mail  
5       because the BT and Royal Mail cases are going to be heard  
6       together and that it is completely unsatisfactory if cases  
7       are heard together with a different version of the file and  
8       that there is nothing disproportionate about that because  
9       that form of file has been disclosed to another party in the  
10      same trial. That, as we understand it, is what BT is asking  
11      for.

12             Mr. Pickford, do you want to address us on that?

13             MR. PICKFORD: Sir, in the light of the Tribunal's  
14      earlier direction, I do not seek to make any submissions in  
15      opposition to that.

16             THE PRESIDENT: So that will be the order for the  
17      file.

18             Now, Dawsongroup. As regards the Commission file,  
19      our present view is that it should be the same version as  
20      has gone to Ryder, but we are going to hear submissions  
21      tomorrow regarding the disclosure that was given in the  
22      Ryder action, so we will postpone that when we deal with  
23      what actually that form of disclosure should finally be.

24             MR. WARD: Sir, you will have seen we have great  
25      concerns about what DAF is disclosing. I appreciate that is

1 a matter for tomorrow.

2 THE PRESIDENT: There is then an application that  
3 some in-house counsel should go to the inner ring. I think  
4 that is an application, Ms. Demetriou, by your clients,  
5 which is opposed. Perhaps we can deal with that when we  
6 deal with the issue of reclassification of documents,  
7 because if certain documents now go to the outer ring, which  
8 were proving unpopular in something I've said, then that  
9 may take care of that concern.

10 MS. DEMETRIOU: Yes.

11 THE PRESIDENT: But we note that there is that  
12 application.

13 There is then the question of what discussions can  
14 take place where cases are being heard together. So that is  
15 to say Royal Mail and BT and the VSW Claimants. It seems to  
16 us, subject to anything anyone wishes to say, that in those  
17 respective cases, the members of the confidentiality rings  
18 should be able to discuss the documents together. So that  
19 is -- indeed, given that in BT and Royal Mail the solicitors  
20 are the same, the counsel are largely the same, it is  
21 somewhat artificial to say that they cannot discuss them  
22 together.

23 Given that in VSW's claims the solicitors and  
24 counsel are absolutely the same, it would be extraordinary  
25 to say that, as it were, "You cannot discuss this with

1       yourselves". So there are, of course, a number of  
2       Defendants in the VSW claims and they are slightly  
3       different, as has been pointed out in particular that in one  
4       of them, there are more Defendants than in the other, but it  
5       seems to us sensible that if they are being heard together,  
6       that the members of the ring can discuss the documents  
7       together.

8                Is there any opposition to that? I'll deal first  
9       with Royal Mail/BT. Mr. Pickford.

10               MR. PICKFORD: No opposition on my part.

11               THE PRESIDENT: So that should be incorporated in  
12       the draft order.

13               In VSW, do any of the Defendants -- do any of  
14       those cases wish to object to that?

15               MR. JOWELL: No.

16               THE PRESIDENT: Thank you. So that should be  
17       incorporated also. That will be then an amendment to the  
18       VSW ring that is being set up, I think.

19               There is then the question whether members of  
20       confidentiality rings beyond the cases that are presently  
21       being heard together can discuss them. In particular,  
22       I think Ryder and VSW have both asked whether they can talk  
23       to each other, particularly if the same version of the file  
24       is disclosed.

25               The concern we have is these rings will cover

1 other things in due course, not just the common version of  
2 Commission documents. We think that it is premature to  
3 address that now and that we should revisit it later when a  
4 proper justification has been advanced by Ryder and VSW for  
5 that proposal. It can be done at the CMC in the New Year,  
6 but if someone wishes and says it is extremely important to  
7 VSW and Ryder, we will do so, but I think it is not agreed.

8 Ms. Demetriou, is that something that is urgent?

9 MS. DEMETRIOU: No, we are content with that  
10 proposal.

11 MR. BREALEY: Yes, we will deal with that at the  
12 next CMC.

13 THE PRESIDENT: The next CMC.

14 The final thing on confidentiality I would say is  
15 that it looks like the orders that have been made may be  
16 amended. There is no need for individuals who have given  
17 undertakings to refile fresh undertakings for the amended  
18 order. There are a lot of people in these rings and it  
19 causes a lot of problems, I think, administratively if every  
20 time there is an amendment, they have to be refiled. We  
21 rely on the solicitors to inform the members of the ring of  
22 any changes to the order and we assume that, with very  
23 responsible solicitors for all these parties, that will be  
24 done and does not require refiling undertakings.

25 Next under confidentiality there is the question

1 of what is confidential and whether documents that are  
2 disclosed from the Commission file are really to be  
3 regarded as confidential at all and whether the footnotes of  
4 the decision, which is the material section dealing with the  
5 conduct, are to be treated as confidential. Some of them  
6 have been redacted and they seem, those that have not been  
7 redacted, also to cross-reference that document.

8 We think that should be considered at the next  
9 CMC, but it is an important question. We are proposing to  
10 write to the Commission to ask their views regarding the  
11 footnotes to section 3. We are not going to ask them  
12 whether pre-existing documents should be regarded as  
13 confidential because that is not a matter for the  
14 Commission, in our view. It is a matter for us.

15 We would like for the next CMC, the Defendants --  
16 well, all parties, but it is obviously particularly the  
17 Defendants that are concerned -- to make observations  
18 regarding the documents that have been disclosed from the  
19 Commission file and why they should be treated as  
20 confidential. Some of that may be covered by what  
21 Mr. Pickford addresses on us tomorrow, but this is having  
22 regard particularly to what the documents are.

23 That, therefore, will be held over. But in  
24 general, pre-existing documents dating back many years ago  
25 are not normally to be treated as confidential.

1                   Meanwhile --

2                   MR. JOWELL:  Sir, when you propose that order, do  
3                   you mean we should make submissions in relation to the  
4                   documents as a class or in relation to individual documents?

5                   THE PRESIDENT:  Well, you can make submissions in  
6                   any way you like.  If you want to say in entirety they  
7                   should be treated as confidential, if you say so, if your  
8                   submissions are, "We accept that many of them are not, but  
9                   these seven are", then you will address it accordingly.

10                  MR. JOWELL:  But then you are proposing that we  
11                  should mount a review of all the main documents in order to  
12                  ascertain which of them we wish to maintain confidentiality  
13                  over.

14                  THE PRESIDENT:  Well, I would imagine that it is in  
15                  part as a class and that you may identify certain particular  
16                  features which you say, "If a document contains such and  
17                  such, then it is confidential".  We are not expecting  
18                  submissions on each of the 32,000 documents.

19                  MR. JOWELL:  Quite.

20                  THE PRESIDENT:  But we would like to ask you to  
21                  consider -- because we are getting to a point with the  
22                  amendments and pleadings and so on where things do have to  
23                  be in the open and they also have to be available as between  
24                  the different claims and excessive confidentiality claims do  
25                  not help.

1           MR. JOWELL: But in effect, the Tribunal is  
2 content if we were to identify particular subclasses of  
3 documents of a particular type with certain features where  
4 we say are at least potentially still confidential.

5           THE PRESIDENT: If you want to supply an example to  
6 illustrate your point, that is a matter for you.

7           MR. JOWELL: I am grateful.

8           THE PRESIDENT: But in a way that we can sensibly  
9 deal with this.

10          MR. JOWELL: Thank you.

11          THE PRESIDENT: In the meantime, there is the  
12 question about the Commission file documents that have been  
13 disclosed at present into the inner confidentiality ring and  
14 there is a proposal that they should now go into the outer  
15 confidentiality ring, which I think is your application,  
16 Ms. Demetriou, and has been the subject of some discussions.  
17 Is that right?

18          MS. DEMETRIOU: So our application was originally  
19 they should be redesignated as non-confidential. The  
20 Defendants have come back with a pragmatic compromise which  
21 is that for the moment, they will redesignate them as into  
22 the outer confidentiality ring with a provision which allows  
23 them to reassess to see whether they should be redesignated  
24 into the inner confidentiality ring, subject to there being  
25 a mechanism, which we discussed earlier, which we will come

1 back to, to permit redesignation out of the ring altogether.

2 THE PRESIDENT: Is that objected to by anybody?

3 Well, we will --

4 MR. PICKFORD: That is not objected to by us.

5 I think we were the people that corresponded so far on that  
6 issue.

7 THE PRESIDENT: Yes. That was our understanding.

8 So we will make that order.

9 MS. DEMETRIOU: I am grateful.

10 THE PRESIDENT: Finally on disclosure, there is the  
11 Scania decision, which was taken some time ago. Of course,  
12 it is under appeal, but it has not yet been published. We  
13 are minded to request the Commission to provide a copy of  
14 the Scania decision and to write to them, either if they  
15 have and are able to produce the non-confidential version  
16 and, of course, that will be made available openly. If not,  
17 then a redacted version that can go into the confidentiality  
18 rings.

19 But, clearly, it is going to be a much fuller  
20 decision than the settlement decision, giving an account of  
21 how -- it is not binding on anyone at the moment, but it may  
22 be very helpful in enabling the parties to understand the  
23 various documents that they have got. It is going to come  
24 in due course. We think it is helpful to get it sooner  
25 rather than later. Is there any objection to our taking

1           that course?

2                       MR. KENNELLY: From Scania's perspective, there is  
3 no objection.

4                       THE PRESIDENT: Does anyone else object? Well, we  
5 will do that. We will, when the next CMC is fixed, we will inform  
6 them of the date, but it would be in case they wish to  
7 make any representations, but we would hope they would be  
8 helpful.

9                       Is there anything else on confidentiality or  
10 general disclosure issues that we are not going to deal with  
11 particular disclosure issues until tomorrow?

12                      Then I shall move on to deal with the question of  
13 common issues or preliminary issues. We have seen your  
14 views on preliminary issues. We do think, in addressing the  
15 question, rather different considerations arise in these  
16 cases from the normal practice of preliminary issues when  
17 one is talking about one case going to trial and the  
18 authorities that have been cited to us.

19                      We are in a very exceptional situation where the  
20 reason, the prime reason, for looking for preliminary issues  
21 is really to find common issues or systemic issues between  
22 the different cases to avoid inconsistent results in the  
23 parallel claims. It is a point that Mr. Hoskins made in his  
24 skeleton argument, that this is not the normal case of  
25 preliminary issues. We are not going to order any

1 preliminary issues today, but we may in future do so. It is  
2 premature today, but we will wish to consider that at the  
3 next CMC.

4 We did want to consider what steps should be taken  
5 before that to enable us to address this and make decisions  
6 on it next time. The first area that we considered as a  
7 candidate for this is the question of what is binding on the  
8 parties in the decision, talking of the settlement decision,  
9 not the Scania decision. In the first case, it would be  
10 just helpful for us to know now to what extent any of the  
11 Claimants are seeking to prove in their claims matters going  
12 beyond what they say is covered by the decision.

13 I do not mean -- obviously, you are all seeking to  
14 assert that it had an effect where the decision was by  
15 object. We understand that. Nor the question of the  
16 involvement of another subsidiary of the same group, but  
17 thinking specifically about products, about the time period  
18 of an infringement and about the geographical scope of an  
19 infringement, we know that VSW are alleging that Scania was  
20 a participant in the cartel. We have got that point. We  
21 know that in the Wolseley claim, and I think only in the  
22 Wolseley claim, there seemed to be some non-EU or non-EEA  
23 Claimants.

24 But perhaps we could ask. I want to go through  
25 each Claimant just to clarify where we are with this.

1           Ms. Demetriou, you are alleging Scania was a  
2 participant in the cartel. As regards these non-EU claims,  
3 are you saying -- is it that the cartel had an effect beyond  
4 what was implemented beyond the EEA or was it that they  
5 brought their trucks within the EEA?

6           MS. DEMETRIOU: Sir, the position in respect of  
7 that -- so we are not saying that those trucks are within  
8 the scope of the decision. So that is not a submission we  
9 are making, but you will have seen from our pleading that we  
10 have also pleaded or kept open the possibility of proving a  
11 stand alone claim going beyond the four corners of the  
12 decision.

13           THE PRESIDENT: Yes.

14           MS. DEMETRIOU: We are, as you have seen also, in  
15 the process of reviewing all of the disclosure that we have  
16 received with a view to determining whether or not to  
17 reamend our claim.

18           THE PRESIDENT: But when you say -- sorry to  
19 interrupt you, but beyond the four corners, I understand the  
20 point that there might have been other forms of collusion.

21           MS. DEMETRIOU: Yes.

22           THE PRESIDENT: But are you also considering  
23 whether it lasted for a longer period and whether it  
24 involved products other than trucks, as defined? Is that  
25 part of your review as well?

1 MS. DEMETRIOU: Sir, we are reviewing all aspects.  
2 So currently, the review is taking place of the documents  
3 that have been disclosed to us from the Commission file and  
4 it all remains under review. I am not in a position to  
5 update the Tribunal as to where we have got to in that  
6 review, but plainly we will take account of all of the  
7 information that we have got. The review is ongoing and we  
8 will decide whether or not to amend, re-amend, our claim.  
9 Sir, on these points, I am not in a position definitively to  
10 give the Tribunal an answer on that.

11 In relation to the trucks that you referred to, we  
12 are not -- we have kept open the stand alone claim which we  
13 are actively considering and to the extent that we consider  
14 appropriate, having reviewed all of these documents, we will  
15 make an application to reamend our claim. We are not saying  
16 that those trucks fall within the scope of the decision.

17 THE PRESIDENT: Though you accept, I think, that it  
18 is a Russian, Swiss and a Kazakhstan company.

19 MS. DEMETRIOU: Unless they were purchased in the  
20 EEA.

21 THE PRESIDENT: Yes, if they are purchased in the  
22 EEA. But if they were purchased -- but you do not yet know  
23 where they were purchased, is that the position?

24 MS. DEMETRIOU: In some cases, that is correct.  
25 Sir, there are gaps, so we do not know in some cases where

1           they were purchased. To the extent that they were purchased  
2           outside the EEA, we accept they do not fall within the scope  
3           of this decision.

4                    THE PRESIDENT: You still wish to pursue the claim  
5           on the basis that the arrangements extended to Kazakhstan  
6           and Russia, is that the position?

7                    MS. DEMETRIOU: Sir, once we have conducted the  
8           review, we will apply to re-amend our particulars as  
9           appropriate and obviously reach a landing on those points.

10                   THE PRESIDENT: I think we do want to have a date  
11           by which you are going to clarify these points because we  
12           are case managing everything together and it is rather  
13           important to have an understanding of really what is the  
14           case you are advancing.

15                   MS. DEMETRIOU: Yes.

16                   THE PRESIDENT: So if you are doing it only on the  
17           basis of those documents and you have had the documents,  
18           when do you expect to be in a position to put forward  
19           proposed amended particulars of claim?

20                   MS. DEMETRIOU: We understand. Sir, I think we  
21           will be in a position to reamend our particulars by January.

22                   THE PRESIDENT: Yes. By January, meaning,  
23           beginning, end?

24                   MS. DEMETRIOU: Can I take precise instructions?

25                   THE PRESIDENT: Yes.

1 MS. DEMETRIOU: Sir, I think it would be safer to  
2 say by the end of January.

3 THE PRESIDENT: Yes. Well, I think we really --  
4 that really is a long stop date.

5 MS. DEMETRIOU: Obviously, we will make every  
6 effort to do it sooner than that.

7 THE PRESIDENT: People have to consider it affects  
8 everything else and if you want to start asking for  
9 disclosure, you know, this is going to have an impact on it.

10 Yes. So that is VSW.

11 MR. BREALEY: Sir, I am Ryder. We have been  
12 hampered, for obvious reasons. We say that we have been  
13 excluded from the 17 categories and the Tribunal will have  
14 also picked up that the disclosure that we have had is a  
15 complete mess.

16 THE PRESIDENT: Yes.

17 MR. BREALEY: It has been an absolute nightmare.

18 THE PRESIDENT: Can I stop you to say one thing?  
19 We understand that you might, on looking at the documents,  
20 want to say that there were other forms of collusion that  
21 are not mentioned. We understand that you might want to say  
22 that a UK subsidiary was involved, although it is not an  
23 addressee. I am thinking in terms of, as I say, the  
24 products and the time period and the geographical scope.  
25 Those are the things that particularly concern me.

1           MR. BREALEY: It is distinctly possible, in what  
2 we have seen, that the time period might have changed.

3           THE PRESIDENT: Yes.

4           MR. BREALEY: Products relating to trucks which  
5 could either be put in the box of the collusive conduct or  
6 the truck loss or spare parts.

7           THE PRESIDENT: Yes.

8           MR. BREALEY: Unlikely geographic. I think we  
9 are -- our claim is for purchases made into the UK. So it  
10 is products to a certain extent, but would be related to  
11 trucks and the time period, which we did flag in our claim.  
12 We said at least --

13          THE PRESIDENT: Yes, we noticed that.

14          MR. BREALEY: I have some --

15          MR. PICKFORD: Sir, I hesitate to rise. Some of the  
16 submissions that Mr. Brealey is currently making are on  
17 subjects that are currently confidential. We just want to  
18 lay down a marker because it relates to what they have seen  
19 on the file.

20          THE PRESIDENT: Well, he is not making any  
21 assertion. He is just indicating a response to our question  
22 so we have some sense of where these cases are going, which  
23 we need to have to manage them effectively, what might be  
24 possibilities. We are not indeed holding anyone to these  
25 statements either. We just need to get some understanding

1 of where we are heading.

2 MR. PICKFORD: I obviously understand that.  
3 I simply want to make sure, because my clients are  
4 concerned, that Mr. Brealey does not go any further in terms  
5 of revealing any specifics of the information, the  
6 documents, they have seen, because we are heading into that  
7 direction. I felt it was appropriate for me to rise.

8 MR. BREALEY: Mr. Pickford made the link. I am  
9 not sure I made any link.

10 THE PRESIDENT: Well, we got your point. Thank you  
11 very much.

12 Mr. Ward.

13 MR. WARD: Sir, the current pleadings on behalf of  
14 all three of my client groups are in the same form. They  
15 all relate only to overcharge on trucks. The time period  
16 and the geographic scope are as in the decision. All three  
17 pleadings do say that they reserve the right to seek to  
18 plead beyond the decision following disclosure. Of course,  
19 as the Tribunal has seen, there is now a dispute as between  
20 us and DAF about whether the additional particulars we have  
21 pleaded are properly to be regarded as within the decision  
22 or as stand alone elements.

23 THE PRESIDENT: Yes.

24 MR. WARD: But that is obviously a debate to be  
25 had tomorrow.

1           THE PRESIDENT: But beyond that, as in your new  
2 particulars, there is no -- that sets out what you say.

3           MR. WARD: It is trucks only, same time period,  
4 same geographic scope, even if you allow all of the  
5 amendments that you seek.

6           THE PRESIDENT: Yes. Thank you. Thank you very  
7 much.

8           Now, on the question of what is binding in the  
9 decision and binding in terms of on the Tribunal and on the  
10 parties in terms of section 58A of the Act, as we understand  
11 it, there is common ground that articles 1 and 2 of the  
12 decision, being the operative part, are binding against all  
13 addressees.

14           Secondly, it is common ground and well established  
15 in EU laws that recitals which are the essential basis of  
16 the operative part will be binding. We have not detected  
17 that anyone seeks to depart from what we think is a classic  
18 statement of law.

19           But there are then two questions in this case or  
20 these cases. First, which recitals come into that category?  
21 That is to say, which recitals are to be regarded as an  
22 essential basis of the operative part? Secondly, even if  
23 they are not, what is the effect of recital three, this  
24 being a settlement decision?

25           It seems to us that those two questions should be

1 answered in common across the cases. They are essentially  
2 questions of law or of interpretation of the decisions on  
3 its face. That is quite distinct from any issues arising  
4 from Royal Mail's application to amend.

5 So what we propose -- as I see it, we are not  
6 going to direct any preliminary issue or common issue at  
7 this stage. What we propose is that each Claimant should  
8 plead a schedule setting out, aside from any effect of  
9 recital three, each recital in the decision which -- and it  
10 may be we can limit it to sections 3, 4 and 7, so certain  
11 recitals about who owns who and so on, which are not really  
12 in dispute -- which recital in those three sections of the  
13 decision they contend is binding as the essential basis for  
14 the operative parts in articles 1 and 2 and briefly the  
15 basis relied on for that contention.

16 Each Defendant then pleads its response stating  
17 where it agrees or, if it disagrees, briefly the basis on  
18 which it disagrees. On those cases that are being heard  
19 together, we expect that the Claimants together will simply  
20 put in one set of assertions. Then, having seen how that  
21 schedule looks, we will consider at the next CMC the extent  
22 of the dispute and how best it should be resolved. It may  
23 be about a preliminary issue, but it is not a preliminary  
24 issue we want to see in the abstract before we have seen  
25 each party's case on that. But it does seem to us that this

1 is really something so important that it should be decided  
2 in common and affecting everyone and it does not involve  
3 factual evidence and it does not involve disclosure.

4 So that is the proposal we put forward. I think  
5 it echoes very much something that, Mr. Harris, you put in  
6 your skeleton, for which we are grateful. Is anyone unhappy  
7 or wants to object to that way of progress?

8 MS. DEMETRIOU: Not to object, but may I make a  
9 suggestion --

10 THE PRESIDENT: Yes.

11 MS. DEMETRIOU: -- which is that, in our  
12 submission, it is important that this does not become an  
13 issue if it is not pertinent in practice. If in fact there  
14 is no -- if in fact any dispute as to whether or not a  
15 particular recital is binding does not have any practical  
16 significance, then we would not want to spend time  
17 discussing that.

18 So the suggestion that I have to make is that if a  
19 particular Defendant takes the view, in response to the  
20 schedule that we serve, that a particular recital is not  
21 binding where we have claimed that it is binding, they  
22 should explain the relevance of that. In particular, if  
23 they are going to be advancing a different factual case,  
24 they should say so, because it is not sufficient they simply  
25 object to its bindingness if that goes nowhere in the trial.

1 We would be wasting time having an abstract decision if in  
2 fact it goes nowhere and they are not advancing some  
3 different factual case.

4 THE PRESIDENT: Well, what they may be saying is,  
5 "We do not accept it and you have to prove it". They do not  
6 have to advance a different positive case. If you -- as  
7 I say, you would only be setting out recitals on which you  
8 want to rely. You do not have to include recitals you  
9 regard as irrelevant, but if you want to rely on them, then  
10 if they do not accept it is binding, it seems to me it is  
11 going be relevant because if it is binding, you do not have  
12 to bring any evidence to prove it and if it is not binding,  
13 you do.

14 MS. DEMETRIOU: I think it would be helpful if  
15 they indicated whether they are simply taking the point they  
16 do not admit it and it is for us to prove our case or  
17 whether or not they are advancing a different factual case,  
18 because I think that does then throw light on the extent to  
19 which this is going to be important in a trial.

20 THE PRESIDENT: I think --

21 [The Panel conferred]

22 THE PRESIDENT: We really think that is going to  
23 complicate what we want to keep as a fairly simple exercise.

24 MS. DEMETRIOU: Sir, our concern is --

25 THE PRESIDENT: We can consider, when we decide at

1 the next CMC when we have seen the schedule, whether there  
2 should be a preliminary issue and what form it should take.  
3 But to get a schedule where people start putting in an  
4 alternative factual case they want to advance is really  
5 getting into the realm of pleadings. We want to confine  
6 this to, as I say, what is really a question of  
7 interpretation of the decision.

8 MS. DEMETRIOU: Sir, I hear what you say, but in  
9 respect of our claim and our pleadings, we have pleaded the  
10 facts on which we rely in the decision. As far as we are  
11 aware, as far as we have been told, those are not disputed.  
12 We have served a series of requests for further information  
13 to tease that out. So there does not, as things stand on  
14 our pleadings, appear to be any dispute. So we are a little  
15 bit reluctant to be embroiled in a further round of this in  
16 circumstances where we have pleaded what we rely on in the  
17 decision and there does not seem to be a dispute between us  
18 and the Defendants on this.

19 THE PRESIDENT: What we can do, Ms. Demetriou, to  
20 meet your point is if the Defendants can say either, if they  
21 do not accept it is binding, is it nonetheless admitted?

22 MS. DEMETRIOU: Yes, that would help.

23 THE PRESIDENT: Then that would clarify that point.

24 MS. DEMETRIOU: Yes, that would help.

25 THE PRESIDENT: Even if they say it is a matter of

1 law, it is not binding.

2 MR. BREALEY: Can I just echo sympathy with that,  
3 because from the Claimants' perspective, we would like to  
4 know what the Defendants accept forms the basis of their  
5 original liability.

6 THE PRESIDENT: Well, that will --

7 MR. BREALEY: It should be teased out.

8 THE PRESIDENT: Well, that may come out of this.  
9 As I say, this schedule, this exercise, will be apart from  
10 the question of the effect of recital 3, which is a quite  
11 separate point. It may go to the point which you have  
12 raised.

13 Then the question is the timing, before we rise to  
14 take a short break, for this exercise. We would like to get  
15 it going and it should not be -- you all have pored over  
16 this decision endlessly, I should have thought. So  
17 Ms. Demetriou and the other Claimants, that is Mr. Ward,  
18 Mr. Brealey, how soon can you prepare your --

19 MS. DEMETRIOU: For our part, we would suggest  
20 two weeks.

21 MR. WARD: We would be content with that.

22 THE PRESIDENT: Mr. Brealey, fourteen days?

23 MR. BREALEY: Fine.

24 THE PRESIDENT: Fourteen days and then perhaps for  
25 a response, can we again say fourteen days?

1 [The Panel conferred]

2 MR. PICKFORD: Sir, we do have a concern about the  
3 timing given the different version that Ms. Demetriou has  
4 persuaded the Tribunal to be providing. It is one thing to  
5 respond to what the Tribunal initially suggested, which is,  
6 "Is this binding or not?" It is quite a different thing for  
7 us to work out whether we necessarily admit certain factual  
8 points which we may think are irrelevant. It is going to  
9 require a whole factual enquiry, which is an entirely  
10 different type of exercise. We do not really see why we --  
11 that that is appropriate because it is straying into the  
12 realms of pleading.

13 THE PRESIDENT: You could just not admit it for the time  
14 being and leave it to pleadings, so it is not binding and  
15 not admitting --

16 MR. PICKFORD: Well, on the basis that we are  
17 effectively at liberty to not investigate certain points  
18 now.

19 MR. WARD: Sorry. I am surprised by Mr. Pickford  
20 effecting to be taken by surprise by the exercise because  
21 you will see in the RFI we served on Royal Mail as long  
22 ago as July, we asked DAF which recitals are accepted as  
23 binding. It is in our draft re-amended particulars of  
24 claim. They must have been thinking about this question.  
25 It cannot possibly have come as a bolt from the blue. It is

1 very, very important that we understand not just what is  
2 binding, but what is actually in dispute. We do not want  
3 pro forma non-admissions from Mr. Pickford as if it was the  
4 pre-Woolf days --

5 THE PRESIDENT: These are all of the matters that  
6 have clearly been relied on. I think --

7 MR. HOSKINS: Sorry, sir, can I just make the  
8 point that is all very well as between Mr. Ward and  
9 Mr. Pickford, but it does not apply to the rest of us.

10 I know that you have made a comment about the CPO  
11 hearing, but we are all preparing for a CPO hearing which is  
12 coming on December. There are work streams to consider.  
13 I would submit that -- we have not had prior warning and  
14 14 days is too short if a more detailed exercise is to be --

15 MR. HARRIS: Sir, there is the allied point that  
16 we would all like to liaise together and I am sure you would  
17 like us to liaise together before putting in responses.  
18 Just the facts of life that that takes time.

19 THE PRESIDENT: If we give you until the middle of  
20 January, Mr. Pickford, and you will get this in 14 days,  
21 will that take care of the points concerned?

22 MR. PICKFORD: Sir, we will respond on that basis.  
23 There are some assertions that are in very general form and  
24 we might have to simply -- if effectively -- this takes us  
25 into the territory of Mr. Ward's application, that we should

1 just plead to the entirety of large parts of the Commission  
2 decision. There are some things we can do practically.  
3 There are some sort of assertions in the Commission decision  
4 which are not suitable for being responded to in a pleading.  
5 It would be embarrassing if they were contained in a  
6 pleading.

7 THE PRESIDENT: Yes.

8 MR. PICKFORD: Indeed, Mr. Ward accepts that in  
9 his submissions where he says that the decision is not  
10 framed precisely. It was why he said that this could not be  
11 a preliminary issue.

12 Now, obviously, that is not the point we are  
13 currently dealing with, but what is quite clear is that  
14 there are many recitals in the decision that we will just  
15 have to, I think, respond to on a pragmatic basis because  
16 some of them are not capable, we say, of the kind of  
17 pleading-based response that would ordinarily occur.

18 THE PRESIDENT: Yes. We do not want complex  
19 responses on this. If you say in your response, "This is so  
20 general we do not see that it can be binding or capable of  
21 admission", so be it.

22 MR. PICKFORD: I am grateful.

23 THE PRESIDENT: We will deal with it. My concern  
24 is to get this process done and see what sort of hearing can  
25 then be held on it, because there is at some stage going to

1 be argument on this question and we think it has got to be  
2 done sooner. This is across all cases.

3 As I say, we will give you until mid- January. To  
4 be clear, in your schedule, Claimants, you will say the  
5 basis relied on, briefly, for asserting that it is an  
6 essential basis for the operative part and the Defendants,  
7 if they disagree, the basis on which they disagree with  
8 that.

9 MR. PICKFORD: Thank you, sir.

10 THE PRESIDENT: Then we will consider at the next  
11 CMC, in the light of that schedule, what sort of issue, if  
12 any, is suitable for determination in advance of trial.

13 We have over-run a bit. We will take a ten-minute  
14 break.

15 (11.40 am)

16 (A short break)

17

18 (11.54 am)

19 THE PRESIDENT: The next issue we wanted to explore  
20 is the question of foreign law. As we now understand it --  
21 I am sorry.

22 MR. PICKFORD: Sorry, sir. Just before the short  
23 break, we dealt with the issue of amendments in the Hausfeld  
24 Claimants, VSW. They said they would do that by the end of  
25 January. I am not sure we timetabled for when everyone

1 would make their amendments. It might be sensible that  
2 everyone made their amendments by January so the Tribunal  
3 has a common position from everyone.

4 THE PRESIDENT: Well, I am going to come --

5 MR. PICKFORD: When I say everyone, I mean all of  
6 the Claimants.

7 THE PRESIDENT: Well, we are going to come to  
8 amendments later.

9 MR. PICKFORD: I am grateful.

10 THE PRESIDENT: The next issue we wanted to  
11 canvass, with the question of whether it is a common issue  
12 in some way and how it might be dealt with, is foreign law.  
13 As we understand the position now, the Ryder and Dawsongroup  
14 claims comprise only trucks bought in the UK. If again --

15 MR. WARD: That is correct.

16 THE PRESIDENT: Mr. Brealey, that is right?

17 MR. BREALEY: Yes.

18 THE PRESIDENT: On that basis, there is no issue of  
19 foreign law in the Royal Mail, BT, Ryder and Dawsongroup  
20 cases and no Defendant now is seeking to introduce foreign  
21 law. That is our understanding.

22 MR. BREALEY: That is correct.

23 MR. WARD: That is our understanding, sir.

24 THE PRESIDENT: In the VSW cases, the position is  
25 that after the -- trucks purchased after 11 January 2009, it

1 is common ground that it is English law for trucks  
2 purchased before 11 January 2009 -- I am not sure about that  
3 specific date, whether it is up to and including, but you  
4 know what I mean -- the position is that a number of the  
5 Defendants say that for trucks purchased on the German  
6 market, it is German law. Iveco says that for each place  
7 where trucks were purchased, it is the law of that country  
8 where the trucks were purchased or leased.

9 Is that right, Ms. Bacon?

10 MS. BACON: There is a nuance on that. We say  
11 that is the position in principle, but we are not proposing  
12 to plead out that in relation to every substantive issue,  
13 the Tribunal, the claimants or anybody needs to look at the law of  
14 each foreign country for each purchase.

15 We are not proposing a patchwork, as some  
16 people have referred to it. What we have said is we are in  
17 a difficult position at the moment because we have not been  
18 able to marry up the claims with our databases because of  
19 the lack of information. There can be a process to sort  
20 that out.

21 Once that has been sorted out and we actually know  
22 how many trucks are claimed for in each jurisdiction and the  
23 idea of the value of those, we would undertake a pragmatic  
24 view. We may, therefore, refer to something other than  
25 German law, but we have not yet decided that because we are

1 not in -- we do not have a complete picture of the claims.  
2 So I can say that we may refer to something other than  
3 German law. We are certainly not saying that the Tribunal  
4 needs to apply the law of the place of purchase to each  
5 individual truck that is purchased in the claim.

6 I hope that clarifies that.

7 THE PRESIDENT: Yes, that is very helpful.  
8 Obviously, it only makes a point referring to foreign law if it has  
9 some consequence.

10 MS. BACON: Absolutely. That is why we have said  
11 we will take a pragmatic view on two bases: one, whether the  
12 foreign law does make a material difference and secondly,  
13 the number of trucks. So if, for example, there is only one  
14 truck that has been purchased in Spain, we are not likely  
15 to say that everyone has to bring experts on Spanish law or  
16 whatever. So that is the position.

17 We propose the process to get to that point.  
18 I think some of DAF's directions also deal with that by  
19 suggesting the further information and I would suggest that  
20 the Tribunal would make an order to that extent today.

21 THE PRESIDENT: Yes.

22 MR. JUSTICE HILDYARD: That does not go beyond, does it,  
23 the  
24 usual position that unless some specific feature of foreign  
25 law is pleaded, all laws are assumed to be the same as our

1 own?

2 MS. BACON: Absolutely. Exactly. Even if in  
3 principle the position is that foreign law applies, the  
4 usual convention is that unless one or other parties  
5 specifically takes a point on it and pleads it out, which we  
6 will envisage doing in due course, the presumption is that  
7 the foreign law is taken to be the same as English law.

8 MR. JUSTICE HILDYARD: Thank you.

9 THE PRESIDENT: So there is clearly a German law  
10 issue. Can I clarify, Ms. Demetriou, because this has sort  
11 of been a bit of a Cheshire cat. It was there in DAF's  
12 defence. It went out. It has come back in a different  
13 guise. You made a submission on that basis. As regards  
14 trucks sold in Germany before the date when the Convention  
15 came in, before 11 January 2009, do you accept that German  
16 law -- whether for a pragmatic or whatever reason, do you  
17 accept that German law will apply?

18 MS. DEMETRIOU: Sir, we want to see, first of all,  
19 what the Defendants will say because we have been facing a  
20 moving target. So we did not plead any application of  
21 foreign law, so unless foreign law is put in issue, then the  
22 starting point is these claims should be determined in their  
23 entirety on the basis of English law. The Defendants all  
24 put in defences and with the exception of DAF -- and those  
25 defences were served many months ago.

1 THE PRESIDENT: Yes.

2 MS. DEMETRIOU: None of the Defendants, apart from  
3 DAF, put foreign law as an issue. DAF pleaded that German  
4 law applies to all claims, to all claims, not just German  
5 claims.

6 THE PRESIDENT: Well, we know the history. You do  
7 not have to take us through the history. The position now  
8 is that no-one is suggesting that.

9 MS. DEMETRIOU: No.

10 THE PRESIDENT: We have had in fact a plea. We  
11 asked everyone to clarify the position. It is, from the MAN  
12 Defendants, actually pleaded out --

13 MS. DEMETRIOU: Yes.

14 THE PRESIDENT: -- on German law, although it is  
15 only in your case. It is found at the back of the Ryder  
16 bundle and that makes their position clear.

17 MS. DEMETRIOU: But what we want to see --

18 THE PRESIDENT: Well --

19 MS. DEMETRIOU: What we want to see --

20 THE PRESIDENT: So you know what their position is.

21 MS. DEMETRIOU: We do not know from Iveco is what  
22 their position is, what view they are going to take about  
23 whether it is a patchwork of different foreign laws or  
24 whether it is just German law for the German sales. DAF's  
25 position -- so DAF has not come off the fence at all. So

1 DAF's position is that the question of applicable law should  
2 be determined not on the basis of where the sale took place,  
3 but on where the gravity of the cartel was. That is why  
4 they said initially --

5 THE PRESIDENT: Well, that was their position.  
6 I do not think it is their position now.

7 MS. DEMETRIOU: They have not said. We do not  
8 know.

9 THE PRESIDENT: We do not know. All I am asking  
10 you is this: as regards those Defendants who have said and  
11 said clearly before this hearing in response to our  
12 direction that for trucks put on the market in Germany, it  
13 is German law, is that disputed?

14 MS. DEMETRIOU: Sir, we want to be -- we want to  
15 try and agree this and be pragmatic if we can, but I do not  
16 want to be bounced into agreeing something now in  
17 circumstances where Iveco at least might plead a patchwork  
18 of foreign laws and that may cause the other Claimants --  
19 the other Defendants to do the same thing. Of course, the  
20 question about whether we are pragmatic and can agree the  
21 decision in relation to Germany, that is going to be  
22 influenced by what they do in relation to foreign law  
23 generally. So I do not think we should be bounced into  
24 being pragmatic now without knowing --

25 THE PRESIDENT: Positions have changed and it is

1 not clear at the moment what everyone's position is.  
2 Several people have said they want to reconsider. We would  
3 like everyone now to have a clear pleading in the VSW cases  
4 to what extent are they relying on foreign law and, if they  
5 are, on what they say is the consequence, so we can get  
6 proper pleadings on this.

7 That may require, Ms. Demetriou, that you provide  
8 the particulars that are being requested of where the trucks  
9 were put on the market. It seemed to me that it has to be  
10 done first because it would be wrong to expect people to  
11 incur the cost of pleading, in Ms. Bacon's hypothetical  
12 case, Spanish law, if in the end you only have two trucks  
13 and you decide it is not worth the effort.

14 MS. DEMETRIOU: Can I make two points in relation  
15 to that?

16 THE PRESIDENT: Yes.

17 MS. DEMETRIOU: The first point arose from the  
18 discussion we had before the short adjournment, which goes  
19 to the point you put to me, sir, about the geographical  
20 scope of the cartel and trucks outside of the EEA. We want until the  
21 end of January to consider whether to re-plead our case generally -- in  
22 relation to that specific point, can

23 I confirm that we will make clear our position in  
24 correspondence within two weeks of today.

25 THE PRESIDENT: That is very helpful.

1           MS. DEMETRIOU: In relation to the issue generally  
2 about precisely where each and every truck the subject of  
3 these claims was purchased, we have got to the position  
4 where we have come -- on the basis of the data that we have  
5 from our clients, we have got to the ends of the road.  
6 There are gaps, but we need disclosure now from the  
7 Defendants to fill those gaps. So records are not complete  
8 and we provided as much information as we can to this point.

9           So we certainly do not agree that the question of  
10 applicable law and the pleadings on applicable law should be  
11 held up through waiting for more data from us, because we  
12 are not going to be able to reach a fully particularised  
13 position in relation to each and every truck that is the  
14 subject of these claims until we have disclosure from the  
15 Defendants and we can match their records against ours.

16           THE PRESIDENT: Where can we see what you have  
17 provided as regards the location of certain -- what do you  
18 say is the best you can do?

19           MS. DEMETRIOU: Can I -- I think the answer to  
20 that question -- it should be an easy answer, but it is not  
21 an easy answer. Sir, can I please do what I can perhaps  
22 over lunch to come back with what has been provided and our  
23 position?

24           THE PRESIDENT: Yes.

25           MS. BACON: Before that discussion is closed, can

1 I just say on behalf of Iveco that we will need further  
2 information. Could I just direct the Tribunal to DAF's  
3 draft order and that is to be found at the end of bundle D,  
4 as a useful starting point. We would add two things.

5 THE PRESIDENT: Just a minute. Bundle D of? We  
6 have got lots of Ds.

7 MS. BACON: Hausfeld D, right at the end, tab 14.

8 THE PRESIDENT: Hausfeld D.

9 MS. BACON: Yes. Where in tab 14 may differ.

10 THE PRESIDENT: Just a moment. Just a moment.

11 MS. BACON: It might also be attached to DAF's  
12 skeleton argument.

13 MR. PICKFORD: It is attached to our skeleton  
14 argument.

15 THE PRESIDENT: Just for your information, there  
16 seems to be, obviously -- nobody's got a copy of Hausfeld D  
17 except me. The registrar has not got them. Mine has -- the  
18 teeth are dislodged anyway, so I will give that back because  
19 they are falling apart. It is behind the skeleton argument  
20 of DAF, is it?

21 MS. BACON: DAF. Yes, I have that at tab 8 of my  
22 skeleton bundle.

23 THE PRESIDENT: Yes. It is at tab-- it is in the  
24 VSW case, is it?

25 MS. BACON: Yes.

1 THE PRESIDENT: Draft order.

2 MR. PICKFORD: It is the final order. It is  
3 easiest to find from the back of tab 8.

4 MS. BACON: Yes, that is where I've got it, sir.  
5 I was looking at paragraph 15, sir.

6 THE PRESIDENT: Is it -- in which action is it?

7 MS. BACON: It is in the VSW action.

8 THE PRESIDENT: Yes, I see.

9 MS. BACON: I have the point at page 4, under the  
10 head of applicable law, dealing with this issue.  
11 Paragraph 15.

12 THE PRESIDENT: Yes.

13 MS. BACON: That is exactly the kind of process  
14 that I think you, sir, had in mind. Now, we can debate  
15 about the dates around this, but there are three things that  
16 DAF has asked to be confirmed for each truck.

17 We would add in two further points, so a D and an  
18 E. D, the VIN number, the vehicle identification number, because  
19 that is quite important to be able to match the truck up  
20 with those on our database. E, the value of the truck,  
21 because that may well have a bearing --

22 THE PRESIDENT: You mean the purchase price.

23 MS. BACON: The purchase price, exactly. Because  
24 it may have a bearing on this proportionality exercise.

25 THE PRESIDENT: Yes.

1 MS. BACON: We think that is not unreasonable and  
2 we do need details from the Claimant about the jurisdiction  
3 in which each transaction took place because we may not know  
4 that, especially if the truck has passed through  
5 intermediaries. We do not know where they bought it.

6 THE PRESIDENT: Yes.

7 MS. BACON: That is information that is in their  
8 hands. Obviously, if there are certain trucks for which  
9 they are not going to be able to provide all of this  
10 information, they will have to tell us and then we will have  
11 to see where we get to on the basis of the information  
12 provided, but certainly there is no reason why, as a  
13 starting point, that should not be the order and then we can  
14 come back with our pleading on that basis.

15 MR. MALEK: Remind me, how many trucks are we  
16 talking about?

17 MS. BACON: Hundreds.

18 THE PRESIDENT: Hundreds or thousands? Well, in a  
19 sense, that is a question for Ms. Demetriou. I mean, you  
20 are the Claimants. Are you talking about hundreds of trucks  
21 or thousands of trucks?

22 MS. DEMETRIOU: I think it is not very many  
23 because we have given them a huge amount of information.

24 THE PRESIDENT: No, the total number of trucks on  
25 which your clients are claiming.

1 MS. DEMETRIOU: In the claim or that we have --

2 THE PRESIDENT: In all three claims, how many  
3 trucks?

4 MS. DEMETRIOU: It is something above 10,000 in  
5 all three claims. What we have done is we have given  
6 them -- through a process of responding to the requests for  
7 further information, we have given them a huge amount of  
8 information. We have given them all of the information that  
9 we can in relation to the identity of the trucks and,  
10 essentially, these questions. We cannot do any more without  
11 disclosure, so that is the position that we are in.

12 THE PRESIDENT: Well, what we do not know is how  
13 many of these 10,000 trucks you have given it and you cannot  
14 give it and what it looks like. If you have provided -- it  
15 would be -- these are very high-value claims.

16 MS. DEMETRIOU: Yes.

17 THE PRESIDENT: It would be extremely helpful if  
18 there could be a schedule with five columns. You are happy  
19 with the two additions that Ms. Bacon has suggested. Well,  
20 not -- probably four columns. For each truck by VIN number, as  
21 it were -- sorry, maybe it is five columns -- showing all of  
22 these things. There will be 10,000 lines and it will be a  
23 spreadsheet so that one can just see what the situation is.  
24 If some you do not know, you will say you do not know.

25 MR. MALEK: You can pursue that by way of

1 disclosure. I presume you are not looking for records for  
2 every single truck sold, because if you have already got  
3 those records, you do not need them. So for the Defendants,  
4 it is helpful to for them to know which truck numbers you do  
5 not have the records for and they can produce those under  
6 disclosure.

7 MS. DEMETRIOU: Sir, can I come back with a more  
8 precise answer after lunch? But what I am instructed is  
9 that there are 35,000 trucks in the claim.

10 THE PRESIDENT: 35,000.

11 MS. DEMETRIOU: 35,000 trucks in the claims, the  
12 three claims. There has been, as I say, a process whereby  
13 all of these Defendants have sought further information of  
14 the type that Ms. Bacon is now requesting. None of that  
15 is in the bundle because it is a vast amount of information that we  
16 have provided and what is left is probably in the  
17 hundreds where the vehicle identification numbers are not  
18 known, so it is a small number. The point -- I will come  
19 back after lunch and give you more precise information.

20 THE PRESIDENT: Yes.

21 MS. DEMETRIOU: But the point of principle that we  
22 make is that we have come to the end of the line. We have  
23 given a huge amount of information. The idea that the gaps  
24 could drive the question of applicable law is simply --  
25 simply unrealistic and incoherent.

1           THE PRESIDENT: Well, it is all a question of  
2 whether for the 34,000 and X hundred for which you say you  
3 have given information for, you have, in each case,  
4 specified the place where the truck was bought or leased.  
5 It is not clear to me at the moment that you have and I am  
6 not sure you even quite know what you have before taking  
7 further instructions.

8           MS. DEMETRIOU: Sir, I am going to take further  
9 instructions.

10           Can I make another point of principle on these  
11 categories?

12           THE PRESIDENT: Yes.

13           MS. DEMETRIOU: Because question C, the  
14 jurisdiction in which each transaction took place, that is  
15 not a precise question. It begs lots of questions because  
16 one can imagine all sorts of quite complicated scenarios  
17 whereby, for example, you may have a purchaser who purchases  
18 a truck from another member state or through a group member  
19 established in another member state, but it has its office  
20 in a third member state and so stuff is damaged in the third  
21 member state.

22           There are all sorts of factual differences which  
23 means the question of where the transaction took place -- is  
24 it the country where the contract -- that the contract  
25 points to, or is it where the country -- the head office of

1 the particular Claimant is based? Those factual points may  
2 vary, so asking where the transaction takes place is overly  
3 broad and not a helpful question.

4 THE PRESIDENT: Yes, Mr. Pickford.

5 MR. PICKFORD: As it is our order that is being  
6 considered here, can I make two observations?

7 THE PRESIDENT: Yes.

8 MR. PICKFORD: Ms. Demetriou makes a very fair  
9 observation but she draws the wrong conclusion from it.  
10 It is obviously critical to the determination of the  
11 applicable law that we have the appropriate facts on  
12 precisely the thing that she identified, namely where there  
13 is some issue about what jurisdiction a transaction took  
14 place in because potentially it was between different member  
15 states. But that is carefully set out, because that is what  
16 will enable us to determine ultimately what the applicable  
17 law is. So that is not a reason for not doing it. That is  
18 a reason for doing it and indeed doing it, in some cases, in  
19 greater specificity.

20 The second point is it is being suggested by  
21 Ms. Demetriou that effectively we know all this already and,  
22 therefore, there is not a problem. The Tribunal touched on  
23 this a little earlier and the point, the observation, made  
24 was entirely correct. We do not know a lot of this  
25 information because a lot of these purchases were indirect.

1       They are through dealers. Unless we are told by the  
2       Claimants what trucks we are talking about and what the  
3       particular transactions are, we do not know what  
4       transactions we are talking about. So it is really crucial  
5       that the Claimants -- because it is their claim, they are  
6       the ones that want the overcharge -- they tell us.

7               THE PRESIDENT: Yes.

8               Ms. Demetriou, the basic point is this: it is  
9       certainly said now, as regards German law, those put on the  
10      markets in Germany, that the Defendants, or many of them and  
11      perhaps ultimately all of them, run a limitation defence --

12              MS. DEMETRIOU: Yes.

13              THE PRESIDENT: -- which if it is successful, it  
14      may not be, and even some Defendants say German law is  
15      unclear at the moment, but it would cut out a significant  
16      part of the claim. It is a pure question of law. So, it is  
17      clearly an attractive candidate for a preliminary issue  
18      because it has great bearing on quantum and all the costs  
19      and effort of disclosure, if it succeeds. If it does not  
20      succeed, as you say it will not, fine.

21              Whether there is any equivalent issue under any  
22      other law, I think 13 countries where your complaints are  
23      based, at the moment, nobody knows. If there is an issue  
24      whether it is worth pursuing anyway, it cannot be  
25      established. So we need to bottom this out.

1           It may take a bit more time, but it has to -- it  
2           seems to us that it is something that has got to be done  
3           because we have got to have foreign law determined and  
4           pleaded. You will want it pleaded and you can only give the  
5           best particulars you can give, but you are going have to do  
6           that. I think it should be in the form of a spreadsheet so  
7           one has one document which everybody can, in your cases,  
8           examine and look at together and the Tribunal can look at  
9           together.

10           So it is a question of how long you need to  
11           produce such a spreadsheet and if you say you have got most  
12           of the information already that you can get, it should not  
13           take too long.

14           MS. DEMETRIOU: Sir --

15           THE PRESIDENT: Mr. Malek makes the important point  
16           that it should also have the date, which is, I think, not in  
17           paragraph 15, on which they acquired the truck, because if  
18           it is after 11 January 2009 --

19           MS. DEMETRIOU: Sir, can I suggest we come back  
20           after the lunchtime adjournment and show the Tribunal what  
21           we have done already? Because we say we have done an awful  
22           lot already.

23           THE PRESIDENT: Yes.

24           MS. DEMETRIOU: It is being suggested --

25           THE PRESIDENT: Well, then it will be easy to

1       prepare a schedule. You can come back after the lunch  
2       adjournment and tell us how long you need to do that with  
3       the sort of detail that is obviously going to be needed for  
4       people to work out what the foreign law might be and how  
5       significant it is in the context of your claim.

6               MS. DEMETRIOU: Well, sir, in that case, that is  
7       what we will do. There are other things I'd like to say on  
8       this issue, but can we please defer that until after lunch  
9       when we have more concrete basis to advance the argument?

10              MR. JUSTICE HILDYARD: Are you saying in the case of  
11       some trucks, you say you have come to the end of the road,  
12       as it were, as to the information you can provide --

13              MS. DEMETRIOU: Yes.

14              MR. JUSTICE HILDYARD: -- but you can summarise the  
15       information you have got, so if that triggers something on  
16       the other side's bank of information, you can then between  
17       you identify the place of purchase?

18              MS. DEMETRIOU: Sir, yes. We have done that  
19       already, we say, because they have -- the Defendants have  
20       served requests for information and we have provided them  
21       with reams of information, which is as much as we have got.  
22       It is not simply that we can do. We have done it already.

23              MR. JUSTICE HILDYARD: Well, it is a question of getting it  
24       into a form which is readily understandable by us on a  
25       spreadsheet, which enables them with appropriate efficiency

1 to identify the place of purchase, if you cannot.

2 MS. DEMETRIOU: Sir, it is on a spreadsheet  
3 already, so I'd like to show the Tribunal that, which is why  
4 I say can I come back after lunch to show the Tribunal the  
5 spreadsheets we have already provided?

6 THE PRESIDENT: You come back after lunch because  
7 there is a lot of shaking of heads. We do not want to have  
8 an argument of what has or has not been provided in the  
9 abstract. If Ms. Demetriou produces her spreadsheets after  
10 lunch, we can look at them.

11 MR. HARRIS: Save only two short points. What has  
12 been provided is "readily available" data and that is not  
13 what the Tribunal is asking for and not what is required.  
14 It is taken from my learned friend's solicitors' letters and  
15 that is obviously not sufficient.

16 Secondly, the second short point is we have been  
17 pressing, for our part, Daimler for information about a  
18 couple of jurisdictions in particular: Austria, as to which  
19 there has been a resounding silence, simply not responding  
20 to at all, and Netherlands. We were told a day or two ago,  
21 "We are not sure, we are still looking".

22 My point there is that as you may have picked up,  
23 I appreciate there has been a vast amount of documents and  
24 evidence for CMC, but Mr. Bronfentrinker for instance on  
25 behalf of my client and similarly, other solicitors on

1       behalf of other Defendant OEMs has identified the sheer  
2       volume of effort that is required to search databases in  
3       different jurisdictions, even for things like VINs and other  
4       sales data, leaving aside the debate we are going to have  
5       later about quantum disclosure.

6               So it is deeply unsatisfactory to be told, "We  
7       have done what we can on "readily available" data. It may  
8       not include Austria and Netherlands. Now you go off and do  
9       this expensive searching exercise for up to  
10      13 jurisdictions." That is why this suggestion of a  
11      properly particularised schedule, not just for reasons of  
12      manageability, but for reasons of substance, has to come  
13      first.

14             THE PRESIDENT: Ms. Demetriou, we have heard what  
15      you have said and we will hear from you after lunch after  
16      you have had a chance to discuss those instructions.

17             I think everyone will appreciate that what we have  
18      in mind is that such information is provided in a manageable  
19      form and then that there are pleadings on foreign law from  
20      every Defendant that wants to raise foreign law in your  
21      case. You can then respond. You reasonably make the point  
22      that you will assess the position, how you want to respond,  
23      once you have seen those pleadings. Then depending on what  
24      limitation is under foreign law, we can decide whether or  
25      not it is suitable for a preliminary issue and clearly, we

1 cannot do that today. We will revisit the question of the  
2 information and a timetable after lunch.

3 The next point concerns pass on, which is pleaded  
4 as a defence in, I think, every case. As many have pointed  
5 out, this has been addressed by the Court of Appeal in its  
6 judgment in the interchange fees cases, where they held that  
7 the approach to pass on under EU law is consistent with the  
8 common law approach to the assessment of damages and  
9 mitigation. The question is whether the Defendant, if it is  
10 pass on defence, as it were, or mitigation, can show a  
11 sufficiently close causal connection, and that has to be  
12 proved on facts, not by assumptions.

13 We can understand that that may be possible when  
14 one is talking about the resale of the same truck or where  
15 the Claimant's business is renting out or leasing trucks.  
16 The question then arises, well, how far does that go with,  
17 for example, Royal Mail, which sells stamps or charges for  
18 parcels, and BT and various other companies?

19 It has been suggested by some that this is  
20 addressed in the context of disclosure applications when  
21 Defendants seek disclosure from the Claimants and then we  
22 should review it. We are not attracted by that course. We  
23 appreciate that it cannot be approached as a purely abstract  
24 question of law, but the issue, it seems to us, is one of  
25 when it is arguable that there may be such a close causal

1 connection so as to found an argument on pass on. The  
2 question is: is there some way of dealing with that as a  
3 form of common issue?

4 We fully recognise that is not straightforward.  
5 We think it may be appropriate to determine that in not  
6 every case, but a number of cases, by a form of summary  
7 judgment hearing under Rule 43. So what we have in mind is  
8 this: that each Claimant should make a short statement as to  
9 what goods or services were supplied under the relevant  
10 period for consideration using the trucks that are the  
11 subject matter of the claim. When we have had those  
12 statements, we can then consider whether one can select a  
13 number of cases of different kinds that could be treated as,  
14 as it were, sort of guidelines cases and where we could hear  
15 a summary judgment application as to whether it is arguable  
16 that in those circumstances there was a sufficiently causal  
17 connection so as to establish pass on.

18 As I said at the outset, we are not going to  
19 direct any preliminary issue today and we are certainly not  
20 going to say there will be a summary judgment hearing, as we  
21 are entitled to do under our rules. The Tribunal can direct  
22 a summary judgment hearing even if nobody asks for it.

23 To get to that point of addressing this, we think  
24 statements of that kind would be very helpful because the  
25 question of what is a sufficiently close causal connection

1 is, in a sense, a mixture of law and fact, but it arises in  
2 every case. If it is not dealt with in some way that gives  
3 guidance to all the cases, we end up with the risk of  
4 different approaches to application of that test, which is  
5 the very thing we are keen to avoid.

6 So that is, in discussion, what we are  
7 suggesting, but we welcome observations as to whether,  
8 first, the Claimants who are facing this allegation and the  
9 Defendants consider in that regard, but as I said in  
10 introducing this, we do not think it is something to be  
11 dealt with ad hoc with each disclosure application as it  
12 arises. Just one moment.

13 [The Panel conferred]

14 THE PRESIDENT: This is just a very brief  
15 statement. Each Claimant says, "This is the nature of our  
16 business. We use trucks, which includes the trucks that are  
17 the subject of the claim, for the following purposes", so we  
18 can just understand what we are facing.

19 So Mr. Ward.

20 MR. WARD: Sir, thank you. Of course, I represent  
21 three different Claimant groups in slightly different  
22 positions. There is Dawsongroup, which is in the business  
23 of truck hire. You have already mentioned BT and  
24 Royal Mail.

25 Two observations, if I may. The first is we

1 welcome that approach rather than trying, as a sort of pure  
2 point of law, some very abstract proposition, which frankly  
3 nobody needs to prove or disprove in this particular  
4 litigation. So what the Tribunal is contemplating is, to an  
5 extent at least, fact-sensitive, albeit on very limited  
6 facts.

7 To that end, what we would respectfully suggest,  
8 as well as the things that you have mentioned that should go  
9 into this brief statement, would also be information about  
10 scale. As you will have seen from our skeleton argument, in  
11 Royal Mail's case, it is claiming, just taking as an  
12 indicative year 2007/8, £5 million in overcharge against a  
13 cost base of £7.6 billion. It delivers 80 million letters  
14 and packages a day and so we think the overcharge is  
15 0.0007% of its costs in that particular year.

16 In BT, the sample year we mention in our skeleton  
17 was 2008/9. It claims overcharge of £735,000. Its group  
18 costs were £21 billion in that year, so the overcharge was  
19 in fact .00035%.

20 THE PRESIDENT: Yes.

21 MR. WARD: Now, obviously, those are some  
22 high-level figures pulled from annual reports. I only  
23 mention them to make the point that as part of this  
24 argument, scale is relevant, or may be.

25 THE PRESIDENT: Yes. We have, of course, come up

1 with this proposal having had regard to what each of you  
2 have said on the question of pass on in your skeletons. So  
3 that is why we have moved away from the earlier indication  
4 or suggestion. It is really a question of how far everyone  
5 has to go in this information, because if one gets into  
6 scale, whether that is necessary in these initial statements  
7 or it would come then in any evidence on a summary judgment  
8 application, because we do not want to -- there are a lot of  
9 Claimants in some of these cases -- get into too much  
10 detail.

11 MR. WARD: Yes, I see that. In our case, it does  
12 seem, respectfully, that it is a particularly pertinent  
13 consideration.

14 THE PRESIDENT: Yes.

15 MR. WARD: But at what stage it comes in is, of  
16 course, case management.

17 THE PRESIDENT: Just a moment.

18 [The Panel conferred]

19 THE PRESIDENT: In our view, Mr. Ward, if you want  
20 to put that in, you can, but we are not going to require it.  
21 Others may not. There may be other information that is  
22 relevant to likelihood of pass on. Once you start getting  
23 into that, you require quite long statements.

24 MR. WARD: Sir, thank you.

25 THE PRESIDENT: We want to make it, really in the

1 interests of Claimants, that it is not a burdensome  
2 obligation.

3 Yes, Mr. Brealey.

4 MR. BREALEY: We will do the exercise if the  
5 Tribunal wants us to. I got the impression from your  
6 opening remarks that maybe it was not relevant to rental.

7 THE PRESIDENT: I think -- just having confirmation  
8 that is the entirety of your business which is trucks. That  
9 is the impression from your pleading.

10 MR. BREALEY: Yes.

11 THE PRESIDENT: If that is the case, it will be a  
12 very quick statement.

13 MR. BREALEY: A quick one.

14 THE PRESIDENT: Ms. Demetriou?

15 MS. DEMETRIOU: Yes, we are content to do that  
16 exercise.

17 THE PRESIDENT: That will be very helpful. So just  
18 a question of -- yes, Mr-- well, this does not require the  
19 Defendants to do anything, but if you think it is a waste of  
20 time, please say so.

21 MR. HARRIS: Not at all, sir. I just wanted to  
22 make some remarks about the potential scope of the exercise  
23 because I apprehend at the moment we are really focusing on  
24 downstream pass on. But could I just show you momentarily,  
25 just so we have the landscape here, that annex B to our

1 skeleton argument is the easiest way to develop or to  
2 identify these points. So it should be right at the back of  
3 the Daimler skeleton argument, annex B, which is in  
4 landscape form.

5 THE PRESIDENT: It is at tab 11 of our skeleton  
6 bundle.

7 MR. HARRIS: I am pleased to hear that. You are  
8 one with the counsel team in having a numerated bundle and  
9 skeleton. It should look like this, a landscape annex B.

10 THE PRESIDENT: Annex B.

11 MR. HARRIS: The proposal is that the Claimants  
12 talk about what they do downstream of themselves. So, for  
13 example, do they rent or lease out their trucks or use their  
14 trucks to carry oranges or washing machines or  
15 what-have-you?

16 If you have regard to this annex, what you will  
17 see is there is a quite a complicated picture of upstream  
18 pass on issues. If I could take on row number 1, a truck  
19 can, of course, be bought directly from an OEM. 1A is very  
20 simple. As we have heard just in passing before from  
21 Mr. Pickford, it can be bought from somebody who is not an  
22 OEM and it can be bought -- so the OEM can sell to 1B, the  
23 independent dealer, and the independent dealer can sell the  
24 truck to the Claimant customer.

25 Then an alternative would be what we have called

1       third parties, of whom an example is -- what you may not be  
2       that familiar with is what we call in the industry body  
3       builders. So obviously, the OEM is my client. We  
4       produce the actual bare truck, the chassis cab, the engine,  
5       the seating. Sometimes there is a bed in there and  
6       what-have-you, but nearly all of these trucks then have to  
7       have a body of some kind. Some get produced rigid and with  
8       bodies on, but some of them have articulated.

9                 Anyway, the point being that in the industry,  
10       quite often -- or certainly what does happen, and I would  
11       not like to say quite how often, is that the third-party  
12       body builder will buy the bare truck independently and then  
13       sell to the Claimant customer the truck comprising both the  
14       chassis cab, the engine and the body. This is bought from  
15       the body builder.

16                Then a further alternative is that instead of  
17       buying from the OEM, you can buy, of course, from a rental  
18       leasing firm under rental and leasing terms. The point  
19       being for all of those on that first line, that you have a  
20       certain level, sometimes more than one level, of upstream  
21       pass on before you even reach the Claimant.

22                So, for instance, a good example is combining 1B  
23       and C together, you could easily have an independent dealer  
24       who has bought the bare truck from the OEM, but then the  
25       independent dealer sends it on to yet another independent

1 upstream person, the body builder. They build the body and  
2 that person sells it on to the Claimant entity. This is all  
3 upstream of the Claimants. What we have always been keen to  
4 try to identify, hopefully for the benefit of the Tribunal,  
5 is that these are issues as well.

6 Then there is a further layer of complexity. If  
7 we look down the table, you see in row number 2 that what  
8 often gets sold is not just the bare truck and it is not  
9 just the bare truck with the body. There are many other  
10 additional elements to the sales transaction. Taking, for  
11 instance, 2A, you can have a mounting, but you can also  
12 have, and you do have -- I am not just speculating here.  
13 This has been very carefully put together, this table. You  
14 do have service contracts and extended warranties and you do  
15 have buy backs. Those sorts of variants can differ and they  
16 tend to differ depending on who the upstream person is from  
17 whom you bought that truck from in the first place.

18 Obviously, for example, if you go across to 2D,  
19 the numbers that are associated with, for example, buying  
20 from a rental leasing firm a truck with a body that has a  
21 service contract and an extended warranty, you can see how  
22 the numbers have to be slotted into the rental leasing  
23 number stream. That is different from the way it would be  
24 done if you just sold, say, a five-year repair and  
25 maintenance contract.

1           The point being there, sir, that there are not  
2           only these different upstream levels, but that how they then  
3           manifest themselves in terms of numbers can and does differ  
4           across these various different bundled elements of the  
5           purchase transaction.

6           Then I am going to keep this as brief as I can,  
7           but line 3 adds another layer of complexity, which is that  
8           when you "purchase" the truck, you can do so in any number  
9           of different ways and not that just you can, but you do in  
10          the real world. So you can have a cash outright purchase,  
11          but many people do not do that. So you can have various  
12          different types of leasing options and there are all manner  
13          of different types that I've identified.

14          I will not go through them now although, further  
15          details are provided on page 2 of the schedule. You can  
16          have financing of various different types. The point being,  
17          and the reason I raise this now while we are on the subject  
18          matter of pass on, is because what we are keen to do is  
19          identify those situations, much like you have been talking  
20          about for downstream pass on, in which it is properly  
21          capable as a matter of law, perhaps on the summary judgment  
22          basis that you have previously identified.

23          But in other words, it is common that there are  
24          going to be, across the claims, different types of upstream  
25          purchase transaction as well as downstream purchase

1 transaction. So, for instance, is it right that as a matter  
2 of law or is it properly capable of being argued on some  
3 representative or illustrative points or some amount of  
4 disclosure that an overcharge that may or may not have taken  
5 place at the OEM level can go through a body builder through  
6 a dealer and then on to a Claimant? Can that happen? Is  
7 that properly pass on or mitigation and/or can the  
8 overcharge that happened at the OEM level --

9 THE PRESIDENT: Mr. Harris, I understand what you  
10 are saying. There is upstream pass on which the Claimants  
11 will have to show, but that is simply a question -- I do not  
12 see how this is in any way a question involving any law. It  
13 is purely a question of fact. They have to show that even  
14 if at point 8 in your table there was an overcharge, that  
15 actually, in the price they paid in D for what they got  
16 included all or some part of the overcharge. It is still a  
17 truck that is working its way through, or the body of a  
18 truck. It is not some other product.

19 So there is no legal issue about pass on. Indeed,  
20 I think under the damages directive, there might even be a  
21 presumption, which technically does not apply to these cases  
22 under the statute, under our statute. I do not see any  
23 question of law, I think, which is quite different from a  
24 defence of pass on, where it has to meet that test  
25 articulated by the Court of Appeal.

1                   MR. HARRIS:  Sir, we are content with that.  What  
2 we did not want is a situation where the upstream part of  
3 the picture was left out of account in this consideration  
4 and it were then said at a later point, "Oh, well, you  
5 cannot -- you cannot as a matter of law have passed on an  
6 OEM overcharge in any or all or some of these ways", because  
7 that we would resist because these are the facts of life.  
8 These transactions actually occur.

9                   If what the Tribunal is saying, "No, no, no, this  
10 is a question of fact on any given circumstance", then yes,  
11 we agree.  I just wanted to make that actually clear.  We  
12 cannot have a later situation where we are having pass on  
13 issues dealt with at a preliminary stage, perhaps along the  
14 lines you have adumbrated earlier and we will take  
15 instructions on, but then after that, it is suddenly said,  
16 "Ah, yes, you cannot do this at an upstream stage.  There is  
17 some legal impediment."

18                   THE PRESIDENT:  Well, it will be for the Claimants  
19 to show that they have suffered from an overcharge and the  
20 burden is on them to prove it.  If you at some point want to  
21 say there is some legal impediment because it is too remote,  
22 you can raise that argument, but I think it is quite  
23 different from the exercise we have in mind.

24                   MR. HARRIS:  I am grateful.  Thank you.

25                   MR. PICKFORD:  I did have some submissions on a

1       rather different topic because we certainly take the  
2       Tribunal's point that there is a distinction between resale  
3       pass on, which was Mr. Harris' concern, and supply pass on,  
4       which is the Tribunal's concern.

5               THE PRESIDENT:   Yes.

6               MR. PICKFORD:   The points, however, I wanted to  
7       make on supply pass on: obviously, we appreciate that the  
8       Tribunal needs to find imaginative case management  
9       solutions.  We are concerned that a summary judgment  
10      application is not the appropriate way to address this  
11      issue.  We will certainly be saying that our pleading is not  
12      strike-able and there should be no summary judgment against  
13      it.

14              Now, if any of the Claimants on -- on each of the  
15      pass on, if any of the Claimants are willing to put their  
16      money where their mouth is and make the application, well,  
17      then that is one thing.  We can obviously respond to a  
18      properly made application.  We are obviously slightly  
19      concerned about some sort of intermediate course that does  
20      not properly reflect the fact that the burden would be on  
21      the Claimant to demonstrate our case was not properly  
22      arguable.  It may be that the Tribunal has this well in mind  
23      with whatever approach is going be taken, but what we cannot  
24      have is a sort of half-hybrid facts-based preliminary issue.  
25      If there is to be any kind of determination on this basis,

1       it needs to be the normal approach, that it is for the  
2       Claimants to demonstrate that our case is not properly  
3       arguable.

4               THE PRESIDENT: Well, that would be a summary  
5       judgment.

6               MR. PICKFORD: Yes.

7               THE PRESIDENT: It would. But we do not know -- we  
8       have not reached a concluded view, as I thought I indicated,  
9       but we thought these statements would be helpful on what is  
10      the range of factual situations we have got and is there  
11      some way of addressing this other than having a fully argued  
12      question of pass on defence in each separate trial, which  
13      might result in slightly different approaches because there  
14      will be arguments of law on what is a direct causal  
15      connection as well, given that it is the common law test.

16              MR. PICKFORD: Sir --

17              THE PRESIDENT: You saw an example that is given in  
18      the Court of Appeal from a charterparty case. No doubt the  
19      researchers of counsel will come up with other cases where  
20      things are held to be appropriate mitigation or too remote  
21      for mitigation and which is the closest analogy to our case.

22              So, we have not reached a definite view that  
23      summary judgment is the right way forward. I note the  
24      marker you have put down.

25              MR. PICKFORD: I am grateful. One further point

1 on the information. We can see that the information the  
2 Tribunal has suggested could be of some assistance. We  
3 would suggest that actually, the ultimate question is how  
4 they treat the costs of trucks, not necessarily what they do  
5 and how they use trucks. For instance, in relation to the  
6 costs of stamps, they are not using trucks, obviously, to  
7 produce stamps, but it may be nonetheless that the costs of  
8 trucks are part of the regulated costs base that the  
9 Claimants are allowed to feed through into their charges,  
10 for example, for stamps, et cetera.

11 So, obviously, the Tribunal needs to ask for  
12 something from the Claimant which is manageable. My point  
13 is essentially that the question that the Tribunal has asked  
14 may well actually leave a number of issues undetermined and  
15 not enable the Tribunal to form a view, which obviously you  
16 are ultimately -- if that is correct, then I shall succeed.

17 THE PRESIDENT: Yes.

18 MR. PICKFORD: It is helpful to make that  
19 observation now.

20 [The Panel conferred]

21 THE PRESIDENT: Thank you, Mr. Pickford, that is  
22 helpful. We think probably the right thing to do is to say  
23 the Claimants can put in their statement and any other  
24 matters that they consider may be relevant to the likelihood  
25 of pass on. We will not order any specific thing to be

1 included and make clear we are not expecting a fully argued  
2 case on pass on, just if there are any particular headline  
3 points such as the ones Mr. Ward made, they can be included  
4 in your statements.

5 Then there is the question of how soon that can be  
6 done. Ms. Demetriou, you have a lot of Claimants in  
7 different circumstances, so I do not know if the end of  
8 January is possible.

9 MS. DEMETRIOU: I am getting nods behind me.  
10 I think that should be possible. If, on reflection, we  
11 think it is not, we will --

12 THE PRESIDENT: End of January. Liberty to apply.

13 MS. DEMETRIOU: Yes.

14 THE PRESIDENT: Obviously, you can group. In many  
15 cases, I think your Claimants are just subsidiaries of the  
16 same group in different countries doing the same thing. So  
17 it may be that for these 65 Claimants, this is the position.  
18 Thank you.

19 The next issue we raised is the English  
20 Limitation Act and section 32. We have seen what you all  
21 said. We agree that, on reflection, it is not appropriate  
22 for a preliminary issue.

23 The next issue was the range of matters, such as  
24 the tax consequences, the interest rate, and in the VSW  
25 cases, the expenses of investigating.

1           Where a matter arises only in one case, like VSW,  
2           it is not then a common issue across the cases and,  
3           therefore, the incentive for any preliminary issue is less.  
4           We think it can be reserved for later consideration and all  
5           of these other matters also we think can be reserved for  
6           later consideration and we do not want to address those now.

7           The next one, however, that has arisen is the  
8           scope of the product. It seems to raise a rather specific  
9           point, maybe a narrow point, whether the Iveco daily range  
10          of trucks are trucks for the purpose of the decision.

11          MR. HARRIS: Sir, also the Mercedes --

12          THE PRESIDENT: Yes, the Mercedes-Benz Sprinter  
13          vans are trucks within the definition in the decision.

14          MR. HOSKINS: Possibly road sweepers and car  
15          transporters.

16          THE PRESIDENT: I thought what was said on your  
17          road sweepers, Mr. Hoskins, which I am sure is very helpful,  
18          which is they were trucks which were converted into road  
19          sweepers, but that was the point being made. It is not said  
20          that a road sweeper necessarily is a truck, but a truck was  
21          purchased and then something was done to it to make it into  
22          a road sweeper.

23          MR. HOSKINS: That has been said in at least one  
24          of the cases, but there are -- it is certainly not something  
25          I'd be pushing as a preliminary issue on its own, but if

1       there are preliminary issues on this issue, we would like to  
2       keep our argument.

3               THE PRESIDENT:  As regards -- we are in no position to  
4       know how significant a part of the claim are the Iveco daily  
5       range or the Mercedes-Benz Sprinter vans, but if there is a  
6       simple question, which is perhaps a question of fact, of the  
7       definition of truck in the decision and then what one is  
8       told about these particular vehicles and an argument to  
9       whether or not it is a truck within the scope of the  
10      decision, it may be that should be decided as a preliminary  
11      issue, because if it is not, then there is no point  
12      considering costs, disclosure, et cetera, et cetera,  
13      regarding those products.  So it is a sort of classic simple  
14      narrow preliminary issue.

15             MS. BACON:  Yes, sir, we agree.  I would just say  
16      this:  it is not just purely a question of fact.  It is a  
17      question of construction of the decision in the light of the  
18      relevant facts.

19             THE PRESIDENT:  Yes.  I do not know if it needs any  
20      further information from the documents underlying in the  
21      file.

22             MS. BACON:  That will be the starting point.  We  
23      have been giving this some consideration.  We may need  
24      further evidence.  We would like to think about that  
25      further, but certainly we think that that should not

1 preclude this from being determined as a preliminary issue  
2 in the appeals.

3 THE PRESIDENT: Could you remind me while I search  
4 for my chart, as well as -- you are in the Wolseley and the  
5 Veolia cases -- you are in the VSW cases and Ryder.

6 MS. BACON: Ryder.

7 THE PRESIDENT: So it does stretch across.

8 MS. BACON: Yes.

9 THE PRESIDENT: Similarly, Daimler is a Defendant  
10 in Ryder and in Dawsongroup.

11 MR. HARRIS: Yes, that is right. Last night,  
12 there was a letter reconfirming that there is an issue about  
13 Mercedes-Benz Sprinter trucks in the Ryder claim.

14 MR. PICKFORD: There is a related issue about  
15 ancillary products and the extent to which they are trucks  
16 or not, which arises in the Royal Mail claim.

17 THE PRESIDENT: Yes.

18 MR. PICKFORD: That is related to their amendment  
19 application. I want to be careful about going too far into  
20 that, but that is a very similar type of situation so far as  
21 it involves the construction of the decision and what is a  
22 truck and what is not.

23 THE PRESIDENT: It seems to us there are these  
24 various questions and it all comes down to the proper  
25 construction of the definition in the decision, in which

1 case, it probably should be, it seems to us, a preliminary  
2 issue.

3 MS. DEMETRIOU: Sir, it depends on the basis --  
4 take the Sprinter trucks. If it is the case in relation to  
5 one of those categories that they say their case is X weight  
6 and the decision says only trucks above Y weight, it is  
7 something that should be capable of agreement on the basis  
8 of correspondence.

9 I think before the Tribunal is in a position to  
10 determine whether it is worth having a preliminary issue on  
11 these points, we would like to know from the Defendants what  
12 facts they rely on, because it may well be this is all  
13 capable of being agreed without the need for preliminary  
14 issue. What we would suggest is that they produce a  
15 document which specifies the facts on which they rely, which  
16 takes these categories of trucks on their case outside the  
17 decision. We will look at that and if we resolve it, we  
18 will resolve it without a preliminary issue. It may not  
19 come down to the construction of the decision at all.

20 THE PRESIDENT: Yes, that does seem to us quite  
21 sensible.

22 Ms. Bacon, presumably that is not very difficult  
23 for you to deal with?

24 MS. BACON: Yes.

25 THE PRESIDENT: You have obviously reached a view

1 on that.

2 MS. BACON: We can do that. Obviously, we would  
3 not be setting out in detail all of the factual evidence  
4 that we would rely on if there were a preliminary issue on  
5 this, but I think we can summarise the essential facts on  
6 which we rely.

7 THE PRESIDENT: Because there will be certain --  
8 the definition is not very extensive.

9 MS. BACON: Yes.

10 THE PRESIDENT: You will explain why you have  
11 reached the view that they are not.

12 MS. BACON: Yes.

13 THE PRESIDENT: Mr. Harris, can you do that for  
14 Sprinter vans?

15 MR. HARRIS: Yes, sir.

16 THE PRESIDENT: Mr. Hoskins?

17 MR. HOSKINS: I can for my road sweepers and  
18 transporters, sir.

19 MR. PICKFORD: For completeness, it is not  
20 applicable to the construction issue that we have with  
21 Royal Mail. That is a pure construction issue. There are no  
22 further facts that need to be provided for that as far as we  
23 are concerned.

24 THE PRESIDENT: Yes. Well, perhaps we will see  
25 that tomorrow when we look at the amendment. Can that be

1 done fairly quickly?

2 MS. BACON: Sir, I am being asked for mid-January.

3 THE PRESIDENT: Yes, in that case, everyone by  
4 mid-January. So if we say about 18 January. Can the  
5 Claimants, respective Claimants, respond, can we say,  
6 four weeks later? So that will be by the 21st -- by the  
7 28th.

8 [The Panel conferred]

9 Can you respond by slightly less, 21 February?

10 MS. DEMETRIOU: We are concerned that takes us  
11 right up to the next CMC. We query really whether  
12 Ms. Bacon's clients really need the middle of January to  
13 provide an outline case of something which they must have  
14 been considering for months and months. We are providing a  
15 lot of information within the next two weeks. Why cannot  
16 they do the same?

17 THE PRESIDENT: I mean, Ms. Bacon, you have pleaded  
18 this point already.

19 MS. BACON: Yes.

20 THE PRESIDENT: Obviously somebody thought about it  
21 before they instructed you.

22 MS. BACON: Yes, that is right. We need to look  
23 at the relevant documents, at least some of them, to make  
24 sure our factual summary is based on the underlying  
25 material. As I said, it will not be all of the evidence.

1 We want to go more than just saying, you know, a one liner.  
2 Otherwise, actually, the Claimant is not going have a  
3 sensible basis on which to decide whether to accept or  
4 resist it.

5 THE PRESIDENT: Yes.

6 MR. HARRIS: Sir, it involves looking at things  
7 like specifications of trucks and where they are  
8 manufactured and sold. That bears on why one thing needs to  
9 be classified as a van as opposed to whether they are to be  
10 classified as a truck, at least a truck within the meaning  
11 of the decision. So it is not quite as simple as --

12 THE PRESIDENT: If we say 4 January, Ms. Bacon.

13 MR. HARRIS: Sir, for my part, as a bare minimum,  
14 could we have the following week, just because of the  
15 Christmas period? I am not sure whether it is being  
16 determined when the next CMC is precisely --

17 THE PRESIDENT: Well, 11 January and 8 February.

18 MS. BACON: We can live with that, bearing in mind  
19 we have the CPO hearing in December and the Christmas break.  
20 But 11 January.

21 THE PRESIDENT: You have quite a large team of  
22 people, I think.

23 MR. HARRIS: Is it envisaged this is done in  
24 correspondence rather than anything more formal? This is us  
25 telling them what we think --



1                   MR. HARRIS: I have also, on that topic, some  
2                   correspondence I want to show you when we do see the  
3                   schedule.

4                   THE PRESIDENT: Is this correspondence  
5                   Ms. Demetriou has seen?

6                   MR. HARRIS: Yes, it is all between her firm of  
7                   solicitors and mine.

8                   THE PRESIDENT: Okay.

9                   MS. DEMETRIOU: Perhaps Mr. Harris could tell us  
10                  where it is so I could look at it before he makes his  
11                  submission.

12                  MR. HARRIS: Shall I send a note down the line?

13                  THE PRESIDENT: Yes, if you like, do that.

14                  I think on that, the Hausfeld D bundles, have we  
15                  had them? Have they been put up? They have.

16                  The issue I mentioned just before the adjournment  
17                  was the liability of non-addressees of decision as  
18                  Defendants. I think in virtually every case, there is a  
19                  Defendant who is not an addressee of the decision, but is a  
20                  member of the same corporate group as companies that were  
21                  addressees. The question arising is what then is the legal  
22                  test to determine whether such a company is liable for the  
23                  infringement and its consequences? We recognise the  
24                  application of the test, whatever it may be. It may need  
25                  different answers for different particular Defendants.

1                   But determining the test is something that will  
2                   have to be done in every case and should, of course, be  
3                   a common test. It is suggested possibly that it is if you  
4                   are a member of the same economic entity, does that make you  
5                   liable? That is disputed, I think, by all the Defendants.  
6                   Is it knowledge? Is it implementation? What does that  
7                   mean, and so on?

8                   It is clearly premature to direct any sort of  
9                   issue on that. There is, as some of you will know, the  
10                  reference pending before the Court of Justice from the  
11                  Finnish Supreme Court in the damages action, which, it seems  
12                  to us, may give a ruling which will have some bearing on  
13                  this. That reference was made in December, last December,  
14                  so one would hope that maybe by the summer there will be a  
15                  judgment.

16                  Nonetheless, we think it would probably be helpful  
17                  if each Claimant or Claimant group would set out in an  
18                  additional pleading or supplementary pleading the basis on  
19                  which it contends that the non-addressee Defendant is  
20                  liable. Sometimes all that is pleaded is that they are part  
21                  of the same economic entity, but it is not clear to us  
22                  whether it is said on that basis they are liable or it is  
23                  said that that plus something else makes them liable and  
24                  what that is, and that the Defendants in their respective --  
25                  those respective actions set out their response, which may

1 be, "This is the wrong test" or it may be, "We accept the  
2 test is, for example, knowledge, but this Defendant did not  
3 know about it", so that we really understand what is the  
4 issue between the parties on this?

5 You will -- clearly, if the ruling of the Court of  
6 Justice sheds more light on it, you will be able to amend  
7 that in due course, but that seemed to us a sensible way of  
8 just trying to crystallise that point at the moment.

9 So, for the Claimants -- so Mr. Ward, you have  
10 three lots of Claimants.

11 MR. WARD: Yes. We do not object to doing some  
12 form of additional pleading, if it assists. Maybe it is  
13 useful to see how we have put it. For example, in the  
14 Royal Mail claim -- I do not know if you are working, sir,  
15 from the proposed re-amended parts. Yes, an amended has been  
16 served and a re-amended, which has not been served, and I --

17 THE PRESIDENT: Yes.

18 MR. WARD: To be honest, the only version I have  
19 been able to find is the provisionally re-amended version.

20 THE PRESIDENT: That is all I've got.

21 MR. WARD: Perhaps if we can work from that,  
22 perhaps disregarding any aspect that is still in contention,  
23 which I think we can do.

24 THE PRESIDENT: In your case, just to be -- in the  
25 Royal Mail case, I think you have actually got, is this

1 right, three of the Defendants who are not addressees?

2 MR. WARD: That is right.

3 THE PRESIDENT: That is to say the first, fifth and  
4 sixth are not addressees.

5 MR. WARD: That is right.

6 THE PRESIDENT: Yes.

7 MR. WARD: We have pleaded this in a number of  
8 different ways. We do say -- sorry, I am looking for the  
9 relevant part. If you turn to what is page 41 of the  
10 provisional re-amended draft and I will only refer you to  
11 the parts which are in the existing pleading.

12 THE PRESIDENT: Yes.

13 MR. WARD: Paragraph 22 alleges the first, fifth  
14 and sixth Defendants were aware and/or implemented, so it is  
15 implementation and/or knowing implementation, through  
16 manufacture price, sale or lease of trucks.

17 THE PRESIDENT: Yes.

18 MR. WARD: We say at 24 that the Defendants are  
19 jointly and severally liable. At 25, further, they are  
20 jointly and severally liable as being part of the same  
21 undertaking.

22 THE PRESIDENT: You plead it in a number of  
23 different ways.

24 MR. WARD: We do. Of course, I am not sure, sir,  
25 if what you had in mind was that we would expand upon those

1 kind of pleas with particulars or whether that was the level  
2 of detail you were looking for.

3 THE PRESIDENT: I think that is all I have in mind.  
4 Have you done that in every case?

5 MR. WARD: From recollection, yes. Obviously, we  
6 can double-check. It must be there or thereabouts the same.

7 THE PRESIDENT: I think Mr. Malek is suggesting we  
8 do not need more detail, but it would be just convenient if  
9 you can pull it out for me and put it in one document.

10 MR. WARD: Yes, certainly. What I would observe  
11 about this plea is that it has been constructed in a manner  
12 to try and avoid making the so-called *Provimi* point  
13 critical to the determination of the case. So that is why  
14 it has been done on a number of different bases.

15 MR. MALEK: If you look at your paragraph 22, are  
16 you saying if we take out "and/or implemented", that would  
17 still be enough, i.e., that they were just aware of it?

18 I do not understand why you have "and/or". I would have thought you  
19 want "aware of and implemented the cartel".

20 MR. WARD: There has been a debate in the case, as  
21 you know, sir, as to whether mere implementation is enough  
22 or whether it has to be knowing implementation. The plea is  
23 intended to capture both those possibilities.

24 MR. MALEK: Okay.

25 MR. WARD: It possibly is not clear in light of

1 the question you have asked. I do not think -- certainly  
2 that is the intention behind the plea. If the law turns out  
3 to be that one does not need knowledge, implementation is  
4 sufficient, that is pleaded.

5 MR. MALEK: Yes, okay.

6 THE PRESIDENT: In BT, which is in our BT core  
7 bundle, where -- in your here unamended particulars, there  
8 is no -- is it what is said is it is paragraph 21.

9 MR. WARD: Yes.

10 THE PRESIDENT: In this claim, as I understand it,  
11 the first Defendant is not an addressee, but the second,  
12 third and fourth are.

13 MR. WARD: Yes.

14 THE PRESIDENT: You say in 21 they are jointly and  
15 severally liable.

16 MR. WARD: It is paragraph 19 as well, the  
17 first --

18 THE PRESIDENT: I see. It is the same.

19 MR. WARD: Bluntly, it is cut and paste.

20 Also, over the page we have the plea at 22 of  
21 liability on the basis of being part of the same  
22 undertaking.

23 THE PRESIDENT: Yes. We need not turn it up if you  
24 tell me it is the same.

25 MR. WARD: I believe so.

1           MR. HARRIS: Sir, it is not quite the same in  
2           Dawson group and there are also a series of relevant matters  
3           raised in at least the Daimler defence by reference to how  
4           it has been put in Dawson.

5           THE PRESIDENT: Well, let us have a look at Dawson.

6           MR. HARRIS: It is paragraph 34 in my learned  
7           friend's pleading on the point in the Dawson particulars.

8           THE PRESIDENT: In Dawson, it is --

9           MR. WARD: On the way of Dawson's.

10          THE PRESIDENT: In Dawson, the fourth, the sixth,  
11          the eleventh Defendants are not addressees.

12          MR. WARD: That is right.

13          THE PRESIDENT: So paragraph 34, you say "aware of  
14          and/or implemented".

15          MR. WARD: Yes, so that is the same, and 36,  
16          jointly and severally liable. I think Mr. Harris is right  
17          that it does not actually include a plea that they are  
18          jointly and severally liable by virtue of being part of the  
19          same undertaking. Whether that is only an oversight,  
20          I cannot say.

21          THE PRESIDENT: Yes.

22          MR. HARRIS: I am sorry. I did not catch that.

23          MR. WARD: Sorry, it is my failure to read on. It  
24          actually is there. It is in 37. It alleges that each group  
25          of Defendants are jointly and severally liable as part of an

1           undertaking.

2                   THE PRESIDENT:   Yes.

3                   MR. WARD:   So I think -- I think the substance of  
4           the plea is the same.

5                   THE PRESIDENT:   Yes.   I think that is one of the  
6           questions that is raised in the Finnish reference, that they  
7           also ask the Court of Justice whether this needs to be  
8           determined as a matter of European law or national law --

9                   MR. WARD:   Right.

10                   THE PRESIDENT:   -- which is a question to which  
11           I do not know the answer.

12                   MR. PICKFORD:   Sir, would it help to see what we  
13           say in response?  We have actually said in the Royal Mail  
14           claim that the plea is not sufficiently clear and  
15           particularised.

16                   THE PRESIDENT:   Yes.

17                   MR. MALEK:   You have done that in the other claims.  
18           In the Suez claim, you say it should be struck out.

19                   MR. PICKFORD:   That is probably correct.  I was  
20           focusing initially on the claims that Mr. Ward was  
21           addressing.

22                   THE PRESIDENT:   Yes.

23                   MR. PICKFORD:   For instance, in the BT claim,  
24           which we can look at in a non-confidential form, that is  
25           bundle A, core bundle of BT.

1           THE PRESIDENT:  BT, I have what is called a draft  
2 amended defence in this bundle at tab 3.

3           MR. PICKFORD:  That is because I think it is  
4 pending -- was pending consent for us to remove our  
5 applicable law claim --

6           THE PRESIDENT:  That is right.

7           MR. PICKFORD:  -- of pleading.  So the particulars  
8 are at tab 2 and the draft amended defence is at tab 3.

9           THE PRESIDENT:  Yes.  So we are at tab 3.

10          MR. PICKFORD:  If you go to paragraph 23,  
11 paragraph 23 deals with the plea in 19, which is not  
12 actually expressed to be the basis on which they say that  
13 the first Defendant is liable, because actually, they have a  
14 heading for Defendants' liability, which comes underneath  
15 19.  But in any event, we plead to the facts there.

16          Then in the section that purports to deal with  
17 Defendants' liability for damages, you will see that at  
18 paragraphs 24 through to 26.  Essentially, what we say is  
19 that they point to the fact that there is a breach of  
20 article 101 TFEU, but they need to show that the  
21 requirements of the tort of breach of statutory duty are  
22 made out.  They have not particularised how, as a matter of  
23 law, they say we are each jointly and severally liable.

24          We go on to say that the mere fact we are an  
25 undertaking, we do not accept, means that we are jointly and

1 severally liable. So there is, we say, some deficiency in  
2 the pleading. It is not clear, at least on its face,  
3 precisely what it is that they say are the facts that lead  
4 to joint and several liability for each of the Defendants.  
5 It appears to be purely on the basis that we are all part of  
6 the same undertaking, although, as Mr. Ward now explains it,  
7 he relies on the prior paragraph, paragraph 19, to say,  
8 actually, we are also relying on that.

9 THE PRESIDENT: Well, it is equally not clear from  
10 this defence what you say is the breadth test, whether you  
11 are saying -- I mean, it is clear that you say being a  
12 member of the same undertaking is not enough.

13 MR. PICKFORD: Yes.

14 THE PRESIDENT: That is clear. But I am not clear  
15 from paragraph 23 whether you are saying if it had been  
16 implemented by the first Defendant, then it is accepted the  
17 first Defendant would be liable because, as a matter of  
18 fact, it was not, or whether you are saying even if it was,  
19 it would it not be liable.

20 MR. PICKFORD: That is quite right, sir. The  
21 reason for that is because they do not say in their plea  
22 what are the particular facts and matters that they rely  
23 upon to establish our joint and several liabilities. Their  
24 paragraph 21 of the BT claim says simply in terms, "The  
25 Defendants are jointly and severally liable for the

1       aforesaid breaches". So we have said, well, you do not  
2       explain what the particular facts and matters that you rely  
3       upon are for that plea. So in the absence of that plea, we  
4       cannot respond. Obviously, if they want to make that  
5       clearer and say, "Well, we rely on undertaking, we rely on  
6       various other points", then we can plead back to it.

7                THE PRESIDENT: But it does sound from this  
8       exchange as though it would be helpful to have a short  
9       additional plea --

10               MR. HARRIS: On that topic, can I show you some  
11       other relevant points directly on this issue. If you take  
12       this core bundle, A in Dawson.

13               THE PRESIDENT: A in Dawson. One moment.

14               MR. HARRIS: I think you may have had it open a  
15       few moments ago. Sir, you have seen Mr. Ward took you to  
16       his paragraph 34 --

17               THE PRESIDENT: Just one minute.

18               MR. HARRIS: I beg your pardon.

19               THE PRESIDENT: Dawson's particulars of claim,  
20       tab 2.

21               MR. HARRIS: Precisely. Mr. Ward took you to 24,  
22       uses the phrase "aware of and/or implemented the cartel of  
23       the sale of trucks throughout the relevant period". That is  
24       worth --

25               THE PRESIDENT: Just a minute. So tab 2 --

1 MR. HARRIS: Paragraph 34. Bundle page 19.

2 THE PRESIDENT: Bundle page 19. Paragraph 34.

3 MR. HARRIS: It might be worth highlighting:

4 "Were aware of and/or implemented the cartel  
5 through the pricing and sale of trucks throughout the  
6 relevant period."

7 So that is his claim against my client. He drew  
8 your attention, saying it was equivalent to my other  
9 pleading that I showed you, because look at 37. What they  
10 say there is the first and fourth Defendant and each of them  
11 are jointly and severally liable as they formed part of the  
12 DAF undertaking. It goes through with the other Defendants.

13 But that is the extent of that plea. Jointly and  
14 severally liable. So this is Mr. Pickford's point. The  
15 only particular then is as part of an undertaking. So it is  
16 important to see what is pleaded and then we respond to  
17 those, because we say these are very unsatisfactory and  
18 defective pleadings.

19 If you pick them up in the next tab of this  
20 bundle and if you look at my pleading at paragraph 15 on  
21 bundle page 80, what you see is we deal with paragraph 34  
22 first. It may be quicker, members of the Tribunal, if you  
23 just look at paragraph 15 rather than me read it out.

24 THE PRESIDENT: Shall we read your paragraph 15?

25 MR. HARRIS: I am grateful. Yes, please. It does

1 go over the page. Sir, (f) is important, and then --

2 THE PRESIDENT: Just a minute. In 15B(ii), the  
3 quote, "the pricing and sale of trucks", comes from where?

4 MR. HARRIS: From paragraph 34, because what is  
5 said --

6 THE PRESIDENT: I see. "To the pricing."

7 MR. HARRIS: Yes, that is key, sir, because we can  
8 only plead back to what is said to us. What is said in the  
9 case, at the moment -- this is, of course, pre-the  
10 Tribunal's suggestion of making their case clearer. What is  
11 said at the moment is limited to awareness and  
12 implementation in one manner through the pricing and sale of  
13 trucks. What we have said --

14 THE PRESIDENT: I understand, but I am not sure  
15 what --

16 MR. HARRIS: Just to finish off the piece on  
17 pleadings, and then I have another substantive point to make  
18 as well about what we can do in response, so please allow me  
19 to do that in just a moment, but on Mr. Ward's paragraph 36,  
20 you will see in this bundle of pleadings, internal bundle,  
21 page 81, we respond to that as well.

22 So this is not a plea of awareness or knowledge of  
23 implementation. This is a different plea of joint and  
24 several liability. Mr. Ward has now attempted to lump them  
25 together, but we say, well, that is not how he is pleading.

1           But in any event, we essentially take the same  
2 point as Mr. Pickford. If you see our paragraph 17, not  
3 admit the liability, but 17B, no basis is identified or  
4 pleaded upon which MBUK can be said to be jointly and  
5 severally liable with any undertakings, liable to be struck  
6 out. For instance, you would normally expect in a jointly  
7 and severally liable plea, which is what this is, something  
8 along the lines of, "There is a common design or purpose and  
9 you have engaged in it in common, which is why you are  
10 jointly and severally liable", but that is absent.

11           MR. MALEK: You say that such a bare assertion  
12 should be struck out now.

13           MR. HARRIS: Well, we recognised that it was  
14 likely to come up. We thought it would then be further  
15 particularised. We do not mount a separate strike-out application,  
16 though we could on the face of it with this, because by itself, just  
17 forming part of an undertaking by itself, which is how it is  
18 pleaded, is insufficient. That is why we say liable to be  
19 struck out.

20           MR. MALEK: I understand.

21           MR. HARRIS: What we do is we respectfully endorse  
22 the suggestion being effectively proposed now, which is this  
23 entire set of pleadings on awareness, knowledge,  
24 implementation, joint and several liability, they need to be  
25 pleaded out properly so the entire case is set out. It is

1 not good enough for Mr. Ward to say, "Well, look I have  
2 pleaded it out in 34 and 36". In the respects that  
3 Mr. Pickford has identified and the respects we have pleaded  
4 out in some detail, that is not sufficient and it is not, in  
5 some cases, liable to be struck out. What we say --

6 MR. MALEK: He is waiting for disclosure before he  
7 can particularise.

8 MR. HARRIS: Well, that is an interesting point,  
9 Mr. Malek.

10 MR. MALEK: That is why I raise the strike out  
11 point. If it does not raise a case, then you strike it out.  
12 If it raises enough of a case that it is arguable, you get  
13 disclosure further down the line.

14 MR. HARRIS: Well, what we say is there are  
15 certain legal issues such as those which we have gone to  
16 some trouble in 15A that could be properly particularised.  
17 Now is the opportune moment to do that. Are you seriously only  
18 relying upon "the pricing and sale of trucks"? That is the  
19 means through which you have awareness or implementation.  
20 Fair enough. If that is all you are doing, fine. But let  
21 us be totally clear before we move on in this case. If you  
22 are not saying only that, tell us what else. By the way,  
23 tell us what you mean by the pricing and sale of trucks. In  
24 what way is that knowledge and implementation of what you  
25 say is the infringement?

1           THE PRESIDENT: Well, I think you may be misreading  
2 the pleading, with respect. It is not the way I read it.  
3 I think what is said is they were aware of the cartel, not  
4 through the pricing, they were aware of the cartel and they  
5 implemented it through the pricing and sale of trucks. That  
6 is the way I read it.

7           MR. HARRIS: Well, sir --

8           THE PRESIDENT: So the knowledge, it is not  
9 knowledge by selling trucks. It is knowledge through what  
10 they actually knew, which is not particularised because they  
11 have not had disclosure. The implementation is that they  
12 were the people actually selling the product. That is the  
13 way I read it.

14          MR. WARD: Well, sir, that is exactly what it is  
15 intended to mean.

16          THE PRESIDENT: Yes. Well, it is not suggested  
17 that knowledge can constitute the sale of a truck.

18          MR. MALEK: Although the issue at paragraph 37 of  
19 the particulars of claim, which is responded to at  
20 paragraph 18 of the amended defence -- of the defence. They  
21 are saying they are jointly and severally liable just  
22 because they are part of the undertaking. You say that is  
23 not enough.

24          MR. HARRIS: I am grateful, Mr. Malek. That is an  
25 additional relevant part of my pleading. The point there on

1       your point, with respect, Mr. President, is that again, if  
2       it is to be limited to through the pricing and sale of  
3       trucks, well, that's fine, but that should be crystal clear  
4       now, and/or what the pricing -- what exactly that means.  
5       What aspects of the pricing and sale of trucks are said to  
6       give rise to this plea? How did you implement the cartel  
7       through the pricing and sale of trucks? These are the  
8       questions that we have asked.

9               My point is more these are illustrative. My point  
10       is that we respectfully endorse the notion that the  
11       Claimants as a group, as similar issues arise in the other  
12       cases as well, that they need to be clear as to what  
13       propositions of law they are advancing on awareness and  
14       knowledge, implementation and joint and several liability.  
15       That is not sufficiently clear. Some of them are demurrable  
16       as they are, but rather than have fairly arid strike outs --

17               THE PRESIDENT: Well, I think it would -- you need  
18       not go on pushing at the path we have suggested. A slight  
19       mixing of metaphors. But we think it would be helpful to  
20       have a clear plea.

21               One thing is clear: it is said in the alternative  
22       that membership of the same undertaking establishes joint  
23       and several liability. That is disputed as a matter of law and that  
24       is a pure legal point.

25       That is one issue, but the other alternative or additional

1 bases on which liability is alleged are not as clear as they  
2 might be and it would be helpful to have it set out.

3 MR. WARD: Sir, we are of course happy --

4 THE PRESIDENT: You do not have to spend time  
5 trying to work out quite what has been said. Put in a short  
6 additional pleading. We are not expecting you to plead  
7 particulars of knowledge at this point.

8 MR. WARD: How can we?

9 THE PRESIDENT: Exactly.

10 MR. WARD: Mr. Harris' submission --

11 THE PRESIDENT: We are not expecting you to. That  
12 is made clear. I think it would be helpful to have it in a  
13 separate document.

14 MR. WARD: Just to be absolutely clear, because,  
15 of course, we want to make sure we do what the Tribunal is  
16 asking us to do, you are not asking us to particularise the  
17 facts of knowledge or implementation, which inevitably will  
18 have to be derived from the evidence and derived, of course,  
19 from the disclosure of this secret cartel. So that, I am  
20 taking, you are not asking us for.

21 THE PRESIDENT: Yes.

22 MR. WARD: You want us to have, I understand, it  
23 explained what the alternative bases are on which we are  
24 asserting liability of non-addressees, with a little bit  
25 more clarity to what are the legal propositions that are

1       advanced. Have I understood correctly what we are being  
2       asked for?

3               THE PRESIDENT: I think on implementation you may  
4       be able to explain, argued as you have, what you mean by  
5       implementation. Knowledge one can understand and details of  
6       knowledge you are not able to get. If you say the selling  
7       of the cartelised product at an elevated price amounts to  
8       implementation, that is a clear assertion.

9               MR. WARD: Sir, we will definitely be able to go  
10      that far, but I will accept now that whatever we say, we  
11      will say this is to be revisited when we get disclosure in  
12      this case. Once we see what the cartelists were actually  
13      doing, we will be in a better position to flesh out the  
14      case.

15              MR. MALEK: As long as we get some bones.

16              THE PRESIDENT: It will give us the bare bones and  
17      it will enable the Defendants to say, as they have already  
18      said, with regard to the assertion that membership of the  
19      undertaking establishes liability, or as a matter of law, or  
20      it does not, that is very clear. They may say mere  
21      implementation by sale without knowledge, also as a matter  
22      of law, does not, or they may not say that, I do not know.  
23      But at least we will be clear on what everybody's position  
24      is.

25              MR. WARD: Sir, we are more than content to do

1           that.

2                       MR. HARRIS:  A few moments ago now you suggested  
3           what the Defendants might do in response.

4                       THE PRESIDENT:  Yes.

5                       MR. HARRIS:  We are very concerned about the  
6           second limb as a response.  The first limb all about these  
7           legal issues and the scope, they are questions of law.  But  
8           Mr. Ward has effectively made the response on the second  
9           limb by himself.  He said:

10                      "Inevitably have to be derived from the evidence  
11           in the disclosure and I can [and I am quoting him] flesh out  
12           the bare bones when we get disclosure."

13                      In your first iteration of the proposal, it was  
14           that the Defendants would not only respond on the issues of  
15           law, but then would identify as a matter of fact whether  
16           there was knowledge of this type or that type or  
17           implementation, if I understood you correctly.  But the  
18           problem with that --

19                      THE PRESIDENT:  I think that is probably premature.

20                      MR. HARRIS:  I am grateful.  That was my point.  
21           That cannot be done pre-disclosure, which seems to be  
22           entirely common ground.

23                      THE PRESIDENT:  Yes.

24                      MR. HARRIS:  I am grateful.

25                      MS. DEMETRIOU:  Can I take you to our pleading on

1       this point so we are clear on what it is the Tribunal wants  
2       us to do?

3               THE PRESIDENT:   Just a moment.   We have got a lot  
4       of bundles.

5               MS. DEMETRIOU:   Yes.   I was going take you to the  
6       Veolia, the A2, Hausfeld A2 bundle, which is the Veolia  
7       claim, behind tab 2.

8               If you start at paragraph 4, you will see there  
9       that the decision was addressed to all of the Defendants  
10      save for the eighth and thirteenth.   In this particular  
11      claim, we are talking about two non-addressees.

12              Then skipping forward in the particulars to  
13      page 12 and 13, so under the heading "Breach of statutory  
14      duty", you see there on page 13 at paragraph 53:

15              "The eighth Defendant and the thirteenth Defendant  
16      implemented the said agreements and/or concerted practices  
17      between these [and the dates are given] by selling trucks to  
18      the Claimants or one or more of them.   To the extent  
19      necessary, the Claimants inferred from the circumstances and  
20      allege that such acts of implementation were engaged in by  
21      the eighth and thirteenth Defendants in the knowledge they  
22      were acting in furtherance of and/or consistently with the  
23      unlawful agreements or concerted practices.   The eighth  
24      Defendant is liable because it formed part of the same  
25      undertaking as one or more of the MAN addressee Defendants.

1       Alternatively, because the knowledge of the fifth and sixth  
2       Defendants is to be attributed to it."

3               Then you have a plea in similar form at 54B in  
4       relation to the thirteenth Defendant.

5               So, sir, pausing there, in my submission, this is  
6       a clear plea. We have pleaded two alternative bases on  
7       which we say the non-addressees are liable for the  
8       infringement. We are not in a position to plead further  
9       particulars at the moment of the implementation or the  
10      knowledge. In my submission, I do not think there is  
11      anything more we can do in terms of elucidating this plea at  
12      this stage. Nobody has applied to strike it out. The  
13      Defendants have all pleaded to it.

14                               [The Panel conferred]

15               MR. JUSTICE HILDYARD: Your 54a is two parts, is this  
16      right? You say the mere fact of being within the undertaking is  
17      sufficient --

18               MS. DEMETRIOU: We do.

19               MR. JUSTICE HILDYARD: -- as a matter of law.

20               MS. DEMETRIOU: That is right.

21               MR. JUSTICE HILDYARD: The fact that you are part of the  
22      undertaking means, in law, anything you do is in implementation  
23      knowingly of the cartel.

24               MS. DEMETRIOU: No, we say that you do not need,  
25      on that basis, to show knowing implementation. This is the

1       so-called *Provimi* point. If you are part of the  
2       same undertaking, you do not need to show knowing  
3       implementation. To put it another way, it is imputed. It  
4       is the *Provimi* point, but we have not just relied  
5       on the *Provimi* point. We have also pleaded in the  
6       alternative knowing implementation.

7               MR. JUSTICE HILDYARD: In the alternative, what do you say  
8       is  
9       the method of attribution, other than the fact of being in  
10      the same undertaking?

11             MS. DEMETRIOU: The plea at 53 --

12             THE PRESIDENT: The plea at 53 --

13             MS. DEMETRIOU: -- is that they sold the trucks  
14      and that constituted the implementation.

15             THE PRESIDENT: The implementation.

16             MS. DEMETRIOU: Yes.

17             THE PRESIDENT: I think what Mr. Justice Hildyard  
18      is asking is you say "alternatively" because the knowledge  
19      is to be attributed to it.

20             MS. DEMETRIOU: But --

21             THE PRESIDENT: What is the basis of attribution of  
22      knowledge, not implementation?

23             MS. DEMETRIOU: Sorry, 53 deals with knowledge  
24      too. So you see at 53 we have implementation and then we  
25      plead that they implemented in the knowledge that they were

1 acting in furtherance of the cartel. So that is at 53. We  
2 do not derive that -- 54 deals with the same undertaking  
3 point, but at 53 we have pleaded knowledge and we say that  
4 we derive that or infer that from the circumstances. Once  
5 we get disclosure, we will plead --

6 THE PRESIDENT: But that is actual knowledge.

7 MS. DEMETRIOU: That is actual knowledge.

8 THE PRESIDENT: In 54B, it is imputed knowledge.

9 MS. DEMETRIOU: Yes.

10 THE PRESIDENT: What is the basis of imputation?  
11 Is it simply because they are part of the same undertaking  
12 or is it something of that particular relationship?

13 MS. DEMETRIOU: So sorry, I understand the  
14 question now. I am sorry for being slow. It is precisely  
15 because they are part of the same undertaking. That's the basis which  
16 we put it there.

17 MR. JUSTICE HILDYARD: It is really redundant, the  
18 alternative.

19 MS. DEMETRIOU: It might be redundant.

20 MR. JUSTICE HILDYARD: Is it or not?

21 MS. DEMETRIOU: Yes. So the first point -- the  
22 first point in 54A is a complete attribution of liability  
23 because of the single undertaking point. So that is the  
24 first plea in 54A. Then we have said, alternatively,  
25 knowledge is to be attributed because of the corporate

1 relationship. So we put it in two ways. So if we are right  
2 on the first limb, we do not need the second limb.

3 MR. JUSTICE HILDYARD: Well, not only that, but the second  
4 limb is saying exactly the same, but simply explaining why  
5 you are saying what you say in the first part of it. It  
6 adds nothing.

7 MS. DEMETRIOU: Yes, I think, sir, I do understand  
8 the difficulty that you are pinpointing. I think the reason  
9 that we have pleaded it this way is because there is a  
10 debate, as somebody has mentioned, as to whether or not  
11 implementation alone is necessary. Sir, this is on the 53  
12 plea at the moment --

13 MR. JUSTICE HILDYARD: Yes.

14 MS. DEMETRIOU: -- or whether knowledge is also  
15 necessary. In 53 we have pleaded that knowledge is to be  
16 inferred from the circumstances. The reason that we have  
17 the alternative plea at 54A is to assist us if we cannot  
18 infer it from the circumstances. We say if you need knowing  
19 implementation, you can infer the knowledge part of it from  
20 belonging to the same undertaking, so that is how we put it.

21 THE PRESIDENT: Yes. I think it needs a bit of  
22 teasing out, but I think I follow what you are saying.

23 MR. JUSTICE HILDYARD: To put it another way, is there  
24 anything beyond the fact of being part of the undertaking  
25 which sustains the second part of 54A?

1 MS. DEMETRIOU: No. No, that is correct. There  
2 is not.

3 MR. JUSTICE HILDYARD: So it is redundant.

4 THE PRESIDENT: Well, I think if I have understood  
5 what you are saying, it is either, you say, being part of  
6 the same undertaking in itself establishes liability or  
7 alternatively, if it does not and if one needs  
8 implementation and knowledge, you can get the knowledge part  
9 from the fact that you are part of the same undertaking.

10 MS. DEMETRIOU: Sir, that is exactly right.

11 THE PRESIDENT: So it is being used to support 53.

12 MS. DEMETRIOU: I think that is right.

13 THE PRESIDENT: I appreciate what you have said.  
14 If we are to consider how to advance this, and given the  
15 number of pleadings we have got, it would be very helpful to  
16 have it isolated and to have it expanded and perhaps clarify  
17 it in answer to our question and have the responses from the  
18 Defendants also clarified so it is in a separate document we  
19 can consider, because what we have to then think is how can  
20 we resolve the legal issues, if possible, in a way that is  
21 common to all cases and produces a consistent result, even  
22 if we cannot resolve the factual issues of actual knowledge,  
23 which, of course, will depend on a lot of disclosure and so  
24 on?

25 MR. MALEK: If we look at the amended defence at

1       tab 7, you will see that at paragraphs 24 and 25, they make  
2       various points about the pleading, including at 25 they say  
3       that the allegation of knowledge of the ninth and twelfth  
4       Defendants to be attributed to the thirteenth Defendant is  
5       insufficiently particularised, no basis for any such  
6       attribution is being pleaded. If you can try and cover that  
7       in your document, that would be helpful.

8               THE PRESIDENT: I think you have now told us the  
9       only basis of attribution is, in fact, that they are part of  
10      the same undertaking.

11             MR. MALEK: It was not clear then.

12             THE PRESIDENT: It was not clear to us and it was  
13      not clear to some of the Defendants either.

14             MS. DEMETRIOU: Well, sir, to that extent, we can  
15      make that clear. We have now elucidated it in the course of  
16      discussion. We can make it clear. We are not in a position  
17      to provide further particulars at this stage.

18             Can I show you -- may I show you the slightly  
19      different --

20             THE PRESIDENT: Yes.

21             MS. DEMETRIOU: May I show you the slightly  
22      different claims, because they were brought against fewer  
23      Defendants in Suez. I think I only need to take you to Suez  
24      because the Wolseley claim is in materially the same form,  
25      but it is bundle A, Hausfeld A1 and again behind tab 2.

1 THE PRESIDENT: Just let us get our bundles.

2 MS. DEMETRIOU: Sorry.

3 THE PRESIDENT: So there is only one non-addressee,  
4 the fourth Defendant.

5 MS. DEMETRIOU: Exactly. So we deal with the  
6 fourth Defendant, you see, at paragraph 16 on page 5. We  
7 say that they form a single undertaking. So you have the  
8 plea there that they are a single undertaking.

9 Then moving forward to page 10, you see at 37 the  
10 agreements which were entered into by addressees and/or  
11 undertakings of which they formed part constituted breach of  
12 statutory duty.

13 Then you see at 39, further or alternatively, the  
14 fourth Defendant implemented the said agreements by selling  
15 trucks and, again, a plea in similar form to the last one  
16 that you saw. Then you have the plea of joint and several  
17 liability at 48 and 49.

18 We do suggest again that it is tolerably clear  
19 from our pleading that two allegations were advanced. The  
20 first is that D4 is liable because it formed part of the  
21 same undertaking as the addressees and the second is knowing  
22 implementation.

23 THE PRESIDENT: Yes.

24 MS. DEMETRIOU: Wolseley claims that the same  
25 Defendants were sued, so I do not need to take you to it

1 separately.

2 MR. HARRIS: While I've got Wolseley 44 in front  
3 of me --

4 THE PRESIDENT: Wolseley 44.

5 MR. HARRIS: Yes, which is said to be identical,  
6 but I apologise if I've got this wrong, but I do not --

7 THE PRESIDENT: We do not have it in front of us.  
8 You want us to look at Wolseley 44.

9 MR. HARRIS: We would --

10 MS. DEMETRIOU: It is always interesting to hear  
11 Mr. Harris, but we have not actually sued his client in this  
12 case, so it is really not a point for him to take. If he  
13 has -- if the UK Daimler entity has been sued, then that is  
14 the fault of one of the main Defendants who have brought  
15 them in as a part 20 and not our pleading.

16 MR. HARRIS: Sir, so paragraph 44 is in tab 2. As  
17 far as I can tell, it does not have their "we are all part  
18 of the same undertaking" point at all.

19 MS. DEMETRIOU: It is 42. It is the same. It is  
20 in exactly the same form. It is 42.

21 THE PRESIDENT: Well, this will all be dealt with  
22 when it is put into a separate document. If anyone wants to  
23 say your separate document is inconsistent with your  
24 pleadings, they can say so. We will assume it will not be.  
25 I think that will just be helpful.

1                   Timing, for Mr. Ward and Ms. Demetriou, that is  
2 not going to take very long. 14 days?

3                   MS. DEMETRIOU: That is ample.

4                   THE PRESIDENT: Yes, and 14 days to respond.

5                   MR. HOSKINS: There is quite a knotty legal issue  
6 for us to consider there. As you will be aware, it has been  
7 in front of a variety of courts up to the Court of Appeal,  
8 and there is, unhappily, not a great deal of consistency  
9 between them. We have got the CPO hearing. I know some of  
10 the solicitors sitting behind us are aware of the mounting  
11 tasks they have, so if I could ask for even just 21 days.

12                   THE PRESIDENT: Well, 21 days probably takes us to  
13 Christmas, so if we say -- it will not make -- if we say  
14 9 January.

15                   MR. HOSKINS: I'd be happy with that. Thank you,  
16 sir.

17                   MS. BACON: The issue also arises in Ryder.  
18 I think it is also a question for Mr. Brealey.

19                   THE PRESIDENT: You are quite right.

20                   MR. BREALEY: Can I, first of all, go to Ryder A.

21                   THE PRESIDENT: Just a minute. Can we just --

22                   MS. BACON: Sir, I am not asking to have a debate  
23 about what has been or has not been said. We have had that  
24 debate.

25                   THE PRESIDENT: You are quite correct that

1 I overlooked Ryder. Is there a problem about making the  
2 same order in Ryder?

3 MR. BREALEY: No.

4 THE PRESIDENT: Well, it will cover Ryder as well.  
5 So it covers every case. I think I did say, in fact, that  
6 in every case a non-addressee has been sued.

7 Then we will see what we can do at that point. As  
8 I say, we might need to wait for the Court of Justice's  
9 ruling.

10 That concludes that. Are you in a position now,  
11 Ms. Demetriou, to go back to foreign law?

12 MS. DEMETRIOU: Sir, yes. What we have got is the  
13 front page of one of the spreadsheets. They are very  
14 voluminous. I thought we could show you the form of what we  
15 have provided and then we can provide, obviously, anything  
16 that the Tribunal -- we can provide this in full to the  
17 Tribunal. Can I make my submissions first on it?

18 THE PRESIDENT: Yes. Do you want to pass that up?

19 MS. DEMETRIOU: Yes, and across. (Same handed)

20 So what the Tribunal has here is the first page  
21 and you need to look at both sides because it is a  
22 spreadsheet with lots of columns.

23 THE PRESIDENT: Yes.

24 MS. DEMETRIOU: It is the first page of Veolia's  
25 response for further information made by Scania. The

1 position is that we have provided responses to all of the  
2 Defendants that cover all of the claims. So what you see,  
3 first of all, is all the trucks, or almost all the trucks,  
4 we think all the trucks, that are subject to the claim are  
5 listed here.

6 THE PRESIDENT: So the left-hand column, the  
7 Hausfeld ID.

8 MS. DEMETRIOU: Yes, I think that must be an  
9 internal --

10 THE PRESIDENT: That is internal.

11 MS. DEMETRIOU: Yes. Then you have whether it is  
12 purchased or leased.

13 THE PRESIDENT: Where do we find the VIN number?

14 MS. DEMETRIOU: Yes, that is over the page. You  
15 have the VIN number --

16 THE PRESIDENT: 2.7.

17 MS. DEMETRIOU: -- and, indeed, the registration  
18 number. Back on the first page, you have the purchasing  
19 entity and then the seller or lessor. There are a number of  
20 other columns, including purchase price, which you can see  
21 in respect of which there are gaps. So there are some gaps  
22 in these spreadsheets.

23 The reason that the information has been provided  
24 in this form is that this is the format that the Defendants  
25 asked for it in. So they provided us with the table and we

1 completed it. We have never had a request for different  
2 information or different information to be provided in a  
3 different form. This is what they asked for.

4 Now, in response to Mr. Harris' point that this  
5 only constitutes readily --

6 THE PRESIDENT: Just one minute. So this will  
7 be --

8 MS. DEMETRIOU: So can we --

9 THE PRESIDENT: In which case is Onyx a Claimant?

10 MS. DEMETRIOU: This is Veolia.

11 THE PRESIDENT: This is Veolia.

12 MS. DEMETRIOU: Yes, Veolia's response to Scania's  
13 RFI.

14 THE PRESIDENT: Onyx is one of the Claimants.  
15 I see. It is Onyx. Although, can you help me? Looking at  
16 the Veolia claim --

17 MS. DEMETRIOU: Yes.

18 THE PRESIDENT: -- is Onyx UK Limited a Claimant?  
19 I am looking at your amended consolidated particulars of  
20 claim.

21 MS. DEMETRIOU: Yes.

22 THE PRESIDENT: Schedule 1.

23 MS. DEMETRIOU: I am just taking instructions on  
24 that point.

25 (Pause)

1           Sir, it may be -- so there are some examples where  
2 we have purchasing entities that are different from the  
3 Claimants. I do not know if this is one of the examples.

4           THE PRESIDENT: Who is claiming for these vehicles,  
5 then?

6           MS. DEMETRIOU: Sir, while I am waiting for an  
7 answer behind, can I take you back? Can I make a different  
8 point? I will not lose sight of that.

9           THE PRESIDENT: All I am saying is that it is not  
10 apparent from this schedule which Claimant these vehicles  
11 relate to.

12          MS. DEMETRIOU: No, I understand that point.  
13 I will come back to that point.

14          Can I take you to the DAF --

15          THE PRESIDENT: The other thing and the other point  
16 that is not clear to me is that you have identified in the  
17 Veolia claim three Scania companies.

18          MS. DEMETRIOU: Yes.

19          THE PRESIDENT: But it is not clear which of them  
20 are referred to when you say Scania. Can you help me: how,  
21 if it is Keltruck Limited, is that said to be a downstream  
22 reseller, or what is the link of vehicles that were  
23 purchased from Keltruck Limited to the claim?

24          MS. DEMETRIOU: Sir, if that is information -- so,  
25 sir, it may be that I cannot answer all of these questions

1       now, but what I am providing the Tribunal with is the  
2       information that was sought by the Defendants that we have  
3       provided. So they have never sought information  
4       specifically relating to applicable law because we can see  
5       that their submissions on that have emerged very recently.  
6       These are all Scania sales. I do not think we can identify  
7       which of the Scania entities they are from this, so this is  
8       the best we can do at the moment.

9               THE PRESIDENT: Sorry to interrupt you, if Onyx UK,  
10       which is not actually a Claimant, but there are other Onyx  
11       companies that are, and somebody has given instructions as a  
12       Claimant that, "We want to claim for these vehicles", they  
13       will presumably -- they have got some records. They will  
14       know from whom they were purchasing them.

15              MS. DEMETRIOU: Well, sir --

16              THE PRESIDENT: It may be that it is a simple  
17       question of which Scania company. I've no idea. But  
18       I thought you had told us, as this whole question arose in  
19       the context of foreign law and the question being asked,  
20       well, in which country was either the truck put in the  
21       market or the contract or purchase made, et cetera, that you  
22       were saying, "Well, we have given all that."

23              MS. DEMETRIOU: No, sir.

24              THE PRESIDENT: As I now understand it, you are  
25       saying, "We have not given it because we were never asked

1 for it".

2 MS. DEMETRIOU: May I develop my submission for a  
3 moment, please. The question about Onyx Limited, as  
4 I understand it from those behind me now, it is one of the  
5 Veolia UK entities which is at 72, 73 or 74, which has  
6 changed its name, and we can obviously provide that  
7 information.

8 On the next point, can we go back to the DAF  
9 schedule, which is at Hausfeld bundle D and it is at the  
10 back. It is in tab 14. You saw it because Ms. Bacon took  
11 you to it.

12 THE PRESIDENT: No, we did not have it.

13 MS. DEMETRIOU: You did not have it.

14 THE PRESIDENT: We did not look at it.

15 MS. DEMETRIOU: Do you recall there were three  
16 categories and she added three more?

17 MS. BACON: It is at the back of the DAF skeleton  
18 argument --

19 THE PRESIDENT: I am sorry, Ms. Demetriou. We did  
20 look at it.

21 MR. MALEK: -- we have had one over and above that.  
22 So it is VIN price plus REF. It is three things.

23 MS. DEMETRIOU: So we have got the VIN because  
24 that is -- so in terms of the information, going through the  
25 categories, whether the truck was leased or purchased new or

1 second hand or from a body builder, so you see that you  
2 have -- there is a column saying "seller or lessor".

3 THE PRESIDENT: Yes.

4 MS. DEMETRIOU: Then over the page, there is a  
5 column which says "body builder". Now, as far as these  
6 particular trucks are concerned, that column is blank  
7 because we do not have the information.

8 THE PRESIDENT: Just, sorry, pause. So it says  
9 whether the truck was leased or purchased.

10 MS. DEMETRIOU: Yes.

11 THE PRESIDENT: Here are you saying these are all  
12 purchases. Is that what is being said? Because it says  
13 "seller or lessors", it is not --

14 MS. DEMETRIOU: Do you see the first column  
15 "purchase or lease"? That specifies whether it is a  
16 purchase or a lease.

17 THE PRESIDENT: Yes.

18 MS. DEMETRIOU: Then at the end you see a column  
19 "new or secondhand". Now, that is not populated for these  
20 particular trucks because we do not have the information at  
21 the moment.

22 Then "body builder" column, likewise, there is a  
23 column. Now, I understand it, if you see the full  
24 schedules, insofar as we have been able to populate those  
25 columns, and for some we have, they are populated.

1           "From whom they acquired the truck", so we have  
2 got that there. Now, it is true that we do not distinguish  
3 between the individual companies within the corporate group  
4 in seller or lessor, but this is the information we have at  
5 the moment.

6           Then "jurisdiction in which each transaction took  
7 place", what we can do is provide the purchasing entity from  
8 which one can see the jurisdiction in which that entity is  
9 based.

10           Then in terms of the additional categories, one  
11 was "purchase price". You have that there as a column for  
12 purchase price and some of the purchase prices are given.  
13 Then VIN number, you have VIN number over the page.

14           So in terms of the work that is being done to  
15 produce these schedules, and they are voluminous schedules,  
16 this has involved very extensive searches of all the  
17 databases of the purchasing entities as well as a manual  
18 review of all the invoices that they have available.

19           As far as Veolia is concerned, Veolia has been  
20 working on this for more than two years. These are the  
21 fruits of the Veolia researches. They have had, over that  
22 time, 100 people working on it, including people that they  
23 have employed from outside specifically to review invoices  
24 manually. Hausfeld, my solicitors, have a full-time team  
25 that has been working, over the course of several months, on

1       this task alone.  Sir, we have reached the end of the road  
2       as far as populating these tables is concerned.

3               Now, Mr. Harris referred to correspondence.  
4       I apprehend that that correspondence is correspondence where  
5       his clients asked our clients for further detail, some of  
6       which was provided.  We went back to his clients saying that  
7       if we were to refine these, if we were to provide further  
8       information than this, we cannot do that at this stage  
9       because that is a full, full disclosure exercise and,  
10      indeed, we would need disclosure from third parties.  So  
11      I think we said in the course of correspondence it would be  
12      an additional five or six weeks' work at that stage, but we  
13      are not at that stage yet.  In fact, we think now that that  
14      significantly understates the position.

15             The position is that we cannot populate these  
16      tables any further now because there are gaps in the  
17      material that we have.  We need disclosure from the  
18      Defendants to fill the gaps and perhaps disclosure from  
19      third parties, in particular, independent dealerships.

20             Now, we say that this information is more than  
21      adequate for the Defendants to decide how they are going to  
22      approach the question of applicable law and plead their  
23      cases on applicable law.  If it is not, we are simply not in  
24      a position to provide further information at this stage.  If  
25      further information is needed, then we say that what that

1 demonstrates is that this is not a preliminary issue, but is  
2 a matter that must be determined at trial on the basis of  
3 full disclosure. We say there is adequate information here  
4 for the Defendants to make their case clear.

5 THE PRESIDENT: Is it clear to anyone with this  
6 schedule? For example, you have explained that Onyx UK is  
7 actually now called either 72 --

8 MS. DEMETRIOU: It is 74, I am told.

9 THE PRESIDENT: 74.

10 MS. DEMETRIOU: Yes.

11 THE PRESIDENT: The selling entity or, in a couple  
12 of cases, leasing entity, whether that is -- that is not  
13 said to be a Defendant, but it is -- that is an onward  
14 lessor, or a seller in the case of Keltruck, of a  
15 Defendant's vehicle. It is not clear at the moment what the  
16 vehicles are, or are these all under a heading that these  
17 are all Scania vehicles?

18 MS. DEMETRIOU: These are all Scania vehicles  
19 because this is a response to Scania's request for further  
20 information. What we have provided -- so all of the  
21 Defendants have asked for further information in relation to  
22 their trucks, so we have provided schedules in a similar  
23 form to all of them and they all have each other's  
24 schedules. They have all got complete information.

25 MS. BACON: I am sorry. We have not made that

1 request. We thought it was premature. We endorse the  
2 Tribunal's suggestion, respectfully. We have been able to  
3 piece together some information, some provisional  
4 information, from the other requests for information. We  
5 have not made our own requests. What we do know is from  
6 trying to collate the other spreadsheets that have been  
7 provided to other Defendants, there are very significant  
8 gaps.

9 I am just being told, for example, that although  
10 we are being shown this as a great model, on this  
11 spreadsheet alone, there were 1,835 trucks of which the  
12 purchasing entity is blank for 1,700. That is what I am  
13 being told. I am being told that 80 were not known whether  
14 they were purchased or leased.

15 We have also done some work on the VIN numbers.  
16 Across the claims, there are literally hundreds of claims  
17 for trucks, and this is across the four claims against my  
18 clients. There are hundreds of trucks for which there is no  
19 VIN number given and we have not been able to match them up  
20 to our database because we do not have adequate records to  
21 show the matching of the --

22 THE PRESIDENT: When you say the four claims, we  
23 are not concerned --

24 MS. BACON: Ryder.

25 THE PRESIDENT: Well, Ryder, there is no foreign

1 law issue with Ryder, so let us leave Ryder out of it.

2 MS. BACON: Even in relation to the Hausfeld  
3 Claimant, the VSW Claimant, I have got a list of several  
4 hundred trucks which are claimed against my clients which we  
5 have not been able to identify, many because no VIN number  
6 has been provided. That is just looking at the schedules  
7 that have been provided in pieces to the Defendants who have  
8 asked for them. Of course, not all of the Defendants who  
9 have served RFIs have asked for the same information.

10 So, for example, this one, we have a column saying  
11 "Seller or lessor", but in relation to other requests for  
12 information, that is not requested. So I think the  
13 Tribunal's original idea of having a single schedule with  
14 the same set of information across all of these is very  
15 important because at the moment, we do have a patchwork  
16 which is a very incomplete patchwork.

17 Just to respond to my learned friend's point about  
18 this all coming out through disclosure, of course, this is a  
19 precursor to disclosure because disclosure is sought in  
20 relation to many jurisdictions. Before we go off and do  
21 that exercise of going through all of the records that we  
22 have got in, say, Spain, or Sweden, we want to know how many  
23 trucks are actually being claimed for in those  
24 jurisdictions.

25 MR. MALEK: I can see there are real implications

1 for disclosure. For example, none of these Scania-sold  
2 trucks you have put a price, for example. Does that mean  
3 you do not have any records which say the price?

4 MS. DEMETRIOU: Yes, you see a price for some of  
5 them.

6 MR. MALEK: I have seen a price for --

7 MS. DEMETRIOU: We do not have the records.

8 MR. MALEK: -- the Scania ones. So you are saying  
9 that when it comes to the disclosure, you are going to have  
10 to require the Defendants to produce their records showing  
11 what price your clients paid.

12 MS. DEMETRIOU: Yes, we have got incomplete  
13 records. There is no doubt they do. It will have to be an  
14 exercise of review following the disclosure to make good  
15 some these gaps.

16 MR. MALEK: You are the plaintiff, so it is for you  
17 to prove your case. It is putting quite a burden on the  
18 defence if for so many of these trucks you have no purchase  
19 price.

20 MS. DEMETRIOU: Sir, it is very important --

21 MR. MALEK: They are going to pull out the records  
22 for every single one of these trucks in order to respond to  
23 your claim and give you that information.

24 MS. DEMETRIOU: It is very important, in my  
25 submission, to bear in mind this was a very long-running

1       cartel of 14 years that was kept secret and which was  
2       uncovered years afterwards. So the idea that my clients  
3       would all have kept comprehensive records -- we are doing  
4       the best we can and making, as I've indicated, very  
5       significant time investments and personnel investments to  
6       retrieve these records and get to the bottom of it, but  
7       there are bound to be gaps. The idea we should not be able  
8       to advance our claim because there are some gaps in this  
9       information, well, we would respectfully say that that is  
10      not a proper -- that is not the basis on which this  
11      litigation should be conducted.

12               MR. MALEK: I can understand some gaps, but there  
13      is not one price for any of the Scania trucks, which is the  
14      most --

15               MS. PICKFORD: May I --

16               MR. JOWELL: May I --

17               THE PRESIDENT: Just one moment, before anyone  
18      speaks, to collect our thoughts.

19                               [The Panel conferred]

20               Does this mean, Ms. Demetriou, when in your  
21      pleading you put an average price paid in the schedule, that  
22      is an average based on a very incomplete field because, for  
23      many of the trucks, you do not know the price?

24               MS. DEMETRIOU: I think that is right. That is,  
25      at the moment, the best particulars that we can provide

1 pending disclosure and I think we have made that clear  
2 elsewhere in our pleading.

3 May I just say also that Ms. Bacon is quite right  
4 that her client amongst the Defendants, alone amongst the  
5 Defendants, did not seek this further information, which in  
6 a sense makes it particularly odd that she is now  
7 criticising us for not having provided it since they did not  
8 ask for it. But we can, of course, provide a similar  
9 schedule in relation to the Iveco sales and we can do that  
10 by January. They have not asked for it.

11 THE PRESIDENT: Well, I do not think she is  
12 criticising you for not having provided it. She is saying  
13 it is important that it be provided.

14 MS. DEMETRIOU: Sir, yes, they have never asked,  
15 is the point. They have never asked.

16 THE PRESIDENT: Really, this has arisen in response  
17 to our indication that it should be provided and you are  
18 saying it has all been done, but you now accept it has not  
19 been done or not been provided for the Iveco trucks.

20 MS. DEMETRIOU: So in relation to Iveco, no, they  
21 never asked and so we did not provide it. We can provide  
22 it.

23 THE PRESIDENT: Yes.

24 MS. DEMETRIOU: The information, like you have had  
25 my submission, was produced in the form in which the

1 Defendants requested it. So this is the first time today  
2 that we have faced a request for information in a different  
3 form relating particularly to applicable law, but, sir, my  
4 submission in relation to applicable law is that, of course,  
5 we are very happy to provide the Iveco information and we  
6 can put it all in a single schedule, if that is easier.

7 Insofar as the Defendants have any questions about  
8 whether a purchasing entity has changed its name and so on  
9 and so forth, we can answer those questions. But in terms  
10 of the gaps, we say that we cannot do anything more at this  
11 stage to fill them, but importantly, we say that this is  
12 ample information on which they can plead their cases on  
13 applicable law. If they do not think that, having seen the  
14 entire schedules, that this is sufficient, then I suggest  
15 they write to us explaining why. Because what one does have  
16 in respect of the vast majority of the trucks that are the  
17 subject of the claim is the location of the purchasing  
18 entity.

19 Now, we do not know, because they have not  
20 explained, on what basis they are approaching applicable  
21 law, whether it is on the basis that DAF originally did,  
22 which is the centre of gravity of the cartel, or whether it  
23 is where the purchase was made. We do not know their case.  
24 So in a sense, we are rather -- we are rather in the dark.

25 THE PRESIDENT: If Iveco have set out their case --

1 MS. DEMETRIOU: If Iveco have. So if Iveco have  
2 said --

3 THE PRESIDENT: -- and it is the place of purchase,  
4 so they want to know -- and given -- I appreciate it may be  
5 difficult for you to plead a case solely on applicable law,  
6 but one may say, well, it looks as though Onyx UK are no  
7 doubt a UK company and the Keltruck and so on may be UK  
8 entities and this may be all bought in England and Wales.

9 MS. DEMETRIOU: Yes.

10 THE PRESIDENT: There will be the German ones and  
11 we know that German law is in play. So the real question  
12 will be, when we come to the other, I think, 11 countries  
13 where some of the Claimants are located, first of all, how  
14 many trucks are there in total --

15 MS. DEMETRIOU: Yes.

16 THE PRESIDENT: -- for starters? How much, if any,  
17 information have you given about purchase price? That will  
18 start to indicate what those claims might be worth if one  
19 assumes that the place of the applicable law might be the  
20 place of the purchaser. That can be explored. It will be  
21 really important to see what these schedules look like, it  
22 seems to me, for the purchasing entities that are neither  
23 English nor French -- English nor German, sorry.

24 MS. DEMETRIOU: Yes, that does appear in the  
25 totality of the schedules, of course, minus the Iveco

1 material, which we will provide. So what they will have is  
2 the location of all the purchasing entities and we say that  
3 that is sufficient in order for them to advance their  
4 position on applicable law.

5 THE PRESIDENT: Yes. Well, I think we should hear  
6 from the Defendants. We go down the line, so Mr. Pickford  
7 for DAF.

8 MR. PICKFORD: Thank you, sir. To respond to  
9 Ms. Demetriou's submission that we have ample information to  
10 plead applicable law because we have in the vast majority of  
11 cases the location of the purchasing entity. That is what  
12 is being said. If I can give one example, please, of the  
13 Suez claim and the trucks against which it is pleaded  
14 against DAF only. This is our analysis of the same sorts of  
15 spreadsheets that Ms. Demetriou has showed you.

16 THE PRESIDENT: Yes.

17 MR. PICKFORD: There are 1,141 trucks. For 1,034  
18 of those, we do not know who they bought from, even at the  
19 level of the type of purchase. So for Ms. Demetriou to say  
20 we have the location of the purchasing entity in the vast  
21 majority of cases is simply wrong.

22 MS. DEMETRIOU: I meant purchasing entity, not the  
23 entity from whom we purchased. It is a different point.

24 MR. PICKFORD: Well, in relation to the market in  
25 which it is bought, that is obviously a highly important

1 feature, we say, which is why we have asked for it in our  
2 spreadsheet.

3 THE PRESIDENT: Yes.

4 MR. PICKFORD: We do not have the country of  
5 purchase for any out of the 1,141. The lessor/seller field  
6 is blank in 1,004 and there is no purchase price in 459 of  
7 them. That is not gaps. That is sinkholes.

8 THE PRESIDENT: No purchase price in how many?

9 MR. PICKFORD: 459.

10 MR. JUSTICE HILDYARD: It is odd to rely on disclosure to  
11 repair your own accounting records, which is really what is  
12 being said. But if it is the fact that their accounting  
13 records are in disarray, what is to be done about it?

14 MR. PICKFORD: They have a big problem because, of  
15 course, and this comes out of the submission I made before  
16 the short adjournment, in the vast majority of cases, these  
17 sales were through dealers. We do not have this  
18 information. We cannot plug their gaps, their so-called  
19 gaps, certainly in a very large number of the cases. So  
20 they are going to have to work out how they are going to  
21 provide this information in order to make their claim good.

22 THE PRESIDENT: Are you saying -- just to be clear,  
23 for the 1,034, are you saying, under the column that is here  
24 headed "seller or lessor" it is just blank?

25 MR. PICKFORD: For -- yes, 1,004. Seller or

1       lessor is blank for 1,004 and who they bought from and where  
2       they were located is blank in 1,034. So in our case, it is  
3       a spreadsheet which is just largely blank.

4               MR. JUSTICE HILDYARD: That is a rather different point  
5       than

6       the applicable law point. It is rather like me going to  
7       Boots without the record of receipt and asking for my money  
8       back, sort of thing. It is a different -- it is an entirely  
9       different point. It is just a deficiency in the means  
10      whereby you can establish the facts you need to establish to  
11      make good your claim.

12             MR. PICKFORD: Well, sir, it goes to the  
13      applicable law point because we need to know --

14             MR. JUSTICE HILDYARD: Also goes to that.

15             MR. PICKFORD: Amongst others. Amongst many,  
16      indeed.

17             I think I can allow Mr --

18             THE PRESIDENT: You have got the VIN number in  
19      every case?

20             MR. PICKFORD: Not in every case, no, but that is  
21      less dramatic in terms of the shortfall. We have no VIN in  
22      18.

23             THE PRESIDENT: 80.

24             MR. PICKFORD: No, 1-8. That is not a problem we  
25      can worry about.

1           THE PRESIDENT: Your records -- some of these  
2 purchasing entities are quite small companies. Your records  
3 of -- well, include -- as I understand it, the VIN numbers  
4 is how you record of trucks.

5           MR. PICKFORD: Yes, sir, post-2004, there is  
6 potentially a chain of inquiry we can put in place for  
7 trucks purchased after 2004, but we cannot do it pre-2004  
8 because that is not the way in which those records were held  
9 and we are not able to identify trucks on that basis prior  
10 to 2004.

11           MR. JUSTICE HILDYARD: There appear to be three questions  
12 arising. The first one is the one we were on, which is  
13 applicable law. The second is whether there is the  
14 substance for the case. The third is who should do the  
15 work. If you can reverse engineer from a VIN number, you  
16 may say that it is for the Claimants to do that because it  
17 is their VIN number and their claim.

18           THE PRESIDENT: I think it is the Claimant's VIN  
19 number or the manufacturer's? Who puts the VIN number on,  
20 the Claimant or the manufacturer?

21                           [The Panel conferred]

22           MR. PICKFORD: The manufacturer puts the VIN  
23 number on.

24           MR. JUSTICE HILDYARD: You should have that.

25           MR. PICKFORD: Post-2004.

1 [The Panel conferred]

2 THE PRESIDENT: Ms. Demetriou, can you expand a  
3 bit? You say you reached the end of the road. What records  
4 were actually looked at to derive this information?

5 MS. DEMETRIOU: My understanding is that the  
6 databases of the purchasing entities were examined, were  
7 mined for information. Insofar as paper records, invoices,  
8 are kept, those have all been reviewed.

9 THE PRESIDENT: Yes.

10 MS. DEMETRIOU: -- manually. Essentially, I have  
11 given you an idea of the personnel and time involved in this  
12 endeavour.

13 THE PRESIDENT: Yes.

14 MS. DEMETRIOU: But where we have got to is a  
15 point where it is short of a full disclosure exercise and  
16 third-party disclosure applications.

17 THE PRESIDENT: Have you looked at, for example,  
18 insurance documents, vehicle insurance, maintenance records?

19 MS. DEMETRIOU: Yes, and registration documents,  
20 so a wide range of different categories of documents. So  
21 those have all been examined and we have had teams of people  
22 doing it.

23 THE PRESIDENT: Well, for Suez, although there are  
24 a very large number of Claimants, they are all in one group,  
25 as I understand it.

1 MS. DEMETRIOU: Yes.

2 THE PRESIDENT: Is there any centralised  
3 procurement in that group?

4 MS. DEMETRIOU: No, I am told it is  
5 de-centralised, it is not centralised.

6 THE PRESIDENT: But de-centralised by country?

7 MS. DEMETRIOU: By purchasing entity.

8 THE PRESIDENT: By country or down to the level of  
9 each? There are countless French companies. Each one  
10 decides on its own where to buy its trucks?

11 MS. DEMETRIOU: So they certainly, as far as  
12 I understand, hold their own records.

13 THE PRESIDENT: But in terms of procurement  
14 policy --

15 MS. DEMETRIOU: Sir --

16 THE PRESIDENT: -- because there seems to be  
17 literally something like 100-plus companies in France all  
18 within the Suez group. Each local company just buys trucks  
19 wherever it likes?

20 MS. DEMETRIOU: Sir, I do not know the answer to  
21 that.

22 THE PRESIDENT: It seems rather odd.

23 MS. DEMETRIOU: I do not know the answer to that  
24 question. I will take instructions on that. In relation to  
25 Veolia, I do have instructions that each -- that purchases

1 are country-specific. So a purchasing entity within the  
2 group in one country takes its own purchasing decisions.

3 THE PRESIDENT: Yes, I can understand that. But  
4 within country, whether they are within the same group, they  
5 take separate decisions or whether it is co-ordinated within  
6 country.

7 MS. DEMETRIOU: May I take instructions on that  
8 point, on the procurement policy? I do not know the answer  
9 offhand to that point.

10 (Pause)

11 Sir, if it is of assistance, because it is  
12 difficult to answer specific questions on the hoof, as it were,  
13 without client instructions, but if it is of assistance, what we can  
14 produce within a short period of time is a witness statement  
15 explaining exactly what we have done in terms of searching  
16 for information so far.

17 THE PRESIDENT: Well, what I think we would like is  
18 a bit more than that. I think we would like a witness  
19 statement from, in the Suez case, the procurement manager or  
20 person in charge of procurement currently within each  
21 country where Suez operates, explaining what their  
22 procurement policy was for trucks over this period and  
23 confirming that the information that you have provided and  
24 now will provide to Iveco is the best information that is  
25 available within the company. That should be done by an

1 executive in the company. That is in the Suez case.

2 Then probably one takes it in stages. The first  
3 is that you have agreed you will provide a schedule to  
4 Iveco, which they have not had.

5 MS. DEMETRIOU: Yes.

6 THE PRESIDENT: We can see foreign law is not going  
7 to be sorted out for a while. This does take time. How  
8 long do you need to provide the Iveco -- the schedule to  
9 Iveco of purchases of Iveco trucks?

10 (Pause)

11 MS. DEMETRIOU: Within 28 days.

12 MS. BACON: I am sorry to speak out of turn. Can  
13 I just clarify what that is going to cover, because of  
14 course we are being sued as being jointly and severally  
15 liable for all of the purchases. So really, what is needed  
16 is not a schedule that covers the points that we want to  
17 know for our own trucks, but for all of them. Then I go  
18 back to the five, or however many, six points we have now  
19 landed at. That is going to have to be provided in respect  
20 of --

21 THE PRESIDENT: First of all, have you had the  
22 schedules that have been provided to everybody else?

23 MS. BACON: Yes.

24 THE PRESIDENT: You have. So, we will start with  
25 Iveco, you getting schedules for Iveco trucks, which have

1 never been provided to anyone, as I understand it.

2 MS. BACON: Yes, the problem is that the schedules  
3 provided to everybody else do not identify the place of  
4 purchase. We are going to be asked for place of purchase in  
5 relation to ours, but we do want to know for everybody else  
6 because the foreign law point does not just apply to Iveco  
7 trucks.

8 THE PRESIDENT: I understand that. We have seen  
9 that point. But let us just take it in stages, please.  
10 First of all, Iveco, and that is going to provide -- because  
11 you say different people ask for different things, it can  
12 provide the information in the Scania schedule which you  
13 have showed us.

14 MS. DEMETRIOU: Yes.

15 THE PRESIDENT: But can it also provide -- have a  
16 column saying "Country of purchase or lease"?

17 MS. DEMETRIOU: Sir, what we can do is provide, as  
18 we have here, the purchasing entity and if, on the basis of  
19 our review that has taken place, we have any reason to  
20 believe that the country of purchase is anything different  
21 to the purchasing entity, then we will point that out.

22 MS. BACON: That begs the question why you did not  
23 put that extra column in. I think that extra column should  
24 be provided.

25 THE PRESIDENT: I mean, you will provide it if --

1 if you do not know, presumably it will be blank, but if you  
2 know, given that you are going to be asking the procurement  
3 person in charge of procurement where they got their trucks,  
4 one imagines that they will know and be able to give you the  
5 country.

6 MS. DEMETRIOU: Sir, may I just clarify? I am a  
7 little bit hazy about what is meant by "country of  
8 purchase", because if you have an entity in, say, Germany,  
9 who buys a truck and that truck is delivered to the entity  
10 in Germany, then we say that on its face, the place of  
11 purchase is Germany. Now, if the Defendants mean something  
12 different, I would like to understand what they mean,  
13 because I do not want to promise something that we are not  
14 able to deliver.

15 THE PRESIDENT: Yes, I think that is an easy case  
16 where the purchasing place is in Germany and the selling  
17 entity is in Germany, then it is Germany. The difficult  
18 case is where the purchasing entity is in Belgium and the  
19 selling entity is in Germany. That is the complicated case,  
20 in which case, you may need to say, "Unclear, sold from  
21 Germany to Belgian purchaser".

22 MS. DEMETRIOU: Sir --

23 THE PRESIDENT: Whatever the position is, one may  
24 have to try and work it out, but at least we know what the  
25 basic bare bones facts are, because, at the moment,

1 everybody is rather in the dark. That is the problem.

2 MS. DEMETRIOU: Well, sir, just to clarify, so  
3 what we can do, as we have done on this schedule, is we can  
4 say who the purchasing entity is and then insofar as we  
5 know, we can say who the seller was. So here you see we  
6 have not been able to burrow down and say which of the  
7 Scania entities the seller is.

8 THE PRESIDENT: No, but Onyx UK Limited, or  
9 whatever they are now called, may be able to tell you, "Oh,  
10 we bought it in Bridgeport. We cannot remember what Scania  
11 was called at the time, but we went and got it there. We  
12 did not order it from Sweden --"

13 MS. DEMETRIOU: Sir --

14 THE PRESIDENT: -- for example.

15 MS. DEMETRIOU: I do understand the nature of the  
16 exercise, but may I just raise one concern, which is that in  
17 a sense, this seems, in my respectful submission, to  
18 somewhat be the tail wagging the dog in the sense that the  
19 Defendants, or some of them, have pleaded cases on  
20 applicable law. We have seen from DAF that they pleaded a  
21 case on applicable law, which is supported by a statement of  
22 truth, and they now seek to change their mind, or we do not  
23 know what their position is. You have seen from some of the  
24 other Defendants a pleaded case on applicable law.

25 The idea that they need chapter and verse or,

1           essentially, a full disclosure exercise to be carried out  
2           before the remaining Defendants can elucidate their  
3           positions, we say, is incorrect. Many of them have pleaded  
4           their case already, supported by statement of truth. It is  
5           not normal in a claim to wait for disclosure before pleading  
6           your position on applicable law.

7                         THE PRESIDENT: We are not asking for disclosure.  
8           We are asking for you to particularise the products for  
9           which you are claiming damages. Normally, the Claimant  
10          would be able to give full particulars without any  
11          difficulty and would be expected to do so. You are being  
12          given a certain indulgence because this was a secret cartel  
13          and it goes back many years and people do not keep records.  
14          So we can understand you cannot give us all of the  
15          information a Claimant would normally give, but I do not  
16          think you can say it is imposing an unusual burden. It is a  
17          rather lighter burden than most Claimants have.

18                        MS. DEMETRIOU: Sir, I do say two things. I say,  
19          first of all, we have, and we will explain this in a  
20          statement, done what we can at this stage. We say also that  
21          the Defendants have been working very hard. If one goes to  
22          Mr. Rowan's second witness statement in our proceedings, he  
23          says:

24                                 "The Iveco Defendants have been working with a  
25          team of expert advisers for almost three years on, amongst

1 other things, the enormous task of identifying, harvesting  
2 and pleading of economic data relating to tens of thousands  
3 of transactions over a period of nearly 20 years."

4 So they have been doing work and we say that on  
5 basis of their evidence, we can expect some of these gaps to  
6 be plugged when it comes to proving our claim. Of course,  
7 if they are not and we cannot prove part of our claim, so be  
8 it. We say we do not need to finalise that exercise now in  
9 order to enable the Defendants to plead applicable law.

10 THE PRESIDENT: Well, they can plead applicable  
11 law. Of course, the point that is being made is it may not  
12 be proportionate and sensible to burden everyone, including  
13 then you, with an applicable law argument if it has very  
14 little financial significance. To assess that, they just  
15 want to get a sense of how many trucks were bought in the  
16 Czech Republic, one of your countries. It may be that that  
17 will be very clear and there will be six trucks and you do  
18 not know many of the details, you do not know the purchase  
19 price, but they will be able to take a pragmatic view of the  
20 six trucks. "We can see what model it is and we do not need  
21 to know the exact price. We are not going to go to the  
22 lengths of instructing a Czech law expert and we are happy  
23 to assume it is English law." That is where we are trying  
24 to get to.

25 MS. DEMETRIOU: Sir, I entirely see --

1                   THE PRESIDENT: We do not think really we are  
2 asking you to do more than any Claimant would normally do.  
3 We are not asking you to go back and go through each of  
4 these records which you have been through. We are trying to  
5 avoid that by simply asking for a witness statement from the  
6 people responsible for purchasing the trucks -- a truck is  
7 quite a big purchase, so they will have some idea of how it  
8 was done and if do not, they will say so -- just confirming  
9 that really they have got no further records to be examined.  
10 Then it will be for the Defendants to go and look at their  
11 records, if they want to.

12                   MS. DEMETRIOU: Sir --

13                   THE PRESIDENT: It will advance this matter. At  
14 the moment, it is rather stuck.

15                   MS. DEMETRIOU: We do understand that. We  
16 certainly will provide that. I just want to be realistic.  
17 It relates to a submission that Ms. Bacon made, which is  
18 that we can provide, insofar as we have the detail in  
19 relation to Iveco, the purchasing entity and, insofar as we  
20 have it, the Iveco entity from which it was purchased. We  
21 can certainly provide a witness statement along the lines,  
22 sir, that you have said. But the reality of the matter is  
23 that it is unlikely that we are able to go any further.

24                   Sir, in relation to German law, all of the  
25 Defendants seem quite happy to plead German law on the basis

1 of what they have, in other words, the identity of the  
2 purchasing entity, without more.

3 We will, of course, do what you say, sir, but  
4 I want to be realistic about what it is we can do at this  
5 stage, but we will produce the witness statement you have  
6 asked for and also the Iveco data in the same form as this  
7 data, indicating, of course, anything else that we know  
8 about.

9 THE PRESIDENT: Well, as I say, if you can add a  
10 column, obviously it is the best particulars you can give,  
11 of the place of purchase or lease. If it is Germany, say  
12 Germany, if it is a seller in France, buyer in Belgium, then  
13 that is all you may be able to say because you are not going  
14 to go back and try and find the sale documents to try and  
15 work out what is the proper law of the sale. No-one is  
16 expecting you to do that. But that should be -- we are  
17 asking you do that, for the moment, just with Iveco.

18 MS. DEMETRIOU: I understand.

19 THE PRESIDENT: We will see where we get to. As  
20 I say, it may be that some of these 13 countries, there will  
21 be so few trucks that the whole issue will just go away.  
22 What is clear is that quite a lot in Germany and, therefore,  
23 people have taken the view that, "We know enough to say that  
24 it is worth pleading German law". That is the position.  
25 Nobody seems to be, at the moment, able to say, "We know

1       that it is worth even investigating Czech law, because we  
2       have no idea how many trucks we would be bothering about".  
3       Can we leave it at that?

4               MS. DEMETRIOU:  Yes.

5               THE PRESIDENT:  You say you can do the schedule for  
6       Iveco in 28 days.  Now, as regards the witness statements,  
7       if we give you to the end of January, will that be  
8       sufficient?

9               MS. DEMETRIOU:  Sir, yes, with liberty to apply  
10       because we do not know how many people are involved in terms  
11       of interviewing witnesses.

12              THE PRESIDENT:  Yes.  I mean, you are going to be,  
13       no doubt, talking to the people who bought the trucks anyway  
14       because they will be relevant for other matters.

15              Just one moment.

16                               [The Panel conferred]

17              Shall we say by 31 January?

18              Also, insofar as, on reflection, you can fill in  
19       the gaps in the schedules that have been served, you should  
20       do so also by 31 January.

21              MS. DEMETRIOU:  Sir, yes, of course.

22              THE PRESIDENT:  The witness statement will be, of  
23       course, the procurement policy for all trucks that are the  
24       subject of the claim, not just trucks bought from Iveco,  
25       from anybody.

1 MS. DEMETRIOU: Sir, yes.

2 THE PRESIDENT: Just one moment.

3 [The Panel conferred]

4 So the statement will explain, for trucks  
5 purchased over that period, where they were being purchased  
6 or leased.

7 MS. DEMETRIOU: Sir, that is -- I hesitate to make  
8 submissions to respond on the hoof, as it were, because we  
9 need to take factual instructions, but may I just raise one  
10 note of caution, which is that this is all a very long time  
11 ago. There are, as you have identified, lots of Suez  
12 entities. If they were -- if they all took their own  
13 procurement decisions, and I am not in a position to tell  
14 you yes or no, but if they did, that is an enormous amount  
15 of research going back perhaps to ex-employees to work out  
16 what each one was doing at the time. I do not think that  
17 can really be feasibly done at this stage. It is not even  
18 the kind of exercise that we would expect to do for trial in  
19 terms of producing witness statements.

20 Now, if, sir, you are saying, "Can you tell us  
21 whether there was a centralised procurement or not during  
22 this time, as opposed to the detail -- if it is not  
23 centralised, as opposed to the detail of each individual  
24 entity's procurement policy over that period of time many  
25 years ago", that is a different thing. But to say that we

1 will be able to come back potentially with dozens of witness  
2 statements explaining where -- what the procurement policies  
3 were that were in place without having done disclosure, so  
4 in advance of disclosure, we say that is putting the cart  
5 before the horse and we do not think it will be possible to  
6 do so.

7 MR. JUSTICE HILDYARD: I am wondering whether you are  
8 looking  
9 at it through the wrong end of the telescope. All you can  
10 do is your best.

11 MS. DEMETRIOU: Yes.

12 MR. JUSTICE HILDYARD: But you are being asked questions  
13 which  
14 you must answer to the best of your ability. It is possible  
15 that in some circumstances you will not get it quite right  
16 and other documents will be shown to show that you are  
17 wrong, in which case, there we are. They will rely on it  
18 and the matter will proceed on the more fixed basis.

19 But what I am worried about is that in the quest  
20 for replies which have some paper background, you are losing  
21 the opportunity of stating what you can say on the footing  
22 of the researches you are going to do -- undertake.

23 MS. DEMETRIOU: Yes. Sir, we are, of course,  
24 happy to do what we can, but I simply wanted to strike a  
25 note of caution, which is that if what we are being

1 requested to do is track down all the employees that were in  
2 charge of procurement at the relevant time in relation to  
3 all of these entities, that is a very involved exercise.  
4 I just want to be realistic about what it is we are being  
5 asked to do. We will obviously do our best.

6 MR. MALEK: I think you need to use your best  
7 endeavours to get that information. If you have to speak to  
8 ex-employees, you should do that. You say it is not  
9 practical for certain reasons. You can say that, but  
10 I think it is in your interests as well as everyone else's  
11 interests that we get this information. You have to prove  
12 your case.

13 MS. DEMETRIOU: Very well, sir.

14 MR. MALEK: In a way, this is an opportunity for  
15 you to plug some gaps.

16 MS. DEMETRIOU: Sir, the point -- I appreciate, of  
17 course, that we have to prove our case and in due course, we  
18 will not succeed to the extent that we cannot prove it. But  
19 we do say that this is, to a certain degree, putting the  
20 cart before the horse because normally what you would have  
21 is disclosure and you would then go and speak to your  
22 potential witnesses on the basis of disclosure. We do not  
23 have that, so we are being asked in a sense to accelerate  
24 our witness evidence. We do not think, with respect, that  
25 is a fair thing to do.

1                   MR. JUSTICE HILDYARD: I think it goes back to the point  
2 that

3       it is very unusual to rely on disclosure to make good the  
4       gaps in your own accounting records. There are special  
5       reasons why that may be appropriate in this case in the end,  
6       but for the moment, do you not have to say what your best  
7       bet is as to the various columns and have done what you  
8       think is necessary, using your best endeavours, for that  
9       purpose?

10                  We cannot, I think, demand you go to any  
11       particular person, nor to any particular level, but you must  
12       do your best to get the evidence which you required in  
13       default of accounting records to make good the questions --  
14       to answer properly the questions you have been asked.

15                  MS. DEMETRIOU: We, of course, accept that in  
16       terms of proving our claim, but the question is whether that  
17       is necessary for applicable law. In our respectful  
18       submission, those lengths are not required, are not  
19       necessary to enable them to plead their cases. Sir, I can  
20       see -- I can see what the Tribunal thinks, so we will do our  
21       best, but I want to be realistic about the nature of the  
22       endeavour.

23                  THE PRESIDENT: I mean, at the moment, I have no  
24       idea, because I have not seen -- well, we have not seen the  
25       schedules, but for the various countries, other than France

1 clearly features prominently, what, of the various other  
2 countries, even how many trucks we are talking about.

3 MS. DEMETRIOU: Well, that is information that we  
4 can provide.

5 THE PRESIDENT: I would have thought that that  
6 could be provided.

7 MS. DEMETRIOU: Yes.

8 THE PRESIDENT: That will assist to start with, if,  
9 in some country, it is six trucks over the fourteen years.

10 What I think we will say is we will give you  
11 liberty to apply if you say it is a small number and the  
12 work involved would be extensive and you, therefore, want to  
13 suggest it is not necessary. It may be the Defendants will  
14 say, "Well, if that is really what it amounts to, we are not  
15 going to push it".

16 But at the moment, we have not even got that basic  
17 information of how many trucks relate to each of the various  
18 jurisdictions.

19 MS. DEMETRIOU: Sir, that --

20 THE PRESIDENT: Further, you may say, well, even if  
21 there are six trucks in the Czech Republic, they were all  
22 purchased in Germany, in which case, the point goes away.

23 MS. DEMETRIOU: Sir, I take that point. May we  
24 progress it as follows, if I might tentatively suggest?

25 That we do the exercise of identifying how many

1 trucks we say relates to each jurisdiction and we provide  
2 the Iveco material along the lines that we have discussed.  
3 We will take instructions from our Suez clients and identify  
4 the nature of the task in terms of producing witness  
5 evidence going back, in relation to the particular entities,  
6 to the period in question. But it may be that on the basis  
7 of the first round of information that we provide, namely  
8 the Iveco material and going through each jurisdiction to  
9 work out how many trucks relate to each jurisdiction, that  
10 that will be enough for applicable law purposes and that we  
11 do not then have to go on and do the witness gathering.

12 THE PRESIDENT: Yes. Well, if you can do that, the  
13 Iveco schedule, in 28 days, the number of trucks in each  
14 jurisdiction in 28 days.

15 MS. DEMETRIOU: Yes.

16 THE PRESIDENT: Then if you wish a witness  
17 statement from your solicitor, if you wish -- I am not  
18 ordering that, but I am saying the number of trucks in  
19 28 days. If you wish then to apply, supported by a  
20 statement from your solicitors to the disproportionate  
21 burden of having to go further with regard to certain  
22 countries, you can do that. So that is on the liberty to  
23 apply provision of what we would expect.

24 Otherwise, by 31 January, you are to produce these  
25 statements from each company.

1 MS. DEMETRIOU: Very well.

2 THE PRESIDENT: That will deal with it.

3 We will not then direct any further pleading on  
4 foreign law until we have all been able to digest that  
5 information. That will be at the next CMC.

6 I have rather over-run, because our transcribers  
7 have had to work without a break. We will take five minutes  
8 and we will sit until 4.30 pm.

9 (4.00 pm)

10 (A short break)

11

12 (4.12 pm)

13 THE PRESIDENT: Yes, Mr. Kennelly.

14 MR. KENNELLY: I will be very brief in response to  
15 this question. I will make two points.

16 The first is a fundamental point of the full  
17 picture as to what is necessary because we have been  
18 discussing country of purchase, and I will come back to  
19 that, but from Scania's perspective, we have a more  
20 fundamental concern about these schedules. It is  
21 important the Claimants bear this in mind, because missing  
22 from our perspective is the VIN and chassis numbers. It is  
23 important to view the full picture. This document is not at  
24 all representative of what has been supplied to Scania in  
25 relation to the trucks which were said to be the subject of

1 the claim.

2 THE PRESIDENT: Your schedule that you have had  
3 does not have what we see in columns 2.7 and 2.8.

4 MR. KENNELLY: No, we have not had a schedule like  
5 that. We simply asked. This is the first page. What is  
6 missing -- this is a sample -- but what is missing, more  
7 broadly, are the VIN and chassis numbers.

8 MR. MALEK: You asked for these.

9 MR. KENNELLY: We have absolutely.

10 MR. MALEK: Is there a column there and it is just  
11 blank?

12 MR. KENNELLY: Yes, many, many blank columns.  
13 Ms. Demetriou suggested that they have given all they can,  
14 they have done all they can. My point is this cannot be all  
15 they can do in respect of VIN and chassis numbers. These  
16 are numbers which they really ought to have, for which they  
17 need no assistance from us. As a bare minimum, when they  
18 come back to do these schedules and go back to refilling  
19 them or filling them further, this point must be addressed  
20 by them.

21 MR. MALEK: Yes, I envisage that when they have  
22 produced a statement, the statement is going to say, "Here  
23 are the updated schedules. This is the best we can do on  
24 the information we have done, having made diligent enquiries  
25 so far as reasonably practical." That is what I envisage

1 and hopefully, you will have a bit more information than you  
2 have at the moment.

3 MR. KENNELLY: One hopes so, yes. In respect of  
4 VIN and chassis numbers, we need more.

5 THE PRESIDENT: The schedule we have before us,  
6 which is concerning Scania, does have VIN and chassis  
7 numbers.

8 MR. KENNELLY: Yes, which is why I say it was  
9 unrepresentative.

10 MR. MALEK: You are saying they probably picked the  
11 best page they have.

12 MR. KENNELLY: We have all done that. We are  
13 missing more than 500 VIN and chassis numbers.

14 MR. MALEK: As long as they do the best they can so  
15 far as is reasonably practical, that is fine.

16 MR. KENNELLY: Very well. To answer Mr. Malek's  
17 point, we certainly have written to them with this question  
18 and we have been given short shrift in response. We hope  
19 for a better effort next time around.

20 The second point -- just for the reference,  
21 I shall not take you to the reference, but since  
22 Ms. Demetriou wants to address you, I will just give you the  
23 reference. It is in the Hausfeld bundle HC1. So C1, tab 3,  
24 page 7 and 8 and page 14, which explains where we have asked  
25 for the chassis numbers, pointing out the massive gaps, and

1 the response then from Hausfeld.

2 The second point I wanted to make was the  
3 arrangement seems to be that Iveco is receiving updated  
4 schedules. My basic point --

5 THE PRESIDENT: No, not updated. Iveco has never  
6 had a schedule. Iveco is going to get its first schedule.

7 MR. KENNELLY: But with certain columns, certain  
8 additional columns added.

9 THE PRESIDENT: With one additional comment saying  
10 place, where known, of lease or purchase.

11 MR. KENNELLY: Indeed. My short point, sir, is we  
12 should all get that. What Iveco has, we should all have.  
13 We should have it in the confidentiality ring for all of the  
14 Defendants because it sounds from what Ms. Bacon said that  
15 Iveco already has or will already get schedules or  
16 information in respect of each of the Defendants. We all  
17 need to have the same material within the inner  
18 confidentiality ring.

19 THE PRESIDENT: Why in the confidentiality?

20 MR. KENNELLY: Because there may be confidential  
21 information contained in it.

22 MR. MALEK: This is really old information. How is  
23 it going to be that confidential whether they bought a truck  
24 for a particular price 15 years ago?

25 MR. KENNELLY: If there is no confidentiality

1 concern, all the better. The important point is that the  
2 Defendants all need to have the same information in respect  
3 of this question of country of purchase. It should be in  
4 respect of all of the claims. It should not be limited to  
5 Suez. This point arises in respect of the other -- of all  
6 three Hausfeld sets of claims, so it should be done for all  
7 of them.

8 THE PRESIDENT: Well, I understand that. It is not  
9 just that -- at the moment, it is all three claims with  
10 regards to Iveco because they are Defendant in all three  
11 claims. We are not minded to order them to redo the  
12 schedules that have been served, which we appreciate do not  
13 have that column, because what we have said is they should  
14 produce the statements which will explain the position and  
15 will say that is the best they can do in terms of what they  
16 have served, schedules they have served. We will take it  
17 from there. If, having received that, you say, "We also now  
18 need, for each truck, a column of country", we can consider  
19 that, but I think we will see what we get on the basis of  
20 the Iveco schedule, the witness statements and any updated  
21 schedules that are served.

22 MR. MALEK: So the difference is going to be that  
23 as regards your schedule, your schedule should be updated  
24 insofar as they can get further information. They will  
25 answer the questions already on the schedule. The only

1 addition is the place of purchase. So that is not going to  
2 be ordered at this stage, but that will be in the Iveco  
3 schedule.

4 MR. KENNELLY: Sir, you have my submissions on how  
5 that will be indispensable for us.

6 THE PRESIDENT: After all, there must be a bit of  
7 common sense in this in terms of the location of the  
8 purchasing entity. A certain amount can be deduced from  
9 that and we are looking for a sort of general feel of how  
10 important are these respective laws of other countries.

11 MR. KENNELLY: We will see what they produce and  
12 then revisit the issue.

13 THE PRESIDENT: I would like to move on,  
14 Mr. Kennelly, if we may. We have a few other things to --

15 MS. DEMETRIOU: May I just clarify?

16 THE PRESIDENT: Yes.

17 MS. DEMETRIOU: I did not understand the Tribunal  
18 to be ordering us to revisit the schedules we have already  
19 done, save in respect of the witness statement we are  
20 producing, which is to indicate that it is the position, as  
21 I believe it to be, that we have done the best we can.

22 THE PRESIDENT: Yes, but if, in preparing the  
23 witness statement, you realise that you can in fact fill out  
24 some of the gaps in the schedule, then you can do that.

25 MS. DEMETRIOU: Of course. I understand.

1                   THE PRESIDENT: You are not being required to  
2 re-serve schedules with an extra column.

3                   MS. DEMETRIOU: I understand. Thank you.

4                   MR. HARRIS: I am sorry to interrupt, but I have  
5 an important concern about what has been addressed to the  
6 Tribunal today on instructions by Ms. Demetriou regarding  
7 this is the end of the road. She has repeatedly said that,  
8 "The schedules that we produced are the end of the road".  
9 She said at one point that there were -- for two years,  
10 100 people had been looking into it and at another point,  
11 "There had been a full-time team of my solicitors working on  
12 this task alone".

13                   The reason I raise it, it bears upon the nature of  
14 the evidence that you have invited to be presented by the  
15 end of January. There is no alternative here but to show  
16 you some short extracts from a number of letters, because  
17 what we have been told today does not seem to sit at all  
18 with what we have been told in writing in these letters.

19                   MR. MALEK: But we expect the statement to say what  
20 efforts they have made in order to get this information and  
21 the document records.

22                   MR. HARRIS: Well, that may be a short circuit to  
23 avoid these letters.

24                   MR. MALEK: Then if, when they are produced, you  
25 say there are problems, you can point out what the problems

1 are, but I think we have other things to do today. I think  
2 we probably have gone as far as we want to today on this one  
3 issue.

4 MR. HARRIS: Well, I understand that, so perhaps  
5 we can leave it like this. It is important that if it is,  
6 in fact, the Claimant's case -- this is -- I am talking  
7 about the VSW case -- that they have reached the end of the  
8 road, taking on board, Mr. Malek, you were talking about  
9 reasonable and practical and all the rest of it, then we  
10 have to know what exactly has been done.

11 MR. MALEK: No doubt about that.

12 MR. HARRIS: Because, in the letters, which I will  
13 not take you to -- invite you to open, we have previously  
14 been told that we are only going to be supplied with readily  
15 available data and, indeed, that our requests were  
16 premature, so they were not going to be responded to.  
17 Indeed, we were told, and I just quote from one of them that  
18 the remainder -- this is from a letter in June:

19 "The remainder would take intensive work with our  
20 clients over two or three weeks."

21 That is why they are not providing it to us. What  
22 we now understand to be the position of the Tribunal, and we  
23 respectfully endorse it, if I can put it like that, is that  
24 is not good enough. If it is going to take intensive work,  
25 so be it. Do the work. If it is going to take two to

1 three weeks, so be it. Do it and then explain what you have  
2 done. If you come to a point at which you say, "I am not  
3 doing any more", and that is not proportionate or practical,  
4 whatever, explain exactly why not, exactly what you have  
5 done, because otherwise, we are going to be met with this  
6 same difficulty that repeated letters from us saying, "You  
7 have not done enough. It should be available."

8 MR. MALEK: I am sure Ms. Demetriou understands the  
9 points you are making. She has heard what you say and  
10 I think what you are saying makes good sense to me.

11 MR. HARRIS: I am very conscious of the time, but  
12 there are two issues going on here, as, with respect,  
13 Mr Justice Hildyard has mentioned once or twice. There are  
14 the questions of applicable law to which these schedules in  
15 part go, but then there are the wider questions about  
16 proving your claim.

17 I could take you, if invited, to a couple of the  
18 other letters where exactly the same things arise on the  
19 second of those two limbs, in both the Dawson group claim and  
20 the Ryder claim. So in other words, I have letters open  
21 here in front of me where we have asked for VIN information,  
22 tallying information, place of supply information, chassis  
23 number and what-have-you, and it has not been provided.

24 So whilst I appreciate that that does not have the  
25 same piquancy for applicable law in claims that are about

1 UK purchases, Ryder and Dawson, nevertheless, it would be  
2 unfortunate if work of an elementary nature in order to  
3 progress the claims generally is only ordered for VSW  
4 because it has both limbs, but is not ordered for Dawson and  
5 Ryder when it is going to be needed as foundational part of  
6 the claim.

7 THE PRESIDENT: Well, if you want to issue a  
8 request for further information seeking that information and  
9 then, if it is not provided, take out an application for an  
10 order that it be provided, then we will address it, but that  
11 is, I think, the way to do it. We really do not want to  
12 look at a lot of correspondence and then no doubt other  
13 correspondence in response.

14 MR. HARRIS: That is as maybe, sir, but this is a  
15 point that has been developed over some months in  
16 correspondence repeatedly.

17 THE PRESIDENT: I understand that, but as I say,  
18 there is a mechanism. If you have not got VIN numbers and  
19 you need them, you issue a request for further information,  
20 or you could do it by correspondence and then issue an  
21 application for an order and then we will address it.

22 MR. HARRIS: So be it.

23 THE PRESIDENT: I would like to deal with other  
24 matters. Dawson have put in an application to amend their  
25 statement of case, amend their particulars of claim. Is

1           that right? I have a draft. Is that not correct? I have  
2           it with an application.

3                     MR. WARD: Sir, the application is for directions  
4           to amend the particulars of claim once disclosure of the  
5           files takes place.

6                     THE PRESIDENT: I see. So this is after this case.

7                     MR. WARD: Yes, there is no application to amend.

8                     THE PRESIDENT: So this is on reflection, right.  
9           So that follows from tomorrow.

10                    The next point, MAN has an application, I think,  
11           to bring additional claims against Scania. Is that right,  
12           Mr. Jowell?

13                    MR. JOWELL: That is correct. I understand it is  
14           unopposed.

15                    MR. KENNELLY: That is correct, sir.

16                    THE PRESIDENT: You need an order, because of the  
17           terms of Rule 39 and Rule 40. So do you need a time to  
18           serve it or has it been provided or just permission to do  
19           so?

20                    MR. JOWELL: Permission to do so.

21                    THE PRESIDENT: Right. We make that order.  
22           Permission granted.

23                    Apart from Royal Mail, which will be heard  
24           tomorrow, are there any other applications to amend  
25           pleadings as at the moment?

1           MR. HOSKINS: Sir, we do not have a live one, but  
2 we have said in our skeleton we would like to take the  
3 opportunity to actually bring our defences into line with  
4 some of the other Defendants. So there will not be new  
5 points as such, but it seems sensible to take that  
6 opportunity. I am quite happy for that to happen. It  
7 sounds like there is going to be a round of pleadings at  
8 some stage, which is why I say we are quite happy to do that  
9 that when it naturally arises and we will not make an  
10 application.

11           THE PRESIDENT: Thank you for that.

12           We then want to ask the Claimants this, just so we  
13 can understand really how these cases may develop. This  
14 cartel, as found, was in large part an information exchange  
15 cartel. There were other aspects to do with emissions  
16 technology and so on, but it was not a price fixing cartel  
17 as such.

18           It would help us if you can just explain, each of  
19 you, how you are going to go about advancing and proving your  
20 case about the resulting, as you say, overcharge. Is it  
21 going to be on the basis of contemporary documents or is it  
22 really a case where to do that, it is going to be by  
23 economic evidence. Because as we understand, reading the  
24 decision, yes, this was not a normal competitive market  
25 because there were always exchanges of information about

1        what each of the companies participating in the cartel  
2        respectively were going to do.

3                But that does not in itself, even if you get all  
4        the minutes of every meeting, if there were minutes or price  
5        intentions passed between them, it does not actually tell  
6        you what level of overcharge may have resulted. Of course,  
7        the Defendants say there was none and they say, in any  
8        event, if there was one, it was only gross prices and you  
9        all purchased net prices, et cetera.

10               So in terms of establishing overcharge, which is  
11        the whole reason you are bringing the claim, are you saying  
12        that contemporary documents, are they relevant, or is it  
13        going to be more by economic evidence, using the sort of  
14        techniques that economists use in these cases to look and  
15        construct a hypothetical counterfactual?

16               If you can help us on that and this is not -- we  
17        are not asking you for a pleading. We are just trying to  
18        understand how this case is going to roll forward.

19        Mr. Ward, can you assist?

20               MR. WARD: I can. I need to be very careful that  
21        Mr. Pickford does not jump up because I am alluding to the  
22        contents of the file.

23               The short answer is: both those methods.  
24        Obviously, the way the -- understanding the way the cartel  
25        works is very, very important. To do so, one does need to

1 look to the file, hence the applications for disclosure of  
2 the file that are in front of you.

3 But also, the manner of proof will be through  
4 econometric evidence. Indeed, through the relatively  
5 advanced Royal Mail case, and I think in the Dawson and BT  
6 cases as well, it is accepted on both sides that econometric  
7 evidence will be adduced in order to prove the overcharge,  
8 but it is evidently right that one needs to have an  
9 understanding of how the cartel worked in order to see what  
10 the price transfer mechanisms are.

11 It is our submission -- well, actually I was about  
12 to make some submissions, but again, I do not want to  
13 trespass into confidential matters. I can say more about it  
14 tomorrow in closed session.

15 THE PRESIDENT: Yes.

16 MR. WARD: But there is more -- just speaking now  
17 about the decision rather than anything that might be  
18 derived from the file, there is more to this cartel than  
19 merely information exchanges.

20 THE PRESIDENT: Yes.

21 MR. WARD: But the only answer I can give to that,  
22 sir, is both methods will be used.

23 THE PRESIDENT: Yes. It will affect the way  
24 disclosure proceeds generally and I am not, at the moment --  
25 you may be able to enlighten us more tomorrow -- quite clear

1 in my mind how understanding how the cartel works in great  
2 detail is going to help a lot in working out the  
3 counterfactual price. You know what you paid, so that is  
4 price paid. You have got to work out the counterfactual  
5 price and what would have happened if competition had been  
6 working properly.

7 MR. WARD: No doubt the central piece in that will  
8 be the econometrics.

9 Of course, the Claimants want to put forward the  
10 best case they can on both limbs. One may corroborate the  
11 other or fill in the gaps of the other or explain what we  
12 might see in the other.

13 THE PRESIDENT: Yes.

14 MR. WARD: One would be rash to rely on either  
15 just the cartel documents, which are always, of course,  
16 incomplete, by the nature of these things, or just the  
17 econometrics in the hope that your expert witness will win  
18 it all on his own.

19 THE PRESIDENT: Yes. So you cannot rely only on  
20 the contemporary documents because that is not going to give  
21 you a counterfactual price.

22 MR. WARD: What it can do is paint a picture of  
23 the way in which competition was softened by the cartel,  
24 which may itself explain or corroborate any effects which  
25 are picked up on the price through econometrics.

1 THE PRESIDENT: Yes, I see.

2 Mr. Brealey.

3 MR. BREALEY: Three points. We repeat: we do not  
4 accept this is just a price information exchange. It is  
5 something deeper than that.

6 The second is one mentions counterfactual price.  
7 We will need to look at the counterfactual gross price and  
8 the counterfactual net price. It would be a mistake just to  
9 focus on the counterfactual net price.

10 The third point is that we will want to prove the  
11 counterfactual gross and net price with reference to the  
12 documents, expert evidence and witnesses of fact. So, for  
13 example, witnesses of fact may deal with how the gross would  
14 feed into the net. In negotiating a net price, what  
15 relevance does the gross price have?

16 THE PRESIDENT: Yes.

17 Ms. Demetriou.

18 MS. DEMETRIOU: We agree that both types of  
19 evidence are going to be relevant to our claim and I endorse  
20 the points that my learned friends have just made. I do not  
21 really have anything to add.

22 THE PRESIDENT: Yes. Thank you. Well, we might  
23 need to revisit that at some point when we are addressing  
24 disclosure, but that is very helpful.

25 A few remaining points. It is asked whether

1 the -- it is suggested whether the Defendants should be  
2 required to have single experts where there are a number of  
3 Defendants. We have to say we do not think -- and we will  
4 take a lot of persuasion -- that that is appropriate. There  
5 may indeed be conflicts of position as between different  
6 Defendants, some of whom are also part 20 Defendants in  
7 other cases or in the same case.

8 It does seem to us, as usual, that each Defendant  
9 should be allowed to call its own expert. There may be --  
10 to deprive them of that would not be appropriate. Of  
11 course, there may then be possibilities for co-operation  
12 between experts to reduce costs or for someone to cover  
13 certain aspects of work which are then adopted by everyone,  
14 but to confine them all to a single expert really does not  
15 seem right, Ms. Demetriou. You can address us on that, if  
16 you like.

17 MS. DEMETRIOU: Sir, can I just raise two points?

18 THE PRESIDENT: Yes.

19 MS. DEMETRIOU: Obviously, I hear what you say.  
20 You have seen what I say in writing, so I will not reiterate  
21 that. The reason for making the application is, of course,  
22 one that is related both to the costs of the proceedings and  
23 to the efficiency with which they are conducted. What we  
24 see -- so there are six sets of Defendants against us and if  
25 everyone is to rely on their own expert, we say, first of

1 all, that their interest, the Defendants' interest, indeed,  
2 and the part 20's interests are indeed aligned. They are  
3 liable for the same loss.

4 The position that we are all going to be in, both  
5 the Claimants and the Tribunal, if everybody relies on their  
6 own expert when it comes to overcharge, is a situation where  
7 seven different experts are conducting potentially different  
8 seven types of economic analysis. Let us say they all rely  
9 on regression analysis. Some of them may not. There may be  
10 different types of economic analysis, but let us say they  
11 all produce regression analysis. There be slightly  
12 different models and different assumptions. When we produce  
13 our econometric reports, there will be six responses, six  
14 different attacks on that report.

15 We do ask -- I ask rhetorically how that is going  
16 to end up in an efficient determination of the overcharge  
17 question. That is really what drives this application. But  
18 the additional point I wish to make -- of course, in  
19 relation to that, the Tribunal is going to be faced with not  
20 just seven separate reports, but obviously reply evidence  
21 too.

22 The additional point that I wish to make is that  
23 none of the points raised by the Defendants in opposition,  
24 and they have all protested, as you have seen very  
25 vehemently about this, but none of the points they raise

1 really address the issue of pass on or compound interest.  
2 The Tribunal will be very well aware that the big three  
3 areas of expert economic evidence in these claims is, number  
4 one, overcharge, second, pass on, and, third, compound  
5 interest.

6 We see absolutely no reason why the Defendants  
7 should not be required to share an expert in relation to  
8 pass on and compound interest. That alone would result in a  
9 significant saving. There are absolutely no conflicts in  
10 the positions of the Defendants on those points. Indeed,  
11 the relevant evidence is evidence which is material which is  
12 going to come from the Claimants, not from them. So we do  
13 say that that could result in a significant saving, even if  
14 one accepts some of the points they make in relation to  
15 overcharge.

16 [The Panel conferred]

17 THE PRESIDENT: Yes, we can see some force in that  
18 point, Ms. Demetriou. Given the time and that I do not  
19 think any work -- well, I do not know, but I suspect that  
20 not much work is being done on pass on before you get any  
21 disclosure from the Claimants, it may not need to be  
22 resolved now, so that you can be left to think about it for  
23 the next CMC. But there might be a lot of attraction in  
24 having a lead expert to be agreed between the Defendants on  
25 pass on, which is based on the Claimants' evidence, of

1 course, and on compound interest, as is distinct from the  
2 overcharge, which is one which may differ as between the  
3 different Defendants.

4 MR. HOSKINS: I have two points of principle as to  
5 why that is not appropriate. It is up to you whether you  
6 want to hear me now or at the next CMC. I can make them  
7 very short.

8 THE PRESIDENT: Let us hear them.

9 MR. HOSKINS: In relation to pass on and compound  
10 interest, two of the points that we made in our skeleton as  
11 points of principle as to why there should not be a single  
12 expert applied to both those items.

13 The first one is that you have part 20 Claimants  
14 suing part 20 Defendants. Where you have a situation where  
15 some of the Defendants are Claimants and some of them are  
16 Defendants in those claims, it seems highly inappropriate to  
17 say people who are parties against each other must have a  
18 common expert. That applies to pass on and compound  
19 interest.

20 The second point of principle is one we made about  
21 one of the important roles that an expert plays in these  
22 sorts of cases is helping to inform, advise on settlement  
23 strategy. That point is not just in relation to overcharge.  
24 It is as to, well, what is a sensible offer you might want  
25 to make? That includes pass on and compound interest.

1                   Those are two fundamental points of principle  
2                   which is why you cannot have a common expert and they apply to  
3                   both pass on and compound interest.

4                                   [The Panel conferred]

5                   THE PRESIDENT: Well, I think we will park it,  
6                   Mr. Hoskins.

7                   On your second point, I have to say we do not find  
8                   that persuasive because, of course, each will have your own  
9                   expert and they can give you any advice they like. Other  
10                  experts, you do not even call to give evidence, who can give  
11                  you advice on settlement.

12                  The real question is whether the Tribunal in the  
13                  proceedings should receive reports and hear all testimony  
14                  from a series of experts on the Claimants' assertion that  
15                  compound interest and, indeed, on what the Defendants say is  
16                  pass on and whether the experts can co-ordinate and put  
17                  forward a lead expert who will, as it were, carry the can on  
18                  that so we do not have the same points from lots of people.  
19                  That is the point.

20                  MR. HOSKINS: I have heard what you said. I think  
21                  everyone can go and reflect on it and we will come back to  
22                  it.

23                  THE PRESIDENT: I think so. I do not think it is  
24                  urgent, so we will park the point of your suggestion.  
25                  I think we will say we are not expecting the same expert on

1 the overcharge because, of course, you are said to be  
2 jointly and severally liable, but they will be dealing with  
3 principally the overcharge on the sales by the company that  
4 is calling them.

5 On the two other matters, namely pass on and  
6 compound interest, we will revisit that.

7 The next suggestion I think also from VSW is that  
8 the Defendants should co-ordinate and send joint  
9 correspondence. We hope you will co-ordinate and seek to  
10 reduce the volume of correspondence, which can rapidly  
11 mushroom in these cases, often to quite burdensome and  
12 unreasonable extent. We really do not think it is  
13 appropriate for us to order that you must co-ordinate.  
14 Sometimes you can; sometimes it may be quite impossible. We  
15 do not think it is an appropriate matter for a Tribunal to  
16 order.

17 Ms. Demetriou.

18 MS. DEMETRIOU: Sir, we are content with that on  
19 the basis that the Tribunal's indicated, which was that the  
20 Defendants make every effort to co-ordinate to reduce the  
21 burden.

22 THE PRESIDENT: Yes. Thank you.

23 The next point on my list is about the translation  
24 of documents. If parties have translated documents which  
25 have been disclosed, they should disclose the translation.

1 Just as the foreign language document is subject to  
2 disclosure, so should any translation be, it seems to us.  
3 That would be the normal position insofar as translations  
4 have been made.

5 Going forward, it would be sensible where you  
6 identify documents you want translated, that you co-ordinate  
7 and instruct the same translator. But our real concern is  
8 that at no point should we be presented with competing  
9 translations which are different. Clearly, there are some  
10 foreign language documents here, even in the Commission  
11 file.

12 But if you have disclosed the file and you have a  
13 translation that you have, or your solicitors have had made,  
14 then that should also be disclosed.

15 MR. HARRIS: Well, sir, this is a rather more  
16 complex topic than it appears at first sight. I have some  
17 developed submissions on that, including reference to a case  
18 that was first raised for the first time on Monday morning  
19 by Ms. Demitriou, the *Sumitomo* case.

20 THE PRESIDENT: Yes.

21 MR. HARRIS: I am very conscious of the length of  
22 this agenda and the busyness of tomorrow, but I respectfully  
23 do not suggest that it is sensible for me to embark on those  
24 now.

25 THE PRESIDENT: Shall we hold it over for tomorrow?

1           MR. HARRIS: I would be most grateful for that  
2 because there are some complicated issues about discretion  
3 and privilege. There is more to this than meets the eye.

4           THE PRESIDENT: We will hold it over to tomorrow.

5           MR. HARRIS: I am grateful. While we are on the  
6 topic of that, could I try to persuade the Tribunal that two  
7 of the putative preliminary issues that have been indicated  
8 should be reserved, not taken off the table but reserved.  
9 They should not be reserved; they should be developed.

10           The first one is about tax documentation and tax  
11 position. The second one is about acquisitions by certain  
12 Claimants of other Claimants. I do not want to develop that  
13 now, but I just wanted to say that it was said reserve them  
14 and then we moved on. My instructions are that we do not  
15 want them reserved.

16           THE PRESIDENT: Yes, well, if we have got time  
17 tomorrow, we will put them over. We will deal with the  
18 translation because that is going to be live pretty  
19 immediately tomorrow and we will see what we can do about  
20 the others.

21           MR. HARRIS: By all means.

22           MR. MALEK: On the privilege issue, if you look at  
23 my book on disclosure, at paragraph 2.94, there is a  
24 Canadian case which deals with whether or not it is  
25 privileged. So if you have an in-house lawyer doing a

1 translation for the purpose of the proceedings, that may be  
2 privileged. But if you have got a pre-existing translation  
3 or one not done by a lawyer, it may not be privileged. You  
4 may want to look at that.

5 MR. HARRIS: Sir, you will doubtless be very  
6 familiar with the *Sumitomo* case where *Lyle*  
7 is mentioned. There are some complications there and it is  
8 not really appropriate for this.

9 THE PRESIDENT: Well, we will look at that  
10 tomorrow.

11 MR. HARRIS: I am grateful.

12 THE PRESIDENT: We will hear you on that tomorrow.  
13 We have looked at it and we can look again at the  
14 *Sumitomo* case.

15 That, subject to fixing a timetable for tomorrow,  
16 concludes what we had in mind for covering today, unless  
17 anyone else thinks there is something very important that  
18 needs to be dealt with. So that tomorrow we wish to start  
19 at 9.30 am, hearing Royal Mail's application to amend. That  
20 will be heard in closed session, in camera, and so only  
21 Royal Mail and DAF to attend. We will allow two hours for  
22 that.

23 Mr. Pickford.

24 MR. PICKFORD: Sir, I do have grave concerns about  
25 my ability to respond properly to the application in that

1 time. It seems simple perhaps on its face when you read  
2 Mr. Ward's skeleton, because he does not grapple, in my  
3 submission, with all of the underlying case law that one  
4 actually needs to grapple with in order to understand the  
5 application properly. So the time I set was considerably  
6 more than two hours. I mean, if the Tribunal says it is two  
7 hours, it is two hours, but I do not think I will be able to  
8 finish properly in that time.

9 THE PRESIDENT: Well, we will read -- we will read  
10 your skeleton so you will not have to repeat it and we will  
11 see where we get to in that two-hour slot. We will say not  
12 before 11.30 for everybody else.

13 MR. PICKFORD: I am grateful.

14 THE PRESIDENT: If you are kept waiting a few  
15 minutes, that is possible, but we certainly will not keep  
16 you waiting until the afternoon.

17 We then want to deal with the confidentiality  
18 orders which you are going to look at, I think, overnight,  
19 and try to produce something for us.

20 Then we will proceed with the various disclosure  
21 applications including the Ryder application and various  
22 other applications for disclosure.

23 We will then deal with the translation issue that  
24 Mr. Harris will address us on, which also affects everyone.

25 It may be in fact -- maybe we should deal with the

1 translation issue after the confidentiality orders before we  
2 go to disclosure.

3 MR. PICKFORD: Sir, one of the disclosure  
4 applications against us also needs to be heard  
5 confidentially. It is the 08 application in relation to the  
6 type of information that we hold on costs.

7 THE PRESIDENT: Is that part of the Ryder  
8 application?

9 MR. PICKFORD: No, that is the Royal Mail  
10 application.

11 THE PRESIDENT: Ah. That I had not picked up. So  
12 that is also -- well, in that case, would it not be sensible  
13 to say that we will hear that immediately after the  
14 amendment?

15 MR. PICKFORD: It would.

16 THE PRESIDENT: To say that then we will say that  
17 all other parties not before 12.00.

18 We referred earlier to Wolseley's application to  
19 strike out Daimler's claim for a declaration, saying that we  
20 will hve that off to a separate hearing which concerns only  
21 those two parties. There are great constraints on the  
22 respective availability of the members of the Tribunal.  
23 This is an application which, as it were, is ready to go.  
24 You have all prepared it. We would like you to consider  
25 overnight whether 19 December is a date that the respective

1 representatives can do, unless you are about to tell us, no,  
2 you cannot.

3 MR. HARRIS: I am in court that day. Is there any  
4 possibility we could liaise with the registry for  
5 alternative dates when the three members are available in  
6 the not distant future?

7 THE PRESIDENT: Yes.

8 MR. HARRIS: Hopefully, we can reach agreement.  
9 Because Ms. Demetriou has obviously got commitments as well.  
10 Some of them she shares with me.

11 THE PRESIDENT: Well, it will almost certainly have  
12 to be in January --

13 MR. HARRIS: I am very grateful.

14 THE PRESIDENT: -- because we have looked at our  
15 dates running up to the end of term. Well, I think we  
16 can --

17 [The Panel conferred]

18 Well, liaise with the registry and we will see  
19 what is available. Does it need a time estimate for that?  
20 Is it half a day?

21 MR. HARRIS: We say, a day especially if you  
22 include judgment. There is more to this, again, than meets  
23 the eye, including Ms. Demetriou has raised eight cases and  
24 some brand-new points.

25 THE PRESIDENT: I would have thought it is likely

1 we would reserve judgment.

2 MR. HARRIS: More than half a day, in my  
3 respectful submission, given all of the issues and the way  
4 they are put in the nine pages in my learned friend's  
5 skeleton.

6 MS. DEMETRIOU: We think half a day. May I make a  
7 point about timetabling?

8 THE PRESIDENT: Yes.

9 MS. DEMETRIOU: If it is not possible to find a  
10 date that my learned friend and I can do, we both have  
11 senior juniors on our teams, so it may be possible that we  
12 can find a day.

13 THE PRESIDENT: Well, let us see what we can come  
14 up with. So we will say 9.30 tomorrow.

15 MR. HARRIS: Not before 12.00 for --

16 THE PRESIDENT: 9.30 for Royal Mail and DAF, not  
17 before 12.00 for other parties.

18 MR. JOWELL: The other issue was whether a trial  
19 could be scheduled before the Scania appeal. Is that matter  
20 that --

21 THE PRESIDENT: As we are not going to schedule the  
22 trial, we are not going to address it.

23 MR. JOWELL: I am grateful.

24 (4.54 pm)

25 (The hearing adjourned until the following morning)