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IN THE COMPETITION

Case No. : see below list

APPEAL TRIBUNAL

Victoria House,

Bloomsbury Place,

London WC1A 2EB

22 November 2018

Before:

**THE PRESIDENT: Mr Justice Roth
The Honourable Mr Justice Hildyard
Hodge Malek QC**

(Sitting as a Tribunal in England and Wales)

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

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**CMC – Day 2
IN OPEN COURT**

1 Thursday, 22 November 2018

2 (12.09 pm)

3 CASE MANAGEMENT CONFERENCE (continued)

4 (In open)

5 THE PRESIDENT: We are again being streamed through
6 to court 2.

7 So the question is where we go next. I think one
8 matter that was held over, for which we were keen in
9 everyone's interest to complete, is the question of the
10 confidentiality rings. I hope you have had a chance to look
11 at forms of order. Who is going to do that?

12 MR. WARD: I can explain as I understand it.
13 There is a text. There is a very large measure of
14 agreement. It is not complete agreement. I am told that
15 there is still room for discussion over lunch so that the
16 number of points the Tribunal has to consider can be further
17 narrowed.

18 THE PRESIDENT: Well, we are happy to deal with it
19 at whatever time is convenient, but we do think it should be
20 resolved today.

21 So in that case, is the next issue then
22 translation of documents before we get into other disclosure
23 matters? Can you give me just a moment to put some things
24 away?

25 (Pause)

1 Is it Mr. Harris or Ms. Demetriou?

2 MS. DEMETRIOU: Could I ask Mr. Harris to clarify
3 one matter, because I know he raised translation yesterday.
4 We have asked in correspondence whether his clients actually
5 have any convenience translations and would quite like to
6 know that before the Tribunal hears Mr. Harris' submissions
7 just to make sure that they are not entirely hypothetical.

8 THE PRESIDENT: Just to be clear, it originated
9 with your client's application.

10 MS. DEMETRIOU: That is correct.

11 THE PRESIDENT: You want -- there were two matters.
12 One is some arrangements so there can be -- for future
13 translations --

14 MS. DEMETRIOU: I do not think that is in dispute.

15 THE PRESIDENT: -- rather than everyone incurring
16 the expense of doing it separately, when a document is
17 identified that is of value for more than one case or even
18 only in one case, if the two sides liaise and no doubt share
19 the costs.

20 There is a separate issue, which is translations
21 already made --

22 MS. DEMETRIOU: Yes.

23 THE PRESIDENT: -- that you seek disclosure of those
24 where the original document is being disclosed, is that
25 right?

1 MS. DEMETRIOU: That is correct. One or two of
2 the Defendants have confirmed they do have such documents.
3 Others have said they do not, but we have not heard from
4 Mr. Harris' clients whether Daimler do or do not have
5 documents.

6 THE PRESIDENT: Which of the defendants do?

7 MS. DEMETRIOU: DAF has confirmed it does have
8 such documents. I think it is in our skeleton argument, so
9 we deal with it at -- so it is paragraph 64 on page-- sorry,
10 that is not the right one.

11 MR. MALEK: It is 47.

12 MS. DEMETRIOU: Paragraph 47 --

13 THE PRESIDENT: Paragraph 47.

14 MS. DEMETRIOU: -- of our skeleton argument.

15 THE PRESIDENT: So Daimler -- just to be clear,
16 Daimler has translations, but does not agree to disclose it.

17 MS. DEMETRIOU: This is resisted by DAF. We wrote
18 to Daimler asking whether they do have such translations.
19 I do not understand that we got a response. So we know that
20 it is an issue vis-à-vis DAF, but we do not know who else is
21 contesting it and indeed whether they have translations.

22 THE PRESIDENT: Is the only company, the only
23 Defendant group, that you know that actually has
24 translations is DAF, is it?

25 MS. DEMETRIOU: I think that is right.

1 THE PRESIDENT: Unless there has been some advance.

2 MS. DEMETRIOU: Unless there has been some
3 advance. So my own point to start with is it would be
4 helpful if Daimler and the remaining Defendants can clarify
5 their situation now just so we know how much is in dispute.

6 THE PRESIDENT: Yes. Wait a minute. There is a
7 footnote 33.

8 MS. DEMETRIOU: Yes, we have had confirmation
9 from -- so DAF, Daimler and MAN -- DAF we know have got
10 translations.

11 MR. MALEK: If we could break it down. With DAF,
12 the translations, when were they made? Were they made
13 before the proceedings?

14 MR. PICKFORD: I can address that for Daimler
15 while Mr. Pickford is taking instructions. Subject to being
16 corrected, we did not produce other language translations of
17 documents from the file during the Commission's proceedings.
18 However, we have produced, that is to say the English
19 solicitors, for litigation purposes, this litigation, some
20 convenience translations of some or part of some documents
21 that came from the file, those documents.

22 MR. MALEK: So you produced translations for these
23 proceedings.

24 MR. HARRIS: For litigation purposes in these
25 proceedings, correct.

1 MR. MALEK: Those translations, have they been done
2 by lawyers?

3 MR. HARRIS: They have been done at the
4 requested direction of lawyers for litigation purposes,
5 which is one of the submissions I would like to develop. It
6 is fair to say that some of them have been done by outside
7 translating people. They have not all been done by a
8 multi-lingual polyglot Quinn Emanuel employee, but some of
9 them have.

10 To pick up a point I would develop in due course,
11 they are not official in the sense -- none of them are
12 official in the sense --

13 MR. MALEK: I want to clarify. To what extent are
14 the translations by lawyers acting for your clients as
15 opposed to people who are not lawyers?

16 MR. HARRIS: I think -- the minority are by
17 actual lawyers.

18 MR. MALEK: Okay.

19 MR. HARRIS: But all of them have been at the
20 direction of lawyers, even though the actual translation
21 might have been done by --

22 THE PRESIDENT: Yes, we understand that. Only a
23 lawyer could ask for the translation, not anybody else.

24 MR. HARRIS: Yes, although the important point
25 yet to be developed is why?

1 THE PRESIDENT: Yes. No, we understand that. Just
2 again, we just want to get the factual framework. About how
3 many, not necessary to the nearest number, documents are we
4 talking about?

5 MR. HARRIS: Less than 1% of the file
6 documents.

7 THE PRESIDENT: In numbers. Is it the total file?
8 The file is I think some 37 --

9 MR. HARRIS: In the hundreds. Speaking only, of
10 course, for Daimler.

11 THE PRESIDENT: Yes.

12 MR. MALEK: Yes.

13 THE PRESIDENT: A few hundred documents that
14 Daimler had translated for the purpose of these proceedings.

15 MR. HARRIS: Of these proceedings, correct.

16 THE PRESIDENT: So that is Daimler.

17 DAF, again, you have translations.

18 MR. PICKFORD: We have translations, yes.

19 THE PRESIDENT: They have been done by?

20 MR. PICKFORD: They have been done by both lawyers
21 and external translators.

22 MR. MALEK: When?

23 MR. PICKFORD: For the purposes of these
24 proceedings, but not for the purpose of the Commission
25 investigation.

1 THE PRESIDENT: Then the third company, I think,
2 that has translations is MAN.

3 MR. JOWELL: If I may take instructions.

4 THE PRESIDENT: Yes.

5 MR. MALEK: What is the volume for you for DAF?

6 MR. PICKFORD: I do not know the answer to that
7 question.

8 MR. MALEK: You do not know. That is fine.

9 MR. HOSKINS: While Mr. Jowell is taking
10 instructions, can I give you the Volvo position, if that is
11 convenient. I think there has been a misunderstanding.
12 Volvo does have convenience translations. I do not want
13 there to be any misunderstanding about that. They were
14 produced for the purposes of the Commission investigation.
15 They were produced by a variety of different people. Some
16 were by Contrast, who were a law firm acting for Volvo in
17 the Commission investigation, some by Eversheds, some by
18 external translators, depending upon the languages involved.
19 There are around 2,600 of those convenience translations.

20 THE PRESIDENT: These are translations into
21 English?

22 MR. HOSKINS: I cannot hear you, sir.

23 THE PRESIDENT: I am sorry. These are translations
24 into English, not in Swedish.

25 MR. HOSKINS: Correct. I want to make submissions

1 to you about our position in relation to the disclosure of
2 those.

3 THE PRESIDENT: Yes, we are just trying to get a
4 feel for who is involved and how much we are talking about.

5 MR. HOSKINS: Yes.

6 MR. HARRIS: Can I just clarify one matter?
7 I want to be complete.

8 THE PRESIDENT: Yes.

9 MR. HARRIS: Some translations for Daimler were
10 done on Commission file documents during the administrative
11 phase, but not into English. They were into German.

12 MR. MALEK: I do not think anyone will be
13 interested in those.

14 MR. HARRIS: Just because I said a minute ago
15 I did not think any had been done.

16 THE PRESIDENT: The ones into English are for the
17 purpose of these proceedings.

18 MR. HARRIS: Correct.

19 THE PRESIDENT: Mr. Jowell.

20 MR. JOWELL: The position of MAN is that MAN
21 agreed a language waiver with the Commission in
22 October 2013, so it was not required to provide translated
23 documents to the Commission as part of their original
24 investigation.

25 So far as documents that have been disclosed in

1 these proceedings to date, Commission file documents that
2 have been disclosed, we are not aware of any translations
3 that have been made into English. We will have to
4 double-check that, but to the best of our information at the
5 moment, that is the position.

6 THE PRESIDENT: Footnote 33 to the skeleton says
7 the other Defendants have confirmed they did not produce
8 translations, so we take it that that is correct, is it, as
9 regards your client?

10 MS. BACON: Yes, no translations.

11 MR. KENNELLY: The same for Scania.

12 THE PRESIDENT: The same for Scania.

13 So Ms. Demetriou, this concerns Daimler, MAN and
14 Volvo.

15 MS. DEMETRIOU: That is very helpful. Thank you.

16 THE PRESIDENT: So who is going to -- where there
17 is the application. Mr. Harris, you were starting to deal
18 with this yesterday. Have you agreed it between you?

19 MR. PICKFORD: We have not. If I can just
20 explain. There is a small issue which we need to address
21 first --

22 THE PRESIDENT: Yes.

23 MR. PICKFORD: -- which is that the application as
24 made by VSW is against my clients only. So in their
25 skeleton argument, paragraph 2, they seek to rely on the

1 witness statement of Anna Morfey and the orders that are
2 attached to her witness statement. If one goes to the
3 Veolia Suez bundle, bundle B, tab 2, we see their draft
4 order. If the Tribunal could please go to page 4 of the
5 draft order.

6 THE PRESIDENT: Yes.

7 MR. PICKFORD: That deals with file disclosure and
8 then at 8(C), it is addressed that DAF will provide
9 available convenience translations of documents disclosed
10 pursuant to the disclosure order.

11 It is consequential upon DAF providing inspection
12 of the documents that it is providing, because, of course,
13 that is the party who were sued first who has been providing
14 disclosure of the decision and the file.

15 THE PRESIDENT: Yes.

16 MR. PICKFORD: Sir, perhaps it is sensible to
17 clarify this then because what it says in my learned friend
18 Ms. Demetriou's skeleton is that VSW seek inspection of any
19 convenience translations made by DAF, Daimler and MAN. We
20 had understood the proposal of the Tribunal yesterday would
21 be, if it is to be produced subject to our submissions, that
22 it would be from all of the parties who had such
23 translations.

24 THE PRESIDENT: Yes. Well, that was how
25 I understood paragraph 47 of the skeleton. I had not looked

1 at any draft orders.

2 Ms. Demetriou.

3 MS. DEMETRIOU: My learned friends make a fair
4 point. The order that we sought relates to DAF's disclosure
5 and the reason for that, of course, is because DAF is the
6 only party that has provided disclosure thus far. So the
7 request related to the file documents provided by DAF. So
8 that is correct that the order that we sought related to the
9 disclosure already received. The Tribunal will perceive
10 that there is a point of principle here that will be
11 relevant going forwards once the other Defendants give
12 disclosure.

13 THE PRESIDENT: Yes.

14 MS. DEMETRIOU: It is a technical matter. It is
15 true that our application relates to the disclosure hitherto
16 given by DAF.

17 THE PRESIDENT: But given that the documents in
18 their original language have all been disclosed by DAF, you
19 are not going to seek re-disclosure from other Defendants of
20 documents you have already got in the file because you have
21 got those documents. It is only the translations that you
22 are going to want.

23 MS. DEMETRIOU: It is the convenience
24 translations. It is -- as drafted, it is a reasonably
25 narrow application.

1 THE PRESIDENT: Yes.

2 MS. DEMETRIOU: Of course, there is a wider point
3 of principle going forward in terms of convenience
4 translations that may be held by the Defendants insofar as
5 disclosures then ordered in relation to the Defendants.

6 THE PRESIDENT: Unless there is strong objection,
7 Mr. Harris clearly is not taken by surprise because he has
8 anticipated this.

9 MS. DEMETRIOU: Yes.

10 THE PRESIDENT: It seems to me that it is sensible
11 that we should give you permission to seek disclosure also
12 from Daimler and unless either Mr. Jowell or Mr. Hoskins, say
13 they are taken by surprise, from their clients of the
14 convenience translations they have of documents in the file,
15 which you have already got in the original.

16 MS. DEMETRIOU: Sir, I am grateful.

17 THE PRESIDENT: Are you content?

18 MR. HARRIS: I am happy to deal with both
19 practical issues to begin with, so discretionary case
20 management issues which may, we respectfully contend,
21 dispose of the application.

22 THE PRESIDENT: Yes.

23 MR. HARRIS: Then, as you know from yesterday,
24 there is an important point of legal principle too. I will
25 obviously constrain these submissions as much as I can, but

1 on the second limb, a legal part, there are one or two
2 material matters on which I want to show you a case or two.

3 THE PRESIDENT: Yes.

4 MR. HARRIS: On a practical point, we say this is
5 really a question of balanced case management. As we
6 understand it, everyone accepts that there should be, going
7 forward, one set of agreed translations. The reason for
8 that is so that we are not forever arguing in a satellite
9 manner about what documents actually mean in English.

10 THE PRESIDENT: Yes.

11 MR. HARRIS: So it makes good sense, just focusing
12 on the other part of this that we are all agreed, to agree a
13 translator, agree a cost, agree a process and a timescale
14 and agree some kind of sharing of the costs mechanism. That
15 has the advantage --

16 THE PRESIDENT: That is agreed by everyone.

17 MR. HARRIS: Yes. I just want to emphasise the
18 reason why that is important because it leads to
19 consistency, not only across these cases before you today,
20 but also for future cases which we all anticipate.

21 THE PRESIDENT: Yes. Can you pause just a moment.
22 Sorry.

23 Yes.

24 MR. HARRIS: I am grateful. This echoes, if I may
25 respectfully put it like this, the remarks of you,

1 Mr. Chairman, yesterday on page 189 that:

2 "The real concern is that at no point should we be
3 presented with competing translations which are different."

4 We completely share that sentiment.

5 THE PRESIDENT: Yes.

6 MR. HARRIS: The difficulty now with the
7 application that is being proposed against MAN, Volvo, DAF
8 and my own client is it will give rise to the disclosure
9 where it to be granted, with multiple different copies
10 produced on a fairly ad hoc or any way differing basis of
11 non-agreed translations. So there will be non-agreed
12 translations produced ad hoc at a degree of reliability or
13 otherwise from my client, potentially some from MAN,
14 potentially some from DAF and potentially some from Volvo.
15 What is more, it does not end there, because it would also,
16 if these are to be disclosed, extend to translations that
17 are produced by the Claimants because they also go to the
18 same documents.

19 So the sentiment of the Tribunal yesterday about
20 "avoiding being presented with competing translations" is
21 exactly what would happen if there is to be disclosure now
22 of this multiplicity of different translations.

23 I further emphasise the point that these are
24 translations that are produced in different ways for
25 different purposes, so it might be that there is a line in

1 the middle of the document that is translated, but in, say,
2 the DAF version, there might be three lines or three other
3 lines or it might be that some have been given a higher
4 grade translation and some have been given an informal
5 lawyers working only-type translation.

6 That by itself gives rise to questions about
7 accuracy and reliability. So not only will there be
8 different versions, but within them, if you like, there will
9 be different grades of different versions and that is
10 potentially from multiple different sources.

11 What we say is that that would swiftly degenerate
12 into exactly the mire of conflicting or competing
13 translations that both the Tribunal and we seek to avoid.
14 What we say is that that is not a sensible way, simply as a
15 matter of case management.

16 In this regard, I am going to be referring to
17 *Sumitomo* in the second part of these submissions in
18 any event, but could I invite your attention to it now on
19 this first part, just case management, please.

20 THE PRESIDENT: Yes.

21 MR. HARRIS: It is to be found in authorities
22 bundle number 1, prepared by Hausfeld. It is at tab 13,
23 I believe. *Sumitomo* in the Court of Appeal.

24 I would just like, if I may -- I am going to be
25 coming back to it, as I said, but just on this first point

1 of case management, the case concerned multinationals
2 disputing financial transactions, but you do not need to
3 know about the facts. The only issue is --

4 THE PRESIDENT: It was the rogue copper trader, was it
5 not?

6 MR. HARRIS: It was a rogue, correct, sir. There
7 was a selection made by one of the corporations'
8 English-instructed lawyers of translation into English of
9 relevant documents, including, in some cases, and I am just
10 reading from the headnote here at (d), indicating a degree
11 of priority appropriate for each. Then the question was,
12 well, are they to be disclosed and what is the relevance of
13 privilege?

14 Privilege I am going to come back to, but just for
15 the moment on case management, we pick it up in paragraph 79
16 in the leading judgment, Lord Justice Parker, I believe.
17 What he says at 79 is he quotes from Lord Justice Bingham in
18 the well-known case of *Ventouris v Mountain*. What
19 he says is it is not a dichotomy. Perhaps I could invite
20 you to read the indented extract for *Ventouris*.

21 (Pause)

22 THE PRESIDENT: Yes.

23 MR. HARRIS: It is a simple point, fairly trite,
24 but on the question of case management, just because
25 something might not be privileged, it does not have to be

1 ordered to be disclosed.

2 What we say is that for the reasons that I have
3 already outlined, and one or two more I will come on to in
4 the context of making the second part of these submissions,
5 there is no justification for ordering inspection of these
6 translations here. It gives rise to the very evil we
7 are all keen to avoid.

8 So that is the first set of submissions, I hope
9 nice and brief.

10 THE PRESIDENT: Yes.

11 MR. HARRIS: Then there is another reason. This
12 is an important reason of principle. Anything to do with
13 this fundamental common law right of legal professional
14 privilege is potentially important. We say it arises here.
15 As in the *Sumitomo* case, there has, certainly in
16 the case of Daimler -- I cannot speak for the other
17 Defendants, but certainly in our case and I venture to
18 suspect for the others -- there has been an exercise of
19 lawyers' skill and judgment in selecting for translation, in
20 the context of ongoing English litigation, documents for
21 translation into English.

22 The point that arises is that that exercise of
23 lawyers' skill and judgment, what the North Americans might
24 call attorney work product, is capable of betraying the
25 trend of a lawyer's legal advice and/or of revealing or

1 indicating the substance of that advice. This is a
2 well-known proposition.

3 So if I could go back to *Sumitomo* and
4 pick it up this time in paragraph 72 on the previous page.
5 I have not burdened the Tribunal with actually bringing
6 *Lyell v Kennedy* here because I want to keep the
7 submissions short as I can, but you can see in paragraph 72
8 it is said in the second line, the second sentence.

9 "*Lyell v Kennedy* is undoubtedly authority
10 for the proposition that where a solicitor has copied or
11 assembled a selection of third party documents the selection
12 will be privileged if its production would "betray the trend
13 of the advice which he is giving the client"."

14 We suspect, before I develop that point and how it
15 works as a matter of the law of privilege -- with great
16 respect, we suspect that is what is really going on here.
17 We suspect that the Claimants really want to see these
18 documents or parts of these documents, upon which they will
19 then know that we, the lawyers, in the context of this
20 litigation that they mount have been giving advice about
21 those documents.

22 We say that that is plain, although I accept it is
23 an inference. We say it is a plain inference because we
24 know perfectly well that the Claimant firms, and this
25 certainly extends to Hausfeld who mount the application, are

1 big, multi-jurisdiction firms with plenty of foreign
2 language capability of their own. For instance, Hausfeld
3 has a sizeable German office and conducts a lot of German
4 litigation. It conducts litigation around Europe. If you
5 went on to their website, which I did this morning, you will
6 see that they also have offices in Belgium, France and
7 Sweden. In fact, you can even access their site in those
8 other languages.

9 THE PRESIDENT: Can I interrupt you to ask for some
10 clarification? You told us it is a few hundred documents.
11 Are they documents that come from your client or are they
12 documents that originated with some of the other addressees?

13 MR. HARRIS: They are both, sir. I shall develop
14 that because I cannot mislead you. There are other parts of
15 *Sumitomo* that need to be --

16 THE PRESIDENT: But the Court of Appeal makes that
17 distinction.

18 MR. HARRIS: It does. I shall expressly address
19 that in a moment. It is fair to say there are both.

20 I have just been handed a note that we have
21 909 pages that have been translated, which includes parts of
22 some documents. It is obviously -- for the reasons I have
23 already given, you do not necessarily translate all of the
24 document in its entirety.

25 THE PRESIDENT: Yes.

1 MR. HARRIS: So, the first point that I was just
2 developing is we suspect that what is really going on here
3 is precisely that they want to see, the Claimants -- one can
4 understand why if one were in the Claimants' shoes --
5 documents that we have identified as being the important
6 ones and indeed the particular parts and the particular
7 degree and amount of translation, because it will start to,
8 and I am here quoting from *Lyell v Kennedy*,
9 "betray the trend of the advice" that we have been giving
10 our clients. That will be all the more so if it turns out
11 that my client has translated, say, a particular paragraph
12 of a particular document and every other Defendant has done
13 the same.

14 THE PRESIDENT: Yes. Whatever the motives, as
15 regards *Lyell*, in *Sumitomo*, the
16 Court of Appeal considers *Lyell v Kennedy* and
17 expresses its conclusion at paragraph 77.

18 MR. HARRIS: Yes.

19 THE PRESIDENT: In our judgment, therefore, the
20 *Lyell v Kennedy* principle should not and does not extend to
21 copies of translations which represent the fruits of the
22 selection made for litigious purposes from client-owned
23 documents.

24 MR. HARRIS: I shall address you on that.

25 MR. MALEK: It raises the issue of what you mean by

1 client-owned documents. Does it mean once the client has
2 possession of a document, you take a translation of that, it
3 is treated as client's own documents or is there a
4 distinction between documents that clients obtain from a
5 third-party or not? Then --

6 MR. HARRIS: May I take both of those points
7 together straightaway? We agree that is what this
8 Court of Appeal judgment says. We also note there is a
9 clear distinction in this judgment between, on the one hand,
10 "own client documents" and, on the other hand, the phrase
11 that is used in paragraph 72 and 75, "third-party
12 documents".

13 Now, at the moment, we are arguing about
14 translations of documents that are somewhere on the
15 Commission file. It goes without saying that some of those
16 documents, and at least in ordinary parlance, would be
17 described as third-party documents. They are not
18 Daimler-produced or generated documents. A lot of those
19 documents are DAF documents or MAN documents or Volvo
20 documents, all of them.

21 So we would say that if nothing else, if nothing
22 else, we ought to be able to defend a disclosure order of
23 translations insofar as they are properly to be called
24 third-party documents of that kind.

25 We also note that -- it is only fair to draw your

1 attention to the final sentence in paragraph 76, because
2 I want you to know that there are other things going on in
3 this case. What it says there at the Court of Appeal is
4 that there is potentially not an ability on the part of a
5 client like mine to refuse discovery of documentary evidence
6 that was in the possession of that party before the
7 selection was made.

8 So there is yet another concept there. So there
9 are two concepts here. There is own client versus
10 third-party. I have two points there.

11 First of all, we do have what would ordinarily be
12 called third-party and we would like to defend that.
13 Secondly, just so you are under no doubt, we do not accept
14 that distinction. I know it is in a Court of Appeal case
15 and I know it is expressed fairly clearly, but there are
16 counterarguments. This is an important common law right.

17 THE PRESIDENT: Yes, because one thing that is
18 going through my mind, but I have not discussed it with my
19 colleagues, is of course we will hear your argument, but if
20 we were to conclude that -- I will not say the
21 Court of Appeal was right. It is not for us to arrogate to
22 ourselves such a conclusion. But if we felt we should
23 follow or aim to follow what the Court of Appeal appears to
24 say, is that each of the various Defendants that have
25 translations would disclose translations of their own

1 documents. That would avoid multiple translations, the
2 point you made earlier, because obviously there would not be
3 overlapping documents. Then the Claimants can see what is
4 left.

5 I note that in *Sumitomo*, as a matter of
6 disclosure, all the translations were disclosed. What was
7 resisted was inspection on the grounds of privilege. So you
8 have to disclose them.

9 MR. HARRIS: Yes, that is not --

10 THE PRESIDENT: So one would see and the Claimants
11 could see from a list actually how many other documents
12 remain that somebody had translated that were not their own,
13 which nobody else has translated.

14 MR. MALEK: If I could interrupt, my understanding
15 of the *Palermo* principle is, when they are talking
16 about third-party documents, they are talking about
17 documents held by a third-party. Once the client has got
18 copies of the documents itself, then they are treated as a
19 client's document. So I am not sure whether your
20 distinction is correct.

21 MR. HARRIS: Well, that, with respect --

22 MR. MALEK: It may come into the discretion at the
23 end of the day whether we apply the *Ventouris v Mountain*
24 discretion, but I am not sure whether you are right
25 about the distinction between client and non-client

1 documents.

2 You know, if the documents are at the Commission
3 and someone goes and inspects them and translates them at
4 the Commission, then that is a third-party document. But if
5 someone gets copies from the Commission and then it is held
6 by your client, they do become your client's documents.

7 MR. HARRIS: Well, let me take that by three
8 answers. First of all, we say that that is not entirely
9 clear in this case, third-party, what is meant, versus own
10 client. In the context of these having come from Commission
11 through access to the file, which is shrouded in all kinds
12 of limitations --

13 MR. MALEK: Yes.

14 MR. HARRIS: -- these are not own client documents
15 that we have always had and we can do with them what we
16 choose, including disclosure and allowing inspection. As we
17 know from other matters that have been going on at the CMC,
18 some of which I have not been in, there are all kinds of
19 limitations and all kinds of involvements by other parties,
20 including the Commission. That is the first point.

21 Two points so far. Not entirely clear and in any
22 event, there is a factual nuance here, the second point,
23 about how and where we got these documents and what we can
24 do with them.

25 The third point is, going back to directly related

1 to what Mr. Malek says, at the end of 76, where it says
2 "were in the possession of the party before the selection
3 was made", taken literally, yes, we had some Commission file
4 documents, including documents from other people. They had
5 to be in our possession before we could make the convenience
6 translations. But it is important to understand what the
7 rationale is for that case.

8 You can pick it up from paragraph 76 itself. What
9 it is talking about is circumstances in which there have
10 been underlying disclosable documents, but then they get
11 destroyed or mislaid. The particular example given in
12 paragraph 76 is imagine that the remainder of the
13 disclosable documents were destroyed in a fire.

14 In those circumstances, can the person who holds
15 either the copies or the translations, say, "Well, hold on a
16 minute. You are not having them because of this attorney
17 work product privilege." In those circumstances, one can
18 see that possibly the interests of justice are such that,
19 notwithstanding there has been an application of attorney
20 skill and expertise, without them, the other side will not
21 have anything.

22 That was driving -- that is driving paragraph 76
23 in what leads to the final sentence, but that is expressly
24 not the position here. The position here is that the
25 Hausfeld Claimants and, for that matter, the other Claimants

1 have the underlying documents. What they want is further
2 versions of the underlying documents that they have already
3 got and that they can read, they ought to be able to read,
4 they have this multi-lingual capability. Indeed, what on
5 earth have they been doing so far if they have not used that
6 multi-lingual capability?

7 But it is not a case in which there is any danger
8 of these underlying documents suddenly disappearing now.
9 They are well and truly out there. So none of these
10 question marks about fire or other destruction or
11 misleading, which is the other case -- I cannot go through
12 all of them, but those are the other cases referred to --
13 that simply does not arise.

14 THE PRESIDENT: I mean, in *Sumitomo* as
15 well, the documents were disclosed in their original. So
16 they got them, the Claimants' lawyers -- sorry, the
17 Defendants' lawyers, I think it is, got the Japanese
18 version. What they wanted was the translation that Sumitomo
19 had of the same documents.

20 MR. HARRIS: Sir, I accept that. I accept that on
21 the facts of *Sumitomo*, that is what happened. But
22 nevertheless, that is what is driving the reference to
23 possession and we say it feeds into the distinction between
24 own client and third-party documents.

25 MR. MALEK: Am I right in understanding, and I may

1 be wrong about this, that in *Sumitomo* the
2 translations were not made for the purposes of those
3 proceedings? It was actually for the earlier stage when
4 they had the subpoena stage.

5 MR. HARRIS: I have to check that.

6 MR. MALEK: I can see one thing, which is if
7 someone has pre-existing translations and you can ask them
8 to produce it, if, for the very proceedings you are
9 fighting, you are making translations all the time, so
10 Hausfeld Claimants will be making translations of the
11 documents as they go along, does that mean if they translate
12 a document, they are under a duty to disclose it to you
13 subject to a court order?

14 MR. HARRIS: This can be checked while I am on my
15 feet. My understanding is that the selection for
16 translation into English of relevant documents was for the
17 regulatory investigations. That can be checked because
18 I certainly cannot --

19 MR. MALEK: The question is: were they prepared for
20 the actual proceedings which were on foot in England? My
21 recollection is that they were not, but maybe --

22 MR. HARRIS: That is my recollection and it will
23 be checked. What I can absolutely guarantee you, and I am
24 expressly not waiving privilege --

25 MR. JOWELL: It is a mixture.

1 MR. MALEK: Is it a mixture?

2 THE PRESIDENT: I think it is a mixture. I think
3 in paragraph 8, what they refer to as the Paul Weiss
4 documents, which was the bulk of them, which were for the
5 purposes of an FTC subpoena. Then Ashursts, that is
6 paragraph 8, some more documents for translation. Last
7 sentence of paragraph 8, all that was done for the purpose
8 of the present action.

9 MR. MALEK: Right, fair enough.

10 MR JUSTICE HILDYARD: It is not altogether easy to see what
11 the fire thing has do with the price of cheese, accept the
12 Court of Appeal says it does, because privilege is absolute.
13 Once you have established legal professional privilege,
14 necessity will not deny the right.

15 What is interesting is the last sentence of 76,
16 which goes to the question of why was *Dubai Bank v Galadari*
17 wrongly decided? That is the central thing.
18 Mr Justice Morritt in *Dubai v Galadari* said you
19 cannot have these because they offer a window into the
20 strategy or legal advice which has been given. You can see
21 that from the selection made, whether internally or of the
22 documents.

23 But the Court of Appeal says that is wrong, but
24 wrong in what context? Wrong in the context of documents
25 which were in their possession prior to litigation privilege

1 being a thing or, *Baldock*, and that is including
2 those documents, translations made, in the context which
3 otherwise you might think might give rise to litigation
4 privilege. That is the central point, is it not?

5 MR. HARRIS: With respect, yes. What we say is
6 that that is -- I will take that one right on the head. We
7 do not agree. There are powerful arguments that can still
8 be mounted that we would wish to mount because the documents
9 that we are talking about from my client are without doubt
10 selected by the exercise of exercise of expert skill and
11 lawyer's judgment for these proceedings. That is what we
12 are arguing about.

13 We say that that is capable under the Lyell test
14 of betraying the trend of the advice and potentially the
15 advice, particularly when one then combines them with other
16 OEM's documents. That would need to be -- if that is to be
17 ordered against me, that would need to be set out clear so,
18 if necessary, we would take it further before any actual
19 inspection takes place, because we do not accept that that
20 is right.

21 Interestingly, and to develop this point a little
22 bit further, we had, Mr. Malek, sir, regard to your helpful
23 test prior to yesterday's intervention and seen the
24 *Han v Cho* case. If I could just hand up now both
25 an extract from your -- I think you, members of the

1 Tribunal, already have that. If I could hand out some
2 copies of the very short extract from your book and the
3 *Han v Cho* case that you cite.

4 We draw further support from that case. We accept
5 it is only persuasive, but I have got this case and one
6 other from Canada. Sorry, whilst we are passing things out,
7 I will pass out the other one as well. They are quite
8 short, these extracts. (Same handed)

9 There are several copies here for the Tribunal.
10 You should have three short handouts. The first is a short
11 extract from Mr. Malek's disclosure book that I will take
12 first. Then there is the *Han v Cho* case to which
13 his book refers. Then there is a supplemental point from
14 the *Bilfinger Berger* case in Canada in the
15 BC Supreme Court.

16 So taking it first with the extract from the book
17 under the section G translations, there is reference of
18 course to *Sumitomo*. Then in footnote 126,
19 reference to the *Han v Cho* case in the
20 British Columbia Supreme Court, where it is suggested that
21 unofficial translations done in-house as a result of the
22 legal team's effort were privileged. This is a common law
23 jurisdiction and builds upon, expressly upon, the *Lyell*
24 line of authority.

25 The case itself, it does it not really add

1 anything to the footnote, but just so you have got it, the
2 relevant passage is at paragraph 10 where the learned judge
3 of the Supreme Court BC says:

4 "I do not agree that if a party has an unofficial
5 translation of a document prepared in-house as part of its
6 legal team efforts, the in-house translation must be
7 produced pursuant to [disclosure]."

8 MR. MALEK: The problem is *Sumitomo* was
9 not cited there.

10 MR. HARRIS: I do accept that. It has been
11 followed in further cases, one of which I will show you. It
12 is expressly a common law professional privilege
13 jurisdiction where it is treated as a fundamental common law
14 right.

15 What is interesting here is that it is essentially
16 a reflection, if you go on to read the next page, she
17 declines to follow a Master's decision in Ontario. The
18 reason that she declines to follow it is because she is
19 concerned about the proposition of a lawyer's work product
20 losing privilege simply because it is a translation. That
21 is essentially my point. This is genuine lawyers' work
22 product, exercise of skill and care, that is capable of
23 betraying the trend and potentially even the substance of
24 the advice. That is a truly fundamental right.

25 Just to finish it off, additional points come out

1 from -- it is in fact the same judge in the *Bilfinger Berger*
2 case. I only need to take you to two passages.
3 She cites her own case of *Han v Cho* in
4 paragraph 11. Then the only passages I would like to draw
5 your attention to are additional points at number 15:

6 "The problem with requiring the *Bilfinger Berger*
7 parties to translate documents is that it can give rise to a
8 whole new area of issues arising out of whether or not the
9 translation was accurate or deliberately misleading."

10 I hope that is not the case here, but
11 nevertheless, you can see the point. It could be
12 inadvertently misleading or inaccurate. I have essentially
13 made the point.

14 What she says is:

15 "It has the danger of raising a subcategory of
16 collateral issues in the litigation."

17 That is exactly our case. We could have all
18 manner of disputes about how Daimler have disclosed, is it
19 accurate, has it been reliable, is it the same as somebody
20 else?

21 MR JUSTICE HILDYARD: That is a *Ventouris v Mountain*
22 point, not a privilege point. On the privilege
23 point, does it come back -- back to 76 and the last bit when
24 the Court of Appeal says:

25 "A lawyer's advice is privileged from discovery

1 should not result in the right of a party to refuse
2 discovery of documentary evidence that was in the possession
3 of that party before the selection was made, or copies or
4 translations of such evidence."

5 Does that last phrase cover any documents whenever
6 made and for whatever purpose?

7 MR. HARRIS: Well, if it does, we say it is wrong
8 and we had like to be able to argue that point before the
9 cat is out of the bag. I do not resale from taking that
10 position.

11 THE PRESIDENT: So you say then the procedure would
12 be that, as we are bound by the Court of Appeal, that we
13 give our judgment and give you permission to appeal.
14 Arguably, you have to go all the way.

15 MR. HARRIS: In the ultimate instance, were I to
16 fail on the case management point, in the ultimate instance,
17 yes.

18 THE PRESIDENT: No, because you say your position
19 is this is wrong, what the Court of Appeal says.

20 MR. HARRIS: If it to be decided on that point,
21 yes, we say that is wrong. We cannot let the cat out of the
22 bag before that is re-ventilated.

23 THE PRESIDENT: Well, the cat, in the other sense,
24 is bound by the Court of Appeal. Indeed, so, in a sense, is
25 the Court of Appeal. So we cannot -- we are not in a

1 position to give you a certificate to go straight to the
2 Supreme Court because we have not got the jurisdiction. So
3 that would be the course you have to take if you want to say
4 that we should not follow *Sumitomo*.

5 MR. HARRIS: If that is right, then yes. That is
6 at one extreme. What I would endeavour to persuade you is
7 this is all making a bit of a mountain out of a molehill,
8 because we do not need do it in the first place. The reason
9 you do not need to do it in the first place is because of
10 the case management reasons that I have already given and
11 the discretions available to the CAT.

12 I just add this. You see there is another level
13 of expenditure, time and resource that is required if this
14 was to be done properly. I would have to have the
15 opportunity, as was done in *Sumitomo* by the
16 Paul Weiss lawyer and the Ashurst lawyer, to put in evidence
17 about what I say is -- and it would include at least the
18 following categories: what is an own client document as
19 opposed to a third-party? Whether I genuinely have
20 possession, at least possession as a matter of fact in the
21 sense that is contemplated in the *Sumitomo* case,
22 bearing in mind how I got it and what my limited degree of
23 control is over those documents, access to the file. Then
24 I have to provide evidence without waiving privilege -- it
25 is careful document, as they say in this case -- why either

1 some or all of those translations are capable of betraying
2 the trend or the content of the legal advice.

3 Then I have to have regard, to do that properly,
4 to the translations that are or capable of or are
5 potentially going to be disclosed by the people because it
6 might be all of a piece rather than looking at in isolation.
7 Then the court has to decide, "Right, well, are your points
8 made good on that evidence?"

9 MR. MALEK: We may have competing translations.

10 MR. HARRIS: You may have competing translations.

11 MR. MALEK: You may have three translations of the
12 same document.

13 MR. HARRIS: On top of that, the additional
14 category is I would certainly endeavour to persuade this
15 Tribunal with the evidence, let alone a higher court if that
16 ever arose, that I could avail myself of the *Han v Cho*,
17 if you like, further point. Are they in-house?
18 Are they properly to fall within the meaning or, at any
19 rate, the principle behind those words that are used?
20 I would say definitely yes in my case. Although they are
21 not in-house in the sense that every one of them has been
22 done by a lawyer who works for Quinn Emanuel or one of the
23 other Daimler instructed firms, some of them were, so they
24 are all square. But they are certainly all unofficial, as
25 I understand that word to be used in *Han v Cho*.

1 None of them have been produced, that translation,
2 in court or in a formal court document or in a pleading.

3 I would like to address you, if you are against me
4 on the case management point, on all of those five points in
5 evidence before the decision is taken. Then, if I were to
6 lose because of the final sentence of paragraph 76 about
7 having them in possession, then we say that that is wrong.
8 We say there are a number of hurdles to go through before
9 that. It is lot of expense and time and effort and a trip
10 to a higher court potentially which simply is not necessary.
11 It is all a sideshow.

12 THE PRESIDENT: Yes, just a moment.

13 [The Panel conferred]

14 MR. PICKFORD: Sir, can I just check that the
15 Tribunal is not deliberating on what the decision is?

16 THE PRESIDENT: No, no, no. Mr. Pickford, we would
17 not deliberate on the decision without the pleasure of
18 listening to you and, indeed, also Mr. Hoskins, whose
19 clients are affected by this, and I think Mr. Jowell said
20 his client is not aware that they have any, so maybe not
21 Mr. Jowell on this occasion.

22 MR JUSTICE HILDYARD: The essence of what you are saying is
23 look, Tribunal, there is an easy and a difficult way. The
24 easy way is to deal with this as a matter of necessity or
25 proportionality. If you are not going along with that, you

1 are going to get into a load of evidence and probably the
2 Supreme Court.

3 MR. HARRIS: It --

4 MR JUSTICE HILDYARD: Putting it brutally, which is, in a
5 way, what you are doing.

6 MR. HARRIS: In my submissions I hope to have been
7 forcefully putting that blunt point. But actually, at the
8 risk of being even more blunt, this is an exercise in
9 futility for this reason. If you were to be against me,
10 I would obviously have to at least have the right to try to
11 persuade a higher court otherwise. That would take however
12 long it takes. In the meantime, we could simply have got on
13 with the agreed set of translations across the board. So
14 this is all utterly pointless. The cat cannot be let out of
15 the bag, my favourite phrase, until I have had the
16 opportunity to take it higher. What would be the point? It
17 would be dealt with in any event. For that reason, we say
18 this is not good case management or right in principle.

19 THE PRESIDENT: Well, give us just a moment,
20 because we are due to rise for lunch in any event, but we
21 will just take a moment.

22 MR. HARRIS: Thank you.

23 [The Panel conferred]

24 THE PRESIDENT: Yes. Ms. Demetriou, we have heard
25 what Mr. Harris says. None of these translations, as we see

1 it, as it were, will be the official translations for the
2 purposes of any hearing, if they are relevant.

3 It is not just a question of whether it is
4 disclosable. There is also now a question of just the
5 proportionality of how we approach this. We can see that it
6 gives rise to certain difficulties of law, even before you
7 get any question of evidence. The languages involved, you
8 are obviously capable of getting your own informal
9 translations in the meantime at a cost which, in the context
10 of the costs of this case, are not really very significant.
11 So what is really the point of pursuing this all of the way
12 now?

13 MS. DEMETRIOU: I have a number of points I would
14 like to make. In a sense, it is our application.
15 Mr. Harris was so keen to get going, I did not have a chance
16 to open the application. I would like to be able to reply
17 properly to the application.

18 THE PRESIDENT: No, you can. But before -- we
19 appreciate your application. What I am saying is we then
20 will hear Mr. Pickford and Mr. Hoskins and you will then
21 have a right to reply to all three.

22 MS. DEMETRIOU: Yes. Well, may I in a nutshell --

23 THE PRESIDENT: Obviously, it is not going to
24 happen now, but what we would like you to reflect on over
25 lunch is, in any event, even if the point on privilege turns

1 out to be bad, there is a discretion in the Tribunal on
2 disclosure and whether really, as it were, this game is
3 worth the gamble in the context of everything else.

4 MS. DEMETRIOU: Sir, I am going to address that
5 point. May I in a nutshell tell before that just tell you
6 our answer and develop it afterwards?

7 THE PRESIDENT: Yes.

8 MS. DEMETRIOU: In a nutshell, we say all of these
9 so-called disproportionate concerns and degeneration into
10 chaos submissions are grossly overblown. When one analyses
11 *Sumitomo*, it is plain they have absolutely no
12 argument on privilege that these documents are to be treated
13 as disclosable documents.

14 Of course, the court always has a discretion
15 whether to permit inspection. We accept that. In the kind
16 of case that was discussed in *Sumitomo*, for
17 example, where that might give rise to intimidation of
18 witnesses and so on, it is a discretion that the court
19 enjoys.

20 But there is no compelling reason here, in
21 circumstances where the courts treat these documents as
22 essentially the same as the original document, so the
23 principles that apply are identical. There is no good
24 reason here why the Tribunal should exercise its discretion
25 against our client. In a nutshell, what we are seeking here

1 is that the descent into chaos simply will not arise.

2 THE PRESIDENT: Well, we have got your summary.

3 The other problem is that even if you are right
4 about *Sumitomo*, and it binds us, Mr. Harris made
5 clear that he wants to argue in another place that *Sumitomo*
6 is wrongly decided, even though one does note it is
7 by what can be fairly described as a strong Court of Appeal.
8 But they want that opportunity. So there will be
9 considerable delay in any event --

10 MS. DEMETRIOU: Well, sir, Mr. Harris will have to
11 persuade you that it is right to stay your judgment.
12 Assuming you are with me, Mr. Harris will have to persuade
13 you it is right to stay your judgment.

14 THE PRESIDENT: Well, to stay implementation.

15 MS. DEMETRIOU: To stay implementation. He will
16 have to persuade you of that.

17 THE PRESIDENT: Yes.

18 MS. DEMETRIOU: Sir, may I make this point before
19 you rise, which is it is all very well to say there is going
20 to be a process for agreed translations and I think we are
21 all on the same page with that. What we are talking about
22 here is review of many thousands of file documents, many of
23 which are in different languages. It may be that many of
24 those documents will not be documents which are not
25 important in the case which merit an agreed translation.

1 What we are talking about now is something to help us and to
2 render less costly the exercise of reviewing them to see
3 whether they are documents we indeed wish to rely on. It is
4 a different point.

5 We completely agree that once we have determined
6 which documents we seek to rely on and those are documents
7 in the case for trial, we will have to agree translations
8 with the other sides. So this chaos simply will not
9 materialise. This is a pragmatic suggestion designed to
10 avoid costs. We are not saying we cannot produce the
11 translations. It is just that many of them may be documents
12 which are not and do not turn out to be important documents
13 in the case. We want a simple and straightforward way of
14 reviewing them.

15 MR JUSTICE HILDYARD: What you have to identify, as
16 I understand the cases, is a legitimate litigious advantage
17 to you which would result from inspection of these documents
18 and that litigious advantage has to be such as to outweigh
19 what may be another factor, which is the disproportion of
20 what is involved.

21 MS. DEMETRIOU: Sir, with respect, we do not
22 accept that is the test, because I want to take you to
23 *Sumitomo*, to other passages in *Sumitomo*,
24 afterwards. We do not accept that the burden is on
25 us to show some overwhelming litigation advantage. We say

1 One is there is no evidence, of course, from the Claimants
2 on the translation point that they need these translations.
3 Indeed, just before the short adjournment, Ms. Demetriou
4 said, and I wrote this down:

5 "We are not saying that we cannot review the
6 documents without the Defendants' translations."

7 That goes into the question of the case management
8 balance, in my respectful submission.

9 One way of putting that is the other Claimant
10 firms, they have not needed translations in order to move
11 forward. Although I was not present this morning,
12 I understand a review has been undertaken of some file
13 documents, indeed to the point they can be pleaded. They
14 are international law firms and it has not proved an
15 impediment to them.

16 The main point is there just no evidence. The way
17 it is presented is it is to reduce costs. For the reasons
18 I have given, it will generate more costs.

19 Although I do not need to detain you with them
20 now, there are some more detailed points about were I to
21 fail and you were to order these documents against me, this
22 disclosure and inspection against me, there are some
23 mechanics about what exactly you have had disclosed. So for
24 instance, there are different versions of the file. We have
25 a different version of the DAF version to the MAN version

1 and we have translated things from their file. It does not
2 follow that should automatically go to a Claimant.

3 Likewise, we would have to analyse each document
4 one by one to see whether it was a document that had been
5 disclosed, even from the DAF version of the file. That is
6 more cost and expense and that goes into the case management
7 balance.

8 Finally, we do not, subject to reviewing every
9 single one of them, even know whether it is an original
10 Daimler document or not. That would have to be a one by one
11 exercise. Then, as you heard me before, I would say that
12 I would have to be given, I respectfully suggest, the
13 opportunity to provide evidence on that.

14 So those are -- those are the additional points.

15 THE PRESIDENT: Yes.

16 MR. HARRIS: Thank you very much.

17 THE PRESIDENT: Ms. Demetriou, I think it would be
18 helpful -- we appreciate that Mr. Pickford and Mr. Hoskins
19 may have further submissions to make. But if we were to
20 assume that you are right on *Sumitomo*, which binds
21 us, and that these are not privileged documents, we would
22 like to hear you on the question of the proportionality of
23 ordering disclosure.

24 MS. DEMETRIOU: May I do that now?

25 THE PRESIDENT: Yes, please.

1 MS. DEMETRIOU: May I just lay down a marker,
2 which is to say that if I were making full submissions --
3 I take it from the premise of your question, sir, that you
4 would accept my submission that *Sumitomo* is in my
5 favour and binds the Tribunal. There are other parts of the
6 *Sumitomo* judgment I would wish to take the Tribunal
7 to if I were opening my application in full, but since you
8 have asked me to deal with discretion --

9 THE PRESIDENT: I am not saying we have necessarily
10 taken the view that the result of *Sumitomo* is that
11 they are not privileged. It certainly binds us. That is
12 clear. But just assuming in your favour that that is the
13 right construction of *Sumitomo*, in which case,
14 there is no privilege objection. Even on that footing, why
15 would it be -- we want to hear whether it would be
16 proportionate.

17 MS. DEMETRIOU: Well, sir, may I suggest, just in
18 the interests of fairness, because I have not opened my
19 application --

20 THE PRESIDENT: Yes.

21 MS. DEMETRIOU: -- that Mr. Pickford and
22 Mr. Hoskins make their submissions now and I deal in the
23 round with everything? Because I do want -- if you are not
24 with me on *Sumitomo* or may not be with me, I do
25 want to make submissions on both things. So I want to make

1 the point that -- I want to make a point about the status of
2 what is meant by own client and third-party.

3 THE PRESIDENT: What is concerning us is this.
4 Even if you are right on *Sumitomo* and there is no
5 privilege objection, we will only order disclosure in any
6 event for inspection if it is proportionate.

7 MS. DEMETRIOU: Yes, sir --

8 THE PRESIDENT: So if you cannot persuade us it is
9 proportionate, we need not spend a lot of time on what may
10 be difficult legal issues on *Sumitomo*.

11 MS. DEMETRIOU: Very well. Let me make my
12 submissions on proportionality. So Mr. Harris' submissions
13 on proportionality start with the premise that we are right
14 on *Sumitomo*. Indeed, that is the premise that you
15 are taking now. He relies on -- he relied at the outset on
16 paragraph 79 of *Sumitomo*, which sets out a citation
17 from the *Ventouris* case.

18 THE PRESIDENT: Yes.

19 MS. DEMETRIOU: You can see in that citation the
20 type of circumstance the court had in mind there when it
21 comes to exercising its discretion against inspection in
22 respect of documents that are otherwise disclosable. So
23 that could lead to violence, intimidation, interference with
24 witnesses, destruction of documents. The first point I make
25 is we are not in that territory at all.

1 So what we have to do is look at the reasons given
2 by Mr. Harris for departing from the normal rule, which is
3 that these documents are disclosable and should be open to
4 inspection.

5 THE PRESIDENT: I am sorry. The normal rule is you
6 are only going to get disclosure where it is proportionate.
7 You have to satisfy the Tribunal that it would be
8 proportionate.

9 MS. DEMETRIOU: Let me then start with the points
10 made by Mr. Harris. The points he made -- essentially five
11 points that we wrote down. So in his submissions in support
12 of his contention that this would be disproportionate, he
13 advanced five points.

14 He said that, firstly, that he would need evidence
15 as to whether the translations were his own client documents
16 or third-party documents.

17 Sir, we say that does not arise because on a
18 proper reading of *Sumitomo*, these are all -- we are
19 only talking about own client documents.

20 THE PRESIDENT: Right, but that distinction is only
21 relevant if there is any privilege on *Sumitomo*. If
22 there is no privilege, which is the assumption we put to
23 you, then that distinction does not matter.

24 MS. DEMETRIOU: Well, what we say is that the only
25 reason that the distinction arises, so the only reason why

1 he says that that distinction matters and that he needs
2 evidence to say whether they are own client documents or
3 not, is because of his reading of *Sumitomo*. That
4 is the only possible basis on which there would be a need to
5 provide evidence.

6 We say that he is wrong on *Sumitomo*
7 because these are all own client documents and,
8 therefore, he does not need to produce a witness statement
9 going into that issue. So that is one point that could be
10 discounted from the proportionality analysis.

11 Can I take the Tribunal briefly back to *Sumitomo*
12 to make the substantive point good?

13 THE PRESIDENT: Well, I think we can see the point,
14 but what is the next point?

15 MS. DEMETRIOU: So the next point -- so we say the
16 first point does not arise.

17 The next point is he says he would need to adduce
18 evidence as to whether the fact of translation, the fact
19 that these documents were selected for translation, betrays
20 legal advice. Again, we say that that point is dependent on
21 him showing that *Sumitomo* is wrong.

22 THE PRESIDENT: Yes.

23 MS. DEMETRIOU: So, we say that that is not an
24 admissible concern and he would not need to do that because
25 we say *Sumitomo* knocks that point on the head. So

1 it does it not matter whether or not these betray legal
2 advice. That is not an admissible concern. He would not
3 need to adduce evidence to that effect.

4 MR JUSTICE HILDYARD: Insofar as they are own documents.

5 MS. DEMETRIOU: We say that all of this only
6 applies to own documents.

7 MR JUSTICE HILDYARD: He says he has to investigate that.

8 MS. DEMETRIOU: We say no. This is my point on
9 *Sumitomo*, and this is why I do really want to
10 develop my points on *Sumitomo* because we say when
11 *Sumitomo* talks about own client documents, they are
12 talking about something quite broad. We say that the
13 category of own client documents in *Sumitomo*
14 applies to all the documents we are looking at
15 here, which are the file documents.

16 MR. MALEK: If you look at other cases, it is
17 fairly clear that own client documents are referring to
18 documents in the possession of the client as opposed to
19 documents held by a third-party and you go to the
20 third-party's offices and then take a copy from them.

21 MS. DEMETRIOU: Sir, that is precisely our point.
22 So we say --

23 MR. MALEK: We were not taken to those authorities,
24 but you can take it as read.

25 MS. DEMETRIOU: I am grateful for that. We say on

1 that basis, they simply do not need to go and conduct this
2 investigation because there is no dispute. If we are right
3 on that point of law, there is no dispute that these are all
4 own client documents, because we are talking about the
5 Commission file that was in their possession. That is
6 simply an avenue of exploration and investigation they
7 simply do not need to conduct.

8 The same applies to the second point, which is
9 whether the fact of translation betrays the legal advice.
10 That, again, is an exercise which is wholly dependent on
11 Mr. Harris showing that *Sumitomo* is wrong and
12 should be departed from.

13 The third point he made falls into the same
14 category. The third point is he said he would need evidence
15 as to whether the translations were produced for the
16 purposes of litigation or not. But again, we know that the
17 translations at issue in *Sumitomo* itself covered
18 both translations that were produced for the purposes of the
19 litigation and pre-existing translations.

20 We say again that the third point does not arise
21 because of *Sumitomo*. So none of these three
22 avenues of investigation arise at all. They are simply
23 points that are made for forensic purposes to try and
24 persuade the Tribunal that this is an onerous exercise.

25 The fourth point was a little difficult to

1 understand. We took a note. Mr. Harris says we need to
2 investigate whether these translations are in the possession
3 of his client -- my client as a matter of fact. We do not
4 understand that point because Mr. Harris purported to answer
5 it at the outset. He said, "We have X number of
6 translations". Obviously, if there is a question, if they
7 do not have translations in their possession or control,
8 they do not fall to be disclosed. So that is not a
9 legitimate concern.

10 The fifth and final point that Mr. Harris made
11 essentially came down to an in terrorem argument where he
12 said, "Well, we will be off to the Court of Appeal and, in
13 fact, Supreme Court if you apply *Sumitomo* against
14 us". Again, we say that the Tribunal should clearly
15 determine the point on its merits. And if Mr. Harris'
16 client wants to challenge the *Sumitomo* decision,
17 they can do that. They will then have to argue that the
18 Tribunal's order should be stayed whilst they go off and try
19 and persuade the Court of Appeal that they should grant
20 permission.

21 So none of Mr. Harris' reasons stack up. This is
22 simply not a disproportionate exercise and he did not offer
23 anything else. We say as against that, as against that,
24 this is a straightforward exercise. These translations
25 exist and they can simply produce them. They are in

1 relation to file documents that they have had for a very
2 long time. It will save costs.

3 Now, of course, we do not say that we are
4 incapable of carrying out translations ourselves in order to
5 review the documents. Plainly, we are. But it would be
6 expensive and this would save costs and save time.

7 Now, there is a distinction to be drawn between
8 the review of these file documents and eventual translations
9 which will have to be agreed. But the reality of the matter
10 is that there are a lot, many thousands of file documents,
11 many in foreign languages. There are translations which
12 will help my clients to review -- the legal team behind me
13 to review these documents more swiftly and at a reduced
14 cost.

15 At the end of that process, there will be a
16 process of agreement between the parties, between all the
17 parties in this litigation, as to which documents are going
18 to be relied on by either side at trial. There will then be
19 a process for agreeing translations of those documents. We
20 anticipate those will be fewer in number than the initial --
21 the initial number of many thousands of file documents that
22 we are currently reviewing.

23 We say proportionality is entirely in our favour.
24 There is no good reason at all why this should be onerous.
25 In fact, it is straightforward. It will save costs. It is

1 a straightforward application. We say that there is no good
2 reason to refuse it.

3 May I say this as well? All of Mr. Harris'
4 reasons why this would be onerous and disproportionate come
5 down, on proper analysis, to a quarrel with *Sumitomo*
6 because they all depend on *Sumitomo*.

7 My submission to the Tribunal is that if the
8 Tribunal refuses disclosure as a matter of discretion on the
9 basis of considerations which assume that *Sumitomo*
10 is wrong, that is effectively tantamount to not
11 giving effect to the Court of Appeal's judgment in *Sumitomo*.

12 So one has to assume in my favour that *Sumitomo*
13 is against Mr. Harris. None of these -- none of
14 these allegedly disproportionate steps that he says he will
15 need to engage in, in terms of investigating what the
16 purpose was of the translation, whether or not it is own
17 client documents, none of them arise on a proper reading of
18 *Sumitomo*. That, in a nutshell, is my submission on
19 proportionality.

20 I am available to assist the Tribunal on *Sumitomo*
21 itself and on the principles that apply, if you
22 would like me to do that.

23 MR JUSTICE HILDYARD: I know you do not like the language,
24 but it is language that you see in the authorities, which is
25 that it is to be demonstrated that there is some proper and

1 proportionate litigious advantage to be had. Would it be
2 fair to summarise your submission as being that the proper
3 and proportionate litigious advantage is the possible saving
4 of costs by having an unofficial translation of a limited
5 number of documents?

6 MS. DEMETRIOU: Sir, yes. We deal with this in
7 evidence. It is not correct that we do not have evidence.
8 We have Ms. Morfey's witness statement, which, for your
9 note, is at Hausfeld volume B, tab 3. She deals with it at
10 paragraph 105. Sir --

11 THE PRESIDENT: Just one minute.

12 MS. DEMETRIOU: Is that not it?

13 THE PRESIDENT: Tab 5.

14 MS. DEMETRIOU: Sorry.

15 THE PRESIDENT: No, it is not tab 5.

16 MS. DEMETRIOU: Tab 3 is --

17 MR JUSTICE HILDYARD: Yes.

18 THE PRESIDENT: Ms. Morfey's second witness
19 statement.

20 MS. DEMETRIOU: Sorry, I think I may have the
21 wrong reference, so I am going to be assisted by a junior in
22 finding the right reference.

23 MR. HARRIS: Paragraph 105.

24 MS. DEMETRIOU: That is right. This has been
25 dealt with in correspondence. It is true that this just

1 summarises the points that have been made in correspondence
2 and I think it is dealt with in our skeleton argument in a
3 little bit more detail.

4 Sir, you are right that the convenience that
5 underlies this is we have -- there are something like 25,000
6 file documents of which I think only 8,000 are in English.
7 There are lots of foreign language documents. What the
8 solicitors have to do is, obviously, review all of these
9 documents to see to what extent they are relevant to the
10 issues in this case.

11 Insofar as there are ready-made translations,
12 convenience translations, it is obviously much quicker and
13 cheaper to be able to use those to see if this is a document
14 that is worth carrying forward in the case.

15 Now, we say that is -- that does represent a
16 convenience and a cost saving and efficiency saving. Of
17 course, I do not say that we cannot do it without the
18 translations, but we say that the Tribunal should, insofar
19 as it can, assist the parties to save costs.

20 MR. MALEK: Ms. Demetriou, surely there will be a
21 lot of documents which have not been translated, for example
22 in German.

23 MS. DEMETRIOU: Yes.

24 MR. MALEK: Surely your clients will get a German
25 speaker to look at those documents and see if they are worth

1 translating.

2 MS. DEMETRIOU: That may well be possible, but
3 that will not necessarily be the same lawyer as the lawyer
4 who is reviewing the documents in the case. There will need
5 to be a process of liaising with German speakers. We do not
6 say -- I do not want to put this too high. We are not
7 saying that it would be impossible to carry this out without
8 these translations, but we do say it will materially assist
9 and help reduce costs and make the process more efficient.

10 What we also say is weighing on the other side of
11 the proportionality equation is no good reason and that is
12 as a result -- that is in light of the submissions I have
13 made. Nothing Mr. Harris has said amounts to a good reason
14 why this should be disproportionate.

15 Now, he referred to a lot of things and tried to
16 convey the impression it would be a lot of work. In fact,
17 none of these stands up, for the reasons that I have given.
18 None of these investigations that he postulates arise at
19 all.

20 THE PRESIDENT: You still -- you say 8,000 only are
21 in English. So of the other 17,000 that are in a foreign
22 language, out of those 17,000, even if you got this
23 disclosure, you would get less than 3,500 of them.

24 MS. DEMETRIOU: Yes, sir. It is not a complete --

25 THE PRESIDENT: So it will not get you very far.

1 MS. DEMETRIOU: It is not a complete answer, but
2 we say it does materially result in a reduction of costs.

3 MR JUSTICE HILDYARD: On your in terrorem point, do you say
4 it
5 is an inadmissible consideration in determining whether this
6 adventure would save costs for us to bear in mind the
7 dislocation of the case and the costs incidental to that if
8 this matter has to go forward on a point of privilege in
9 that context?

10 MS. DEMETRIOU: We say that the Tribunal should
11 give that consideration no weight and --

12 MR JUSTICE HILDYARD: No weight.

13 MS. DEMETRIOU: No weight. The reason I say no
14 weight -- may I explain?

15 MR JUSTICE HILDYARD: Yes.

16 MS. DEMETRIOU: We say that for a number of
17 reasons. We say, first of all, we do not know what
18 Mr. Harris' client is going to do. It is true that for
19 forensic reasons, he says he is going to go to the Supreme
20 Court. But whether in fact that is a realistic suggestion
21 remains to be seen.

22 Secondly, we say that this point of principle will
23 have ramifications going forward in the case and so even if
24 this did go forward to the Supreme Court and it were
25 determined, you can see the timescales that are being

1 suggested in this case for trial. No trial has currently
2 been listed. This is a point that will crop up going
3 forwards in the case and it will be convenient for the
4 parties to disclose convenience translations they make.
5 That will be an important point going forwards and it will
6 lead to convenience and cost savings in the case.

7 It is not a one-off point, sir, which will -- the
8 practical consequence of which ends today. It is a point
9 which is of significance going forward, even if this does go
10 further.

11 We say essentially whether or not it goes further
12 is a matter for the Court of Appeal to determine and the
13 Tribunal should determine the matter on its merits without
14 regard to that submission.

15 MR JUSTICE HILDYARD: Just to be clear, you say that
16 because

17 it may have other ramifications, it would not be a proper
18 element in our discretion to take this into account, this
19 possibility into account.

20 MS. DEMETRIOU: We say of course the Tribunal can
21 take any consideration it wants into account. I say that
22 you should give it no weight. The reason we say that is
23 because even if Mr. Harris manages to get permission from
24 the Supreme Court to argue the case, even if the point does
25 go to the Supreme Court, it does not prevent -- it does not

1 result in dislocation of this case because we will in the
2 meantime, assuming that he gets a stay of the order, be in
3 exactly the same position we were before the application was
4 made. So there is no dislocation.

5 But if we succeed in persuading the Supreme Court
6 that it should follow -- it should apply *Sumitomo*,
7 then we will achieve a practical benefit going
8 forwards. So it will not be all for nothing.

9 We say, on any view, there is no dislocation that
10 results because we are not going to be in any different
11 position than the position we are at to start with, which is
12 we are not getting the translations.

13 THE PRESIDENT: You will probably be translating
14 them in the meantime.

15 MS. DEMETRIOU: I am so sorry?

16 THE PRESIDENT: You will probably translate them
17 yourself in the meantime.

18 MS. DEMETRIOU: Sir, there may be an ongoing
19 relevance to this in terms of further disclosure in the
20 case, because we have had very limited disclosure so far of
21 the file documents.

22 THE PRESIDENT: I see that. I mean, the court's
23 discretion is indicating that the court has to take a
24 pragmatic view as to the cost benefit analysis which is
25 going to result from all of this. You accept it is a valid

1 part of the exercise of our discretion to take into account
2 the complications which may, you say less likely, on the
3 other side, it is said more likely, to arise. But it is
4 simply a pragmatic balance, is it not?

5 MS. DEMETRIOU: Sir, may I make two points about
6 that?

7 MR JUSTICE HILDYARD: Yes.

8 MS. DEMETRIOU: We say usually where it is evident
9 that a document or a category of documents is disclosable
10 and one party says, "Well, it is disclosable, it falls
11 within the scope of disclosure, it is not privileged, but we
12 think it would be disproportionate to produce", you normally
13 have an exchange of evidence on that. You have a proper
14 witness statement explaining precisely why it would be
15 disproportionate to produce it. We do not have that from
16 the Defendants in this case, but we do have Mr. Harris'
17 submissions. So we have Mr. Harris' submissions and he has
18 advanced five factors in favour of his submission, in
19 support of his submission, that this would be
20 disproportionate. I say that none of them stacks up at all.
21 We simply do not accept on the facts that this would be
22 disproportionate.

23 Now, of course, as a matter of principle, if they
24 were coming here with compelling evidence, saying --

25 MR JUSTICE HILDYARD: You know, we have to remember we

1 thought this could be dealt with as a matter of principle
2 almost, or across the board, but the application was only
3 made against that. It is not very surprising there was not
4 evidence in response. So I think, you know, I understand
5 the forensic purpose of that point, but it is not, I think,
6 an entirely fair one.

7 Back to the issue of pragmatism. As a practical
8 matter, if there is that possibility, and as the President
9 has said, you are bound, are you not, to be undertaking your
10 own translations whereby to put yourself in a proper
11 position to fight out the case on the basis of the evidence
12 that you have got, which will include the sourced material?

13 MS. DEMETRIOU: Sir, what I say about that, and
14 leaving aside the forensic point, is that the Tribunal will
15 have to decide whether indeed it is disproportionate to
16 order disclosure or inspection of these documents. You have
17 heard from Mr. Harris and we say that they have provided no
18 reason why it would be disproportionate. None of that
19 stacks up.

20 On the other side of the equation, we have
21 identified cost savings that would result. It is no answer
22 to that to say, well, they will not be complete cost
23 savings, because it is obvious, we say it is obvious, that
24 it will assist.

25 Now, if I were to be faced -- I would be in a more

1 difficult position if I were faced with coherent submissions
2 or evidence as to why this is disproportionate. But an
3 in terrorem argument that we have to carry out X, Y and Z
4 investigation, when on analysis those lines of investigation
5 do not arise, will not do, we say.

6 THE PRESIDENT: Will you give us a moment?

7 [The Panel conferred]

8 THE PRESIDENT: Mr. Pickford, your clients are
9 actually respondents to this application, as made.

10 MR. PICKFORD: Yes.

11 THE PRESIDENT: Can you also just address us,
12 because we are very conscious of time, just on
13 proportionality. So assume that Ms. Demetriou is right and
14 that the documents are -- sorry, assume that Ms. Demetriou
15 is right and that the documents are not privileged. There
16 is clearly then nonetheless a discretion in the Tribunal.
17 We will only order disclosure and inspection when it is
18 proportionate. We ask you to address us on that point
19 rather than on the privilege point.

20 MR. PICKFORD: Sir, that was indeed my intention
21 anyway. I have no submissions to make on the privilege
22 point.

23 On the proportionality issue, we do say that this
24 proposed order has the ability to spiral into a highly
25 onerous, cost-generating and document proliferating

1 exercise. It is not ultimately going to assist either the
2 Tribunal or the parties.

3 My instructing solicitor Ms. Edwards explains in
4 her witness statement that we would need to collate the
5 documents that have been sought from a variety of different
6 sources. If I could expand a little on that in terms of
7 what that will actually mean in practice.

8 THE PRESIDENT: Could you just give me the
9 reference to the witness statement, please?

10 MR. PICKFORD: Sir, the witness statement is sixth
11 Edwards. Sorry, it is not sixth Edwards, it is third
12 Edwards. The reference is Hausfeld volume B, tab 8,
13 paragraph 85.

14 On instruction, I had some further points that
15 I would like to advance to the Tribunal, but I will explain
16 that in more detail because obviously this issue has morphed
17 somewhat from the way the application was put, when our
18 principal point is this very unfair to be singling us out.

19 MR. MALEK: What paragraph of Edwards is it?

20 MR. PICKFORD: It is 85 and towards the bottom.

21 THE PRESIDENT: Tab 8.

22 MR. PICKFORD: Tab 8. As I say, sir, I wish to
23 expand and explain what lies behind that, on instruction.

24 THE PRESIDENT: Yes.

25 MR. PICKFORD: So the position is that the

1 available translations that we could be being required by
2 this order to disclose could derive from a number of
3 sources, including, firstly, external translations.

4 I explained to the Tribunal at the outset that we have some
5 of those. Lawyers' translations, by either of the two
6 instructing firms, Travers Smith and De Brauw. The
7 particular one I will come back to, this is absolutely
8 critical in this case, computer-generated translations,
9 because my firm, and, as I understand it, all of the firms,
10 will have software that enables them to generate rough and
11 ready Google Translate-style translations. There will be
12 very large numbers of those because you can simply generate
13 them at the touch of a button.

14 MR. MALEK: So you are saying that Hausfeld can do
15 exactly the same.

16 MR. PICKFORD: Yes.

17 MR. MALEK: They can get the documents and do the
18 equivalent of a Google Translate.

19 MS. DEMETRIOU: Can I just clarify that. We are
20 not looking for that, because of course we can do that. We
21 are looking for convenience translations that have been put
22 together by someone, not automated.

23 THE PRESIDENT: I think you told us, Mr. Pickford,
24 when we asked you before, that --

25 MR. PICKFORD: We did not give you a number.

1 THE PRESIDENT: You did not give me a number.

2 MR. PICKFORD: No. We simply do not know. We
3 have not scoped that exercise. Because we have been in this
4 litigation for the longest, that is likely to be a much
5 larger number for us than for some of the other parties.

6 THE PRESIDENT: Yes.

7 MR. PICKFORD: Of course, those three different
8 sources could give rise to full translations or partial
9 translations.

10 THE PRESIDENT: Yes.

11 MR. PICKFORD: Obviously, particularly the latter
12 category of computer-generated translations will be
13 snippets.

14 THE PRESIDENT: Well, those are not being sought.

15 MR. PICKFORD: Well, that is obviously -- that is
16 an assistance to know that, but it still remains the case
17 that the lawyers' translations themselves will also tend to
18 be partial. I understand that they will have also been
19 produced by both the Dutch and German lawyers working for
20 DAF in relation to the European-wide litigation that we are
21 facing, not just in this jurisdiction.

22 So we say that there is a considerable search
23 exercise to be undertaken merely to find and locate the
24 existing translations. Then there was the question of what
25 happens on a continuing basis, as was put to Ms. Demetriou?

1 Are we then expected, whenever we produce a new translation,
2 to provide that as well?

3 So against that, there are obvious costs involved.
4 We have to consider what the benefits in the weighing
5 exercise really are. We say that they are very hard to
6 identify. We have already heard from Ms. Demetriou that
7 Hausfeld have their own multi-lingual team and that they are
8 able to do their own translations, just as we do. Indeed,
9 they can obviously use software, just as we do.

10 We understand that Royal Mail has itself already
11 retained external translators, presumably with a view to
12 producing some official translations. So we have those
13 currently in the pipeline. I am not making an application
14 against them now. Obviously, I am simply responding to
15 Ms. Demetriou's application.

16 It might be thought a more sensible solution,
17 along the lines of what the Tribunal appear to be envisaging
18 originally when talking about an agreed set of translations,
19 perhaps to follow-up on what Royal Mail has done and might
20 do by way of official translations.

21 I beg your pardon. I have to correct one point
22 I made. We do not have translations for the other
23 jurisdictions. It is simply the lawyers have been producing
24 them in other jurisdictions. I am afraid I misspoke
25 earlier.

1 One has to then finally come back to, well, what
2 is the objective of all of this? Ultimately, what we want
3 is official, agreed translations. We will have to incur the
4 costs of obtaining those. That is ultimately what will be
5 required.

6 We have probably already in debating this
7 particular application for about two hours, by my
8 estimation, probably expended about £100,000 or more in
9 costs. We then have the costs of the disclosure application
10 itself and potentially the costs of a trip to the Supreme
11 Court in relation to the privilege issue.

12 We say that is -- all of that is wholly
13 disproportionate in the context of obtaining convenience
14 translations which, if the Hausfeld Claimants wish to
15 generate, they can generate easily themselves, even using
16 software.

17 THE PRESIDENT: Yes.

18 Mr. Hoskins.

19 MR. HOSKINS: I have four points to make on
20 proportionality.

21 First of all, Hausfeld received the Commission
22 file documents on, I believe, 1 August. They have had them
23 for some months. I believe from what I have seen that they
24 indicated they have been engaged in review of the Commission
25 file documents that have been disclosed.

1 A very pertinent to question to ask, which we do
2 not know the answer to, is to ask Hausfeld how many
3 translations, if any, they have already done. They will
4 know the answer, because it would be surprising in a case of
5 this magnitude if they had been sitting on those documents
6 and had done nothing with the foreign language ones. That
7 is my first point.

8 The second point is a short one. It has been made
9 before. No other Claimant is making this application. When
10 you are looking at proportionality, the question of utility
11 is obviously at the forefront. Nobody else says this is
12 necessary.

13 The third point is that VSW says that the
14 documents will save the costs of the Hausfeld's review of
15 the Commission file documents. But as is quite clear, you
16 have to take account of costs on all sides. On all sides,
17 you have that potential saving, on the Hausfeld side. On
18 the other side, you have all of the Defendants' costs who
19 are the targets of this application.

20 Now, I do apologise for not producing evidence on
21 this point, but it was not an application that was made
22 against us. So on instruction, I am told the following.
23 You know, because I told you earlier, we have around 2,600
24 convenience translations.

25 MR. MALEK: You mean separate documents or pages.

1 MR. HOSKINS: Separate documents is my
2 understanding. You know, because I told you earlier, the
3 documents were translated by different people, depending on
4 the language involved. I told you it was Contrast,
5 Eversheds and some external translators.

6 The second point on this, the documents are not
7 currently uploaded to a usable review platform, so it would
8 be a mechanical exercise to be gone through to collate and
9 put them in an appropriate form.

10 The third point is the documents we have, the
11 translations, are not marked with Commission file
12 references, so they would need to be matched to the
13 Commission file documents.

14 The fourth point is, of course, that not all the
15 Commission file materials have been disclosed pursuant to
16 the order of Mrs. Justice Rose and the President. There are
17 extracts from the file that have gone across. So a further
18 matching exercise would have to be done to match the
19 convenience translations to the documents that have been
20 disclosed.

21 The fifth point is that the translations were done
22 on pre-redaction documents. The practical import of that is
23 that the translation, convenience translations, will
24 themselves have to be redacted in terms of privileged,
25 confidential material, et cetera.

1 So it is not simply, as you may have had the
2 impression from the submissions you have heard, a case of,
3 "Here is a pile of documents and I am handing them over".
4 I am told it would be a material amount of work.

5 My fourth and final point is that VSW have
6 accepted that if this order is to be made, all parties going
7 forward would have to disclose any convenience translations
8 that they made. Clearly, in our submission, that is
9 undesirable because it will result in a proliferation of
10 translations and that is what we are trying to avoid.

11 Those are the four submissions I would like to
12 make.

13 THE PRESIDENT: Yes.

14 MR. JOWELL: With the Tribunal's permission,
15 I would like to add one very brief point.

16 THE PRESIDENT: I am not sure you are having any
17 translations.

18 MR. JOWELL: No, that is correct. We do not
19 currently have any -- we believe we do not currently have
20 any English translations of the Commission file, those parts
21 of the Commission file that have been disclosed. But that
22 does not mean that we do not have an interest in this
23 application.

24 The reason for that is because the way it has been
25 put is that -- and it is logical enough -- this will have an

1 effect also going forward on any future translations that
2 the parties do choose to make of documents falling into that
3 category.

4 That, we say, will be undesirable not just for the
5 reason that Mr. Hoskins has mentioned, but also because it
6 is likely to have a severely inhibitory effect upon the
7 parties in deciding whether to conduct those translations at
8 all, because every time -- because disclosure is, of course,
9 an ongoing duty, if this order is made, they would then have
10 an obligation, every time a translation is made, to hand it
11 over to the other side, thereby providing a sort of running
12 commentary of their own document review. That is not
13 desirable in litigation of this nature and nor is it
14 necessary, in our submission.

15 MS. BACON: Just to say I have been asked to make
16 the same point too. I do not need to repeat it. But for
17 the same reason, I would request that whatever order is
18 drawn up, we would have an opportunity to comment on it
19 because we are effectively in exactly the same way that MAN
20 is affected. We absolutely endorse what my learned friend
21 Mr. Jowell has just said.

22 MR. HARRIS: May I reply on one point from
23 Ms. Demetriou?

24 THE PRESIDENT: I think, no, first Ms. Demetriou
25 should be given a chance to respond to the points made by

1 counsel for the other Defendants.

2 MS. DEMETRIOU: Yes, not to shut anyone out, but
3 I am not sure they have a right of reply.

4 THE PRESIDENT: Never mind. We want to hear from
5 you.

6 MS. DEMETRIOU: So dealing with the last points
7 made by Mr. Hoskins and Mr. Jowell and Ms. Bacon first.

8 THE PRESIDENT: Yes.

9 MS. DEMETRIOU: We do not accept that there would
10 be any disadvantageous consequence from an order that
11 convenience translations be provided or disclosed going
12 forward. On the contrary, we think it would facilitate this
13 litigation. If the Tribunal had any concerns about that and
14 wished to hear further argument on that as a matter going
15 forward, then of course you could draw up the order in a way
16 that left that open for the next CMC and simply deal at this
17 stage with our application that relates to the file
18 documents.

19 Now, in relation to the file documents, there was
20 a certain conflation, I think, on the part of my learned
21 friends, Mr. Pickford and Mr. Hoskins, as to -- so they
22 said, "Well, this is going to lead to a proliferation of
23 translations and that is not in anyone's interests. We need
24 one set of agreed translations." Of course, we agree with
25 that. I have made this point already. We agree with that

1 when it comes to the documents that are going to be used in
2 this case, but there is a review process that goes on first
3 to determine whether those documents are documents which
4 anyone wants to rely on at all.

5 So it would be -- it would be wasteful of costs to
6 be agreeing translations in advance of a whole host of
7 documents that no-one ends up relying on. What we are
8 talking about is convenience documents to enable us to
9 conduct the first review.

10 In relation to the factual points made by
11 Mr. Hoskins, it is not correct that the file documents were
12 disclosed on 1 August. We got them on 25 September. We
13 have not had them for the amount of time that Mr. Hoskins
14 has indicated.

15 The position is that although there has been a
16 first-level review of the documents, we have not, the
17 Hausfeld team have not, produced yet any translations of the
18 foreign language documents.

19 Moreover, the documents are provided to us in PDF
20 format, which means that it is difficult to obtain
21 computer-generated translations because of the format in
22 which they are provided, so that is the catch-all position.

23 Now, Mr. Hoskins made a number of points
24 specific --

25 THE PRESIDENT: Can they not be converted from PDF

1 into Word?

2 MS. DEMETRIOU: No, because they are scanned.
3 I think they are scanned. It is scanned. They were
4 provided with scanned documents. It is not as simple as
5 getting computer-generated -- it is very, very unreliable.
6 So that is not an easy thing and it is not a reliable thing
7 to do.

8 Now, Mr. Hoskins said that -- both Mr. Pickford
9 and Mr. Hoskins talked about review. We see from
10 Ms. Edwards' statement, from the very limited evidence in
11 Ms. Edwards' statement about the disproportionality of this,
12 that she talks about the need to review the documents
13 including for privilege. We say that just does not arise on
14 *Sumitomo*. So the real cost, if there is any cost,
15 is in locating them and collating them. There is no need to
16 review them.

17 Now, Mr. Hoskins made a point on review. He said
18 some of the file documents are redacted. If there are a
19 category of redacted documents which have been translated
20 and if his client thinks that would be a disproportionate
21 exercise to do, then they can come back and say, "Well, we
22 are going to exclude those because it would be
23 disproportionate".

24 But, sir, where we have got to is that we made our
25 application. It was an agenda item. It has been very

1 faintly opposed in the skeleton arguments. There is almost
2 nothing on it in the skeleton arguments of my learned
3 friends. There is certainly no substantial evidence about
4 disproportionality. We say this has all now been overblown.

5 The reality of the situation is that we are
6 talking at the moment about the file documents, the
7 documents on the file. They know how many translations they
8 have got because they have told the Tribunal. They
9 presumably know where they are. Otherwise, they would not
10 have been able to count them. All they have do is produce
11 them.

12 Sir, unless I can assist further, those are my
13 submissions in reply.

14 MR. PICKFORD: There is one minor point of factual
15 correction. I am instructed that we have disclosed OCR text
16 files, not merely PDFs.

17 THE PRESIDENT: Sorry, what?

18 MR. PICKFORD: The files are available in more
19 than one format, not merely as PDFs, but also as text files.
20 They can be searched as text files, I am instructed.

21 MR. HARRIS: Mine is also a point of correction.

22 THE PRESIDENT: Yes.

23 MR. HARRIS: Ms. Demetriou took aim at -- missing
24 largely the point of the proportionality point that
25 Mr. Pickford and Mr. Hoskins and my learned friends to my

1 left have made, she took aim solely at the nature of the
2 evidence that I wanted to put forward. But there is a
3 complete answer to that. It is just wrong. It is a bad
4 point.

5 She says, "Oh, well, *Sumitomo* is in my
6 favour, so none of your points will work". I have already
7 explained to the Tribunal I want to have the opportunity to
8 run those points at a higher level.

9 THE PRESIDENT: We have got that point.

10 MR. HARRIS: That means I will necessarily need
11 the evidence, whether you agree with it or whether she
12 agrees with it or not, because I will need that at the
13 higher level. Otherwise, I will be told, "Oh, you want to
14 run all these points about how own client documents should
15 be treated in a different way than third-party, in-house
16 should be treated in a different way from external, whether
17 it is in your possession and what degree of control, but
18 where is your evidence, Mr. Harris?" I will say, "Oh, well,
19 I have not got any."

20 THE PRESIDENT: Yes.

21 MR. HARRIS: That is impossible. I have to put
22 forward the evidence now. Even though it is a largely
23 misdirected complaint, it is bad as well. I will have to do
24 that.

25 Then it is not fair, just before I sit down, to

1 say we should have put in evidence. It was not until we saw
2 Ms. Demetriou's skeleton argument on Monday morning that we
3 knew this point was being pursued against us.

4 [The Panel conferred]

5 THE PRESIDENT: We shall rise for about
6 five minutes.

7 (2.59 pm)

8 (A short break)

9
10 (3.05 pm)

11 THE PRESIDENT: For reasons that the Tribunal will
12 set out in writing, we refuse this application essentially
13 on the basis that even if it is assumed that none of the
14 documents involved are privileged, to order disclosure and
15 inspection would be disproportionate having regard to the
16 Tribunal rules and paragraph 2.3 of the Tribunal's Practice
17 Direction on disclosure.

18 We are a bit concerned about time. There are two
19 matters we are very keen to complete today if at all
20 possible. One is the confidentiality ring and the second is
21 at least the disclosure applications which cut across the
22 board with regard to the other documents on the Commission
23 file that were held back in the disclosure to Ryder and will
24 affect disclosure to Dawson and to the VSW Claimants.

25 Can we deal with confidentiality rings now? Have

1 we got an order?

2 MR. PICKFORD: Sir, there is a version that has
3 been going around behind the scenes at a very rapid rate, it
4 is marked up in at least five different colours. As
5 I understand it, it has not yet been marked up by Ryder or
6 Hausfeld when they have had it. All of the parties have had
7 it and it has been marked up by all of the Defendants and
8 also by Royal Mail, BT and Dawsongroup.

9 There are, as I understand it, two main issues
10 that seem to still be live, albeit it is fair to say that
11 there are some very -- there are some minor points still
12 being worked through. This is very much subject to someone
13 else to tell me that I am wrong and in fact there are far
14 more issues than this. But doing my best on behalf of --

15 THE PRESIDENT: Would it help us to see it, because
16 we have not?

17 MR. PICKFORD: Yes.

18 THE PRESIDENT: Just look at the guide at the
19 front. Yes, what you will have to help us with is really
20 what is being objected to, as we go through it.

21 MR. PICKFORD: Yes. So I am not really -- this is
22 as new to me as it is to the Tribunal.

23 THE PRESIDENT: I see.

24 MR. PICKFORD: But particularly in an advantageous
25 position to speak to most of it, the two items I am aware of

1 where there is still some dispute is in relation to the
2 reclassification of documents so that they are no longer
3 confidential at all. That goes back to an issue that was
4 canvassed before the Tribunal yesterday, namely that we say,
5 on behalf of certainly DAF and some of the Defendants say
6 the same thing, that the Commission and CMA should be
7 involved in any question of whether documents that were
8 provided initially from their files should be -- there is a
9 mechanism for them to become wholly non-confidential. I can
10 obviously develop submissions on that. That is not my point
11 now. That is the issue.

12 THE PRESIDENT: If you identify first the points.
13 So there is an issue on that, on whether the Commission/CMA
14 need to be, what, consulted?

15 MR. PICKFORD: Yes, the Commission and the CMA
16 and. That is, I think, the grey. I am just receiving --
17 8.6, as far as I understand it.

18 THE PRESIDENT: Yes, on page 9, yes, and following.

19 MR. PICKFORD: Then there is a question -- the
20 second question, as I understand matters, is a debate about
21 the inclusion of in-house counsel within the inner
22 confidentiality ring. Now, that, as I understand it, should
23 not really matter for the time being for anyone apart from
24 for us in relation to the BT disclosure because no-one else
25 is yet getting on to economic disclosure. We are providing

1 some economic disclosure to BT because we are providing them
2 with effectively the equivalent of what was received by
3 Royal Mail.

4 THE PRESIDENT: BT would like its in-house counsel
5 in the inner confidentiality ring, is that right?

6 MR. PICKFORD: Its in-house counsel and
7 economists, I am instructed. It is both.

8 THE PRESIDENT: The economist always, but the
9 outside economist?

10 MR. PICKFORD: In-house. So BT's own lawyer,
11 in-house counsel and BT's own economists. There is
12 currently a dispute, as I understand it, between my clients
13 and BT about that particular issue. Now, it may be that
14 that is capable of being resolved, but as of now at 3.10,
15 that has not been resolved.

16 THE PRESIDENT: I would suggest we park the second
17 issue. Either it can be resolved -- if necessary, it can be
18 dealt with either in writing or by a further hearing which
19 will involve only two parties and which can be heard by
20 myself alone. We do not need to constitute a full Tribunal
21 just on what would be a pretty short point anyway.

22 MR. WARD: Can I make an effort, I am conscious of
23 the time, to persuade you? Our concern about that is we
24 were ordered yesterday that the file will be disclosed in
25 the BT/DAF case.

1 THE PRESIDENT: Yes.

2 MR. WARD: The reason why there is an argument
3 about having in-house counsel in the ring is to have them in
4 the part of the ring where the file is disclosed into. So
5 that is the case -- in Royal Mail's case, the file went into
6 the inner ring and, therefore, it was agreed that some
7 in-house lawyers from Royal Mail would go into the inner
8 ring. That is the concern. For precisely the same reason
9 in the BT case, it is desirable to have at least in-house
10 lawyers in the ring, economists too because BT has their own
11 in-house economists.

12 THE PRESIDENT: Yes, I understand.

13 MR. WARD: It is a question of putting the
14 in-house lawyers in wherever the file is going to go. If it
15 is just deferred to another day, that then actually builds
16 in some quite appreciable delay, in our eyes, in the file
17 that has now been ordered.

18 THE PRESIDENT: The file at the moment, under the
19 order made --

20 MR. WARD: In Royal Mail's --

21 THE PRESIDENT: -- in Royal -- there was Royal Mail
22 and then there was an order made in Ryder. In which part of
23 the ring did the file go?

24 MR. WARD: In Royal Mail, it went into the inner
25 ring. So the in-house counsel followed the file into the

1 inner ring. That was the effect of it.

2 THE PRESIDENT: It has never been -- so what you
3 are saying is if the file went into the outer ring, this
4 would not be an issue of such concern.

5 MR. WARD: Providing those same people could go
6 into the outer ring.

7 THE PRESIDENT: I think the in-house counsel and
8 economists --

9 MR. WARD: I think that is what is intended.

10 THE PRESIDENT: If there is no outer ring, there is
11 no point to the inner ring.

12 MR. PICKFORD: It is agreed yesterday that the
13 Commission file was going to go into the outer ring. It is
14 going there, but we simply have to review it first.

15 THE PRESIDENT: That was my understanding.

16 MR. PICKFORD: If that is the point, it is a
17 non-point.

18 MR. WARD: If it is a non-point, that is the
19 point.

20 THE PRESIDENT: We do not have to defer it because
21 the disclosure is going into the outer ring and you are then
22 content that the in-house counsel and economists need to not
23 be in the inner ring.

24 MR. WARD: Yes.

25 THE PRESIDENT: So we are left with the one point.

1 Would it be sensible to address that one point, which may be
2 a point of more principle now, to leave all other drafting
3 over to give you more time, as you have been trying to deal
4 with this while also being in court, and to invite you to
5 submit by whatever you think is reasonable, Tuesday of next
6 week --

7 MR. WARD: At the latest.

8 THE PRESIDENT: -- what we hope will be a largely
9 agreed version.

10 MR. WARD: Yes.

11 THE PRESIDENT: Is there anyone not content with
12 that? So that is what we will do. We will just address the
13 first point identified by Mr. Pickford, namely is it
14 necessary in order to have what are described as
15 confidential Commission documents, consent of the
16 Commission -- not consent, but observations from the
17 Commission.

18 Where is the definition of Commission confidential
19 document? It is on 1.1. Yes, so it does not include, on my
20 reading of that, the confidential version of the decision
21 itself. Is that right?

22 MR. WARD: That is my reading too.

23 THE PRESIDENT: Yes.

24 MR. WARD: It is really the documents on the file.

25 THE PRESIDENT: It is documents on the file.

1 MR. WARD: From the Claimants perspective, I think
2 I am speaking actually -- I know my learned friends on the
3 Claimants' side have the same point. This protection is
4 unnecessary and unwieldy. You will see it allows for a
5 28-day period in effect for a response from those --

6 THE PRESIDENT: Yes, I understand all that.

7 Mr. Pickford, why is it necessary to consult the
8 Commission at all?

9 MR. PICKFORD: Because of the basis on which the
10 Commission originally made its submissions in relation to
11 the confidentiality order. Can I take you, please, firstly,
12 to the damages directive?

13 THE PRESIDENT: Yes.

14 MR. PICKFORD: It provides the legislative
15 context. If you go to the authorities bundle, volume 4,
16 tab 59. If we could go, please, to article 5 on disclosure
17 of evidence.

18 THE PRESIDENT: Yes.

19 MR. PICKFORD: So one sees at article 5.3 that:

20 "Member states should ensure that national courts
21 limit the disclosure of evidence to that which is
22 proportionate. In determining whether any disclosure
23 requested by a party is proportionate, national courts shall
24 consider the legitimate interests of all parties and third
25 parties concerned. They shall in particular consider."

1 Sub-C:

2 "Whether the evidence, the disclosure of which is
3 sought, contains confidential information, especially
4 concerning any third-parties, and what arrangements are in
5 place for protecting such confidential information."

6 So, we say, on the basis of that, that
7 confidential -- the protection that is afforded to
8 confidential information is bound up in European law with
9 the question of the proportionality of making any disclosure
10 order.

11 Now, the order that was made in the present case
12 was one on which the European Commission was given an
13 opportunity to comment. We did have some copies of the
14 European Commission's observations to hand up, but I only
15 have -- I seem to only have been given one or two copies at
16 the moment.

17 THE PRESIDENT: They are not in any of these files.

18 MR. PICKFORD: They are not. Sir, this is the
19 application that was heard before you, sir.

20 THE PRESIDENT: Yes, I remember it.

21 MR. PICKFORD: There is literally one sentence
22 that I would like to read from their observations, if I may.

23 THE PRESIDENT: Yes.

24 MR. PICKFORD: It is that they observed that:

25 "The Claimants seek the disclosure of documents in

1 a confidentiality ring. Draft disclosure orders have been
2 notified by the Claimants to the European Commission."

3 So, that was an observation made by the Commission
4 when it was explaining its position in relation to
5 disclosure to, as it then was called.

6 Of course, the Commission had to be notified at
7 that point to be able to give its observations on
8 proportionality. There is no dispute about its involvement
9 at that point in the disclosure process.

10 THE PRESIDENT: That was under the CPR.

11 MR. PICKFORD: Yes.

12 THE PRESIDENT: It was CPR Practice Direction.

13 MR. PICKFORD: That is correct.

14 THE PRESIDENT: Yes.

15 MR. PICKFORD: So the situation we have then is
16 that the observations of the Commission were sought. It
17 gave them. It noted that there was to be confidential
18 protection afforded to the documents and ultimately, that
19 was -- that was the basis on which it made its observations.
20 It was also a lawyers-only ring, as I understand it.

21 Now, what we say cannot now happen properly within
22 the scope of that framework is that the Hausfeld Claimants
23 now move the goalposts, indeed, all of the Claimants, as
24 I understand it, move the goalposts and say, "We gave the
25 Commission notice on the basis there was going to be one

1 scheme that disclosure was going to be -- it was all going
2 to be fine because it was going to go into a confidentially
3 ring. Now let us get rid of that wholesale and have a
4 mechanism whereby we can simply redesignate documents
5 altogether, but let us not tell them."

6 We say that cannot properly happen within the
7 scheme under which the Commission is allowed to make
8 observations on the proportionality of disclosure. It is
9 changing the rules. It is moving the goalposts.

10 We are not saying that redesignation cannot
11 happen, that the documents cannot ultimately be made
12 non-confidential. We are not saying there could not even be
13 a mechanism for doing it in which the Commission was not
14 involved in each redesignation itself. All we are saying is
15 if we are going to change the rules of the scheme that
16 fundamentally where there is potentially no longer
17 confidential protection afforded to a large swathe of
18 documents, then properly under the damages directive, read
19 together with the relevant Practice Direction, which I have
20 not taken you to because I think it is common ground, there
21 needs to be notification to --

22 THE PRESIDENT: Would you take us to the Practice
23 Direction?

24 MR. PICKFORD: I can do that, yes. Sir, the
25 easiest way to address this, the quickest way, is actually

1 if you go to the Hausfeld skeleton where they conveniently
2 summarise the relevant arguments. If one goes to tab 6,
3 paragraph 26. So tab 26 sets out the argument that we made
4 in correspondence with VSW. It says:

5 "We contended they have adopted the wrong approach
6 in seeking modifications to the confidentiality orders.
7 Instead, they should have made a fresh application in
8 respect of the file disclosure that has already been given."

9 So the Commission has the opportunity to make
10 representations in accordance with the application to vary
11 the July 2018 order.

12 Then they go on to say:

13 "Paragraph 5.2 of the Practice Direction states
14 that in determining applications of file disclosure, the
15 Tribunal will have regard to any observations of the
16 Commission authority in respect of proportionality of the
17 application."

18 They go on to make the argument that that
19 provision reflects the terms of article 6.11 of the damages
20 directive. It does not envisage the Commission submitting
21 observations on the detailed workings of confidentiality
22 rings.

23 THE PRESIDENT: Yes.

24 MR. PICKFORD: What we say is overlooked there is
25 that, of course, the question of proportionality depends in

1 part on the protection that is going to be afforded. It was
2 explained to the Commission that a certain type of
3 protection was going to be afforded, namely that these
4 documents would always be within a confidentiality ring.
5 That was the basis. One of the complaints, of course, that
6 is made --

7 THE PRESIDENT: As I recall, the Commission --
8 notwithstanding that, their letter suggested that, in their
9 view, disclosure should not be ordered and I took account of
10 that and I ordered disclosure contrary to their views.

11 MR. PICKFORD: There was obviously a scope
12 argument there, but what is --

13 THE PRESIDENT: Well, no, they were basically
14 saying that on that application, disclosure should not be
15 ordered under the directive. I looked at their arguments
16 and I did not accept it. I said it was proportionate to
17 disclose. So they have made their observations on
18 proportionality. Rightly or wrongly, they did not find
19 favour with the court.

20 MR. PICKFORD: But what they did not do is they
21 may well have had observations that they would have wished
22 to have made had they known that the disclosure regime and
23 confidentiality regime was going to be an entirely different
24 one from the one that they were being notified about.

25 THE PRESIDENT: Has someone written to them,

1 I thought, in any event?

2 MR. PICKFORD: Not that I am aware of. That is
3 what we are asking to happen.

4 THE PRESIDENT: Am I wrong? I thought someone has
5 now written to the Commission. Is that not correct?
6 Perhaps I am wrong.

7 MR JUSTICE HILDYARD: Is it your submission that the
8 Commission would not have envisaged that the confidentiality
9 rings established by the Tribunal could be varied by the
10 Tribunal?

11 MR. PICKFORD: Well, I am not in a position to
12 speculate as to what the Commission did or did not or may or
13 may not have envisaged. My point is that they were notified
14 of a particular regime by which the documents would always
15 remain in a confidentiality ring.

16 MR JUSTICE HILDYARD: Always.

17 MR. PICKFORD: Yes, because -- well, they were
18 given the terms of the ring and under that ring, there was
19 no way of de-designating. What is said is that is
20 deficient.

21 THE PRESIDENT: Look, if everything is based on
22 that this would in some way be going behind what the
23 Commission expressed a view on, we ought to look at their
24 view. We need to see their letter. It is not a very long
25 letter. From memory, it is about three or four pages.

1 MR. PICKFORD: Sir, I have a copy here. Somewhere
2 in this Tribunal room, apparently somebody has 30 or 40 more
3 copies, but --

4 THE PRESIDENT: Well, if you say, as you did a
5 short while ago, that every hour here costs £50,000 or
6 £60,000, I think we can make a few copies in the Tribunal
7 and hand them around.

8 MR. BREALEY: Sir --

9 THE PRESIDENT: Am I wrong in recalling from
10 somewhere that someone recently wrote to the Commission?

11 MS. DEMETRIOU: Sir, yes.

12 THE PRESIDENT: I thought it was your solicitors.

13 MS. DEMETRIOU: Yes, if you turn to our skeleton
14 argument, paragraph -- footnote 14 on page 8.

15 THE PRESIDENT: That is at?

16 MR. MALEK: Tab 6.

17 THE PRESIDENT: Tab 6, thank you. Page 8,
18 footnote 14.

19 MS. DEMETRIOU: Yes, that is what we said.

20 MR. MALEK: They sent their application.

21 THE PRESIDENT: It has been sent to the Commission.

22 MS. DEMETRIOU: Sir, yes, that was in the context
23 of the third excluded categories. There was a fresh
24 application.

25 THE PRESIDENT: That is about the excluded

1 categories from the disclosure.

2 MS. DEMETRIOU: Yes.

3 THE PRESIDENT: Yes, but not about the
4 redesignation.

5 MS. DEMETRIOU: No.

6 THE PRESIDENT: Yes, I see. That is what
7 I misremembered. I see. Yes.

8 MR. BREALEY: Sir, can I make one point on the
9 directive?

10 THE PRESIDENT: Yes.

11 MR. BREALEY: It all seems to be predicated on the
12 directive. Mr. Pickford did not take you to recital 28 of
13 the directive, which I think is the point that was made in
14 almost the first couple of minutes of yesterday. So we are
15 talking about primarily pre-existing documents.

16 THE PRESIDENT: Yes.

17 MR. BREALEY: The scheme under the damages
18 directive is clearly set out at recital 28:

19 "National courts should be able at any time, at
20 any time, to order in the context of an action for damages
21 the disclosure of evidence that exists independently of the
22 proceedings of a competition authority pre-existing
23 information."

24 There is no need to seek the views of the
25 Commission as to whether they are confidential. The damages

1 directive clearly gives a right of a national court in a
2 damages case to order disclosure of pre-existing documents.

3 If this was a breach of contract case, all of
4 these emails would clearly not be confidential. It is real
5 irony that these documents relate to a secret cartel and in
6 some sense, the Defendants are trying to keep them secret.

7 THE PRESIDENT: Yes.

8 MR. BREALEY: They are pre-existing documents.
9 They exist independently of any investigation and the
10 directive clearly states that the court at any time can
11 order their disclosure.

12 MR. PICKFORD: Sir, that is --

13 THE PRESIDENT: Well, Mr. Pickford --

14 MR. PICKFORD: That is wrong.

15 THE PRESIDENT: Well, 8.6 is not ordering that
16 matters cease to be in the confidentiality ring. It is a
17 mechanism whereby either the parties can agree that
18 something is no longer confidential, or if they cannot
19 agree, the Tribunal will have to decide. If a matter is
20 properly confidential, it remains within the confidentiality
21 ring. If it is not confidential, in the decision of the
22 Tribunal, then it is not. If it is not confidential, then
23 there is no need to have arrangements protecting such
24 confidential information because it is not confidential
25 information.

1 MR. PICKFORD: Well, it envisages that it is
2 effectively up to the parties and the Tribunal to decide for
3 themselves, potentially allowing wholesale reclassification
4 of a file that they understood at least -- that was the
5 basis on which representations were evidently made to them
6 initially -- would be protected by a confidentiality ring.
7 They may have no objection. The point is we do not know
8 because they have not been told.

9 [The Panel conferred]

10 I have also now been told we have further copies
11 of the letter, if that would assist. I can hand those up.
12 (Same handed)

13 THE PRESIDENT: Yes. I mean, the Commission was
14 asked about this, expressed its views, was concerned about
15 over-broad and non-specific disclosure and relevance. Is
16 there anything in the letter that expresses concern about
17 confidentiality?

18 MR. PICKFORD: Well, sir, there would not be
19 because it was provided with -- it notes -- I mean, it
20 certainly is live to the issue of confidentiality because it
21 expressly notes that the disclosure will be into a
22 confidentiality ring, the terms of which it has seen. That
23 is the sentence that I read out.

24 THE PRESIDENT: Yes.

25 MR. PICKFORD: Sir, that is indicative of a

1 concern about confidentiality. It does not tell us what
2 their position would have been had the order allowed for
3 wholesale designation. They may have told us, "No, that is
4 very problematic to us. We would like to be able to explain
5 why that is the case."

6 THE PRESIDENT: It certainly does not indicate that
7 it is inviting or welcoming being consulted on disclosure,
8 because it says the opposite.

9 MR. PICKFORD: Well, sir, I do not think we can
10 conclude, not having asked them, that the Commission would
11 have no view.

12 THE PRESIDENT: Well, it says that it takes the
13 view that for it to submit observations would be wholly
14 exceptional.

15 MR. PICKFORD: Which they then did.

16 THE PRESIDENT: Yes, but they certainly do not
17 indicate they are anxious to do so in the future.

18 MR. PICKFORD: Sir, you heard my submission. We
19 simply do not know if we do not ask them. I think it boils
20 down to that.

21 THE PRESIDENT: Yes. Thank you.

22 So that is DAF's option. I am not clear from the
23 colouring as to who else from the Defendants is objecting to
24 8.6.

25 MR. HOSKINS: There is some red, which is Volvo,

1 but that was just to make the clause work if --

2 THE PRESIDENT: Mr. Pickford has very clearly
3 expressed his concerns and objections. Any other counsel
4 for the Defendants.

5 MR. HARRIS: Sir, we simply ask, if it is to be
6 ordered in 8.6A, over the page at (b), we have 21 days, not
7 14. We agree with Mr. Pickford's submission in principle.
8 We think 14 days is too little and 21 is more reasonable.

9 THE PRESIDENT: More reasonable. Thank you.

10 Ms. Bacon.

11 MS. BACON: No objection.

12 MR. JOWELL: No further submissions.

13 THE PRESIDENT: Yes, we will just take a moment.

14 [The Panel conferred]

15 Yes, thank you. Again, in the interests of time,
16 we will give short written reasons subsequently. We will
17 not require any notification to the Commission as regards
18 that aspect of the draft. We do not think that is in any
19 way required of the directive.

20 There remains the question at paragraph (b) of 14
21 or 21 days. Without hearing from anyone, and we can hear
22 from you if necessary, it seemed to us that 21 days is not
23 unreasonable. We are minded to change the time for response
24 to 21 days, given the size of the teams involved in this
25 case and the fact that some of the parties are largely based

1 abroad.

2 Is there any -- are you concerned about the
3 14 days?

4 MS. DEMETRIOU: Sir, can I lay down a marker. It
5 is not for now, but we are concerned by the nature of the
6 process that the onus should be on the Claimants under 8.6
7 to seek redesignation. We think the reality of the matter
8 is that the vast majority of these documents are not going
9 to be confidential at all.

10 THE PRESIDENT: Well, we said we would consider
11 that next time.

12 MS. DEMETRIOU: We will consider that next time.

13 THE PRESIDENT: At the moment, they are in the
14 inner or outer ring. Maybe the outer ring now.

15 MS. DEMETRIOU: Yes.

16 THE PRESIDENT: Therefore, that is the way they
17 have been disclosed. So the onus must be on the party to
18 whom they have been disclosed saying, "We would like to
19 remove them".

20 MS. DEMETRIOU: We will revisit them next time.

21 THE PRESIDENT: We will revisit the general
22 question of whether they are confidential. There will be
23 future documents, no doubt, to be disclosed that may well
24 start being disclosed into an inner ring. We cannot rule on
25 that without knowing what they are. This a mechanism for

1 sorting it out and, if not, to the Tribunal, 21 days seems
2 reasonable. On that basis, that deals with that point.

3 Yes. Ms. Bacon.

4 MS. BACON: Yes, if we are on the question of
5 Commission file disclosure, I know it is an application
6 against me. I thought it would be helpful to just outline
7 where we have got because I have a pragmatic proposal in
8 light of the time.

9 THE PRESIDENT: Yes.

10 MS. BACON: So, sir, there are numerous
11 applications by Hausfeld and Ryder. Most of them have
12 fallen away. Just for the Tribunal's note, there was an
13 issue regarding documents relating to prices charged in
14 countries other than the UK.

15 THE PRESIDENT: Yes.

16 MS. BACON: We have agreed that with Hausfeld.

17 There are various points that are made in our
18 skeleton argument which are not disputed and particularly
19 the addition of one word to the order, which I understand
20 from discussions with my learned friend, Ms. Demetriou, is
21 not opposed. That is dealt with.

22 On pragmatic grounds, we have agreed to disclosure
23 of documents in four categories, which were requested, I, N,
24 O and Q.

25 THE PRESIDENT: This is out of the Commission's

1 files, is it?

2 MS. BACON: Yes. So perhaps I should preface this
3 by saying, as your Lordship knows, pursuant to the order of
4 Mrs. Justice Rose, a version of the Commission file was
5 created which excluded various documents on leniency and
6 privilege grounds, which I will come to in a minute.

7 That sub-version of the Commission file was the one
8 that in principle was to be disclosed in Hausfeld and Ryder,
9 subject to Iveco and DAF's review for relevancy. That
10 resulted in a number of further exclusions which -- those
11 exclusions have mainly been the subject of this dispute.

12 THE PRESIDENT: Yes.

13 MS. BACON: Those exclusions were set out in
14 various lettered categories in a disclosure statement, which
15 I do not think I need to take you to.

16 THE PRESIDENT: Well, I think actually, it would be
17 helpful to have that, those categories, because different
18 people have consented and, equally, some categories are no
19 longer being pursued.

20 MS. BACON: Yes, I am about to tell you about some
21 of them.

22 THE PRESIDENT: If we can look at that.

23 MS. BACON: The disclosure statement --

24 THE PRESIDENT: Where do we find it?

25 MS. BACON: I think it is -- yes, it is in

1 Hausfeld volume C/3, behind tab 8. This is in the exhibit
2 to the witness statement of Mr. Rowan. He exhibits to
3 Rowan.

4 THE PRESIDENT: Mr. Rowan.

5 MS. BACON: It may be elsewhere as well.

6 MR. PICKFORD: I should probably point out that
7 this document is in the outer ring.

8 THE PRESIDENT: Well, it is in the outer ring, but
9 you can take us to the lettered categories.

10 MS. BACON: The descriptions are not confidential,
11 I understand.

12 THE PRESIDENT: I think I have got it.

13 MS. BACON: It is C/3. It starts at page 258.

14 THE PRESIDENT: So this is a witness statement, is
15 it?

16 MS. BACON: No, it is the exhibits to the witness
17 statement of Mr. Rowan.

18 THE PRESIDENT: The second witness statement of
19 Mr. Rowan.

20 MS. BACON: Exactly.

21 THE PRESIDENT: Yes. Just a minute.

22 MS. BACON: The category descriptions are not
23 confidential. We have all been referring to them in open
24 court.

25 THE PRESIDENT: Just a moment. Yes, it is

1 Hausfeld.

2 MR. MALEK: C/3, tab 8.

3 THE PRESIDENT: At page?

4 MS. BACON: 258.

5 MR. BREALEY: It is a rather complicated --
6 really, one needs to go to Mr. Levy's witness statement
7 where it is all set out in much more easier form.

8 MS. BACON: I was asked by the Tribunal to show
9 where Mr. Rowan's statement is and that is where it is.

10 THE PRESIDENT: Yes, it might be helpful to go with
11 that because, to have it more compendiously, if you go to
12 Mr. Levy's witness statement, which is in Ryder bundle B, at
13 tab 2.

14 MS. BACON: Yes.

15 THE PRESIDENT: Page 13.

16 MR. BREALEY: Paragraph 31.

17 THE PRESIDENT: There are set out on two adjacent
18 pages the withheld categories numbered A to R.

19 MS. BACON: Yes.

20 THE PRESIDENT: We appreciate that this is a
21 confidential witness statement and, for reasons not entirely
22 clear to me, the summary of the categories is said itself to
23 be confidential.

24 MS. BACON: Well, I think matters have moved on
25 and we have agreed between ourselves, and I will be

1 corrected if anyone disagrees with me, that we can refer to
2 the descriptions of the categories.

3 THE PRESIDENT: Yes, as long as we do not look at
4 the underlying documents.

5 MS. BACON: Yes, exactly.

6 THE PRESIDENT: Well, that is sensible. So we will
7 treat this paragraph 31 as not confidential.

8 MS. BACON: Yes. If I can tell you that the
9 categories, before today, we had agreed between ourselves
10 anyway.

11 THE PRESIDENT: Yes.

12 MS. BACON: We had agreed, given the number of
13 documents and on pragmatic grounds, that we would
14 un-withhold, if you like, categories N, O and Q, as well as
15 I. So those are the subjects of dispute and we have agreed
16 to provide those.

17 THE PRESIDENT: Yes.

18 MS. BACON: I will come back to category M in a
19 minute.

20 Ryder asked for further explanations of
21 categories A, E and R, which we have given in Rowan 2. My
22 understanding is that Ryder does not pursue any further
23 request for explanation in this hearing. That leaves --

24 THE PRESIDENT: So just to be clear, this A, O, Q
25 and I, because not everyone has claimed against Iveco -- you

1 represent Iveco, do you not?

2 MS. BACON: Iveco. Which category are we talking
3 about?

4 THE PRESIDENT: No, you are saying you have agreed
5 A, O, Q and I.

6 MS. BACON: No, we agreed to provide N, Q, O and
7 I. Those were within our withheld categories.

8 MR. BREALEY: Can I just interrupt. I am not
9 going to stop Ms. Bacon because she is going to try to be
10 helpful, but Ryder B, Ryder bundle B, tab 6A has a copy of
11 DAF's, because obviously this application is made against
12 DAF, not Iveco. So Ms. Bacon can try and assist, but
13 bundle B, Ryder, 6A, that is page 116.2, to 6A. There
14 should be a 6A.

15 THE PRESIDENT: Yes, there is.

16 MR. BREALEY: This is a DAF draft order. At the
17 bottom of page 116.2, the Tribunal will see at 3A:

18 "DAF shall provide inspection of those four
19 categories."

20 THE PRESIDENT: Yes.

21 MR. BREALEY: Given the time, obviously we would
22 ask the Tribunal at least to make that order today because
23 that is agreed. Some of them have occurred very recently.

24 THE PRESIDENT: Well, just to be clear, Iveco has
25 agreed to provide N, O, Q and I. We can order that. The

1 main difference -- they are the same documents, but do we
2 take it then that DAF is prepared to provide I, N, O and Q.

3 MR. PICKFORD: We are.

4 THE PRESIDENT: You are.

5 MS. BACON: So the order does not need to be made.

6 If I can carry on with the --

7 THE PRESIDENT: Just a moment.

8 MR. BREALEY: Yes. But can I ask that all the
9 documents that were withheld in those categories, because
10 there are nuances here, all the documents that were
11 previously withheld in those documents are indeed being
12 disclosed.

13 THE PRESIDENT: So --

14 MR. BREALEY: That is not --

15 THE PRESIDENT: So those were not disclosed in
16 those categories.

17 MR. BREALEY: No.

18 MS. BACON: No, these were withheld documents.

19 There is no objection to any of the documents in those
20 categories being disclosed and we reached that position
21 before court yesterday. So I can --

22 THE PRESIDENT: Thank you.

23 MS. BACON: I can carry on explaining where we get
24 to with the others and sort this. A, E and R, in relation
25 to those, there was no application for them to be disclosed.

1 There was an application that we provide further
2 explanations. We gave further explanations of those
3 categories, insofar as necessary, in Rowan 2. Then there
4 is, as I understand it, no further request we give yet
5 further explanations.

6 MR. BREALEY: No application today about those
7 categories.

8 THE PRESIDENT: That is true of your client and
9 also VSW, is it?

10 MS. BACON: VSW never asked us. Ryder did.

11 THE PRESIDENT: It is purely Ryder.

12 MS. BACON: That leaves three categories. I will
13 start with category M. Category M was the subject of a
14 Ryder application. This is -- as you will see from this
15 list, it is documents --

16 THE PRESIDENT: Corporate structures.

17 MS. BACON: Corporate structures, but not the
18 individuals. Now, before today, we had agreed to give
19 Iveco's corporate structure documents within that category.

20 THE PRESIDENT: Yes.

21 MS. BACON: There were also some corporate
22 structure documents for other OEMs which we did not consider
23 to be relevant, but we had further discussions today and we
24 are willing to provide all of the documents on category M.
25 There are not a large number of other documents.

1 THE PRESIDENT: So that is now agreed.

2 MS. BACON: I am telling you this on instructions
3 now. Until I stood up, Mr. Brealey was aware we were
4 providing at least some of them. I would like to clarify we
5 are willing to provide all of the documents in category M.
6 So that leaves two categories alone.

7 MR. BREALEY: Can I interrupt? Sorry.

8 THE PRESIDENT: Yes.

9 MR. BREALEY: I think that is Iveco's position,
10 but not DAF's position.

11 THE PRESIDENT: Well, if Iveco provides you with --
12 it is a file that everybody has got.

13 MS. BACON: DAF has to provide the disclosure, but
14 it was Iveco's relevance ground that led to category being
15 withheld.

16 THE PRESIDENT: They both went through the
17 documents.

18 MS. BACON: Mr. Pickford can make submissions on
19 whether he thinks something in a category can continue to be
20 closed.

21 THE PRESIDENT: Let us do it by category. I am
22 sorry, Ms. Bacon.

23 Mr. Pickford, are you seeking to -- so Iveco's
24 corporate structure clearly comes. Are you seeking to
25 withhold anybody else's?

1 MR. PICKFORD: No.

2 THE PRESIDENT: No.

3 MR. HARRIS: I am sorry to rise, but this is an
4 order in, I think, our action for Daimler as well. I think
5 the position is we -- the Defendants were consulting with
6 each other insofar as the documents related to another
7 Defendant, with an opportunity for the other Defendant to
8 provide comments. For all I know, we do not object. I have
9 been told this has been very fast moving and we have not yet
10 been consulted on those corporate structures that relate to
11 us. Before they actually get disclosed, we need to have a
12 reasonable opportunity to be consulted on them. That may
13 result in us not objecting. I see the other two object, but
14 we have not had that opportunity because it has moved too
15 fast.

16 THE PRESIDENT: We make the order that all be
17 disclosed, with liberty for Daimler to apply within 14 days
18 if it objects.

19 MR. HOSKINS: We should have the same liberty to
20 apply.

21 THE PRESIDENT: They will have to make a specific
22 application explaining why.

23 MS. BACON: I think that is very fair because --

24 THE PRESIDENT: That is the order we make. It is
25 good to know you think it is fair. Can we move on, please?

1 MS. BACON: Yes. So that leaves two categories, B
2 and L.

3 Now, B is still pursued by Ryder. The status of
4 that is we are resisting because we say that the material in
5 that is completely irrelevant. If you like, I am happy for
6 Mr. Brealey to make his submissions on that. I just wanted
7 to give you a summary of where we are on everything. That
8 is still resisted.

9 THE PRESIDENT: Just pause a moment. I may have
10 misunderstood paragraph 19 of your skeleton argument dealing
11 with -- you say that is only in countries --

12 MS. BACON: No, this is a different paragraph. 19
13 is one of the issues that was agreed with Hausfeld before we
14 got here.

15 THE PRESIDENT: Yes, and that is --

16 MS. BACON: The relevant -- yes, the relevant
17 paragraph is 30/B. Mr. Rowan has given examples of the
18 documents in this category, which include, for example, a
19 dealer application form for a truck purchase in Russia. So
20 this is documents that do not relate to any of the
21 jurisdictions in the Hausfeld or Ryder claims. We have
22 explained in our evidence that we are not holding --
23 withholding in this category anything that focuses upon the
24 workings of the alleged infringement. You can --

25 THE PRESIDENT: Yes.

1 MS. BACON: So this is purely --

2 THE PRESIDENT: No, there is one Russian Claimant,
3 the Hausfeld Claimant.

4 MS. BACON: Yes, but I am not sure -- well,
5 Hausfeld have not pursued this, I do not think. I do not
6 believe that this is sought on that basis, because if there
7 were any documents relating to the countries sought by
8 Hausfeld, that has already been wrapped up.

9 THE PRESIDENT: Yes.

10 MS. BACON: We have agreed to hand over those.

11 THE PRESIDENT: Yes.

12 MS. BACON: So in our submission, these are
13 relevant and that is why we are continuing to resist
14 disclosure.

15 Now, L is a bit of a strange animal. This is a
16 Ryder application and you might want to just see how Ryder
17 put it originally. That is behind tab 3 of the Ryder file.

18 MR. BREALEY: I am sorry.

19 THE PRESIDENT: Well, it is very, very helpful,
20 Ms. Bacon, to have this list, to see what is agreed and what
21 we are left with. We understand from this we are left with
22 two categories, B and L.

23 MS. BACON: Yes, I was about to explain L.

24 THE PRESIDENT: I think then if they are opposed,
25 if you say a bit of L is agreed, you can tell us which

1 parts.

2 MS. BACON: I was about to explain to you what has
3 happened on L.

4 THE PRESIDENT: You do that, but I think then it
5 must be for the applicants to make the application.

6 MS. BACON: Yes, of course. Of course. I wanted
7 to just explain where we have got to.

8 This does come down to an application that we
9 thought was about category L. What it has now become is an
10 application, we understand it, essentially for the Rose
11 order of December to be varied, because what is said is that
12 we have not disclosed Commission RFIs, which, from the
13 original application, I think there was a suggestion that
14 these were category L. They are not in category L. The
15 Commission RFIs and our responses to those were always
16 excluded under the Rose order.

17 THE PRESIDENT: So they have not been disclosed to
18 Royal Mail.

19 MS. BACON: No. I think it is important that you
20 have this clarification as to where I understand things have
21 got to and Mr. Brealey can make his application. What I was
22 going to say is that has always been withheld. The
23 Royal Mail version of the file did not get these documents.
24 I understand that Mr. Brealey now wants to see those
25 documents and this is --

1 THE PRESIDENT: So what is left in category L?

2 MS. BACON: So category L contains OFT RFIs. I am
3 not sure if that is pursued, but it is, in any event, RFIs
4 that do not contain any factual information relevant to the
5 case.

6 The focus of Mr. Brealey's complaint now seems to
7 be the Commission RFIs and responses. I needed to make this
8 clear because we did not understand this until the eve of
9 the CMC. What I was going to make as a pragmatic suggestion
10 was that this is a new point that has only just arisen. We
11 were not aware that what was actually sought was effectively
12 a variation of Mrs. Justice Rose's order as it applies to
13 the disclosure in these proceedings. In other words,
14 Mr. Brealey is asking for something that goes beyond
15 Royal Mail's file. My pragmatic suggestion is that should
16 be deferred until the next CMC and the Tribunal can make an
17 order in relation to category B if there is time.

18 THE PRESIDENT: Yes. Can you also tell me: is
19 category B a category that was disclosed to -- you were not
20 involved in that disclosure, DAF was, to Royal Mail.

21 MS. BACON: Yes.

22 THE PRESIDENT: Mr. Pickford.

23 MR. PICKFORD: Sir, two points. Firstly, just to
24 make very briefly the point that we have made a number of
25 concessions. They were purely for pragmatic reasons because

1 of the need to get through this. We do not -- nothing
2 further should be read into that at all --

3 THE PRESIDENT: We appreciate that.

4 MR. PICKFORD: -- because of the very small number
5 of documents.

6 The second issue concerns category L. So I think
7 in relation to category B, our position is essentially as
8 per Iveco.

9 THE PRESIDENT: Can you tell me, the category B
10 documents, were they disclosed to Royal Mail?

11 MR. WARD: Yes, they were.

12 MR. PICKFORD: Yes.

13 THE PRESIDENT: They were disclosed to Royal Mail.
14 They now go to BT pursuant to the order we made yesterday.
15 But you say actually they are not relevant so they should
16 not go to the other Claimants in the other actions. Yes.
17 So that is B.

18 MS. BACON: Yes.

19 THE PRESIDENT: Is your understanding of L that
20 what we are dealing with is Commission RFIs and responses?

21 MR. PICKFORD: So we have a different position in
22 relation to category L because as I understand the position
23 of Ms. Bacon's clients, they withheld certain documents on
24 the basis that they were leniency applicants. We have not
25 withheld any RFIs. Category L concerns procedural

1 documents -- any relevant RFIs, I should say. Category L
2 concerns procedural documents, effectively irrelevant
3 procedural documents that have no substantive bearing on the
4 issues in the case.

5 If there was a request for further information or
6 a response to it that contained information that should have
7 been disclosed, we have disclosed it. We have not taken a
8 position on the form of the document, but there are some
9 procedural documents that we have not disclosed. There is
10 probably simply a confusion on the part of the Ryder
11 Claimants that they have conflated the procedural documents,
12 withholding. At least on our part with RFIs, that is not
13 what we have done. That was explained in Ms. Edwards' third
14 statement.

15 THE PRESIDENT: My understanding of the genesis of
16 this is that in the Royal Mail action, which was the first
17 which came before Mrs. Justice Rose, she ordered disclosure
18 of certain exclusions, which excluded leniency documents and
19 settlements and issues, and some 32,000 documents were
20 disclosed to Royal Mail. When the Ryder application came
21 before me, at which Iveco also appeared, and there was
22 further argument, because it came under the damages
23 directive, I permitted Iveco and, I think, your clients to
24 go through, as it were, the 32,000 and take out certain
25 things. That was done. As a result, Ryder received not

1 32,000 documents, but some 24,000. Their concern is about
2 what they say are the missing 8,000.

3 So there should not be anything in these
4 categories which are additional to Royal Mail and involve a
5 variation of the Royal Mail order. These are all things
6 that were disclosed to Royal Mail and not disclosed to
7 Ryder.

8 Mr. Brealey, that was my understanding of your
9 application, is that right?

10 MR. BREALEY: That is right. So, yes, the
11 excluded categories we would not --

12 THE PRESIDENT: Yes.

13 MR. BREALEY: I do not know whether the guillotine
14 is at 4.00. On B, we would ask for that for consistency
15 purposes, if the Tribunal was minded to order it.

16 There is a deeper issue on responses. Could
17 I just very quickly --

18 THE PRESIDENT: Were the responses disclosed to
19 Royal Mail? If you want to press disclosure responses,
20 obviously you are free to make that application, but that is
21 a slightly different point.

22 MR. BREALEY: Yes, we say that the responses have
23 been wrongly withheld.

24 THE PRESIDENT: From the Royal Mail disclosure?

25 MR. BREALEY: From Royal Mail.

1 THE PRESIDENT: From your disclosure by reference.

2 MR. BREALEY: When one reads the Royal Mail's
3 disclosure, it does not give justification --

4 THE PRESIDENT: We are going to have to disband.
5 I do not know if you are going to pursue that and if
6 Royal Mail have --

7 MR. WARD: It is a completely new issue that we
8 are not yet sighted on. If I may explain the position. We
9 have had disclosure in Royal Mail. You ordered yesterday
10 that BT should receive the same file as Royal Mail. I am
11 now addressing you on behalf of the Dawsongroup, with whom
12 there has been dialogue with DAF. DAF has adopted broadly
13 the same approach that you have already heard from
14 Ms. Bacon.

15 On behalf of Dawsongroup, we would like to
16 challenge some of the categories of exclusion, but because
17 of the time and where we are today, what we would like is an
18 order for what they are willing to give us. If we were able
19 to come back before Christmas, assuming we cannot resolve it in
20 correspondence, briefly address argument at
21 least to you, sir. In addition, there is another Royal Mail
22 category which has been floating around, the so-called
23 communications disclosure.

24 THE PRESIDENT: Yes, I saw that.

25 MR. WARD: It is partially agreed, but not

1 totally. That is very, very important and we do not want it
2 to wait until the next CMC.

3 THE PRESIDENT: Yes.

4 MR. WARD: Looking at the time, we could at least
5 have what they are prepared to give and then argue for the
6 rest, hopefully, on a date very soon.

7 THE PRESIDENT: Yes. Will you give us just a
8 moment?

9 [The Panel conferred]

10 Yes, we really do have to stop because one my
11 colleagues has to catch a plane.

12 We will order what has been agreed as explained.
13 We will reserve categories B and L and any further
14 application may be issued to vary or complain about
15 non-compliance with previous orders, to be heard separately,
16 to be heard by myself sitting alone. I will be available.
17 I hope my availability will be able to fit with those
18 counsel concerned. It is limited, but it is certainly less
19 limited than if we have to get the three of us together.

20 So there is a question of timing for this
21 disclosure. That is a matter for DAF and Iveco. How many
22 days to provide it? It has all been provided to Royal Mail,
23 so it is not new material.

24 MR. PICKFORD: I understand that there is an
25 agreed date of 21 December. Yes.

1 THE PRESIDENT: That is 21 December to be provided.

2 There is one other matter that perhaps can be --

3 MR. BREALEY: It is not agreed.

4 THE PRESIDENT: Is it agreed, 21 December?

5 MR. BREALEY: It is not agreed, apparently.

6 THE PRESIDENT: It is not agreed.

7 MR. BREALEY: No. It should be done

8 instantaneously, never mind 21 December.

9 MR. KENNELLY: Sir, while that is being hammered
10 out, just for the record, Scania have the same liberty to
11 apply.

12 THE PRESIDENT: Yes.

13 MR. JOWELL: For all Defendants.

14 THE PRESIDENT: For all Defendants other than Iveco
15 and DAF.

16 MS. DEMETRIOU: Sir --

17 THE PRESIDENT: Just a moment.

18 MR. PICKFORD: Sir, I have been just handed up the
19 Ryder draft order. It was their draft order. It says by
20 4.00 pm on 21 December. You may now say we not agreed it,
21 but we are happy with that. If that is what they have asked
22 for, they can have it.

23 MR. BREALEY: That was in relation to B and L,
24 apparently --

25 THE PRESIDENT: Well --

1 MR. BREALEY: -- which will take longer.

2 THE PRESIDENT: Well, I know. It need not take
3 longer if it has been disclosed to Royal Mail. Are you
4 going to push for an earlier date? Are you keen to get it?

5 MR. BREALEY: Sir --

6 MR. PICKFORD: Daimler understand it needs 14 days
7 to make its representations to us. Sir, probably a further
8 14 after that. I think it was probably about 21 December.

9 THE PRESIDENT: I think we will say 21 December.

10 The one other matter we might be able to deal with
11 in a minute is, I think, Ms. Demetriou, you have applied for
12 further information from DAF, which I am told is not
13 opposed, but just a question of whether it is 21 days or
14 14 days, is that correct?

15 MS. DEMETRIOU: That has all been agreed.

16 THE PRESIDENT: That has been agreed at?

17 MS. DEMETRIOU: 21 days.

18 THE PRESIDENT: So we can make that order.

19 MS. DEMETRIOU: We can make that order.

20 THE PRESIDENT: Yes.

21 MR. WARD: Sir, can I take it that your provision
22 to hear further argument relates to Royal Mail, DAF --

23 THE PRESIDENT: We can deal with that at the same
24 time. It may be, if those matters would take a half a day,
25 that the confidential economic disclosure that was

1 ventilated this morning could be heard in camera in the
2 afternoon, if we can find one day for DAF and Royal Mail.
3 It does not affect anybody else.

4 The other matter, I think there is an application
5 by Mr. Brealey -- no, it is not Mr. Brealey. It is
6 Dawsongroup. It is Mr. Ward. Some overcharge categories
7 that have been agreed.

8 MR. WARD: In a nutshell, the position is there
9 has been a lot of dialogue between at least two of the three
10 of the Defendant parties about the actual trucks at issue.
11 We are at least 90% there, at least provisionally. Efforts
12 will continue.

13 On the more general economic disclosure, there has
14 not -- we are at very early stages. What we will try and do
15 is progress robustly between now and the next CMC.
16 Hopefully we will have some substantive feedback for the
17 proposals we will make. Proposals were made based on what
18 happened in Royal Mail, in a nutshell. There is nothing we
19 are seeking today.

20 THE PRESIDENT: If there are any agreed orders and
21 agreed orders --

22 MR. WARD: I am so sorry. I am reminded that DAF
23 has agreed to provide some overcharge categories.

24 THE PRESIDENT: Yes, that is what I had said. If
25 there are agreed orders, just send them through to us.

1 Unless we find something startling in them that we are not
2 happy about, you can expect the orders will be made.

3 MS. DEMETRIOU: Obviously it cannot be done now.
4 We have an outstanding application for various categories of
5 overcharge disclosure.

6 THE PRESIDENT: Yes.

7 MS. DEMETRIOU: DAF, I think, has agreed to
8 provide us what they are going to provide Royal Mail. At
9 least in their skeleton they say they can do that, so I hope
10 that they will.

11 In relation to progressing this matter, we are
12 very anxious to make progress on it before the next CMC.
13 Could I ask the Tribunal, I hope it will not be
14 controversial, to order that the Defendants respond
15 substantively to our proposal in correspondence within
16 28 days so we can take forward the proposal that we have
17 made?

18 We have sought an order for disclosure of
19 particular categories. We are obviously not going to be
20 able to deal with it now. What we do not want to be is in a
21 position -- in the same position at the next CMC where this
22 has not been progressed. Can we, please, have an order that
23 the Defendants respond substantially to our disclosure
24 categories?

25 THE PRESIDENT: Well, you need to do that. We need

1 to know actually what they are being ordered to respond to.

2 MS. DEMETRIOU: So that is all set out in our
3 draft order. You have -- we have discussed it. We have
4 advanced submissions in our skeleton argument.

5 MR. HOSKINS: That is objected to.

6 THE PRESIDENT: I think what you need to do,
7 Ms. Demetriou, is fix a date for hearing of your
8 application. It is a disclosure application. All
9 disclosure applications do not need a full Tribunal.

10 MS. DEMETRIOU: No.

11 THE PRESIDENT: Before me. No doubt, with the date
12 hanging over them, that will encourage people to respond.
13 I think that is the way to do it.

14 MS. DEMETRIOU: Sir, yes.

15 THE PRESIDENT: Then pursue it in correspondence.
16 We do have to stop.

17 MS. DEMETRIOU: In respect of category L that has
18 been discussed, we also seek that and we made that clear in
19 our skeleton.

20 THE PRESIDENT: Yes. Anyone can participate in
21 that.

22 MR. PICKFORD: Sir, there is one consequential
23 matter that arises from today's directions, which is that in
24 relation to the Royal Mail claim, there were originally set
25 down dates for extended witness statements and also in

1 relation to expert evidence.

2 THE PRESIDENT: Yes, we will vacate those dates and
3 that is agreed by Royal Mail. That order is varied
4 accordingly.

5 We shall, therefore, rise. We just wanted to
6 thank not only the counsel we have heard, but those juniors
7 and the teams of solicitors. The very helpful skeleton
8 arguments have enabled us to get through really quite a lot
9 in a very short time. We appreciate that.

10 (4.11 pm)

11 (The hearing concluded)

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