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4 definitive record.

5 **IN THE COMPETITION**

Case No. : 1291/5/7/18 (T)

6 APPEAL TRIBUNAL

7 Victoria House,

8 Bloomsbury Place,

9 London WC1A 2EB

10 11 March 2019

11 Before:

12 **The Honourable Mr Justice Roth**

13 (Sitting as a Tribunal in England and Wales)

14 BETWEEN:

15 **Ryder Limited and Another**

16 **v**

17 **MAN SE and Others**

18 _____
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26 **HEARING (Disclosure application) - Day 1 - Open Court**
27
28

Monday, 11 March 2019

(10.30 am)

Discussion

THE PRESIDENT: I should say at the outset that it may be necessary at some point to go into camera. By that I mean that those who are not in the confidentiality ring would have to leave court. But it is certainly not necessary to hear the whole proceedings in camera. We will deal with that as and when it may arise.

The proceedings are being streamed to court 2 as we could not fit, you can see, everyone in this court. Obviously if we do go into camera the streaming will be turned off.

MR. BREALEY: I am obliged.

Sir, I think to be fair we will be referring to many of the documents in the annex and the B bundles behind you.

THE PRESIDENT: Yes.

MR. BREALEY: Clearly we do not claim confidentiality over those. Clearly we do not believe that they are confidential at all. I mean, one of the first documents I am going to refer to dates back to 1998.

At some point, in my submission, the defendants have got to grasp the nettle and realise that these are pre-existing documents and that in any ordinary

1 commercial litigation they have to be disclosed.

2 THE PRESIDENT: I fully take that point, Mr. Brealey, and
3 I was going to address that in due course. I do not
4 think today is the occasion where we can conduct that
5 exercise, but I entirely agree with you.

6 Indeed, I was going to raise that very point, but
7 for the moment, for today's exercise, I think what's
8 been placed into the confidentiality ring, let's treat
9 it as confidential otherwise we will get diverted into
10 a whole lot of other argument.

11 MR. BREALEY: It is just for the purposes of the public
12 people in court 2. At some point in the very near
13 future I will have to go to some of the confidential --

14 THE PRESIDENT: Yes, there seems to me quite a bit we can do
15 before we get to that.

16 Can I just ask at the outset, really to clear my
17 mind on this because I have got a little confused, the
18 Commission file, which has been referred to in various
19 ways by different people, is my understanding there
20 correct? The Commission makes one file for this
21 investigation, which is its file. Then it allows all
22 the addressees of the statement of objections, that
23 would include Scania, access to that file, but the
24 access that each individual addressee is partially
25 restricted in that other addressees can ask for

1 documents to be redacted or withheld so that the actual
2 version that the different parties see of the same file
3 is not identical.

4 Is that the position, or if not can someone clarify
5 for me because perhaps you can give me your version.

6 I think we do need to understand -- this is not
7 a contentious point at all -- just how it is done and
8 what is the base that's being looked at.

9 MR. BREALEY: If we could go to bundle B7. Right at the end
10 of tab 401.

11 THE PRESIDENT: This is not a confidential document, is it?
12 It is their index, is it?

13 MR. BREALEY: It is the index, but whether that is
14 confidential.

15 THE PRESIDENT: You need not read it out. It is not
16 something you would read out anyway.

17 MR. BREALEY: If one goes to page 2604.

18 THE PRESIDENT: Yes. I take it this is an extract from the
19 index, not a full index; is that right?

20 MR. BREALEY: It is an extract, my Lord. The first point
21 I would just like to make, and then the defendants can
22 expand on this, we see if one looks halfway down we have
23 got 00840, "Inspection documents gathered, Iveco".

24 THE PRESIDENT: Yes.

25 MR. BREALEY: So that is obviously documents that have been

1 gathered during an inspection. Then we go along and we
2 see "accessibility" under G.

3 THE PRESIDENT: Yes.

4 MR. BREALEY: We see "non-accessible".

5 THE PRESIDENT: Yes.

6 MR. BREALEY: Some are accessible, some are non-accessible.

7 As we understand it, those documents have been redacted.

8 They are either non-accessible at all, a party cannot

9 see them other than, for example, Iveco clearly. Or, as

10 is often the case, they have been redacted, and then if

11 one goes to the next column, H, 4070, there is

12 a document --

13 THE PRESIDENT: Sorry? 47? H. Yes. Which document? The

14 same? Yes, 4070.

15 MR. BREALEY: That will be a copy of the document which has
16 been redacted.

17 THE PRESIDENT: Right.

18 MR. BREALEY: As I understand it. If one was to go to

19 document 4070 -- and we have got copies --

20 THE PRESIDENT: I just want to get the sense of how it

21 works.

22 MR. BREALEY: Clearly, when we see it there is quite a lot,

23 that is why one of our complaints is there has been

24 a lot of redactions. The defendants, as I understand

25 it, say, okay, fair enough, we will unredact.

1 THE PRESIDENT: Just a minute. This index is the master
2 index of the Commission file?

3 MR. BREALEY: As I understand it, yes.

4 THE PRESIDENT: So there is only one version of this index.

5 MR. BREALEY: The defendants can --

6 THE PRESIDENT: They will know better, I would think.

7 MR. BREALEY: We are told there is one version of the
8 Commission's file, although one sees from, for example,
9 the Daimler letters that the file that we have got does
10 not necessarily tie in with what Daimler has. It is
11 a mass of confusion surrounding what is on the
12 Commission file.

13 THE PRESIDENT: That is what I am trying to clarify at the
14 outset. As I said, my understanding was that there was
15 one file, but the access to it given to different
16 addressees of the statement of objections is slightly
17 different because there may be documents, said at the
18 time to have been business secrets, which were not
19 disclosed to one of the other addressees but would have
20 been disclosed obviously to the company from whom the
21 documents came.

22 MR. BREALEY: Yes.

23 THE PRESIDENT: Is that your understanding?

24 MR. BREALEY: That is our understanding. It puts us at
25 a slight disadvantage because we cannot see the

1 unredacted version.

2 Just to flag a point and then I can leave for the
3 defendants to explain in more detail. They in their
4 witness statements say they will unredact it to make it
5 accessible. It will cost a lot of money. All the
6 defendants will have to do their own. We say why do we
7 not just go to the source document rather than the
8 defendants go ahead and --

9 THE PRESIDENT: When you say the source document?

10 MR. BREALEY: The document that was provided to the
11 Commission. The documents that were obtained, we will
12 see this maybe this afternoon, the defendants have
13 a whole host of data. They have done massive searches
14 already, and so it is very likely that this document
15 will be available -- if they were to disclose the
16 document we would get it in the unredacted form.

17 THE PRESIDENT: Well, the Commission will have it in
18 unredacted form.

19 MR. BREALEY: So will Iveco.

20 THE PRESIDENT: Except we start here more neatly with
21 a file. We can talk about what is the most practical
22 way of doing it, but that is your understanding of how
23 the file is done.

24 So it is one file. Some things non-accessible,
25 possibly to everyone, or redacted, but more likely with

1 different restrictions on the different parties. Is
2 that right?

3 MR. BREALEY: Yes. We were given this on 21 December.

4 THE PRESIDENT: Can I just clarify with the parties whether
5 that is a correct summary of how the thing operated at
6 the Commission level.

7 Shall we go along the row for convenience.

8 Mr. Singla.

9 MR. SINGLA: Sir, on behalf of Iveco what Mr. Brealey says
10 conflates two different issues. The question which you
11 asked was is there one version of the file, and the
12 separate issue relates to redactions which we can no
13 doubt come onto in due course.

14 Our understanding of the file is -- it is dealt with
15 at paragraph 38 of Mr. Farrell's witness statement. In
16 essence, he says there is one file, albeit that in
17 relation to certain documents different parties have
18 different access, but the suggestion that there are
19 different versions of the file is not correct.

20 THE PRESIDENT: I think the sense that there is one file is
21 what I have just confirmed with Mr. Brealey. So he
22 accepts that. The different parties have different
23 access.

24 MR. SINGLA: That is my understanding, sir, but we have not
25 put in evidence to deal with the parameters of the

1 different access. I am afraid I am not able to assist
2 with what is in Mr. Farrell's witness statement.

3 THE PRESIDENT: Mr. Farrell will know presumably. I do not
4 know if he is in court.

5 MR. SINGLA: I have asked the question, sir. We cannot
6 answer it immediately.

7 THE PRESIDENT: It will be the same for everyone. It will
8 all have been treated on the same parameters. So we
9 will get a clearer picture as we go along.

10 Mr. Harris for Daimler.

11 MR HARRIS: I have nothing to add on that point, but
12 an additional point the Tribunal should be aware of is
13 that there were, as you may recall, OFT criminal
14 investigations and they exercised criminal powers, and
15 they received documents and then there were varying
16 degrees, as I understand it, of access or permission to
17 have regard to any OFT-seized criminal document which
18 was then transmitted by the OFT to the Commission.
19 There were varying degrees of access or permission to
20 access by the defendant OEMs to those documents. That
21 is an additional point.

22 So that you are also aware, sir, I think amongst the
23 OEM defendants there are different degrees of ability to
24 go back in time to access any underlying documents that
25 were the subject of the criminal seizure orders.

1 Indeed, it may even be the case that some documents were
2 seized, and that is it. I just alert you to --

3 THE PRESIDENT: Yes. While you are on the subject of the
4 OFT, the OFT, as part of its non-criminal investigation,
5 served section 26 notices and, indeed, I think some
6 notices under section 193 of the Enterprise Act.

7 MR HARRIS: That is correct.

8 THE PRESIDENT: So those documents which were taken or
9 supplied to the OFT, they were then passed to the
10 Commission, I believe.

11 MR HARRIS: Yes, that is correct.

12 THE PRESIDENT: But are they, as far as Daimler's documents
13 are concerned, then on the Commission file or are they
14 separately held by the Commission as documents received
15 from the OFT?

16 MR HARRIS: As far as Daimler is concerned, so far as the
17 Daimler documents are concerned, they are on the
18 Commission file because they got transmitted to the
19 Commission. That is right.

20 MR. BREALEY: Before we get to maybe Mr. Hoskins, so that
21 Mr. Harris may be able to address this, first of all we
22 do not accept that all the documents that they obtained
23 as a result of the OFT and the Commission are on this
24 file.

25 THE PRESIDENT: What do you know?

1 MR. BREALEY: It is a numbers game. We will come on to
2 that. But it is absolutely clear there are massive gaps
3 relating to documents on the Commission file. That is
4 what I want to take you --

5 THE PRESIDENT: I understand that, but that does not mean
6 that all the OFT documents did not go to the Commission.
7 The OFT said it was transferring its documents to the
8 Commission.

9 MR. BREALEY: We will look at the evidence. They are
10 actually slightly opaque on this. They are not sure
11 whether all the OFT documents went across. We will come
12 to the statements.

13 THE PRESIDENT: We can clarify that.

14 MR. BREALEY: Just on Daimler. If one goes to their
15 skeleton, they do not really adduce any evidence. They
16 have not sworn a witness statement. But they attach to
17 their short skeleton the letter from Quinn Emanuel dated
18 4 March.

19 THE PRESIDENT: Yes.

20 MR. BREALEY: At page 5 at the bottom, this is a point -- so
21 at paragraph 16 they say that they are willing to lift
22 those redactions. We go over the page. They say that
23 this will take time and cost a lot of money.

24 But the point I just want to raise here, after they
25 say, several lines down:

1 "This will be a time-consuming exercise."

2 They then say:

3 "Second largest volume of documents on the
4 Commission file out of all the addressees. Of 9,806
5 non-unitised documents of ... file, 2,788 were
6 submitted."

7 Then:

8 "It is further complicated by the fact that
9 documents on the Ryder Commission file have been
10 unitised by the DAF defendants and that the version of
11 the Ryder Commission file does not mirror the way in
12 which Daimler's Commission file documents are
13 organised."

14 So we are not quite sure what all that means.

15 Clearly when we are told there is a single file, at
16 least their files do not mirror the way in which we have
17 been given them. I don't know if Mr. Harris wants to
18 respond to that question.

19 MR HARRIS: Sir, I am not sure there is anything in this
20 point. When one gets file documents from a Commission
21 file they might come as a big pdf of 500 pages, which is
22 a mixture of documents.

23 DAF, as I understand their evidence, have helpfully
24 sought to split that up and what they call unitise it,
25 so that it is user friendly. That was done in the

1 context of the DAF disclosure exercise, which is now
2 translated in part to Ryder. But Daimler might have
3 done it in a slightly different way for their own
4 internal purposes.

5 THE PRESIDENT: That is rather what I had assumed.

6 Who is next? Is it Mr. Hoskins?

7 MR. HOSKINS: I am not sure I have much I can usefully add.
8 Our understanding is there is one file. Some documents
9 are marked non-accessible and there are different
10 redactions for different parties, which is exactly the
11 way you phrased it, sir.

12 THE PRESIDENT: So that is the position.

13 Mr. Jowell, anything to add to that?

14 MR. JOWELL: No, we understand that it is entirely standard
15 practice for the Commission to enquire whether there are
16 business secrets amongst the documents that are
17 disclosed to it, and then to redact those that are said
18 to contain business secrets.

19 In relation to the OFT investigation, that is set
20 out in Mr. Taylor's statement at paragraph 44. MAN
21 provided documents to the Commission which have been
22 provided to the OFT in the UK, and on 22 March 2013 the
23 OFT informed Slaughter and May that the Commission had
24 requested that the OFT provide to the Commission from
25 the OFT's investigation file specific categories of

1 documents, and that MAN had consented to that.

2 THE PRESIDENT: If it is specific categories of document, it
3 might not be the entirety of the OFT investigation.

4 MR. JOWELL: It is a possibility.

5 THE PRESIDENT: I was just wishing to clarify that at the
6 outset. Before we get into any of the detail.

7 Have you, Mr. Pickford, anything to qualify or add
8 to what's been said?

9 MR. PICKFORD: Only very briefly, sir.

10 Simply that the Commission notice on rules for
11 access actually describes in precise terms what it is
12 that the file comprises. I am not sure whether that is
13 actually in the bundles.

14 THE PRESIDENT: It will be in the purple book.

15 MR. PICKFORD: I am sure it will be somewhere. In
16 particular, paragraph 10.

17 It is document 2005C325, if that assists.

18 THE PRESIDENT: Sorry? You found it in the book. I cannot
19 see it at the moment. Yes, it is at 4.116, I think.

20 MR. PICKFORD: Very grateful, sir. So paragraph 10 --

21 THE PRESIDENT: Just give me a moment.

22 MR. BREALEY: Sir, which section is it under?

23 THE PRESIDENT: Paragraph 10.

24 MR. PICKFORD: The section in the purple book.

25 THE PRESIDENT: It is page 4.117 at the top, which is

1 page 1773, 2018 edition. That is the notice on access
2 to the file. Mr. Pickford was referring to
3 paragraph 10.

4 MR. PICKFORD: That, sir, as you will see, provides that:

5 "The parties must be able to acquaint themselves
6 with the information in the Commission's file so that on
7 the basis of that information they can effectively
8 express their views on the preliminary conclusions
9 reached by the Commission in its objections. For this
10 purpose, they will be granted access to all documents
11 making up the Commission file, as defined in
12 paragraph 8, with the exception of internal documents,
13 business secrets of other undertakings, or other
14 confidential information."

15 As I understand it, the "internal documents" is
16 largely the procedural documents itself of the
17 Commission.

18 So that is the basis on which the Commission grants
19 access.

20 THE PRESIDENT: That is explained in paragraph 17:

21 "The Commission file may also include documents
22 containing two categories of information, namely,
23 business secrets and other confidential information to
24 which access may be partially or totally restricted."

25 That explains --

1 MR. PICKFORD: Yes.

2 THE PRESIDENT: That is very helpful, and paragraph 18.

3 MR. PICKFORD: I do not think I need to take the Tribunal to
4 it, but the order that required DAF to disclose the file
5 required DAF to disclose, unsurprisingly, the version of
6 the file to which it had access. So we obviously
7 disclosed everything to which we had access that is
8 subject to those qualifications.

9 THE PRESIDENT: Well, you could not disclose something which
10 you never had.

11 MR. PICKFORD: Quite.

12 THE PRESIDENT: That is extremely helpful and I hope clears
13 the air a little bit to what has been going on.

14 MR. PICKFORD: I have also been asked by Mr. Hoskins to draw
15 your attention to paragraph 8 on the content of the
16 Commission file and the definition of the Commission
17 file:

18 "The competition investigation, herein also referred
19 to as 'the file', consists of all documents which have
20 been obtained, produced and/or assembled by the
21 Commission Director General for Competition during
22 investigation."

23 It is comprehensive, but it is subject to the
24 qualifications we have seen.

25 THE PRESIDENT: Thank you very much.

1 Mr. Brealey, we now turn to your application for
2 Ryder.

3 Application by MR. BREALEY

4 THE PRESIDENT: The draft order, which is in bundle B1.

5 Document preservation. There has been, I know,
6 correspondence about that. Is that still a live issue?

7 MR. BREALEY: I do not believe -- I think there may be some
8 discussion still with Daimler, and I can get back to you
9 on that. Clearly one will have seen from the skeletons
10 that at the moment I am taking it that it will be
11 a mention rather than a fight.

12 THE PRESIDENT: Yes. Will I be asked to make an order or
13 not?

14 MR. BREALEY: I doubt it from the correspondence to date.

15 THE PRESIDENT: But you will come back if necessary. Yes.
16 I think, and I am very conscious of the fact that we
17 should do as much as we can in open hearing, first
18 because to go in and out of camera is obviously hugely
19 inconvenient. There are a lot of people in court.

20 It seems to me that it may be sensible to go next to
21 the application you make regarding what has been
22 compendiously called the RFIs. But I think that covers
23 both questions by the OFT, or notices by the OFT and the
24 Commission and responses to them, and where you are
25 seeking further disclosure, and clearly quite a lot of

1 them have not been disclosed for reasons that have been
2 variously mentioned in the skeleton arguments and,
3 indeed, the evidence. Would you like to address that
4 part of the application?

5 MR. BREALEY: Yes, of course, sir.

6 As you will have seen, it has come to light that the
7 defendants, but not DAF, have withheld responses to
8 requests for information sought by the Commission.

9 Just as a preliminary, we thought that such
10 responses are usually informative because they usually
11 constitute a targeted request.

12 THE PRESIDENT: Yes.

13 MR. BREALEY: Just as a preliminary point, the objection is
14 not because the defendants have settled, and I am going
15 to come on to this in a moment, because DAF obviously
16 settled. So the objection is not because they settled.
17 We know they all submitted settlement submissions, that
18 is recital 43 of the decision, but we have, for example,
19 the responses from DAF even though it was a settlement.

20 THE PRESIDENT: It is about leniency.

21 MR. BREALEY: That ties in with the way that the Damages
22 Directive works, as we will see.

23 THE PRESIDENT: Yes.

24 MR. BREALEY: So the objection is that the response was made
25 by a leniency applicant. I would like just to go to the

1 decision, to bundle A, to see the implications. If we
2 go to the decision at bundle A, tab 4.

3 THE PRESIDENT: Yes.

4 MR. BREALEY: Page 61 of the bundle.

5 THE PRESIDENT: Can you give me the paragraphs in the
6 passages, I have it separately.

7 MR. BREALEY: The paragraph is 133, page 61.

8 THE PRESIDENT: In the Commission decision?

9 MR. BREALEY: In the Commission decision. A, tab 4.

10 Basically at the end.

11 We see this concerns Iveco. I will take it this is
12 not confidential?

13 THE PRESIDENT: No, this is the public version of the
14 decision, I think.

15 MR. BREALEY: We see that Iveco gave some information as
16 a leniency applicant and got a reduction of 10%.

17 THE PRESIDENT: Yes.

18 MR. BREALEY: One sees that Iveco is saying, well, I got
19 a reduction of 10% because of leniency, but now all the
20 responses that I made as a leniency applicant should be
21 withheld.

22 THE PRESIDENT: The question is what is leniency material.

23 MR. BREALEY: Correct.

24 THE PRESIDENT: That is the issue.

25 MR. BREALEY: That is the implication. Just because you

1 sought leniency, you gave some information, not a great
2 deal because you only get a 10% reduction, that you
3 still want to have the responses withheld under the
4 Damages Directive. That is the implication.

5 THE PRESIDENT: It is actually under the statute now.

6 MR. BREALEY: Yes.

7 THE PRESIDENT: Implementing the Damages Directive. Is not
8 then the issue this: you may say whether they gave
9 little or much information, I do not know because the
10 leniency reduction is also about the value, the
11 additional added value for the Commission of the
12 information. They may have given a lot of information.

13 There were a whole series of requests. If we take
14 it in stages. As regards responses to the OFT,
15 section 26 notices or notices under the Enterprise Act,
16 I am not aware there was any leniency submission to the
17 OFT, was there? There was?

18 MR. BREALEY: MAN has sought to withhold disclosure.

19 THE PRESIDENT: MAN was a leniency applicant?

20 MR. JOWELL: Sir, it is correct that MAN was a leniency
21 applicant to the OFT, but it is not correct that MAN has
22 sought to withhold.

23 THE PRESIDENT: You have provided I think the responses to
24 the OFT; is that right?

25 MR. JOWELL: That is correct. Our position is set out in

1 a letter which I can take you to, sir.

2 THE PRESIDENT: I think what would be helpful for the
3 Tribunal, and possibly also for Ryder, is if each
4 defendant could just provide a list with the dates of
5 notices received from the OFT and specifying whether it
6 is section 26 or section 193 of the Enterprise Act, and
7 of requests from the Commission if there were -- now
8 there might have been follow-ups and emails and
9 correspondence, but the main requests -- and under
10 a leniency exchange or where it was specifically under
11 Article 18 of Regulation 1/2003, which is, it seems to
12 me, not part of the leniency process but is a mandatory
13 request.

14 Some of you have referred to this in the witness
15 statements, some in general terms, some have actually
16 set out the numbers. But just to have on a couple of
17 pieces of paper so one can see exactly what there is.
18 I would find that for my part very helpful. That's
19 something presumably you can do. It may be I do not
20 always remember which parties' evidence has done it,
21 but --

22 MR. JOWELL: Sir, we had not done it in our witness
23 evidence, then we thought we should do it. If you could
24 take, sir --

25 THE PRESIDENT: I do not want to look at it now. If it is

1 there it will take you even less time, but just to have
2 on one piece of paper from all the defendants so we can
3 see.

4 MR. JOWELL: I thought possibly it might help to show you
5 what we have done by way of example to see if that is
6 what your Lordship has in mind. It is in 59R.

7 THE PRESIDENT: Which bundle?

8 MR. JOWELL: Of the correspondence bundle.

9 THE PRESIDENT: Page?

10 MR. JOWELL: It is tab R, 59R, page 162.28.

11 THE PRESIDENT: That is a letter from Slaughter & May of
12 8 March.

13 MR. JOWELL: Perhaps if I could invite you to read that, and
14 then if that is the -- I think that is precisely the
15 kind of information that you have in mind everybody
16 providing.

17 THE PRESIDENT: Yes, that is exactly what I have in mind.

18 Mr. Brealey, I think if you were provided with that
19 information from each defendant, and I will hear from
20 their counsel in a moment -- just a minute,
21 Mr. Pickford -- that would be helpful because it would
22 set out what you have got, what there is and what you
23 might want to argue about, and so on.

24 MR. BREALEY: Correct.

25 THE PRESIDENT: Yes, Mr. Pickford.

1 MR. PICKFORD: Sir, thank you. I rise simply because you
2 indicated you would like all of the OEMs to do this. My
3 understanding is that this application was not pursued
4 against us because we were not leniency applicants and
5 we have not withheld anything on the basis that it is
6 an RFI.

7 We have withheld irrelevant material, but there is
8 no category of RFIs where we have said, well, we are not
9 providing that because we are leniency applicants. So
10 on that basis does the Tribunal need us to engage in
11 this exercise as well?

12 THE PRESIDENT: It is a very simple exercise.

13 MR. PICKFORD: Insofar as the Commission file is concerned
14 it is something we can do. There is a difficulty as
15 regards the OFT element to it because no one currently
16 instructed who is acting for DAF in this matter had any
17 involvement in the OFT investigation. That was dealt
18 with by other solicitors.

19 In order to be able to address the OFT aspect, we
20 would have to go to those other solicitors and engage
21 them in doing that task. It is not as straightforward
22 as it might first appear.

23 THE PRESIDENT: It might take you a couple of weeks longer,
24 but from what I have heard it is not clear that
25 necessarily all the OFT responses to OFT requests,

1 especially criminal requests, made their way onto the
2 Commission file. So I think it would be helpful. But
3 I appreciate you might then want a short while longer to
4 do it.

5 MR HARRIS: Sir --

6 THE PRESIDENT: It can be done this way or in a tabular
7 form.

8 Yes, Mr. --

9 MR HARRIS: Can I raise a timing point, which is we are in
10 the same position as DAF as regards four different
11 solicitors having been on the record in the OFT civil
12 investigation, and then it is further complicated by the
13 fact that, at least in the case of Mercedes-Benz, there
14 were some individuals who were under investigation.
15 They had yet further separate lawyers because it was
16 criminal.

17 My only point is simply that could we have, at least
18 for those, two weeks to try to get to the bottom of it
19 but with liberty to apply, because it might prove --

20 THE PRESIDENT: I think two weeks is entirely reasonable.

21 So two weeks for everyone. Some may not need it.

22 MR. BREALEY: Can we deal with the principle?

23 THE PRESIDENT: So you will get that, Mr. Brealey. Where
24 documents are withheld for leniency you may say this
25 should not count as leniency materials and you may or

1 may not be right. But is not the position -- if I can
2 find my documents -- now under the statute that we have
3 to follow slightly unusual procedure, but there it is.

4 If you look at Schedule 8A to the Act, we have under
5 paragraph 4 of Schedule 8A, headed "Cartels", then in
6 (iv) of paragraph 4 "cartel leniency statement" is
7 defined and it excludes any pre-existing information.
8 Then under (vi), references to a cartel leniency
9 statement include:

10 "Part of cartel leniency statement etc."

11 So that is what cartel leniency statement is
12 directed to mean.

13 Then one gets to (vii) and (viii):

14 "On the application of the claimant in competition
15 proceedings a court or the Tribunal may, in accordance
16 with ... determine whether information is a cartel
17 leniency statement."

18 So it is for this Tribunal to decide.

19 But (viii):

20 "For the purpose of making a determination under
21 (vii), the Tribunal may take evidence from the author of
22 the document and obtain assistance from the competition
23 authority, but may not obtain assistance from anyone
24 else."

25 You will make your submissions on how this should be

1 done, but it does seem to me -- and it will be easier
2 when you get this list -- if you identify the RFIs and
3 responses to RFIs, and we will go back to how that is
4 done, where it has not been provided on grounds of
5 asserted leniency, in other words, that it constitutes
6 a cartel leniency statement within this definition, you
7 can then say to the Tribunal, the Tribunal should
8 determine whether that is right. To do that, I can then
9 obviously see the statement, take evidence in each case
10 from the company that submitted it and consult the
11 Commission.

12 But it is for me to decide without obviously the
13 statement being provided to you or further submissions
14 from you. You make the application and then that
15 procedure kicks in. Is that a correct reading of the
16 statute?

17 MR. BREALEY: I think that is the correct reading.

18 As, sir, you will remember, today was about the
19 principle.

20 THE PRESIDENT: Yes.

21 MR. BREALEY: You may remember at the last hearing, it was
22 a very long two-day hearing.

23 THE PRESIDENT: In November.

24 MR. BREALEY: In November. A letter had been written to the
25 Commission. If I could just remind you, sir, of the

1 transcript on this. This is in the authorities bundle.

2 THE PRESIDENT: This is a letter from?

3 MR. BREALEY: I think from DAF to the Commission, about
4 whether there was to be disclosure of documents on the
5 Commission file. The Commission, if you will remember,
6 said that the document should not be disclosed and you
7 disagreed.

8 THE PRESIDENT: Yes. That was about proportionality. I do
9 remember, about proportionality -- this was not the --
10 I thought that was still in the High Court, not the
11 November CMC. That was long before the November CMC.
12 That was back in June/July.

13 MR. BREALEY: Yes, but in November -- if I just go to tab 23
14 of the authorities. It may well be that the defendants
15 again can assist on this.

16 We know from the skeleton I think of Volvo, that
17 Mr. Frey of Freshfields has written to the Commission on
18 1 March about this.

19 THE PRESIDENT: Yes.

20 MR. BREALEY: We have seen that. Just to remind my Lord.
21 That is a lengthy document, tab 23. This is a
22 transcript of the CMC, 21 November 2018.

23 At the end there was about some of the excluded
24 categories. Mr. Pickford said the Commission needs to
25 be notified.

1 THE PRESIDENT: Which page are you on?

2 MR. BREALEY: Sir, we are going to go to page 740. All this
3 is going to is whether the Commission needs to be
4 consulted again.

5 THE PRESIDENT: They have not been consulted on the question
6 of whether a particular RFI or response to it
7 constitutes leniency, and that is the issue. That is
8 the process that the statute says -- well, I do not
9 think it says I have to consult them, but I may consult
10 them, and I thought it would be sensible to do so.

11 MR. BREALEY: All I was pointing out:

12 "As I recall, the Commission, notwithstanding that
13 the letter should not be ordered ... I looked at their
14 arguments ... did not accept it. I said it was
15 proportional --"

16 THE PRESIDENT: Sorry to interrupt you, Mr. Brealey. That
17 was nothing to do with leniency. That was to do with
18 what is proportionate, excluding leniency.

19 On that, they expressed views and they do not have
20 any particular standing on that. But obviously one took
21 it into account. But this is rather different.

22 MR. BREALEY: I take that point. All I want to emphasise is
23 that the letter basically told the court that we do not
24 want to be bothered.

25 THE PRESIDENT: We can look at the letter. It may be that

1 they do not want to be bothered on interpretation of
2 proportionality under the Damages Directive, because the
3 directive has set out the law and it is then for
4 national courts to interpret it. But it is quite
5 different when it comes to what is a leniency document
6 for the purpose of the directive, and --

7 MR. PICKFORD: Sir, it was me --

8 THE PRESIDENT: I do not have any basis for thinking they do
9 not want to be bothered on that. Indeed, the statute
10 clearly indicates that the court should consider
11 bothering the Commission. If they write back a short
12 letter saying "Thank you very much, we have nothing to
13 say", that is up to them.

14 MR. BREALEY: It is a matter for your discretion, as you
15 know, sir.

16 Sir, that is the procedure.

17 MR. HOSKINS: Sir, before we leave --

18 THE PRESIDENT: If that is -- and it does seem to me that is
19 the procedure -- I cannot decide whether something is
20 a leniency statement without looking at it. I cannot do
21 it in the abstract.

22 MR. BREALEY: No.

23 THE PRESIDENT: You cannot look at it because it is
24 a question of whether it should be disclosed, rather
25 like legal professional privilege in some cases. But

1 this goes a bit deeper. It is for the Tribunal to
2 decide, and I would need to do it by you identifying,
3 with the help of the list that you are going to get:
4 these are the following RFIs and responses we have not
5 seen, or we have seen them heavily redacted on the
6 assertion of leniency.

7 Then it will be for the company that produced that
8 response, as the author of the document, to make
9 submissions, I would have thought in writing, it seems
10 to me a sensible way, with the document to the Tribunal,
11 and I will hear from you all as to whether you think
12 this is an appropriate procedure. We have not done it
13 before.

14 MR. HOSKINS: I just want to add to the procedure, there is
15 another procedural element which --

16 THE PRESIDENT: Can I finish, and then --

17 MR. HOSKINS: I just wanted to make it clear --

18 THE PRESIDENT: I will give you all a chance to address it.

19 I am not saying this is what I am going to do without
20 hearing from you.

21 MR. HOSKINS: I do not want to make controversy, I want to
22 draw your attention to another procedural position which
23 chimes with what you are thinking, sir, which is the
24 practice direction of the Tribunal relating to
25 disclosure and inspection.

1 THE PRESIDENT: I am well aware of that.

2 MR. HOSKINS: F1, tab 6 at page 92, because it is not simply
3 only that the Tribunal can look at the documents but the
4 claimant cannot. There is a prior step, according to
5 the practice direction.

6 THE PRESIDENT: Yes.

7 MR. HOSKINS: "The applicant must serve a copy of its
8 application on the competition authority and the author
9 of the document."

10 Sir, that chimes perfectly with the procedure you
11 are suggesting. The list would be produced. Ryder
12 would look at the list and have to decide what they were
13 pursuing and serve that application on the relevant
14 competition authority and the author. So that chimes
15 precisely, sir, with what you're suggesting.

16 THE PRESIDENT: Yes. Then one can take it forward, and it
17 may be, Mr. Brealey, that with some of these I look at
18 them and see what the author of the document, the
19 company, says and I decide I do not think it is
20 a leniency document within the statutory definition and
21 it should be disclosed. In others, I may not. But that
22 seems to me the procedure we have to follow.

23 MR. BREALEY: I think if we do that, and I think we do need
24 some directions from you, sir, because you will remember
25 that we have been seeking these documents -- it was

1 Mr. Levy of Ashurst who first swore the witness
2 statement on 1 November.

3 This application was adjourned from the last
4 hearing.

5 THE PRESIDENT: But you have not served. I mean,
6 Mr. Hoskins drew attention, I was indeed going to come
7 onto that, to paragraph 4 of the practice direction,
8 which was written, as I know because I wrote it, to set
9 out a procedure to be followed when we are dealing with
10 this new world of the Damages Directive and the
11 prescriptions in Schedule 8A of our domestic statute.

12 It is for you then to serve that application, and
13 you will have separate applications for the different
14 RFIs from the different parties. We need to go through
15 that process and deal with it then. We cannot clearly
16 do it now.

17 MR. BREALEY: I take that point.

18 THE PRESIDENT: I think what would be also helpful, and
19 I think in the letter that Mr. Jowell showed me MAN has
20 done that, if, when identifying the RFI or the date of
21 a response, you could have a third column saying
22 "disclosed" or "not disclosed on grounds of leniency" so
23 that one can see, or not disclosed for some other reason
24 if there is another reason, and irrelevant because
25 concerning penalties, for example, so that one will have

1 the dates, under what basis the request was made, the
2 dates of the response and whether disclosed or not and
3 why not if not.

4 Is that something that each of you can -- if I say
5 two weeks with liberty to apply, is that satisfactory?
6 I do not hear any dissent.

7 I think that deals with the RFI part. To be clear
8 it is OFT and Commission.

9 Is there anything else on the RFI aspect of the
10 application?

11 MR. JOWELL: You said that you were going to give us

12 an opportunity to comment on the procedure that you --

13 THE PRESIDENT: Yes.

14 MR. JOWELL: Two comments. One is that you mentioned that

15 you would be looking at the leniency statements, and

16 I would question the propriety of you personally looking

17 at them. Not the Tribunal, but as I understand it, you,

18 sir, are the assigned judge for all of these trucks

19 cases, if I can put it.

20 THE PRESIDENT: Yes.

21 MR. JOWELL: Therefore, the intention is that you will be

22 hearing the final determination. Certainly in the High

23 Court when it comes to matters of privilege in those

24 rare circumstances where the court itself has recourse

25 to looking at the allegedly privileged document in order

1 to determine whether it is privileged, the general
2 procedure -- I fear I do not have my White Book, but
3 I am confident about it -- is that it typically goes
4 before a master or another judge to determine the issue
5 so that the judge that hears the final determination is
6 not thereby prejudiced by having seen the privileged
7 material. Otherwise it rather undermines the whole
8 purpose of the protection that the privilege gives.

9 Therefore, I suggest it should be a different judge
10 hearing this determination. I know that complicates
11 matters, but I feel that is the proper procedure
12 certainly by analogy with the High Court, and I think
13 also on the basic principle that it would be wrong for
14 the leniency material to be seen by the judge who is
15 then determining the very matter.

16 THE PRESIDENT: We do of course as judges see evidence that
17 may then be ruled inadmissible.

18 MR. JOWELL: Sometimes that is true. Sometimes yes and
19 sometimes no. But not privileged material and not, for
20 example, say, when it comes to costs, the judge is not
21 shown previous without prejudice material, for example.
22 So it depends on the circumstances. I would think that
23 there is a close analogy here to privilege. Therefore,
24 I would suggest that the proper procedure is for
25 a different judge to hear it.

1 The other issue I would raise is the question of
2 what is meant by the author of the document. Is that
3 the company, is that the law firm that was responsible,
4 or is that the individual lawyer whose name is at the
5 bottom of the particular leniency application? I would
6 assume it is the company itself.

7 THE PRESIDENT: This is in the statute, is it not?

8 MR. JOWELL: Yes.

9 THE PRESIDENT: Have they taken it from the Damages
10 Directive directly? Where does that phrase come from?

11 MR. SINGLA: Sir, it is in article 6.7 of the Damages
12 Directive, which is in the previous tab.

13 THE PRESIDENT: Yes. That is where the phrase "the author"
14 comes from. If there is anything in the recitals that
15 assists, but from memory I do not think there is. As to
16 what that means, as it is evidence from the author it
17 seems to me it is clearly not the law firm which is
18 represented.

19 MR. JOWELL: No.

20 THE PRESIDENT: I would have thought these are put in for
21 the company and it is the company.

22 MR. JOWELL: Yes.

23 THE PRESIDENT: Does anyone want to submit otherwise?

24 MR. HOSKINS: I said company acting through its current law
25 firm for obvious reasons.

1 THE PRESIDENT: Yes. The company can put it in as who
2 actually makes -- if it is a witness statement, who
3 makes the witness statement, but they will be speaking
4 for the company. So it is the company.

5 On the question raised by Mr. Jowell that it
6 should --

7 MR. PICKFORD: Sir, sorry, I had a very short submission to
8 make on that.

9 THE PRESIDENT: I was going to ask is there anyone else who
10 wanted to speak on it.

11 Mr. Pickford.

12 MR. PICKFORD: Beg your pardon.

13 THE PRESIDENT: On this particular point that they should go
14 before a different judge.

15 MR. PICKFORD: Sir, there is some precedent in the Tribunal
16 for a similar procedure. It is harking back a little
17 bit because the president at the time was
18 Sir Christopher Bellamy, and I believe the case was the
19 VIP FLOE ^ case name litigation.

20 Forgive me if I made a mistake because it was some
21 time ago. Certainly in relation to without prejudice
22 material in that case the Tribunal adopted the approach
23 suggested by Mr. Jowell that the chair of the Tribunal
24 did not review the material. In that case the chair was
25 not the president, so it was perhaps slightly easier.

1 It was given to the president and he addressed the issue
2 and then the matter went back to the chair.

3 Certainly that split approach has been adopted by
4 the Tribunal before.

5 THE PRESIDENT: Yes, and you support it; is that right?

6 MR. PICKFORD: Yes, we do.

7 THE PRESIDENT: Mr. Singla?

8 MR. SINGLA: Sir, we also see the sense of that.

9 THE PRESIDENT: Mr. Harris?

10 MR HARRIS: We support it because it chimes with the policy
11 concern underlying the leniency regime.

12 THE PRESIDENT: The policy concern is that parties are not
13 prejudiced by disclosure of leniency material. That is
14 on the basis you say, well, it might with the best will
15 in the world affect the view taken by the judge hearing
16 the case.

17 MR HARRIS: Yes.

18 THE PRESIDENT: Do you have any objection to the Tribunal
19 adopting that approach? There are a number of chairs at
20 the Tribunal now, including a large number of Chancery
21 High Court judges.

22 MR. BREALEY: Clearly it can be done by somebody else. All
23 I would say is that the authority in the bundle, in
24 National Grid ^ case name , you looked at the
25 documents and they were the leniency. When one looks at

1 precedents, the only authority in the bundle supports
2 the fact that the assigned judge can look at leniency.

3 MR. HOSKINS: I am not sure if you were the assigned judge
4 in that case.

5 THE PRESIDENT: I was. It was a High Court case and I was
6 the docketed judge. It was docketed.

7 MR. BREALEY: Paragraph 5 of the judgment.

8 THE PRESIDENT: I think I am not going to take a definitive
9 view that this must always happen as the approach.

10 I would like to reflect on that, but I think in this
11 case the course of least resistance, as it were, is that
12 we will follow that approach and that I will arrange
13 for -- I do not know who it will be, but for another
14 judge who is a chair to look at the materials and carry
15 out that exercise.

16 I think it should be a paper exercise, that the
17 submissions should be on paper. If that judge feels he
18 or she wants to have a hearing, well, it will be
19 a matter for them, not for me, but I think one should
20 assume that it will be done on paper.

21 So you will get this schedule separately from each
22 defendant in two weeks unless they seek extra time. It
23 is then for you, as Ryder, to make your application or
24 applications separately as regards each defendant, serve
25 it on the Commission and we will then direct a timing as

1 to how things will go forward once you have made your
2 application.

3 Anything else on RFIs from anyone?

4 MR. BREALEY: No, my Lord, thank you.

5 MR. SINGLA: Sir, before we leave this issue could I perhaps
6 put down a marker as regards costs, because I do not
7 want to get into this now and I am sure there are more
8 pressing things to deal with. But there is a concern,
9 certainly on Iveco's part, that this matter has now been
10 raised twice.

11 THE PRESIDENT: We are not going to deal with costs now
12 because there will be other issues on costs.

13 Application regarding redactions

14 THE PRESIDENT: Right. The next matter that I think we can
15 address now in open court is something raised in your
16 application for Ryder, which is at paragraph 2. This is
17 as regards redactions not now from obviously RFIs and
18 responses thereto, but redactions from documents.
19 Mr. Burrows in his witness statement identifies a number
20 of documents with redactions, and so on.

21 I take it, Mr. Brealey, that although paragraph 2
22 says:

23 "Any of the documents or information to be disclosed
24 under paragraph 1, which relates to the Commission
25 file," but you mean to be disclosed and which have been

1 disclosed.

2 MR. BREALEY: Yes.

3 THE PRESIDENT: That is the way I read Mr. Burrows' witness
4 statement.

5 So dealing with the ones that have been disclosed or
6 to be disclosed. I think you got, of course, the
7 Royal Mail disclosure, which was the DAF disclosure, and
8 the various other defendants who made the point that for
9 reasons we explored at the outset, the file that they
10 got was slightly different and they are willing to
11 supply I think without exception, I will be corrected if
12 that is not correct, additional documents that were in
13 the file that they got but was not in the DAF file, and
14 they are willing to go through and provide those to you.

15 MR. BREALEY: Yes.

16 THE PRESIDENT: There is a question of how long that will
17 take, but they are ready to do that.

18 MR. BREALEY: Yes.

19 THE PRESIDENT: That is presumably something you want?

20 MR. BREALEY: Yes. Subject to the point that I made earlier
21 and I will repeat, but the answer is yes.

22 THE PRESIDENT: There is then a question of redactions.

23 When we are talking about pre-existing documents, it
24 seems to me there is no issue of any of them being
25 leniency documents because that is clear from the

1 definition of a leniency statement. So redactions are
2 not on the grounds of leniency. Some may be on the
3 grounds of privilege, some may be on grounds of
4 relevance, some may be on grounds of business secrets,
5 but I have to say I struggle to see how there should be
6 any redactions on grounds of business secrets from any
7 documents.

8 At most it can be said they go into a
9 confidentiality ring, but there is no basis I can see
10 for anything now being a business secret in 2019.

11 I am not sure quite the basis on which some of the
12 redactions that I have seen are being made, and what
13 I would like to ask the defendants is what grounds
14 are -- other than privilege, and some of the redactions
15 I have seen clearly are not privileged material, legal
16 professional privilege -- are documents being redacted?

17 We are talking, as I say, about pre-existing
18 documents, not RFIs and responses. Again, these are
19 documents in the Commission file that we are now talking
20 about, and would it be sensible again to go down the
21 line and start with Mr. Singla?

22 MR. SINGLA: Sir, the answer to your question is business
23 secrets was the basis for the redactions, and we have
24 said given the passage of time we accept those
25 redactions will need to be lifted. But there is a very

1 major practical issue, which is why we say, well,
2 Mr. Farrell says his best present estimate is
3 approximately two months, and I will not go through the
4 detail of that right now. Mr. Brealey says one month.
5 We say that is not feasible.

6 THE PRESIDENT: You want two months, but it was only
7 business secrets.

8 MR. SINGLA: Correct.

9 THE PRESIDENT: There may be the odd document that is
10 privileged, but there are very few, I would have
11 thought.

12 MR. SINGLA: Yes.

13 THE PRESIDENT: Mr. Harris?

14 MR HARRIS: Sir, we have documents that were originally
15 redacted for business secrets and we, like Iveco, are
16 content to put them into the ring and we have said so in
17 writing. But we also have some documents that were
18 privileged.

19 There was, as you will understand, privilege issues
20 in English companies with in-house counsel. But we also
21 have the major practical problem. These were (a) a long
22 time ago with a different firm of solicitors, and in our
23 case that some in the OFT procedure were redacted on
24 behalf of, for all I know, individuals. So there is the
25 practical issue.

1 THE PRESIDENT: Yes. When you say they were a long time
2 ago, these are documents that were, if they are Daimler
3 documents, supplied to the Commission, you got access to
4 the Commission file, your documents would not have been
5 redacted when you got that part of the Commission file,
6 your own documents would not be redacted.

7 MR HARRIS: Well --

8 THE PRESIDENT: Because you are now going to --

9 MR HARRIS: The issue, sir, crystallises I think in this
10 way. It is not clear to me standing before you today
11 whether we can, given the previous solicitors and the
12 number of previous solicitors, go back and find
13 an original wholly unredacted document so that we could
14 then -- those are just the facts. So that we could then
15 provide a wholly unredacted copy of the original into
16 a confidentiality ring now with no redactions. That is
17 just the way the cards have fallen, if you like, with --

18 THE PRESIDENT: I find that puzzling. I find it hard to
19 believe that Daimler has not retained copies of the
20 documents it provided to the Commission.

21 MR HARRIS: We are not saying that they have not, what we
22 are saying is that that will have been done, if it has
23 been done, by other solicitors and maybe more than one
24 other solicitor.

25 THE PRESIDENT: There must have been someone centrally

1 coordinating Daimler's response to the Commission
2 investigation.

3 MR HARRIS: We are endeavouring to find out.

4 THE PRESIDENT: Yes.

5 MR HARRIS: It puzzles, to some extent, the Tribunal. All
6 I can do is say that that is a puzzle that is yet to be
7 unpicked or solved.

8 THE PRESIDENT: I will need a good explanation if it is said
9 that Daimler, given the seriousness of this matter, the
10 obvious likelihood of damages claims, it was a settling
11 party, did not retain itself copies of what it provided
12 to the Commission.

13 MR HARRIS: We hear that very loud and clear, sir. All I am
14 saying is there will be a timescale. We would like a --
15 some months and we would need liberty to apply.

16 THE PRESIDENT: Yes, you can all have liberty to apply. Two
17 months seems a reasonable period.

18 MR HARRIS: My instructions -- because we have given some
19 thought to this and here I am saying we do not quite
20 know and we have started to look at it, we would ask for
21 three months and liberty to apply, and that is after
22 some conscious thought about the matter.

23 MR. BREALEY: Can I point out --

24 THE PRESIDENT: No, let us hear from all the defendants and
25 then you can speak.

1 Mr. Hoskins.

2 MR. HOSKINS: My instructions are that the Commission file
3 is not -- the redactions for business secrets are not
4 tailored to each company. So when you get access --

5 THE PRESIDENT: They are?

6 MR. HOSKINS: They are not tailored to each company. So the
7 business secrets that people claim are taken out of the
8 documents and you all get the same set, so even your own
9 business secrets are redacted from the documents you see
10 on the Commission file.

11 THE PRESIDENT: Yes, I see.

12 MR. HOSKINS: That is why --

13 THE PRESIDENT: I thought I was told earlier that you are
14 given different access to the Commission file, that the
15 access is tailored to each company.

16 MR. HOSKINS: I just took instructions on the point now to
17 address you.

18 THE PRESIDENT: I thought that was what I was told.

19 MR. HOSKINS: Everyone is nodding vigorously to me. Sorry
20 if there was a misunderstanding earlier. No doubt my
21 fault.

22 One has the Commission files with redactions for
23 business secrets. We want to give the documents
24 unredacted for business secrets. It means that we have
25 to match our original documents to the Commission file.

1 One of the practical problems for us, as for many of
2 the others, is that different companies acted for Volvo
3 in the Commission investigation to those now acting in
4 these proceedings. But as Mr. Frey explains,
5 paragraph 39 of his second witness statement, he says:

6 "Once identified ..."

7 So once you have identified the original documents
8 which match the Commission file:

9 "... these documents will need to be
10 cross-referenced against the disclosed file to identify
11 those documents disclosed to the applicant. I am
12 informed by my team that this is not anticipated to be
13 a trivial task ..."

14 This is the important bit:

15 "... as the Commission file does not necessarily
16 reflect the structure of the underlying documents and
17 contains, for example, single pdf files containing
18 scanned copies of multiple documents."

19 So the task involves having to identify the original
20 documents as against the Commission file documents, and
21 the task is made more complicated by the fact it is not
22 simply that when one has a native document one finds it
23 in that form in the Commission file. There is a bit of
24 detective work to be done.

25 It is that unpicking that is the primary driver for

1 saying that this is not simply a case of there is
2 a ready package sitting there to be handed over, and
3 that's why I think all the defendants are saying we are
4 certainly asking for three months because it is to
5 a certain extent, I am afraid, a detective exercise.
6 That is not the fault of any of the defendants or the
7 way they have structured them. It is just the way the
8 Commission file works. You give the documents, the
9 Commission then repackages them, you get something back.
10 And we are having to work back from that. That is why
11 we say we would need three months to do it.

12 MR. SINGLA: Sir, if it assists, my instructions are the
13 same as Mr. Hoskins' in terms of what you actually get
14 from the Commission. So apologies for the confusion,
15 but --

16 THE PRESIDENT: So you all get the same.

17 MR. SINGLA: It seems slightly strange, but we are not able
18 to see the materials that we ourselves have asked to be
19 redacted on business secrets grounds. That is the
20 position in practice, contrary to what the notice may
21 suggest.

22 MR. JOWELL: My instructions are the same. I will not
23 duplicate what Mr. Hoskins --

24 THE PRESIDENT: You say three months, do you?

25 MR. JOWELL: Yes.

1 MR. PICKFORD: Sir, we are in a slightly different position
2 because we are the people who actually gave access and
3 gave the disclosure. We did not redact any documents
4 other than three documents on the basis of privilege.
5 So as far as we are concerned, that is the sum total of
6 everything that has been withheld.

7 THE PRESIDENT: Although you provided the Commission file,
8 and the Commission file I have just been told included
9 redactions of your own business secrets; you unredacted
10 those redactions.

11 MR. PICKFORD: Because we did the job that everyone else is
12 now saying they need to do, which is we found the native
13 original versions of all our own documents.

14 THE PRESIDENT: How long did it take you?

15 MR. PICKFORD: My instructions on that are "quite a while".
16 But with a certain amount of pain I am sure. But I am
17 not sure we can assist very much on the three months
18 point.

19 My point is simply that as far as I understand what
20 the Tribunal has said, the process that is now being
21 envisaged is in place of the request at point 2, which
22 is for the provision of reasoned justification or at
23 least the part relating to reasoned justifications for
24 maintaining redactions. Certainly as far as we are
25 concerned there are only three. We have told the

1 claimants what they are. There is nothing much more we
2 can do on that. We do not need an order made against us
3 in that respect.

4 THE PRESIDENT: You say it is on grounds of privilege on
5 those documents.

6 MR. PICKFORD: Yes, we have done it.

7 THE PRESIDENT: When you say the order is not maintained,
8 I think it has been accepted that business secrets will
9 not be a basis for redaction. Leniency on these
10 documents does not arise. Paragraph 2 is broader in its
11 scope.

12 There should only be privilege, it seems to me, in
13 terms of the basis for redaction. I cannot see any
14 other basis which should now apply.

15 MR. HOSKINS: Sir, that is absolutely right in relation to
16 pre-existing documentation. I just hesitate because
17 there may be documents, not pre-existing documents,
18 which may have been redacted for leniency, for example
19 RFIs.

20 THE PRESIDENT: We are not dealing with RFIs.

21 MR. HOSKINS: Yes, but they are on the Commission file --

22 THE PRESIDENT: This is the pre-existing. We have dealt
23 with RFIs quite separately. This is only about the
24 pre-existing documents.

25 MR. HOSKINS: The scope of the order is broader. It covers

1 the Commission file generally, which will not be limited
2 necessarily to pre-existing documents.

3 THE PRESIDENT: The order has not been drawn up.

4 MR. HOSKINS: No, the draft order.

5 THE PRESIDENT: The order which will be made is obviously
6 going to be different from the draft order, and this is
7 now concerning pre-existing documents.

8 So, Mr. Brealey --

9 MR. BREALEY: Can I make a few points --

10 THE PRESIDENT: -- that is how it has been suggested that it
11 might be dealt with. What do you want to say? Just one
12 moment.

13 I think we should take a break to help our
14 transcribers. So I will come back at 11.55 am.

15 (11.50 am)

16 (A short break)

17 (11.55 am)

18 THE PRESIDENT: Yes, Mr. Brealey.

19 MR. BREALEY: Yes, sir. Just on the redaction point,
20 obviously the first point is clearly we do want the
21 pre-existing documents to be unredacted.

22 THE PRESIDENT: Yes.

23 MR. BREALEY: Sir, the question arises as to what is the
24 most efficient way of doing that. What is the most
25 efficient and proportionate way of doing that.

1 On that, I want to make two points. The first is
2 that DAF seem to say, well, no order should be made
3 against them. But that misses out the words "to be
4 disclosed" in our order, which is that we want further
5 categories of documents.

6 THE PRESIDENT: At the moment we are dealing with the
7 documents that have been disclosed or which are going to
8 be disclosed, not by DAF but by the other parties,
9 because of the withholding from the Commission file.

10 MR. BREALEY: I will come on to the second point in
11 a minute, but I would like to get to a certain extent
12 a mindset away from the Commission file.

13 THE PRESIDENT: I have not at the moment heard you as to
14 whether anything should be disclosed at this point
15 beyond the Commission file.

16 MR. BREALEY: Correct. What was part of my submission,
17 which is that I would be grateful if you would kind of
18 hear me and then work out what is to happen in the most
19 efficient way after I have made the submissions on the
20 further categories, because --

21 THE PRESIDENT: Yes.

22 MR. BREALEY: That is the first point. The second point,
23 again to kind of get away from the Commission file to
24 a certain extent, I noted it all down. So we were told
25 that in order to redact they have got to go to "the

1 source document". They referred to the source document.

2 Mr. Hoskins referred to the documents being
3 repackaged by the Commission. Then he said that they
4 have got to unpick that repackaging and then they have
5 got to match the document by reference to "the native
6 document". That was the phrase used by Mr. Pickford.
7 They said that is going to take time and substantial
8 cost.

9 So there is a source document, it is repackaging, it
10 is unpicked and then you are back to the source/native
11 document, to which we say you must have copies of
12 unredacted documents that you have retained as part of
13 the searches that we say you did. You must have them
14 already.

15 Why do you not just disclose those to us rather than
16 go through this rigmarole of working out what the
17 Commission has done and incurring the costs?

18 That would be part of the wider submission I would
19 like to make when I come on to the further categories.
20 It is what is the most efficient way of getting the
21 unredacted pre-existing documents.

22 THE PRESIDENT: You are assuming that there is one set of
23 computer files, whatever, which contains all the
24 documents that were provided to the Commission.

25 MR. BREALEY: The evidence seems to suggest that. It is

1 quite remarkable that it has taken this application to
2 tease out of the defendants what limited amount of money
3 and time they have spent on working out what source
4 documents they do have.

5 We will see that from the defendants' own witness
6 statements maybe this afternoon. It is quite remarkable
7 that in a private action for damages, where clearly the
8 Commission file is relevant but it is not the end of the
9 road by any stretch of the imagination, because we have
10 got quantum, we have got causation, we cannot just rely
11 on whether it is an object infringement, we have other
12 things to worry about to be in the light of their
13 defences, they have not even begun to work out what
14 source documents they have got.

15 It has taken this application to tease out some
16 fairly opaque statements from the defendants, and
17 Daimler have not even bothered to put forward a witness
18 statement. That is actually quite alarming.

19 On the redactions, what they want to do is incur
20 substantial costs on unpicking the packaging, but it
21 appears from their witness statements that they do have
22 source documents, native documents which were provided
23 to the Commission. We will say in the light of their
24 statements clearly there are other documents that cannot
25 have been provided to the Commission or did not appear

1 on the file.

2 THE PRESIDENT: Other documents that?

3 MR. BREALEY: That either were not provided to the
4 Commission, or were but did not land on the Commission's
5 file, which may be a very small subset because of the
6 settlement discussions, we do not know.

7 THE PRESIDENT: I do not understand the second one. I am
8 sure there are documents that were not provided to the
9 Commission. If they were provided to the Commission,
10 you were saying they would not be on the Commission
11 file?

12 MR. BREALEY: Let us put it this way, Freshfields in
13 Mr. Frey's witness statement said they did a massive
14 search and they had lots of custodians, a responsive
15 team and they have had 475,000 responsive documents.
16 475,000 responsive documents. That is just for
17 Volvo/Renault.

18 We end up with a Commission file of 24,000
19 documents. So that one defendant, in the light of the
20 Commission's notice, does a massive search and comes up
21 with 475,000. Just playing the numbers game, it is said
22 very glibly and opaquely that documents were provided to
23 the Commission. So we say, well, playing the numbers
24 game, if this is the Commission's file they cannot all
25 have been provided, and we would say clearly there would

1 be some relevant documents not provided.

2 If we take them at face value and they were
3 provided, they cannot have landed --

4 THE PRESIDENT: You just show me the 475,000.

5 MR. BREALEY: All the defendants pray in aid when it comes
6 to proportionality. It is C1, tab 2. This is the
7 irony, just to flag it. C1, tab 2.

8 THE PRESIDENT: Mr. Frey.

9 MR. BREALEY: Mr. Frey. He really starts at paragraph 49.
10 If I could just -- we will go through -- flag a point.
11 This is made in the context of: it is all
12 disproportionate for us to do the searches. To which we
13 say, well, you have already done the searches.

14 THE PRESIDENT: Let me just see. You are looking at
15 paragraph 55?

16 MR. BREALEY: Absolutely. We will look at this: 11 major
17 European jurisdictions, 125 custodians, 8 million in
18 reviewable data universe, 791 keyword searches returned
19 a total of more than 475,000 responsive documents.
20 These responsive documents were manually reviewed,
21 including in respect of at least ... by a team of up to
22 40 reviewers in seven languages. At paragraph 56, he
23 says there were further searches done.

24 THE PRESIDENT: All you are saying, as I understand it, is
25 that by applying the 791 keywords to this universe of

1 a bit over 8 million, you get 475,000 are responding.

2 It does not mean they are necessarily relevant at all.

3 MR. BREALEY: No, they do not.

4 THE PRESIDENT: Then they went through them to see what
5 actually is relevant to the questions the Commission has
6 asked. Of course it will be much less than 475,000.

7 MR. BREALEY: Yes, but the question is, the questions that
8 the Commission asked.

9 THE PRESIDENT: Yes.

10 MR. BREALEY: We know, for example, recital 5 of the
11 decision, that it only relates to truck prices
12 basically. It specifically excludes warranties,
13 maintenance --

14 THE PRESIDENT: There are the excluded categories which you
15 now want disclosure of.

16 MR. BREALEY: Yes.

17 THE PRESIDENT: But that is a separate point, is it not? Of
18 course if you want to and can make good an application
19 covering categories, whether it is warranties, spare
20 parts and so on, there are going to be probably many
21 more documents. But that is a separate point from this
22 question of the documents and Commission file.

23 You can say if you are right on that, everything
24 else follows. But the starting point then is: is it
25 appropriate at this point to require the defendants to

1 make disclosure of matters that have not been pleaded?

2 That is quite a separate point.

3 MR. BREALEY: That is a separate point.

4 THE PRESIDENT: Of course if it is, then one has to go back
5 to the source, and you do not start with the file.

6 MR. BREALEY: But what I would say on a point that you have
7 just said to me, sir, when one reads these witness
8 statements it is not clear the extent to which the
9 documents were handed over to the Commission. What they
10 concerned, it is just said that various documents were
11 handed over to the Commission.

12 THE PRESIDENT: Leaving aside what I will call the excluded
13 categories, as these were in most instances leniency
14 applicants, of course they had an obligation to find
15 everything that is relevant.

16 There is no reason to assume they did not comply
17 with that and that they have failed in their duties
18 under the leniency statement and that their leniency
19 discount should be revoked. This can happen.

20 MR. BREALEY: We are not --

21 THE PRESIDENT: There is nothing to suggest that is the
22 case. I do not find just the fact that the Commission
23 file in the DAF version I think includes some 32,000
24 documents, I think, and that Volvo found, out of over
25 8 million documents, that a bit under half a million

1 responded to these keywords, takes one anywhere.

2 MR. BREALEY: With respect, it should do because -- and we

3 will see because we have the -- this was in response to

4 the Commission's investigation.

5 THE PRESIDENT: Yes.

6 MR. BREALEY: We say that the request for information went

7 far wider than actually the decision ended up. So the

8 decision ended up with, as we know, exchange of the

9 prices and the admissions, but the Commission's

10 investigation went wider. It is, we say, relevant to us

11 that we look at the wider categories of documents, and

12 that is what I want to articulate.

13 THE PRESIDENT: But if the Commission's investigation went

14 wider, then the documents supplied under that

15 investigation would go wider, would they not?

16 MR. BREALEY: We just do not know --

17 THE PRESIDENT: You say if they were investigating and

18 asking for documents of other categories, then they

19 would have received documents relating to other

20 categories.

21 MR. BREALEY: So that is 475,000 -- but then we have the

22 other --

23 THE PRESIDENT: I just do not see the relevance of the

24 475,000. Suppose one of the people who attended the

25 meeting was a man working for one of these companies

1 called Matheus Schmidt, so they use as a keyword
2 "Matheus Schmidt" and it turns out it produces a lot of
3 documents to do with Matheus Schmidt, some of which have
4 absolutely nothing to do with these arrangements. So
5 they have to be filtered to get to the documents which
6 actually Matheus Schmidt, going to these meetings or
7 communicating the results of the meetings etc, or
8 talking about truck prices, and that will be a much
9 smaller subset of the response to the keywords.

10 That is why just putting in keywords and getting
11 a number does not produce documents all of which are
12 relevant. It should catch the relevant documents and
13 will catch a lot more. So I do not find this reference
14 takes one anywhere, Mr. Brealey.

15 MR. BREALEY: Hopefully I will come back --

16 THE PRESIDENT: It may be that if I have misunderstood it,
17 then -- this is Volvo, is it not? Mr. Hoskins will
18 correct me. But that seems to me the reality of the
19 keyword search.

20 MR. BREALEY: We do not know what the keyword searches are.
21 It was in response to the Commission's invitation, which
22 went wider. All we have is essentially one page, and we
23 are being asked to take at face value that everything of
24 relevance ended up with the Commission in circumstances
25 where the Commission's investigation -- the decision is

1 a lot more limited than how it started out.

2 THE PRESIDENT: At the moment if you want to come on, and
3 you say that is a sensible way of doing it, to the other
4 part of your application, namely the other categories --

5 MR. BREALEY: I do --

6 THE PRESIDENT: -- so that we approach it that way, and
7 therefore the Commission file as it stands is too
8 narrow. I think the OFT investigation did cover spare
9 parts.

10 MR. BREALEY: It did.

11 MR. SINGLA: Sir, I wonder before we move off the file, we
12 have moved topic here because as I understood the
13 exchanges we were having earlier, you were asking, sir,
14 about redactions to documents disclosed to date which
15 necessarily come off the file, because that is the
16 application which Mr. Brealey's clients made last year.

17 THE PRESIDENT: Yes.

18 MR. SINGLA: We have some points in our evidence about the
19 amount of time that we will need to make those
20 redactions which Mr. Brealey has overlooked. If,
21 therefore, we are still --

22 THE PRESIDENT: Sorry, I have lost you.

23 We were talking about the redactions in the file and
24 the time taken for you, and your clients rather, to look
25 at those and remove the redactions.

1 MR. SINGLA: Yes. As I understood it, that was the original
2 discussion.

3 THE PRESIDENT: Before the short break.

4 MR. SINGLA: It was one month or two or three months.

5 THE PRESIDENT: Yes.

6 MR. SINGLA: I think in the course of dealing with that
7 point Mr. Brealey has now moved off topic, because he
8 has asked you, sir, not to look at this issue in terms
9 of the file, and the redactions debate seems to have
10 morphed now into his wider application.

11 THE PRESIDENT: I think what he is saying is, as he is
12 entitled to make the submission, Mr. Singla, that would
13 be one way of doing things. But if he is right on his
14 other application, it is not the most efficient way of
15 doing it.

16 So he wants to be heard on his other application,
17 because he is saying if he is right on that then what we
18 were discussing before the short break is actually not
19 the most efficient way of proceeding.

20 MR. SINGLA: If that's the way in which he now wants to put
21 it, that is fine.

22 THE PRESIDENT: He is entitled to make that argument. So
23 I have not decided that we are going to do the 2-month,
24 3-month exercise. It has been parked as a possible way
25 forward which I have canvassed with each of you.

1 Mr. Brealey is now saying actually, no, we should
2 approach it differently. Obviously you will be able to
3 respond.

4 MR. SINGLA: If it does arise we do have some points on the
5 practicalities.

6 MR. BREALEY: I never ignore Mr. Singla's evidence.

7 MR. HOSKINS: I think the logic of the alternative and the
8 way you understood it, sir, is that we would have to
9 disclose again documents that have already been
10 disclosed through the Commission file because the
11 alternative seems to be the whole universe.

12 I want to make this point now. It is not just extra
13 documents under this alternative, it is the extra
14 documents they are seeking and all the original ones
15 that they want again. So it is a disclosure exercise
16 twice.

17 THE PRESIDENT: That is right. They will get a huge number
18 of additional documents from each defendant, including
19 all the documents you have had already.

20 MR. BREALEY: It may well be that that is, again, the most
21 efficient way forward --

22 THE PRESIDENT: That is what you suggested.

23 MR. BREALEY: Because there are big gaps, we say, in the
24 Commission file.

25 THE PRESIDENT: I think we are confusing quite a lot of

1 things, Mr. Brealey. One issue is dealing with trucks,
2 not the excluded categories. That there seems to be
3 gaps. On trucks.

4 MR. BREALEY: Yes.

5 THE PRESIDENT: That is one point.

6 MR. BREALEY: Yes.

7 THE PRESIDENT: A second point is you want disclosure of the
8 additional categories, spare parts warranties,
9 limitation of supplies to rental companies, which has
10 not been disclosed. It is common ground they have not
11 been provided. They were excluded I think under the
12 terms of Mrs Justice Rose's order and that has continued
13 through.

14 That is a separate point. I can hear you on that,
15 but we need to keep them distinct. The fact that there
16 may be gaps on trucks, you can say, well, you think that
17 is because things were deliberately withheld.

18 MR. BREALEY: No --

19 THE PRESIDENT: But I say would be a breach of the leniency
20 obligations for all those who sought leniency. But
21 where there are gaps on trucks, and Mr. Burrows in his
22 witness statement has identified those and you have been
23 through it, the team from Ashurst has obviously spent
24 a lot of time going through these documents.

25 The normal way to deal with that is to make

1 an application for specific disclosure saying: look at
2 this, we want the email of such-and-such a date, see
3 these emails. It seems there is one and we want this
4 defendant to supply or to state what has happened to it.
5 You identify, as he has done, those gaps specifically
6 and ask specifically for those documents, and if they
7 are not on the Commission file, maybe they were
8 overlooked. Then the relevant defendant has to go back
9 and check.

10 Normally that would be how specific disclosure, when
11 you think there are gaps, is done. It is not by getting
12 a huge great volume of documents all over again.

13 MR. BREALEY: I understand that. But, again, I think one
14 has to appreciate that this is in the nature of a secret
15 cartel. When we come to the documents there will be
16 gaps, but the extent to which there is a gap is very
17 difficult to identify. But if I can do that when I go
18 through the documents.

19 THE PRESIDENT: You have identified quite a lot, and they
20 are the sort of gaps that I would not be surprised if
21 there was an application for specific disclosure.
22 Without having to read anything out. I mean, if we, for
23 example, look at Mr. Burrows' witness statement.
24 I think one can do this perfectly well in open session.
25 If you go, say, by way of example, to paragraph 39.

1 This is the annex, on page 24 of the annex. You have
2 two gentlemen on 17 and 18 December 2003. One sends
3 an email to the other saying "I am going to send you
4 a document", or one says "I have some notes", the other
5 says "Could you send them to me" and the other says
6 "I have done it" in response. He says "We have not got
7 the email with the notes" and the notes could be
8 relevant. So you make an application for specific
9 disclosure saying "We want that email". It is then for
10 that company to say either here it is or we have checked
11 and we cannot find it, or whatever. You would do that
12 initially by correspondence and if you do not get
13 a satisfactory response you make an application to the
14 Tribunal, and there may be a whole lot of documents from
15 this careful review that you identify and that would be
16 a way that specific disclosure is conducted on trucks.

17 It is quite separate from what you want to say about
18 excluded additional categories. But I do not see that
19 is a basis for saying you want everything that's
20 provided to the Commission all over again.

21 MR. BREALEY: Can I start going through the documents,
22 because I think it is important --

23 THE PRESIDENT: Well, I say you have identified various
24 gaps. Sometimes it may be on some of them you have
25 missed something and they will affect different

1 defendants, but you could produce a list of specific
2 disclosure requests.

3 MR. BREALEY: If we are going to be kind of shackled because
4 we cannot go to the documents because we need to be in
5 open court, I would apply that every single document
6 that I would like to read out should be made public,
7 because I feel that the confidentiality ring that the
8 defendants are kind of imposing on us is limiting the
9 way that I can actually show you, sir, the extent of the
10 gaps and how it is not as easy as it may seem just to
11 say, well, there is this document, there is not a reply
12 to that, I want specific disclosure of that reply.

13 The gaps are quite wide and one only sees that when
14 one goes through the documents. I would urge on you,
15 sir, that we are not prejudiced by the fact that we
16 cannot refer to these documents in open court as
17 normally one should be allowed to do.

18 THE PRESIDENT: Mr. Brealey, I am not seeking to hamper your
19 submissions and we will very shortly go into camera when
20 you can show me any document you want.

21 MR. BREALEY: Thank you.

22 THE PRESIDENT: I wanted to canvass with you before we do
23 that certain general points of principle which occurred
24 to me which can be discussed in open court.

25 MR. BREALEY: Of course.

1 THE PRESIDENT: Then by all means we certainly will have to
2 go into camera. It is just a question of when, and what
3 I accept is we might break early for lunch and we go
4 into camera after lunch. But the point that I am
5 raising with you, and obviously it has come out of
6 reading the evidence and the skeletons, is that
7 Mr. Burrows has clearly been able, with the help of all
8 the lawyers working on this at Ashurst, to identify
9 a whole series of specific gaps or, indeed, specific
10 documents.

11 Now, the idea that -- which do not seem to be
12 therefore on the Commission file, it may be the
13 Commission missed these points. It is quite possible.
14 You have picked them up and one approach to specific
15 disclosure is by preparing that list, which might be
16 a long list, but all the work that has been done clearly
17 has resulted in that, and that would be one approach
18 that could be followed.

19 It would be the more orthodox approach. That is all
20 I am saying.

21 MR. BREALEY: I appreciate that. Hopefully when we get to
22 the end, for example, when one looks at our order, we
23 want specific disclosure during the cartel period
24 relating to spare parts, for example.

25 Now, we will see the limited number of documents of

1 spare parts. So that is why --

2 THE PRESIDENT: But they were excluded from the disclosure
3 order, were they not, under the excluded categories?

4 MR. BREALEY: Sir, we are not making any criticism. We want
5 to move forward --

6 THE PRESIDENT: But they were excluded as being documents on
7 the file that were excluded because you said you want to
8 take me away from the file, but actually the disclosure
9 was only of documents on the file and they were
10 excluded.

11 MR. BREALEY: Correct.

12 THE PRESIDENT: So one can remove the exclusion if you were
13 right and still work on the basis of the Commission
14 file.

15 MR. BREALEY: No, because we will look at some of the
16 documents relating to spare parts, but there are only,
17 even on the spare parts on the Commission file which
18 have been excluded, there are numbered 58 documents
19 which have been excluded, which we say is not a large
20 category for a 14-year cartel.

21 THE PRESIDENT: I see. But then there is the separate quite
22 distinct point of principle which is should you receive
23 disclosure of matters that are not covered by the
24 existing pleaded claim?

25 MR. BREALEY: What we have tried to do, obviously the

1 defendants make the point there is a draft pleading
2 there. They have had since last week the draft pleading
3 and we have pleaded it. In many respects the annex is
4 putting the defendants on notice of what the allegations
5 are and where the gaps are.

6 So the draft pleading has to be read with the very
7 thorough annex which is putting the defendants on notice
8 that there are these further allegations relating to
9 collusive practices. Is it appropriate that we have to
10 plead that now?

11 We have a draft pleading, but let's take, for
12 example, the spare part. We can refer to certain
13 documents which I hopefully will do at the moment, but
14 the actual duration or scope of it is very difficult to
15 plead to because it is this chicken and egg situation
16 which we have referred to in our skeleton, that it is
17 only when you get the documents that very often you know
18 what the precise scope of the infringement is and, sir,
19 you mentioned that in your disclosure judgment.

20 THE PRESIDENT: Yes.

21 MR. BREALEY: One has to appreciate the handicap that we are
22 in. We have gone to this enormous amount of time,
23 paragraph --

24 THE PRESIDENT: Yes.

25 MR. BREALEY: Putting this together, we have put the

1 defendants on notice. They are their documents at the
2 end of the day, so they should know what are in those
3 documents. We are not taking them by surprise as such.
4 So I would ask you to read the draft pleading with the
5 very detailed annex we have put forward.

6 THE PRESIDENT: But why, first of all, should it be done on
7 a draft pleading and not on a pleading? You can apply
8 to amend. Of course you say the best particulars you
9 can give are as follows, and that is well understood in
10 a cartel case, especially a stand-alone aspect that it
11 won't be very full. But you can make the allegations on
12 your application to amend and then one gets to
13 disclosure.

14 The second problem is that while this was fixed at
15 the restored hearing of those aspects of the disclosure
16 application that was adjourned from the CMC in November
17 and expressly adjourned under the order the Tribunal
18 made, this goes far beyond it and was only notified very
19 recently. I think the pleading was about a week ago,
20 which was not, for a hearing of this substance,
21 satisfactory.

22 There was no problem about the RFIs point because
23 that was specifically adjourned from the last hearing,
24 or about the issue on redactions which has been going
25 back and forth. But the expansion of your application,

1 or rather the introduction into your application
2 something far beyond the material that was adjourned
3 into something which is obviously, for the defendants,
4 very serious, some of which may have been gathered
5 before, some of which not, is something that ought to be
6 done on a pleaded case and not on a draft pleading which
7 you told me is not actually the pleading you necessarily
8 are applying to amend to, it is just an indicative
9 draft.

10 MR. BREALEY: I mean, I can apply now that that draft
11 pleading, for permission to amend in the form of that
12 draft pleading.

13 All I am trying to impress on the defendants and to
14 you, sir, is that the extent to which we can plead the
15 precise scope of these further allegations is extremely
16 difficult until we get the further disclosure that we
17 seek.

18 THE PRESIDENT: Yes.

19 MR. BREALEY: Because it is this chicken and egg situation
20 where in order to fully plead out the case we would
21 need -- we were criticised for going for the Commission
22 file when we did. It is only by getting access to the
23 Commission file that we have spent a considerable amount
24 of time and effort putting this together in an annex,
25 and it is almost like voluntary particulars, so I know

1 it is unorthodox but this is a slightly unorthodox case
2 where the defendants have got this very detailed annex
3 which put them on notice of exactly the categories of
4 documents we are seeking and why.

5 Yes, I can ask for permission to amend. It is in
6 the --

7 THE PRESIDENT: There was a lot of correspondence, most of
8 which I have not read, making the point that you have
9 not said this is actually the amended pleading that you
10 are asking for.

11 MR. BREALEY: I think that has to be read simply in the
12 light of we would want to put forward a more detailed
13 pleading in the light of the disclosure that we would
14 hope to get. If we do not get the disclosure, we would
15 have to put that pleading forward and then progress. It
16 seems to be slightly form over substance in
17 circumstances where we have put forward such a detailed
18 annex.

19 THE PRESIDENT: Except that they will be able to -- I do not
20 know what sort of response would come to the amended
21 case, but it would crystallise the issue and enable one
22 to assess what disclosure is appropriate and to do it on
23 a long witness statement as opposed to a pleading is
24 not, it seems to me, satisfactory.

25 What is clear from the witness statement, as

1 a result of all the works done, is actually you can
2 plead in rather more detail than might normally be the
3 case because so much impressive effort has been put into
4 it. But that is the way these things should be done,
5 and as I say, even if you may say, well, we should not
6 be overtechnical, we have got the draft pleading,
7 normally in a case of this substance one week's notice
8 before a hearing is not adequate, and so there is that
9 problem as well for the pleading.

10 If you had put it forward as an application to amend
11 I suspect many people would have said, well, we need
12 more than a week to respond to the application. That
13 seems to me not unreasonable.

14 So that is the difficulty that I find that we are in
15 today with the additional categories. I will leave you
16 I think with those thoughts, and I have not heard from
17 any of the defendants who no doubt will have more to
18 say. If you want to say something else in general terms
19 you can do it now, otherwise I would suggest that we
20 take an early adjournment and then can come back in
21 camera and then you can show me particular documents.

22 MR. BREALEY: The gaps.

23 THE PRESIDENT: The gaps. I can see from reading
24 Mr. Burrows that there are gaps. I pointed to just one
25 because it is a very obvious and specific thing to be

1 missing a particular email of a particular date. You
2 can even time it within about an hour. So it is a very
3 easy object for a specific disclosure request.

4 There are others which are broader. There are some
5 others which may be equally specific but not quite as
6 precise. If you were to seek specific disclosure of
7 those, obviously I would have to hear the defendant in
8 each case but you might find that you are pushing at
9 an open door. But the application you are making is
10 very different, as you appreciate.

11 As regards the other categories, there seems to me
12 a lot of force in what has been said that the notice is
13 too short and there ought to be a pleaded case which you
14 are able to do in sufficient terms.

15 I do not think anyone would be able to say it should
16 be struck out because you have not given detailed
17 particulars when you have not heard the disclosure.

18 Would that be a sensible place then --

19 MR. BREALEY: We will have an early lunch.

20 THE PRESIDENT: -- to come back at 1.40 pm. I think it
21 might be appropriate -- I certainly do not want to curb
22 either your submissions or your enthusiasm,
23 Mr. Brealey -- that we come back in camera.

24 MR. BREALEY: Yes.

25 THE PRESIDENT: So that then we can look in some more

1 detail. What we do have is an alternative way forward
2 which I appreciate is not the one you are urging me to
3 take whereby the redactions in documents received and to
4 be received under the removal of the business secret
5 redactions will be resolved within a period of time to
6 be ordered. But I have heard what -- you have heard
7 what the defendants say, how long they need. That
8 option remains when we are considering your
9 alternatives, and we will say at 1.40 pm.

10 That means, I should make clear, that those who are
11 not in the confidentiality ring cannot be admitted to
12 the afternoon session and that the streaming to court 2
13 will be discontinued.

14 MR HARRIS: Sir, you mean the Ryder confidentiality ring?

15 THE PRESIDENT: Yes.

16 MR HARRIS: I only make that point because there has been a
17 suggestion that I have seen --

18 THE PRESIDENT: No, it has to be the Ryder confidentiality
19 ring in this action.

20 MR HARRIS: I am grateful for that clarification.

21 (12.41 pm)

22 (The short adjournment)

23 (1.40 pm)

24 Proceedings in camera (see separate transcript)

25 (3.50 pm)

1 Proceedings in open court

2 Application by MR. HOSKINS

3 THE PRESIDENT: More particularly, the transcript goes on
4 our website and obviously the confidential part does
5 not. We are now formally back in open court.

6 MR. HOSKINS: Are you happy for me to continue, sir?

7 THE PRESIDENT: Yes.

8 MR. HOSKINS: Let us take the four headings. First of all,
9 preservation.

10 That was resolved in correspondence prior to this
11 hearing. It could and should have been resolved before
12 any application was brought. There was no need for us
13 to attend court today. There was no need for
14 an application to be made. We would have agreed to that
15 in correspondence.

16 In relation to the redactions that all the
17 defendants other than DAF have offered to give, again,
18 as has been proven, we would have agreed to give them if
19 asked for in correspondence. There has been no dispute
20 about that before the Tribunal. That was all agreed.
21 That is why it can go in a recital; there is no order
22 required.

23 In relation to the disclosure applications,
24 Mr. Brealey has just accepted that it has fallen away.
25 If I can make four points in relation to that.

1 First of all, the detailed disclosure was not
2 canvassed in correspondence. We knew there was
3 something coming, we did not know what, and then we got
4 the seven lever arch files which included Mr. Burrows'
5 witness statement which I think was about 49 pages long,
6 and the annex which is 129 pages long, several lever
7 arch files of exhibits. Not canvassed in
8 correspondence.

9 The second point is that that annex was only
10 produced on 12 February 2019. You will imagine the
11 amount of work, the amount of midnight oil that has been
12 burned trying to deal with the detail of that in that
13 very short time period.

14 The third point is that despite producing the annex
15 on 12 February 2019, despite the fact that clearly work
16 has been on-going on this issue on Ryder's side for
17 months, they failed to produce a draft amended
18 particulars of claim in good time or, indeed, one might
19 say at all, because the first time that we saw anything
20 approaching a draft amended particulars of claim was
21 last Wednesday. It was sent subject to the caveat that
22 it was subject to change, and even then we were not
23 asked to consent to those amendments being made. So
24 actually no draft amended particulars of claim in
25 respect of which permission has been sought has been

1 served at all.

2 The fourth point in relation to disclosure is that
3 the draft order was hopelessly overblown. It should
4 have been made, if at all, by way of a targeted
5 application for specific disclosure, and that targeted
6 application for specific disclosure should have been
7 tee'd up in correspondence. Instead, we had this vastly
8 overblown draft order not tee'd up at all in
9 correspondence.

10 The final point is the RFIs where Mr. Brealey says
11 we have made some progress. Sir, all you have done is
12 point out to Ryder that they failed to follow the proper
13 procedure. They could and should have read the relevant
14 parts of Schedule 8A and the practice direction, and
15 then, again, we would not have all come to this Tribunal
16 today and wasted the time we have. They simply did not
17 follow the proper procedure.

18 For those reasons we say this is absolutely a clear
19 case where Ryder should pay the costs. The application
20 has failed and it has, in addition, been brought in
21 a way that has incurred unnecessary extra costs over and
22 above simply a normally failed application.

23 MR HARRIS: Sir, can I just add one point on this, which is
24 that without detaining you with the actual letters, it
25 will not surprise you, sir, that these deficiencies and

1 the deficient and, I might add, reckless manner in which
2 this overblown application has been brought were pointed
3 out in correspondence repeatedly by the defendants'
4 solicitors prior to this hearing, and Ryder was given
5 the express opportunity to vacate the hearing and do the
6 application properly, including by reference to specific
7 targeted disclosure against the background of
8 a pleading, and they turned those opportunities down
9 repeatedly.

10 THE PRESIDENT: I think there was a request that the hearing
11 should be vacated.

12 MR HARRIS: Absolutely, but that only came at the end of us
13 saying things like where is your pleading and we cannot
14 understand it; all the points which essentially
15 Mr. Hoskins has made. Yet it was said, no, no, we are
16 carrying on and we are carrying on with our order. We
17 are carrying on with a two-day hearing notwithstanding
18 that we all said it was not going to succeed, it was
19 misconceived.

20 MR. PICKFORD: Sir, for the Tribunal's note, that letter
21 from Mr. Harris' instructing solicitors is at page 116
22 of the correspondence bundle and it sets out in very
23 detailed terms, written on behalf of all of the
24 defendants --

25 THE PRESIDENT: It was attached to a skeleton as well?

1 MR. PICKFORD: It is certainly at bundle D. It may have
2 been attached to the skeleton as well.

3 THE PRESIDENT: It is the letter of 4 March?

4 MR. PICKFORD: No, this is the letter of 15 February.

5 THE PRESIDENT: It is a different one.

6 MR. PICKFORD: We were served very late on 12 February with
7 the application. If one goes to page 116, one sees that
8 within a few days of receipt of it, Quinn Emanuel had
9 written on behalf of all of the defendants to object to
10 the bringing of the application.

11 In the second paragraph it is noted that it sought:
12 "... wide-ranging disclosure of documents not
13 limited to the Commission file, outside of the relevant
14 periods pleaded in Ryder's claim, covering jurisdictions
15 in which Ryder has no purchases and in relation to
16 alleged conduct which is beyond the scope of the
17 settlement decision and your clients' currently pleaded
18 claim, insufficient notice of such a wide-ranging
19 application was given."

20 It then goes on to make a number of points.

21 On the second full page, fourth paragraph down, it
22 explains how:

23 "It is unreasonable to expect the defendants to be
24 in a position to prepare to respond to the application
25 in the timeframe you have proposed for the hearing," and

1 we asked Ryder to vacate the hearing which we understood
2 they were trying to have listed for the 11th and 12th as
3 we are now here today, and those requests by us were
4 ignored.

5 THE PRESIDENT: Thank you.

6 MR. PICKFORD: The only other points to make very briefly is
7 that obviously two aspects of the application were not
8 even brought against us. So insofar as there are some
9 very minor points which could have been dealt with in
10 correspondence that are being entertained by the OEMs,
11 they are not relevant to us at all.

12 We join Mr. Hoskins in saying that this was a very
13 serious, very heavy application which, had it been
14 granted, would have potentially caused millions of
15 pounds' worth of expenditure, and it is one of the least
16 specific applications for specific disclosure that one
17 could really conceive.

18 THE PRESIDENT: You are all jumping up at once. I think
19 Mr. Jowell was first.

20 MR. JOWELL: I just wanted to, if I may, just add two points
21 on behalf of MAN. I gratefully endorse everything that
22 was said, in particular by Mr. Hoskins.

23 First, in relation to the RFIs. You have seen that
24 we provided the information that now forms the subject
25 of the undertaking voluntarily and in advance. I think

1 no doubt had it been asked of the others, they too would
2 have provided it, which I think shows there has been no
3 victory here in any sense of the claimants in relation
4 to that aspect of this application.

5 The second is that we wrote in advance, having
6 received this curious document that appeared to be
7 a draft pleading, and we asked specifically, our letter
8 is at page 162.16 of the correspondence bundle, whether
9 they were seeking either an order from the Tribunal or
10 consent from us as to an amendment in that form, and the
11 answer we got back was no, we are not seeking consent,
12 which only goes to show the inappropriate way in which
13 this application has been made.

14 If I may add, it is a profoundly irresponsible
15 application because it is all very well going forward
16 hoping, well, if we ask for a lot maybe we will get
17 something. But, actually, when you are dealing with
18 this kind of scope of material, 16/17 years' worth of
19 material from five enormous defendants, it is just
20 simply irresponsible to ask for this kind of scale of
21 disclosure.

22 THE PRESIDENT: Yes, Mr. Singla.

23 MR. SINGLA: Sir, I do not propose to add to the adjectives,
24 but if I could give you two more reasons why the
25 defendants should receive their costs.

1 a restored hearing. We took the view that the letter
2 had been written to the Commission. DAF at the last CMC
3 had said we should write again --

4 THE PRESIDENT: Which letter?

5 MR. BREALEY: The Commission had written -- there was
6 a letter written to the Commission. I mentioned it
7 earlier.

8 THE PRESIDENT: Sorry? We may be at cross-purposes. Can
9 you show me the letter?

10 MR. BREALEY: It is Mr. Singla's point that this is the
11 second time the leniency material is being sought. It
12 is, and we still have not --

13 THE PRESIDENT: The practice direction is clear that you
14 will have to notify the Commission if served -- we do
15 not have a formal application notice here, but the terms
16 of the application on the Commission. Where is the
17 letter you are referring to?

18 MR. BREALEY: We do not have the letter, but I was going to
19 go to the November CMC, which is in the authorities
20 bundle, where last time around we got the letter from
21 the Commission to the court saying do not bother us --

22 THE PRESIDENT: I am sorry, that is the letter of 6 July.

23 MR. BREALEY: Yes.

24 THE PRESIDENT: That application on which they were
25 approached, at that point, did not concern disclosure of

1 leniency material.

2 MR. BREALEY: It did at the CMC.

3 THE PRESIDENT: But this was 6 July, the response from the
4 Commission. It was not a response I think to a letter
5 from me. It was some of the defendants had notified the
6 Commission of an application, and it was not about
7 whether documents were leniency documents. It was about
8 what is a fishing expedition and what is within
9 article 5.3. It was not addressing this point at all.

10 MR. BREALEY: The reason I was mentioning it is that at the
11 end of the letter, the Commission had said to this court
12 it is only in exceptional circumstances that it wants to
13 be troubled by High Court litigation. That is what,
14 from memory, the letter said. The exchange was at the
15 end of the last CMC --

16 THE PRESIDENT: I am just looking at the letter.

17 MR. BREALEY: I am just looking at what you said, sir --

18 THE PRESIDENT: It says -- is this what you are saying:

19 "The Commission is of the view that submitting
20 observations regarding applications for disclosure for
21 the assessment of damages claims by national courts is,
22 and will remain, an exceptional circumstance."

23 Is that --

24 MR. BREALEY: Yes. That is the exchange at page 746 of the
25 transcript. If one goes to the authorities bundle --

1 THE PRESIDENT: F1 or 2?

2 MR. BREALEY: It will be tab 23.

3 MR HARRIS: F2.

4 THE PRESIDENT: Yes.

5 MR. BREALEY: At page 746 there was a big dispute about
6 this, whether we should write back to the Commission.

7 At the time we were at this CMC seeking disclosure
8 of leniency materials, and at 746 you say to Mr.
9 Pickford:

10 "It certainly does not indicate it is inviting or
11 welcoming being consulted on disclosure because it says
12 the opposite."

13 That is the reason why we have not gone through this
14 process again.

15 THE PRESIDENT: But, Mr. Brealey, we have a very specific
16 practice direction dealing with this. This came long
17 after the July letter from the Commission dealing with
18 this much narrower point of how we deal with the
19 prohibition on the court ordering disclosure of leniency
20 statements and the court having to decide, if it is
21 challenged, whether something is properly viewed as
22 a leniency statement.

23 The burden of your application was that these
24 responses to the RFIs are not leniency statements
25 because you have acknowledged very properly that

1 I cannot order disclosure of the leniency statements.

2 If you are asking the Tribunal to do that, then
3 paragraph 4 of the practice direction specifies what has
4 to be done, and it is mandatory and it was not done.

5 MR. BREALEY: It was not done, but one just has to read that
6 in the light of what was done. The Commission has been
7 notified that people want access to the file in this
8 case and the Commission has written back saying only in
9 exceptional circumstances.

10 THE PRESIDENT: Yes.

11 MR. BREALEY: Yes, it is mandatory, but the question is
12 whether what has already been done is sufficient, and
13 my Lord may say it is not. But the Commission has at
14 least once in this case been notified that we are
15 seeking access to the file.

16 It has written back saying X, Y and Z, but in future
17 we only want to be notified in exceptional
18 circumstances.

19 MR. PICKFORD: It is not what it says, obviously. What the
20 Commission says is they may not write back themselves.

21 THE PRESIDENT: Yes.

22 MR. BREALEY: On the redactions, really it was only apparent
23 in my submission from the witness statements that they
24 were prepared to do it, and once we get it in
25 a witness -- I appreciate that they then say they will

1 do it, and that is on 5 March, but it cannot be said
2 that the application did not focus the defendants'
3 minds.

4 I do not think we have time to go through all of the
5 witness statements, but clearly in the witness
6 statements they say that they will do the relevant
7 redactions subject to leniency. But in my submission,
8 the application, Mr. Burrows' witness statement, did
9 focus the minds on the defendants to give us the
10 redactions which they had been essentially refusing to
11 give beforehand.

12 THE PRESIDENT: Yes.

13 MR. BREALEY: We accept that we will plead and the
14 disclosure application will be dismissed for the reasons
15 that you have indicated, sir.

16 Clearly a lot of the work we have gone through will
17 not be irrelevant because the annex is clearly of
18 relevance in these proceedings.

19 THE PRESIDENT: Yes.

20 MR. BREALEY: In my submission, it cannot be said that the
21 time looking at Mr. Burrows' annex has been wasted
22 because quite clearly it is relevant to these
23 proceedings going forward, and when we renew the
24 application for disclosure, all this will clearly form
25 the backbone of the application. So it cannot be said

1 that the time has been wasted looking at this annex.

2 THE PRESIDENT: Yes.

3 Does anyone --

4 MR. HOSKINS: I do not know if you require to hear from me.

5 Very briefly, in relation to the leniency material,
6 I do have to update you. You will have noticed attached
7 to our skeleton that Contrast, who had acted for Volvo
8 in the Commission investigation, had written a letter to
9 the Commission on 1 March in which it asked a question
10 about the status of an Article 18(3) request from the
11 Commission, and a response, because there was a concern
12 on our part that even although that was an 18(3)
13 response it nonetheless concerned leniency issues.

14 I do not need to go into substance of that, all
15 I need to tell you is that apparently the Commission
16 replied this afternoon to that letter. The suggestion
17 that because of something that was said in the previous
18 Commission letter that it has not been bothered with
19 leniency issues is proven to be incorrect by the very
20 prompt response to the 1 March letter of Contrast.

21 There is absolutely no reason for Ryder not having
22 followed the practice direction.

23 THE PRESIDENT: I did not quite understand, Mr. Hoskins, the
24 redactions in Contrast's letter to the Commission.

25 MR. HOSKINS: Can I finish dealing with costs, and if you

1 want to ask me questions about that --

2 THE PRESIDENT: You have just referred me to this letter.

3 MR. HOSKINS: I did, but I just wanted to finish my
4 submissions.

5 THE PRESIDENT: Yes, but I thought you were referring me to
6 that letter in the context of your submissions.

7 MR. HOSKINS: I did, but all I wanted to tell you was that
8 Contrast wrote a letter to the Commission to ask whether
9 Article 18(3) requests and responses, specific ones,
10 were leniency material, and the Commission has responded
11 within a couple of weeks to that.

12 So it is simply going to the point Mr. Brealey says
13 we did not think it was necessary to follow the practice
14 direction because of what the Commission said at the end
15 of their previous letter.

16 Mr. Pickford has pointed out that that does not get
17 Ryder home. My point is that it is after the event, but
18 the proof is in the pudding. If you do write to the
19 Commission about leniency material, everyone knows how
20 concerned the Commission is about that issue, you at
21 least have to give them a chance to respond. That is
22 what the practice direction is. This letter from
23 Contrast shows they do take it very seriously. That is
24 simply the point I want to make.

25 In relation to the redactions, Mr. Brealey's point

1 is it only became apparent from the witness statements
2 that the defendants were prepared to offer the documents
3 unredacted for business secrets. But of course that's
4 because the issue was not raised in correspondence. It
5 was raised in Mr. Burrows' witness statement. It was
6 responded to by way of the response witness statement.

7 If the issue had been raised in correspondence,
8 backed by the threat of an application, then we would
9 have offered the redactions in correspondence. There
10 was no need to make this application.

11 On the question of the disclosure issue which really
12 I am assuming I have to see the figures, one assumes the
13 disclosure was the bulk of the costs. Mr. Brealey
14 accepts now that those parts of the draft order should
15 be dismissed, and that is where the bulk of the costs
16 lies, and that is really the one that has fallen flat,
17 the suggestion that time has not been wasted because we
18 have all had to wade through Mr. Burrows' annex. But
19 I am sorry, a huge amount of time has been wasted
20 because if a specific disclosure application has been
21 made then the relevant parts of Mr. Burrows' statement
22 and annex may reappear, but then they can be looked at
23 in detail in context. A huge amount of time has been
24 wasted by having to wade through the detail in that
25 annex.

1 For all those reasons, we do ask for our costs.

2 MR HARRIS: Sir, can I simply add one point that it is
3 important from the perspective of the defendants that if
4 there is to be a cost order in our favour, that it be
5 made payable forthwith because otherwise there is
6 a danger that this costs reflection on the Ryder
7 behaviour will be lost in the post and disappear off.

8 One of the reasons that we are keen on the costs is
9 not only that we get our costs, but so that we are not
10 met by this kind of misguided application in the future.
11 The best way to do that is to ensure that the costs are
12 payable forthwith.

13 Plainly, if they end up being agreed between the
14 parties prior to the prosecution, if you like, of any
15 assessment exercise then no problem. But absent the
16 word "forthwith" that won't happen, and that is why we
17 ask for the inclusion of that word.

18 THE PRESIDENT: Yes.

19 Order by THE TRIBUNAL

20 THE PRESIDENT: As a result of a day of submissions made on
21 behalf of the Ryder applicants, the form of order sought
22 in this application, supported by a very detailed and
23 lengthy witness statement from their solicitors, has
24 been effectively refused, though certain matters have
25 been addressed constructively in discussion.

1 This is a complex case and in totality a very
2 expensive case. I do not underestimate the difficulties
3 facing claimants seeking to prove causation and recover
4 damages as the result of an unlawful and secret cartel.
5 But that does not in any way detract from the importance
6 of claimants going about the proceedings in a sensible
7 and proportionate manner.

8 In particular, all parties have to comply with the
9 governing principles in rule 4 of the Tribunal rules,
10 which includes under rule 4(7) that the parties should
11 co-operate with the Tribunal to give effect to the
12 principles in the rule which largely mirror the
13 overriding objective in the Civil Procedure Rules.

14 I have to say that I regard this application and the
15 way it has been pursued as seriously misconceived. As
16 regards leniency, the claimants very properly accept
17 that they cannot, on the law as it stands, obtain
18 disclosure of leniency statements as defined in
19 Schedule 8A of the statute. That is the legislative
20 provision whereby the United Kingdom has implemented its
21 obligations under the EU Damages Directive.

22 The claimant seeks to argue, as it is entitled to
23 do, that certain documents that have been withheld are
24 not leniency statements. It is then for the Tribunal to
25 decide. But the Tribunal's practice direction of

1 14 March 2017 at paragraph 4 prescribes the procedure
2 that must be followed if such a challenge is to be made,
3 and requires in terms that the application for such
4 a determination must be served on the relevant
5 competition authority, in this case the European
6 Commission.

7 Mr. Brealey says that was not done because in
8 a letter of 6 July of last year when this case was still
9 in the High Court, the Commission had written saying
10 that it does not expect to make observations regarding
11 disclosure to national courts, save in exceptional
12 circumstances.

13 But that letter was written in a very different
14 context when the court was considering what is
15 proportionate disclosure under Article 5 of the
16 directive. The issue raised by leniency statements
17 arises under Article 6 of the Directive and under
18 Article 6, paragraph 7, it is stated that:

19 "A claimant may present a reasoned request that
20 a national court access the evidence referred to."

21 That is to say a leniency statement for the sole
22 purpose of ensuring their contents correspond to the
23 requirements, or definition of a leniency statement, and
24 continues:

25 "In that assessment, national courts may request

1 assistance only from the competent competition
2 authority."

3 So the Damages Directive expressly envisages that
4 national courts may request assistance from the
5 Commission for that specific and defined exercise.

6 I do not see in those circumstances there is any
7 grounds to draw any conclusions from what the Commission
8 had written on the very different question addressed in
9 the letter to which Mr. Brealey referred.

10 The simple fact is that the mandatory procedure in
11 paragraph 4 of the practice direction to which I have
12 referred was not followed, and it should have been.

13 As regards redactions, Mr. Brealey submitted that
14 some significant progress has been made through the
15 agreement of what is now going to be done in that
16 regard, and he said that emerged only from the witness
17 statements made by the solicitors to the various
18 defendants in response to this application.

19 But the explanation is that this particular aspect
20 emerged from the application and the witness statement
21 in support. It was not pursued specifically in
22 correspondence before that, and if it had been there is
23 no reason to suppose that the defendants would not have
24 taken exactly the same position as they then did in
25 their witness statements, which would have obviated the

1 need for this application.

2 As for the disclosure issue more generally, I made
3 observations in the course of argument about the proper
4 way to pursue an application for specific disclosure.
5 That, insofar as it relates to matters that have not
6 been pleaded but the claimant may seek to introduce by
7 way of an amended pleading, the proper course is for the
8 claimant to apply to amend its pleading, and if that
9 application is granted, it can then pursue disclosure
10 related to the expansion of its case under the
11 amendment.

12 No doubt the considerable work that Ryder's
13 solicitors have put into preparing this application and
14 preparing the annex to the witness statement of
15 Mr. Burrows will be of great use in refining that
16 pleading and taking forward any application. But the
17 matter now before me concerns not Ryder's costs and the
18 costs of their solicitors and counsel, but the costs
19 incurred by the defendants in meeting what was a very
20 broad-ranging application for disclosure, which has not
21 succeeded.

22 I have to say it seems to me in these circumstances
23 the defendants should recover their costs. I am asked
24 by Mr. Harris for Daimler to order that those costs
25 should be paid forthwith because he suggests that

1 otherwise the message of this court's determination of
2 the present application will not get through. I do not
3 accept that.

4 The claimants are represented by well known and
5 responsible solicitors. I am sure that they and their
6 counsel have appreciated what the Tribunal has done.
7 There is no question of the defendants or any of them
8 being in financial difficulties because of these costs,
9 and I am not going to make a forthwith order, but the
10 defendants shall recover their costs.

11
12
13 THE PRESIDENT: As regards assessment, are you in a position
14 to assess costs or should it be just to be subject to
15 detailed assessment --

16 MR. HOSKINS: I think none of us have produced schedules.
17 You say it is a two-day hearing and you can imagine it
18 is quite cumbersome.

19 THE PRESIDENT: If you do not have schedules, that is that.
20 I shall say I think our form of order, which I do not
21 know by heart, is subject to an assessment by a costs
22 officer. (Pause)

23 There are two possibilities. Either you can
24 submit -- not now -- schedules, and obviously Ryder
25 through its solicitors can comment on them and then

1 I can make an assessment summarily, or it goes to
2 detailed assessment by a cost judge of the High Court.
3 We do not carry out our own detailed assessments here.

4 MR. HOSKINS: Sir, just so I understand, would the detailed
5 assessment take place -- I won't use the word
6 forthwith -- now or at the end of the proceedings?

7 THE PRESIDENT: It would be at the end of the proceedings.

8 MR. HOSKINS: Can I take instructions, please?

9 THE PRESIDENT: That is the normal way it would be done.

10 The summary assessment would be done now, but you would
11 not get the money now.

12 MR. HOSKINS: Absolutely.

13 THE PRESIDENT: Let Mr. Hoskins take instructions.

14 MR. HOSKINS: Sir, in our submission we would prefer to go
15 for summary assessment.

16 THE PRESIDENT: I would only wish to go for summary
17 assessment if everybody wants to go for summary
18 assessment. I do not want a mixed assessment.

19 MR HARRIS: Sir, we endorse that suggestion. Summary
20 assessment. We could put in a cost schedule within
21 seven days, and if it would assist the Tribunal it could
22 be dealt with in writing.

23 THE PRESIDENT: Certainly it should be dealt with -- I am
24 not going to have a hearing on costs.

25 MR. SINGLA: Sir, we would support that as well.

1 MR. JOWELL: Likewise.

2 MR. PICKFORD: And likewise.

3 THE PRESIDENT: In that case --

4 MR. BREALEY: We would say detailed assessment because it is
5 very difficult to work out on a summary basis on
6 a matter as complex as this what actually was necessary
7 and what was unnecessary. We would urge a detailed
8 assessment and not a summary assessment.

9 THE PRESIDENT: It was to be a two-day hearing. It has only
10 been one day. Even for two-day hearings in complex
11 matters in the High Court we often have summary
12 assessment, and it does save a lot of complication later
13 on in the day because it is assessed by a judge who has
14 actually heard the case and understands what is
15 involved. That is the benefit of it. So I think it is
16 sensible to do summary assessment. So seven days for
17 submission and service on the claimant of cost
18 schedules. Another seven days for any submissions by
19 the claimant in response.

20 When you say seven days, that will be by the end of
21 next Monday; is that right?

22 MR HARRIS: Yes, sir.

23 THE PRESIDENT: That is what you envisage. Today is the
24 11th. By the end of the 18th.

25 MR. HOSKINS: Today is the --

1 THE PRESIDENT: So the 25th for the claimants in response.

2 Can I say the 29th for any reply to the claimant's
3 response.

4 MR. HOSKINS: Could I ask that we have the weekend, unless
5 it inconveniences the Tribunal. I don't know how people
6 are going to be placed. 1 April.

7 THE PRESIDENT: Yes, very well.

8 MR. HOSKINS: Thank you. I am obliged.

9 THE PRESIDENT: You want to work the weekend. 1 April for
10 response. Then there will be summary assessment unless
11 agreed.

12 Can I then just add this. Mr. Brealey mentioned
13 earlier, and I indicated that I had a lot of sympathy
14 with that, the concern about business secrets. There is
15 now quite a bit of authority at European level on
16 business secrets. We have had to sit in closed hearing
17 for much of this afternoon. We may well be back at some
18 stage with further issues on disclosure. I would like
19 all the defendants, or each of the defendants, to
20 consider with their clients on what basis it can be said
21 that any of these documents -- and I am talking about in
22 particular the contemporaneous documents as opposed to
23 possibly replies to RFIs -- but the pre-existing
24 document can now be said to be a business secret.
25 Because standing back from it all I can only say I would

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