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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. : see below list

Victoria House,
Bloomsbury Place,
London WC1A 2EB

3 May 2019

Before:

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

Royal Mail Group Limited v DAF Trucks Limited & Ors

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

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

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

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

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

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

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

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CMC – Day 2

Friday, 3 May 2019

(10.30 am)

Case management conference (continued)

THE PRESIDENT: Good morning, everyone. I think there are a number of issues held over from yesterday. The first was the wording of the preliminary issue, which we gave for the parties to consider overnight. Are there any comments on that from anyone?

Yes, Mr. Jowell.

MR. JOWELL: Yes, sir. The defendants, or at least some of them, have conferred overnight.

THE PRESIDENT: Yes.

MR. JOWELL: They do have -- we have got some suggestions for a slightly more formalised version of the preliminary issue, but it is not intended to change the substance.

Perhaps if I can hand up copies of what is proposed, if we have got -- have you got copies?

THE PRESIDENT: Have the claimants seen that yet? No.

MR. JOWELL: Well, the claimants have not yet seen this, so it may be --

THE PRESIDENT: Well, it is more sensible if you show it to them --

MR. JOWELL: Yes.

THE PRESIDENT: It sounds as though there needs to be some

1 more discussions.

2 MR. JOWELL: There may need to be some more. In any
3 event --

4 THE PRESIDENT: We can come back to it at 2 o'clock.

5 MR. JOWELL: That is a very good -- or possibly after the
6 short adjournment.

7 THE PRESIDENT: Short adjournment or whenever, at a suitable
8 point in the day.

9 MR. JOWELL: Thank you.

10 THE PRESIDENT: The next thing was we discussed having --
11 fixing the next CMC having regard to counsel's
12 engagement in the Supreme Court. We think early
13 February, we hope, would be suitable, and we would
14 suggest 6 and 7 February. That is Thursday, Friday
15 week, is that a problem?

16 MS. DEMETRIOU: Sir, I do not know if it is a problem, but
17 may I raise a related point --

18 THE PRESIDENT: Yes.

19 MS. DEMETRIOU: -- which is that the Tribunal will have seen
20 that as far as economic disclosure is concerned as
21 between the VSW claimants and the defendants, there are
22 no applications at the CMC, but there are ongoing
23 discussions and we hope to reach agreement.

24 But we do think and I do not -- I think only some of
25 the defendants are happy with this, but we would like to

1 pencil in a date in July, a one-day hearing, so that, if
2 necessary, any disputes can be resolved at that hearing
3 so that we do not have to wait until a February CMC,
4 because it is very important, of course, that economic
5 disclosure, data disclosure is progressed.

6 THE PRESIDENT: Yes.

7 MS. DEMETRIOU: It may be that the hearing is unnecessary,
8 but it will certainly focus the minds and the efforts --

9 THE PRESIDENT: Well, we want to address economic disclosure
10 more generally in a moment, and we will see whether that
11 is suitable. We would like to look at that across the
12 board, rather than --

13 MS. DEMETRIOU: I understand.

14 THE PRESIDENT: -- piecemeal, in which case, we might need
15 possibly two days, but -- and let us come back to that.

16 But I think a CMC in February, which will be after
17 judgment on the preliminary issue, and no doubt there
18 will be a whole raft of things to consider, as there
19 usually are, and that we should get dates in now.

20 So if you could -- if possible over the lunch
21 adjournment, check your diaries with those involved to
22 see if those dates suit. We want to avoid the half-term
23 week, as we expect that is inconvenient for various
24 people, which is either the following week or, for most
25 people, two weeks thereafter.

1 The other next point I think held over was
2 an amendment to the confidentiality rings to enable
3 Ryder and VSW lawyers to share and confer on documents.
4 Has any progress been made in drafting something?

5 MR. BREALEY: I believe so, sir. Could one go to the
6 Ryder -- the electronic {R-A/80/1}.

7 MR. HARRIS: Sorry to interrupt, my understanding is my
8 instructing solicitors are sending some more amendments
9 on this topic today, this morning.

10 THE PRESIDENT: Yes. It would be helpful if we could wrap
11 it up today --

12 MR. HARRIS: Yes.

13 THE PRESIDENT: -- rather than -- otherwise, it generates --

14 MR. HARRIS: I understand, sir.

15 THE PRESIDENT: -- numerous correspondence, of experience.

16 MR. HARRIS: Maybe we could revisit that at 2 o'clock.

17 THE PRESIDENT: Yes, very well.

18 MR WARD: Sir, may I just add one point on this. I hope it
19 is not presumptuous, but my solicitors, BCLP, have also
20 been included in the proposed sharing of --

21 THE PRESIDENT: Yes. I think it should be across the board.

22 I think the next point was the Iveco Daily range.

23 MS. BACON: Yes. I am in a position to answer your question
24 definitively. The sales figures that are given in the
25 decision do not include Dailys. However, the Commission

1 did not ask for and we did not give a breakdown showing
2 precisely which trucks were included. So there is
3 nothing saying, "And by the way, those did not include
4 Dailys", because they simply asked for the figures for
5 medium and heavy trucks.

6 So there was nothing in the figures given to the
7 Commission that expressly excluded Dailys or identified
8 those figures as excluding Dailys.

9 THE PRESIDENT: Yes.

10 MS. BACON: What the Commission did know, and you get that
11 from recital 13 of the decision, was that Iveco's
12 business distinguished between medium and heavy trucks
13 on the one hand and light commercial vehicles on the
14 other.

15 THE PRESIDENT: Yes.

16 MS. BACON: That is set out in the recital:

17 "Iveco is active in the production and sale of light
18 commercial vehicles, medium and heavy trucks."

19 That was what the Commission had always known. So
20 since the Dailys are classified by Iveco as light
21 commercial vehicles, when it comes to the sales figures
22 for medium and heavy trucks, Iveco necessarily did not
23 give figures for Dailys in that. So that is where we
24 are.

25 THE PRESIDENT: Yes.

1 MS. BACON: We would, of course, envisage in due course
2 giving -- providing witness evidence of that and the
3 reasons for the difference in classification, some of
4 which are set out in our statement on the -- on the
5 issue, namely the difference in characteristics between
6 the vehicles, in the course of a preliminary issue
7 hearing.

8 So on that basis, we would maintain the request that
9 this is decided by way of preliminary issue for the
10 reasons that we have given. As you have seen, sir, it
11 is not just the 76 vehicles that might be in issue in
12 these proceedings, but there are potentially thousands
13 of others because across Europe, there are, as
14 Mr. Farrell said and you commented yesterday, 55,000
15 Daily vehicles above the six-tonne weight --

16 THE PRESIDENT: Yes.

17 MS. BACON: -- sold during the relevant period.

18 So potentially, this could be a much bigger issue,
19 including in other claims that may be brought in this
20 jurisdiction or other jurisdictions.

21 THE PRESIDENT: Of course, any ruling we made would not
22 bind --

23 MS. BACON: No.

24 THE PRESIDENT: -- even another claim in this jurisdiction.

25 MS. BACON: But from our perspective, it is important to

1 have that dealt with, so that means that we say that the
2 point that we have made about the disproportionality of
3 having to go away and provide, effectively, two sets of
4 evidence, two sets of disclosure from two different
5 business divisions, if, as we contend, this was never
6 within the contemplation of the Commission and it was
7 always clear to everyone that this was a different
8 business division outside the scope of the
9 investigation.

10 THE PRESIDENT: Yes. This is -- could you just remind me,
11 this arises in the VSW claims?

12 MS. BACON: VSW, because Ryder have accepted for the purpose
13 of their claim that Dailys were outside of the decision.
14 So Ryder are not pursuing any claim regarding Dailys,
15 but VSW are. So the point does remain extant in the VSW
16 proceedings.

17 THE PRESIDENT: Yes.

18 MS. BACON: But there is a question about how long such
19 a hearing would take and for our part, we do not think
20 it should take more than a day. The evidence on matters
21 such as the different characteristics of the vehicles
22 should be uncontroversial. One hopes it would be
23 uncontroversial and the question will then simply be the
24 relevance of that.

25 THE PRESIDENT: Yes.

1 MS. BACON: We would have thought that this could be
2 included within the preliminary issue hearing -- not
3 included, but this to be at the same time as and
4 possibly to succeed the preliminary issue trial ordered
5 for November.

6 THE PRESIDENT: Yes. Well, that's a detail, as to when it
7 is heard. It only involves two parties, so --

8 MS. BACON: I am being reminded that there are Daily
9 vehicles included in the Adnams claim.

10 THE PRESIDENT: Yes. Well, are you -- I mean --

11 MS. BACON: We obviously do not have the Adnams claimants
12 here.

13 THE PRESIDENT: No.

14 MS. BACON: But there are other ongoing proceedings in this
15 jurisdiction which do or may bring in those vehicles.
16 I can see that that is a sort of an icing on the cake
17 point, really, because, in our submission, one has to
18 grapple with it for the purpose of these proceedings.

19 THE PRESIDENT: Yes, I have not looked at the Adnams claim,
20 which is in the -- is it in the Tribunal or the High
21 Court?

22 MS. BACON: It is still in the High Court.

23 THE PRESIDENT: Still in the High Court, so it has not come
24 here yet, and where it has got to.

25 If it is a significant issue in that case as well,

1 one could even think about having it as a preliminary
2 issue in both together --

3 MS. BACON: Yes, that might be possible.

4 THE PRESIDENT: -- because at least then Adnams is brought
5 in and it is not -- as you say, it is a one or, at most,
6 a two-day point.

7 MS. BACON: Yes.

8 THE PRESIDENT: Is it significant in the Adnams' case in
9 terms of number of vehicles?

10 MS. BACON: It is a small number of vehicles. I thought it
11 right to mention for completeness, but I do not think it
12 is going to be a huge issue in that case.

13 So that was their submission, that this is the
14 appropriate way to deal with the point, given that there
15 is no -- you cannot clearly identify from the
16 information given to the Commission that those sales did
17 explicitly exclude Dailys, but the reason we did not
18 include them is, as I said, that the Commission asked
19 for medium and heavy trucks figures and we never
20 included Dailys within that division.

21 THE PRESIDENT: Yes.

22 Well, Ms. Demetriou, as I understand it, Iveco is
23 saying this should be heard upfront, but not so much
24 because of the financial significance of the 76 or
25 whatever it is vehicles, but because of the very

1 significant expense of disclosure searching to cover
2 those 76 vehicles if the Daily range is included.

3 MS. DEMETRIOU: Sir, it is not clear to us that there would
4 be a big difference in terms of disclosure burden if it
5 were heard as a preliminary issue or not, because we say
6 that there are a number of factual and expert matters
7 which would be in dispute on the preliminary issue and
8 so there would need to be disclosure.

9 THE PRESIDENT: Well, there would be bound to be some
10 disclosure, but not the searching of the database on
11 pricing.

12 MS. DEMETRIOU: No, I accept that.

13 THE PRESIDENT: That is -- yes, there would have to be,
14 perhaps, expert evidence on what these vehicles looked
15 like compared to the other vehicles and what is a medium
16 truck.

17 MS. DEMETRIOU: Yes. Sir, there is a question of
18 proportionality, which is we have identified 36 rather
19 than 76 trucks, and I think that ought to be a matter
20 which is explored in correspondence first.

21 THE PRESIDENT: Yes.

22 MS. DEMETRIOU: It seems as though Iveco has identified 76
23 trucks from its records, but, of course, we have not had
24 the benefit of data from the defendants yet. So I think
25 that at least should be explored first so that the

1 Tribunal can take a view as to proportionality.

2 THE PRESIDENT: Well, I think that might be sensible,
3 Ms. Bacon. Indeed, it may be if there are only 36 or 50
4 or whatever, when you have shared your identification of
5 vehicles, consideration is given as to really whether
6 it -- if that is what is involved, it is worth pursuing
7 the claim for those vehicles, given you have many
8 thousands of others.

9 MS. BACON: Yes, or if this led to a reconsideration of the
10 VSW claimants' position, then we would be grateful, and
11 indeed Ryder has obviously reconsidered its position and
12 is not pursuing that.

13 THE PRESIDENT: Yes.

14 MS. BACON: What I do not really want is for this -- for us
15 to miss the opportunity to go forward in November when
16 other issues are going to be heard, or at least one
17 other issue is going to be heard.

18 So I would suggest that what we do is, if the
19 Tribunal were minded to do so, provisionally list it for
20 November, and that could always be vacated if, in the
21 light of further reflection, the VSW claimants decide to
22 drop those claims.

23 THE PRESIDENT: There is no particular reason it has to be
24 heard alongside the other preliminary issue. It is
25 a quite different argument with only two parties.

1 MS. BACON: Yes.

2 THE PRESIDENT: It does not concern anybody else.

3 MS. BACON: Yes.

4 THE PRESIDENT: Just one moment. (Pause)

5 (The Tribunal conferred)

6 THE PRESIDENT: Well, Ms. Bacon we do not think it is right
7 to order a preliminary issue now. We will keep it open.
8 We would like you, your -- Iveco's representatives to
9 communicate with the VSW representatives to try and iron
10 out how many vehicles are affected --

11 MS. BACON: Yes.

12 THE PRESIDENT: -- because we have obviously got different
13 figures at the moment.

14 In the light of that, VSW will consider whether this
15 is being pursued. Even if they do not concede that they
16 are not trucks, they might just not think it is worth it
17 or otherwise. If it is, we would like you to consider
18 what would be precisely the preliminary issue that is
19 proposed and to inform us what disclosure might be
20 involved and how much that would cost.

21 MS. BACON: Are we talking about for the purpose of the
22 preliminary issue hearing?

23 THE PRESIDENT: For the purpose of the preliminary issue
24 hearing only.

25 MS. BACON: Yes, because, of course, my disclosure point was

1 not about that particular --

2 THE PRESIDENT: We understand that.

3 MS. BACON: It was about the disclosure that might be

4 ordered against us, yes.

5 THE PRESIDENT: We have that on board. We just want to know

6 what is -- in terms of the proportionality of having

7 a preliminary issue, also what it would cost.

8 MS. BACON: Exactly. Does that go to how long the trial --

9 how long the hearing would be?

10 THE PRESIDENT: Well, it would include how long -- does it

11 involve expert evidence or not, for example?

12 MS. BACON: Well, I can confirm that. As far as we are

13 concerned, it would be factual evidence rather than

14 expert evidence.

15 MS. DEMETRIOU: Sir, we do not agree with that. We think it

16 would require expert evidence. I have got submissions

17 to make, but I do not think you want to hear them now.

18 THE PRESIDENT: Yes. I think that is exactly why we would

19 like both of you to consider that --

20 MS. BACON: Yes.

21 THE PRESIDENT: -- and to inform us of the position. We

22 will not set a deadline.

23 MS. BACON: Yes.

24 THE PRESIDENT: Then we can consider, on that information,

25 whether -- and your formulation of the preliminary

1 issue, if it is pursued, whether we should order one.
2 We can probably do that without a hearing, but, if
3 necessary, we can put in a short hearing before the
4 summer for Iveco and VSW to attend.

5 MS. BACON: Yes. So essentially, you are inviting
6 submissions on the papers in the first instance --

7 THE PRESIDENT: On the papers initially.

8 MS. BACON: -- which should succeed any consideration by VSW
9 of whether, in light of the number of vehicles involved,
10 they are pursuing this.

11 THE PRESIDENT: Exactly.

12 MS. BACON: I am grateful.

13 THE PRESIDENT: Then we will decide what to do.

14 MS. BACON: Yes.

15 HODGE MALEK QC: We would like to hear from both parties as
16 to what disclosure they expect to have in this part of
17 that process, not just you saying what you are going to
18 disclose. I would like to hear from Ms. Demetriou's
19 side as to what they expect to see in order to have that
20 issue resolved.

21 MS. BACON: Yes.

22 THE PRESIDENT: So on the preliminary issue itself.

23 MS. BACON: On the preliminary issue itself, and separate
24 from the issue as what disclosure may later be provided.

25 THE PRESIDENT: Yes.

1 MS. BACON: May I just put down this marker: if, in due
2 course, any disclosure is being ordered against us, then
3 I would hope that that would not include disclosure in
4 relation to the Daily range until this issue is
5 resolved, because what we do not want to be doing is
6 having to give the disclosure, which is precisely what
7 we are trying to avoid if Dailys are outside the scope
8 of the decision.

9 THE PRESIDENT: Well, it would not be on pricing because it
10 is not about price, but if the preliminary issue
11 concerns whether a Daily vehicle is a truck within the
12 definition, then obviously if there is disclosure, it is
13 going to concern a Daily vehicle.

14 MS. DEMETRIOU: No, what --

15 THE PRESIDENT: But it will not be this broad-ranging
16 disclosure about pricing and purchasing and so on --

17 MS. BACON: Yes, exactly.

18 THE PRESIDENT: -- because it is not about cost and price.

19 MS. BACON: No.

20 THE PRESIDENT: It is about, really, classification.

21 MS. BACON: My point is if, in the more general scheme of
22 the preparation for this trial, disclosure is ordered
23 that might otherwise extend to the Daily range if they
24 are within the scope of the claim, we do not want to
25 have to be providing that because that is what we are

1 trying to avoid through asking for a preliminary issue.

2 THE PRESIDENT: Well, there is no application for

3 disclosure --

4 MS. BACON: No.

5 THE PRESIDENT: -- by VSW at the moment.

6 MS. BACON: No.

7 THE PRESIDENT: So that does not arise.

8 MR. HOSKINS: Sir, can I ask if we could have the same

9 suggested type of procedure for superstructures. Should

10 it arise that we still think a preliminary issue may be

11 appropriate, we can make an application on the papers

12 once we have seen the pleading. It is simply so we do

13 not get left behind, if you like.

14 THE PRESIDENT: It is a rather different issue, isn't it,

15 superstructures?

16 MR. HOSKINS: Well, that is why I raise it, because I would

17 like to keep it alive in case we do want a preliminary

18 issue. What I am asking is would you be content for us

19 to apply for a preliminary issue in writing explaining

20 why we think it is still appropriate if that is where we

21 get to? The other option, of course, is to leave it

22 over until we all come for another CMC at some stage,

23 but I am in your hands. But I assume the procedure you

24 suggested --

25 THE PRESIDENT: Does it arise only on VSW?

1 MR. HOSKINS: It is also a VSW point.

2 But the point about superstructures, while I am not
3 sort of giving it up, is superstructures, you can see,
4 can apply to lots of other claims other than these
5 people in the room at the moment. It could potentially
6 be a very important general issue. That is why I would
7 like to -- I am not saying we will apply, I would like
8 to be able to in the most efficient way for the
9 Tribunal.

10 THE PRESIDENT: Well, we are not shutting you out from
11 applying. You can apply in the first instance on the
12 papers and we will see what the response is.

13 MR. HOSKINS: I am very happy with that.

14 THE PRESIDENT: But I do not think we should -- can take
15 that further.

16 MR. HOSKINS: I do not need anything else. Thank you, sir.

17 THE PRESIDENT: I think those were the points, as far as
18 I noted them, held over. Was there something else
19 before we get into --

20 MR. PICKFORD: Sir, yes, if I may. There was a very short
21 point also relating to the sequencing issues we
22 discussed yesterday and that is, in particular, the
23 taxation point where the Tribunal suggested yesterday
24 that it might be appropriate to replicate the approach
25 that was adopted in the *Interchange* case of

1 *Sainsbury's v MasterCard.*

2 THE PRESIDENT: Yes.

3 MR. PICKFORD: That was obviously a new point yesterday.

4 I have taken some instructions on that overnight in
5 relation to the *Sainsbury's* case. I just want
6 to make a couple of very short points. I understand
7 obviously that the Tribunal is not making an order on
8 this.

9 THE PRESIDENT: Yes.

10 MR. PICKFORD: But there were, obviously, representations
11 made about the sensible direction of travel.

12 THE PRESIDENT: Yes.

13 MR. PICKFORD: The only point is really this: in
14 *Sainsbury's*, as we understand it, it was not
15 merely that taxation was dealt with separately. There
16 was, in fact, an order for payment at a gross level and
17 then there was payment back by *Sainsbury's* subsequently
18 to MasterCard.

19 That would not be a model that we would suggest
20 could be sensibly carried over into these proceedings.
21 The reason for that is in the VSW claims, there are
22 hundreds of claimants, not merely one as there was in
23 *Sainsbury's*, and whereas *Sainsbury's* was one
24 single, large firm in this jurisdiction, we are faced
25 with a very large number of smaller claimants in other

1 jurisdictions.

2 That faces obvious problems if we are to overpay
3 them and to then be in a situation where we have to seek
4 to recover from many claimants in many other
5 jurisdictions monies that may have been overpaid. It
6 raises credit risks and --

7 THE PRESIDENT: So your concern --

8 MR. PICKFORD: -- all sorts of --

9 THE PRESIDENT: Go on.

10 MR. PICKFORD: -- all sorts of very obvious problems.

11 Additionally, we think it is likely that there are
12 funders involved in this litigation. That would again
13 create complications that we understand would not have
14 arisen in *Sainsbury's*.

15 So we would be very, very cautious about adopting
16 an approach that led to any form of order, at the very
17 least, for payment prior to the taxation issues being
18 considered. That would obviously have a bearing on
19 whether it is actually then ultimately sensible to parse
20 the issues out in that way.

21 That is simply the marker I lay down at the moment.

22 THE PRESIDENT: Yes. They are two quite separate questions.

23 One is whether the initial trial should consider
24 damages on a gross basis and if it does and then reaches
25 a figure, whether it should order and does that on the

1 basis that this is then subject to consideration of tax
2 effects.

3 The second question is should it then order payment
4 of that amount? As I understand it, what you have been
5 saying addresses the second point.

6 MR. PICKFORD: It does principally, sir, that is right. My
7 only addendum to that is simply that in the light of the
8 second, if one is to form a view on the second, that
9 might influence one's position on the first. But my
10 point is principally focused on the fact that we -- what
11 we certainly do not want is to be in a situation where
12 there is an order for payment and then we have to seek
13 back very large sums from a very large number of
14 different companies in other jurisdictions.

15 THE PRESIDENT: Although there could be some payment on
16 account.

17 MR. PICKFORD: That is true. It will obviously have to be
18 judged at an appropriately conservative level.

19 MR. HOSKINS: Sir, on this issue, can I address you on the
20 first issue, which is whether it is suitable to split
21 the trial in that way. I must admit, that caused us
22 some concern, but I am not in a position to articulate
23 those concerns. We do not have to make an order on that
24 now, and the Tribunal has obviously said this is an idea
25 and one can see how it might well work.

1 I simply ask: can we please not decide this now,
2 because it may well be we would like to make considered
3 submissions to you on that, but there is no urgency,
4 sir. If we could just keep it live to the next CMC, but
5 I have heard what the Tribunal has said.

6 THE PRESIDENT: Well, it will arise. Where it will come to
7 be relevant is on disclosure, because if it is not being
8 heard at the first trial, that may have significance as
9 to whether there should be --

10 MR. HOSKINS: Yes.

11 THE PRESIDENT: -- potentially expensive disclosure, expert
12 evidence, et cetera, on tax, if that is not going to be
13 decided.

14 MR. HOSKINS: I understand, sir, but what I would say about
15 that is one should be careful the tail does not wag the
16 dog. So in order to avoid making a ruling on disclosure
17 now, one should not make a ruling about the nature of
18 the trial.

19 If the Tribunal is concerned about the tax
20 disclosure, you do not have to make an order today. Mr.
21 Harris will probably kick me under the table for saying
22 that, but our preference, sir, would be let us see what
23 the shape of the trial sensibly looks like. That should
24 be the driver rather than at what date should tax
25 disclosure be made.

1 You have my submission that I think tax disclosure
2 should be made in advance of the trial in any event,
3 even if it is split in the way that the Tribunal has
4 suggested.

5 THE PRESIDENT: Yes.

6 MR. HOSKINS: I would just like -- my clients would like
7 some more time to think about it and to help --

8 THE PRESIDENT: Yes. We have not made any ruling or
9 decision on that. We have indicated that that is
10 a possibility. Mr. Harris has not kicked you under the
11 table.

12 MR. HARRIS: No, I would never dream of doing that, but can
13 I add a tax-related point that may not have percolated
14 through into everybody's comprehension because of the
15 sheer volume of material, but it is relevant to raise
16 now, and it is this: there is a distinction of kind
17 between the corporate taxation position which we have so
18 far ventilated, on the one hand, versus, on the other
19 hand, what has been called in the expert evidence the
20 capital allowances depreciation point.

21 I do not have to develop it now, but at some stage
22 I will need the opportunity to address you as to why
23 that is a distinction in kind. The distinction is that
24 conceptually, although we oppose it, including for the
25 reasons Mr. Hoskins has given or has adverted to as

1 being possibly given, you might be able to have
2 a two-part trial on corporation tax, but you cannot do
3 that on capital allowance and depreciation because that
4 goes to the question of what is your loss in the first
5 place to which you then apply the corporation tax rates?

6 It is quite a complicated point. It does involve
7 looking at some expert evidence, but the long and short
8 of it is because it goes to the underlying nature of the
9 loss in the first place, have you even suffered the loss
10 or, instead, have you essentially passed it on through
11 an allowance-based regime, essentially, to the taxman?
12 Have you not suffered the loss in the first place?

13 That has to go in stage 1 of the trial. That is not
14 something that you can subsequently say, "Oh, okay, we
15 will give you a figure and then we will worry about how
16 it should be adjusted for changing rates of corporate
17 taxation". You have to decide, in the first place, was
18 that loss suffered?

19 That is something that, therefore, if we get to the
20 stage of considering substantive taxation disclosure
21 today, which you know our position is we should not, but
22 if we did, I would have to address you in more detail on
23 that by reference --

24 THE PRESIDENT: You might, at some point, have to do that.

25 We will not reach a view on it and you might have to

1 explain why it is essential.

2 MR. HARRIS: I am happy to do that. I just wanted to make
3 it clear that that was --

4 THE PRESIDENT: But we will not get into that now because we
5 have quite a lot of other things to do.

6 Are there any other, as it were, preliminary matters
7 before we turn to disclosure? Then that is where we
8 will go.

9 I think we are happy to take it, as was requested,
10 I think, that the first matter we will look at is the
11 TDDB minutes.

12 Well, perhaps before -- no, before that, shall we
13 just deal with, as I think it may be agreed, in
14 Royal Mail/BT, documents -- it has been referred to as
15 documents relied on in the defence, which, as we
16 understand from Ms. Edwards' witness statement, there
17 seems to be some agreement on.

18 MR WARD: Yes, it is now complete agreement, I understand.

19 Since Ms. Edwards' witness statement, there was further
20 correspondence and I think the parties have reached
21 a common position.

22 THE PRESIDENT: Is that something that has been done by
23 consent or is it to be incorporated in the order?

24 MR WARD: By consent order.

25 THE PRESIDENT: I mean, to be ordered or just --

1 MR WARD: Yes.

2 THE PRESIDENT: -- agreed as between you?

3 MR WARD: We propose to put forward a consent order for the
4 Tribunal.

5 THE PRESIDENT: You will be producing one for us?

6 MR WARD: Yes.

7 THE PRESIDENT: I think we will probably incorporate it in
8 the overall order from the CMC. But that is correct,
9 Mr. Pickford, is that right?

10 MR. PICKFORD: We are content with that.

11 THE PRESIDENT: So we will say no more about that.

12 Then we move on to the TDDB minutes, which, as we
13 understand it, Ms. Demetriou, what you are seeking is
14 the minutes for the period 1985 to 1999, and you say
15 there are 15 meetings.

16 MS. DEMETRIOU: 15, three of which -- so three of the sets
17 of minutes fall within the scope of the cartel period
18 set out in the decision and the remaining 12 pre-date
19 that.

20 Application was made against all the defendants
21 except for Daimler, because Daimler agreed to carry out
22 reasonable and proportionate searches. Since making the
23 application, both Volvo and MAN have agreed to do the
24 same. So the application, therefore, proceeds against
25 DAF, Iveco and Scania.

1 Sir, the draft order is at VSW-B, volume 2. Perhaps
2 we could turn that up first {VSW-B/OC2/1}.

3 THE PRESIDENT: Yes. You say it has been agreed with those
4 defendants.

5 MS. DEMETRIOU: Yes.

6 THE PRESIDENT: What time has been agreed for them to be
7 provided?

8 MS. DEMETRIOU: I will check. (Pause)

9 One by mid-May to carry out proportionate and
10 reasonable searches and one by the end of May.

11 THE PRESIDENT: Yes. This is a committee or association
12 that they all attended.

13 MS. DEMETRIOU: That is correct. It was -- there was
14 a sophisticated -- I will show you --

15 THE PRESIDENT: Yes, I understand that.

16 MS. DEMETRIOU: Yes.

17 THE PRESIDENT: We have looked at some of that. If you
18 receive those minutes from the defendants who have
19 agreed to search for them, you do not then need them, do
20 you, from DAF, Iveco and Scania?

21 MS. DEMETRIOU: That is correct, because they are the same
22 minutes.

23 THE PRESIDENT: Yes.

24 MS. DEMETRIOU: But -- and so it may be that the Tribunal,
25 if we succeed in the application, can make appropriate

1 provision in the order such that --

2 THE PRESIDENT: It may be -- if I may interrupt you, it may
3 be you do not need the application. You will know at
4 the end of May.

5 MS. DEMETRIOU: We may or may not. So Daimler have carried
6 out the reasonable searches and not found --

7 THE PRESIDENT: So they have done it and nothing turned up.

8 MS. DEMETRIOU: No.

9 THE PRESIDENT: Yes.

10 MS. DEMETRIOU: Of course, in cases like this, it is usual
11 to pursue applications against all defendants and not
12 against one or two who have ostensibly agreed and
13 then --

14 THE PRESIDENT: Yes, just taking a pragmatic approach.

15 MS. DEMETRIOU: Yes. So we do think we need the application
16 because we think that there is a risk that they will not
17 be found by the two other defendants who have agreed to
18 search for them, so we do pursue it.

19 If the Tribunal, for pragmatic reasons, on the basis
20 that we succeed in the application, wishes to make
21 a contingent order such that it applies if the minutes
22 are not provided by one of the other two defendants, we
23 would, of course, be content with that. (Pause)

24 THE PRESIDENT: So the draft order is --

25 MS. DEMETRIOU: At VSW-B, tab OC2.

1 THE PRESIDENT: Yes.

2 MS. DEMETRIOU: It is not confidential any more, even though
3 it is ...

4 THE PRESIDENT: Yes.

5 MS. DEMETRIOU: Sir, as a footnote to what I just said, the
6 MAN and Volvo defendants have not agreed to the order,
7 but they have essentially agreed to make reasonable and
8 proportionate searches.

9 THE PRESIDENT: Yes.

10 MS. DEMETRIOU: So we are not pursuing the application
11 against them.

12 So you can see what we are asking for are reasonable
13 and proportionate searches for this set of minutes that
14 are listed and then, of course, provision -- inspection
15 of the minutes in the event that they are located and
16 details of the search -- searches if they are unable to
17 locate them.

18 THE PRESIDENT: Yes.

19 MS. DEMETRIOU: The background is set out in Mr. Bolster's
20 witness statement, which is in the same bundle, so
21 VSW-B, tab OC3 {VSW-B/OC3/2}. The background to the
22 application is set out at paragraph 6 through to 9 and
23 you can see briefly -- so I will summarise -- that this
24 came to light during the course of a review of documents
25 from the Commission file.

1 My instructing solicitors identified several
2 documents referring to a trucks delivery database, which
3 appeared to be a forum used by the trucks manufacturers
4 to exchange information. Some of the minutes were there
5 on the Commission file, so we have got several sets of
6 minutes.

7 You can see that the purpose of the agreement was
8 a data exchange on deliveries of trucks. The TDDB
9 agreement refers to a contract between each manufacturer
10 and a third party firm. That contract was then provided
11 to us in full by Daimler, so we have that and that is in
12 the bundle.

13 Then we were also able to identify during the review
14 a list of meetings. So we know when the meetings took
15 place, we know that minutes were routinely produced for
16 these meetings and in that way, we -- on that basis, we
17 make this targeted application for specific disclosure.

18 Just giving the Tribunal a flavour of the documents
19 that we do have, if you could turn to VSW C1, tab OC1,
20 pages -- so page 115 {VSW-C1/OC1/115}. This is the
21 start of the contract. (Pause)

22 It is not on screen. I am going to say it again.

23 VSW-C1 -- ah, it is there.

24 THE PRESIDENT: Yes.

25 MS. DEMETRIOU: If the Tribunal could look first at clause 1

1 under "Introduction", you can see that it:

2 "Concerns the organisation of a confidential data
3 exchange on worldwide truck deliveries. Best [that is
4 the third party] shall conclude this contract also with
5 the firms mentioned below. The purpose of these
6 contracts is to gather the data information from all
7 companies and to distribute this information to the
8 other companies."

9 Then you see a list of the manufacturers. Then over
10 the page {VSW-C1/OC1/117}, at 3.3 you see that:

11 "Best shall organize a secretariat ..."

12 So you see there that this was a formal arrangement:

13 "... on behalf of the manufacturers which would not
14 only process the data ... but also to:

15 "Convene meetings of the manufacturers at least
16 twice a year."

17 Then 4, 4.1:

18 "The data material to be incorporated in the
19 exchange will initially be as follows ..."

20 Then over the page on page 118 {VSW-C1/OC1/118}:

21 "The data material to be included may be expanded by
22 an unanimous decision of the manufacturers and subject
23 to agreement on extra expenses incurred by Best."

24 So it is quite possible that the scope of this
25 agreement was expanded over time. We just do not know.

1 That is one of the reasons why we want to see the
2 minutes.

3 Now, when Hausfeld sought these documents in
4 correspondence, some of the defendants' solicitors
5 confidently explained that the arrangements constituted
6 a lawful information exchange, and we see the letter
7 from Freshfields of 15 March at VSW-C1, tab 1, page 91.

8 (Pause)

9 VSW-C1, tab 1, page 91 {VSW-C1/OC1/91}. You will
10 see -- does the Tribunal have that letter? It has not
11 yet come up on the screen. So VSW-C1/OC1.

12 THE PRESIDENT: C1.1 is the bundle, and it is tab OC1.

13 MS. DEMETRIOU: Ah.

14 THE PRESIDENT: Yes, we have got you.

15 MS. DEMETRIOU: Thank you, sir. So you can see on the first
16 page of that letter in the final paragraph on the first
17 page:

18 "The Named Parties do not consider these documents
19 to be relevant to your clients' claims as currently
20 pleaded, notwithstanding your assertions to the
21 contrary."

22 Then the invitation to make a stand-alone claim
23 going beyond the infringement:

24 "Your clients will need to particularise such
25 a claim."

1 Then you see an explanation on page 92
2 {VSW-C1/OC1/92}, an explanation provided by Freshfields
3 of the TDDB. I am not going to read it out, but you see
4 the penultimate paragraph on that page:

5 "We emphasise that the TDDB arrangement consisted of
6 the exchange of operational data, some of which ..."

7 Some of which, not all of which:

8 "... was already publicly available."

9 Then it explains the objectives.

10 Then on page 93 at the top {VSW-C1/OC1/93}:

11 "The conduct described above was not infringing and
12 did not take place in secret."

13 So that is what is said.

14 But it then transpired that the relevant minutes had
15 not been read by the defendants, or even located when
16 they made this statement. So we see that from
17 Freshfields' letter of 3 April on page 102 of the same
18 bundle {VSW-C1/OC1/102}, and it is paragraph 7 of that
19 letter:

20 "You have incorrectly suggested in your 18 March
21 letter that the description of the TDDB set out in the
22 15 March letter ..."

23 Which is the one we just looked at:

24 "... was based on 'a detailed review of the [13
25 requested] TDDB documents'. Volvo/Renault has, however,

1 to date only been able to identify the requested
2 contract, and not the 12 sets of ... minutes."

3 So the position, therefore, is this: we know that
4 the manufacturers met on particular dates to exchange
5 confidential data which was not all in the public
6 domain. We also know that they had increasing concerns
7 about the lawfulness of what they were doing.

8 We can see that point from an example of the
9 minutes. So that is at VSW-C1.1, tab OC1, page 45
10 {VSW-C1/OC1/45}. So these are the minutes -- this is
11 a progress -- you can see from the top of the document,
12 "Progress Meeting, 30 June to 2 July 2004". So that
13 implies it was quite a detailed meeting that lasted
14 several days.

15 Then you see on the first page:

16 "After a short review of articles 81, and 82 and
17 a brief review of council regulation, Mr. Willem Boon
18 explained that his legal department had changed its
19 position after reading Mr. Amador's memo. Now they
20 agree with Scania's Lawyer not to proceed or continue
21 with new projects."

22 There are various -- that is just one example, but
23 there are various examples in the minutes we have of
24 an increasing awareness amongst the manufacturers that
25 what they were doing may indeed not be lawful.

1 For completeness, behind the same tab at page 8, the
2 Tribunal will see the list -- this is a document which
3 was on the Commission file. So it is page 8 and you
4 will see a list of all the meetings {VSW-C1/OC1/8}.

5 (Pause)

6 THE PRESIDENT: Can I just ask --

7 MS. DEMETRIOU: Of course.

8 THE PRESIDENT: -- did the previous document, the one at
9 page 85, also come from the Commission file?

10 MS. DEMETRIOU: Yes, whatever we have comes from the
11 Commission's file.

12 So the Tribunal can see that the Commission decision
13 establishes an unlawful information exchange for the
14 period set down in that decision. Of course, it is
15 a settlement decision. So we are not sure of the
16 precise temporal scope of the cartel, but what we have
17 here -- what we can see in these minutes is that for a
18 protracted period of time, there was a formalised
19 arrangement through which the manufacturers were
20 exchanging confidential information for another
21 information exchange.

22 THE PRESIDENT: Yes, but if I may interrupt you.

23 MS. DEMETRIOU: Yes.

24 THE PRESIDENT: The Commission was well aware of this.

25 Indeed, the documents you are showing us were reviewed

1 by the Commission. The Commission was also aware about
2 these earlier meetings because the list of meetings on
3 page 8 also comes from the Commission.

4 MS. DEMETRIOU: Yes.

5 THE PRESIDENT: The Commission decision records the fact
6 that there were meetings between these manufacturers on
7 a regular basis. Indeed, at one point, I think, based
8 on what was said by one of the leniency applicants, they
9 reconsidered that initial view that the cartel started
10 in 2001 and brought it back to 1997.

11 So are you not effectively saying, well, the
12 Commission, you suspect, did not do their job properly
13 or that the leniency applicants did not comply with
14 their obligations as part of leniency to provide
15 everything that indicated and advanced the case for
16 infringement?

17 MS. DEMETRIOU: Sir, I have a number of responses to that,
18 and can I tell you in a nutshell what they are and then
19 develop our submissions?

20 THE PRESIDENT: Yes.

21 MS. DEMETRIOU: As to leniency, I am not, in this
22 application, advancing any submission that they did not
23 comply with their leniency obligations. I am not in
24 a position to do so because we do not know -- obviously,
25 the leniency documents have not been disclosed and so we

1 are not in a position to tell. So I am certainly not
2 alleging --

3 THE PRESIDENT: You say the leniency documents have not been
4 disclosed, but all the contemporary documents have been
5 disclosed, if they are relevant.

6 MS. DEMETRIOU: That is correct.

7 THE PRESIDENT: What you are looking for are contemporary
8 documents.

9 MS. DEMETRIOU: That is correct.

10 THE PRESIDENT: So if the 1991 meeting was relevant, it
11 should have been -- the minutes should have been
12 disclosed to the Commission as part of leniency and in
13 which case, you would have them from the Commission
14 file.

15 MS. DEMETRIOU: Sir, the second point that I make, because
16 I make a number of points -- and they are to be assessed
17 in combination, if I may, but I am just going to tell
18 you in a nutshell what the points are.

19 THE PRESIDENT: Yes.

20 MS. DEMETRIOU: So the second point is that this is
21 a settlement decision.

22 THE PRESIDENT: Yes.

23 MS. DEMETRIOU: We just do not know the extent to which the
24 Commission agreed not to pursue a wider --
25 an infringement of a wider temporal scope in return for

1 the settlement of the defendants. We just do not know.

2 So in my respectful submission, sir, your point
3 would have a lot more force if this were a decision
4 reached after an investigation which was not settled.
5 We know that settlement decisions are much shorter. It
6 may well be, but we do not know, that the Commission
7 took a pragmatic decision not to pursue the infringement
8 for a longer period of time, and then the --

9 THE PRESIDENT: Well, I can see that that is always
10 possible, but nonetheless, the leniency applicants have
11 an obligation to provide them with all relevant
12 documents.

13 So these are not documents that are somehow hidden
14 in the sense that you need to do a lot of digging to
15 locate them. They are directly identifiable from this
16 list of meetings and that is, indeed, how you have
17 identified them.

18 So anyone in the Commission getting that document,
19 seeing the minutes of the 2004 meeting that you have
20 shown us, if they were thought to be relevant, would
21 say, "Well, we see from this list that you did not start
22 these meetings in 1999. We can see how long they have
23 been going on. Can we have those minutes?"

24 MS. DEMETRIOU: Sir, we are not, with respect, in a position
25 to speculate as to what went on in the Commission

1 investigation. We say, sir -- the other point I was
2 coming to is we say that these documents are relevant --
3 may well be relevant to overcharge, which was not the
4 focus of the Commission's investigation.

5 So we are not in a position at this stage to say
6 that the documents will reveal an earlier infringement.
7 We certainly do not -- we do not know what the
8 documents -- what is in them.

9 So it may well be, sir, that you are correct that
10 the Commission took the view that there was no earlier
11 infringement, but we say, and this is really my final
12 point which I want to develop now, that the documents
13 are relevant in any event to the issues before this
14 Tribunal in terms of analysing the overcharge. It is
15 that point that I want to go on to now --

16 THE PRESIDENT: Yes.

17 MS. DEMETRIOU: -- because that was not an issue that the
18 Commission was concerned with.

19 So as to relevance, we say that the documents are
20 relevant to our pleaded case and we make the following
21 points.

22 First of all, we say that if the documents reveal
23 a lawful information exchange, this is relevant because
24 it helps to show what the market was like in normal
25 lawful circumstances. If we could just turn up the

1 decision, which I know -- I think you have got
2 separately --

3 THE PRESIDENT: Yes.

4 MS. DEMETRIOU: -- but we have in VSW-2, tab 1 -- tab 1.1.
5 If you could turn to recital 39 on page 8
6 {VSW-C2/1.1/8}, you see there that that recital
7 expressly refers to the exchange of information on
8 various matters, including on order intake, delivery
9 periods and stock levels. So, in other words, precisely
10 the type of information that appears to have been
11 exchanged through the TDDB.

12 It was this high degree of transparency in the
13 market that meant that price was one of the remaining
14 uncertainties, and I am picking up the words there from
15 recital 30 on page 9 {VSW-C2/1.1/9} and which meant that
16 the information exchange on price was particularly
17 serious.

18 Now, one of the defendants says that this point does
19 not really get me anywhere, they say, because they say
20 it is possible to look at what information was lawfully
21 being exchanged during the cartel. So my point -- the
22 point I am seeking to make is that it is relevant to
23 understand -- if what was going on was a lawful
24 information exchange, it is relevant to understand what
25 the market looked like normally in order to assess the

1 effect of removing the remaining uncertainty of price.
2 That is relevant to overcharge.

3 What is said against me on that is, "Well, you can
4 do that anyway by looking at the lawful information that
5 was exchanged during the cartel period and that is all
6 addressed in the decision".

7 But the difficulty with this is that it is extremely
8 difficult during the cartel period to draw the line
9 between what was lawful and what was unlawful. We see
10 that at recitals 50 to 52, which are on page 12
11 {VSW-C2/1.1/12}. Yes, the heading is on the previous
12 page on page 11. There is a heading "Further
13 transparency between the Addressees", and what you have
14 in the recitals following that is a combined list of all
15 the types of information that were being exchanged.

16 You see, for example, at the bottom of 51
17 {VSW-C2/1.1/13}:

18 "Furthermore, they exchanged ..."

19 This is under the heading "Nature and scope of the
20 infringement", the last sentences of 51:

21 "Furthermore, they exchanged their respective
22 delivery periods in their country-specific general
23 market forecasts, subdivided by countries and track
24 categories. In addition to meetings, there were regular
25 exchanges of competitively sensitive information by

1 phone and email."

2 I am not going to take the Tribunal to the
3 documents, but you will recall yesterday in the context
4 of the discussion about the binding recitals that there
5 is going to be a live dispute as to whether or not much
6 of this information exchange was lawful, because the
7 Tribunal will recall the DAF schedule which did not
8 admit certain sentences on the basis that this was
9 information that was not commercially sensitive.

10 So there is going to be a significant dispute
11 between the parties as to what was lawful and what was
12 not lawful information exchange. We say that the
13 formalised and long-running exchange of information in
14 advance of the cartel is highly relevant to assessing
15 what the degree of lawful information exchange was
16 already in the market.

17 THE PRESIDENT: Have you seen the notification to the
18 Commission of the arrangement which is referred to in
19 Freshfields' letter?

20 MS. DEMETRIOU: No, we have not seen that.

21 THE PRESIDENT: Might that be helpful, because that sets out
22 what the parties said they were doing and which they
23 considered was non-infringing?

24 MS. DEMETRIOU: Yes, sir, that might well be helpful.

25 I just want to check the date of that because it is

1 referred to, I think --

2 THE PRESIDENT: Is it 1990? (Pause)

3 MS. DEMETRIOU: Yes, 1990, that is right. So you see

4 that --

5 THE PRESIDENT: That is significantly before the start of

6 the cartel period and certainly before any possible

7 period you could use -- your economists could use for

8 a before/during assessment.

9 MS. DEMETRIOU: Sir, I think it would be useful to see that.

10 We have not seen it and so --

11 THE PRESIDENT: That would be an easy document for anyone to

12 find.

13 MS. DEMETRIOU: Well, we say that it is -- it would be

14 useful -- it would be useful, but not sufficient because

15 it provides a snapshot in time. It may well be that

16 when that -- when the negative clearance proceedings did

17 not really go any further that there were then changes.

18 You have seen in the contract that there was provision

19 to make changes to the nature of information that was

20 discussed, that there may well have been changes to the

21 arrangements.

22 THE PRESIDENT: Well, realistically, it is going to be

23 difficult to get proper data for the earlier period

24 because it is so long ago. I think in certainly some of

25 the disclosure applications, it may be it is

1 Dawsongroup, they suggest going back to 1994. Even that
2 may be challenging. I cannot imagine that we are going
3 to authorise disclosure going back before 1990.

4 MS. DEMETRIOU: Sir, the point -- the point in response to
5 that, we would say, is that we do not want to prejudge.
6 So our negotiations or discussions with the defendants
7 about disclosure and the dates are at an early stage.
8 It is not appropriate, in my submission, to prejudge the
9 outcome of that now. The question for the Tribunal is:
10 are these documents relevant? We say yes.

11 THE PRESIDENT: You say it is not appropriate now. You are
12 asking us to order documents going back to 1985.

13 MS. DEMETRIOU: Sir, yes, but a specific and very confined
14 set of minutes --

15 THE PRESIDENT: Yes, but they are not kept in a nice little
16 file, as we understand reading the evidence that has
17 been put in, labelled "TDDDB" so they can just be pulled
18 out and handed over.

19 MS. DEMETRIOU: Sir, we do not know, with respect, because
20 we do not have evidence from all of the defendants in
21 relation to this and the defendants against whom we are
22 pursuing the application have not yet carried out the
23 searches. So they speculate as to what may or may not
24 be required, but we say all we are asking for ultimately
25 are reasonable and proportionate searches.

1 So we say it is open to them to go away and conduct
2 what they say are reasonable and proportionate searches,
3 come back, tell us what they have done and we can have
4 a debate about it. But what we should not have to do is
5 simply accept at face value now without proper evidence,
6 without having made any attempt to look for these
7 documents, that it is going to be disproportionate.

8 THE PRESIDENT: But how can documents from the 1980s
9 possibly be relevant to anything?

10 MS. DEMETRIOU: Well, sir, this is what I am attempting to
11 explain. So we say that they are relevant to, first of
12 all, the degree of transparency in a lawful market, if
13 it turns out that these are lawful information
14 exchanges.

15 THE PRESIDENT: But we are not -- nobody is going to be
16 looking at the 1980s for comparison.

17 MS. DEMETRIOU: Sir, the reason it is relevant is that the
18 Tribunal has seen that an important part of the
19 defendants' case will be that the information exchange
20 found by the Commission was not unlawful or not unlawful
21 in large part.

22 Obviously, I cannot resile from the infringement
23 finding, but you have seen the nature of what they were
24 submitting in their schedule. So they deny or they do
25 not admit that the information exchange was, in large

1 part, commercially sensitive. So we need to understand
2 what the effect of the infringement was, and that
3 involves looking at what was going on anyway in the
4 market.

5 That is -- that is for the point -- that is because
6 of the point set out in the decision, which is that if
7 there are -- if it is already a highly transparent
8 market, then any -- removing the remaining uncertainty
9 as to price was highly, highly significant.

10 So the reason we want to see these documents is to
11 take a view and reach an assessment as to the degree of
12 transparency that existed in the market over a long
13 period of time up to the start of the cartel. So that
14 is one of the reasons why we say they are relevant.

15 The second reason I have already -- sir, you have
16 already put to me in argument that relates to our
17 overcharge analysis, and Mr. Bolster states at
18 paragraph 17 of the statement -- can we pull that up?
19 So that is bundle B, VSW-B, tab --

20 THE PRESIDENT: It is tab OC3.

21 MS. DEMETRIOU: Tab OC3, and this is dealt with at
22 paragraph 17, which is on page 4 {VSW-B/OC3/5}. You can
23 see there that Mr. Bolster says that the expert
24 economists of the claimants are:

25 "Considering (amongst other options) using a form of

1 'before, during and after' analysis which compares
2 prices during the Cartel to prices in the 'clean'
3 periods before and after it."

4 So we want to know that the period before is clean.

5 THE PRESIDENT: I understand that, but the question is what
6 is before? You would not be looking at the 1960s, so
7 what is a reasonable period to go back? That is why
8 I say --

9 MS. DEMETRIOU: Well, sir, we --

10 THE PRESIDENT: -- 1985, 1986, 1987.

11 MS. DEMETRIOU: Sir, I respectfully submit that there is
12 a distinction to be drawn between two things. The first
13 is what period before is relevant to give economic data
14 disclosure on to carry out the economic analysis? We
15 are certainly not, at this stage, suggesting that that
16 should go back for years and years before the cartel.

17 But what we are seeking to ascertain is whether in
18 the period just before the cartel there may be useful
19 data to help inform the economic analysis. With
20 respect, we are not going to be able to ascertain that
21 unless we know that that was a clean period in the sense
22 that it was not affected by any infringement.

23 Now, what we are asking for is not onerous. This is
24 about as specific an application one can get in terms of
25 identifying documents which we know to exist, which we

1 have listed out, and asking for reasonable and
2 proportionate searches. We are certainly not canvassing
3 at this stage a large, wide-ranging disclosure exercise
4 going back years on economic data. We simply want to
5 know whether that is an exercise which is worth doing.
6 The question for the Tribunal is --

7 THE PRESIDENT: Sorry, whether which exercise is worth
8 doing?

9 MS. DEMETRIOU: Whether there is any sense in conducting
10 a before analysis to ascertain the overcharge. Now,
11 a separate question is if the answer to that is "yes",
12 what data do we ask for? I am not addressing it now.

13 We know that DAF is able to provide data going back
14 to 1994. I am certainly not submitting to the Tribunal
15 today that we are going to go back to the 1980s in terms
16 of seeking data from the defendants, but my submission
17 today is more limited.

18 It is that our economists wish to understand, and
19 this is a relevant question, whether there is purpose in
20 seeking any data from before the cartel period, perhaps
21 just before the cartel period, to help inform and make
22 more robust their analysis.

23 Of course, sir, we are in a position -- there is --
24 as in many of these cases, we are in a position of
25 information asymmetry where the defendants' starting

1 point for their economic analysis is much more well
2 informed by ours -- than ours.

3 Now, sir, the final point I want to make as to
4 relevance to our pleaded case is that we say that these
5 documents are relevant to the manner in which the cartel
6 pleaded in our current case operated. So the settlement
7 decision found that over the cartel period, the
8 defendants unlawfully exchanged information. The
9 minutes show a highly organised mechanism for the
10 regular exchange of information between the same
11 defendants.

12 So we say it is very likely that some of the
13 features, including the scope of the information
14 exchanged, which, as we have seen, could be subject to
15 change, very likely that some of those features carried
16 over into the infringement and will assist in providing
17 a better particularisation of the mechanism and the
18 manner in which the cartel operated.

19 THE PRESIDENT: Well, that goes to the 1997 to 1999 minutes,
20 doesn't it?

21 MS. DEMETRIOU: No, sir, it also goes to the minutes before,
22 because this was a very, very well established
23 mechanism. We do not know what is going to be in those
24 minutes. There may well be information in those minutes
25 which we then see -- once matched against documents that

1 we have on the file in relation to the cartel period,
2 which shed light on how the cartel operated, because we
3 are talking about, in both cases, an information
4 exchange.

5 Now, we make a further point in our application,
6 which is the point that the defendants all latch on to,
7 which is that if the minutes do reveal, and we do not
8 know that they are going to, but if they do reveal that
9 there was unlawful conduct in the pre-cartel period,
10 then it is possible, though not certain, that the
11 claimants will amend their case so as to seek losses
12 accordingly.

13 Now, the defendants say, "Well, if that is the
14 reason for seeking these documents, then it is incumbent
15 on the claimants to amend their pleaded case first and
16 then seek the documents". We see this in clear terms --

17 THE PRESIDENT: Yes.

18 MS. DEMETRIOU: -- from Mr. Taylor's statement.

19 THE PRESIDENT: We have seen that.

20 MS. DEMETRIOU: So they accept, Mr. Taylor accepts, that we
21 already have enough information to plead an amended
22 case. That is what they say. But we say that this is
23 not a sensible or proportionate suggestion.

24 We agree that we could have done what Mr. Taylor
25 suggested. Indeed, that avenue is still open to us. We

1 could plead a cartel on the basis of the information we
2 have for an extended period. We agree with Mr. Taylor.

3 But if we make the amendment suggested by Mr. Taylor
4 we will then be entitled to disclosure of a much wider
5 range of documents which are relevant to that revised
6 pleaded case. We certainly would not be confining our
7 disclosure request in those circumstances to the very --
8 in the very tight way we are today.

9 Sir, instead, we have adopted a proportionate
10 approach. The documents which we seek may reveal that
11 the information exchange was lawful, in which case, of
12 course, there would be no question -- of course we would
13 not amend our case if that is what they show -- or they
14 may reveal that there was an unlawful information
15 exchange, in which case, we will have to take a view.
16 We will have to take a view as to whether it was likely
17 to have had a sufficient effect on prices so as to
18 justify the cost to everyone of expanding the scope of
19 our claim.

20 So ultimately, we say that this argument made by the
21 defendants that we should amend first and seek later is
22 counter-intuitive and not in their interests.

23 HODGE MALEK QC: Ms. Demetriou, ordinarily, in deciding
24 whether or not documents are relevant, you look at the
25 pleadings to see what the scope of the issues are

1 between the parties.

2 MS. DEMETRIOU: Yes.

3 HODGE MALEK QC: What you are saying -- in this case, you
4 are saying, "Well, put the pleadings to one side, we
5 want to go a bit further than the ordinary situation";
6 is that right?

7 MS. DEMETRIOU: Sir, I am not advancing this as
8 a free-standing -- you have seen that we have put our
9 case in both ways. So my primary submission is that you
10 look at the pleadings and, for the reasons I have given,
11 it is relevant to our pleaded case. But we say that
12 this is an additional point which weighs in favour of
13 disclosure.

14 Of course, the defendants are right: the orthodox
15 approach is to amend your case first and seek disclosure
16 later, but this is a case where there is an obvious
17 asymmetry of information between the parties. We say it
18 would be wrong in effect to -- for the Tribunal to allow
19 the defendants to sit back and make assertions, as they
20 have done, about the lawfulness of this conduct,
21 assertions which are not based on a review of the
22 documents, and then refuse to disclose them on the basis
23 that we should first plead a case, because we are not --
24 what we have asked for is not onerous and if it is
25 onerous, they can come back and say, "Well, it is not

1 reasonable and proportionate to conduct any more
2 searches".

3 HODGE MALEK QC: If you break down what you need to show,
4 firstly, you need to show that the -- ordinarily, the
5 documents sought are relevant to the issues on the
6 pleadings and then, secondly, you need to show that it
7 would be proportionate to make an order --

8 MS. DEMETRIOU: Yes.

9 HODGE MALEK QC: -- requiring together them to take out
10 proportionate steps. So it is not merely looking at
11 "you have to do what is proportionate"~--.

12 MS. DEMETRIOU: No.

13 HODGE MALEK QC: It is whether it is proportionate to make
14 the order.

15 MS. DEMETRIOU: Yes.

16 HODGE MALEK QC: Then bearing in mind rule 60, you have got
17 to show it is necessary to deal with -- to resolve this
18 case justly, that the documents are disclosed.

19 MS. DEMETRIOU: We say --

20 HODGE MALEK QC: It is not merely just a question of
21 relevance.

22 MS. DEMETRIOU: No, and we accept that, sir, but we say it
23 is necessary to dispose of the case justly, because we
24 have zero visibility about what happened in that period
25 and these are matters which are highly material.

1 HODGE MALEK QC: One thing I would like to know, I am not
2 sure if Mr. Harris can help me, is how much did it
3 actually cost to do the search that you carried out?
4 MR. HARRIS: I can try to find out.
5 HODGE MALEK QC: Try and find out. Yes, just see if your
6 solicitor knows roughly --
7 MR. HARRIS: Perhaps after the next break --
8 HODGE MALEK QC: -- whether it is a small amount or was it
9 quite a burdensome job?
10 MR. HARRIS: -- or the one after that, I can endeavour to
11 find out.
12 HODGE MALEK QC: Yes, because I appreciate if you are trying
13 to look for records which are probably held manually
14 rather than electronically, it can be quite a task to
15 look for what could be a needle in a haystack.
16 I would have thought if these minutes were easily
17 available, certainly the ones in the relevant period,
18 they would have been produced to the Commission as part
19 of their own investigation. Clearly, there is that gap
20 for those three minutes within that period. They are
21 not on the file, but had they been available, one would
22 have thought the Commission would say, "Well, where are
23 these minutes? Let us have a look at them."
24 So if you could just make that enquiry and we will
25 see what the answer is.

1 MR. HARRIS: I will try to find out both; what we did to
2 look and what it cost.

3 HODGE MALEK QC: Yes, exactly.

4 MR. HARRIS: Thank you.

5 MS. DEMETRIOU: Sir, that would be helpful.

6 Sir, as to, Mr. Malek, your point about whether it
7 is proportionate to make the order --

8 HODGE MALEK QC: Yes.

9 MS. DEMETRIOU: -- we say it plainly would be because what
10 we are asking for is reasonable and proportionate
11 searches, and so the two points are obviously linked.
12 If they come back -- at the moment, we are faced with
13 assertions about how it is going to be difficult.

14 HODGE MALEK QC: Yes.

15 MS. DEMETRIOU: We do not have any real evidence about that
16 and we do not have any real evidence as to whether or
17 not they have made any attempt thus far to carry out
18 searches or to investigate what would be involved.

19 HODGE MALEK QC: You are happy that if an order is to be
20 made, it be on a contingent basis. So if the other
21 defendants are carrying out a search in May and they
22 find the documents --

23 MS. DEMETRIOU: Yes.

24 HODGE MALEK QC: -- then that resolves that one way or
25 another and it is not necessary for the other parties to

1 go to the expense of doing it.

2 MS. DEMETRIOU: No, there would be no point, so we are
3 absolutely happy for it to be on a contingent basis.

4 HODGE MALEK QC: Yes.

5 MS. DEMETRIOU: So we simply say that if the defendants that
6 we are pursuing this application against come back and
7 say, "Well, this is what we have done, we have contacted
8 the individual that was -- that represented us or the
9 individuals that represented us during this period and
10 we have taken steps to ascertain where they may have
11 kept documents and come back with some kind of
12 description of what they have done", then there can be
13 a proper debate as to whether that is reasonable and
14 proportionate. The Tribunal may conclude at that point
15 that it is, and that is the end of the matter.

16 All we are saying at this stage is that the Tribunal
17 should not accept their assertions, without having made
18 these attempts, that it would be disproportionate to
19 carry out the searches. There is a mechanism. We are
20 only asking for proportionate searches. There is
21 a mechanism to come back and say to the Tribunal that
22 these are not proportionate.

23 Sir, I have got -- I may have a couple of other
24 points, but can we just pause now for the shorthand
25 writers because I think I have overstepped the time.

1 I do not think I will be much longer, but I would quite
2 like to take stock and have a break now.

3 THE PRESIDENT: Very well. So we will take about five
4 minutes.

5 (11.45 am)

6 (A short break)

7 (12.08 pm)

8 THE PRESIDENT: Yes, Ms. Demetriou.

9 MS. DEMETRIOU: Sir, members of the Tribunal, I can be very
10 brief. I want to take you, for completeness, to the
11 letters sent to us by parties against whom we are not
12 pursuing this application because I think it is relevant
13 for you to see what they have done.

14 THE PRESIDENT: Yes.

15 MS. DEMETRIOU: You will see in VSW bundle D, volume 2,
16 behind tab OC140 --

17 THE PRESIDENT: That is an electronic document.

18 MS. DEMETRIOU: It is VSW-D tab OC140. I am going to try
19 again. I am so sorry that I am not very good at saying
20 these references. I have been working on hard copies
21 and I really apologise. It is {VSW-D1/OC140/1}.

22 (Pause)

23 Good. Now, this is the letter from Quinn Emanuel
24 who -- on behalf of Daimler, and you can see on the
25 second page on page 2 {VSW-D1/OC140/2}:

1 "We explained in our letter dated 8 April that
2 Daimler had undertaken internal enquiries, and that
3 those enquiries were ongoing ... co-operating with your
4 request ... concluded as soon as practicable."

5 Then you then see in the next paragraph:

6 "Daimler has taken reasonable steps to locate the
7 requested material, at not insignificant time and cost.
8 This has included identifying employees who were
9 involved in the TDDB arrangements and may have been
10 present at the meetings or who, because of their
11 position, may have come into possession of the minutes
12 from their predecessors."

13 You see -- I am not going to read it all out.
14 Perhaps the Tribunal could briefly read it so you could
15 see the steps that Daimler have taken.

16 Then in the last paragraph:

17 "Daimler has acted reasonably and proportionately in
18 dealing with a request from your clients ..."

19 Then we see in the same bundle behind tab 153 the
20 letter from Freshfields. I hope that is going to come
21 up. 155, someone has -- I think it is 153. OC155, I am
22 so sorry {VSW-D1/OC155/1}. (Pause)

23 You see here a description -- so that is a letter of
24 25 April, and so you see here at 3:

25 "VT/RT have to date sought to co-operate with your

1 clients by conducting reasonable and proportionate
2 searches to seek to locate the documents requested. The
3 steps ... will be addressed in our evidence, but, in
4 short, they have included searches undertaken by
5 an employee who attended TDDB meetings and who we
6 understand holds some documents previously held by his
7 predecessor, whom we understand was involved in the
8 earliest meetings."

9 You can see --

10 THE PRESIDENT: Sorry to pause. Can we have the second page
11 of that letter? Thank you.

12 MS. DEMETRIOU: I am grateful, sir.

13 So that -- so you can see there that those searches
14 which are described at the top of the page did yield the
15 contract.

16 Then you see in the next paragraph that Freshfields
17 say they are prepared to conduct further searches. Then
18 at paragraph 5, those further searches are identified
19 and described. (Pause)

20 Then if the Tribunal has read that, the final letter
21 is the letter from Slaughter & May behind tab 167, and
22 I hope that is going to come up. That is tab 167.

23 (Pause)

24 We see at paragraph 3 {VSW-D1/167/1}:

25 "... an effort to avoid a contested application ...

1 our clients wrote to explain that they are prepared to
2 conduct further reasonable and proportionate enquiries
3 of individuals who are still employed by MAN or
4 contactable by MAN and who were named in the minutes ...
5 disclosed to your clients ..."

6 Then you see over the page the further steps --
7 sorry, the steps set out at paragraph 4 {VSW-D1/167/2}
8 and the time at sub-paragraph (b), 4(b), that they are
9 going to endeavour to complete the enquiries by 31 May.

10 So, sir, those are what those three defendants have
11 done and our essential point is that -- I am just going
12 to take one example, but when one compares that to, for
13 example, Iveco -- and you see Mr. Farrell's second
14 statement, and this is in VSW-B, tab 9 --

15 THE PRESIDENT: Yes.

16 MS. DEMETRIOU: -- at page 9 {VSW-B/9/9}, so paragraph 37
17 and onwards. You see there in those paragraphs -- and
18 these are the points which are distilled and set out in
19 my learned friend Ms. Bacon's skeleton argument --
20 a description of steps that Iveco say would be extremely
21 onerous and disproportionate to carry out.

22 But our essential point in a nutshell is that this
23 is starting from the wrong starting point, because if
24 these steps -- we are not saying that all of these steps
25 need to be carried out. The Tribunal has seen that

1 where proportionate and reasonable steps have been
2 proposed by the other three defendants, we have been
3 content with that.

4 MR JUSTICE FANCOURT: Are you accepting for the purposes of
5 this application that to take equivalent steps would be
6 reasonable and proportionate searches?

7 MS. DEMETRIOU: We are, sir, yes.

8 MR JUSTICE FANCOURT: Right.

9 MS. DEMETRIOU: So our simple point is that we are not
10 prepared to simply take at face value the fact that
11 steps would be disproportionate when what is being
12 described is perhaps the Rolls-Royce of what might be
13 carried out, because we are not saying that that is
14 necessarily required.

15 We are also saying that in circumstances where we do
16 not know what went on in the Commission investigation
17 and what was covered by leniency statements and so on,
18 that it is not adequate, with respect, for us to simply
19 take at face value that if these had been discoverable
20 and provided, they would have been.

21 So, sir, members of the Tribunal, unless there is
22 anything further, that is what I have to say in opening
23 my application.

24 THE PRESIDENT: Yes. Thank you. Can you pause a moment.

25 (Pause)

1 (The Tribunal conferred)

2 THE PRESIDENT: Yes. Thank you. We have had a chance to
3 consider what has been said. We are not, in any event,
4 prepared to order disclosure or searches for these
5 documents pre-1990.

6 We do think there should be disclosure of the
7 notification to the Commission made in 1990 of the
8 arrangements and we assume that can be found without too
9 much difficulty.

10 We have an open mind at the moment as regards the
11 documents from 1990 to 1999. We particularly want to
12 know, given what has just been said in particular in
13 answer to the question from Mr. Justice Fancourt, how
14 burdensome that would be for the three defendants
15 against whom this is pursued.

16 We also think that the two parties that are still in
17 the process of searching for documents should, in
18 addition to what they are doing, make contact with
19 Mr. Comas and see if he or his company has retained
20 minutes from 1990 onwards, because, as he was engaged by
21 their clients, that would be a very easy way of asking
22 for them and certainly not expensive.

23 So we want to hear from the three companies against
24 whom this is being pursued.

25 MR. HOSKINS: Sir, I am not one of those.

1 THE PRESIDENT: You are not.

2 MR. HOSKINS: But in relation to the notification, we will
3 get a hard copy. I doubt we will have any submissions
4 to make on why it should not be disclosed, but we
5 will -- well, exactly. You are furrowing your brow in
6 the same way that I am. I have just been asked to
7 reserve our position. We will look at it, if we have
8 any points to make.

9 THE PRESIDENT: Yes.

10 MR. HOSKINS: But I am not anticipating any problems.

11 THE PRESIDENT: Well, we will give you liberty to apply, but
12 in principle, it will be ordered -- well, you will be
13 ordered to produce them, subject to --

14 MR. HOSKINS: I understand that, sir, if we have anything to
15 say, I need to say it very quickly to you.

16 THE PRESIDENT: Yes.

17 So who wants to go first?

18 MR. JOWELL: Just on that point, we are also not concerned
19 with the main application, but on the notification, my
20 immediate instructions are that we do not have a copy
21 immediately available.

22 THE PRESIDENT: Yes. Well, it was Freshfields who
23 apparently handled it; is that right?

24 MR. HOSKINS: That is right. We can certainly get a copy.

25 THE PRESIDENT: Yes, I am sure they will have a copy.

1 MR. JOWELL: It would be against them, but not against --

2 THE PRESIDENT: Yes, it is -- well, yes, it can be as

3 against that company.

4 MR. JOWELL: I am grateful.

5 THE PRESIDENT: It may be we do not need an order at all.

6 MR. JOWELL: No.

7 MS. DEMETRIOU: Sir, just one point of detail, which is we

8 are grateful about the indication about contacting

9 Comas, but could that extend to Best, because there was

10 a transfer at some stage between the two firms?

11 THE PRESIDENT: Well, Mr. Best retired in 2000 and we assume

12 his records would have gone over to Mr. Comas who used

13 to work with him and continued.

14 MS. DEMETRIOU: Yes.

15 THE PRESIDENT: So I think, as far as we are concerned,

16 Mr. Comas is the person to contact.

17 Yes, Ms. Bacon for Iveco, yes.

18 MS. BACON: I think we do have some difficulty in responding

19 to the Tribunal's last question about how burdensome it

20 would be to do the same as the other defendants when we

21 do not exactly know what those defendants have done.

22 What we can -- what we have done is set out in

23 Mr. Farrell's witness statement what we would have

24 proposed to do. We are grateful for the confirmation by

25 Ms. Demetriou that she would not be expecting us to do

1 all of that, but it is not clear what she would want us
2 to do.

3 What I was proposing to do was to address the
4 Tribunal on three points. One is relevance, the second
5 is the proportionality, and we would have to look at
6 Mr. Farrell's witness statement, and the third is the
7 proposal for a contingent order.

8 If I could just give you the spoiler of my
9 submission, which would be I think that a contingent
10 order would be very difficult, certainly if it were made
11 in anything resembling the terms of the current draft
12 order because we -- there would be no easy way of
13 determining, on the current wording of the draft order,
14 whether certain things had been found or not.

15 For example, the current draft order refers to both
16 notes and minutes. So, for example, if minutes are
17 found by some of the other defendants, but not notes,
18 are then we going to be expected to go away and try and
19 find notes that may have been taken of those meetings?
20 That is just one practical proposal.

21 My proposal would be, if I can just trail it now,
22 that after the other defendants have done the exercise
23 and provided whatever they are going to provide, then
24 the issue can be revisited in the same way that the
25 Daily's issue is going to be revisited in any event when

1 further information has been exchanged between the
2 parties. The issue can be revisited then, we can see
3 what has been provided and then the claimants can take
4 a view on whether anything more from us is required and,
5 if so, what, rather than having a rather open-ended
6 order at this stage.

7 (The Tribunal conferred)

8 THE PRESIDENT: On your point about notes and minutes, if
9 minutes are produced, we do not think notes are
10 required.

11 MS. BACON: I see. So it would not be made in the terms of
12 the current order, it would simply be related to
13 minutes. That is helpful.

14 But I would still -- I would still make the point
15 that it would be appropriate to actually revisit the
16 question of what is needed when we see what has been
17 provided.

18 Of course, by way of another example, if it turns
19 out that each of the sets of minutes from 1990 onwards
20 is provided except for one, are we going to be required
21 to go and interview up to 12 current employees, or even
22 maybe others, to try and find out whether those have --
23 any of those have the one set of missing minutes, if we
24 do in fact -- if there is a complete picture of all the
25 others? So --

1 THE PRESIDENT: I think the point is it is one a year, is it
2 not?

3 MS. BACON: Yes.

4 THE PRESIDENT: One meeting a year. If, say, 1996 is
5 missing, then you would be expected to identify who, if
6 anyone, from Iveco went to the 1996 meeting and then
7 speak to that person.

8 MS. BACON: If that could be easily determined, yes.

9 THE PRESIDENT: If you say that is terribly onerous, we will
10 hear you, but --

11 MS. BACON: I will take instructions on that point. If that
12 is the scope of what is now being proposed, that is
13 considerably more limited than what was sought in the
14 application and, indeed, set out in the draft order.

15 But perhaps I ought to start with the relevance
16 issue and we -- as you will have seen from the letters
17 that you were just shown by Ms. Demetriou --

18 THE PRESIDENT: Yes.

19 MS. BACON: -- the defendants in no way accepted the
20 relevance of what was to being sought from them and we
21 do not accept that any of this is relevant.

22 THE PRESIDENT: Yes.

23 MS. BACON: There are three bases on which relevance is
24 advanced.

25 The first is that the minutes might help to show

1 what the market was like in lawful circumstances. Our
2 difficulty with that is we have got a number of minutes
3 already. They occupy, together with the contract and
4 various other documents, about 86 pages of the bundle,
5 of which you have seen some of those.

6 If that submission was being made, it could have
7 been made by reference to those documents, but we have
8 not been taken to any particular aspect of those
9 documents. To make the submission, this is
10 the particular point that this document shows and this
11 is the point in our pleading to which it goes.

12 I am afraid I search in vain for anything in the
13 pleaded case which would or might be affected by any of
14 these minutes. That simply is not there. Vague
15 comments about transparency really do not do it because
16 transparency is a comment that is simply made in the
17 decision, but there is no point in the pleaded case
18 which is said to be in dispute which it is suggested is
19 advanced by anything in any of these 86 pages, which
20 they could have done, and we do not see anything there.

21 To just show you what was said in some of those
22 actual minutes, I think it would be helpful for the
23 Tribunal to turn up bundle VSW-C1, and it is OC. If
24 I could just show you some of what was said about the
25 nature of this arrangement and this is at -- this is

1 a comment that -- this is a document, if you would like
2 to turn to page 49 of OC1 {VSW-C1/OC1/49}.

3 There is an annex which sets out a legal comment and
4 the legal comment is made is precisely because some of
5 the participants had expressed concerns. In response to
6 that, there was a document produced that was annexed to
7 this particular minute.

8 If you turn to page 50 {VSW-C1/OC1/49}, there is
9 quite a good description of what was and what was not
10 being exchanged. At the top of page 50, you see:

11 "Currently, the participating companies supply
12 Best/Comas with country-specific data on the delivery of
13 trucks, buses ... Best/Comas compiles and anonymises
14 these data and makes them available to the participants
15 on a country-specific basis."

16 The participants then get them two months later.

17 Then there is a comment about this being notified to
18 the Commission and Best being informed that the
19 Commission have then closed the matter.

20 Then you get a comment on all of this if you then
21 look further down the page at section 2(a), and the
22 second bullet reveals what can be deduced from these
23 data, and you see in the middle of that:

24 "These data are such that they may have an immediate
25 influence on the respective marketing decisions ..."

1 Which is the planned expansion of the data:

2 "... while the current system has so far been only
3 able to serve only as a basis for medium term
4 planning ..."

5 Then at (b):

6 "the participants cannot collude in activities
7 concerning common pricing, common production quantities
8 and/or market sharing without further arrangements."

9 Then on the next page, that is page 51
10 {VSW-C1/OC1/51}, the objective of the information is set
11 out at the top, and then in the fourth paragraph:

12 "The data which are exchanged ... do not allow any
13 conclusions concerning the future behaviour of one of
14 the participants."

15 Then a bit further down:

16 "They cannot learn which participant has gained or
17 lost market shares during the reporting period. The
18 data are not what is called identifying data."

19 There is a point about the way that the information
20 is gathered. Then in the fifth paragraph, halfway down:

21 "The data ... do not make it possible to draw any
22 conclusions concerning the prices and/or the
23 success/failure of individual models in the market."

24 At the end of that paragraph:

25 "... there is no risk that the information learned

1 from the market information system alone will make price
2 competition ... with one another impossible."

3 So what is being said here is that this is all very
4 high-level data. It is nothing to do with price at all,
5 it will not affect price competition, and then will not
6 allow conclusions concerning the future behaviour of any
7 of the participants. So it is expressly excluding the
8 sort of arrangements that were the subject of the
9 Commission's infringement decision.

10 In those circumstances, it really is difficult to
11 see how that can have any bearing at all, even by way of
12 looking at a counterfactual case, on the issues in
13 dispute in these proceedings. It was a very different
14 kind of arrangement.

15 So for that reason, it is all the more important
16 that if a point is made about the relevance, it is made
17 by reference to the documents that we have already by
18 way of example and by reference back to the pleaded
19 case, of which we have heard nothing.

20 The second basis on which relevance is advanced is
21 a point about the economists. Again, this is very
22 vague. We have no expert report confirming what
23 information might be derived from these minutes, again
24 by reference to the 86 pages of documents that we
25 already have in the bundles.

1 So there is no explanation of how this could be
2 relevant and simply, again, vague statements made by
3 Mr. Bolster on the basis of what he has been told by the
4 economists. Even leaving aside the vagueness of that,
5 it is very difficult to see how anything to do with this
6 very different arrangement, that has no bearing on price
7 whatsoever, could help the economists in their
8 counterfactual case, which is going to have to look at
9 the files.

10 The third basis on which relevance is advanced is
11 that it might shed light on how this cartel operated.
12 Again, the answer to that is: how is that going to be
13 the case when what is said is that this is a very
14 different arrangement which did not concern price
15 whatsoever and did not allow the participants to gather
16 any idea about the behaviour of individual participants?

17 It was simply an aggregated reporting mechanism
18 about truck volumes which enabled them to see how trends
19 in the overall market were developing. Nothing at all
20 to do with the subject of the infringement decision.

21 So given that and given that there has been nothing
22 drawing from these documents any threads that might
23 relate to the pleaded case, we say that the test for
24 relevance simply is not satisfied. It just does not get
25 over the first hurdle and the matter should, therefore,

1 stop there.

2 But even leaving that aside, there is then the
3 question of what has to be done. You have seen what
4 Mr. Farrell has said. In our case, and this may not be
5 the case for some of the others, in our case, the
6 relevant individuals are not located in the UK. We
7 think that there are up to 12 employees that would have
8 to be identified and interviewed. They are in Italy and
9 we would think that would take about six weeks to
10 conduct those interviews and ask for that information to
11 be sought and then reviewed because of the --

12 THE PRESIDENT: The fact that they are in Italy, that has
13 got no bearing on this, does it?

14 MS. BACON: Well, it is not as easy as simply going along to
15 somebody's office and seeing them there and then.

16 THE PRESIDENT: You can go along to somebody's office in
17 Milan. I cannot see that is of any relevance.

18 MS. BACON: It is a more burdensome exercise than if the
19 individuals had been in this jurisdiction. But there is
20 a question mark as to whether one should --

21 THE PRESIDENT: This is international litigation. It is the
22 norm, is not it?

23 MS. BACON: Yes. But there is a question mark as to whether
24 we should be put to that expense, given the relevance is
25 so tenuously explained. In our submission, these are

1 simply not relevant at all. We do have them -- we do
2 have a number of these minutes already.

3 Then as to the contingent order, I have trailed my
4 submission. Rather than making an order at this stage
5 which then hangs over us, I think it would be
6 appropriate for the claimants to come back after they
7 have got such further minutes as may be provided. Now,
8 if at that point --

9 THE PRESIDENT: What is the point of that? I mean, if they
10 get -- we have heard a lot of argument about this. We
11 know how many minutes there are. There are a small
12 number. If they get certain years and they are missing
13 1996, what is the point of them coming back and
14 repeating the arguments we have just heard?

15 MS. BACON: Well, because they will then be able to assess
16 whether there is anything in these that they need us to
17 search for.

18 THE PRESIDENT: They will not know what is in the 1996
19 minutes because they have not got it.

20 MS. BACON: If it is just the 1996 that are missing and then
21 they can see all of the others and they can actually see
22 at that stage that there really is not -- there is not
23 any smoking gun in any of this --

24 THE PRESIDENT: I am not sure it is about a smoking gun.
25 They want to -- given what is said is in the decision

1 that other commercially sensitive information such as
2 order intake and delivery times were exchanged and that
3 that, they say, is part of the infringement having
4 an effect on pricing decisions, even though the actual
5 information exchanged is not price information, to
6 balance that against an understanding of what sort of
7 non-price information was exchanged before the cartel.

8 MS. BACON: Yes, well --

9 THE PRESIDENT: That is what they are seeking to do. For
10 the years just before the cartel, one can see that might
11 be relevant.

12 MS. BACON: What this is asking for is going back to 1990,
13 which, by now, is some time away.

14 THE PRESIDENT: I said 1990 because I thought that 1990 was
15 the date of notification. I thought I picked that up
16 somewhere, but from the document you have just shown us,
17 it seems to have been -- there was -- or at least
18 a later notification in December 1992.

19 MS. BACON: Yes, there seems to have been some later
20 discussion with the Commission --

21 THE PRESIDENT: So it may be that on that basis, it is
22 really 1993 onwards that we are looking at.

23 MS. BACON: That would certainly narrow the time period. It
24 may be that following the other defendants' searches,
25 all this is uncovered. I am grateful for the Tribunal's

1 indication that once minutes have been found, notes will
2 not be -- will not then be required.

3 THE PRESIDENT: Not under --

4 MS. BACON: Yes.

5 THE PRESIDENT: -- the order we make now. If there is
6 something in the minutes that prompts further
7 investigation --

8 MS. BACON: Then they will have to come back, yes.

9 THE PRESIDENT: -- there will have to be another
10 application.

11 MS. BACON: But I do maintain the position that we have set
12 out on relevance. Sir, you referred to some statements
13 in the decision, but at the end of the day, I maintain
14 the point it needs to come back to their pleaded case.
15 What they have not done is identify anything in their
16 pleaded case.

17 THE PRESIDENT: Yes, we have got your point. We need to
18 hear -- who is next? Mr. Pickford for DAF.

19 MR. PICKFORD: Thank you, sir. Sir, we are in a different
20 position slightly from Iveco in that although we agree
21 with their submission on the relevance of the documents
22 in the 1997 to 1999 period, we do not oppose a search
23 for that period, because we are able to see that it at
24 least coincides with the period of the admitted conduct.
25 So there is some sense in looking for those documents,

1 albeit --

2 THE PRESIDENT: Yes.

3 MR. PICKFORD: -- we do not disagree with the points that
4 have been made by Ms. Bacon.

5 But we do oppose the order prior to 1997, and we do
6 so for very similar reasons to Ms. Bacon. So I can try
7 to be swift, but there are a few supplementary points
8 I would like to make.

9 Our starting point is that the exchanges that we are
10 now concerned with were a formal, multilateral,
11 commercial agreement. They were not informal
12 information exchanges, which is the subject matter of
13 the admitted conduct. It relates to delivery
14 information and not price. We sought negative clearance
15 from the Commission in relation to those arrangements.
16 So they are an entirely different type of arrangement to
17 those that form the basis of the Commission's decision.

18 If we could go, please, to the notes that
19 Ms. Demetriou took us to, to very briefly just flesh
20 that out a little bit more because a slightly misleading
21 impression might have been gained by the Tribunal in
22 relation to the reasons why legal advice was taken.

23 The reference is VSW-C1, tab OC1, page 17, please
24 {VSW-C1/OC1/17}. (Pause)

25 THE PRESIDENT: Those are the minutes of 13 to

1 15 September 2000?

2 MR. PICKFORD: That is right. The reason why I start here
3 is because these are the minutes when Mr. Comas is
4 taking over from Mr. Best. Mr. Best is retiring.

5 THE PRESIDENT: Yes.

6 MR. PICKFORD: Mr. Comas is taking over. What is clear is
7 that with the new broom, new projects are being
8 considered. So one sees at 2.1:

9 "Mr. Comas outlined his proposal to continue to
10 operate the TDDB."

11 Then:

12 "He proposed to continue to operate for the
13 remainder of the 2000 free of charge."

14 Then he goes on. Over the page at 2.1.1
15 {VSW-C1/OC1/18}, we see a "Review of new projects
16 started in 2000" and then "Other possible projects" over
17 the page.

18 So these are various new projects that are being
19 considered for the future. It does not particularly
20 matter what the detail of those is for my submission.
21 It is merely to make the point that there were
22 existing --

23 THE PRESIDENT: Yes.

24 MR. PICKFORD: -- types of information exchange and then
25 there were new things that were being proposed.

1 If we then go on to page 24 {VSW-C1/OC1/24}, you see
2 a progress meeting of 23 to 24 October. At 3.1 on the
3 facing page, page 25 {VSW-C1/OC1/25}, there is
4 a proposal to change from quarterly to monthly exchanges
5 of data:

6 "A big majority of represented companies expressed
7 a need about TDDB change from a quarterly to a monthly
8 exchange."

9 So that is something that is being proposed and
10 suggested.

11 THE PRESIDENT: Yes.

12 MR. PICKFORD: Then if we can skip through, please, to
13 page 45 {VSW-C1/OC1/45}, we see meeting notes from 2004
14 which are considering legal aspects. So Ms. Demetriou
15 went to this and the Tribunal might have gained the
16 impression that the legal aspects -- the concern was
17 that what we were already doing, we thought, was
18 unlawful and, therefore, that -- she uses that to
19 support the idea that there is something here to
20 investigate, whereas what actually happened is that we
21 were concerned to consider the lawfulness of the new
22 projects.

23 So one sees "Legal aspects":

24 "After a short review of articles 81 and 82 and
25 a brief review of council regulation 1/2003,

1 Mr. Willem Boon explained that his legal department had
2 changed its position after reading Mr. Amador's memo.
3 Now they agree with Scania's lawyer not to proceed or
4 continue with new projects."

5 Mr. Boon is a representative of DAF Trucks, one sees
6 from the list of those present at the top.

7 Then one sees a bit of push back from Mr. Comas, who
8 is obviously concerned that there is an income stream at
9 risk here. He:

10 "Also tried to show that the conclusions on new
11 projects were without solid foundations and were based
12 on fears and possible incorrect interpretation."

13 So that was Mr. Comas' view.

14 But if you turn over, page 2 {VSW-C1/OC1/46}, it is
15 then said:

16 "Even if they are agreed, some participants
17 explained that they are blocked by internal legal
18 decisions and that the possible fines are too high.

19 "Faced with the decision of the majority and
20 understanding their position, Comas & Co accepted to be
21 dependent on expert legal interpretation each time that
22 a new project will be raised and a doubt of infringement
23 of the law exists."

24 Then you see over the page {VSW-C1/OC1/47} under
25 "Monthly data exchange", about a third of the way down:

1 "Due to legal circumstance this point was deleted
2 and will not be presented again until any new legal
3 event or request from one of the participants arrives."

4 So the monthly suggestion was not adopted because of
5 those concerns.

6 One then gets to the annex at page 49 that Ms. Bacon
7 took you to. I would just like to emphasise again, if
8 one turns over to page 50 {VSW-C1/OC1/50}, the third
9 paragraph down, underscoring the point that I have been
10 making that the assessment that was made of the existing
11 arrangements, which was what Ms. Bacon took you through,
12 is that they were fine, but there was a concern that the
13 new arrangements might not be and that is why they were
14 not adopted. One sees that very clearly brought out in
15 the paragraph:

16 "Asked by Best/Comas, the Brussels-based law office
17 Nauta Dutilh ..."

18 So, sir, that is the context for the arrangements
19 that we are considering.

20 Then it is said by Mr. Bolster that there were
21 various reasons why these are relevant to the claimants'
22 currently pleaded claim. If we can take his evidence
23 up, please. It is in the bundle at {VSW-B/OC3/3}.

24 So his first reason he gives at paragraph 13 is the
25 documents would cast light on the degree of transparency

1 that pertained to the market, absent the cartel. But as
2 Ms. Bacon has said, the reason for that is entirely
3 unexplained. For our part, we do not understand how
4 those documents could do that. Certainly the documents
5 that we are arguing about, which, of course, are the
6 pre-1997 ones, because we are willing to give 1997 or at
7 least search for 1997 onwards --

8 THE PRESIDENT: Yes.

9 MR. PICKFORD: -- we cannot see how they can be of any
10 relevance for that issue.

11 The second point on relevance that is alleged is
12 that they may nonetheless shed light on the origins of
13 the cartel. But, again, this, as Ms. Bacon pointed out,
14 is an exceptionally speculative basis for alleging
15 relevance. It is quite unclear to us what is really
16 meant by this and, in particular, how it is going to
17 help the VSW claimants prove their loss.

18 As I have explained, these arrangements are clearly
19 of an entirely different nature to the arrangements that
20 ultimately concerned the Commission and which led to the
21 decision.

22 THE PRESIDENT: Is the relevance that he is referring to not
23 essentially this: if you look at the decision and the
24 section on the transparency of the trucks market, which
25 is recital 29 where there is very general description of

1 the sort of exchange of data that takes place.

2 Further -- the middle of recital 29:

3 "Furthermore, truck producers and their distributor
4 companies had regular exchanges within various industry
5 associations. Within some of these associations data on
6 order intake and delivery periods or stock levels was
7 exchanged."

8 Then recital 30:

9 "As a result, one of the remaining uncertainties for
10 the Addressees... was the intentions [of competing truck
11 producers] with regard to their gross prices."

12 It may well be that that sentence in recital 29 had
13 in mind this very association, among others, these
14 meetings of which we are seeing the minutes, although
15 the Commission did not have the minutes, but knew about
16 it.

17 The relevance, as I understand it, is to really just
18 understand a bit more about exactly what information was
19 being exchanged lawfully, and to what extent. On that
20 basis, one can see to what extent it meant that exchange
21 of information on gross prices would have an effect on
22 these companies in the market, just to understand really
23 how transparent the market was.

24 MR. PICKFORD: Sir, I have --

25 THE PRESIDENT: One can take it simply on the basis of that

1 sentence, but it is not purporting to be clear or
2 complete. Here is a rather convenient source on which
3 you can just get a better picture of what took place
4 before the cartel started.

5 MR. PICKFORD: Well, sir, I have three points to make in
6 response to that. The --

7 THE PRESIDENT: I think, yes, before you say that,
8 Ms. Demetriou, is that a fair description of one of
9 the -- I know you put it otherwise -- but of one of the
10 grounds you are relying on?

11 MS. DEMETRIOU: That is precisely what we say.

12 THE PRESIDENT: Yes.

13 MR. PICKFORD: Sir, the points in response to that, firstly,
14 are the period, because, as I understand the point that
15 has been put to me, that is context for the period over
16 which the admitted conduct took place, and we are
17 prepared to give documents over that period.

18 THE PRESIDENT: No, I am sorry, it is -- well, it is partly
19 context for the -- I see that for the period, but it is
20 also looking at how things were before to see whether
21 what continued had any -- to what extent it might have
22 a pricing effect.

23 MR. PICKFORD: Well, sir, there are two points to make in
24 response to that, which is, firstly, there is no support
25 for any of this from any economist that has been

1 provided by the VSW claimants. But what we do know is
2 the approach that they are, in fact, intending to take
3 in relation to the econometrics, which goes directly to
4 the point, sir, that you are concerned with, which is:
5 what is the effect of this ultimately on price?

6 Because that relates to the point that Mr. Bolster
7 then goes on to make in paragraph 17(a) {VSW-B/OC3/5} of
8 his witness statements, which is this will be helpful
9 for a before and after analysis, which, as I understand
10 it, is effectively a quantitative expression, the point
11 that you, sir, are putting to me.

12 THE PRESIDENT: Yes.

13 MR. PICKFORD: The simple point to make in relation to that
14 is that that might be a good point were the claimants
15 intending to undertake an analysis of prices prior
16 to 1997. But they have confirmed to us in
17 correspondence that that is not the data that they seek
18 for the purposes of their economic analysis.

19 If one goes, please, to the letter of Hausfeld of
20 28 March 2019 which is contained in bundle VSW-C1,
21 tab 7.

22 THE PRESIDENT: VSW-C1?

23 MR. PICKFORD: Tab 7.

24 THE PRESIDENT: No, I think that is not the right reference.

25 MR. PICKFORD: So I will try again {VSW-C1/OC7/1}.

1 THE PRESIDENT: So that is C1 -- that will be C1.2 -- C7.

2 MR. PICKFORD: This is said to contain outer confidentiality
3 ring information.

4 THE PRESIDENT: What page?

5 MR. PICKFORD: So it is page 30 of the Magnum numbering,
6 paragraph 11 {VSW-C1/OC7/30}.

7 THE PRESIDENT: That is not this. That is not OC7.

8 MR. PICKFORD: Sir, so what I am looking at is I have what
9 I intend to be the Magnum references in the bottom
10 right-hand corner of the various pages.

11 THE PRESIDENT: Yes.

12 MR. PICKFORD: I have a reference which is VSW-C1, tab OC7
13 and then page 30. So we have now got it on the screen.

14 THE PRESIDENT: Ah, very good.

15 MR. PICKFORD: It is page 4 of the Hausfeld letter of
16 28 March.

17 THE PRESIDENT: Yes, page 26, I think, yes.

18 MR. PICKFORD: Yes, page 26. There is a multiplicity of
19 different page numberings.

20 THE PRESIDENT: Yes. (Pause)

21 MR. PICKFORD: Sir, I propose -- unless anyone wishes to
22 stop me, I am going to read some of the first and second
23 sentences because I cannot see for the life of me that
24 any of this is confidential, notwithstanding where it is
25 to be found.

1 THE PRESIDENT: Yes.

2 MR. PICKFORD: Sir, the issue here is what economic evidence
3 the parties are going to be exchanging in order to carry
4 out the various economic analyses that they wish to do.
5 There has been some debate up to this point about how
6 far back in time --

7 THE PRESIDENT: What I do not understand -- if I may
8 interrupt you, that is a letter of 28 March.
9 Mr. Bolster makes a witness statement on 18 April and he
10 says that the expert economist, CG Europe, are
11 considering using a form of before, during, after
12 analysis. So that is after this letter, and says the
13 economists are considering whether to use the before
14 period.

15 MR. PICKFORD: Yes. Well, our point is that is not
16 consistent with what Hausfeld have told us in
17 correspondence, and Ms. Edwards put this in her
18 evidence. She referred to this letter and said, "Well,
19 it is all very well to say that they want it for
20 a before analysis, but we have already agreed as regards
21 the time period. We are not interested in data before
22 because that is what the claimants are telling us."
23 There has not been any response to that to say, "No,
24 that is wrong".

25 THE PRESIDENT: Ms. Demetriou, what is the position? I am a

1 bit --

2 MS. DEMETRIOU: Sir, the position is that the economists
3 are, as Mr. Bolster says, actively considering whether
4 to conduct an analysis before. The context of this
5 letter is, of course, that it is seeking disclosure. We
6 are obviously now not in a position to seek pre-cartel
7 disclosure because we do not know what the position was,
8 whether it is a clean period.

9 Now, if we get the minutes and we can take a view,
10 then obviously we will revisit that, but this is not
11 intended to be a concession once and for all that we do
12 not think that this is relevant data. The position is
13 as in --

14 THE PRESIDENT: This is about your present disclosure
15 request?

16 MS. DEMETRIOU: It is our present disclosure request.

17 THE PRESIDENT: Yes.

18 MR. PICKFORD: Sir, our point is that given the nature of
19 the economic analysis that they presently wish to engage
20 in, which is based on data from 1997, that does not
21 justify going back to try to understand this very vague
22 idea of the origins of transparency in the market prior
23 to 1997. (Pause)

24 The final point to make: I do not think I need to go
25 back to Mr. Bolster's statement, I can just summarise

1 what he says. He goes on to say in paragraphs 17 and
2 17(b) {VSW-B/OC3/5} effectively that the pre-1997
3 infringement -- sorry, a pre-1997 infringement, he says
4 that there could be one, could be relevant to post-1997
5 damages.

6 Our answer to that is that cannot be right. If
7 there was a pre-1997 infringement, they need to plead
8 that out. Whatever the consequences of that will be
9 will flow from that prior infringement. It is to
10 confuse the two claims to try -- to conflate them in
11 that way.

12 So, sir, those are the additional submissions that
13 I wanted to make --

14 THE PRESIDENT: Yes.

15 MR. PICKFORD: -- on the question of relevance.

16 I have very little to add to the debate on the
17 question of proportionality, merely to say this.
18 Certainly, as was adverted to by the Tribunal, if we
19 were to have to search for these documents, I understand
20 that it would be a paper-based search, given how far we
21 are going back.

22 It is also relevant to bear in mind that DAF went
23 insolvent in 1993 to 1994 and that must have some, we
24 would say, likely bearing on the chance of there being
25 any documents that could be conceivably located before

1 then.

2 THE PRESIDENT: Yes.

3 MR. PICKFORD: Sir, those are my additional submissions.

4 THE PRESIDENT: Mr. Pobjoy for Scania.

5 MR. POBJOY: That is right. Sir, I can take this very
6 quickly.

7 Scania is in the same position as Iveco in that we
8 oppose disclosure for the entire period. We endorse the
9 submissions made by Iveco and DAF on the issue of
10 relevance.

11 As to the Tribunal's question as to how burdensome
12 it would be for Scania to undertake this task, we share
13 the difficulty that was identified by Ms. Bacon; that we
14 do not know precisely what -- what exercise was
15 undertaken by the other defendants who have agreed. So
16 we do not know how difficult that would be.

17 In terms of what we had envisaged would be required,
18 we had envisaged it would have to be a paper-based
19 search. It would have to identify the relevant
20 individuals or the subsequent individuals in those posts
21 and then to go on and undertake those searches. That
22 would be no small undertaking, we say.

23 THE PRESIDENT: I do struggle with that, Mr. Pobjoy. How
24 big an undertaking is it? You have got a minute from
25 2000 of this committee or association or whatever it is

1 called, so you look at that and you see that Mr. -- four
2 people from Scania were there.

3 MR. POBJOY: That is right.

4 THE PRESIDENT: So you contact those four people and say,
5 "Was that your first meeting or have you been going
6 before?" They will tell you that. You ask them, "How
7 long have you been going?" or if -- they will tell you.
8 You ask them, "If you took over from someone else, who
9 was it?" You then ask them, "Well, have you kept the
10 minutes or where have you filed them in the Scania
11 offices?" Now, why is that so phenomenally burdensome?

12 MR. POBJOY: Sir, I accept that is the first part of the
13 task, which is the identification of the relevant
14 individuals. It is then the paper-based search that
15 will be required for those individuals.

16 THE PRESIDENT: They would have got the minutes and they
17 tell you, if they can, where they would have filed them,
18 and then you go and look for that file. If it turns out
19 all their files have been deposited at some great
20 archive in Gothenburg and it would -- in lots and lots
21 of filing cabinets and you have not the slightest idea
22 where it might be, well, then you will say that is not
23 a proportionate search any more. But the first step of
24 that is surely not burdensome.

25 MR. POBJOY: I accept that, and I am grateful for the

1 indication that if we are required to do the latter
2 task, that that would be disproportionate. But --
3 THE PRESIDENT: Yes. It would cost less, I suspect, than
4 the combined fees of everyone who is arguing this
5 case --
6 MR. POBJOY: That may well be right.
7 THE PRESIDENT: -- or this issue.
8 MR. POBJOY: But I have no further submissions.
9 THE PRESIDENT: Yes, Mr. Harris, are you able to help with
10 the questions Mr. Malek posed?
11 MR. HARRIS: Yes. It may be helpful to just go back to
12 tab 140, which is in the VSW bundle D1, volume 2 of 2
13 {VSW-D1/OC140/1}. That is the letter we had before.
14 THE PRESIDENT: Just a minute. That is electronic bundle
15 for us. It is VSW --
16 MR. HARRIS: Bundle D1, volume 2 of 2. It is a whole series
17 of correspondence tabs, and it is tab 140.
18 THE PRESIDENT: Just pause for a moment.
19 MR. HARRIS: Thank you. (Pause)
20 THE PRESIDENT: Well, we could adjourn now. It would be
21 good to finish this if we can find that document.
22 MR. HARRIS: We had it before.
23 MS. DEMETRIOU: Yes.
24 MR. HARRIS: It was the one that Ms. Demetriou took us to
25 before.

1 MS. DEMETRIOU: It was {VSW-D1/OC140/1}.

2 MR. HARRIS: Thank you.

3 THE PRESIDENT: Yes, we have got it.

4 MR. HARRIS: Very good. It is the second page
5 {VSW-D1/OC140/2}, and the paragraph -- second paragraph
6 down beginning, "Daimler has taken reasonable steps ..."
7 It does what it says on the tin. It was:
8 "At not insignificant time and cost. This has
9 included identifying employees who were involved ..."
10 Perhaps if you just refresh your memory as to that
11 and then I can add some more detail.

12 THE PRESIDENT: Shall we just reread that paragraph?

13 MR. HARRIS: Yes, please. (Pause)

14 THE PRESIDENT: Yes.

15 MR. HARRIS: So the additional details I can add are as
16 follows. That this involved five different Daimler
17 employees and, as it says in this paragraph, both a
18 paper-based search and an electronic search, including
19 some keyword searches. The -- although I cannot put
20 a cost on it, because I have simply not had the
21 opportunity -- enough time --

22 THE PRESIDENT: Yes.

23 MR. HARRIS: -- I can say that my instructions are that the
24 entire process took 11 and a half weeks so as to cover
25 the five people, doing the hard and electronic,

1 including, as you can see, some of them have sort of
2 moved on and what have you.

3 THE PRESIDENT: Yes.

4 MR. HARRIS: Then it has been described by the solicitors in
5 this letter as at not insignificant time and cost.

6 So those are the further details that I can provide.

7 THE PRESIDENT: Yes.

8 MR. HARRIS: I hope that is of some assistance.

9 THE PRESIDENT: Yes, thank you.

10 MS. DEMETRIOU: Sir, I can see the time. I have only one
11 point of factual clarification, if I may, by way of
12 reply.

13 THE PRESIDENT: Yes.

14 MS. DEMETRIOU: It relates to the document at VSW-C1,
15 tab 1 -- tab OC1. VSW-C1, tab OC1.

16 THE PRESIDENT: At page?

17 MS. DEMETRIOU: So at page -- initially page 49
18 {VSW-C1/OC1/49}.

19 THE PRESIDENT: Is this the legal advice?

20 MS. DEMETRIOU: Yes, exactly.

21 So you will recall that Ms. Bacon and then
22 Mr. Pickford took you to this in some detail. The
23 submission made by Ms. Bacon was -- she essentially
24 presented the document, which goes on at page 50 and 51
25 to 52, as indicating the lawfulness of the agreement.

1 The simple point of factual clarification I wish to
2 make is if you turn to page 45 in the same document
3 {VSW-C1/OC1/45}, you can see the context of this. So
4 you can see that Mr. Boon, who, of course, is
5 Mr. Pickford's client, explained that various people did
6 have doubts about the lawfulness of what was going on
7 and that the exception -- so:

8 "This position appears similar for other companies
9 with the exception of MAN's legal expert, whose comments
10 were distributed to the assembly. Mr. Vucak underlined
11 the major arguments of MAN's lawyer [so that is the
12 exception]... in annex 1."

13 So I am just concerned that what was being presented
14 to you as the agreed position may not have been. So
15 obviously I am unable to make --

16 THE PRESIDENT: I see. Ah, I think I slightly
17 misunderstood. I thought we were told that this was
18 produced by Nauta Dutilh, annex 1, but it looks as
19 though in fact it is MAN's lawyer; is that right?

20 MS. DEMETRIOU: That is our understanding on the face of the
21 document. I obviously cannot take it any further, but I
22 would not want the Tribunal to be left with the
23 impression that this was the unanimous view of the
24 manufacturers.

25 MS. BACON: Sir, in case it can help, I was not suggesting

1 that this was the unanimous view. I said that this was
2 a document produced following concerns expressed about
3 the lawfulness of what was going on.

4 THE PRESIDENT: Yes.

5 MS. DEMETRIOU: Sir, in that case, it was an exception.

6 THE PRESIDENT: Yes. Well, I think we understand it.

7 MS. DEMETRIOU: Of course, we say that in any event, we are
8 not -- we do not have to take at face value what anyone
9 said in terms of the manufacturers.

10 THE PRESIDENT: Yes.

11 MS. DEMETRIOU: That is a self-serving statement about the
12 lawfulness of this.

13 MR. PICKFORD: Sir, I think I may be able to assist Ms.
14 Demetriou, because I think she may have misunderstood my
15 submission. I took the Tribunal to the opinion of the
16 Brussels law office Nauta Dutilh, which was on page 50,
17 and my point was to distinguish between --

18 THE PRESIDENT: What page?

19 MR. PICKFORD: Page 50 of the note -- page 50, sorry, of the
20 exhibit or --

21 THE PRESIDENT: Well, that is the -- that is a reference to
22 what Nauta says, as commented on by MAN's lawyer.

23 MS. DEMETRIOU: Exactly. It is a reference to that. So
24 their comment is it is MAN's lawyer.

25 THE PRESIDENT: Yes.

1 MS. DEMETRIOU: So that is the only point I wish to make.

2 THE PRESIDENT: I understand.

3 MR. PICKFORD: But I was not seeking to take any -- I think
4 there is a possible misunderstanding here. Also, the
5 point was about what was new in the arrangement as
6 opposed to what was existing.

7 THE PRESIDENT: Yes, I see.

8 We will give our ruling on this at 2 o'clock.

9 MR. HARRIS: Sir, sorry, just before you disappear, there is
10 a question of whether or not there is to be a -- some
11 people do not appear this afternoon, in which case,
12 there would be a reordering of files on the front bench.

13 I only raise it now because I would not want to come
14 in and then there is a ruling and then suddenly I say,
15 "We need 20 minutes, or whatever, to reorganise". So
16 I am just putting it on the table, because we are going
17 to fight any substantive issues in the disclosure
18 applications, then I need further support with me and
19 I think some people might not be here.

20 THE PRESIDENT: Well, I think, as I understand it, the
21 disclosure applications, apart from this one, are not
22 advanced against -- they are only in the Dawsongroup
23 claim and they do not concern Scania and they do not
24 concern Iveco --

25 MR. HARRIS: Correct.

1 THE PRESIDENT: -- or MAN.

2 MR. HARRIS: Or, indeed, Ryder.

3 THE PRESIDENT: But -- so there might have to be some
4 reordering, but that does not mean I can therefore give
5 a ruling immediately.

6 MR. HARRIS: No, I just wanted it to be --

7 THE PRESIDENT: So we may have to rise for a few moments.

8 MR. HARRIS: I am afraid it is a fact of life. So I thought
9 I would -- thank you.

10 THE PRESIDENT: No, we appreciate that.

11 (1.06 pm)

12 (The luncheon adjournment)

13 (2.00 pm)

14 (Judgment given - see separate transcript)

15 (2.17 pm)

16 MS. BACON: Sir, I am obliged. I have been instructed to
17 ask for four weeks for those searches, from the date on
18 which we are notified as to what is missing and what may
19 be further required from us.

20 THE PRESIDENT: Yes, that seems reasonable.

21 MR. PICKFORD: We are content -- oh, sorry, I was told
22 a moment ago -- I thought we were content. I am just
23 going to --

24 THE PRESIDENT: Yes.

25 MR. POBJOY: Scania is content with four weeks.

1 MR. PICKFORD: We had asked for six weeks on the basis of
2 archive searches, but if we are not being required to do
3 such searches, then --

4 THE PRESIDENT: You may be, because what I said is that if
5 you hear where they were filed, you will see if the
6 files can be accessed without access -- excessive cost.

7 (Pause)

8 MR. PICKFORD: We are content with four weeks. Thank you.

9 THE PRESIDENT: Well, four, we said. Four weeks from being
10 notified of the outcome of the searches.

11 MS. DEMETRIOU: I am very grateful.

12 THE PRESIDENT: Is there anything else on that?

13 MR. HOSKINS: Sir, I am afraid I have a point of
14 clarification, which is that the document that we have
15 in our hands is not the 1992 notification.

16 THE PRESIDENT: You have the 1990.

17 MR. HOSKINS: We have the 1990, and it is marked "draft",
18 but we believe that it is the best copy that is
19 available of the 1990 notification.

20 THE PRESIDENT: Well, I think if you are -- are you prepared
21 to disclose that?

22 MR. HOSKINS: Yes.

23 THE PRESIDENT: Yes. Well, you disclose that. There is
24 a 1992 notification, that seems pretty clear, because it
25 is specified by date. In that case, we will not make

1 an order as against Volvo.

2 It is not clear whose lawyer will have made it,
3 I think. Does that emerge from these minutes?

4 MR. HOSKINS: I think I can -- I do not know. I am
5 searching the recesses of my memory. I think it is fair
6 to say it is almost certainly not Freshfields who did
7 it.

8 THE PRESIDENT: Yes.

9 MR. HOSKINS: But --

10 THE PRESIDENT: Well.

11 MR. HOSKINS: -- that is probably the best I can do.

12 THE PRESIDENT: Just give me a moment.

13 (The Tribunal conferred)

14 THE PRESIDENT: I think the appropriate order would seem to
15 be that it is an order against all six defendant groups,
16 but if any one of them discloses it, that satisfies the
17 obligation on all, because we think it is inevitable
18 that the lawyers acting at the time for these companies
19 will have a copy of it.

20 But that seems to us the best way of framing. The
21 alternative, the only alternative, is we could write to
22 the Commission and ask them who provided the
23 notification and then proceed from there, but we would
24 rather deal with it now.

25 MR. HOSKINS: I understand. Are we being --

1 THE PRESIDENT: It is just a question of how we frame the
2 order.

3 MR. HOSKINS: Exactly, sir, just in terms of what we are
4 being asked to do, because are we being asked to go and
5 make enquiries and if it turns out it is a solicitors'
6 firm that is not before the Tribunal now, are we to
7 contact them? Do you see what I mean? I just need to
8 know exactly what you want us to do.

9 THE PRESIDENT: Yes. Well, I would have thought you would,
10 because they would be your client's solicitor,
11 December 1992.

12 MR. HOSKINS: Or someone's solicitors.

13 THE PRESIDENT: Or you can ask for a copy from the
14 Commission, if you want. I mean, it is just the
15 mechanics of how it is obtained.

16 MR. HOSKINS: Sir, I understand. I just wanted to know
17 because it may not be in anyone's hands, so it is more
18 than that that you want, and I understand that. It is
19 an order against all six of us, so we will put our heads
20 together and find out what the best way to get it is.

21 THE PRESIDENT: Yes. I think against all six, and I think
22 maybe for that we will give you six weeks for that, if
23 it is more complicated.

24 MR. HARRIS: Sir, may I respectfully ask for a carve-out,
25 and the reason is twofold.

1 We have actually completed the entire exercise. So
2 it would mean, for us, going back to people and,
3 secondly, in circumstances where there are five other
4 people going to look for the same document. That seems
5 overkill, with great respect. We did a responsible job
6 of, fairly promptly, looking at the relevant people and
7 we finished --

8 THE PRESIDENT: Mr. Harris, no, you are not being ordered to
9 produce the minutes. You were not asked to look for
10 this document. It is the Tribunal's initiative under
11 our power. I do not, frankly, see why you should have
12 a carve-out any more than anybody else should have
13 a carve-out.

14 MR. HARRIS: Well, only for those reasons, that we --

15 THE PRESIDENT: It is a different exercise. So it is
16 against all of you.

17 Does this conclude this part of the disclosure?

18 MS. DEMETRIOU: Yes, we are grateful.

19 THE PRESIDENT: Then can we have an update on the
20 preliminary issue and the confidentiality rings?

21 MR. JOWELL: On the preliminary issue, you have a version
22 that is agreed between the defendants and has been sent
23 to the claimants, but it has only been sent to the
24 claimants over the lunchtime adjournment. Therefore, it
25 is probably not fair to expect them necessarily to agree

1 it now. They are not in a position to do so. However,
2 it is not intended to be controversial.

3 MS. DEMETRIOU: Sir, we can agree it, subject to one point,
4 so we may be able to take this very quickly --

5 MR. PICKFORD: Sorry, it might be helpful for me to just
6 interject. It is not agreed as between the defendants.

7 MS. DEMETRIOU: Ah, therefore --

8 MR WARD: We have not seen it, so perhaps -- could we deal
9 with it in correspondence, sir?

10 THE PRESIDENT: Well, if it is not agreed ... (Pause)

11 MS. DEMETRIOU: Sir, can I raise the point of principle --

12 THE PRESIDENT: At the moment -- it will be for the Tribunal
13 to formulate it.

14 MS. DEMETRIOU: Yes.

15 THE PRESIDENT: We are hoping there might be an agreed
16 proposal. At the moment, we have not seen anything.
17 You are all carrying a piece of paper, but we do not
18 have it.

19 MS. DEMETRIOU: Sir, it is a broad point of principle. I
20 just want to flag it. I appreciate it might not be
21 resolved now, but it is expressed in terms of
22 bindingness on the addressee defendants. I understand
23 why that is so; because they are addressees of the
24 decision.

25 But what we are concerned to ensure does not happen

1 is that, for example, we win on bindingness against the
2 addressee defendants and then it is said by the
3 non-addressees, "Well, that does not matter because it
4 is not binding on us".

5 Now, I am sure that is not what they are intending
6 to do, but it would be good to get that confirmation,
7 because if that were the case, then obviously the entire
8 exercise would be entirely futile.

9 (The Tribunal conferred)

10 THE PRESIDENT: I mean, isn't that a separate issue, what
11 the position is as regards non-addressees?

12 MS. DEMETRIOU: Sir, the point is this: that even if they
13 have an argument that formally these recitals are not
14 binding on the non-addressees, unless they agree as
15 a matter of practicality that they are not going to take
16 the point, then it becomes futile to have the
17 preliminary issue, on one view, because -- let us say --
18 let us hypothesise that we succeed in showing that all
19 of these recitals are binding against the addressees.

20 What we do not want to happen is for the
21 non-addressees to say, "Well, we do not admit these
22 points and they are not binding on us", because that, it
23 seems to us, has the potential of undermining the
24 utility of the preliminary issue, because the point of
25 the preliminary issue, as we see it, is to establish

1 which recitals are binding so as to avoid the potential
2 need for evidence on these points.

3 If it is going to be said at a later date by the
4 non-addressees that they are contesting them anyway and
5 if they say that that makes a difference, then we see --
6 then we think that the utility will be undermined.

7 THE PRESIDENT: Yes. Well, it might be,
8 Mr. Justice Fancourt is saying to me, a shortcut to bind
9 the non-addressees, but I think that may open up
10 different issues. I do not see that -- I mean, this is
11 about the -- the recitals are about the cartel agreed
12 between the addressees.

13 MS. DEMETRIOU: Yes.

14 THE PRESIDENT: So if it is established that that is what it
15 did, it would be rather odd for DAF that took part --
16 the company that took part in the cartel to be accepting
17 that that is what it did and then its subsidiary to
18 stand up and say, "No, our parent company did not. It
19 did not do what it is admitting."

20 MS. DEMETRIOU: Sir, we agree with that. There may be
21 recitals, of course, that go to the conduct of the
22 subsidiaries.

23 But we agree with the point, sir, that you are
24 making, and it may be simply that the defendants
25 formally confirm that they are not then going to reopen

1 issues of fact, because we say that would undermine the
2 preliminary issue. I just flag the point.

3 THE PRESIDENT: Yes.

4 MR. JOWELL: If I may say, sir, I think this is just
5 an illegitimate attempt to reopen the question of
6 whether there should be a preliminary issue at all.
7 I do not think --

8 THE PRESIDENT: I do not think it is, but I think -- I am
9 not sure that that is something that can necessarily be
10 covered by a preliminary issue. It still seems to me it
11 would have great utility. One then has other issues
12 about non-addressee liability and how it arises and so
13 on.

14 But it looks as though you cannot have an agreed
15 version now, so if you would like to take this up in
16 correspondence with us, we will deal with it next week.

17 We are -- having indicated that it will be heard in
18 late November, we do think we ought to have some
19 directions for any necessary pleadings for it --

20 MR. JOWELL: Yes.

21 THE PRESIDENT: -- which we have not made as yet, on the
22 basis that it is finalised as an issue next week or the
23 beginning of the week after, and that you will then set
24 out -- it will be for VSW to set out the list of the
25 statements that you say are binding, having looked at

1 what has been admitted as fact.

2 Then there will have to be the directions for the
3 pleadings and the basis on which you say it is binding,
4 whether as a matter of EU law or because of abuse of
5 process or whatever.

6 MS. DEMETRIOU: Sir, this follows, I think -- so yesterday,
7 the Tribunal said that Daimler should, by the end of
8 May, 31 May, provide -- so this would follow that.

9 THE PRESIDENT: This would follow that.

10 MS. DEMETRIOU: Yes.

11 THE PRESIDENT: But if this is heard in mid-November,
12 I would have thought it is a pleading in, what, late
13 September and mid-October, that sort of time period? Or
14 would you prefer -- we can do it this way -- that you
15 try and agree between you a time period for pleadings on
16 the preliminary issue --

17 MS. DEMETRIOU: I think we --

18 THE PRESIDENT: -- and submit that.

19 MS. DEMETRIOU: I think we should be --

20 MR. JOWELL: That is --

21 THE PRESIDENT: Because you know your own availability. But
22 obviously, we want those pleadings to be completed by
23 mid-October, so you can then do your skeletons and so
24 on.

25 MS. DEMETRIOU: We understand.

1 MR. JOWELL: Yes.

2 MS. DEMETRIOU: We will take that away and reach agreement.

3 MR. JOWELL: Indeed. In terms of this draft, which I think
4 is nearly agreed, you would like us to write to you in
5 due course --

6 THE PRESIDENT: Yes. Well --

7 MR. JOWELL: -- and any differences will be resolved by the
8 Tribunal.

9 THE PRESIDENT: Exactly. So we hope the defendants can,
10 first, agree on what they agree.

11 MR. JOWELL: I think subject -- I am told that subject to
12 adding four words at the end, DAF can agree.

13 THE PRESIDENT: Whatever. Then it goes to the claimants, if
14 they can agree, and then we will look at it if there is
15 any disagreement and consider it on paper.

16 MR. JOWELL: Thank you.

17 MR. HOSKINS: Sir, I am very sorry to rise on this point,
18 but I think it is important to clarify. The preliminary
19 issue is on the binding nature of the recitals, but, of
20 course, there may be a separate issue about the
21 interpretation of a recital that is binding. Our
22 understanding is that it is not in scope for the
23 preliminary issue.

24 But I would rather -- I want to stand up and make
25 that point now rather than doing it after you have ruled

1 on the binding nature of the decision, because it seems
2 to us those are potentially distinct issues.

3 THE PRESIDENT: Yes. Well, we are not going to --

4 MR. HOSKINS: It is the former that is in a preliminary
5 issue.

6 THE PRESIDENT: -- interpret what is meant by "net price" --

7 MR. HOSKINS: Indeed.

8 THE PRESIDENT: -- or what is meant by "commercially
9 sensitive information", if it has not been defined in
10 the --

11 MR. HOSKINS: That was my understanding, but I wanted to
12 stand up so that everyone hears that, that we think
13 there is a different issue --

14 THE PRESIDENT: It will be statements in the -- statements
15 in the decision.

16 MR. HOSKINS: Yes, there's a difference between bindings --
17 the bindingness of a recital and the interpretation of
18 a recital.

19 THE PRESIDENT: Yes. Well, we -- the interpretation of
20 a recital is a matter for argument.

21 MR. HOSKINS: That is my point.

22 THE PRESIDENT: Yes.

23 MS. DEMETRIOU: Sir, may I just clarify what you mean by
24 "pleadings", because we have the tables indicating
25 whether or not --

1 THE PRESIDENT: Yes.

2 MS. DEMETRIOU: So do you envisage something --

3 THE PRESIDENT: If you are -- you may not, but if you are
4 saying that, it may be you can do it just by skeleton
5 argument, but if you are saying it would be an abuse --

6 MS. DEMETRIOU: I see.

7 THE PRESIDENT: -- to go behind it, that is something that
8 perhaps ought to be pleaded out and with particulars
9 why.

10 In that case, unless there is anything else -- the
11 confidentiality ring, is that resolved?

12 MR. HARRIS: Not quite, sir. The position is -- can I hand
13 in, because they are not on the electronic file, three
14 copies of a letter and three copies of a draft order and
15 then some more for everyone there, and I have got some
16 spares, so you can see where the issues arise. (Handed)

17 (Pause)

18 So may I preface the short remarks with the -- we
19 have some more copies if anyone needs any -- with the
20 point I do not think there is a great deal left in
21 dispute, but it has been a little bit of a moving feast
22 in the sense that if you turn to the second page of this
23 letter, which is from my instructing solicitors, which
24 encloses the draft which you also have with some
25 amendments, you will see that in the third paragraph on

1 that page headed -- beginning "Ashurst's amendments" --

2 THE PRESIDENT: Yes.

3 MR. HARRIS: Ashurst are Ryder's solicitors. They were
4 received by email at 09.42 this morning, and so there
5 were some late changes before we went into court. I --
6 as you recall, at some point this morning, I said,
7 "Well, we sent a letter in response". Well, this is
8 that letter in response. So it has been moving during
9 the course of today.

10 So whilst we understand and appreciate the desire on
11 the part of the Tribunal and, for that matter, everybody
12 else to get this resolved, we just have not quite got
13 there yet. So --

14 THE PRESIDENT: Is it paragraph 6A?

15 MR. HARRIS: There is one drafting point and then,
16 essentially, one other point. The drafting point may
17 not be controversial, and I would invite any claimant
18 counsel who thinks it is to say.

19 But all that we did in this one is move what was at
20 the bottom of page 6, which is now crossed out at
21 5(a)(ii), to 6A. But there is also one change when
22 moving it, so the movement itself ought not to be
23 controversial. We thought it was better there.

24 But you will see that in the wording that is crossed
25 out at the top of page 7, the suggestion had been in the

1 draft that we got from Ryder's solicitors at 09.42 this
2 morning that the extended discussions would not simply
3 be the ones that had hitherto been mooted between -- if
4 you see the case names, you will see in brackets Suez,
5 then Wolseley and then Ryder.

6 That is what we had hitherto, prior to 09.42, been
7 discussing, but they had added in Royal Mail. That had
8 never been discussed or mentioned before between the
9 parties.

10 So all that we have said in our cover letter -- you
11 do not really need to read this bit in the cover
12 letter -- is, "Well, where has this come from and what
13 do Royal Mail and their solicitors say about it? You
14 have never asked for this and what is the reason?"

15 So that is why Royal Mail got crossed out when it
16 was moved from 5(a) to 6A. Now, that may not be the
17 biggest issue in the world, but it is only fair that
18 I should point it out because, as I stand here this
19 afternoon, I do not know what the claimants' position is
20 on that.

21 THE PRESIDENT: Mr. Ward.

22 MR WARD: Sir, you might recall I mentioned this morning it
23 had been suggested, and I think your observation was it
24 made sense on grounds of parity, or words to that
25 effect. So --

1 THE PRESIDENT: Yes.

2 MR WARD: There are more issues on this --

3 THE PRESIDENT: We did, and not just Royal Mail; it would be
4 Royal Mail, BT and Dawsongroup.

5 MR WARD: Yes, indeed it should be. But if there are issues
6 on this, of course we are very happy to keep pursuing
7 them in correspondence.

8 THE PRESIDENT: Yes.

9 MR. HARRIS: Yes.

10 THE PRESIDENT: Is there any objection to it being
11 Royal Mail, BT, Dawsongroup?

12 MR. HARRIS: Well, the issue, if you recall, that had
13 previously been, yesterday, ordered by the Tribunal
14 concerned the pleadings. It was not the -- it was, "Can
15 you, please, defendants, all disclose, with redactions
16 as necessary, copies of your pleadings more widely?" We
17 had said yes. That was dealt with yesterday.

18 What had never been said before this morning was,
19 "Oh, there should be a wider, if you like, composite
20 super confidentiality ring across all the orders. It
21 certainly appeared in the wording this morning. It is
22 now said it should go even further.

23 The only reason we hesitate here, my Lord, is if you
24 remember, right at the outset in this set of
25 proceedings, the suggestion of a super

1 confidentiality --

2 THE PRESIDENT: Sorry to interrupt you. It is not a super
3 confidentiality ring because there will be other
4 documents, particularly from party disclosure, which are
5 not being covered by 6(a). This is about just the
6 Commission documents from the Commission file. It is
7 those documents that we did say yesterday, when someone,
8 maybe Mr. Ward, raised the point, that there should be
9 parity across the board.

10 MR. HARRIS: Exactly. Sir, I am delighted you mentioned --

11 THE PRESIDENT: So that -- it is Commission documents and
12 that is made clear in 6A, and that should apply to all
13 claimants.

14 MR. HARRIS: I am delighted you mention that because,
15 actually, that is the biggest point, and there are two
16 points there.

17 We do not understand that to be accepted by the
18 claimants. In the short adjournment, we were approached
19 and we were told, "No, no, there should not be the
20 limitation to confidential Commission documents, this
21 should be other documents that may, in future, get
22 disclosed". That gives rise to an issue --

23 THE PRESIDENT: No, no, that was not our understanding of
24 what was being asked for or raised, because we do not
25 know what might get disclosed in future.

1 MR. HARRIS: Yes.

2 THE PRESIDENT: Indeed, we might well see that Ryder might
3 not be happy that everything gets disclosed to
4 Dawsongroup and so on.

5 MR. HARRIS: Precisely, sir.

6 THE PRESIDENT: This is the Commission documents and that
7 covers, therefore, the pleadings.

8 MR. HARRIS: Absolutely, sir, and that is why --

9 THE PRESIDENT: So on that basis, it is to be all claimants.
10 Can that be amended and can we proceed with the order on
11 that basis?

12 MR. HARRIS: Understood, subject to this one much more minor
13 point, which is the Royal -- as I understand it, the
14 Royal Mail Commission file is not identical to the other
15 versions of the Commission file that were disclosed. It
16 therefore gives rise to this slightly headache-y point,
17 which is there would be people conferring about
18 documents from the different versions of the Commission
19 file which not necessarily each of those persons who are
20 conferring has had disclosed to them. So, in other
21 words, it is -- they are not common documents.

22 So all our suggestion was at the bottom of our
23 letter -- this is the final paragraph of the letter --
24 is what are going to be -- would the claimants please
25 clarify the practical arrangement, including measures to

1 ensure that the discussions do not relate to documents
2 which have been disclosed in some, but not all,
3 proceedings?

4 This follows a logic in the sense that a version of
5 the file was disclosed in proceedings A and a different
6 version was disclosed in proceedings B because there was
7 reason to do that. It therefore follows that there is
8 not entire commonality of the documents. But if
9 everyone is allowed to talk about everything, it rather
10 overrides why there was a different version.

11 THE PRESIDENT: Any confidential Commission document of
12 which it has -- which has been disclosed to it, with
13 individuals having the same -- any which has been
14 disclosed to it~-- with individuals in the claims who
15 have also~-- to whom that documents have also been
16 disclosed.

17 MR. HARRIS: Sir, may I respectfully suggest on that that we
18 are definitely on the right lines. Can we take that
19 offline between the parties and try and agree that
20 wording? That is the point.

21 THE PRESIDENT: Yes.

22 MR. HARRIS: Rather than do it --

23 THE PRESIDENT: Shall we deal with it that way? At some
24 point, we need to iron out the different degrees of
25 disclosure. That is not for today.

1 MR. HARRIS: I am grateful. Thank you very much.

2 THE PRESIDENT: On that basis, if you can finalise that
3 wording, we will proceed that way.

4 Right. It is now 2.40 pm. We will rise so that
5 those parties not affected by Dawsongroup's
6 application -- no, is that right, Ms. Demetriou?

7 MS. DEMETRIOU: I think it is right, subject to one small
8 point, which is we had asked -- you raised the issue of
9 the CMC, and I said we would like a date pencilled in in
10 July to deal with economic disclosure. I think, sir,
11 you said that that was going to be wrapped up in the
12 discussion this afternoon.

13 So if there is agreement and if the Tribunal is
14 amenable to a date being pencilled in July, at least in
15 principle, then I think, for our part, we can go.

16 THE PRESIDENT: Well, we are not at the moment. Well,
17 perhaps you should all stay for a moment, then, because
18 we -- Mr. Ward, Dawsongroup, we did read with mounting
19 fascination the various statements, schedules and so on
20 that our attention was directed to and we see there has
21 been a lot of movement and greater agreement and so on.

22 We are, however, concerned about the process of
23 disclosure, economic disclosure, that the defendants
24 have to go through and then may have to go through
25 again, accessing pretty much similar files and databases

1 once Ryder makes its application for disclosure, and
2 then conceivably a third time once VSW makes its
3 application for disclosure.

4 We think that is really not a sensible way to
5 proceed. Royal Mail and BT, whom you also represent,
6 are ahead of the curve. There is no issue before us for
7 disclosure in that case and we would not want to hold it
8 up, but it does seem to us that Dawsongroup, yes, you
9 have an amended pleading at the moment, but it is not
10 finalised. Ryder has not done it yet.

11 But once we reconvene all three of those claimant
12 groups, that is to say Dawsongroup, Ryder and VSW, they
13 will have fully pleaded out their cases, you will have
14 served your pleading, there will be defences. It seems
15 that that would be an appropriate time to make economic
16 disclosure orders in favour of all three claimant
17 groups, such that the various defendants can do their
18 searches once.

19 If you can agree matters that are covered, of course
20 they can provide disclosure without order, or we can
21 have a consent order. But to -- even where it is agreed
22 that something is relevant, such as obviously relevant
23 is all their contract documents for the actual sale of
24 these trucks to your client, and equally to Ryder and
25 equally to all the VSW people insofar as they made

1 direct sales, but those contracts may all be stored in
2 the same archives.

3 We are dealing, given the long time period that this
4 matter goes back to, with paper archives as well as
5 electronic documents. You can seek to persuade us that
6 there is now agreement on various things so we should
7 make orders, but that is our firm view, having read not
8 only what you and your clients have said and what the
9 defendants have said, quite apart from relevance of
10 documents which, in some instances, we can see the force
11 of what you say and, in other instances, less so.

12 So that is our overall position and that does
13 affect, therefore, economic disclosure for Ryder and VSW
14 as well.

15 MR WARD: Sir, thank you. Just if I may offer some
16 countervailing considerations from my clients'
17 perspective and, as you say, I am talking only about
18 Dawsongroup at this point.

19 Despite a lot of the noise around this, there is
20 a quite substantial core of material in the schedule
21 which is either agreed or very close to agreement. In
22 other words, there are a relatively small number of
23 issues that would fall to be decided by the Tribunal in
24 order to unlock quite a lot of useful bilateral
25 disclosure.

1 From my clients' perspective, the -- their concern
2 is that there is now going to be something of a hiatus
3 until we get to the CMC next February because of the
4 preliminary issue and because of the fact that other
5 people's actions are at different stages. Whilst they
6 are not as far ahead as BT and Royal Mail, they are
7 further ahead than Ryder and VSW, for various reasons
8 that have been ventilated over the last couple of days.

9 So it is both tantalising and, if I may respectfully
10 say so, a little frustrating for them if they are held
11 back from what could be useful, productive work that
12 could be taking place through the summer and into the
13 autumn because of the, if I may say, entirely
14 understandable desire of the Tribunal to, in a sense,
15 harmonise the treatment of these different parties.

16 But, really, in truth, the -- disposing of a few
17 areas of disagreement such as what should be the precise
18 time frame for a particular type of disclosure or some
19 relatively fine-grained questions would allow a lot of
20 work to be done.

21 So in the case of Volvo, they have accepted there
22 are certain databases they are willing to search. They
23 have raised other concerns about proportionality. We
24 accept that. All that would be required is a reasonable
25 and proportionate search, but I do not want to open the

1 submissions; more, if I may, just put the perspective of
2 my client --

3 THE PRESIDENT: We understand that and we understand the
4 frustration. There has got to be a certain amount of
5 give and take.

6 MR WARD: Of course.

7 THE PRESIDENT: It is not simply wishing to harmonise the
8 progress, it is the proportionality from the point of
9 view of the defendants. It is not just what documents
10 are to be provided, it is about how many times they have
11 to go back --

12 MR WARD: Yes.

13 THE PRESIDENT: -- and re-conduct the exercise. Even when
14 they have agreed that you are entitled or should be
15 given, to put it more neutrally, this category of
16 documents, as I understand it, they do not necessarily
17 agree that it is proportionate for them to access them
18 now.

19 MR WARD: Well, in the case of Volvo, they raise
20 wide-ranging proportionality issues, albeit that,
21 generally speaking, they have said, "But here is
22 something we can do".

23 THE PRESIDENT: Yes. Well, I mean, if this --

24 MR WARD: Daimler and DAF are largely agreed.

25 THE PRESIDENT: Well, Mr. Ward, nothing we say prevents any

1 defendant providing you with disclosure if they -- you
2 are agreed that it is appropriate and relevant or should
3 be produced, they can produce it.

4 MR WARD: Well, sir --

5 THE PRESIDENT: They do not need an order from this
6 Tribunal.

7 MR WARD: Well, sir, the difficulty with that, with the
8 greatest of respect, is there is a strange habit that
9 things are almost agreed and there are some boundary
10 issues that need to be resolved. We -- I would like to
11 think -- I would like to think that they could be
12 resolved amicably. That has not always been the way in
13 this litigation and there is nothing quite so good at
14 focusing minds as an actual court order.

15 THE PRESIDENT: I mean, if there are boundary issues of
16 principle on which we could hear argument, subject to
17 conferring with my colleagues, we could usefully do
18 that. We are here. There is some time available.

19 MR WARD: Yes.

20 THE PRESIDENT: But that does not necessarily mean that we
21 then make an order. We might be able to reach a view as
22 to whether disclosure should go back to 1994 or only
23 start in December 1996 or whatever it is, and to reach
24 a view on that. That does not involve anyone doing any
25 work outside this hearing, but that does not mean we

1 then say, "Okay, now we have reached the view that it is
2 1994", that that defendant must go away and do it.

3 MR WARD: Well, sir, frankly, any progress would be welcome
4 on our side.

5 THE PRESIDENT: But, I mean, it is -- as I say, one needs to
6 hear from the defendants whether that is a -- really
7 a sensible course or whether -- because the advantage
8 also of not dealing with this immediately is that it is
9 clear from what has happened over the last four weeks
10 that, as every week goes by, there are more discussions
11 and the difference between you gets narrowed.

12 So while you say there is a hiatus over the summer,
13 it is a hiatus as regards the Tribunal, but it is not
14 a hiatus as regards discussions between the parties to
15 narrow the remaining differences.

16 MR WARD: Sir, can I just make one more respectful request.
17 If -- if -- decision on any of those issues today would
18 be welcome, but insofar as things are not going to be
19 decided today, really the sooner this can be done, the
20 better. Ms. Demetriou talking about a hearing before
21 the summer makes a lot of sense.

22 We are talking about quantum disclosure here. We
23 are not concerned with arguments about whether the
24 Scania decision may change the way that the cartel is
25 characterised.

1 THE PRESIDENT: No, we understand that. It is not affected
2 by --

3 MR WARD: So none of that really matters.

4 THE PRESIDENT: I am talking over you, which is what the
5 transcribers, most understandably, dislike, but the --
6 we understand that the preliminary issue, the foreign
7 law, the recitals, does not affect issues of quantum
8 disclosure. We appreciate that.

9 Well, shall we hear from the -- so the alternative,
10 I think, that has been floated is that it is not left
11 until February, but there is an earlier CMC on
12 disclosure.

13 MR. BREALEY: I think I would welcome that, because
14 otherwise, we are in the process of having ten months
15 where there is just correspondence. Sorry. What is it
16 saying on the transcript?

17 MR. HOSKINS: You do not want to know.

18 MR. BREALEY: Does it make sense?

19 THE PRESIDENT: Yes.

20 MR. BREALEY: We do not want ten months where we are just in
21 correspondence. We have instructed our economists and
22 they want to get on with things.

23 THE PRESIDENT: Yes, well, give us a moment before we hear
24 from the defendants.

25 MR. PICKFORD: Sir.

1 (The Tribunal conferred)

2 THE PRESIDENT: Well, we are sympathetic to scheduling
3 a disclosure CMC earlier than February. So we would not
4 deal with this now, we would give sufficient time. We
5 are going to give some explanation of how we think it
6 should be approached in a moment, but that we should
7 have two days in, we suspect, September when that can be
8 addressed.

9 MR. HARRIS: Sir, yes. With great respect that may be an
10 alternative way of putting it. Things are narrowing all
11 the time. May I just remind the Tribunal that one of
12 the letters you read overnight --

13 THE PRESIDENT: If we are agreeing what we are going to do,
14 I do not think we need to look at letters, do we?

15 MR. HARRIS: It is just we had made a written offer to meet
16 with them and their experts.

17 THE PRESIDENT: We saw that, yes, thank you.

18 Mr. Pickford, did you want to add anything?

19 MR. PICKFORD: I think in the light of the Tribunal's ruling
20 just now, I do not. It was merely there was some
21 concern that the submissions of Mr. Ward that these were
22 just boundary issues and we were happy for the order to
23 be made; we were very unhappy for an order to be made.

24 THE PRESIDENT: We would rather leave that.

25 Now, how should disclosure be approached? We think,

1 given the complexity here, that the appropriate course
2 is that the claimants should prepare a Redfern schedule
3 and we approach it that way. I will ask Mr. Malek to
4 indicate what we think should be done.

5 HODGE MALEK QC: I think we should have a revised approach
6 with a Redfern schedule. Normally, a Redfern schedule
7 lists the categories of documents being sought. The
8 claimant says why they want it, the respondent says why
9 it is not appropriate and then there is a further column
10 for the claimant to respond.

11 I think that what we should do -- given the advanced
12 nature of the discussions between the parties, everyone
13 knows what is in issue. I would want a revised
14 schedule, so when we come to the hearing, the schedule
15 will only be in relation to categories of documents
16 which are in issue. So you can agree everything else
17 and that can be a separate document.

18 But the ones which are in issue: the first column
19 should be the categories of documents which are in
20 issue, the second column should be the claimants'
21 position as to why they are relevant and identify the
22 issues to which they have them.

23 Then the third column will be -- or the third series
24 of columns, because there is more than one defendant,
25 will be each defendant's response to that. Then the

1 final column will be the claimants' final responses to
2 that category. So we have it all in one place.

3 In addition, each party will be allowed to file one
4 statement only in relation to quantum disclosure
5 generally and in relation specifically to those items
6 which are outstanding by reference to the Redfern
7 schedule.

8 So one would hope that within, let us say, six weeks
9 of the date of the hearing, you would have the revised
10 Redfern schedule ready. Then the parties can
11 concentrate on preparing one statement each on the
12 categories which are outstanding.

13 So that is what I envisage.

14 THE PRESIDENT: Yes, just one moment.

15 (The Tribunal conferred)

16 HODGE MALEK QC: You can have one statement in relation to
17 the schedule -- the general statement. You can have one
18 statement from an expert as well, because you may need
19 to have a separate statement from the expert, unless you
20 put it in the statement from the solicitor as well.

21 MS. DEMETRIOU: Can I just check it is one schedule per set
22 of proceedings, VSW to be --

23 HODGE MALEK QC: Yes.

24 MS. DEMETRIOU: Yes.

25 MR. PICKFORD: Sir, you referred to the claimants' request.

1 Obviously, there are reciprocal requests --

2 HODGE MALEK QC: Yes, of course, whichever way.

3 MR. PICKFORD: Of course.

4 HODGE MALEK QC: Yes, exactly.

5 MR. HARRIS: One other point is that one witness statement
6 is understandable, but it is just that quite a lot of
7 the disputes, at least as of today, involve expert
8 evidence and, indeed, expert dispute of a different
9 discipline.

10 So it might be, potentially, that there could be,
11 say, an instructing solicitor who gives one witness
12 statement, but on topic 01A, subcategory 5, he or she
13 might have to say, "Having spoken to my expert
14 economist, these are our points". Then on subcategory
15 something else, "Having spoken to my expert forensic
16 accountant, these are the points".

17 THE PRESIDENT: I think you had your back turned when
18 Mr. Malek added one statement plus one statement from
19 the expert, if so advised.

20 MR. HARRIS: I do apologise. I did miss that, yes.

21 THE PRESIDENT: So that will allow the economist -- as
22 regards the accountant, I would hope that can be fed
23 into the solicitor's statement.

24 I have to say, without getting into it, I read the
25 statement from your -- I do not think he is put forward

1 as the expert, but the accountant adviser who makes
2 reference to the Tribunal's decision in
3 *Sainsbury's v MasterCard*, but seems to have
4 completely misunderstood it, or else I have completely
5 misunderstood it.

6 But the sort of documents that he seems to think are
7 relevant are, in my view, exactly what the Tribunal said
8 is not part of mitigation. So he may want to look at
9 that again.

10 MR. HARRIS: But the point is taken that we can get input
11 from --

12 THE PRESIDENT: Yes, you can have an expert, but I would
13 expect it should be only one expert files an additional
14 statement.

15 HODGE MALEK QC: I do not expect us to have to go through
16 inter-solicitor correspondence. The whole idea is
17 giving us all -- the applications in a form that is
18 easily digestible.

19 MR. HARRIS: I could not agree more, Mr. Malek. It has been
20 impossible trying to deal with the applications for
21 today.

22 MR. HARRIS: Can I just say this: the skeleton arguments,
23 they have to be a succinct summary of that which is in
24 dispute on the schedule. That is the whole point of the
25 schedule. So when we come to setting down the

1 timetable, there needs to be a sufficient gap between
2 the finalisation of the schedule such that then the
3 counsel teams can hopefully assist the Tribunal by
4 making succinct the issues in the schedule.

5 HODGE MALEK QC: I envisage we will have the schedule
6 completed, let us say, six weeks before the hearing.
7 Then the parties will file their statements so we
8 know -- by reference to the schedules in relation to
9 what is outstanding. Then we will have skeleton
10 arguments. It is just a question of what the timing is
11 for all of those.

12 MR. HARRIS: Yes, exactly.

13 THE PRESIDENT: We want to fix a timetable for that, and
14 that is why we think that the disclosure CMC should be
15 in the autumn.

16 MR. JOWELL: May I clarify one thing?

17 THE PRESIDENT: Yes.

18 MR. JOWELL: Do you envisage there being one statement per
19 set of proceedings or one statement across all of the
20 proceedings? Because you mentioned there will be
21 several Redfern schedules. Just so there is no
22 ambiguity, are you also envisaging several statements or
23 one statement to cover them all? (Pause)

24 HODGE MALEK QC: Yes, one statement can cover them all.

25 THE PRESIDENT: Yes.

1 MS. BACON: May I raise a point about timing, which I think
2 we were just about to come on to. I think we would have
3 a real difficulty with September because, of course, in
4 the case of VSW and Ryder, the discussions on disclosure
5 are less further advanced than Dawsongroup. If
6 September is set by reference to Dawsongroup, we are
7 effectively being accelerated, and our discussions with
8 VSW are in a rather earlier stage.

9 MR. JOWELL: Just to be clear, in the case of Ryder, I think
10 we received their schedule literally days ago. So that
11 is very early.

12 THE PRESIDENT: We are at the beginning of May.

13 MR WARD: Yes.

14 MR. PICKFORD: Sir, the submission I would make on the
15 timing is more that, obviously, there are some
16 preparatory steps here. It would be unfortunate if we
17 had to have a lot of preparatory steps in August. So
18 I would ask for some leeway in terms of how the steps
19 pan out to a hearing some time, perhaps, in October.

20 THE PRESIDENT: Well, I mean, what we envisage is that you
21 could produce your schedule by the end of July.

22 MR. PICKFORD: Yes.

23 THE PRESIDENT: That gives you three months, effectively, to
24 have your discussions, even if you were starting from
25 nowhere today. There have been discussions with VSW,

1 There are difficulties, if not -- probably insuperable
2 difficulties doing it later in September. Then, as
3 Ms. Bacon knows, I am hearing a trial all October in the
4 High Court. So --

5 MR. BREALEY: Just one very small point. We obviously
6 need -- the claimants need to co-ordinate in order to
7 prepare these schedules so they are razor sharp, if
8 I can put it that way. That means that we will
9 obviously need to speak with each other.

10 When we are looking at this confidentiality ring,
11 I do not know whether there is going to be a restriction
12 on the confidentiality ring, but anything that restricts
13 Hausfeld talking to Ashurst or whatever, I think we may
14 need to sort out maybe in writing, but if the defendants
15 say we cannot talk to each other, we have to sort that
16 out.

17 THE PRESIDENT: Yes, you are talking about categories of
18 documents in descriptive terms --

19 MR. BREALEY: One would have thought so.

20 THE PRESIDENT: -- not looking at any actual documents.

21 MR. BREALEY: Correct.

22 THE PRESIDENT: So I would hope there is not really
23 a problem about that.

24 MR. BREALEY: So would I, yes.

25 THE PRESIDENT: There should not be.

1 MR. BREALEY: No.

2 THE PRESIDENT: You are not looking at any confidential
3 information as such.

4 MR. BREALEY: I would hope not, yes.

5 MR. JOWELL: That is an issue that cuts both ways because,
6 of course, the MAN group, for example, amongst other
7 defendants does not have access to what has been sought
8 in the Dawsongroup proceedings because we are not
9 a party to those proceedings. So we will need to be
10 educated as to what categories are being sought and what
11 categories will not be in Dawsongroup.

12 THE PRESIDENT: But insofar as documents are not
13 confidential --

14 MR. JOWELL: No.

15 THE PRESIDENT: -- there is no problem about talking to
16 anybody.

17 MR. JOWELL: No, you would have thought.

18 (The Tribunal conferred)

19 THE PRESIDENT: So what we envisage is the schedule -- we
20 can make detailed directions as to when each party must
21 fill in its columns, but the completed schedule should
22 be by the end of July.

23 So in fact, I think we can say -- 26 July is the
24 Friday and that the witness statement should be by
25 6 September. If you require us to make more granular

1 orders, that the claimants' column must be by then, the
2 defendants' column must be by then, the claimants'
3 response by then, perhaps you can try and agree that
4 between you, working back from 26 July.

5 Good. We hope that can be resolved sensibly.

6 (Pause)

7 MR JUSTICE FANCOURT: The only additional point, perhaps, is
8 not to launch straight into the drafting of the
9 schedule, but to allow plenty of time for meetings,
10 a series of meetings, without prejudice to try and
11 narrow the ground first, because, after all, the
12 schedule is only supposed to comprise those classes of
13 documents that remain in issue after that process has
14 been fully exhausted, if that is the right word, gone
15 through to put it neutrally. (Pause)

16 THE PRESIDENT: Very well. Are there any other disclosure
17 issues that we are being asked to address?

18 MR. BREALEY: I do not believe so.

19 THE PRESIDENT: So there will be a two-day disclosure CMC in
20 the week of 16 September. It may be that it will be
21 held in the Rolls Building, but you will be advised
22 about that, and the preliminary issue in mid-November,
23 precise date to be determined. Then we have dates for
24 the further CMC in February.

25 MR. BREALEY: Thank you.

1 THE PRESIDENT: Is there anything else that anyone else
2 wishes to raise? (Pause)

3 Very well. Thank you, all. I mean all: you have
4 large teams behind you. Thank you all very much.

5 (3.06 pm)

6 (The hearing concluded)

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