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Case No.: 1291/5/7/18(T); 1294/5/7/18 (T) ; 1295/5/7/18 (T)

IN THE COMPETITION
APPEAL TRIBUNAL

Victoria House,
Bloomsbury Place,
London WC1A 2EB

20 September 2019

Before:

The Honourable Mr Justice Roth, Hodge Malek QC

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Trucks Proceedings (Disclosure Hearing)

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

Day 2

Friday, 20 September 2019

(10.00 am)

(Proceedings delayed)

(10.10 am)

Case management conference (continued)

THE PRESIDENT: Yes. Just to say that we've received, as I assume you all have, an additional short note from counsel for Ryder this morning.

MR JOWELL: That is what I wanted to address you on.

I personally received it just 20 minutes ago, together with a very long amended order which has not been marked up. We, in the time available, have simply not been able to fully digest either the note or the changes to the order and what we would propose is that in relation to at least the Ryder dispute, there should be a significant adjournment to allow us to consider those and, without wishing to get your hopes up too much, possibly further narrow the issues that require resolution by the Tribunal. It seems to us that that would probably be sensible.

We don't say that that necessarily has to occur now because it may be possible to deal with the issues relating to the Dawson group and clear those out of the way first but we would be extremely grateful if the Tribunal would afford us that opportunity to consider

1 the changes which we simply have not been able to
2 consider up to now.

3 THE PRESIDENT: I have to say, for my part, we also got the
4 note about 30 minutes ago. It seemed to me simply
5 a speaking note just explaining, as already set out in
6 the witness statement of Dr Wu, explaining the nature of
7 this category that was being discussed towards the end
8 of yesterday. We were dealing with the -- I think it's
9 O4 and O4A in the respective schedules. There's
10 a slightly modified O4A which you can consider before we
11 get to Ryder but it's on the lines of the initial one.
12 If there are other major changes, as I understand it,
13 all that's happened is some categories have been
14 dropped.

15 We can look at that when we come to the other
16 categories but we certainly would like to deal with the
17 matter that was the subject of submissions in the last
18 part of yesterday's hearing from Mr Ward and Mr Brealey.
19 They go together. Indeed I think it was the suggestion
20 of you, Mr Jowell, supported by Mr Singla, that if we're
21 dealing with the Dawson group we should deal with the
22 comparable Ryder category and that's how we started on
23 this.

24 MR JOWELL: Sir, that's absolutely right. Where there's an
25 overlap, I'm not clear whether or to what extent there

1 is an overlap in all of these areas.

2 THE PRESIDENT: I don't think it's terribly difficult to
3 work it out because if you open O4A in the new schedule
4 on page 49, then you can compare it with O4 in the
5 Dawsongroup schedule and it will be pretty clear.

6 I think it's modelled to some extent on the Dawsongroup.

7 MR MALEK QC: The fact is we are here. These hearings cost
8 a great deal of money. Insofar as there is anything we
9 can deal with we want to spend the rest of the day
10 dealing with disclosure issues. If there's any
11 particular issue where you say "I'm embarrassed, I need
12 more time to consider it", or whatever, it may well be
13 we can come back on another day, we've already pencilled
14 in 4 October, or we can deal with it in one of our
15 monthly disclosure hearings. But the problem with that
16 is I don't want the monthly disclosure hearing to be
17 a circus, lots of people, and I would prefer those
18 hearings to be used for discrete issues between
19 individual claimants and individual defendants rather
20 than the whole team coming.

21 MR JOWELL: I hear what you say, sir, and I appreciate that.
22 The difficulty that we have is that I am told that this
23 order has been amended in a number of respects.

24 MR MALEK QC: It has been, yes.

25 MR JOWELL: And I simply don't know what the amendments are

1 because I don't currently have a mark-up of it.

2 THE PRESIDENT: We'll get to them when we go through and if
3 there's any particular point, you say "This is such
4 a material change, I'm embarrassed", then we can
5 consider it. At the moment, picking up where we left
6 off yesterday on that category, we would like to
7 continue it and conclude it.

8 MR JOWELL: No, I wasn't suggesting -- forgive me, I wasn't
9 suggesting this should be put off to another day, just
10 simply suggesting that we should have some time to be
11 provided with, or obtain for ourselves a mark-up of the
12 order so that we can consider it and see what the
13 changes are so that we then know what has changed --

14 MR MALEK QC: It shouldn't be very difficult for someone to
15 prepare a mark-up now and give it to you in the course
16 of the next hour or so.

17 MR SINGLA: Sir, my team has tried to produce a mark-up in
18 the 20 minutes or so and there are very extensive
19 changes. One of the points -- I'm not saying this in
20 itself justifies an adjournment but one of the points we
21 have managed to notice in the time is that insofar as
22 changes have been made they've not been made
23 consistently. So there is some force in what's being
24 said about prejudice because the first thing is to work
25 out what has gone, what has gone as a matter of

1 substance and what needs to go as a matter of drafting.

2 MR MALEK QC: If they're taking things out, that's to your
3 advantage. If they're adding things, which is something
4 new, then of course you have a legitimate point. For my
5 part, I too have only had an hour or so looking at the
6 schedule. I don't see things which are being added, I'm
7 seeing things which are being qualified.

8 THE PRESIDENT: But we'll pick it up as we go through.

9 Let's resume where we were, which is with the
10 Dawsongroup. I think it was O4 of the Dawsongroup
11 schedule.

12 MR WARD: Sir, it was. We've reached agreement with
13 Volvo/Renault as to the proposed modification of O4 and
14 that category --

15 MR MALEK QC: What page are we in now of the schedule?

16 MR WARD: Page 45.

17 MR MALEK QC: What tab?

18 THE PRESIDENT: Tab 1, page 45 {COM-C/1/45}. That, as
19 I understand it, it's been agreed already with DAF?

20 MR WARD: It's agreed with DAF and agreed with Daimler.

21 THE PRESIDENT: Subject to proportionality as we heard.

22 MR WARD: Yes, and it's now been narrowed and in no sense
23 expanded so I don't think that agreement is imperilled
24 by the changes.

25 If you have it there, obviously we will hand it up

1 in due course but if I can I will read in the changes so
2 you can see what we've done.

3 At the beginning, which at the moment reads
4 "Documents and/or information", the following words have
5 been inserted, "a representative sample from each year
6 from 1997 to 2017 of documents and information".

7 Then reading on, where it says "any factors relevant
8 to the setting of any prices", the word "any" has been
9 deleted so it's "setting of prices".

10 Then in the brackets where it says "(including, but
11 not limited to, gross list prices)", the words "but not
12 limited to" have been deleted and the words "and
13 internal pricing" have been deleted. To preserve the
14 grammatical sense, there's now an "and" before "customer
15 net prices". If I may I'll just read that back:

16 "[...] relevant to the setting of prices (including
17 gross list prices, dealer net prices and customer net
18 prices) that occurred after January [...]" and now it
19 should say "1997" to reflect the Tribunal's temporal
20 scope ruling of yesterday.

21 THE PRESIDENT: Yes.

22 MR WARD: That's agreed --

23 THE PRESIDENT: Just to be clear, it's agreed with
24 Volvo/Renault.

25 MR WARD: Yes. I think this wording hasn't been shared

1 before with Daimler or DAF but it is only a narrowing.

2 MR HARRIS: Sir, Daimler is happy with that revised wording.

3 THE PRESIDENT: Thank you.

4 MR WARD: Sir, I know you want to maintain on this category
5 but just if I can complete the picture, you will recall
6 at the end of the hearing yesterday Mr Hoskins was
7 concerned that we might have overstated the level of
8 agreement and we had an open meeting after court and it
9 turns out to be good news. Perhaps if I can just take
10 five minutes to explain?

11 THE PRESIDENT: Yes.

12 MR WARD: It turns out there is almost nothing at all that
13 remains in dispute on the Dawson schedule now and it is
14 ready for an order. Just if I can page through the
15 categories. On volume of commerce 2 overcharge 1, the
16 main categories, it is accepted on both sides --

17 THE PRESIDENT: Sorry, you don't have a page number, do you?

18 MR WARD: Sorry, volume of commerce 2 is the one that starts
19 on page 12 and this is the main category of information
20 about the trucks and the prices. It's the same category
21 referred to as value of commerce 2 and overcharge 1.

22 In both cases, there was an issue about
23 proportionality but both sides are agreed that the right
24 approach is in accordance with your order yesterday that
25 the court should make the order for a reasonable and

1 proportionate search but on the understanding that the
2 initial disclosure is BNA and Partner databases but, as
3 the Tribunal ordered yesterday, subject to a requirement
4 to report in November on their investigation of other
5 databases.

6 MR HOSKINS: Can I just -- hopefully this is helpful. Just
7 so it's absolutely clear what we're offering, it's the
8 same in a sense as what's in the VSW consent order.
9 This says "reasonable and proportionate" on the
10 understanding it's going to be -- our position is the
11 order should just be, it's the BNA and Partner and
12 TRITON report. So we won't be doing anything else other
13 than those. But I don't think, between us, it's a
14 (inaudible).

15 MR WARD: I think what we understand, certainly what we're
16 asking for is an order for a reasonable and
17 proportionate search but recognising initially, as the
18 Tribunal said yesterday, that's what will be provided
19 and there will be a report in November and then there
20 will be a dialogue about the next stage. It may only be
21 a semantic difference but that's --

22 MR MALEK QC: Well, no. Normally -- there are two stages
23 when you decide the extent of the search. One is you
24 can make it actually in the order where you say: you
25 conduct a reasonable and proportionate search of those

1 two particular databases, which is the cleanest way of
2 doing it. The other way of doing it is to say: you
3 conduct a reasonable and proportionate search on the
4 understanding that a reasonable and proportionate search
5 will amount to this. I prefer to do it the first way to
6 be honest.

7 MR HOSKINS: I was about to say we vote for number one.

8 MR WARD: In a sense this is semantic. As long as it's
9 properly understood, as it clearly is, that that is the
10 beginning of this process --

11 MR MALEK QC: We've got the separate order in relation to
12 the other part --

13 THE PRESIDENT: Yes, they've been required to report so
14 I think this initial order is for those two databases.

15 MR WARD: There's a similar point that I think not
16 necessarily to be dealt with in the same way which you
17 can see on page {COM-C/1/43} which is by way of an
18 example. There's a number of times in the schedule
19 where again the defendant has given an early indication
20 of the source of disclosure it has in mind. You can see
21 this, it's category O3 which is agreed, which is about
22 truck manufacturing. You can see if you look in the
23 penultimate column which is Volvo/Renault, it says:

24 "To the extent that this category of disclosure is
25 agreed or is ordered, and subject to the proportionality

1 of the disclosure sought as a whole, Volvo/Renault
2 consider that proportionate searches would involve
3 liaising with relevant individuals within the
4 Volvo/Renault business to identify copies of these
5 documents."

6 That's obviously very non-specific. What we made
7 clear in the discussion yesterday is that we shouldn't
8 be taken to have agreed in advance the adequacy of that
9 search. It's obviously a great deal less information
10 than you saw on BNA and Partner. We understand that's
11 what they're saying they're going to do and we very much
12 reserve the right to challenge either the adequacy of
13 the search or the adequacy of the results.

14 MR MALEK QC: Just one point arising from that. Under Rule
15 60(3), a party is not required to give disclosure of
16 more than one copy of the document unless it's been
17 changed or annotated in a material way. But on some of
18 these categories there's going to be numerous documents
19 which effectively have the same information and what to
20 me is not proportionate is for them to give you every
21 single piece of paper that may have this information on.
22 What you really want is the information.

23 MR WARD: Yes.

24 MR MALEK QC: But you don't want it from repeated sources if
25 it's saying the same thing.

1 MR WARD: Of course.

2 MR MALEK QC: As long as everyone understands that's what
3 we're doing, because when you're just dealing with
4 databases it's quite easy and it's not a problem, but
5 when you're dealing with documents outside of databases
6 and you're dealing with let's say qualitative
7 disclosure, we really do need to keep it proportionate
8 in a way that everyone understands what we're looking
9 for.

10 MR HOSKINS: I think that would be covered by the phrase
11 "reasonable and proportionate" in a sense because the
12 reasonableness would go to the point you make as long as
13 everyone understands that's the basis --

14 MR MALEK QC: The problem with that is the obligation is to
15 do a reasonable and proportionate search, so if you do
16 a reasonable and proportionate search and you find lots
17 of documents in that category you would normally be
18 required to give disclosure.

19 MR HOSKINS: I understand. What I'm suggesting is everyone
20 has heard what you've said, I think we're agreed, I'm
21 not sure we need to draft anything else into it, as long
22 as everyone understands that the phrase "reasonable and
23 proportionate" encapsulates the point you've just made.

24 MR MALEK QC: What we'll be doing after this hearing is
25 issuing a ruling setting out how we see disclosure

1 should be done in this case and generally and what the
2 relevant principles are. I think the President will
3 ensure that we do have something in that that deals with
4 this point.

5 MR HOSKINS: That's very helpful.

6 MR WARD: The final matter which I need to draw to your
7 attention is in respect of PO1 which is pass-on category
8 1, page 60 and following {COM-C/1/60}. These are the
9 documents or information which identify any trucks which
10 were effectively traded back to the defendant itself.
11 There's no dispute here about relevance and there's no
12 dispute about the details of the categories. The point
13 that was made last night is in the last week or so it
14 has become clear that we're actually only talking about
15 111 trucks that went back to the defendant and --

16 THE PRESIDENT: Is that this particular defendant?

17 MR WARD: This particular defendant. What was said last
18 night is that the relevant information is itself in
19 a particular database and there was a concern about
20 whether it was going to be worthwhile to pursue this.
21 What we said, what we maintain now, is that of course it
22 is the defendant's decision whether or not to run this
23 defence. If it does want to run this defence, it needs
24 to be a reasonable and proportionate search against
25 relevant categories. As I understand it, their position

1 is they accept that if they do decide to run the defence
2 this category would be relevant but they wanted to put
3 a hold on this pending a decision about whether it was
4 going to be done.

5 Now, our concern about that is only about time and
6 the effluxion of time and the foot-dragging kind of
7 issues that we talked about yesterday. So what we would
8 suggest is that they confirm by mid-November whether
9 this is going to be pursued or abandoned by when the
10 Tribunal has ordered them to review the existing
11 databases. Then they can just make a decision whether
12 it's worth it to them to try to run a pass-on or not on
13 111 trucks.

14 THE PRESIDENT: This is 111 Volvo and Renault, is it?

15 MR WARD: Yes.

16 MR HOSKINS: No, it's 111 Renault and no Volvo.

17 THE PRESIDENT: No Volvo, right.

18 MR WARD: Of course it's up to them, it's a defence, it's
19 not part of our claim but we just do not want this to
20 drag on indefinitely on the basis that there may be
21 other claims and so on and so forth.

22 THE PRESIDENT: Yes.

23 MR WARD: What we would suggest is that this is -- it should
24 be ordered but with some provision that allows for
25 election by mid-November as to whether this should

1 progress.

2 What we're most anxious today is that we walk out of
3 the building with an actual order on the schedule
4 because, as you can appreciate, it is now essentially
5 all resolved. We don't want things put into the long
6 grass.

7 THE PRESIDENT: So that's the point on PO1 regarding only
8 Volvo?

9 MR WARD: Yes, that's correct.

10 THE PRESIDENT: Only Renault in fact.

11 MR WARD: Only Renault in fact, yes.

12 THE PRESIDENT: Mr Hoskins, what do you say about that
13 suggestion?

14 MR HOSKINS: I need to unpack it a little bit. In Mr Frey's
15 third statement he explains that the particular position
16 in relation to Renault is that the relevant databases
17 are separate from Partner so there's a further scoping
18 exercise to be done and we don't know, for example, what
19 the current use database -- how far it goes back and
20 whether we're going to have to look at other archive
21 databases for Renault. So, again, we're in a category
22 in which we're saying not that this should never be
23 disclosed but that we need a bit more time to scope what
24 the position is.

25 THE PRESIDENT: Just so I understand it, you say it's in

1 a different -- the buy-back is in a different database?

2 MR HOSKINS: Yes, it's not in Partner. The used truck
3 information is not in Partner.

4 THE PRESIDENT: Then did you say you don't know how far that
5 database goes back?

6 MR HOSKINS: No, the scoping exercise hasn't been done
7 because this is the point that arose relatively late in
8 the day.

9 THE PRESIDENT: I'm a bit disappointed to hear that. That
10 would be an easy thing to establish.

11 MR HOSKINS: Well, I can only apologise. I can only also
12 say, sir, I think it's fair to say you see the amount of
13 work that's gone into trying to tee everything up. It's
14 not perfect, I apologise for that but it's certainly no
15 lack of will on our part to progress matters, it really
16 isn't, and I'm sorry if it's ...

17 MR WARD: Sir, from our perspective, the defence on pass-on
18 has been pleaded --

19 THE PRESIDENT: No, I understand all that, Mr Ward.

20 So, Mr Hoskins, what you're suggesting, what is
21 being proposed is that if you want to maintain this
22 defence for the 111 Renault trucks, you've got at some
23 point to provide this information.

24 MR HOSKINS: I understand.

25 THE PRESIDENT: And that it should therefore be in the

1 order. It may be that the date is slightly later than
2 for the others, we haven't really focused on by when you
3 must provide this particular category, but if you
4 confirm to the Dawsongroup that actually you're not
5 going to spend time arguing about an increased trade-in
6 price to be set off against an overcharge on 111 trucks,
7 then of course you don't have to provide information at
8 all.

9 MR HOSKINS: I'm not sure -- if I understand correctly,
10 what's being suggested is we would have to by November
11 say if we were pursuing this but not that we would have
12 to necessarily provide the disclosure by mid-November,
13 which would not be possible.

14 THE PRESIDENT: Yes but we make an order today with a later
15 date, such that if by mid-November you confirm you are
16 pursuing it, by when you have to produce it.

17 MR HOSKINS: Well, we are not going to be in a position
18 today for me to make a proper submission to you on what
19 the end date for that would be. We would be sticking
20 our finger in the air.

21 MR MALEK QC: We will put an end date and there will be
22 liberty to apply in the ordinary way. If prior to that
23 date you see that you can't comply with that timetable,
24 you write to the other side, see if they agree an
25 extension; if they don't have an extension, come back to

1 us.

2 MR HOSKINS: We'll see you on a Friday.

3 THE PRESIDENT: We propose, having regard to what's been

4 said and we bear in mind, Mr Ward, you say they should

5 have got on with it but we are where we are, 31 January.

6 If you want to continue it and you say that's not enough

7 time you'll have to apply and explain why you need

8 longer.

9 MR HOSKINS: Sir, the date was?

10 THE PRESIDENT: 31 January 2020.

11 MR HOSKINS: I anticipate that won't be enough but I

12 understand what you're saying to me about us coming

13 back.

14 THE PRESIDENT: Well, you'll certainly know a lot more.

15 MR HOSKINS: Yes, absolutely.

16 THE PRESIDENT: That will be the date for this category.

17 MR HOSKINS: Is that the only order or is there an order by

18 mid-November to state our position or is it simply --

19 MR MALEK QC: Yes, 15 November you state your position,

20 disclosure on 31 January with liberty to apply in the

21 ordinary way.

22 MR HOSKINS: Can I just take final instructions that I'm

23 instructed to say we're happy? (Pause).

24 Sir, we're content with that. I do anticipate we

25 will be back to say we can't do it by 31 January but

1 that's --

2 THE PRESIDENT: Well, you will have an idea of, apart from
3 anything else, what in terms of pounds and pence this is
4 actually worth and it may be so little money in the
5 context of the case that the whole searching exercise is
6 just a waste of time.

7 MR HOSKINS: Thank you.

8 MR WARD: In that case we are in the happy position where
9 the claimant Redfern schedule is ready to be ordered.
10 The only outstanding question will be of dates in
11 respect of all of the defendants now in that case,
12 that's Daimler, DAF and Volvo/Renault. I confess
13 I don't think we've had discussions with the other
14 parties about that but, for our part, as this is
15 obviously -- this is mutual disclosure, Dawsongroup is
16 able to provide this database disclosure by the end
17 of November and would like until the end of December to
18 provide everything else. That's in the hope and
19 expectation that that would be reasonably mutual.

20 THE PRESIDENT: So are we clear what is meant by database
21 disclosure? What categories are covered?

22 MR WARD: I admit I am not but I am sure that can be
23 specified precisely in the letter from my solicitors.

24 THE PRESIDENT: Yes but some on 30 November, the more
25 readily accessible, and the rest by the end of this

1 year?

2 MR WARD: Yes.

3 THE PRESIDENT: That's dealing then with the other schedule

4 concerning Dawsongroup?

5 MR WARD: Yes, sorry --

6 THE PRESIDENT: Which we haven't actually spent time on.

7 MR WARD: Which we haven't got to and I do need to address

8 you on that.

9 THE PRESIDENT: Are you saying everything is agreed on that?

10 MR WARD: No, it isn't by any means. But what matters now

11 is hearing from the defendants about when they will

12 provide the material in the Dawson schedule but I wanted

13 to give the Tribunal an indication of what we were

14 prepared to do by way of opening position.

15 THE PRESIDENT: So far as you're ordered to do things, even

16 things you may dispute, and if you lose that argument

17 you say you can do it by 31 December?

18 MR WARD: We've got some categories to dispute in the

19 schedule against us and then one large point of

20 principle about the scope of pass-on that you've seen in

21 our skeleton argument.

22 THE PRESIDENT: Yes.

23 MR WARD: The immediate question is the date by which the

24 defendants are going to comply with the Dawson request.

25 THE PRESIDENT: Yes.

1 MR WARD: We say reciprocal times --

2 THE PRESIDENT: So those are the dates you suggest, so we
3 need to hear each of the defendants on that. Shall we
4 start with DAF and Mr Pickford, just on dates?

5 MR PICKFORD: Sir, I'm just taking instructions. I think
6 that that will be acceptable but I'm just confirming
7 that with those behind me now. So if anyone else is
8 ahead of the game on that, perhaps they could go first.

9 THE PRESIDENT: Yes. Mr Hoskins, for Volvo/Renault.

10 MR PICKFORD: Sorry, I'm told we can confirm that.

11 THE PRESIDENT: Thank you.

12 MR HOSKINS: I still need to take instructions on a final
13 date but I can say confidently there's absolutely no way
14 we can do it by December. We will give the database
15 disclosure by 29 November, which was already the
16 position in the VSW consent orders. Part of the
17 difficulty is, as you've seen it, we have scoping issues
18 and that's a similar theme. We're also going to have to
19 know what we have to do for Ryder as well in terms of
20 manpower and you remember that we have to do this for
21 Volvo and Renault so we have to do it twice.

22 THE PRESIDENT: Yes.

23 MR HOSKINS: So I can say we're not going to do it by
24 December and I'll try to get a best estimate for you as
25 soon as possible.

1 MR MALEK QC: The way I look at it, this isn't the type of
2 disclosure where the dates have to be the same for
3 everyone. It doesn't have to be the same for the
4 claimants and the defendants because it's not one of
5 those cases where people can tailor their disclosure in
6 the light of the other parties' disclosure. I'm not
7 unduly fixed with the idea that everything has to be on
8 the same precise date because some people have greater
9 difficulties than the others with their databases for
10 example.

11 MR HOSKINS: That seems to be the unfortunate position we're
12 in so I'm very happy to hear that.

13 MR MALEK QC: As regards the database disclosure, you can do
14 that by the end of --

15 MR HOSKINS: 29 November.

16 THE PRESIDENT: And you'll come back to us shortly on the
17 rest.

18 MR HOSKINS: Absolutely.

19 THE PRESIDENT: Then Daimler, Mr Harris?

20 MR HARRIS: Sir, yes, we've given this quite some thought.

21 I won't take you back to Mr Bronfentrinker's evidence
22 that sets out in some detail what the nature of the
23 difficulties are with the myriad databases, but with
24 that in the background --

25 THE PRESIDENT: Tell us what you can do.

1 MR HARRIS: -- we say this should be done a la VSW in stages
2 and we're quite happy to provide to Dawsongroup the
3 VoC2/01 and 02 categories by 31 January, bearing in mind
4 that that would also be the date that we are proposing
5 for, if you like, similar categories for Ryder, so you
6 will be hearing this submission again later, but then it
7 would be by 4 April for, in Dawsongroup, 03, 04, 05 and
8 06, again bearing in mind there will be quite a lot of
9 disclosure to Ryder on those dates as well. We're yet
10 to have the whole argument about what's to be ordered in
11 Ryder.

12 But that, without reminding you of the detail,
13 reflects Daimler's assessment of its precise position
14 with its scoping exercise and its databases and its
15 myriad offices and HQs and what have you. So if you
16 would like them again, it's 31 January 2020 for VoC2/01
17 and 02, that's in Dawsongroup, then 4 April 2020 for
18 Dawsongroup 03, 04, 05 and 06.

19 MR WARD: Sir, it goes without saying we would prefer
20 a tighter timetable, not least because we have a CMC
21 already in the diary for February.

22 MR MALEK QC: Yes, I agree.

23 MR HARRIS: For what it's worth, members of the Tribunal, we
24 would, on the staging approach, accept the claimants'
25 disclosure to us, which of course we've yet to argue

1 about in detail, on 31 January as well. So it's not as
2 though we're seeking a great deal from them way in
3 advance of us providing our first stage.

4 MR MALEK QC: Yes but they would be in a position to
5 disclose those before that date.

6 MR HARRIS: It may depend on where we get to with the
7 argument that we are yet to have about what we want from
8 them. They say they're prepared to disclose what they
9 say they're going to disclose but it may prove to be
10 a different complexion when we say actually the Tribunal
11 has now ordered the following five additional...

12 THE PRESIDENT: I'm not quite clear, I can see that 03, 04,
13 05 and 06 involve a lot of searching but VoC2/01, 02
14 which is the more database-focused disclosure, why can
15 that not be done by the end of this year? We're only in
16 mid-September.

17 MR HARRIS: Well, we can turn up Mr Bronfentrinker's
18 evidence but the highlight of that was that they have --
19 as you know, Daimler, unlike some of the other parties,
20 have already engaged in quite a substantial scoping
21 exercise and there are at least 20 databases to which
22 Mr Bronfentrinker referred, we can turn up that passage
23 if you would like to see it. There are complications,
24 this is the same for some of the other defendants where,
25 when it comes to the actual access, especially with

1 archive or legacy database systems, you have to find
2 possibly the one individual, if there is even an
3 individual left, within the business who has to access
4 that system, get it to actually work and the considered
5 scoping exercise, which we've done deliberately and
6 I would submit responsibly, has led us to the conclusion
7 that across those databases, bearing in mind historic
8 and legacy systems and bearing in mind how it has to be
9 coordinated through a relatively small group which is
10 again described in detail in Mr Bronfentrinker's witness
11 statement, that's where the date comes out.

12 This comes against the background, sir, of the
13 submission I was making yesterday that Daimler, perhaps
14 uniquely amongst some of the defendants, is keen to make
15 progress. We're actually keen to do more and address
16 more categories but nevertheless there are time
17 constraints as to those categories having been dealt
18 with in relevance terms, there is a limit to what one
19 can do in time terms.

20 Sir, it might be worth just drawing back to your
21 attention that the reference to the 20 databases is
22 Mr Bronfentrinker 76.3 {COM-C/7/30}, but in addition
23 we've specifically gone on the record to explain that in
24 our scoping exercise, this is Mr Bronfentrinker 5, which
25 if you wanted to turn it up is in COM-C, tab 7.

1 THE PRESIDENT: We're looking at it.

2 MR HARRIS: We've hired a particular external provider
3 called EFS to assist us with the scoping exercise.

4 THE PRESIDENT: What he says, "possibly as many as 20
5 different systems". It's pretty extraordinary,
6 Mr Harris, that here we are in September 2019 and they
7 still haven't identified how many databases.

8 MR HARRIS: I think what this reflects is the fact that
9 there has been a scoping exercise already carried out to
10 date and what it says is they've discovered it's likely
11 to be from a comparatively large number of systems and
12 databases. The point that is made on the previous page
13 at 76.2 is that based upon considerable experience from
14 my team, there are, and I quote:

15 "[...] always unforeseen difficulties and challenges
16 in a disclosure of the size and scope that is going to
17 be required in these claims [...]"

18 It's a responsible statement to say we've hired
19 external people, we've got a dedicated project team,
20 we've looked into it, this is already the sort of scale
21 and if this needs to be done it needs to be done
22 properly and this is the sort of time it will require.

23 This is not me making this up on my feet and just
24 saying I want to push it off in the long grass. This is
25 against the background of sworn evidence that has been

1 further informed by both EFS and if you see over the
2 page we've also employed the Ernst & Young e-discovery
3 team.

4 MR MALEK QC: I saw that but sometimes it's just a question
5 of putting sufficient resources into something. So, for
6 example, as regards the non-database, you're asking for
7 April, you can easily beat April by just putting more
8 people on it. On the databases, I can see you've got
9 some issues there which may justify being later than
10 November of this year.

11 THE PRESIDENT: Can you at least tell us, you say a lot of
12 work has been done on databases; the current databases,
13 how far do they go back? If all that work has been
14 done, then those behind you can answer that question.

15 MR HARRIS: May I respond with a number of points. The
16 first is I've been reminded that in the VSW order where
17 there's considerably less disclosure, that's to be
18 provided on 31 January, so that puts a little bit of
19 context into the date that we're suggesting for the
20 first tranche. That was accepted all round, and we were
21 told don't interrupt that agreement with anybody else.

22 THE PRESIDENT: Yes but that action is a bit behind this
23 action.

24 MR HARRIS: The second thing is, it might be the case that
25 some of the databases within that 20 that relate to more

1 recent years can be provided because they don't suffer
2 from these difficulties of access and can be provided
3 a little bit sooner. If that's the case then we'll
4 endeavour to do that.

5 THE PRESIDENT: That's why I'm asking you, how many of them?
6 Because you've been at it for more than a year according
7 to --

8 MR HARRIS: It's piecemeal, sir, is the answer. Some of the
9 databases are of more recent data, more readily
10 accessible with more people that know how to use them
11 and more people that can then actually use them, that
12 can be done sooner. But when you get into the earlier
13 periods, in the legacy systems where there either is
14 nobody who knows how to use them, to access them, or
15 there can be only one and then that person has to do
16 a number of different databases, it's plainly got to be
17 staggered.

18 (Pause).

19 THE PRESIDENT: Yes.

20 MR HARRIS: May I draw one other part of the story to your
21 attention because it addresses the point that Mr Malek
22 has raised with us. It is at the top of page 29 of
23 Mr Bronfentrinker's statement and it's in 76.2
24 {COM-C/7/29}. Having talked about the project team with
25 EFS and the E&Y disclosure people, it goes on to say:

1 "I understand from the associate leading the project
2 team which had been referred to earlier that it's
3 scoping quantum disclosure that Daimler and EFS do not
4 consider this process can be sped up by adding
5 additional resources, as those individuals who have
6 carried out the scoping exercise will need to undertake
7 the collection of responsive material due to their
8 familiarity with the information that is available,
9 where it is stored, and how to navigate the very many
10 different Daimler databases and systems. The
11 information will then need to be produced for
12 disclosure. To assist [...]"

13 Then we talk about the assistance.

14 MR MALEK QC: I've read that. I've already made it clear
15 that I can see a distinction between database, where I
16 think you have a valid point, and the non-database
17 disclosure where I think the date of 4 April is far too
18 late.

19 But as regards the database, I think we understand
20 the distinction you're making between legacy and
21 non-legacy databases and you've already indicated that
22 you could provide the non-legacy database information
23 significantly quicker than the legacy database. I think
24 we understand those points.

25 MR HARRIS: Yes, well, it could be quicker, I'm hesitant

1 about significantly because you'll appreciate that
2 Daimler is the biggest truck manufacturer in Germany,
3 has something like a 40% market share, so these are
4 significant systems and they're subject to this point
5 about how you can't just -- this is the sworn evidence
6 that I'm working with, in the same way that Mr Hoskins
7 was working with the sworn evidence about --

8 THE PRESIDENT: If you want to rely on a lot of detailed
9 evidence, we would expect much more detail about what
10 the databases are, which are legacy, which are not, what
11 are the particular problems about the non-legacy
12 databases if you say that even though it's current,
13 obviously a lot of people there, Daimler who understand
14 it very well because they're working with it day in day
15 out, why they can't access it quicker.

16 What we have in mind is that we can't specify the
17 databases because it's not even clear whether there are
18 20 or it says possibly as many as 20 so we don't know
19 how many, but we will say that for the non-legacy
20 databases, that's to say the current ones, the date will
21 be 29 November; for the legacy systems, it will be
22 31 December and for the other categories we think
23 4 April is really too late and we'll give you some
24 indulgence and make it a month earlier, 6 March. That's
25 what we're minded to do, Mr Ward. If you want to try

1 and push back on that --

2 MR WARD: No.

3 THE PRESIDENT: There's always liberty to apply but you'll

4 have to explain what is the particular database, what

5 period it covers and what is the particular problem.

6 MR HARRIS: I understand, thank you.

7 MR WARD: Sir, thank you. That concludes the debate about

8 the Dawson claimant schedule. I'm so sorry, I said that

9 and then somebody spoke behind me. One moment.

10 MR HOSKINS: I'm not sure --

11 THE PRESIDENT: No, I don't think we've finished with Volvo

12 because Mr Hoskins was going to take instructions.

13 MR HOSKINS: I was in the process of doing it so I'm sorry,

14 I'm going to need a minute but I thought I'd better...

15 MR WARD: Can I mention something else while Mr Hoskins

16 takes instructions. Mr Malek mentioned that the

17 Tribunal is planning to give some generalised indication

18 at least about how the disclosure process should

19 proceed. Just for the Tribunal's information, a draft

20 cover order is circulating between the parties which

21 will append to it the relevant schedules. Of course

22 subject to the Tribunal's view, it will make provision

23 for, for example, evidence to be confined to the best

24 available evidence and make the provision that, where

25 there is a sample of relevant documents to be provided,

1 the basis on which the sampling shall take place will be
2 set out in the disclosure statement. But that's still
3 in circulation, I just wanted to put that on the
4 Tribunal's radar, if I may. Of course that will come to
5 you for your consideration.

6 THE PRESIDENT: Thank you, that's helpful.

7 Yes, Mr Hoskins.

8 MR HOSKINS: Sir, I would like to say for the databases you
9 have our position, 29 November, that's all sorted. For
10 the other categories I would ask for 20 April. Let me
11 explain. 20 April with liberty to apply. We will
12 disclose everything we have gathered under the order on
13 20 April so it's not that we're looking to hold back
14 stuff, anything -- all the progress we've made will be
15 delivered.

16 Let me explain why I'm asking the indulgence of the
17 difference between 6 March and 20 April and I'm sorry,
18 you probably think I'm a bit of a broken record at this
19 stage. You remember that for Volvo/Renault we are
20 dealing with three countries: the UK, France and Sweden.
21 We are dealing with three languages dealing with
22 disclosure. We are dealing with the fact that we've got
23 Volvo and Renault you have to look at separately so we
24 are in a worse position than someone like Daimler is for
25 those three reasons. That's why we would ask for

1 20 April because we think it's more realistic for us but
2 we will disclose everything we have managed to find by
3 20 April, so it's not a question of trying to drag it
4 out any further.

5 THE PRESIDENT: Yes, Mr Ward.

6 MR WARD: Well, Volvo/Renault is a business with a turnover
7 in the hundreds of billions assisted by one of the
8 world's largest law firms. It's facing a claim that's
9 been afoot for two years. In my respectful submission,
10 Mr Hoskins used the word "indulgence", that is
11 indulgence too far.

12 THE PRESIDENT: Yes, I think, Mr Hoskins, it will be 6 March
13 as for Daimler.

14 MR HOSKINS: That's fine but with liberty to apply.

15 THE PRESIDENT: You'll have liberty to apply.

16 MR WARD: I'll try again. I think that's the end of the
17 Dawson schedule.

18 THE PRESIDENT: Yes, but we now turn to applications against
19 Dawson.

20 MR WARD: Yes. There is a separate Redfern sheet for that.
21 This is a bit like a wedge of cheese. We start with
22 a very small amount of disagreement and we end up with
23 a much thicker amount of disagreement towards the back
24 of the schedule.

25 THE PRESIDENT: Yes.

1 MR WARD: Under the VoC category there are I think just two
2 disputed categories. The first is VoC2(bb) which is on
3 page 17 of the schedule. It is useful to of course put
4 this in context, that the preceding categories provide
5 an enormous amount of information about the trucks
6 themselves and the prices charged for them. I'm sure
7 the Tribunal is familiar with that flavour by now.

8 VoC2(bb) has been -- we've reached agreement with
9 DAF and with Daimler but not with Volvo/Renault and I'll
10 explain the category and I'll explain the basis --

11 MR HOSKINS: Can I cut through? I'm going to save us all
12 some time I think. Where there are remaining disputes
13 simply between us and Mr Ward relating to this, we are
14 not going to pursue them individually. So hopefully
15 that will save time.

16 THE PRESIDENT: That's very helpful.

17 MR WARD: That's good. So that will mean the treaty is
18 agreed, thank you.

19 The next one is on the same page which I think --

20 THE PRESIDENT: (e) is it?

21 MR WARD: (ee) is the next one that's disputed, fixed asset
22 register. I believe DAF is no longer pursuing it but
23 I think Daimler is. Perhaps Mr Harris can confirm
24 that's right?

25 MR HARRIS: Sir, that is right. I'm afraid this is not --

1 I had apprehended that the defendants would be pursuing
2 their applications themselves rather than Mr Ward
3 pursuing them on our behalf and introducing them, so
4 this is not the order in which I was proposing to deal
5 with it.

6 THE PRESIDENT: Anyway, he's not showing me the badge, he's
7 waiting for you.

8 MR HARRIS: I just say that because I now have to locate
9 this particular --

10 MR MALEK QC: Page 17.

11 MR HARRIS: I have that but that is not how it's organised
12 in my submissions. So if you just bear with me one
13 moment, I do apologise.

14 THE PRESIDENT: Take your time.

15 MR HARRIS: I do apologise. (Pause).

16 Yes, this one, VoC2, thank you, members of the
17 Tribunal, VoC2/01(ee), this one boils down to a document
18 called the fixed asset register and if you could please
19 turn up Mr Grantham's letter appended to
20 Mr Bronfentrinker's statement, he deals with this in --
21 so you'll find his letter in COM-D, that's the exhibits
22 bundle and it begins at tab 1 on page 40 but the
23 relevant paragraphs for this category --

24 THE PRESIDENT: Just a minute. I think it's tab 2, isn't
25 it? Isn't it page 40? This is the letter of 6

1 September.

2 MR HARRIS: Yes, in mine it's tab 1 but in any event the
3 relevant page is page 46 {COM-D/2/49}. May
4 I respectfully invite you, it will be quicker if you
5 were to please, members of the Tribunal, read
6 paragraphs 2.20 and the next two, to 2.22.

7 THE PRESIDENT: Yes, thank you. (Pause).

8 MR HARRIS: So there are three short points then. Number
9 one, the expert forensic accountant has given clear
10 evidence in 2.20 and 2.21 as to why changes in fleet
11 make-up are relevant. I respectfully contend they are
12 obviously right, it is obviously relevant for the
13 reasons that he gives. I add to that that is no doubt
14 therefore why Ryder has agreed this category and why, in
15 principle, VSW also agreed the category. I appreciate
16 there are staging issues in VSW. So reasons for
17 relevance, they are obviously right, the other two sets
18 of claimants have accepted that, that's the first point.

19 The second point is that the evidence here is that
20 there's one document called a fixed asset register,
21 that's this category, that contains this information.
22 Then the third point is that -- the evidence is that
23 they would be expected to have this fixed asset
24 register. It's inconceivable that Dawsongroup won't
25 have this given that their business is buying these

1 assets and renting them out and so should be easy to
2 provide.

3 Those are my submissions.

4 THE PRESIDENT: Yes.

5 MR WARD: Sir, this is an example of the point you made at
6 the beginning of this hearing that there may be
7 information that an expert would like to have but that
8 is not actually necessary. It's important to recall
9 what information the defendants will actually be
10 receiving and under VoC they will be receiving the full
11 details of both the characteristics of the trucks and
12 the purchase of the trucks, including the price and the
13 date. There will be further information in the pass-on
14 schedule about trucks that were sold back to them and
15 indeed under PO2, information about policies about
16 disposal of trucks. So our submission is that this is
17 just unnecessary.

18 The relevant information is elsewhere. Why do we
19 resist disclosure of this? It's because of course the
20 asset register also contains a huge range of other
21 information that is completely irrelevant to this claim
22 and we are generally concerned to avoid opening up areas
23 of disclosure that may lead to costly and potentially
24 fruitless further enquiry. The core information is all
25 there in any event.

1 THE PRESIDENT: Mr Ward, we think it may be that one could
2 put it together from data disclosed under other
3 categories but it's clearly a convenient source bringing
4 it all together, reflecting fleet size at any time and
5 we think it should be disclosed. If it contains the
6 register, other assets than trucks, those parts of it
7 can be redacted. But it's the trucks or indeed vans
8 that are not within the category of the claim, but as
9 far as it's the register of trucks as defined for these
10 proceedings, we think it should be disclosed and broadly
11 we're persuaded Mr Harris is right. We don't make any
12 inference from that as to whether the sort of use that
13 Mr Grantham says he might want to make of it is relevant
14 for damages or not. That's something for later
15 argument. But disclosure, yes.

16 MR WARD: Thank you, sir.

17 I may at least proceed to just guide the Tribunal
18 through the issues? That's everything that's contested
19 under VoC.

20 MR HARRIS: No, that's not correct.

21 THE PRESIDENT: Right, let Mr Harris then take us through.

22 What else is there in VoC?

23 MR HARRIS: There is an issue about the product scope. You
24 will recall this from our -- that is to say whether or
25 not there should be disclosure by Dawsongroup only of

1 trucks that it purchased from the named three defendants
2 or whether it should extend to trucks from both -- from
3 other non-defendant manufacturers, which is not limited
4 to Scania but does include Scania.

5 This issue is addressed, sir, in the Daimler
6 skeleton argument {COM-B/7/12}, it might be helpful to
7 have that to hand and then I'm going to draw your
8 attention to two paragraphs in Dr Nitsche's expert
9 witness statement. But before I go into the detail,
10 this is a category that applies just as much to Ryder
11 and it's only fair that I should make that clear right
12 now.

13 THE PRESIDENT: Yes. So it's the product scope.

14 MR HARRIS: It's the product scope of VoC and it's
15 summarised in my paragraphs 35 and 36 but you will find,
16 if I may now take you to Dr Nitsche's evidence which is
17 in COM-C --

18 THE PRESIDENT: Before we get into that, trucks purchased
19 from the defendants, can I just clarify? That's how it
20 was put but sometimes you purchased, I think,
21 defendants' trucks, defendant-manufactured trucks from
22 sellers other than the defendants. Is it accepted that
23 it should be not just trucks purchased from the
24 defendants but trucks manufactured by the defendants
25 irrespective of the seller?

1 MR WARD: It is. Just to be clear also, sir, you probably
2 have this already, Dawson has only sued on the value of
3 commerce of the defendants. It has not sought to make
4 them jointly and severally liable for purchases from
5 other manufacturers. That's approximately, I believe,
6 about 10% of Dawson's total fleet was purchased from
7 manufacturers who are not defendants in the case.

8 THE PRESIDENT: Yes. So it's trucks manufactured by
9 defendants, it's accepted, not just trucks purchased
10 from the defendants.

11 MR WARD: Yes.

12 THE PRESIDENT: Just to clarify that. Mr Harris,
13 I interrupted you but I think that's an important
14 distinction.

15 MR HARRIS: It is although it's dealt with by Dr Nitsche and
16 the easiest way to deal with this again is to, if I may
17 respectfully suggest, take COM-C and turn to tab 8 and
18 that's Dr Nitsche's witness statement for today
19 {COM-C/8/1}.

20 MR MALEK QC: Will you be giving the Scania manufactured
21 trucks data as well?

22 MR WARD: No, we're not suing Scania.

23 MR MALEK QC: Okay, so you're not going to be giving that,
24 on your basis.

25 MR WARD: It's just Daimler, Volvo and DAF.

1 THE PRESIDENT: Your defendants.

2 MR WARD: We have no Part 20 defendants in our case.

3 MR HARRIS: Mr Malek, that's a good point. That highlights
4 one area. We want that and they won't provide it.
5 Dr Nitsche explains why it's relevant, what he proposes
6 to use it for and also why it's not de minimis.
7 Probably the quickest way, I'm in your hands but
8 probably the quickest way is for you to read
9 paragraphs 50 to 52 on internal page 15 of tab 8.
10 {COM-C/8/15}.

11 (Pause).

12 THE PRESIDENT: And this goes to the whole question,
13 Mr Harris, of how an overcharge, what methods the
14 experts are going to use to calculate overcharge?

15 MR HARRIS: It does and on that -- I beg your pardon. On
16 that point of course we hear the constant refrain from
17 the claimants it's not for us to tell them how their
18 experts should go about doing its modelling. Now the
19 boot is on the other foot. Our expert proposes, as he
20 explains in some detail here, that he does need to have
21 access to what he specifically identifies as not de
22 minimis numbers in order to do two things and he
23 explains what they are.

24 THE PRESIDENT: Then the boot is on both sides and there's
25 a major question. We don't think it's satisfactory that

1 each side, whether it's on pass-through or the different
2 approaches to overcharge, can either say we want to use
3 this method, we want to use four methods, we don't know
4 which method we want to use so we want to get all the
5 data for every possible method and then we'll see how
6 the numbers work out.

7 MR HARRIS: I understand.

8 THE PRESIDENT: We think that really on a case of this
9 scale, as in other cases of this scale, we have to reach
10 a view as to what is the method that's going to be used
11 and of course we know that in some cases it can be
12 helpful to use three methods as a cross-check and so on
13 as reflected in the Commission's recent guidance on
14 pass-through, but as you will have studied the recent
15 guidance you will know that it also records the ruling
16 of Mrs Justice Rose as she then was in the
17 *Air Cargo* case where she had precisely this
18 problem and said, no, the court will decide early on how
19 we're going to approach overcharge having listened to
20 the experts and that will govern the way disclosure is
21 proposed.

22 MR HARRIS: I understand.

23 THE PRESIDENT: That relates to you, it relates to the
24 request made probably from you and various people by
25 Ryder for US and for data on vans, on the basis looking

1 at prices of vans can be another comparator et cetera,
2 and that affects a whole range of requests we're going
3 to have to address.

4 We do think that that's something that just needs to
5 be confronted and decided and we've read all the expert
6 statements so we've had evidence from the experts and
7 our provisional view based on what we've seen, subject
8 to what people may say, it affects in particular
9 Mr Brealey's clients because Dr Wu wants to pursue lots
10 of approaches, is that this is a case where the most
11 reasonable way of approaching it is through econometric
12 analysis based on during and after and ideally, if
13 possible, before, during and after, with a regression
14 model.

15 That is certainly a method, as we understand it,
16 every expert thinks is appropriate, it's really
17 a question whether one then has disclosure which will
18 assist other methods as well. We think that gets out of
19 control here. We will have to hear Mr Brealey on that
20 because we know you want other methods but this also
21 seems to us to be directed at looking at something else,
22 namely by looking at switches in purchasing and so on,
23 practice. But we think that the massive volume of
24 disclosure that will go to building an econometric model
25 and looking at price movements is the way we should

1 approach it in this case. Here that works against you
2 but when it comes to Ryder's requests that works in your
3 favour.

4 MR HARRIS: Absolutely. I hear you loud and clear and we
5 endorse the comments and no doubt I'll be smiling when
6 I have to make any submissions on light commercial vans
7 and USA and EEA comparators. May I take 60 seconds to
8 try to persuade you this is not of the same genre? This
9 is not comparing it with a completely different market,
10 it's not comparing it with a completely different
11 country. It's not the difference say between
12 econometric analysis and margin analysis or econometric
13 analysis and a different product analysis. This is much
14 more within the heart of the very thing that the
15 Tribunal has just indicated it's minded to order. It is
16 VoC data to be plugged into an econometric model and all
17 he's saying is that it's important to have VoC data from
18 the people who are in that trucks market as defendants.

19 As it happens, Dawsongroup has only chosen to sue
20 three defendants but there are, as we know, six big
21 players in the market and all he's saying is he wants
22 that additional information so that he can use it in the
23 econometric analysis. He says in 52, he gives the two
24 reasons why. There are two distinct things that he
25 wants this for within the econometric models. Not

1 a margin analysis or an EEA or USA.

2 He says at 52 in the second line, he wants it to
3 know about how the claimants shifted purchases. By that
4 he means shifting the number of purchases. Because it
5 goes to -- earlier in his statement he explains how he's
6 going to do his model and it is an econometric model.

7 Can I just show you what he says? I can't find it
8 but he paraphrases. He says his first step is
9 a plausibility analysis for the econometric model.
10 That's entirely orthodox for econometricians. This
11 first sentence here or the first point in paragraph 52
12 goes to the plausibility analysis for his econometric
13 model. That's what it goes to. He says:

14 "Such shifts are indicative of effective
15 competition, either in terms of price or other
16 conditions, which speaks against the infringement having
17 had any effect in practice."

18 So that is the first stage. We'll find you the
19 reference. So that's stage one of an econometric model.

20 Then the second point is four lines up from the
21 bottom:

22 "Second, data on the prices [...]"

23 So the difference here is it's prices and what he's
24 talking about is price alignment and he gives an
25 example, perhaps the most helpful one is the last two

1 sentences on page 15:

2 "For instance, any alignment between the prices of
3 the defendant-manufacturers' trucks may have been
4 disrupted by a non-defendant undercutting their prices.
5 This disruption would be evidence that the infringement
6 (an information exchange) did not lead to a collusive
7 equilibrium [...]"

8 That again goes to the plausibility and this is what
9 he says in paragraph 10, I'm grateful to Mr Rayment. If
10 you were to turn up paragraph 10 {COM-C/8/4}, he says in
11 terms:

12 "An economic quantum analysis [in other words this
13 is the econometrics] [...] ought to consider three
14 issues:

15 "i. Whether, given the nature of the infringement
16 and the facts of the case, it is plausible that [...]"
17 the overcharge was incurred. "This plausibility
18 analysis will underpin and complement any quantitative
19 analysis."

20 So that's slightly more than 60 seconds but the gist
21 of it is this is stage one of an entirely orthodox
22 econometric quantitative analysis. He gives the two
23 reasons why he wants it.

24 With respect, they must be good reasons. It's
25 obviously the case that if there are shifts, either of

1 numbers of trucks when one particular manufacturer
2 increases prices, which is the allegation, and then yet
3 there are noticeable shifts to other manufacturers
4 including -- well, any other manufacturers, then it's
5 less plausible that there was a stable and functioning
6 cartel effect. That's a very simple point.

7 THE PRESIDENT: Well, it depends whether the shift was due
8 to price or to a new model being introduced which is
9 a better quality or better suited --

10 MR HARRIS: Which are all controlled for in the econometric
11 model.

12 THE PRESIDENT: They won't be because the econometric model
13 isn't looking at shifts in purchases, it's looking at
14 what drives price rises. It's not looking at shifts in
15 purchases at all. This is a plausibility analysis.
16 This is not a before and after analysis. It is looking
17 at something quite different. It's looking to say was
18 there a competitive market continuing and then that
19 might make it less plausible that prices rose.

20 MR HARRIS: Yes.

21 THE PRESIDENT: Then you'll have to look at who were the
22 shifts to. If there are other cartel members, then of
23 course it proves nothing.

24 MR HARRIS: Well, it proves --

25 THE PRESIDENT: Because if their prices were also affected,

1 you then have to start getting into witness evidence of
2 why the purchaser decided that this year I prefer having
3 Scania trucks as my new truck instead of a Daimler truck
4 and you'll have to start investigating all of that and
5 it may be Scania has brought out a new model and that
6 seemed attractive. It opens up a whole area of enquiry.

7 MR HARRIS: Sir, I take issue with that because you say it
8 proves nothing but my expert, in his sworn witness
9 statement, says that these go to the heart of stage one
10 of an econometric analysis, namely the plausibility, and
11 he explains why.

12 THE PRESIDENT: Well, no, he doesn't say econometric. It's
13 nothing to do with that. He says an economic quantum
14 analysis.

15 MR HARRIS: Yes but -- that's true but if you read the rest
16 of paragraph 10, that's because it's stage one of the
17 econometric analysis. So that's (ii) at the top of
18 page 5 {COM-C/8/5}. It's stage one. With respect, I'm
19 at risk, I apologise, of repetition, this is utterly
20 orthodox. You don't begin to do the number-crunching
21 econometrics if you're a responsible economist without
22 having asked yourself the question: are the things I now
23 think I'm now going to go off and build into my model,
24 are they plausible? No responsible economist does that
25 and that is because if one gets into, which I shan't do

1 now, the nitty-gritty of the econometrics, how you
2 construct the model is critically conditioned by the
3 plausibility of your thesis about what has happened in
4 the market.

5 So I do respectfully urge upon you that this is of
6 a completely different kind, this information request
7 for disclosure, than something like margin analysis
8 or...

9 THE PRESIDENT: I'm sure Dr Nitsche is of great distinction.

10 As I understand it, none of the other equally
11 experienced economists acting for the other two
12 defendants feel they need this to build their
13 econometric model.

14 MR HARRIS: Well, it's noticeable that in the case of Mr Von
15 Hinten-Reed who is the expert for VSW, that this has
16 been agreed as being relevant. I appreciate the timing
17 is completely different.

18 THE PRESIDENT: Yes but I'm looking at this case.

19 MR HARRIS: Well, when you say there are no other --

20 THE PRESIDENT: I don't think it's being pursued by Volvo,
21 is that right?

22 MR WARD: Not by anybody else, sir.

23 THE PRESIDENT: And Mr Biro who has of course vast
24 experience of these cases.

25 MR HOSKINS: The Redfern schedule records Volvo/Renault

1 adopting the justification provided by Daimler.

2 THE PRESIDENT: Yes but I thought you're not pursuing it

3 now, is that right or am I wrong?

4 MR HOSKINS: Sorry, we're not pursuing it. I'm sorry.

5 THE PRESIDENT: Yes.

6 As I understand it, Mr Pickford, are you pursuing

7 this category?

8 MR PICKFORD: Sir, there's some involved and intense

9 discussions going on just behind me at the moment. My

10 position was I certainly wasn't going to be making

11 submissions on it but I just want to clarify with those

12 instructing me.

13 THE PRESIDENT: What I want to know, it's in the schedule,

14 I don't know if -- it's resisted by Dawsongroup, so I

15 don't know if DAF is, in the light of --

16 MR PICKFORD: I am able to confirm, we are not seeking it.

17 I was just slightly concerned that --

18 THE PRESIDENT: No, no, you needed to clarify.

19 MR PICKFORD: -- the busy conversations suggested otherwise.

20 THE PRESIDENT: Mr Andreu of Compass Lexecon equally is very

21 experienced in doing econometric modelling. So you are

22 an outlier at this. As I read paragraph 52, what

23 Dr Nitsche wants to do is look at two separate points,

24 and he explains why he thinks they're relevant, but, as

25 I say, it opens up another area of investigation which

1 will involve a whole lot of other evidence then, no
2 doubt from Dawsongroup, explaining shifts in purchases
3 and whether then is that a sign of effective competition
4 on price or is it competition on other things et cetera.

5 MR HARRIS: Well, sir, I hear what you say. I'm obviously
6 having difficulty persuading you. It is not fair, in my
7 respectful submission, to describe it as an outlier when
8 it's not contested by VSW's expert and until a moment
9 ago, for completely different reasons, the
10 justifications that were supported in principle by Volvo
11 are simply not being pursued. That doesn't detract from
12 the force of the points that I make but those are my
13 submissions. If you're not persuaded, so be it.

14 THE PRESIDENT: No, we're not going to grant that disclosure
15 for the reasons I outlined. We will in due course,
16 Mr Brealey, obviously hear you on the US and the vans.
17 We won't -- I don't think that affects this point
18 immediately.

19 MR BREALEY: No, it does not.

20 THE PRESIDENT: Although it might in due course.

21 MR WARD: Sir, there was a very brief point of order that my
22 instructing solicitors helpfully brought to my attention
23 on VoC2/01(ee) that the Tribunal has ordered and it's
24 just about the date range. That was on page 17 of this
25 Redfern schedule {COM-C/3/17}, I think this is going to

1 be common ground.

2 The Tribunal has granted the order that Daimler
3 sought but you will see that the --

4 THE PRESIDENT: That's the fixed asset register.

5 MR WARD: Yes. It includes the year from 1996.

6 THE PRESIDENT: I think it should be 1997, shouldn't it?

7 MR WARD: That's what we hope is going to be common ground.

8 THE PRESIDENT: I think that's right.

9 MR WARD: Sir, I think I'm going to try again. I think
10 that's everything on VoC. I see it probably is a
11 convenient moment for a break.

12 THE PRESIDENT: Yes, I think we probably need to take
13 a break. What's the next item?

14 MR WARD: Interest, just going through the schedule in its
15 form. We've had a helpful concession from DAF in the
16 course of this morning so I need to update my own
17 thinking on that, but there are I think still some
18 significant disputes about interest.

19 MR MALEK QC: I would like to see during the lunch break
20 your draft preamble just in case that does raise issues
21 because we're all here and we should be able to finalise
22 what the preambles are going to be.

23 MR WARD: Apparently it's available now so if you like...

24 THE PRESIDENT: Is this now one that has been shared with
25 everyone?

1 MR WARD: It has been shared with everyone and is still in
2 circulation. It doesn't represent a finalised view
3 between the parties.

4 MR MALEK QC: No, of course not but we can decide what's
5 appropriate.

6 MR SINGLA: Sir, is the point that this preamble should be
7 shared across all parties to all proceedings?

8 MR MALEK QC: We need to look at it first and see whether
9 it's appropriate.

10 MR SINGLA: We've not been provided with it.

11 MR MALEK QC: We'll have a look at it.

12 (Handed).

13 I think we've already been given this, this version.

14 MR WARD: It's been in circulation this morning, there have
15 been changes, that's the latest.

16 MR MALEK QC: I'll put the time on it so we know.

17 THE PRESIDENT: Right. We'll take five minutes.

18 (11.28 am)

19 (A short break)

20 (11.42 am)

21 MR MALEK QC: Mr Ward, just a couple of points. At the
22 moment we're still pencilled in to have a hearing on
23 4 October with Mr Harris as far as things aren't agreed.
24 The first disclosure hearing will be on 1 November and
25 I'll deal with that. I don't think the President is

1 available so I'll deal with that. I don't want it to be
2 an enormous amount of applications all to be heard on
3 the same day but if there are other parties that need
4 things to be done which will make that hearing last more
5 than let's say a day, then they can have theirs on
6 a separate day or schedule it for the next month. But
7 I don't want to have everyone piling in on the same day.
8 That's the first point.

9 The second point is I've looked at your draft order
10 and as regards that, obviously point 3, if you're going
11 to run that, that's got to be agreed between you and the
12 defendants in that action and no doubt that is still
13 a matter of discussion between you. If it's agreed then
14 that's fine.

15 MR WARD: I'm sorry, sir, I actually didn't catch the
16 beginning of what you said.

17 MR MALEK QC: On point 3 in your draft order, we're not
18 going to make any order to that effect today unless
19 that's agreed between the parties. As regards point 6
20 which is the disclosure statement, the wording that the
21 President and I have agreed between ourselves, subject
22 to comment, will be:

23 "The parties' disclosure by list given pursuant to
24 paragraph 1 shall be accompanied by a disclosure
25 statement by an appropriate person which shall (a) set

1 out the extent of the search that has been made in order
2 to locate the documents ordered to be disclosed, (b)
3 specify the manner in which the search has been limited
4 on reasonableness and proportionality grounds and why,
5 and (c) certify to the best of his knowledge and belief
6 that the disclosure ordered has been provided."

7 THE PRESIDENT: So rather than a reference by
8 cross-reference to the CPR, it will be the language in
9 the order.

10 MR WARD: I understand, thank you.

11 We were about to turn to interest and there has been
12 a lot of movement on this. What I would propose to do
13 is just briefly page-turn through the interest section
14 of the schedule which starts on page 21 and see if we
15 can establish what remains in dispute. It's certainly
16 been narrowing. We're not 100% clear what is left.

17 THE PRESIDENT: That's on page 21?

18 MR WARD: It starts on page 21. If I can do my best just to
19 identify where I think we are because two things have
20 happened this morning. One was that Mr Hoskins has said
21 he's not going to pursue anything that Volvo/Renault are
22 pursuing but nobody else is and DAF has indicated that
23 it is only pursuing two categories here which I'll show
24 you in a moment, I8(e) and I10. Mr Pickford is
25 standing.

1 MR PICKFORD: The only reason I'm standing up is because
2 it's my application.

3 MR WARD: It's your application but I thought I would assist
4 by trying to work out which bits are still in dispute
5 but if you want to do that, Mr Pickford, I'd be
6 delighted.

7 MR PICKFORD: As between my clients and Mr Ward's, Mr Ward
8 is correct that the only applications we are making
9 today, the only contested matters that remain to be
10 determined by the Tribunal are I8(e) and I10 because
11 other matters have either been agreed by Dawsongroup or
12 we have agreed to pursue them, if necessary, at a later
13 date.

14 THE PRESIDENT: Yes.

15 MR WARD: So if I may, I7 which is about cash balances, was
16 certainly in dispute this morning but if DAF are not
17 pursuing it, Mr Harris has confirmed that Daimler are
18 not pursuing it, I think it therefore follows that
19 Volvo/Renault are not pursuing it?

20 MR HOSKINS: That's right. The only caveat is not today.

21 MR WARD: Then I8, we have documents or information
22 identifying three categories -- actually I'm so sorry,
23 five categories. Here there has been some agreement but
24 there is still some dispute.

25 So I8(a) {COM-C-2/22} is:

1 "The cost of new debt for each year for each
2 claimant [...]", in other words the effective rate of
3 debt. That is agreed.

4 (b) is a request for each debt facility available to
5 the claimant in great particularity.

6 As you know every single truck was purchased on
7 credit, therefore it's a huge number, and what the
8 defendant has offered is essentially a summary verified
9 by a statement of truth, as you can see at the top of
10 the next page. I think this is still disputed by
11 Daimler, is that right, I8(b)? No. That one probably
12 falls away as well.

13 THE PRESIDENT: In the column for Daimler it says "Daimler
14 is willing to accept Dawsongroup's proposal".

15 MR WARD: So sorry, that is my mistake. In that case if DAF
16 have accepted it and Volvo are happy to fall in behind
17 DAF, then that one has fallen away as well.

18 THE PRESIDENT: And Daimler also have accepted it.

19 MR WARD: At (c) there is an average cost of debt which
20 again has been agreed. (e) is definitely in dispute and
21 that's Mr Pickford's application.

22 I9 was certainly pursued by DAF but no longer.

23 I don't know if Daimler is going to pursue it if DAF is
24 not, which is credit rating reports.

25 MR HARRIS: No, that's not pursued.

1 MR MALEK QC: Are you saying not pursued just for today or
2 not pursued at all?

3 MR HARRIS: We're in the same position as DAF so if they're
4 going to pursue it later we may well pursue it with them
5 later but my understanding from Mr Pickford is he says
6 he's not pursuing it today.

7 THE PRESIDENT: Yes.

8 MR WARD: Then I10 which is pursued by DAF therefore remains
9 in play. So I think we are left with I8(e) and I10
10 which, as Mr Pickford rightly says, are his
11 applications.

12 THE PRESIDENT: Yes. Mr Pickford.

13 MR PICKFORD: Thank you. I'm grateful for Mr Ward's
14 enthusiasm to begin my application.

15 Just to clarify, because Mr Ward said that we're not
16 pursuing them, we're not pursuing them today. That does
17 not mean we will not necessarily pursue them in the
18 future.

19 If we can go to the Dawsongroup particulars of claim
20 which you'll find in the bundle at DG/A1, tab OC2,
21 page 57 {DG/A1/OC2/57}. This is where they deal with
22 interest.

23 THE PRESIDENT: Yes, I think it doesn't -- although there is
24 the amended particulars of claim -- have some
25 confidential passages. This part of it does not.

1 MR PICKFORD: That's correct, I am not aware that any of
2 this is confidential.

3 One sees at the top of the page, paragraph 48, that
4 the pleaded claim involves a claim for compound interest
5 which extends up until the date of judgment.

6 Then we see at paragraph 50, as at approximately ten
7 months ago, so to the end of December 2018, the
8 overcharge claim is £64 million; the financing losses,
9 that is the interest claim, is £81 million. It's
10 interesting to note that those numbers have changed as
11 compared to the 2017 version of this particulars of
12 claim in that the overcharge has gone down whilst the
13 financing losses have radically shot up.

14 THE PRESIDENT: Yes.

15 MR PICKFORD: There seems to be two potential explanations
16 for that, either that the alleged financing losses are
17 accumulating at an extraordinary rate or, potentially,
18 that Dawsongroup has had some difficulties in
19 calculating its financing losses and has decided to do,
20 to recalculate them on a slightly different basis, which
21 seems the more plausible one because otherwise the rate
22 of interest in a few months seems somewhat
23 stratospheric.

24 Either way it certainly points to the need for
25 considerable care in calculating interest losses given

1 that they even now, or even ten months ago, constitute
2 well over half the claim and that will only increase as
3 time goes on.

4 So in terms of the categories that we're pursuing
5 today, as Mr Ward rightly points out --

6 THE PRESIDENT: Sorry, can you just pause a moment? I'm
7 just reading 49. (Pause).

8 Yes, thank you.

9 MR PICKFORD: Thank you, sir, that's actually very helpful
10 because it comes on to a point I was going to make in
11 any event. What one sees in 49 is that the claimants
12 say that their financing was by a variety of hire
13 purchase agreements and also interest rate swaps. There
14 are two points that I will be coming on to make that
15 arise from this. One is that it is said by the
16 claimants that the only thing you need to see is the
17 hire purchase agreements and we say there's a mistake
18 there, that's simply wrong and I'll come on to explain
19 why that's the case.

20 Secondly, they themselves plead to their use of
21 interest rate swaps and that's item I10 that I'll be
22 coming on to, and again on the basis of the pleaded case
23 against us we will be making the submission it's
24 essential that we see the information that underlies
25 that.

1 MR MALEK QC: You don't know whether it's just a small
2 number of swaps or -- it's unlikely to be a large number
3 but...

4 MR PICKFORD: We don't know.

5 MR MALEK QC: No.

6 MR PICKFORD: But I'll come on to deal with the details of
7 that in a moment because the first thing I wanted to go
8 to was I8(e).

9 THE PRESIDENT: Before you do, there isn't an annex or
10 appendix that actually shows the interest calculation,
11 is there?

12 MR PICKFORD: There is but it doesn't show the calculations
13 in any detail. What it does is set out the average
14 interest rate that they're using is for a year and then
15 what the interest rate is that they're claiming in
16 respect of that year. It's annex D.

17 THE PRESIDENT: Page 101.

18 MR PICKFORD: Yes, 101, 102. Perhaps if the Tribunal would
19 like to turn it up briefly {DG-A1/OC2/101}. They say
20 that their financing costs are addressed by reference to
21 their average finance cost.

22 "The average finance cost is the average rate of
23 interest that the claimant paid on its debt each year
24 during and after the relevant period. It is calculated
25 by dividing the claimants' annual interest payment on

1 their debt by the average of their opening and closing
2 balances."

3 Then we come on, and table 4 sets out the interest
4 calculations to the end of 2018.

5 If we turn on to the next page we can see an example
6 {DG-A1/OC2/102}, this is as regards purchases from DAF.
7 We have table 3, "Interest rates by financial year"
8 which clearly vary quite considerably from year to year.
9 Then "Interest claimed to end of 2018" as a function of
10 those.

11 MR MALEK QC: And you want to satisfy yourself that they've
12 got the average finance costs correct because it has
13 such a big impact on the figures?

14 MR PICKFORD: In essence, yes. That's certainly one point.
15 In fact ultimately the question that we say the Tribunal
16 should be asking itself is what would the financing
17 costs have been in the counterfactual world and they may
18 or may not relate to the financing costs in the actual
19 world.

20 MR MALEK QC: Yes.

21 MR PICKFORD: But as a very first step in analysing that
22 question, we need to see all of the primary
23 documentation that underlies the calculations that are
24 relied upon by the claimants themselves to get to
25 that --

1 MR MALEK QC: My experience in other cases is just even
2 getting a figure for average financing costs can be
3 quite controversial.

4 MR PICKFORD: Well, indeed. Indeed. Even if we're to
5 accept the claimants' methodology, which we don't, they
6 have their average financing costs and they say, "Well,
7 what we'll show you, we'll give you some calculations
8 but we're not going to show you the underlying documents
9 that we used to get to those calculations". They
10 plainly know how they calculated these numbers, they
11 plainly know which documents they went back to in order
12 to be able to create them. They plead themselves that
13 they have taken into account the effect of the interest
14 swap agreements which they entered into and yet they
15 refuse to show us the documents.

16 MR MALEK QC: But one step would be to require them to
17 provide further information as to exactly how they got
18 those figures so you get the underlying data. I can see
19 the importance of seeing the interest rate swaps.

20 MR WARD: Sir, if it saves time, DG11 and DG12 are addressed
21 to exactly this. It's on page 25.

22 THE PRESIDENT: DG?

23 MR WARD: DG11 and DG12, page 25. These are agreed
24 categories to support the tables that Mr Pickford showed
25 you, underlying calculations and supporting documents

1 behind the average finance cost in table 3. I showed
2 you this briefly yesterday in relation to tax because it
3 was going to be on a pre-tax and post-tax basis. Then
4 precisely the same form of words is used at DG12 with
5 the compound interest figures in table 4.

6 MR MALEK QC: Are you saying, for example, you understand
7 that you will be providing the interest rate swap
8 agreements?

9 MR WARD: I think we -- the proposal -- let me get a precise
10 answer to that rather than what I think the answer is.

11 That would be not under that head. That's the
12 contested matter under I10. I just wanted the Tribunal
13 to see that we have agreed to provide this
14 exceptionally.

15 MR MALEK QC: If it's not going to be under there, obviously
16 we need to look at I10.

17 MR PICKFORD: Quite. I'm not quite sure the point that
18 Mr Ward is making there. Our point is that we need to
19 see the underlying documentation, not merely how they
20 claim to have come to their numbers because that's only
21 part of the story. We may take a very different view
22 about what the implications are of those documents.

23 THE PRESIDENT: I thought under DG11, DG12, you were
24 supplying the supporting documentation? Wouldn't the
25 supporting documentation, given what we've been shown in

1 your pleading, include those agreements?

2 MR WARD: I've just been told from behind that listening to
3 the discussion that has just taken place, we are
4 prepared to give the interest rate swap agreements which
5 would form part of that. Clearly what's being proposed
6 in DG11 and DG12 does not provide the broadest
7 imaginable disclosure here. Mr Pickford is right to
8 suggest that the interest rate swap agreements are not
9 likely to be highly voluminous, so that we are content
10 to do.

11 THE PRESIDENT: So I10.

12 MR MALEK QC: I10 is agreed now?

13 MR WARD: Sorry if I may just take instructions.

14 So what I'm told is yes to the agreements themselves
15 but then there's a much broader request which is in
16 parenthesis which follows, if you look at the text of
17 I10 {COM-C/2/24}:

18 "[...] (as well as documents and information showing
19 the impact and effectiveness of those agreements) [...]"

20 I'm not really sure what that would be but the only
21 offer is the agreements.

22 THE PRESIDENT: That's a rather vague -- the parenthesis is
23 a bit vague, Mr Pickford.

24 MR PICKFORD: If I may just take instructions for a moment
25 in light of the substantial movement that we've had on

1 this particular category.

2 THE PRESIDENT: Yes. (Pause).

3 MR PICKFORD: Members of the Tribunal, in accordance with

4 the helpful guidance that the Tribunal gave us

5 yesterday, we're content for the time being to not

6 pursue at this hearing the part in parenthesis, insofar

7 as we have difficulties in understanding what it is that

8 has --

9 MR MALEK QC: You may need at some stage to see what the

10 result of those agreements are.

11 MR PICKFORD: Yes but we are happy as a first stage to

12 take -- basically for I10 to be redrafted for these

13 current purposes without the part in parenthesis. We

14 will come back.

15 MR MALEK QC: Insofar as any agreement they disclosed was

16 cancelled mid-term, which quite often happens, I think

17 you need to have that as well.

18 MR PICKFORD: Yes, we would ask for that.

19 THE PRESIDENT: Mr Ward, on that basis, it's agreements and

20 any termination or amendment to the agreements?

21 MR WARD: Yes.

22 THE PRESIDENT: So I think we put that in instead of what's

23 in brackets. "Agreements and any subsequent amendment

24 or early termination".

25 If there are then queries, Mr Pickford, you don't

1 always have to pursue it by documentary disclosure. You
2 can sometimes write and ask for further information and
3 explanation.

4 MR PICKFORD: Indeed.

5 THE PRESIDENT: And deal with it that way.

6 MR PICKFORD: Indeed and obviously to some extent that's
7 what DG11 and DG12 go to. The problem we had was that
8 until about two minutes ago we were told: but what
9 you're not going to ever get is the interest rate swaps,
10 and that's why we had to pursue the point.

11 MR MALEK QC: Everyone is being helpful and flexible so
12 that's fine.

13 THE PRESIDENT: We've solved that.

14 So that's I10. Then we go back, do we, to --

15 MR PICKFORD: I don't know whether we can perhaps make as
16 rapid progress on I8(e). So I8(e) is the only matter
17 currently in contention between my clients and
18 Dawsongroup within I8 because they are providing I8(a),
19 that is:

20 "The cost of new debt for each year for each
21 claimant ([...] effective rate on debt raised within the
22 year)."

23 They're also providing:

24 "The average cost of debt, for each claimant for
25 every year."

1 And what we would like to do, again to interrogate
2 the approach that they have adopted, both to verify it
3 and also to consider potential cherry-picking issues and
4 also to consider the alternatives that would have been
5 available to Dawsongroup, also see the interest rates
6 earned by the claimant on its cash balances and other
7 financial assets because, depending on the relationship
8 between those interest rates and its cost of debt, it
9 may very well be that the most plausible situation in
10 the counterfactual is that they would have not
11 necessarily paid down debt, they may simply have
12 accumulated additional cash in the counterfactual as
13 cash. In order to be able to work out what the
14 implications are of that, we need to see what they were
15 earning on their cash.

16 MR MALEK QC: You're saying you don't mind whether you get
17 it by way of documents or information, is that right or
18 not?

19 MR PICKFORD: That is true, it was phrased in the sense of
20 documents or information, it obviously needs to be
21 sufficient information. If I can just check -- that's
22 correct.

23 I can go on to expand my application in relation to
24 this point because I have a number of submissions to
25 make as to why we really should be provided with this

1 information but --

2 THE PRESIDENT: If you got it by way of a schedule
3 specifying the cash balances, you've got the assets,
4 interest on each.

5 MR PICKFORD: Sir, if we had a suitably full schedule
6 accompanied by a statement of truth, that would
7 obviously be a very productive first step and in
8 accordance with the approach we're taking generally, the
9 pragmatic one that we've adopted, we can look at that
10 and we can assess its efficiency.

11 MR MALEK QC: That sounds sensible. It may be that we don't
12 really appreciate how difficult that might be so shall
13 we just hear from Mr Ward on that?

14 MR WARD: Sir, the concern we have is principally about
15 relevance because the way that the Dawson group ran its
16 business, as you have seen or I can show you, is it was
17 always on a net debt basis and it borrowed to purchase
18 all of the trucks. So the compound interest claim is
19 really a very simple one in this case which is just the
20 additional cost of finance rolling forward. It's not
21 a claim which is based, for example, on what we might
22 have done with the money otherwise and have invested it
23 to recover a WACC or something of that kind. Our
24 submission is principally just that this isn't relevant
25 to the particular business model of this particular

1 claimant.

2 MR PICKFORD: It seems to me in the light of that we're not
3 going to have the same short cut that we had in relation
4 to I10 so I need to make my application properly on this
5 point.

6 THE PRESIDENT: Yes.

7 MR PICKFORD: So, as Mr Ward has explained, the principal
8 answer that they give to us in relation to our
9 application here is, as he says, well, we financed our
10 trucks with hire purchase agreements so all you really
11 need to know about is the hire purchase agreement
12 principally and potentially any interest rate swap that
13 was directly connected to it.

14 We say that that is an incorrect analysis and I'll
15 come on to show you in just a moment Mr Andreu's
16 evidence in relation to this. But to summarise the
17 points I'm going to make, we say that the first thing
18 you need to do is calculate how much Dawsongroup had to
19 spend under the hire purchase agreement as a result of
20 the infringement. There will be two elements to that.
21 In the event that there was an overcharge, there will be
22 an increase in the capital and also in the interest
23 payments that they had to pay. So we quite accept that
24 the hire purchase agreement is one part of the relevant
25 calculation.

1 The question then is, having paid that principal
2 cost and the hire interest payments under that
3 agreement, how did it then provide the cash for those in
4 terms of the impact on the rest of the business and what
5 has the impact been continuing from that point until
6 today? One can well see, supposing the hire purchase
7 agreement ended ten years ago, twenty years ago, they
8 haven't been incurring the hire purchase agreement
9 interest rate in the period between ten years ago and
10 now, yet we do still have a claim for interest.

11 So what one will need to do is consider the more
12 general debt costs of the business and the cost of the
13 cash that was diverted into paying the hire purchase
14 agreements that might have done something else. For
15 instance that might have paid down their debt, that
16 might have been accumulated in a bank account had they
17 not been overcharged. I can take the Tribunal, to
18 explain this point a little further, to the evidence of
19 Mr Andreu, he gives a helpful worked example. That's at
20 bundle COM-C, tab 14, page 15 {COM-C/14/15}.

21 So we see here at paragraph 55:

22 "For the purpose of calculating Dawsongroup's claim
23 for compound interest, as part of the second enquiry",
24 that's the point I've just been making about after the
25 hire purchase, you then see how it was provided for

1 within the business, "we need to assess what Dawsongroup
2 would have done with the additional funds it would not
3 have spent on the hire/purchase instalments [...] As
4 part of this inquiry we need to consider the options
5 available to Dawsongroup in terms of the use that could
6 have been made with the additional funds, which, for
7 example, may have been distributed to shareholders, or
8 used to pay down existing debt [...]"

9 THE PRESIDENT: Sorry to interrupt you. Of course if one is
10 doing an absolute perfect counterfactual world this is
11 entirely logical. The real question is, in approaching
12 the measure of damages in a large business commercial
13 damages claim, it doesn't matter whether it's
14 competition or anything else, where a business says it
15 has to spend so much extra money over a period, is it
16 relevant as a matter of law to go into this enquiry or
17 is it outside as too remote or not relevant to the way
18 an English court calculates damages? If you're right
19 that it is, then one needs the information and, if it
20 isn't, then it falls away even though in
21 a counterfactual world, of course things would have been
22 different.

23 MR PICKFORD: Sir, my submission is it is certainly relevant
24 in law. The question that the Tribunal needs to ask
25 itself is what would have happened in the

1 counterfactual?

2 THE PRESIDENT: Well, up to a point. We don't -- all sorts
3 of things. We don't go to everything. You know, if BT
4 paid more for trucks and BT's prices went up, we don't
5 look at what Dawsongroup's bill was on its telephones
6 and say, well, it would have paid less for telephones
7 because BT would have charged less because BT was paying
8 more for trucks and fed it through. There is a limit to
9 the enquiry we conduct. There has to be or no case
10 could ever be decided.

11 MR PICKFORD: Yes, sir, but the starting point, but therein
12 lies the distinction between the legal test which is we
13 are seeking within the constraints, within the necessary
14 constraints of these proceedings to determine what would
15 have happened in the counterfactual and I quite
16 understand the point that at some point that enquiry has
17 to end. That is however an evidential issue, in my
18 submission, to be decided in the case before the
19 Tribunal.

20 There's no problem in principle with seeking to
21 establish what went on in the counterfactual. The
22 question is how much effort do we put into that enquiry?

23 THE PRESIDENT: Sorry to interrupt you but isn't it not an
24 evidential question? There's a prior question which is
25 a legal question which is how many aspects are to be

1 taken into account? If it is to be taken into account,
2 then that drives the evidence that's to be produced and
3 that then drives disclosure. But if it's -- you may be
4 right, I'm not saying you're wrong but it does seem to
5 me that there is a more fundamental question of whether
6 one -- beyond saying what were the agreements, what was
7 the interest et cetera, the enquiry as to how the
8 business might have organised itself with that extra
9 cash, whether that's relevant or not is a legal question
10 on the approach to calculation of damages.

11 MR PICKFORD: Sir, if one is claiming interest on damages
12 and adopting the approach in *Sempra Metals*, the
13 burden is on the claimant to demonstrate that they have
14 lost out compound interest because of the way in which
15 effectively the running of their business was prejudiced
16 in one way or another because of the lack of funds.

17 In some cases that might be because they had to
18 borrow more; in other cases it might be because they had
19 to issue more equity. In another case it might be
20 because they say, "If only we'd had these funds, we
21 would have invested in this extremely profitable project
22 but we were denied that possibility and we therefore
23 claim for the losses that have arisen from that". Those
24 are the sorts of things that at least in theory
25 a claimant might want to say to try and justify their

1 claim.

2 MR MALEK QC: In practice some of those are very difficult
3 to get off the ground.

4 MR PICKFORD: Indeed but what we had in this case is
5 a claimant which says, well, we suffered additional loss
6 and we're going to claim for it as damages and we
7 suffered it in relation to the additional financing
8 costs that we bore as a result of the alleged
9 overcharge. We say, okay, fine, that's what you say, we
10 need to examine what additional financing costs you
11 really did suffer.

12 The point of the submission that I'm halfway through
13 making here is that you did not suffer the interest rate
14 in relation to the hire purchase agreement for 15 years
15 after the hire purchase agreement came to an end. That
16 simply is not possible. You must have suffered some
17 alternative cost of finance insofar as you suffered
18 anything at all and that is what underpins the
19 submission that I'm making to the Tribunal as to the
20 need, on our part, to know what the interest rates were
21 that were earned on their cash balances because
22 something that we may wish to submit to the Tribunal,
23 obviously it depends on the evidence and what we see, is
24 that in fact the most plausible thing is that what they
25 lost out on was not paying more interest in a hire

1 purchase agreement that at that point in time didn't
2 exist, it was simply the opportunity to earn more
3 interest on cash in a bank account.

4 If the Tribunal accepts that that is the most
5 plausible thing, that is the likely thing that would
6 have happened, then the way of calculating the
7 appropriate loss from Dawsongroup's point of view is by
8 reference to the opportunity cost of the cash that they
9 couldn't put into a bank account as opposed to
10 a hypothetical hire purchase agreement, which is the
11 beginning of the equation but it is not the end of it.

12 So that's what Mr Andreu's worked example at
13 paragraph 56 sets out. He shows how one takes into
14 account the hire purchase agreement and the effect that
15 it would have had on Dawsongroup, which we don't deny
16 are relevant, but then goes on to explain it isn't the
17 end of the story {COM-C/14/15}

18 It begins on page 15 and then we go over to page 16
19 {COM-C/14/16}.

20 Having explained how he takes account of the costs,
21 the hire purchase costs up to (c) he then explains in
22 (d) that:

23 "The nominal overcharge, however, materialised [in
24 his example] between 2005 and 2009. For the purposes of
25 a claim for compound interest to the date of judgment,

1 these amounts must be updated to a current date at an
2 appropriate interest rate."

3 Then he applies an indicative 3% interest rate to
4 show how that would work.

5 THE PRESIDENT: I fully understand his point but isn't that
6 a point of principle that doesn't need this disclosure?
7 He's saying you don't apply the interest rate in the
8 agreement after the agreement is over because the loss
9 is crystallised.

10 MR PICKFORD: Yes.

11 THE PRESIDENT: You then just apply an ordinary compound
12 interest rate?

13 MR PICKFORD: Yes but the question is, what interest rate
14 do you apply? In order to determine what is a sensible
15 interest rate to apply, the Tribunal is going to have to
16 make some type of finding about what it thinks is the
17 most likely thing that would have happened.

18 MR MALEK QC: You're saying you have to do that because
19 they're claiming it as damages as opposed to normal
20 interest rates?

21 MR PICKFORD: Indeed. Following the approach in
22 *Sempra Metals*, the burden is on the claimant to
23 persuade you there is something particular about their
24 business which means that the damage that they suffered
25 wasn't merely the principal sum; it was also that they

1 were denied something by virtue of the principal loss
2 because of, for instance, the additional financing that
3 they had to incur or, alternatively, their lack of
4 ability to use those funds to earn interest on, in the
5 ordinary way that often surplus funds are used.

6 That is, I'm afraid, going to require the Tribunal
7 to consider that question and consider what is the most
8 appropriate measure to use. That's not something the
9 Tribunal can decide now. That will depend on the
10 evidence at trial as to what it thinks actually is
11 likely to have occurred. We quite accept that
12 ultimately some approximations may need to be made in
13 relation to that and that's one of the reasons why we've
14 taken a proportionate approach today and I've really
15 focused in just on this particular aspect, which is
16 crucial to our understanding of what went on in
17 Dawsongroup, and postponed an application in relation to
18 all of the documents that potentially underpin that to
19 try and reconstruct history.

20 MR MALEK QC: Presumably your case is they shouldn't be
21 entitled to interests as damages at all?

22 MR PICKFORD: That will be our primary case but our
23 secondary case will be, insofar as they are entitled to
24 interest, we have to look at what the right interest
25 rate is. It is very likely, I imagine, but ultimately

1 we'll have to conduct an economic analysis, that there
2 may be an argument between us and Dawsongroup as to what
3 the effects were of them being denied the cash
4 essentially in their business that they say they should
5 have had had they not had to pay the overcharges which
6 they say that they suffered.

7 So to close my submission on this point, in the
8 light of the helpful discussion that I've had with the
9 Tribunal which I think elucidates our understanding of
10 the case that's made against us and why it is that we
11 need to see this information, we say it is not
12 acceptable for a party who is advancing a special type
13 of claim for interest as damages to be unwilling to
14 provide the essential information which underpins what
15 would have happened in the counterfactual had in fact
16 they not suffered the overcharge.

17 This schedule that we're seeking, if that's their
18 preferred means of providing it, is an essential first
19 step in making that assessment and it is something with
20 which ultimately the Tribunal is going to have to
21 grapple at trial, in the light of evidence I imagine
22 from possibly someone in the finance department at
23 Dawsongroup, who says: here's what we do with our money,
24 here's why in fact it was problematic to us and here's
25 what I estimate we suffered as a result of this

1 overcharge in terms of additional financing costs. We
2 need to be able to interrogate that.

3 THE PRESIDENT: Yes, thank you.

4 MR WARD: Sir, I make two submissions on this. Firstly,
5 there is a proportionality submission which is that what
6 Mr Pickford is asking for, at least at the first stage,
7 sounds relatively anodyne in the sense of cash interest
8 rates but if we are going to open the counterfactual,
9 exactly what Dawsongroup would or wouldn't have done
10 with sums of money that are additional in terms of the
11 charges that it has incurred on each credit agreement on
12 each truck, that is obviously a very large can of worms
13 indeed.

14 But our second submission --

15 MR PICKFORD: Sorry, just to be clear that's not what we're
16 seeking today.

17 MR WARD: Not today but that word keeps being said. That is
18 the beginning of an enquiry that leads inextricably to
19 that point.

20 But the point that is broader that I made when
21 I made introductory remarks under this head is that the
22 Dawson business model and the nature of the claim in our
23 submission renders this not relevant because, as I've
24 explained and as you've seen from the pleadings, all of
25 these trucks were bought on credit, our claim is

1 a simple one. Dawson is a net debt business. The
2 overcharge increased the level of net debt. There is in
3 a sense a rolling level of net debt within the business.
4 We claim for that. We don't make a complicated claim
5 about counterfactual scenarios with the money. We paid
6 too much, as a result we borrowed too much. That's the
7 claim.

8 (Pause).

9 THE PRESIDENT: Mr Ward, Mr Pickford, we think this raises
10 quite difficult issues which we are not certainly in
11 a position, nor would it be right, for us to address
12 today. First we'd need much fuller submissions,
13 secondly we'd need to be a full Tribunal. We think as
14 a first step, given that it's not burdensome, subject to
15 perhaps clarifying other financial assets, that
16 Dawsongroup should provide a schedule. The question of
17 whether it's relevant and how much further one goes is
18 something we'd like to postpone and we think it's worth
19 thinking about whether there is scope for the Tribunal
20 to have really as a preliminary issue in this action
21 argument as to where a compound interest as damages is
22 being pursued, what is the proper scope of an enquiry as
23 to whether that is damages and the counterfactual.

24 You may well be right, Mr Pickford, or you may not.
25 I don't know. But that does seem to me to raise quite

1 difficult legal points and one would look at the cases
2 that have followed *Sempra Metals*, it's not
3 a competition law point, and see how the law was
4 developed.

5 We think for today Dawsongroup should give the
6 information. We're not going to order a preliminary
7 issue now but we think if this is going to lead to
8 potentially quite complex enquiry, more disclosure,
9 significant time at trial on the facts, it might be
10 worth having that as a legal issue well in advance of
11 trial and you might want to reflect on that with your
12 clients and your legal teams.

13 So for now, subject as I say to just clarifying the
14 scope of the request, we think a schedule should be
15 provided.

16 MR WARD: Sir, thank you. May I suggest that my solicitors
17 talk to Mr Pickford's in the course of the day and try
18 and agree what the schedule would look like.

19 I certainly have no sense of what is really practical.

20 THE PRESIDENT: Yes. It's the -- cash balances, that's
21 fairly clear. It's the other financial assets which is
22 a potentially somewhat uncertain category. It may be
23 you just mean any dividend-producing investments and
24 that's what's meant. I'm not sure.

25 MR PICKFORD: I'm sure that with sensible cooperation

1 between our solicitors we can reach something
2 sufficiently precise in relation to that.

3 THE PRESIDENT: And you'll reflect on what we've said?

4 MR WARD: Yes, of course. I'm told there may be a concern
5 about whether we can show the interest rates rather than
6 the interest amounts but again that may be a matter to
7 take away.

8 THE PRESIDENT: Well, there must be some way one can work
9 out what --

10 MR WARD: One would hope so.

11 MR PICKFORD: I think seeing the rates would be essential.
12 Simply seeing they paid X amount of interest without
13 seeing how --

14 THE PRESIDENT: Yes, that seems right. Just knowing
15 a figure of interest doesn't help.

16 MR HARRIS: Sir, there is one short issue on interest before
17 we leave the I topics. Just for the sake of clarity, I
18 said -- Mr Ward was quite right to say that Daimler
19 doesn't pursue that. The basis upon which it doesn't
20 pursue that is that it seeks a confirmation of some
21 facts that Dawsongroup has put into the schedule.
22 Perhaps the easiest place to pick it up is in the
23 disclosure sought from Dawsongroup by the defendants and
24 at page 21, where you'll see topic I7 {COM-C/2/21}.

25 THE PRESIDENT: Yes.

1 MR HARRIS: Then do you see in the fifth substantive column
2 that's the Dawsongroup reply?

3 THE PRESIDENT: Yes.

4 MR HARRIS: It doesn't have a heading but halfway down, next
5 to the "DAF" heading it says:

6 "However, Dawsongroup's truck purchases [...]"

7 And then it gives some facts and it goes on.

8 Mr Ward has repeated this to the Tribunal today.

9 THE PRESIDENT: Yes.

10 MR HARRIS: Then it says: as a result of the above --

11 I paraphrase -- simply do not have any relationship to
12 how Dawsongroup ... and all we've said and the reason
13 it's not pursued today is that's fine, if that's correct
14 please can you confirm that formally and then we don't
15 need the disclosure that we sought. I just want to make
16 that absolutely clear because Mr Ward said it's not
17 pursued. But it's not pursued on the basis that we're
18 going to get a formal confirmation of those important
19 facts, which means in a statement or in a disclosure
20 statement or -- probably not controversial but I wanted
21 to make the position absolutely clear.

22 THE PRESIDENT: Yes. Is that satisfactory, Mr Ward?

23 MR WARD: Sir, I can't see there's a difficulty in us
24 confirming what's already in the Redfern schedule.

25 THE PRESIDENT: Yes.

1 MR HARRIS: Thank you.

2 THE PRESIDENT: That's what's been asked for.

3 Yes. Does that conclude interest?

4 MR WARD: I hope so.

5 THE PRESIDENT: Is the next category pass-on?

6 MR WARD: Pass-on. We start with some relatively small

7 issues on pass-on categories 1, 2 and 3 and then, as the

8 Tribunal have seen, there's a very big issue of

9 principle about categories 4, 5 and 6.

10 I think there are three categories that are in

11 dispute on pass-on, although again it's possible some of

12 these have fallen away. These are all really requests

13 that we would regard as excessively granular detail

14 about the disposal of trucks. You will recall that

15 pass-on category 1 is about trucks that were purchased

16 by the claimants and then subsequently transferred back

17 to the defendant by way of trade-in or similar.

18 THE PRESIDENT: Yes.

19 MR WARD: It's worth doing a quick page-turn through PO1 to

20 see the kinds of information that's in there. There's

21 a lot of information about identifying the truck and

22 then how the truck was disposed of, dates of the

23 agreements, details of the prices, I just invite you to

24 skim because it does provide useful context. How the

25 prices were fixed, set, characteristics of the truck

1 et cetera et cetera.

2 I hope it's helpful if I again try and explain which
3 categories we think are in dispute. The first one
4 I believe there's a dispute is PO1(i) on page 32
5 {COM-C/2/32} which is DAF and Daimler I think.

6 THE PRESIDENT: Yes.

7 MR WARD: Just Daimler I'm told, sorry. Just Daimler. Then
8 PO1(j) which is certainly Daimler and I don't know about
9 DAF. Just Daimler. PO1(m) which is Daimler. It may be
10 all of them, that one is certainly in dispute. Then
11 PO1(n), just Daimler. That's what we think on PO1.

12 THE PRESIDENT: Yes.

13 MR HARRIS: Sir, I'm happy to address those categories. My
14 list I think is the same as Mr Ward's. PO1(i), PO1(j),
15 PO1(m) and PO1(n) on PO1.

16 THE PRESIDENT: Yes.

17 MR HARRIS: So I'll take them in that order if I may.

18 As regards PO1(i), which is on page 32 of the
19 schedule, you will see that -- I will inform you that
20 the relevant evidence is in Dr Nitsche's witness
21 statement which is to be found in COM-C, tab 8, internal
22 page 21 and it's paragraph 71 {COM-C/8/21}. Can
23 I please ask you to read that or refresh your memory as
24 to PO1(i), what he says. (Pause).

25 What we see here, sir, Mr Malek, is that it is, and

1 I quote from the middle of the paragraph, used to
2 "inform the specification used in the used truck model".
3 That will be, as you will have seen when you read
4 Dr Rainer paragraph 10, that is an econometric model and
5 it is the stage (iii), it is the (iii) of paragraph 10.

6 So we're full square in the territory that we talked
7 about that this Tribunal is going to engage in:
8 econometric modelling, nothing else. So we don't have
9 to worry about anything else.

10 Then he gives the explanation in the first line,
11 that it's a simple request regarding how the sales --
12 "details on how the sales price was calculated for the
13 trucks disposed of". Well, that ought not to be
14 controversial. Plainly we're entitled to have regard to
15 that.

16 What he goes on to say is that this qualitative
17 information that he's requesting in this category to
18 supplement the other is used:

19 "[... both to inform and validate the results of the
20 quantitative analysis. For example [and this puts some
21 flesh on the bones], it could be the case that the
22 claimants' principal consideration in agreeing the price
23 was the original purchase price in combination with
24 typical depreciation rates."

25 That strikes me, as a non-truck owner, as being

1 a fairly obvious way in which you might calculate the
2 sales price of one of your assets. It's plainly going
3 to be informative if that's the case.

4 MR MALEK QC: Are you looking for this for every truck sold?

5 MR HARRIS: No. My understanding of these is these are --
6 as I read this, this is generic qualitative evidence
7 about the relationship between the purchase price of
8 a new truck and the truck trade-in buy-back prices.

9 MR MALEK QC: So you're not looking for that --

10 MR HARRIS: No, I don't think there's a suggestion that
11 there would be a bespoke document or set of emails about
12 each of the hundreds or thousands of trucks.

13 THE PRESIDENT: But what sort of -- if there is some general
14 guidance on pricing of resale buy-back trucks, that's
15 one thing.

16 MR HARRIS: Yes.

17 THE PRESIDENT: But looking at this category (i), and this
18 may vary significantly, one group of trucks to another
19 group of trucks to another truck. I mean, I would have
20 thought again we're looking at the pricing of resale
21 trucks during the period of the cartel, perhaps for
22 a bit longer, and then the pricing of resold or
23 bought-back trucks in more recent times as a clean
24 period to see whether it was inflated. I don't quite
25 follow how the length between purchase and buy-back and

1 so on affects that.

2 MR HARRIS: That one you're reading (i)iii?

3 THE PRESIDENT: For example, yes. All of this, of course,

4 it all will go...

5 MR HARRIS: It may help if I just clarify, these are generic

6 pre-existing documents about the relationship between

7 the transfer, the sale value and the sell-on value. So

8 what we're saying, and if it needs redraft to go make

9 that a little clearer --

10 MR MALEK QC: When you look at the DAF column, the next

11 column, it looks as though they're looking at something

12 a lot more specific.

13 MR HARRIS: Sorry, which column are you...

14 THE PRESIDENT: I think the second column -- no, the second

15 column is Daimler, the third column is DAF.

16 MR MALEK QC: The third column, yes, which is DAF, the one

17 after yours.

18 MR HARRIS: Yes.

19 Well, it's not clear to me from that lengthy

20 exegesis in that column that -- perhaps Mr Pickford can

21 enlighten us. Are you not seeking the entirety of (i)?

22 MR PICKFORD: Our position in relation to (i) is as set out

23 in the schedule that we're willing not to pursue it at

24 this stage of the process.

25 THE PRESIDENT: But we're trying to understand what you

1 understand -- what DAF considers (i) means because, as
2 Mr Malek has pointed out, you are not pursuing it now
3 but, as you describe it, it's actual truck data, not
4 some generic data.

5 MR PICKFORD: My understanding, sir, is that it is actual
6 truck data but it's not something I've come to make
7 submissions to you on today because I'm not pursuing it
8 on behalf of my clients.

9 MR HARRIS: Maybe the answer, sir, is that Mr Pickford says
10 it's granular but he's not pursuing it today. Maybe the
11 staged approach is the way forward. We would want
12 a generic pre-existing document, we're not suggesting
13 that there be any custodian searches or truck by truck
14 specific searches, then we'll take that and if that's
15 insufficient we'll come back on a later day and say,
16 actually, no, now that we've got these generic
17 pre-existing documents about the relationship, then we
18 need some more. That would be a proportionate approach.

19 I just note in passing that this is an agreed
20 category as against Ryder so there's no suggestion in
21 the Ryder case that this is somehow over the top or
22 something like that.

23 The other point that arises is that in the
24 Dawsongroup response column, which is the penultimate
25 column going left to right across the page, there seems

1 to be a suggestion that it might not be provided if it's
2 not within the AS/400 database, but unsurprisingly of
3 course we don't accept that it's relevant to only have
4 regard to one particular database, especially in
5 circumstances where we heard at the last CMC that the
6 AS/400 database which, until shortly before that hearing
7 we'd been told was the only database with relevant
8 information in, was then supplemented shortly before the
9 hearing with the so called build sheets which were then
10 said to have a lot more information.

11 But in any event that's probably taken care of by
12 the fact that we can clarify that in the first instance
13 this should be generic pre-existing documents rather
14 than truck granular data and then defer any truck
15 granular data, if subsequently required, until a later
16 date.

17 MR MALEK QC: Or by way of information?

18 MR HARRIS: Or -- and I accept those comments from earlier
19 categories, yes. It could be by way of information and
20 an appropriate confirmatory status, precisely.

21 THE PRESIDENT: So does it amount then to really what you're
22 wanting as not this degree of specificity but any
23 policies or guidelines as varied from time to time
24 through this period for the resale or negotiation of
25 buy-back agreements of trucks in the UK? DG were in the

1 UK so I think it's all in the UK.

2 MR WARD: Sir, we'd be --

3 THE PRESIDENT: Let Mr Harris -- he needs to hear you.

4 (Pause)

5 MR HARRIS: I'm sorry, I didn't hear that, Mr Ward.

6 THE PRESIDENT: I stopped Mr Ward so you could --

7 MR HARRIS: I'm very grateful.

8 THE PRESIDENT: Now, Mr Ward.

9 MR WARD: I was going to say we are content to agree the

10 Tribunal's formulation. What we were resisting was this

11 extremely granular attempt to --

12 THE PRESIDENT: Yes, I understand that. So if it is all

13 policies or guidelines for the resale or entry into of

14 buy-back agreements of trucks as varied or issued at any

15 point during this period, that will get you started.

16 MR HARRIS: That's the starting point. That's sensible. We

17 will take it offline to do the redrafting but it will

18 come along the lines of what we can see on the

19 transcript.

20 So that then is PO1(i).

21 The next one on my list is PO1(j). The evidence of

22 this one is in the very next paragraph of Dr Nitsche's

23 witness statement which I hope you may still have to

24 hand.

25 THE PRESIDENT: Isn't that covered by the formulation we've

1 just produced, the factors taken into account?

2 MR HARRIS: Maybe that's the answer, sir, that when
3 reformulating (i) to be the generic guideline principle
4 type guidance documents, we will include that it should
5 cover factors taken into account further to --

6 THE PRESIDENT: Yes --

7 MR MALEK QC: You're really looking for what their policies
8 are, aren't you?

9 MR HARRIS: In the first instance, that's what gets us
10 going, exactly.

11 THE PRESIDENT: I think that will cover (i) and (j).

12 MR HARRIS: Yes, understood, we're making progress.

13 So then we go on to (m), this one is -- may I just
14 take a moment on this?

15 THE PRESIDENT: Yes. (Pause)

16 MR HARRIS: I'm going to take instructions, if I may, over
17 the short adjournment on that one.

18 THE PRESIDENT: Yes. I think you are not the only defendant
19 pursuing that, is that right? Mr Pickford, are you
20 pursuing (m)?

21 MR PICKFORD: We are pursuing it. We had agreed a division
22 of labour where Daimler were going to make the
23 submissions on that.

24 THE PRESIDENT: Okay.

25 So (n).

1 MR HARRIS: PO1(n). May I just turn that up in the schedule
2 because my note says --

3 THE PRESIDENT: It's page 35 I think.

4 MR HARRIS: Thank you very much. My note says that the
5 dispute here is the supposed limitation to only the
6 AS/400 database.

7 THE PRESIDENT: No, it's not recorded on the database.

8 MR HARRIS: That's right. The way I understand the
9 Dawsongroup position to be was, because it's not on the
10 database, therefore that's it, we can't go anywhere with
11 it. That's the point with which we take issue.

12 THE PRESIDENT: I think they're saying, because that would
13 not be of course a complete answer, that just goes to
14 perhaps the time they need, they say it's not relevant
15 or they don't understand the relevance.

16 MR WARD: May I assist, sir?

17 THE PRESIDENT: Yes.

18 MR WARD: I'm sorry Mr Harris hasn't understood our position
19 on AS/400, perhaps we haven't made it clear enough.
20 It's certainly the starting point for us, it's the core
21 database with truck by truck information in it. When
22 documents come in on individual trucks, the information
23 is loaded into AS/400. We have been very clear in our
24 evidence, or sought to be, that that is the starting
25 point but not the end of whatever is proportionate and

1 reasonable search. We also think it's likely that
2 things that are not on there, that might be, are
3 probably not to be found elsewhere. But that does
4 not -- we do not present that as discharging the search
5 obligations.

6 The objection, if I can just make clear what it is
7 so that Mr Harris can address the right objection, is
8 that this is again a highly granular request on a truck
9 by truck basis. As it's not on the AS/400, that would
10 indeed be a very, very onerous thing to start to
11 examine.

12 THE PRESIDENT: Can I just, Mr Ward, in very general terms,
13 to help me sort of appreciate what's going on, is it the
14 case, and your client were major truck purchasers, that
15 generally at some point they would resell the trucks?
16 Was that their general approach or...

17 MR WARD: Can I just confirm what I understand to be the
18 case?

19 THE PRESIDENT: Yes.

20 MR WARD: I think that is right but it's also true to say
21 that used truck revenue is just 3% of the Dawson group
22 revenue.

23 THE PRESIDENT: I would find it helpful following that,
24 I don't know what total Dawson group revenue is and in
25 any event we have individual claimants, just to have set

1 out in a schedule just what you actually received year
2 by year through the years of the claim and up to --
3 I can't remember when our cut-off is for pass-on, it
4 might have been December 2018, I think it was. What you
5 actually got in total on the buy-back or resale, just to
6 have some sense of -- given that what we're looking at
7 is not that but any reflective overcharge on it which
8 you benefited from, what sort of money we're talking
9 about. I have no sense of that at the moment.

10 MR WARD: I don't and probably over the short adjournment
11 I can give you an indicative figure and we can get --

12 THE PRESIDENT: But it does affect of course the
13 proportionality of how far we go.

14 MR MALEK QC: One thing I would like, if possible, is the
15 sort of average truck life we're talking about
16 throughout the period.

17 MR WARD: If I may take instructions, neither of those sound
18 difficult to me but I'll make sure no one disagrees.

19 We'll discuss it over lunch.

20 THE PRESIDENT: Yes. If you can't produce, you know, exact
21 figures today it's a schedule that could be prepared and
22 really would be very useful.

23 MR WARD: Yes.

24 THE PRESIDENT: And probably very useful for the defendants.
25 Yes. So Mr Harris, that's the relevance of the

1 database.

2 This is a truck by truck category as well, isn't it,
3 I think?

4 MR HARRIS: It is, sir, you're right. The justification is
5 given in the second column on page 35 {COM-C/2/35}:

6 "Qualitative evidence about the negotiations around
7 enhanced trade-in values may be useful to validate the
8 results of a quantitative analysis."

9 I don't shirk from that. That's what the expert
10 says he needs --

11 THE PRESIDENT: If it's to validate the quantitative
12 analysis, that means the quantitative analysis is
13 conducted not using this but after it's done in the
14 first instance, you then look at it in the light of this
15 information and see does it need refining, correction
16 and so on. That's the way it's put here. Will it
17 explain some odd results that have come up from the --
18 in which case I would have thought it could be
19 postponed.

20 MR HARRIS: I think that's the right answer for today, sir.

21 I am bound by what it says, that's what it says and it
22 seems that we take it in stages.

23 THE PRESIDENT: Yes. Let's put that one back. So we're
24 left with PO1(m).

25 MR HARRIS: Yes. I suggest that the sensible course there

1 is for me to clarify that position.

2 THE PRESIDENT: And come back after the adjournment.

3 Then we've got -- so that's the first lot. Then

4 we've got the major issues on PO4 to 6.

5 MR HARRIS: There is --

6 MR WARD: I think there are some small points on PO2 --

7 MR HARRIS: There are some PO2 points and then --

8 THE PRESIDENT: Oh, yes, you said there are some other small

9 points. PO2.

10 MR HARRIS: I think there's a PO2 point and a PO3 point

11 according to my note.

12 THE PRESIDENT: Can we do those before lunch then? PO2?

13 MR HARRIS: PO2 is guidelines and internal policies in

14 respect of trucks. That one is dealt with by

15 Mr Grantham. But just as we're turning up --

16 THE PRESIDENT: Sorry, PO2 is partially agreed, it's only

17 sub-category (c), "Details regarding price frequency".

18 I mean, if it's policies and procedures, it should be

19 covered by the formulation we had, namely policies and

20 guidelines. Policies and procedures, with respect,

21 including details of price frequency -- what you mean is

22 what policies should be pursued regarding the price and

23 the frequency of sale?

24 MR HARRIS: Yes --

25 THE PRESIDENT: Well, that's covered by the reformulation of

1 PO1(i)?

2 MR HARRIS: Well, subject to making sure that that is in
3 fact covered by the reformulation, then yes.

4 THE PRESIDENT: Yes, if it's policies and guidelines for
5 resale and buy-back, clearly that will include policies
6 on the price you ought to seek and when you ought to do
7 it.

8 MR WARD: Yes. The other short point --

9 THE PRESIDENT: It goes to Mr Malek's point of what shelf
10 life do you tend to apply? Yes.

11 MR WARD: Then there is just one other point which is in
12 dispute on this schedule which are the words "including
13 details regarding write-offs". Our short point on that
14 is, if the truck has been written off, there is no
15 question of any pass-through. We weren't sure why any
16 details are needed of those.

17 THE PRESIDENT: Well, if the policy says, you know, trucks
18 that have been, I don't know, found to have been used
19 for a particular purpose are generally in such
20 a condition after six years that it's better to let them
21 run the six years and then scrap them rather than
22 terminating -- withdrawing them after four years and
23 seeking a resale, that will be in the policy.

24 MR WARD: That will be caught by what you've ordered
25 already. We just didn't want a whole line of enquiry

1 about written-off trucks which are by definition not
2 within the scope of the pass-on claim.

3 MR HARRIS: This is taken care of by the reformulation,
4 policies and guidelines.

5 THE PRESIDENT: I think so. You'll see what you get and if
6 it doesn't answer relevant questions you will ask for
7 something else.

8 MR HARRIS: I think we can deal with PO3 in very short order
9 because my note says that the only -- this is another
10 one where we simply seek a form of compensation because
11 the basis of resistance is in the Dawsongroup
12 penultimate column and it reads, and I quote:

13 "This information is not held by Dawsongroup."

14 We say, fine, if you can confirm that, so be it. We
15 say we're surprised and not least of all because both
16 VSW, who is not even in the particular business of
17 renting out or selling -- renting out trucks and then
18 selling them on as part of its business had agreed to it
19 and so does Ryder. So it's not we're just being obtuse.
20 We think this probably -- we're surprised that it is
21 said to be not held and that's why we want that
22 confirmation.

23 MR MALEK QC: Is this a generic category and you're saying
24 they don't have policies on this or what, Mr Ward?

25 MR WARD: I confess I don't know. You've already ordered

1 some generic policy guidance if there is any. It is
2 less clear whether this was intended to be only by
3 individual truck.

4 MR MALEK QC: It's unclear and that's why I don't want you
5 to be held necessarily by that answer.

6 MR WARD: May I suggest, rather in the spirit of the last 15
7 minutes, that we give the disclosure of guidance that
8 the Tribunal has ordered. Mr Harris has made it
9 absolutely clear he might come back for more but
10 I respectfully agree with your observation, sir, that
11 when there is a lack of clarity about what we're talking
12 about, it may be better to proceed in that way rather
13 than on the assumption --

14 MR MALEK QC: It's certainly safer from your point of view.

15 MR WARD: Yes.

16 MR MALEK QC: Mr Harris?

17 MR HARRIS: Yes, Mr Malek, we accept that. There should be
18 a stage one and if we want more when we've seen it,
19 we'll come back.

20 MR MALEK QC: That's fine.

21 MR HARRIS: I'm grateful.

22 That may be a convenient moment. So I shall take
23 instructions on PO1(m) and then there will be a dispute
24 after the short adjournment about lots of other PO
25 categories including 4, 5 and 6.

1 THE PRESIDENT: I think the other PO categories overlap, do
2 they not, with some of the disclosure sought from Ryder,
3 is that right?

4 MR BREALEY: Basically we've agreed to give most of the
5 disclosure.

6 THE PRESIDENT: Yes.

7 MR HARRIS: That's correct. Some of them overlap but in
8 very large measure, all of the ones that are said to be
9 grossly over the top and disproportionate when requested
10 from Dawsongroup are not said to be anything of the kind
11 when requested from Ryder. To the contrary, Ryder says,
12 "Yes, we'll do the reasonable and proportionate search".

13 THE PRESIDENT: Right. We'll come back to that.

14 How long do you think -- we're just conscious that
15 we do need to deal with the Ryder requests and we've now
16 got half a day. How long do you think the Ryder
17 disclosure issues are going to take?

18 MR BREALEY: Well, it depends on the defendants' reaction.

19 Half a day. So if we're going to eat into this
20 afternoon, we're going to be in trouble. It really
21 depends on the cooperation of the defendants.

22 THE PRESIDENT: Yes. Also I think from Ryder, having regard
23 to some observations we made earlier about the relevant
24 methodology to be used, that also applies but I think
25 that goes more to the defendants but it does affect

1 quite significantly some of your requests.

2 MR BREALEY: It does and I need to make submissions on that.

3 You'll have noticed from the draft order that LCVs are

4 not being pursued today so we've taken that on board.

5 THE PRESIDENT: Well, you can reflect over lunch about the

6 US.

7 MR BREALEY: That's gone.

8 THE PRESIDENT: That's gone, right.

9 MR BREALEY: So there's a lot that has been dropped given

10 the steer from the Tribunal and given the timing.

11 THE PRESIDENT: Yes.

12 MR BREALEY: But we are at the bare bones of --

13 THE PRESIDENT: Yes, I understand. I think we've got to try

14 and complete Dawsongroup by 2.30. We'll come back at

15 1.45 so you will have 45 minutes.

16 MR HARRIS: May I just make a point about when we turn to

17 Ryder, that in light of the time constraints certainly

18 for our part we would, subject to the Tribunal, prefer

19 to be able to do say one that they want from us and then

20 one that we want from them and then one -- because

21 otherwise there's a danger that we'll get through all of

22 Mr Brealey's categories sought from us, maybe resulting

23 in an order, and have nothing in return. We say with

24 respect that wouldn't be a fair approach.

25 THE PRESIDENT: You think over lunch what is the best way to

1 do it.

2 MR BREALEY: I would reject that. We need to get our --

3 MR HARRIS: And so do we. There are two applications.

4 MR MALEK QC: Both parties need an order today and both

5 parties will get an order today so it's a question of --

6 THE PRESIDENT: How much we get through.

7 MR PICKFORD: Before the Tribunal rises, I thought it might

8 be helpful to point out we have an overarching point to

9 make out on categories 4 to 6 because we say that

10 contested matters -- we are very happy for agreed

11 matters to be part of the consent order, contested

12 matters should be held over to a future date so it's

13 obviously helpful if I make that point first because the

14 Tribunal agrees with me --

15 THE PRESIDENT: This is P04 to 6 in the schedule.

16 MR PICKFORD: Yes.

17 THE PRESIDENT: That was something I was going to float with

18 you.

19 MR HARRIS: I understand that. We'll have that out after

20 the short adjournment but of course it can't be the

21 basis that Daimler is not allowed to pursue applications

22 simply because DAF doesn't pursue an application and

23 wants it held over. We're not in the territory here of

24 a consent order. We have a role as a defendant and we

25 respectfully contend the right to defend ourselves by

1 reference to disclosure that we are ready to argue --

2 THE PRESIDENT: No, no, I understand that but we've got to

3 just work within the time constraints to manage the case

4 that we've got, that's all, and whether it's got to be

5 done now or it's got to be adjourned to another day.

6 That's the only question.

7 MR HARRIS: Understood.

8 MR HOSKINS: I'm really sorry, on Ryder, I have used this

9 morning to try to go through a mark-up that Freshfields

10 have produced for me of the new Ryder order. Like I'm

11 sure Mr Jowell, I need to take instructions on that and

12 sit down and talk to my solicitors about it in order --

13 THE PRESIDENT: Right. Is that this -- I don't know who

14 that's come from but we were given this document

15 (Indicates). That's from Ryder I think, that mark-up.

16 MR BREALEY: It could be. Has that just come in?

17 THE PRESIDENT: This morning.

18 MR BREALEY: I'm astonished at the defendants' reaction to

19 this order. They do know what has happened. Things

20 have been dropped in their favour and they've just got

21 to grasp the nettle.

22 MR HOSKINS: I'm sorry, that's not fair --

23 THE PRESIDENT: We'll deal with this -- we're not going to

24 argue as to who has got what schedule and whether it

25 deletes or adds. We will look at them and work through

1 it but according to --

2 MR HOSKINS: How are we going to take instructions? Is it
3 the case that whenever something comes up where one of
4 us feels we don't have instructions we say "I'm sorry we
5 can't deal with this", or do you want to give us more
6 time so that when we come back we have been able to take
7 instructions?

8 THE PRESIDENT: If there are new requests in that schedule,
9 we will not deal with them at this hearing -- that's how
10 I'm going to deal with it -- at all. But if there are
11 dropped requests, you are not going to be concerned.

12 MR HOSKINS: Absolutely. But there are some which have been
13 modified so, for example, the configurator's request
14 which is a major concern for us, you'll have seen from
15 our evidence, has been substantially modified.

16 MR BREALEY: Reduced.

17 THE PRESIDENT: I think the point Mr Hoskins is making which
18 is a valid point, namely they were objecting strongly to
19 the original request, he needs to take instructions as
20 to whether they are still objecting to the reduced
21 request and on what basis. So sometimes if it's
22 dropped, that's one thing. If it's rephrased and
23 therefore becomes a different request in scope, he may
24 need to --

25 MR BREALEY: I can guarantee there are very, very few

1 modified --

2 THE PRESIDENT: Some of those may have to be adjourned. If
3 you are in difficulty because it's changed
4 substantially, we won't push it for today.

5 MR HOSKINS: I'm very happy with that guidance, thank you.

6 THE PRESIDENT: Right. In the light of that, we'll say
7 1.50.

8 (1.10 pm)

9 (The short adjournment)

10 (1.50 pm)

11 THE PRESIDENT: Yes, Mr Harris.

12 MR HARRIS: Sir, I'm pleased to report that I've taken
13 instructions on the PO1(m) category and there can be
14 a narrowing of this request. I think the concern was
15 that it might be too granular at this stage on a truck
16 by truck basis but my instructions are that, in the same
17 way that we take a staged process on some of the other
18 PO1 categories, what would suffice for the moment is
19 a statement, whether that be -- whether in the actual
20 documents or some other confirmed statement of
21 information of the profit or loss on the disposal of the
22 trucks held as fixed assets on a monthly basis, so
23 instead of being a granular truck by truck enquiry it's
24 a higher level profit or loss on a monthly basis across
25 the trucks, the fleet as a whole, and my instructions

1 and the information from my accounting expert is that
2 this is readily available from the accounting documents
3 that are prepared on a monthly basis. That would be
4 a sensible way to move this forward at a first stage.

5 MR MALEK QC: It's sensible as long as it's practicable.

6 I don't know whether it is.

7 MR WARD: Unfortunately we weren't offered this over lunch.

8 I've no idea whether it's practicable, still less
9 whether it's even reasonably necessary in circumstances
10 where they are getting information about truck purchases
11 and they are getting information about truck sales.

12 MR MALEK QC: Can we just make the order to the extent

13 reasonably practicable and then you can come back --

14 MR HARRIS: Yes sir, that's a sensible compromise.

15 MR WARD: I just don't understand the relevance of it, sir.

16 THE PRESIDENT: When it's profit or loss, this is as against
17 what? As against purchase price or depreciated? That's
18 the problem. I don't know how they record it. I think
19 we should hold this over actually. I do also want to
20 see actually what are those figures and what are the
21 sales of trucks.

22 MR WARD: Just to update you on that, I wasn't able to get
23 a quick answer over lunch.

24 THE PRESIDENT: But that can be sent to the Tribunal fairly
25 soon.

1 MR WARD: Oh, it will be.

2 THE PRESIDENT: I think we'll adjourn that request, you can
3 pursue it on a Friday hearing.

4 MR HARRIS: We'll try to deal with it in correspondence. If
5 it can't be dealt with, we can come back.

6 I'm delighted to see what had looked to be a rather
7 hideous set of PO4, 5 and 6 categories given
8 considerable and welcome movement including page 32 of
9 my learned friend's skeleton argument, wherein he sets
10 out a number of proposals the Dawsongroup is prepared to
11 provide in categories PO4, 5 and 6. You're welcome to
12 turn that up if you like but there's a lot of very
13 helpful -- and we accept all of those. As for those
14 categories we say great, let's take that as a stage one,
15 we'll assess it, if we want to come back, we'll come
16 back.

17 That only leaves 4. My respectful suggestion is
18 five or so minutes on each of those takes us up to
19 the --

20 THE PRESIDENT: Yes.

21 MR HARRIS: Can I begin then straightaway with the first one
22 of those which is PO4(d) {COM-C/2/39} which is some
23 internal memoranda, margin analyses and commentaries in
24 respect of the management accounts and financial
25 information which is going to be provided.

1 This one is a very short and simple point. In the
2 same way that we were told that there has got to be
3 some, if you like, qualitative complexion and context
4 provided to other financial documents, take for instance
5 the tax returns, then we would like the same readily
6 available internal memoranda, analyses and commentary.

7 We note that in this regard both of the other two
8 claimant groups have agreed with the usual caveat about
9 timing for VSW. We say the context is important to
10 understanding those. So we're not seeking anything
11 onerous. It's accompanying analyses and commentary in
12 respect of the financial management accounts submitted
13 to the board and it shouldn't be limited -- I'm not sure
14 this is what Mr Ward will say but insofar as there's
15 a suggestion, oh, you can only have what's on the AS/400
16 database, well, obviously that's not an apposite comment
17 because these are not likely to be internal memoranda,
18 analyses and commentary on a database.

19 So those are my short submissions as regards PO4(d).

20 That's the first of four PO4 categories.

21 THE PRESIDENT: Okay. Yes. The others being is it (f), (g)
22 and (h)? Could you just help us, which are the live
23 ones?

24 MR HARRIS: The next one is PO5(e).

25 THE PRESIDENT: PO4?

1 MR HARRIS: No, in light of Mr Ward's skeleton, nothing else
2 on PO4 for today. The next one is PO5(e) {COM-C/2/48}
3 which is transfer prices as a short heading. Then the
4 next one is PO6(g), that's an important category about
5 input prices of trucks and residual values. Then the
6 final one is PO6(h) about emissions technology. They
7 are the only live disputes between me and Mr Ward on PO4
8 to 6 today.

9 THE PRESIDENT: When you say between you and Mr Ward, are
10 any other defendants to Dawsongroup raising any other
11 categories? I know you said Mr Harris is taking the
12 lead on this.

13 MR PICKFORD: Sir, no, we're not advancing any other
14 categories. We are quite content to allow Mr Harris to
15 advance all of those points. Only one of those points
16 raises the concern that I implicitly articulated before
17 the short adjournment which is in relation to the
18 *Sainsbury's v Mastercard* issue. As far as
19 *Sainsbury's v Mastercard* is concerned, that's
20 PO6(g). On that, we very much agree with Daimler that
21 we want to make progress, there is just a slight
22 difference of view between us as to whether it's
23 appropriate to deal with *Sainsbury's v Mastercard*
24 points now or whether they should be held over.

25 THE PRESIDENT: Right, okay.

1 MR PICKFORD: But other than that, we're entirely content to
2 effectively sit behind Daimler on this.

3 THE PRESIDENT: Just to be quite clear, Mr Hoskins,
4 Volvo/Renault?

5 MR HOSKINS: You will see from the Redfern schedules we
6 quite often adopt Daimler's position. I have nothing
7 independent that I wish to add.

8 THE PRESIDENT: Fine. Mr Harris, do you want to take us
9 through those categories? Shall we deal with them one
10 by one? Let's deal with them one by one. So PO4(d)
11 you've addressed us on. So Mr Ward.

12 MR WARD: Sir, can I make some introductory remarks on this
13 topic? What's happened here is that these requests, PO4
14 to PO6, are astonishingly wide-ranging requests which
15 essentially sought to impose an economic audit on the
16 Dawsongroup in pursuit of a case, a defence based on
17 pass-on.

18 THE PRESIDENT: Yes.

19 MR WARD: We all know in this room that the Competition
20 Tribunal has said that pass-on has to be of sums that
21 directly affect sale prices and there is no pleaded case
22 at all against us based on any form of broader
23 mitigation.

24 Can I show you the pleadings on this, please?

25 THE PRESIDENT: Before you do that, whether the pleadings

1 may need amendment or not I don't know, but given you,
2 like Ryder, your business is renting out trucks.

3 MR WARD: Yes.

4 THE PRESIDENT: So the notion of pass-on here is, to my mind
5 at least and maybe I'm being simplistic and naive, the
6 rather simple one that if you are buying trucks and the
7 price of the truck goes up, it is not unreasonable to
8 think it might affect the charge you make to your
9 customers for renting the truck out.

10 MR WARD: All of that is common ground.

11 THE PRESIDENT: And what is being explored here is -- and
12 they say did, and want to understand to what extent it
13 did and it seems to me that may indeed prove to be
14 a more relevant form of pass-on financially than the
15 resale buy-back. So I think that's what it's getting at
16 and therefore when they want to understand your business
17 it's because your business is renting out trucks.

18 MR WARD: We have absolutely no difficulty at all with that
19 in that they are entitled to try and show if the
20 overcharge led to an identifiable price increase to our
21 customers, in the language of the Competition Tribunal.

22 THE PRESIDENT: Yes, and your charge to your customers is
23 your customers are customers renting trucks.

24 MR WARD: Yes but we also know from the Competition Tribunal
25 that what you're not allowed to do is a form of economic

1 analysis that shows there is some form of economic
2 pass-through of a more oblique kind. That's the law,
3 it's in the Competition --

4 MR HARRIS: With respect it's not the law because that's not
5 what the Court of Appeal said.

6 MR WARD: With the greatest respect you can make your
7 submissions in due course.

8 THE PRESIDENT: We won't go into that. You continue
9 Mr Ward.

10 MR WARD: What we have though in this PO4 to PO6 category is
11 an attempt to conduct an economic audit. If I can just
12 show you, even by reference to the categories that
13 Mr Harris has highlighted, PO4(d) is a good example,
14 this first example {COM-C/2/39}, it says:

15 "Internal memoranda, margin analyses and
16 commentaries in respect of management accounts, or any
17 other information, which is used by management to manage
18 the business."

19 Now, that is not a targeted request which deals with
20 the question of whether or not truck prices went up
21 because of the overcharge. It needs to be seen in the
22 wider context that we've already agreed to provide
23 management accounts themselves and indeed audited and
24 consolidated financial statements. Because as Mr Harris
25 rightly says, even though we think these categories 4 to

1 6 are completely excessive and wrong in principle, we
2 have indeed as a matter of pragmatism offered a very
3 large amount of information of that kind and what we do
4 resist is any suggestion that either now or frankly
5 later that can be much expanded out into economic audit.

6 THE PRESIDENT: Can I just see what you are giving, which
7 will help look at how you set prices to your customers
8 for rental?

9 MR WARD: Yes. Can I ask you to turn up bundle B1 under
10 tab 21.

11 THE PRESIDENT: We don't see this -- it's not in the
12 schedule here.

13 MR WARD: It isn't. It's in Mr Coulson's fourth witness
14 statement. B1, tab 21, page 23. {DG-B1/21/23}. Do you
15 have that, sir?

16 THE PRESIDENT: Yes. Magnum has got it very quickly.

17 MR WARD: So 8.6:

18 "In order to respond constructively [...] however,
19 Dawsongroup has undertaken a significant review of the
20 repositories and information that it holds which may
21 contain information which is relevant to the pass-on
22 issues in dispute."

23 This is what we propose to provide:

24 "The AS/400 database [...]"

25 You've already heard about that, sir.

1 "Audited consolidated financial statements [...] for
2 each of the claimants [...] including [...] accounting
3 policies [...]

4 "Management accounts which provide granular
5 financial information for each of the claimants, on
6 a monthly basis, including budgeted margins, cost
7 allocations, and key performance indicators [...]

8 "Forecasts, budgets and capture expenditure plans
9 [...]

10 "Financial budgeting methodologies and processes
11 [...]

12 "Price setting documents, which will provide details
13 of any factors relevant to the setting of prices charged
14 to Dawsongroup's customers [...]

15 "Copies of a representative sample of contracts
16 entered into by each claimant with its customers [...]

17 "Documents and information relating to Dawsongroup's
18 considerations of the competitive conditions [...]

19 "Documents concerning Dawsongroup's fleet size and
20 composition of [its] fleets [...]"

21 You'll see also it's explained how they actually
22 relate to the -- they don't match what they've asked for
23 precisely because they've asked for things that are far,
24 far broader. But those are things that would certainly
25 allow them to consider the question that is legitimately

1 raised about whether or not Dawsongroup did increase the
2 price of its truck products, if you like, as a result of
3 the overcharge.

4 MR MALEK QC: Are they really looking for the commentary --
5 so when senior management look at the management
6 accounts, quite often there will be a document with it
7 that explains what the management accounts are and the
8 movements et cetera. Looking at the management accounts
9 on their own may not assist a great deal. So I can't,
10 for my part, see any problem with the provision of that
11 type of information, not necessarily the way it's been
12 framed here but if someone is submitting the management
13 accounts to the board or whoever it is, and there's
14 a commentary that goes with it, I think the commentary
15 should be disclosed.

16 MR HARRIS: Yes, sir, that is what we want.

17 MR WARD: We can agree to that if that's what we're talking
18 about. What is said here is "or any other information
19 which is used --"

20 MR HARRIS: With respect to Mr Ward, those words, he ought
21 to know, have been dropped so I don't know where he's
22 pursuing those.

23 THE PRESIDENT: So can I be clear, PO4(d) reads in the
24 draft -- in the schedule we've got:

25 "Internal memoranda, margin analyses and

1 commentaries in respect of such management accounts, or
2 any other information [...]"

3 MR HARRIS: No because in the final column:

4 "Daimler agrees to remove the wording 'any other
5 information, which is used by the management to manage
6 the business' to address Dawsongroup's concern about the
7 scope of this category."

8 MR MALEK QC: All you need to do is revise the wording to
9 reflect what I've just said and then I think we're
10 agreed, aren't we?

11 THE PRESIDENT: Well, I'm not sure. Just a moment.

12 Mr Ward, I hadn't appreciated that revision as Mr Harris
13 points it out, it is in that column. So it's:

14 "Internal memoranda, margin [...] and commentaries
15 in respect of such management accounts [...]"

16 MR HARRIS: Exactly.

17 THE PRESIDENT: Are they not therefore the sort of documents
18 you would need, as Mr Malek has pointed out, to
19 understand the management accounts?

20 MR WARD: If what we're talking about is commentaries that
21 accompanied the management accounts --

22 MR MALEK QC: That's what I think you should get.

23 MR WARD: -- then that is --

24 THE PRESIDENT: Accompanied or -- either as presented to the
25 board or were prepared by management to prepare those

1 accounts.

2 MR WARD: That's fine.

3 THE PRESIDENT: Yes, then that category is agreed then on
4 that basis.

5 MR HARRIS: In that case shall I move on?

6 THE PRESIDENT: Let's go on to (e). We've got your general
7 point, Mr Ward. This is PO5(e), is that right, page 48?

8 MR HARRIS: PO5(e).

9 THE PRESIDENT: Page 48 {COM-C/2/48}.

10 MR HARRIS: That sounds right, let me just turn that one up:
11 "[...] details of how the transfer prices are set,
12 and the underlying costs of the goods or services,
13 including explanations as to the difference between
14 transfer price and the onward sale price [...]"

15 THE PRESIDENT: It's not just transfer pricing of trucks,
16 it's all goods, all services. Why is that relevant?

17 MR HARRIS: Well, I think the point that the expert is
18 making is that the transfer pricing mechanisms are
19 required to assess whether there is pass-on in respect
20 of transfer prices and to look at that one, one needs to
21 look at the wider range.

22 THE PRESIDENT: When you say pass-on in terms, transfer
23 pricing is not pass-on.

24 MR HARRIS: No, I accept that. If I misspoke, I'm sure we
25 are talking about transfer.

1 THE PRESIDENT: I'm just trying to understand this.

2 MR HARRIS: Well, this one is dealt with, if I could take
3 you to Mr Grantham's letter. He's the best --

4 THE PRESIDENT: It seems to be pass-on between different
5 entities in the group.

6 MR MALEK QC: And it's being explained as transfers of
7 trucks within the group with the exception of a de
8 minimis quantity of trucks. What are we talking about,
9 Mr Ward?

10 MR HARRIS: Well --

11 THE PRESIDENT: The claimants, there are five claimants but
12 they actually aren't all trading at the same time. It
13 was explained, I think the second claimant really was
14 the trading entity. It then stopped business, from
15 memory on 31 December 1999, and its business was then
16 split between -- by sort of subject matter of customer
17 between the third and fourth claimants.

18 MR HARRIS: It's best explained -- I'm happy to read it out
19 or you can turn it up, but I'm obviously beholden here
20 to my expert and what he says --

21 THE PRESIDENT: Dawsongroup says it's a de minimis quantity
22 because of the way the business was run and I don't
23 think your expert addresses that from memory, does he,
24 Mr Grantham?

25 MR HARRIS: It is at paragraph 2.42 of Mr Grantham which is

1 in COM-D, I think in my tab 1, maybe in tab 2 for you,
2 page 51 of the bundle {COM-D/2/54}

3 THE PRESIDENT: It's annexed to Mr Bronfentrinker, isn't it?

4 MR HARRIS: That's correct although it's in a different
5 bundle, it's in COM-D, the exhibits bundle, page 51 of
6 that bundle. If you were to pick it up in the middle of
7 the page at paragraph 2.42 --

8 THE PRESIDENT: Just a moment. 2.42 on page? Is that
9 page 49?

10 MR HARRIS: Internal bundle page 051, so big numbers.

11 THE PRESIDENT: We've got it now.

12 MR HARRIS: Perhaps if you could just remind yourselves of
13 2.42 please.

14 (Pause).

15 THE PRESIDENT: We've read that. We don't see how this
16 deals with pass-through. This might be relevant if
17 you're doing a margin analysis of profitability which
18 I don't think your expert necessarily suggests he wants
19 to do.

20 MR HARRIS: What he says as I read it is it is there to
21 enable him, and I quote from the fourth line "[...] to
22 assess the extent to which transfer pricing affects the
23 financial results of each of the different claimants."

24 THE PRESIDENT: Yes.

25 MR HARRIS: As I understand it, otherwise absent that he

1 won't be able to penetrate the financial results of
2 different claimants, particularly bearing in mind that
3 some, as you said, are not trading at all.

4 THE PRESIDENT: But we're not concerned with the financial
5 results unless you're doing a margin analysis. We're
6 concerned with truck prices and pass-through. I just
7 don't -- this is just trying to understand why the
8 business was more or less profitable, which is not
9 relevant to this analysis. It's relevant if you're
10 doing a margin analysis.

11 I suggest we adjourn this and he can explain in
12 future, if it's pursued, why actually it's said to be
13 relevant.

14 MR HARRIS: Sir, I accept that. We'll come back on a Friday
15 if we want to pursue that.

16 THE PRESIDENT: Next is PO6(g)?

17 MR HARRIS: Yes. This is an important one.

18 THE PRESIDENT: Which is page 55.

19 MR HARRIS: That's right. {COM-C/2/55}.

20 Information as to how the residual values of trucks
21 are assessed in the calculation of appreciation. This
22 one is dealt with by Mr Grantham in terms at
23 paragraph 2.30 to 2.32.

24 THE PRESIDENT: That's internal page 48?

25 MR HARRIS: On 48, yes {COM-D/2/51}.

1 THE PRESIDENT: Let's just read that.

2 MR HARRIS: This is a very important point about truck
3 assets and how they're capitalised on the balance sheet
4 and written down over time. May I respectfully invite
5 you to read 2.30 to 2.32. It's page 48 of the bundle.
6 (Pause).

7 MR MALEK QC: Can you go to page 49? Thank you
8 {COM-D/2/52}.

9 (Pause).

10 THE PRESIDENT: Yes. Well, we see what he says. It's not
11 dealing clearly with direct pass-through in the rental
12 charge at all. It's looking at how you deal with loss
13 on the input cost and whether the way it was depreciated
14 affects the way the costs were accounted for in the
15 business.

16 MR HARRIS: Yes, that's right.

17 THE PRESIDENT: Which goes I think -- I have to say, it
18 seems to me Mr Pickford is right, in my view, that
19 that's a question of whether that really is direct
20 pass-through or whether that is what in the Tribunal's
21 language in *Sainsbury's*, not questioned by the
22 Court of Appeal, is economic pass-through.

23 MR HARRIS: With respect, what we say to that, sir, is that
24 what Mr Ward submitted was simply wrong. What the Court
25 of Appeal says, and I've got it open in front of me, is

1 firstly, and I quote from 324:

2 "Whether or not the unlawful charge has been passed
3 on is a question of fact [...]"

4 And then it goes on to talk about burden of proof.
5 Then it says that the key test, in 330, is whether or
6 not there is a sufficiently close causative link between
7 them and the wrong committed, and then most critically
8 at all perhaps is at paragraph 332:

9 "On the other hand we accept Mr Hoskins' submission
10 that in each case it is a matter for the judge to decide
11 whether, on the evidence before her or him, the
12 defendant can show that there is a sufficiently close
13 causal connection between an overcharge and an increase
14 in the [...] price. We see no reason why that increase
15 should not be established by a combination of empirical
16 fact and economic opinion evidence."

17 THE PRESIDENT: Yes but that's all about direct
18 pass-through. The Court of Appeal did not question the
19 Tribunal's judgment when it found that what the Tribunal
20 described as "economic pass-through" is not relevant
21 legally at all, namely that *Sainsbury's* might have
22 absorbed this in another part of its business. That's
23 the Tribunal judgment, not the Court of Appeal.

24 I think it's difficult to -- if we're going to have
25 a detailed argument about this and I don't think

1 Mr Pickford conceded the point, I think he said it's
2 a point that needs full argument for which there is not
3 time today.

4 MR PICKFORD: Absolutely, we do have a lot to say on it.

5 THE PRESIDENT: This is not about the rental price to
6 customers, that's clear, which is what is direct
7 pass-through.

8 I think that we should also adjourn that and it
9 might need substantial argument as to whether it's
10 legally relevant or not. And if that's the question,
11 whether it's legally relevant or not, as Mr Malek just
12 whispered to me, we will need the full Tribunal to rule
13 on that. So we can't decide that relevance point today
14 but before we allow disclosure, I think we must decide
15 the relevance.

16 MR HARRIS: I understand that. So that's an issue then
17 that's going to be adjourned and we'll have to have
18 a scoping of who is to be involved and in what way.

19 THE PRESIDENT: Not to a Friday. It might have to be
20 adjourned to February.

21 MR HARRIS: Yes, well, can we come back on that?

22 THE PRESIDENT: Yes, we can try to find another date.

23 MR HOSKINS: Sir, as a matter of housekeeping, if that is to
24 be decided as a free-standing point it concerns everyone
25 because obviously the issue goes way beyond this one.

1 THE PRESIDENT: Oh, absolutely, yes. No, I appreciate that.
2 That's why I don't think -- we'd need to hear all of you
3 and it will take a good hour or more. It's not
4 something we can do now. Or it might even be
5 potentially a preliminary issue to be decided in all the
6 cases. As you know, we've been trying to isolate some
7 preliminary issues for argument, so we might add that to
8 the list.

9 That's (g). Then we have (h).

10 MR HARRIS: The last one then is PO6(h), members of the
11 Tribunal, so it's the very last entry on the Redfern
12 schedule, page 56.

13 THE PRESIDENT: What actually are you asking for in terms of
14 disclosure?

15 MR HARRIS: Again it's the guideline policy documents:

16 "Information as to each claimant's policy in respect
17 of the use or implementation of the emissions
18 technologies".

19 THE PRESIDENT: Well, Dawsongroup, Mr Ward, from your entry,
20 it suggests there are no documents.

21 MR WARD: What would they even be? We buy trucks from
22 cartelists, they agreed the emissions technologies,
23 prices and date of introduction, I actually don't
24 understand what our policy is supposed to even look
25 like. We just receive the trucks with the emissions

1 technology they've sold us. We can tell what the trucks
2 were and therefore what the emissions technology was.

3 What's Mr Harris actually asking for?

4 THE PRESIDENT: Is this dealt with by any expert?

5 Mr Grantham or --

6 MR HARRIS: It is. It's under the heading of Mr Grantham's
7 statement beginning on page 046 of his statement, so
8 three pages earlier than that which is on the screen at
9 the moment {COM-D/2/49}, it's under the heading "Truck
10 fleet size and composition" and you see PO6(h) is in
11 there.

12 THE PRESIDENT: Yes but when you read what he says, where
13 does he actually address this?

14 MR HARRIS: I can't see a separate entry in there so maybe
15 the answer to -- maybe the answer to this one, members
16 of the Tribunal, is that we take the fleet asset
17 register which has already been ordered as a first
18 stage, and then we come back if we have further specific
19 need for --

20 THE PRESIDENT: Yes but I think you need to think about it
21 because you've heard what Mr Ward said.

22 MR HARRIS: Yes, we need to be more precise.

23 THE PRESIDENT: If you are a purchaser of trucks, you assume
24 that the truck you buy has the right conforming
25 technology. But you can consider it further.

1 MR HARRIS: I think that's a fair criticism, sir, in that
2 I don't think that's what we're getting at but what
3 needs to be clearer is what we're getting at and with
4 some supporting evidence.

5 THE PRESIDENT: And why it's relevant, very good.

6 MR HARRIS: I'm grateful. So those are the ones in
7 revision.

8 THE PRESIDENT: So then we're just left with dates.

9 Mr Ward, of all the information you've either agreed
10 or been ordered to provide, you suggested earlier that
11 the dates you were asking for from the defendants were
12 dates that your clients can similarly comply with?

13 MR WARD: I did and I'm looking for my note but I think what
14 he said was end of November for databases and end of
15 December for everything else.

16 THE PRESIDENT: That is exactly what you said.

17 MR WARD: If you give me one moment, just to make sure
18 things haven't moved on.

19 THE PRESIDENT: That is what you said.

20 (Pause).

21 MR WARD: What I'm asked is if we could be moved to the end
22 of January for the everything else given the deadlines
23 that have been fixed for my friends on the other side.

24 THE PRESIDENT: Well, I don't think that was fixed for
25 everyone on the other side. I think we will hold you to

1 what you said earlier: 31 December for everything else.

2 There's always liberty to apply.

3 MR WARD: Yes.

4 THE PRESIDENT: I think that concludes the Dawsongroup?

5 MR WARD: It does, sir. May we be excused?

6 THE PRESIDENT: You may be excused and I think we have kept
7 to our 45 minutes.

8 MR WARD: Thank you very much.

9 MR PICKFORD: Sir, before we go on to Ryder --

10 THE PRESIDENT: Does this concern Dawsongroup?

11 MR PICKFORD: It may.

12 THE PRESIDENT: You had better stay for the minute, Mr Ward.

13 MR PICKFORD: Because of the ebb and flow on different
14 points, there were two points I wanted to make some
15 short submissions on at some point and perhaps Mr Ward
16 would prefer to hear them now. They are the monthly
17 hearings issue and I had a few points to make on that,
18 you remember I mentioned that point yesterday.

19 THE PRESIDENT: Yes.

20 MR PICKFORD: And also a comment just so the Tribunal was
21 clear about our position in relation to other economic
22 models other than econometric ones because that was
23 a point that was raised this morning. We had again
24 a short point to make in response to that. I'm very
25 happy to make them at whatever point the Tribunal thinks

1 is most convenient but as Mr Ward is about to leave,
2 I thought I should at least make it clear I had some
3 further things to say.

4 THE PRESIDENT: Yes, you go ahead.

5 MR PICKFORD: I'm very grateful. In reverse order, the
6 first one, on the point about economic models, we had
7 a discussion this morning where the Tribunal noted there
8 was some degree of consensus around the main type of
9 econometric model that the economists wished to employ
10 in order to assess the extent of any overcharge.

11 The only point I wanted to make about that comes
12 back to a point that, sir, you made yesterday. There
13 are in fact two stages to the analysis. The first
14 question is did the conduct of the defendants actually
15 affect prices? The second question is, if so, how? The
16 second question is what is addressed by the economic
17 models. The first question, did the conduct of the
18 defendants affect prices, is something that we intend to
19 lead economic evidence on in the form of what we call
20 the theory of harm analysis which is an economic model
21 which goes to that question of whether the type of
22 conduct with which we're concerned was even capable of
23 actually affecting prices.

24 I simply wanted to make clear to the Tribunal that,
25 insofar as there has been discussion of other types of

1 model other than econometrics, there is a further type
2 of model that we intend to deploy that fits in at that
3 stage of the analysis.

4 THE PRESIDENT: Yes. Perhaps I didn't make it sufficiently
5 clear. I wasn't seeking to preclude that. What I was
6 saying was that when we come to the second stage of
7 estimating the overcharge, which is what generates the
8 desire for data and disclosure, it's important and
9 I think stated appropriate to decide the model or the
10 method, not the model because there may be different
11 models within the method, but the method that's going to
12 be used because different methods require sometimes
13 completely different data of great scope and therefore
14 great cost and effort and burden and it's on the method
15 of calculating the overcharge where there are these
16 various well-established methods in theory, such as
17 comparisons with unaffected markets, for example, which
18 sometimes works well.

19 But in this case, I think there seems to be common
20 ground that everyone agrees that the econometric model
21 of before and after or during and after, if before is
22 not available, is one that should be used and in those
23 circumstances I don't think it's appropriate, even if
24 some would like to, to also use other models which then
25 generate a whole other raft of disclosure and witness

1 statements and all the rest.

2 MR PICKFORD: Sir, that's quite understood. I simply wanted
3 to make the submission for clarity so everyone knew
4 where we stood on that issue.

5 THE PRESIDENT: But for theory of harm that's a different
6 matter. Yes, so that's the second point. And then
7 monthly hearings?

8 MR PICKFORD: The first point to make is we very much
9 appreciate the Tribunal making itself available and that
10 could obviously be extremely helpful to the parties. We
11 did have some concerns which we just wanted to air and
12 to some extent I think they've been addressed already by
13 Mr Malek's comments this morning about the expected
14 scope of those hearings which, as I understand it, is
15 very much to address small, discrete points that tend to
16 arise between particular parties, they are not intended
17 to be an opportunity for parties to bring large
18 disclosure applications that are properly to be heralded
19 by correspondence, notice and the proper subject of CMCs
20 like this one.

21 MR MALEK QC: I'm not sure that's right. Look, there's two
22 types. There may just be one with routine questions
23 saying we can't agree that point. There may be others
24 where it's appropriate to have an application notice,
25 witness statements, skeleton arguments and a bundle and

1 I'm quite happy to deal with either. So don't assume
2 it's just going to be a five-minute thing saying,
3 Mr Malek, what do you think about this? I'm quite happy
4 to deal with substantive disclosure issues. You may
5 have some concerns about that but I think that's what
6 we're going to do.

7 MR PICKFORD: Okay. That's a very helpful clarification.
8 I think the concern we do have about that is that
9 obviously these proceedings, this room is a very costly
10 one and what we don't want to do is be incurring these
11 sorts of costs, and it's obviously not just today, it's
12 all of the preparation that leads up to it --

13 MR MALEK QC: Of course.

14 MR PICKFORD: -- on an almost rolling basis because
15 preparation for this hearing goes back well more than
16 a month. This hearing alone was several months in
17 preparation.

18 MR MALEK QC: The parties will have to decide, is this
19 something we're quite happy to leave to a normal CMC six
20 months down the line, or is this something we want to
21 get resolved now and it's something that's not going to
22 take, with all the other applications on that particular
23 day, it's not going to take more than a day. The reason
24 why we've proposed this is because there was a lot of
25 concern by a number of parties saying, look, we've got

1 this hearing today, we can't get things resolved now,
2 we're not going to have an opportunity for six months.
3 We're giving you the opportunity to come back and say:
4 we've got issues between us, we want those resolved now
5 so we can know what we're doing.

6 MR PICKFORD: Sir, we hear that and we well understand it.
7 I think our concern derives from, in one case, an
8 example of a hearing that we had in March of this year,
9 where we had an application from Ryder that we said was
10 misconceived. We had to spend a very large amount of
11 cost coming to deal with that application, saying you
12 really shouldn't be bringing this application now, it's
13 premature, you should go away, but we all turned up only
14 for the Tribunal to agree with us that it was the wrong
15 application brought at the wrong time.

16 MR MALEK QC: Then you get a costs order against them. If
17 someone brings a misconceived application, they're going
18 to get a costs order against them.

19 MR PICKFORD: As long as they don't infer from the
20 Tribunal's readiness to hear these sorts of matters that
21 they're in any way being encouraged to bring
22 applications that require much greater notice,
23 preparation, correspondence --

24 MR MALEK QC: If there's a concern, the parties can write to
25 the Tribunal before the hearing and say, look, this is

1 what we want to do in principle, the other side don't
2 want it, are you willing to countenance having a hearing
3 on this date to deal with it? Then we can reply in
4 correspondence to say yes or no.

5 MR PICKFORD: Certainly if we are able to engage with the
6 Tribunal in correspondence like that, that would be
7 extremely helpful, so thank you. I think the other
8 thing that would be very helpful is to ensure that
9 parties give a very substantial degree of notice in
10 relation to such applications. Obviously we're not in
11 a kind of Chancery three-day notice environment here.
12 These proceedings necessarily require some more time to
13 gear up but I'm sure the other parties will have that
14 well in mind.

15 MR MALEK QC: It all depends on the nature of the
16 application. If it's something relatively confined
17 I don't think we need that. If it's something that's
18 very major, I think we probably do need that. I think
19 we just have to play it by ear and we'll deal with it in
20 correspondence in deciding what we're going to do on
21 those particular Fridays.

22 MR SINGLA: Sir, I was asked to make some points on these
23 hearings as well. I think we had in mind that we would
24 have a structure whereby it would be a requirement to
25 issue a formal application and that should be issued

1 four weeks in advance of the hearing, and then a
2 timetable for evidence in response, because otherwise if
3 one has a rolling agenda it will just drain resources.

4 We do want a requirement for formal applications to
5 put parties on cost risks and then the Tribunal can tell
6 us in advance of the hearing what it accepts on the
7 agenda, otherwise there will just be a bun fight as to
8 who gets the hearing time.

9 MR MALEK QC: I'll tell you what I expect. If there's
10 anything other than something very minor, an application
11 notice, a Redfern schedule on what the issue is,
12 a witness statement or maybe two witness statements,
13 very few exhibits, no more than 25 pages, and a skeleton
14 argument. As long as, from my point of view, I have
15 that two clear days before the hearing, that's fine for
16 me. As to how you organise that amongst yourselves,
17 I would have thought that with all the experience of
18 people here you can organise that amongst yourselves but
19 I'm not going to give a timetable that you've got to do
20 things by a certain date prior to the hearing.

21 MR SINGLA: Sir, can I tentatively seek to persuade you that
22 it would help all of the parties to have at least
23 a timetable, a structure for each of these hearings.
24 Just to give you an example, since skeletons were
25 exchanged last Friday, there have been 25 letters in the

1 Ryder proceedings alone and we also have the issue, sir,
2 which arose yesterday --

3 MR MALEK QC: We can have a provision whereby the
4 application should be taken out either ten days or two
5 weeks before the actual hearing date and that -- I don't
6 think we need to make any further directions apart from
7 what I've indicated what I expect in the bundles. From
8 my point of view, what I really want is to make sure
9 that two clear days I have a bundle in the format
10 I wanted, the submissions in the way we wanted and
11 that's what we've had here so far and it's worked out
12 really well. The mechanics as to what day people file
13 those things you should be able to agree amongst
14 yourselves, as long as you understand the application
15 notice has got to be taken out, let's say, 14 days
16 before the hearing.

17 MR SINGLA: Sorry, as I understood your exchange with
18 Mr Pickford, you said you would give an indication in
19 advance of the hearing as to what would be on the
20 agenda.

21 MR MALEK QC: If someone has a doubt as to whether or not
22 the Tribunal is prepared to deal with something, they
23 could write in and say "We've got this issue, is this an
24 issue suitable for a Friday" and then we can come back
25 and say yes or no.

1 MR SINGLA: Which would be very helpful but then I think one
2 needs to have a timetable which is slightly in advance
3 of two or three clear days because, as we saw yesterday,
4 there are overlap issues as well. So that if an issue
5 arises in the Dawson group proceedings where, for
6 example, Iveco is not a party, one then has to work out
7 actually does that concern us in some way, do we need to
8 put in evidence and submissions and so on? The
9 mechanics of these hearings will get rather complicated,
10 sir, unless you do give us directions.

11 MR MALEK QC: The application notice with any evidence two
12 weeks before, the response evidence and anything else
13 you rely on one week before, and the bundle in the
14 format that I've said two clear days before.

15 MR SINGLA: I'm very grateful.

16 MR HARRIS: Sir, we for our part have a slightly different
17 but generic concern that may be of interest to Mr Ward
18 before he departs. Could the Tribunal offer any
19 clarification or guidance as to what happens when there
20 is only one party, say one defendant out of say three or
21 four or maybe a Part 20 defendant but only one or
22 perhaps only two out of five, and then they want to
23 bring applications because they're ready and obviously
24 I'm speaking from a defendant's point of view as
25 I would, we might say, for instance, oh, well that's for

1 our defence, we want to make progress on this issue,
2 whether it be a legal issue or a disclosure issue, and
3 other parties say "We're not ready". Is it the case --
4 our respectful stance is that, well, if they're not
5 ready, so be it but that shouldn't preclude the ability
6 on the part of say one defendant or maybe a group of two
7 or even three, but what I'm talking about is when it's
8 not everybody, shouldn't preclude their ability to come
9 forward and say "We endeavour to persuade the Tribunal
10 this is the right order to make at the right time".

11 What slightly concerns us is, in light of what
12 happened with VSW and I accept that was a consent order
13 situation and there was a measure of agreement from
14 everybody but us, but equally we were told "You can't do
15 it now so come back". To put some flesh on the bones,
16 take VSW as an example. We were told don't do it now
17 because everybody else has agreed not to do it now but
18 at what point can we --

19 THE PRESIDENT: I'll interrupt you because I don't want to
20 spend a lot of time talking about when we talk about
21 things and cut into Ryder's application. I think one
22 has just got to apply a certain common sense to this and
23 if there are four defendants and three want something
24 done and the fourth says they're not ready, then the
25 Tribunal can direct -- the Tribunal will direct it will

1 be dealt with now and the fourth has to as it were put
2 up or shut up.

3 If on the other hand three think it should be
4 postponed but one wants to go ahead, we may well say,
5 sorry, you're going to have to wait for the other three.

6 We've just got to case-manage this in a sensible way
7 both for use of Tribunal time and to avoid potentially
8 inconsistent rulings on the same point.

9 So I don't think we can lay down a rule that you can
10 never come ahead of anybody else and anyone can hold up
11 everybody else. It's got to be a bit ad hoc with common
12 sense.

13 MR HARRIS: I'm grateful for that indication. May I take it
14 that it would also be relevant, it's not just
15 necessarily the number of defendants. Let's say for the
16 sake of argument one defendant is 50% of the claim, then
17 a relative weighting factor ought also to be employed?

18 THE PRESIDENT: Well, it may be but if another defendant is
19 45% of the claim --

20 MR HARRIS: I accept that as well. What I'm saying, if
21 there are three defendants that make up 5%, in the
22 relative weighting they may have --

23 THE PRESIDENT: Yes.

24 MR HARRIS: I'm grateful.

25 THE PRESIDENT: But we're concerned about time because we

1 end up under time pressure and we're concerned about
2 inconsistency, particularly within an action.

3 Right, can we turn to Ryder and Mr Brealey and we
4 will release the Dawson group parties. I think we won't
5 rise yet, we'll just carry on.

6 So Mr Brealey.

7 MR BREALEY: I'm going to do the best I can this afternoon.

8 Whether we finish I don't know.

9 THE PRESIDENT: Yes.

10 MR BREALEY: Clearly there are some important points about
11 models to the possible exclusion of anything else which
12 has been flagged for the first time at this hearing.
13 I'll make some submissions on that if necessary but it
14 may well be that we have to deal with this another time
15 because we are running out of time and there are some
16 obviously big points of principle.

17 On the quantum disclosure note, I won't go through
18 that. What I would like to do first, we'll come on to
19 that maybe when we get to the overcharge categories.
20 I think we've got to cut to the chase and go to the
21 order because we've done it by reference to the order
22 rather than the Redfern schedule.

23 THE PRESIDENT: When you say the order?

24 MR BREALEY: The amended order that we gave this morning.

25 THE PRESIDENT: That's this document, is that right?

1 MR BREALEY: Yes. There was a document emailed this
2 morning, that was a clean version. Then there was an
3 amended order which had a comparison on it which was
4 given to the Tribunal around about 11 o'clock.

5 THE PRESIDENT: Yes. That's this one (Indicates).

6 MR BREALEY: That's that one.

7 THE PRESIDENT: We will also -- because the order -- I don't
8 know to what extent it tracks the Redfern schedule but
9 we'll try and follow it on both. Okay.

10 MR BREALEY: If you could follow it on both. Certainly on
11 the VoC there's hardly any change. If we can -- what
12 I would like to do is go through the category and then
13 find out whether the defendants object because we've put
14 in the right-hand side "Agree" and we think it is agreed
15 because of the Redfern schedule or because of subsequent
16 correspondence.

17 So what we need to do is go to page 2 of the order
18 {COM-B/2.2/2} and I would hope that most of this is
19 uncontroversial.

20 THE PRESIDENT: So this is VoC2/01(b) which is page 9 of the
21 schedule. VIN, vehicle identification number.

22 MR HARRIS: Sir, I have a prior point I'm afraid on VoC
23 which I'm told is not agreed or it needs to be
24 clarified. I'm sorry to interrupt.

25 THE PRESIDENT: Yes.

1 MR MALEK QC: Which one?

2 MR HARRIS: I have a note that by reference to the VoC that
3 Ryder had perhaps until today sought transaction data on
4 leased trucks, but that in light of the fact that, as
5 I was instructed over lunch, that they now do not pursue
6 VoC2/01(h), which was information on leasing terms, that
7 it therefore makes no sense for them to be continuing to
8 seek leased truck data. One is unintelligible without
9 the other. I simply rise to clarify that that is the
10 case, that VoC transaction-type data on lease trucks is
11 no longer pursued.

12 MR BREALEY: We're not going to get anywhere if I keep on
13 getting interrupted before I --

14 THE PRESIDENT: Yes. I think this is VoC2/01.

15 MR BREALEY: What I would like to do --

16 THE PRESIDENT: Which I thought is in respect of trucks
17 purchased, isn't it? It's nothing to do with leased
18 trucks.

19 MR BREALEY: No, if I can be allowed to develop and then
20 they can say whether they agree or disagree.
21 What I'd like to do is go off the clean copy. The
22 clean copy is the best copy. It was emailed at 8.30
23 this morning to your solicitors.

24 THE PRESIDENT: I think some people -- the problem is --
25 have you got hard copies you can provide? Some people

1 may not have been -- may have come straight here or
2 whatever, they clearly haven't got it. If you're doing
3 that, I would have hoped that the resources of your
4 instructing solicitors would have produced some hard
5 copies to be --

6 MR BREALEY: I understand it's been circulated.

7 THE PRESIDENT: Right.

8 MR BREALEY: Can I just give the Magnum reference. For
9 those who want to see it on Magnum, the clean order is
10 at {COM-B/2.1} and the amended order comparisons is
11 {COM-B/2.2/1}.

12 THE PRESIDENT: But this is, on the schedule we all had
13 before the hearing, the VIN for each truck sold by
14 a defendant, you say, to any customers in the UK?

15 MR BREALEY: Can I just explain, because it's actually quite
16 simple, that as against -- we are not pursuing leased
17 trucks today. As the schedule says, against Daimler and
18 DAF we are pursuing the request as regards used because
19 they have agreed to make the requisite searches. That
20 is what the order says.

21 So I'm looking at page 2 of the clean order that
22 I --

23 THE PRESIDENT: Yes.

24 MR BREALEY: It's page 6 because this document has expert
25 text in front of it. Maybe it's better that we go to

1 the amended version because that is the version that
2 I see on the screen at the moment {COM-B/2.2/6}.

3 As I understand it, this is a simple category that
4 is agreed.

5 THE PRESIDENT: We're just trying to make your life easier
6 and much swifter, Mr Brealey. The category I think --
7 if we look at the Redfern schedule in your bundle, which
8 everybody's got and has been working on, on page 9,
9 VoC2/O1(b), VIN for each truck. You've made it clear
10 you're not dealing with leased. Now, as framed it was
11 for each truck sold, whether it was sold new or sold
12 used, you say that Daimler -- you say from January 1997
13 to 30 September 2017, you say Daimler agrees, you say
14 DAF agrees -- has agreed and you say Iveco and Volvo
15 have only agreed for new and so you're restricting it --
16 and MAN -- to new trucks. That's the position?

17 MR BREALEY: That's the position.

18 THE PRESIDENT: For Volvo it's in the first instance for the
19 shorter period for the reasons Mr Hoskins explained. On
20 that basis you say that's resolved?

21 MR BREALEY: Yes.

22 THE PRESIDENT: So pausing there, is that correct? Does
23 anyone for any of the defendants say that's wrong?

24 MR HOSKINS: I just want to clarify that the disclosure we
25 will give, as you'll understand, will be from the BNA

1 and Partner systems, it's not requiring us to do any
2 further searches at this stage. So that will be
3 consistent with what's been agreed in VSW and in DG.

4 THE PRESIDENT: Yes.

5 MR MALEK QC: That would need to be put in the order? That
6 would need to be reflected in the order.

7 MR HOSKINS: I would like it to be in the order for obvious
8 reasons.

9 THE PRESIDENT: That's understood, Mr Brealey. So that's
10 that category.

11 MR BREALEY: What I'd like to do, sir, if possible is to go
12 through the red line version because -- as opposed to
13 the Redfern. We can cross-refer to the Redfern, but the
14 reason for that is that this is the draft order that
15 reflects recent correspondence. So people have been
16 agreeing categories, sub-categories for the past couple
17 of weeks and so what we've tried to do is, on this
18 document, reflect the terms of the order. We just amend
19 it with Volvo but the red line version reflects the
20 terms of the order.

21 THE PRESIDENT: Yes. So that's that one.

22 MR BREALEY: That's VoC(b), that's sub-category (b). Unless
23 I hear from anybody, that is --

24 THE PRESIDENT: Yes. Well, we've had the one clarification,
25 nobody else is -- Mr Jowell?

1 MR JOWELL: We also have a similar issue to that of
2 Volvo/Renault which is that in the VSW order, we've
3 agreed that we will give this information but we will
4 give it from the AVIS and ESA systems by 29 November and
5 then in due course we will give the remaining data from,
6 in the first instance, extracts from the JD Edwards and
7 Kerridge systems thereafter. So as long as there is
8 again proviso that reflects what's been agreed in VSW,
9 we are equally content.

10 MR MALEK QC: That should be reflected in the order but that
11 sounds sensible.

12 MR BREALEY: If Mr Jowell says (inaudible) is agreed, which
13 I understand it was, then that will be reflected in the
14 order.

15 If we go then to (c), this is page 8 of the
16 {COM-B/2.2/8} -- this is all raw data. Again we have
17 the leases have been dropped, it's new and used only for
18 Daimler and DAF, and unless anybody objects or qualifies
19 it by reference to a certain database we understand that
20 that sub-category (c), production plant location, which
21 has been ordered in other proceedings is agreed.

22 THE PRESIDENT: Mr Brealey, we can continue like this. The
23 problem is where on the schedule it's shown as agreed in
24 grey, it may be there's some finessing of the drafting
25 that needs to be made, such as Mr Jowell, which you

1 won't object to. But if we go through each item, then
2 no way are we going to complete this application today
3 and moreover you will be wasting a bit of time because
4 we won't have proper argument on the substantial points
5 where there is disagreement.

6 It seems to me that where you've basically got
7 agreement already on the Redfern schedule or, as your
8 understanding is something has been ironed out since, we
9 needn't deal with that now. That's just the sort of
10 thing the Friday application can be used for and it's
11 better to go and isolate the major issues which are not
12 agreed which you wish to pursue and we deal with those.
13 Otherwise I appreciate you're trying to, as it were,
14 approve a draft final order but that will take far too
15 long and it's a bit wasteful if I may say so.

16 MR BREALEY: Can I then, because obviously people want to go
17 away with an order, can we install some discipline on
18 the basis that this is just fine-tuning. We in good
19 faith have put forward these categories. We've accepted
20 some of their suggestions, we've dropped stuff where
21 they have objected and really VoC2 category is
22 uncontroversial.

23 MR SINGLA: That's not right, sir, so Mr Brealey needs to
24 make a choice. Either he goes through each of these
25 categories and we argue them out insofar as they're

1 disputed or he decides not to pursue the VoC/O2
2 categories today. He can't simply say this is all
3 agreed, let's just draft the order after the hearing,
4 because we're about to come to one that Iveco does
5 oppose.

6 MR BREALEY: Sir, to a certain extent we've listened for
7 almost a day to the Dawsongroup and it is becoming quite
8 often that we are at the end of the two-day hearing and
9 we get squeezed for time.

10 THE PRESIDENT: Well, we didn't allow Dawsongroup to do what
11 you're seeking to do.

12 MR BREALEY: Well, they went through most of the contested
13 categories.

14 THE PRESIDENT: Yes, the contested categories but you're
15 trying to take us through the agreed categories to get
16 them confirmed.

17 MR BREALEY: Well, I'm trying to go through category by
18 category saying that we believe it's agreed, giving the
19 defendants an opportunity to say no. If they say no,
20 then they can explain.

21 THE PRESIDENT: But we needn't do it by the wording, exact
22 wording, that's the point. If that's what you want to
23 do --

24 MR BREALEY: I would rather get on with some of the issues
25 that have troubled you sir, but I'm also here clearly to

1 get an order for disclosure.

2 THE PRESIDENT: Yes.

3 MR BREALEY: We essentially start at 2.45 on the second day
4 and I'm trying to make as good progress as I can.

5 THE PRESIDENT: Well, we are -- you may not feel it but I'm
6 trying to help you.

7 MR BREALEY: I do. Well, can Mr Singla explain what his
8 problem is with the next category?

9 MR SINGLA: My problem, as it were, is that we say in
10 relation to category (e), it's (e)(v) which is the date
11 of buy-back. It's the actual date of buy-back and this
12 is to some extent duplicative or it overlaps with
13 category (v). It's a simple point of relevance. We say
14 that we are content to provide --

15 THE PRESIDENT: Overlaps with category?

16 MR SINGLA: (v).

17 THE PRESIDENT: What's (v)?

18 MR SINGLA: It's (v), (vii) and (viii). We are still within
19 VoC2/O1 but it's category (v).

20 THE PRESIDENT: I see.

21 MR SINGLA: Sorry, we're currently in (e). So this arises
22 in relation to (e)(v) but also (v)(vii) and (viii).

23 THE PRESIDENT: I see.

24 MR SINGLA: It's a short point really, it's one of
25 relevance. We say in relation to pass-on we can

1 understand why Ryder needs disclosure in relation to
2 what actually happened in relation to the buy-back and
3 therefore we're content to provide disclosure in
4 relation to those trucks which are the subject of the
5 claim because there is a pass-on issue which arises, but
6 beyond that we cannot understand the relevance of the
7 actual buy-back date or the actual buy-back events
8 because by definition they cannot have had a bearing on
9 the price and the negotiations at the time of purchase.
10 They happened subsequently.

11 So we resist this beyond the trucks which are the
12 subject of the claim because we can't understand how
13 this will be relevant to an overcharge analysis. That's
14 all explained by Compass Lexecon but I don't want to
15 take up unnecessary time.

16 THE PRESIDENT: What you've said in the schedule, as

17 I understand it, is Iveco defendants don't object to
18 sub-category (v).

19 MR SINGLA: Sir, I can take five or ten minutes to explain
20 the chronology but I don't --

21 THE PRESIDENT: Is that no longer --

22 MR SINGLA: No, it's not our position. We are criticised
23 from having resiled from that but I suspect Mr Brealey
24 would prefer to use the next five or ten minutes in
25 a different way. The short point is we were not clear

1 that they were after the actual buy-back date as opposed
2 to the agreed buy-back date which is something that
3 arose at the time of purchase.

4 THE PRESIDENT: And that you accept you'll give at the time?

5 MR SINGLA: Yes, exactly because it happens at the time of
6 purchase so may be relevant.

7 Our position is we're content to give this material
8 insofar as it relates to trucks which are the subject of
9 the claim but not any wider than that.

10 There is a separate issue which I'll come to in
11 relation to (v) but just dealing with this point which
12 overlaps between (e) and (v), it's a timing point really
13 and they've not explained how this will be relevant to
14 overcharge when it by definition occurred after the
15 event.

16 MR PICKFORD: Sir, we for our part don't agree (e) as worded
17 here because it's worded in terms as "for each truck
18 sold or leased" and we rejected the application in
19 relation to leased which I thought was not longer
20 pursued.

21 THE PRESIDENT: It's been dropped for leased trucks.

22 MR PICKFORD: It's been dropped for leased but the words
23 haven't in the version that I have.

24 MR BREALEY: That's just an error. "For each truck sold".

25 THE PRESIDENT: So "each truck sold".

1 Mr Singla, I take your point of date of actual
2 buy-back but buy-back agreement, why should that be
3 restricted to trucks that are subject to the claim?
4 What's being looked at is Iveco's prices for trucks
5 generally, isn't it, in the market? Your pricing?

6 MR SINGLA: I'm sorry, sir, I'm not sure where you are.

7 Are you in (v)?

8 THE PRESIDENT: In (v), I think you said you would only
9 cover it for trucks that are subject to the claim, in
10 other words trucks sold to Ryder and not trucks sold to
11 other purchasers.

12 MR SINGLA: This is in relation to (v) (vii) and (viii)?

13 THE PRESIDENT: No, it's VoC2/O1(e) (v).

14 MR SINGLA: Yes, they are asking for the date of actual
15 buy-back.

16 THE PRESIDENT: Yes and you've said you won't give that.
17 I understand that but I thought you said you only agree
18 (e) for trucks that are subject to the claim, is that
19 right?

20 MR SINGLA: No, sorry, sir, I may have misspoken. Our
21 position is that in relation to (e) (v), we are content
22 to give the date of actual buy-back for the trucks which
23 are the subject of the claim but not to give the date of
24 actual buy-back more widely.

25 THE PRESIDENT: And you're content to give the date of

1 buy-back that was in the original agreement if there was
2 a buy-back agreement for all trucks?

3 MR SINGLA: Yes, consistent with our point about timing.

4 If it assists, Mr Brealey's solicitors sent a letter
5 on Wednesday night making exactly the same point that
6 I'm making now, that only things which happened at the
7 time of purchase could possibly be relevant.

8 THE PRESIDENT: Well, that's clear, thank you. So is that
9 satisfactory, Mr Brealey?

10 MR BREALEY: So far as Iveco is concerned, we can -- can we
11 adjourn that (v) and we'll try to do that in
12 correspondence?

13 THE PRESIDENT: In terms of the order --

14 MR BREALEY: In terms of the order, as far as Iveco is
15 concerned, the rest as I understand -- the other parties
16 have agreed. As far as Iveco is concerned, we can
17 adjourn that --

18 THE PRESIDENT: But the order that will be made will be
19 buy-back terms at the time of sale but not the date of
20 actual buy-back of the truck except when it's purchased
21 by you.

22 MR BREALEY: Correct. Thank you.

23 THE PRESIDENT: Okay. That's (e).

24 MR BREALEY: (f) we again --

25 THE PRESIDENT: Shown in grey, so said to be?

1 MR BREALEY: It's not on the screen on Magnum. I don't know
2 whether it can be. {COM-B/2.2/14}.

3 THE PRESIDENT: But in the schedule said to be agreed?

4 MR BREALEY: Page 14. We understand it's agreed, unless
5 anybody --

6 THE PRESIDENT: I think but I say we're not -- the actual
7 wording will be looked at by people subsequently and you
8 will circulate a draft order and they can't comment on
9 this which they've only just received.

10 MR BREALEY: Well, it reflects the wording that's been there
11 for ages.

12 THE PRESIDENT: Yes, it may do but they must be given
13 a chance to verify that.

14 The next one that on the schedule was in issue, if
15 it still is, is (h).

16 MR BREALEY: That's gone because that concerned lease terms.
17 So we're not pursuing that.

18 THE PRESIDENT: Right, so (h) has gone. Then (i) seems to
19 have been agreed, (j) isn't used, (k) is shown as
20 agreed, (l), (m), (n) agreed. One gets to (o), is that
21 right? (o) you say the current position is for Daimler
22 and DAF?

23 MR BREALEY: This only relates to Daimler and DAF because
24 they have agreed to provide data on used second-hand
25 trucks.

1 MR HARRIS: Sir, I need to update the Tribunal. That's not
2 a fair characterisation.

3 THE PRESIDENT: Just before you do, as regards Iveco and MAN
4 and Volvo/Renault, are you then not now pursuing it?

5 MR BREALEY: No. Well, not today. Clearly the leases will
6 have some impact on lost profits, because we're a lease
7 company, we competed with the cartel. But for the
8 purposes of today we are only pursuing data relating to
9 used trucks for those who say they will give it to us.
10 That to date has been Daimler and DAF.

11 THE PRESIDENT: Fine. Mr Harris, what's the position of
12 Daimler?

13 MR HARRIS: Yes, the position is, we had in the interests of
14 pragmatism agreed to provide this on the understanding
15 that it was being provided by all of the other OEMs and
16 that's because -- being provided by because pursued
17 against all the OEMs, and that's because this is a VoC
18 and overcharge category and the claimants' consistent
19 refrain has always been they need that against all the
20 OEMs in order to pursue their modelling.

21 But we now see, and this is why with great respect
22 this is an extremely difficult process, it has been
23 brought to my attention only minutes ago and
24 I personally have only seen this minutes ago for the
25 first time, that in fact it's now not pursued against

1 three of the other OEMs, they're all crossed out now in
2 red and in those circumstances we don't agreed to
3 provide it.

4 On the claimants' own case it's no use to them to
5 have just our data. I can't comment on DAF but I do
6 know that in some other categories, the reason that DAF
7 has agreed is because they've already provided it in
8 another case. It is, if you like, off the shelf.
9 I don't know if that's this but that's not us. So
10 whilst it would have been agreed and was agreed at
11 a time when it was pursued against everybody, that has
12 now shifted during the course of the day and we
13 therefore remove the agreement.

14 MR BREALEY: Can I make two points in response to that. The
15 first is that Daimler have never made it a condition,
16 they've just said they would give us the information on
17 used trucks. Secondly, we took the view that because
18 two parties were going to give it, that was a start for
19 representative sampling and that's exactly what we've
20 been forced to accept for pre-cartel data. So the
21 second point is that Mr Harris is essentially blowing
22 hot and cold on us.

23 THE PRESIDENT: Just a minute. (Pause).

24 Mr Harris, we really don't find that either
25 attractive or helpful. Different parties are in

1 different positions regarding the ease with which they
2 may be able to gather data and provide information and
3 it doesn't all have to be simultaneous. It's not
4 dropped against the other parties, it's just not pursued
5 now in the interests of efficiency and time. If you've
6 said you're capable of doing it or willing to do it, you
7 may wish to withdraw the consent but it seems to us we
8 will then order you to do it because you're obviously
9 able to do it.

10 MR HARRIS: No, no, with respect, sir, this schedule has
11 never been on Daimler's part we are able to do it. This
12 has always been about relevance. You know that --

13 THE PRESIDENT: Yes but you agreed relevance so it is
14 relevant.

15 MR HARRIS: That's right but it does not go to the ease or
16 ready availability at all --

17 THE PRESIDENT: I thought you just told us that you had been
18 willing, not just agreed relevance, had been willing to
19 do it on the assumption other people were doing it.

20 I thought that's what you'd said.

21 MR BREALEY: In correspondence they said they would agree to
22 do a reasonable and proportionate search.

23 MR HARRIS: This needs to be corrected. This is proceeding
24 on completely the wrong premise. Mr Brealey's clients'
25 justification hitherto has been that this data is needed

1 across defendant OEM set, that's because it's a VoC and
2 overcharge category. So it doesn't work for him if it's
3 only one or two OEMs. That's the basis upon which we
4 were approached to provide agreements to relevance.
5 Only today, whilst I've been on my feet dealing with
6 other categories, that has fundamentally shifted. That
7 justification cannot stand any longer so that undermines
8 the basis of the consent.

9 If you say to me formally do I withdraw this word
10 "agreed" given that it was made on premise A, yes,
11 I formally withdraw it. It was based upon a premise
12 that has now changed.

13 Secondly, we have never said whether by this word
14 "agreed" or in correspondence or anywhere else this is
15 readily available data that we can provide and we're
16 happy to provide by such and such a date. That is not
17 the position, we haven't gone into that, and I can't
18 comment on why it's gone against Iveco, VRT and MAN.
19 Maybe they've got difficulties.

20 The third point, as regards what my learned friend
21 Mr Brealey said was being inconsistent, that's not
22 a fair point as regards pre-infringement data. The
23 pre-infringement data that was ordered to be provided by
24 this Tribunal was from DAF because it's off the shelf
25 data. That is not this case.

1 THE PRESIDENT: I understand that, that's different. But
2 you had told us just moments ago:

3 "We had agreed to provide this on the understanding
4 that it was being provided by all of the other OEMs."

5 MR HARRIS: That's right but that's not a question of the
6 date or the ready availability or anything like that.

7 THE PRESIDENT: No, but you obviously were able to do it
8 because you said "We will do it". You may say your
9 consent was conditional and the condition for your
10 consent does not arise so you do not consent, but you
11 obviously are able to do it because you'd agreed to do
12 it.

13 MR HARRIS: Well, my Lord, that doesn't deal with the point
14 that this is based upon a supposed justification of
15 across the board and that's now not happening.

16 MR MALEK QC: It can start off with a representative sample
17 and I think you should conduct a reasonable and
18 proportionate search for this information.

19 THE PRESIDENT: As you were going to do provided everybody
20 else did it. So we're not going to get anywhere if
21 everybody is agreeing conditionally only on everybody
22 else. So it's not by consent but we'll order it.

23 Next point.

24 It clearly is important that in due course this
25 is --

1 MR PICKFORD: Sir, sorry, I made this point yesterday but it
2 hasn't been picked up in Mr Brealey's order I think.
3 New information we said we would provide from 1997. We
4 were only providing information back to 1994 where it
5 was already off-the-shelf information. We're being
6 sought I think in this to provide it from 1994, unless
7 I've got the wrong bit of the order.

8 MR BREALEY: Yes, I think to be fair that is a slip. We
9 amended for Daimler --

10 THE PRESIDENT: Yes, I think that is why I don't think it's
11 productive, Mr Brealey, to finalise the exact wording
12 because there will be these points. It's not
13 a criticism, it's produced quickly. If the parties have
14 a few days to look at it, Mr Pickford can tell you
15 through his solicitors or his solicitors can tell your
16 solicitors it should be 1997, your solicitors would
17 agree, you'll then amend it and we'll be presented with
18 the final version.

19 MR BREALEY: I think we're almost there on VoC.

20 THE PRESIDENT: Yes but there are a whole lot of other
21 categories. The same point might arise.

22 MR HARRIS: Sir, the position as regards this category (o)
23 we respectfully contend is very unsatisfactory because
24 my instructions are that we were strongly to resist the
25 giving of this information in the circumstances that

1 have now arisen but we'd been told that in the light of
2 the fact that it's not relevant, by way of an objection,
3 even though it was sought to be justified across the
4 board, other people haven't now agreed.

5 What it will lead to is a situation in which parties
6 will now say, right, we don't agree anything until such
7 time as everybody has agreed because otherwise everybody
8 else is going to find themselves in the position that
9 I now find myself in for this category and that is
10 a problematic and unhelpful way forward.

11 We strongly resist this now that there has been
12 a fundamental shift and as a minimum we respectfully
13 contend that this should now be adjourned and we can
14 come back to one of the later dates --

15 THE PRESIDENT: Well, you've made these points and we've
16 ruled on it, Mr Harris, so would you sit down, please.

17 Yes, Mr Brealey.

18 MR BREALEY: I'm obliged.

19 I'll try to guillotine myself at half past and then
20 we'll move on.

21 So the next category (p) was dropped, so page 34
22 {COM-B/2.2/34}. Not dropped but not pursued for the
23 moment.

24 Then we go on to page 36, (r) {COM-B/2.2/36}. That
25 as I understand it is agreed, that is the name of the

1 purchasing entity. The only wrinkle there is the
2 defendants want the names to go into a confidentiality
3 agreement. It can but clearly I think some sense has
4 got to be introduced here relating to customers going
5 back to 1997.

6 THE PRESIDENT: It's only new trucks for Iveco. Is it just
7 sold to the claimants or is it all new trucks sold?

8 MR BREALEY: It's to any customers. It's the market-wide
9 which everybody has agreed except Mr Jowell looks as if
10 he's going to make a comment.

11 MR JOWELL: I'm not disagreeing but just to add to that
12 confidentiality point, we have got very serious concerns
13 about the confidentiality of purchaser names.

14 MR MALEK QC: I think the confidentiality point, we'll be
15 with you on that and if anyone wants to remove it, they
16 can apply separately.

17 MR JOWELL: We're grateful. Actually it goes a little bit
18 beyond that because we have concerns even about whether
19 the strictures of the inner confidentiality ring are
20 sufficient for this. What we have agreed in
21 correspondence with Ryder is that we will seek to liaise
22 about this and we will come back to the Tribunal on
23 paper, if we may, in order to seek to resolve any
24 outstanding issues --

25 MR MALEK QC: That's sensible.

1 THE PRESIDENT: Yes. You may sometimes be able to resolve
2 that by giving the customer a pseudonym and using the
3 same pseudonym so, as I understand it, what they want to
4 see is whether one customer has been buying a lot of
5 trucks, they don't necessarily need to know who it is
6 always but they want to see if they're getting a volume
7 discount over the years.

8 MR JOWELL: That may be only part of it. They may be
9 looking to the type of customer.

10 THE PRESIDENT: Yes.

11 MR JOWELL: We're perfectly happy for the experts to see
12 this information in full. Anything beyond that we start
13 to get very nervous.

14 THE PRESIDENT: I think deal with that in correspondence and
15 I think one can put in the order subject to
16 confidentiality protection.

17 MR JOWELL: Yes.

18 MR BREALEY: Moving on to page 41 {COM-B/2.2/41}, that's
19 VoC2/01(u).

20 THE PRESIDENT: Sorry, page 41 of?

21 MR BREALEY: The marked-up version.

22 THE PRESIDENT: Then what category is it?

23 MR BREALEY: It's VoC2/01(u) and it's truck specification --

24 THE PRESIDENT: Just one minute. Yes, that was shown as
25 agreed in the schedule at page 17 subject to -- you've

1 got some changes there. I think that was indicated that
2 it was agreed {COM-B/2.1/17}. Yes?

3 MR BREALEY: Then (v) {COM-B/2.1/45}.

4 MR SINGLA: Sir, I mentioned earlier we have a small point
5 on (v). It's a small point but actually the dispute is
6 a wider one. In relation to (v), this is buy-back
7 arrangements and they seek evidence of -- this is
8 (v) (v) -- seeking enhanced buy-back. Do you see that?
9 Our position on this is this falls into what Mr Farrell
10 describes in his witness statement as qualitative
11 disclosure. It's evidence, it's not something that's
12 stored in a database and therefore this is part of the
13 wider issue that we have with the overcharge requests.

14 So perhaps we could pass over this one and then have
15 the wider debate in relation to overcharge but that's
16 our position.

17 THE PRESIDENT: If one removes (v) --

18 MR SINGLA: Yes, it's all agreed.

19 THE PRESIDENT: -- the rest is agreed?

20 MR SINGLA: Yes and the point on (v) is just that it's not
21 database --

22 THE PRESIDENT: It's evidence, yes. Well, it's a slightly
23 odd term in a disclosure order, to disclose evidence.

24 MR MALEK QC: You normally specify the type of documents you
25 are seeking rather than just saying "I want evidence".

1 MR SINGLA: Exactly.

2 MR MALEK QC: It's a recurrent problem.

3 MR BREALEY: Documents evidencing buy-back, documents
4 evidencing enhanced buy-back.

5 MR SINGLA: It's flawed as drafted but there's a substantive
6 issue which --

7 MR BREALEY: We can correct it. Documents --

8 MR SINGLA: It's not merely the drafting point. We're
9 saying we're not prepared to give this because it's not
10 in databases and what I would suggest is we don't have
11 that wider argument in the context of (v) (v).

12 THE PRESIDENT: If we remove (v) --

13 MR BREALEY: For Iveco.

14 THE PRESIDENT: -- then it's agreed and we can come back to
15 it subsequently.

16 MR BREALEY: Everyone else has agreed but Iveco haven't.

17 THE PRESIDENT: Is that right because that wasn't the
18 position before? We'll amend it to documents showing,
19 seeking... is that correct that everyone else has agreed
20 that?

21 MR HOSKINS: In relation to us, it doesn't arise in relation
22 to us because we're only giving disclosure from the
23 databases for VoC2/01.

24 THE PRESIDENT: What's the position regarding Daimler? Is
25 that all right on this category (v)? Mr Harris, is that

1 agreed for Daimler?

2 MR HARRIS: May I just take a moment to check, sir? I'm

3 sorry.

4 THE PRESIDENT: Sure.

5 MR JOWELL: Sir, I think from MAN's point of view it's

6 subject to the same proviso as Volvo, which is that our

7 understanding is that all of this is to be modelled on

8 the VSW arrangements which are database searches.

9 MR SINGLA: Sorry, could I mention a point which is just as

10 between myself and Mr Brealey.

11 THE PRESIDENT: Yes.

12 MR SINGLA: Yesterday I mentioned in relation to VoC2/01

13 that in the light of where we got to on temporal scope

14 for the OEM's disclosure, that we would be seeking the

15 mirror image from Ryder, and I think you said that

16 seemed sensible to you and we've asked in correspondence

17 for confirmation but they've not responded.

18 MR BREALEY: I think -- I've discussed this and I will be

19 corrected, that's fine. That leads me to the point

20 I was going to make which is this is wording that comes

21 from the defendants. As I understand it, this wording

22 in (v) is the defendants' wording when they're seeking

23 the mirror image request from us.

24 MR PICKFORD: On that, we haven't agreed to search for

25 documents. What we've agreed to do for Ryder is to make

1 a reasonable and proportionate search for information
2 and insofar as we can find information relating to
3 enhanced buy-back we will provide it. We're not going
4 to do a specific document search. We have a database
5 that we will interrogate.

6 THE PRESIDENT: This will be -- Mr Brealey, I think given
7 this is for each truck, I think, sold to any customer in
8 the UK, that they will do it on the basis of their
9 databases and they're not being -- no OEM at the moment
10 is being expected, if it's not on the database, to start
11 doing individual documentary searches. Is that
12 understood?

13 MR BREALEY: Yes.

14 THE PRESIDENT: I think that's a concern all the defendants
15 have.

16 MR BREALEY: I think that must apply to us as well because
17 a --

18 THE PRESIDENT: Well, it probably will when we get there,
19 yes. But that's the position and I think that's the
20 basis on which it's agreed.

21 On that basis, if there is evidence seeking enhanced
22 buy-back in the database, then people are ready to give
23 it. Yes. So you just need to specify somewhere in the
24 introduction that insofar as available on database.
25 Yes, good.

1 Is there anything else on VoC --

2 MR BREALEY: We're almost there.

3 THE PRESIDENT: -- O2?

4 MR BREALEY: (w) at page 52 {COM-B/2.2/52}, there's three
5 more categories.

6 THE PRESIDENT: Yes, (w) was shown as agreed I think.

7 MR PICKFORD: It still has the same typographic errors in
8 relation to including leased but other than that --

9 THE PRESIDENT: Yes, taking out leased.

10 MR BREALEY: The next category is page 54 (x), "Information
11 on the body purchased" {COM-B/2.2/54}. We understand
12 that that is --

13 THE PRESIDENT: Again it's based on what's in databases, is
14 that right, because it's again each truck, yes?

15 MR BREALEY: Yes.

16 THE PRESIDENT: And then (y).

17 MR BREALEY: (y), the extended warranty which we again
18 understand is agreed. That is it on VoC.

19 THE PRESIDENT: Right. I think we do need to take a short
20 break for our transcribers, we'll do that now. Five
21 minutes.

22 (3.33 pm)

23 (A short break)

24 (3.45 pm)

25 THE PRESIDENT: Mr Brealey, we think the fair thing to do is

1 continue with your request until 4.15. We'll then
2 switch to the defendants' request against you. If
3 there's time left at the end we'll come back to what's
4 left in your request so that we have half an hour to
5 continue here.

6 MR BREALEY: That obviously does cause a problem.

7 THE PRESIDENT: Let's see how we get on but we want to try
8 and get as much done as we can on both.

9 MR BREALEY: Okay.

10 We were on page 60 {COM-B/2.2/60} of the marked-up
11 version which is headed "Overcharge". In order to put
12 that in context can I go to Dr Wu's statement very
13 quickly which is at {R-C/4.1/4}. In hard copy I've got
14 it in the Ryder C evidence bundle at tab 4.

15 THE PRESIDENT: Yes.

16 MR BREALEY: Because it's very important to understand what
17 this information is going to. Page 4 of Wu. You see
18 here that he sets out the information that he seeks
19 under three headings. This is at paragraph 11. The
20 "Trucks data set", that's the VoC2, that's what we've
21 just gone through and that's basically half of the raw
22 data that we're talking about.

23 In order to do any sort of modelling you need the
24 production costs and that is essentially those 0
25 categories that are listed there.

1 THE PRESIDENT: Yes.

2 MR BREALEY: But also to do a modelling, you need, we can
3 look at this at O4 for example, factors relevant to the
4 setting of prices. So that is key to a regression
5 model.

6 THE PRESIDENT: Yes.

7 MR BREALEY: I know my Lord knows this. There are two
8 issues here: what are the type of documents you need for
9 a regression model and what methods is Dr Wu going to
10 have and the two should not be confused.

11 What methods and what type of documents do you need
12 for a regression analysis? It is standard practice, as
13 you know, sir, that the information in A, B and C is
14 necessary to conduct any regression model. We can argue
15 about the sub-categories but you need data on the
16 trucks, the data set, that is what is the chassis
17 number, you need the production costs and you need
18 factors which influence the pricing.

19 THE PRESIDENT: Yes.

20 MR BREALEY: Because you've got to --

21 THE PRESIDENT: No, I accept.

22 MR BREALEY: I pray in aid what the defendants have said to
23 the Tribunal on this and just if you bear with me --

24 THE PRESIDENT: You're pushing at an open door on the
25 general principle.

1 MR BREALEY: Right. So I'll just push it so it doesn't ever
2 close on me --

3 THE PRESIDENT: I can't promise that. I haven't heard from
4 anyone else.

5 MR BREALEY: You heard from Mr Pickford today at page 77, he
6 says:

7 "[...] we say it is not acceptable for a party who
8 is advancing a special type of claim [...] to be
9 unwilling to provide the essential information which
10 underpins what would have happened in the counterfactual
11 [...]"

12 That is what we're talking about, this is what the
13 economists have got to do with their model.

14 THE PRESIDENT: Yes.

15 MR BREALEY: Mr Harris -- then I won't cite any more:

16 "You don't begin to do the number-crunching
17 econometrics if you're a responsible economist without
18 having asked yourself the question: are the things I'm
19 now going to do, go off and build my model, are they
20 plausible? [...] How you construct the model is
21 explicitly conditioned by the plausibility of your
22 thesis about what has happened in the market."

23 THE PRESIDENT: Yes but how does this impact, if I can cut
24 you short because you are keen to get on, just on the
25 categories, the sub-categories? The general point,

1 truck production cost price setting, query margins, not
2 so sure but we'll come to it, that's clear. It's the
3 detail.

4 MR BREALEY: It's the detail.

5 THE PRESIDENT: So if we go to O1.

6 MR BREALEY: O1 is, as I understand it, agreed so I don't
7 understand, and there are nuances for example relating
8 to Volvo, we've set out Iveco's -- we've had this this
9 morning. We have tried to accommodate what parties have
10 offered and been agreed in recent correspondence on
11 this. We don't understand that O1 is -- there's any
12 real disagreement on O1. There is a little bit of
13 disagreement on O2.

14 MR SINGLA: Sir, again that's not right. We are going to
15 have to go more slowly because there is a disagreement
16 on O1.

17 THE PRESIDENT: Yes, so O1, let's take it through. Any
18 documents produced recording a breakdown of all
19 production costs and any method (inaudible) allocate
20 those costs. We'll see what you're thinking.

21 MR SINGLA: Mr Hoskins has a small point for Volvo which he
22 just wants to make.

23 THE PRESIDENT: Yes.

24 MR HOSKINS: Again, absolutely correct. As with the VoC2 as
25 the O1, we will give disclosure for the BNA and Partner

1 databases and that is agreed.

2 MR BREALEY: Just before Mr Singla, if one looks at Iveco,
3 here we do have Iveco, so this is on page 62
4 {COM-B/2.2/62}, Daimler agree to provide the
5 information, DAF agree to provide the information. We
6 set out as far as DAF what they particularly want to
7 give us and we've agreed. We set out on Iveco, it is
8 agreed in relation to data, this is at page 62, that
9 documents are resisted on the basis of qualitative
10 criteria.

11 MR SINGLA: Which is correct and if he's saying he's not
12 pursuing the qualitative aspect of this then that is
13 agreed but I don't believe that is his position.

14 MR BREALEY: No -- well, that's why we're going to have --
15 as I say, it's agreed subject to this debate obviously
16 we're going to have about qualitative.

17 MR HOSKINS: Can I just check that we're agreed as between
18 Volvo and the BNA/Partner position.

19 MR MALEK QC: Your position is your search is a reasonable
20 and proportionate search in terms of those two
21 databases?

22 MR HOSKINS: That's right. I just want to make sure that's
23 what we're --

24 MR MALEK QC: You've made that clear and he hasn't dissented
25 from it.

1 MR HOSKINS: I'll take that.

2 MR BREALEY: It doesn't excuse Volvo from conducting other
3 searches, we would say, not on this category, for
4 example management accounts when we come to O14.

5 THE PRESIDENT: No, just on this category.

6 MR BREALEY: On this category.

7 THE PRESIDENT: On Iveco, you say you have a database which
8 has some information on production costs. Clearly it
9 would be normal to get information as to -- that you
10 have on labour costs for materials and so on because
11 those are the things that, as the price rises, that you
12 pay and one adjusts for in a regression model.

13 What are you proposing by way of disclosure of those
14 costs?

15 MR SINGLA: Sir, we're proposing to give to Ryder exactly
16 the same data set that we have agreed to give to VSW.
17 It's a slightly different category number but it's O2(b)
18 in VSW, it's COGS data per individual truck which is
19 equivalent data to composite material, labour and
20 overhead, and also some data under what is VSW/O4(c)
21 data showing the scale and timing of any changes to
22 truck manufacturing capacity, output and utilisation.

23 It's not I think an exact match but it's very
24 similar to what O1 is concerned with and we're willing
25 to give that data set just as we are under the consent

1 order.

2 THE PRESIDENT: Well, Mr Brealey, whether that gives you
3 enough, it's very hard for you to say until you get it,
4 but that's what can be provided as agreed to be
5 provided. Wouldn't it be sensible that you first get
6 hold of that, look at it and then if you say, well, this
7 is of limited use because it doesn't explain how labour
8 costs go up or whatever, you then ask for more. Would
9 that not be an appropriate way of dealing with this?
10 You may well then be entitled to more but you will then
11 know why specifically that data doesn't meet your needs.

12 MR BREALEY: Clearly we can accept what Iveco are offering
13 but it does, in my submission, go to a really
14 fundamental point that two and a half defendants are
15 refusing throughout the overcharge categories to give us
16 anything else bar raw data. No explanation -- they are
17 not giving us any documents which would explain price
18 rises, price decreases, and that is in contrast to the
19 sort of documents that they are asking of us. When they
20 ask it of us, they say it is essential for them to
21 understand the financial information. There is a real
22 inconsistency here and a big point of principle and it
23 may well be that in 15 minutes we won't have time to
24 deal with it, we will have to come back. But I do
25 understand the point that you're making, well take it

1 now. But any economist, that's why I quoted Mr Harris
2 and Mr Pickford, the raw data is meaningless without
3 having access to also explanations for price rises,
4 increasing costs.

5 It's so unfair on the claimants that I --

6 THE PRESIDENT: In your description of O1, when you say "on
7 a per truck chassis basis", I'm not quite clear myself
8 what that means. I understand for each truck model
9 supplied to the UK and I'm not sure about either by
10 month -- isn't it really for each truck model supplied
11 to the UK? You want the documents recording the
12 breakdown of production costs including these
13 categories?

14 MR BREALEY: Yes.

15 THE PRESIDENT: Can we delete "on a per truck chassis basis"
16 and can we delete "by month"? They may be monthly, they
17 may be six-monthly, they may be twice a month in some
18 instances. It's during the period.

19 MR BREALEY: It's agreed for data --

20 THE PRESIDENT: Well, data may be done on a monthly basis
21 but you're looking at documents, you want to know what
22 the senior management had in assessing information on
23 costs and cost increases. That's what you want,
24 isn't it?

25 MR BREALEY: Yes.

1 THE PRESIDENT: Then you want -- when you say any documents,
2 that may be very broad but you want a search for the
3 major documents which set out how they view the costings
4 and the changing in the various elements of costs.

5 MR BREALEY: Correct. We can change the wording. Daimler
6 have accepted the wording; DAF has accepted the wording
7 and to a certain extent it reflects what's already been
8 ordered in previous proceedings and they have done their
9 search and we see what they have offered on page 61 --

10 MR PICKFORD: It isn't right that we've accepted the
11 wording. We've offered to provide the same tranche of
12 documents that we've already searched for and provided
13 in the *Royal Mail* and BT and now Dawsongroup
14 proceedings --

15 THE PRESIDENT: Yes but it's not restricted to just
16 database, is it?

17 MR PICKFORD: That's correct. They include documents about
18 how we priced but we didn't agree the particular
19 wording. We said what we can give you is what we've
20 already searched for and that's been accepted --

21 THE PRESIDENT: Yes and we can look at the wording there but
22 without focusing on the precise wording, going back to
23 what's been said about qualitative, it does seem to us
24 that the defendants are going to have to supply these
25 documents and not just figures in a database because

1 there may well be pricing papers which really inform the
2 construction of a model, which reflect rises in costs.
3 And they are very relevant.

4 MR SINGLA: Sir, could we perhaps zoom out of O1 and
5 actually have that debate because what I was trying to
6 make clear is that we agree to give data but not the
7 documents.

8 THE PRESIDENT: Well, I know. That's what you said.

9 MR SINGLA: In my submission, it's slightly unsatisfactory
10 to have that debate in the context of individual
11 categories because --

12 THE PRESIDENT: Just a moment. (Pause).

13 Well, Mr Singla, it maybe covers other categories as
14 well but if you're saying it's not relevant or
15 proportionate for your client to search for any
16 documents other than data in a database dealing with how
17 your clients saw their costs going up of the elements
18 that go into producing a truck, you'll have a lot of
19 persuading to do.

20 MR SINGLA: Of course, sir, but we're not saying that.

21 We're saying at this stage.

22 THE PRESIDENT: Why should it not be searched for at this
23 stage?

24 MR SINGLA: Well, I have some detailed submissions. I think
25 Mr Jowell has been standing up to make the same

1 points --

2 THE PRESIDENT: You can decide who goes first but let's hear
3 from you because that goes to the heart of a lot of the
4 Ryder requests.

5 MR SINGLA: Of course.

6 MR BREALEY: It does and it's not just to plug the gaps. It
7 is to understand what is happening.

8 THE PRESIDENT: No, I understand. We see your point and it
9 may be these are the issues we need to debate now rather
10 than the fine-tuning of the wording of agreed
11 categories.

12 MR BREALEY: Yes.

13 MR JOWELL: In relation to O1 may I just say that we
14 understood it to be agreed that we would just be
15 providing the data and not the documents and that's what
16 we've offered to produce. We thought that had been
17 agreed pro tem but there we are.

18 In relation to the more general point, let me start
19 off by saying what we are not saying because what we are
20 not saying is that no qualitative or descriptive
21 documents of these types can be relevant or are
22 relevant. That's not the question. The question is
23 rather when is the most appropriate time to order that
24 disclosure? We say it is in the next phase of
25 disclosure, after the initially readily available data

1 has already been provided.

2 We understood from the Tribunal yesterday morning
3 that at least its initial view was that that was an
4 appropriate approach. I remind the Tribunal of what
5 they said. They said --

6 THE PRESIDENT: I remember what we said, but we've heard
7 more since.

8 MR JOWELL: Indeed. We say that approach, that contemporary
9 documents which require searches of a potential host of
10 individual custodians, is not appropriately given at
11 this stage. We say that essentially for three reasons.
12 First of all, the role of the documents that are not
13 data in the quantification are going to be by their
14 nature secondary or supportive. All of the experts
15 acknowledge that ultimately the quantification is going
16 to be done on the basis of a quantitative analysis of
17 the data. It's rather difficult to see how in this case
18 it could be done in any other way.

19 So what one has is qualitative documents that may
20 provide some secondary assistance, potentially by
21 formulating the most realistic specifications for an
22 econometric model.

23 As regards the internal operation of the
24 infringement, it has to be borne in mind that the
25 claimants already have a mass of documents. They have

1 25,000 documents that have been disclosed to them from
2 the Commission file which go to the operation of the
3 infringement. That aspect -- those qualitative
4 documents they already have.

5 The second point --

6 THE PRESIDENT: Those go to actually how you priced
7 individual models. I thought that would go -- the
8 documents in the Commission file would go to the
9 exchanges between -- so they won't be relevant for this
10 so they won't help very much with the model.

11 MR JOWELL: They may or may not. They're certainly relevant
12 by way of background.

13 But the relevance of any particular set of
14 qualitative documents is always going to be somewhat
15 speculative. They may or may not -- it may be hoped
16 that they will provide some kind of insight but they may
17 also be wholly uninformative. The critical point is
18 really this, that once the experts have got the data,
19 once they have had a chance to analyse it, they will be
20 in a better position to know which qualitative documents
21 are genuinely likely to advance their assessment in due
22 course. They're going to know what are the
23 uncertainties, what are the gaps in their knowledge that
24 can be filled by the documentary evidence. Once that
25 data is obtained by the experts, once it's analysed,

1 then the number of qualitative requests is likely to be
2 refined and more confined to allow for more targeted
3 searches. That is important because it leads to the
4 third point which is proportionality and the potentially
5 extremely burdensome nature of these searches in this
6 case.

7 My client, MAN, does not have a central repository
8 of documents. These are not documents that are likely
9 to be found in one location like the data set. They're
10 going to be spread out across multiple mailboxes,
11 multiple files. The searches for them will be
12 geographically dispersed between the UK and Germany and
13 potentially other countries as well, over multiple
14 national sales companies. The critical point is this,
15 they cover an exceptionally long period of time. One is
16 talking about going back to documents dated to 1997 and
17 on some of their requests 1994.

18 We say that those points in combination provide
19 a compelling reason for deferring the disclosure of
20 these categories of documents because the burdensome
21 nature of those searches is going to be exacerbated if
22 we have to come back and do them a second time. So they
23 should be done at one point after the quantitative data
24 has been considered and examined.

25 THE PRESIDENT: What's the pricing of your model sold in the

1 UK? Was that determined by your UK operating companies
2 or centrally by your headquarters?

3 MR JOWELL: I understand it's a bit of both but my
4 understanding on this is extremely limited.

5 But if one just takes for example this category that
6 has just been adverted to in O1 where we talk about --
7 we've spoken about documents that have been produced for
8 senior management at HQ or UK level. Now, that sounds
9 all very easy until you notice that you are going back
10 to 1997. One just has to remember what one's own IT
11 systems were like in 1997.

12 THE PRESIDENT: Isn't that the price you pay for having
13 engaged in such a long-running cartel?

14 MR JOWELL: It may well ultimately be but it needs to be --
15 nevertheless the Tribunal has to have in mind
16 proportionality and the appropriate way and timing of
17 doing this. To expect us to do it and to go back and
18 resuscitate IT systems for documents that may not prove
19 relevant is not proportionate. It's not sensible at
20 this stage. We say the Tribunal should remain resolute
21 in its initial view that this is not the time.

22 THE PRESIDENT: Mr Singla, obviously you don't need to
23 repeat that.

24 MR SINGLA: No. My first point was the proportionality
25 point that Mr Jowell finished with but what I did want

1 to do was actually take a little time to show you the
2 evidence of Mr Farrell. I appreciate it's now 4.12 but
3 one has to see what he says about the documents.

4 THE PRESIDENT: We're planning to sit late because we want
5 to make some progress. I know we said -- but this will
6 impinge on both areas of disclosure I think. So you
7 want to show us?

8 MR SINGLA: Mr Farrell's third witness statement which is in
9 the Ryder C bundle. It's tab 11 of the Ryder C
10 bundle and it's section B which starts at paragraph 45.
11 {R-C/11/12}.

12 Sir, the submission is -- before I take you through
13 the evidence the submission is this. We have not sought
14 to be obstructive and Mr Brealey is not fairly
15 characterising our position because we've accepted
16 relevance in relation to a number of these categories so
17 we're putting this point purely on the basis of timing
18 and proportionality.

19 What one has to weigh up in my submission is the --
20 what Dr Wu is saying and Mr Brealey is submitting is
21 that he cannot get on with any work, notwithstanding
22 that we're offering to provide data in relation to
23 20 years' worth of new trucks, and we say one has to
24 weigh up whether that is actually right and is he going
25 to be prejudiced in his work against the prejudice of us

1 having to do these very extensive searches.

2 Sir, you'll see that Mr Farrell has dealt separately
3 with documents and data.

4 (Pause).

5 THE PRESIDENT: Mr Singla, you also say or rather Mr Farrell
6 says that of course it's going to take a lot of time to
7 produce.

8 MR SINGLA: Yes.

9 THE PRESIDENT: What concerns us is, if we lose six months
10 and then we come back and then, having looked at the
11 data, it is said, well, now you've got to start this
12 exercise, everything is put back.

13 MR SINGLA: Of course I understand that, sir, but really one
14 is trying to arrive at a solution which takes into
15 account all of the various points which go in different
16 directions. What we're saying is as currently
17 formulated these overcharge requests are extremely
18 broad. One has to also take, in my submission, what
19 Dr Wu is saying with some caution in circumstances where
20 each of the OEM's expert and importantly VSW's expert is
21 saying that he can perfectly well get on with what will
22 be a significant amount of data. So the prejudice, very
23 real prejudice to us, sir, is that if we were to go away
24 and conduct searches along the lines that would be
25 required by Mr Brealey's draft order, then we will be

1 spending a massive amount of time and a massive amount
2 of money.

3 We submit that really the right approach would be
4 for the expert to receive the significant quantity of
5 data and then, as Mr Jowell has submitted, to make more
6 targeted and narrower document requests. We are very
7 concerned that a lot of this will end up being wasted
8 time and cost and what we want to do is to do this
9 exercise once and to do it in a proportionate manner.

10 The VSW aspect of this is important, in my
11 submission, because where the Tribunal is presented --
12 Mr Brealey says, well, look what's happened in Royal
13 Mail, look at the orders that have been made in Royal
14 Mail, we submit that's a bad point because (a) his claim
15 was issued a year after the *Royal Mail* claim and (b) my
16 clients aren't a party to the *Royal Mail* proceedings and
17 (c) what's sauce for the goose is sauce for the gander.
18 We say if he's saying look at the *Royal Mail*
19 proceedings, we're saying look at the VSW proceedings.

20 So we really are not seeking to shut them out from
21 documents, we absolutely accept that they're entitled to
22 come back in due course and make narrower requests, but
23 one only has to look at what Mr Farrell says about the
24 way in which Iveco's business is structured, the number
25 of personnel who would have been involved over this very

1 long period of time and the number of repositories, as
2 MAN and Iveco similarly do not have one single
3 repository.

4 Mr Farrell has quite helpfully distinguished between
5 data and document scoping in his witness statement. He
6 explains that Iveco has a combination of network drives,
7 employees, hard drives and emails, hard copy file
8 documents. He says there were no policies, the Iveco
9 marketing companies did not require employees to use
10 these network drives.

11 That's paragraph 79.

12 "[...] Iveco did not require its employees to file
13 documents on network drives [...]"

14 "The network drives are typically structured."

15 One can see from the table at paragraph 80 just how
16 vast these quantities of materials are.

17 Then one gets to individual employees' emails and
18 hard drives. Of course one has to identify the
19 custodians before one searches their emails. As he says
20 at paragraph 82 {R-C/11/22}:

21 "Identifying and speaking with every such relevant
22 Iveco employee would be an extremely expensive and
23 onerous task. The Iveco defendants have contacted
24 and/or collected documents from over 60 employees [...]"

25 It's not as though we're saying we're not prepared

1 to do any work over the next six months, we're simply
2 saying based on the work done to date we can see this is
3 going to be an enormous exercise and therefore the onus
4 should be on Ryder to come up with narrower categories.

5 THE PRESIDENT: Yes, just a moment.

6 (Pause).

7 As I understand it, you say none of these documents
8 are on your database, is that right?

9 MR SINGLA: No, the distinction that Mr Farrell draws in his
10 statement is between qualitative --

11 THE PRESIDENT: Yes, but the documents in O1, documents
12 produced for senior management recording breakdowns of
13 costs.

14 MR SINGLA: They're not on databases, no.

15 THE PRESIDENT: They're not. Nothing.

16 MR SINGLA: That's the bright line distinction we are
17 drawing for today's purposes, it's database disclosure
18 versus documents.

19 MR JOWELL: May I add one point, forgive me, this is surely
20 something that has to be done in liaison with VSW
21 because they're going to have their own similar
22 qualitative requests and the two have to be coordinated.
23 Otherwise it's going to be completely chaotic.

24 MR MALEK QC: As I understand it, you're saying you're going
25 to be giving disclosure documents in these categories

1 insofar as they're on a database, is that right or not?

2 MR JOWELL: Well, yes, effectively what we're giving is, if
3 you take for example the O1 category, we say we will
4 give disclosure from the databases of all of the data
5 and the information that's there set out.

6 THE PRESIDENT: Well, does the database sort of say, we have
7 no idea what it shows, does it show separately labour
8 costs?

9 MR JOWELL: Yes, it's per truck costs. It gives all of this
10 extraordinarily detailed disaggregated information.
11 Well, it gives an aggregation of the fixed cost and then
12 aggregation of the variable cost. It gives that
13 information on a per truck basis.

14 THE PRESIDENT: But just under broad heads of fixed costs
15 and variable costs?

16 MR JOWELL: As I understand it. But we are going to give
17 all the database material on these that we have but the
18 nightmare for us is to go and start looking at
19 individuals' mailboxes from 1997 and then having to come
20 back and do the same thing for VSW in due course and
21 everybody else, Dawson, whoever else, other claimants.
22 And that can't be a sensible way of proceeding. It
23 should be borne in mind that Ryder did originally accept
24 in correspondence that this first phase was going to be
25 a data phase. They did --

1 MR BREALEY: That's simply not --

2 THE PRESIDENT: Never mind that. It doesn't matter when it
3 was accepted --

4 MR SINGLA: Can I just address Mr Malek's question in
5 relation to Iveco. There are no documents on our
6 databases but we are, across the overcharge categories
7 that are still live and still being pursued, we are
8 content to give readily available quantitative data.
9 Again it's not fair to say we're doing nothing and
10 sitting on our hands.

11 MR MALEK QC: No but you can have on a database qualitative
12 information as well.

13 MR SINGLA: The way we've approached this -- that might well
14 be right in the abstract but what Mr Farrell says at the
15 beginning of his evidence at paragraphs 18 to 19,
16 because I think these terms may be being used slightly
17 differently by different people --

18 MR MALEK QC: That's the problem, yes.

19 MR SINGLA: Mr Brealey says "We don't understand these
20 terms". The way in which we are using them is explained
21 at paragraphs 17 to 19, where we are saying quantitative
22 disclosure would include data and/or information that
23 can be extracted reasonably readily from a database. In
24 contrast qualitative disclosure would include documents
25 and/or information that is descriptive in nature.

1 This is the crucial point. It would require
2 searches over non-database sources, for example
3 custodian mailboxes.

4 MR MALEK QC: What's confusing about your quantitative --
5 you can have something that's qualitative, that can be
6 extracted easily from a database, can't you? The
7 problem I've got with your definition is paragraph 18
8 you say:

9 "Quantitative disclosure would include data and/or
10 information that are non-descriptive in nature and can
11 be extracted [...]"

12 So you're making a distinction, you're saying if
13 it's descriptive I'm not going to give it to you.
14 That's the unsatisfactory way in which these things have
15 been defined.

16 If what you're prepared to give is descriptive
17 documents which can be extracted reasonably readily from
18 a database, then that's fine.

19 MR SINGLA: Sir, I think I would need to take instructions
20 to make sure I deal properly with the Iveco databases.
21 I don't want to misstate the position.

22 As I understand, what we're saying is -- the key
23 point is extracted reasonably readily versus having to
24 (a) identify lots and lots of custodians and then (b)
25 search their mailboxes for documents.

1 MR MALEK QC: So in fact if you do have documents which are
2 readily available from a database that is descriptive,
3 that falls within this category, will you be giving
4 disclosure?

5 MR SINGLA: Can I take instructions? My understanding is
6 that doesn't arise because of the way --

7 MR MALEK QC: You may say it's not on your database.

8 MR SINGLA: Exactly. Can I take instructions?

9 MR MALEK QC: Just quickly take instructions.

10 (Pause).

11 MR SINGLA: Sir, I'm being told the databases will have,
12 beyond data, things like customer names and so on but
13 what one is actually looking at are the requests by
14 Ryder where they are asking for things like documents
15 going to senior management and so on. Those sorts of
16 documents plainly will be outside the scope of our
17 databases. You may well be right, there may well be
18 something which is other than a number or a figure on
19 a database but that doesn't really meet what Mr Brealey
20 is asking for.

21 MR JOWELL: Our understanding is the same.

22 MR PICKFORD: Sir, I don't know whether it helps at all,
23 this obviously isn't actually in issue between me and
24 Mr Brealey because he's accepted what we're going to
25 provide. When I was asked whether we'd provided

1 documents, we did provide documents, we provided some
2 descriptions, but what we have provided is I think far
3 more limited than Mr Brealey seems to think that he is
4 entitled to ask the other OEMs for. It's set out in the
5 Redfern schedule and he's accepted that that's
6 appropriate in our context.

7 MR BREALEY: Well, for the time being. It's in the order.
8 We've set out for each defendant what each is prepared
9 to give us. DAF, at page 61 of the order
10 {COM-B/2.2/61}, has said it will give to us what it has
11 given in the *Royal Mail*, because this category of
12 document essentially was ordered in the *Royal Mail*
13 proceedings by Mrs Justice Rose. DAF went away and came
14 up with certain documents. They have then said "We will
15 give you what we have given to *Royal Mail*" and we said,
16 I think pragmatically, "Okay, we'll take what you've got
17 and then we can come back to you".

18 THE PRESIDENT: But I think it's not all documents produced
19 for senior management, is it, looking at the order at --
20 that's the point Mr Pickford is making.

21 MR PICKFORD: That's the point.

22 THE PRESIDENT: It's documents showing breakdown of costs,
23 it's materials and overheads, it's description of cost
24 allocation methodology and documents or data showing
25 et cetera. So it's not the briefing papers for senior

1 management which is what you're seeking from the others.
2 MR PICKFORD: Quite. The order of Mrs Justice Rose as she
3 then was, was essentially an information order which we
4 were allowed to satisfy through information in
5 documents. As I understand it, that's what we've done.
6 We have not searched for the kind of breadth of category
7 that is now sought against the other manufacturers in
8 this order. We haven't said we won't provide you
9 anything that's qualitative. We provided a description
10 because it was helpful and that's what was accepted.

11 MR SINGLA: Can I --

12 THE PRESIDENT: Just a moment.

13 (Pause).

14 We've been troubled by this because it's very
15 important across the board. We think that the potential
16 way forward is this, and this will apply to everyone,
17 even those who have perhaps agreed with you, that rather
18 than requiring a search across a whole lot of custodians
19 for documents, that each defendant should provide by way
20 of further information a statement as to how the
21 individual models were priced and any increases in price
22 over each year of the period up to September 2017 with
23 an explanation of which body within the company took the
24 decision, whether it's at headquarters or UK subsidiary,
25 this is pricing for the UK market of course, and what

1 information they relied on in taking that decision.

2 That will be a statement coming from each defendant
3 that then, having got that and having got the data which
4 has been offered, Ryder and indeed the other claimants
5 will be able then to tailor a request for what's been
6 described as more descriptive documents more
7 specifically. But you will then understand who took
8 these pricing decisions and what did they get in general
9 terms. On that basis you can then come back.

10 MR SINGLA: I understand.

11 THE PRESIDENT: That's what -- we've been trying to resolve
12 the problem because there is one difficulty about the
13 course you urged aside from cost and so on, that it may
14 be when you get it you start wanting more from
15 custodians and then the process goes back and you might
16 be entitled to more. I think once you get a picture of
17 how they priced and who took the decisions and you've
18 had the data and you've been able to look at it, you can
19 be rather more precise about what actual documents you
20 want.

21 MR BREALEY: Two things. The first is, yes, we've actually
22 had that conundrum as well, not knowing how they go in
23 the pricing. Secondly, if we go down that path we'll
24 get the data from the databases but, as you will have
25 appreciated from Mr Ward, we regard the defendants as

1 some sort of slo-mo camera iPhone that needs to be
2 charged and we are concerned with the snail's pace of
3 disclosure. So if we are going down that route and I'm
4 not... could we inject some discipline into how that's
5 to be done?

6 THE PRESIDENT: Well, the discipline will be the date by
7 which it has to be done.

8 MR BREALEY: Yes, that's essentially what I'm asking.

9 THE PRESIDENT: That will be to match -- we'll have to hear
10 from them because it goes back a long time so they may
11 have to speak to various people, but I would imagine by
12 this stage the lawyers to the various parties would have
13 made enquiries about how these trucks were priced.

14 MR BREALEY: Absolutely.

15 THE PRESIDENT: So they're not starting from scratch and
16 that's something that each company will do. On that
17 basis we will not require searches beyond databases
18 other than the few additional documents DAF have said it
19 might provide, but we won't require anyone to go
20 further.

21 Can I take it -- you're all standing up. First of
22 all, Mr Brealey... and then we would not give you these
23 categories that require a documentary non-database
24 search, for the moment. Of course it's not refused for
25 all time.

1 MR BREALEY: I fully understand where you're going, sir.
2 Subject to one caveat, we would like the disclosure that
3 has already been given in the Royal Mail -- sorry, in
4 the Royal Mail and Dawsongroup by DAF.

5 THE PRESIDENT: I think DAF has said it will do that.

6 MR PICKFORD: Sir, the situation is this. We reached an
7 agreement with Ryder that we will provide the disclosure
8 that we'd already provided. In relation to O1, that was
9 the kind of documents that I showed you where the
10 documentary evidence is relatively limited but there may
11 be some.

12 In relation to O4 which was the pricing aspect,
13 there are approximately 4,000 documents that we have
14 searched and provided to explain how we set our prices.

15 Now, on that basis, that was agreed by Mr Brealey,
16 he then withdrew the application as against us and in
17 that case I think we were in a rather different position
18 from the other manufacturers who are not being asked to
19 make those searches now. We've done it, we're providing
20 it to him. In view of that --

21 THE PRESIDENT: To cut you short, is the point you're making
22 you don't want to provide this statement?

23 MR PICKFORD: Yes, because we've already gone further and
24 provided the documents, whereas as I understand it the
25 statement is effectively in lieu of not providing any

1 documents yet so that they can make more targeted
2 requests. We've done the disclosure.

3 MR BREALEY: I really don't understand that.

4 THE PRESIDENT: We appreciate you've made an agreement but
5 no one is being excused from providing documents.
6 You've done it already, others may have to do it later.
7 We think, irrespective of what you may have agreed, the
8 Tribunal of its own motion would require you to do what
9 everybody else is doing in terms of a statement. We
10 think it would be very helpful to the Tribunal, it would
11 be helpful to the claimants and so all defendants will
12 have to provide such a statement.

13 MR HOSKINS: I'm sorry, I understand that this is
14 potentially a very helpful way forward. I would like --
15 I've had lots of whispering in my ears about the
16 difficulties of doing this. Before the order is made
17 I would certainly like to be able to take instructions
18 from my clients about what is involved in this and about
19 whether it is feasible because I don't want to have
20 a situation where you make an order today and then we're
21 coming back saying actually we've got these problems.

22 THE PRESIDENT: If there are difficulties, presumably they
23 relate to the earlier years and I'm sure someone can say
24 how they priced three years ago.

25 MR HOSKINS: Yes, of course. So it's either we take

1 a breath and you let us take instructions and see
2 whether that is an attractive way forward and clearly if
3 it works it is an attractive way forward. I'm certainly
4 not pushing back on that.

5 THE PRESIDENT: No, I understand.

6 MR HOSKINS: Or if you were to make the order there has to
7 be some understanding that we can come back in pretty
8 short order and say we can do it for this fine but we're
9 going to have problems in relation to this, this and
10 this. I'm in your hands but we just need time to see
11 what we can do.

12 THE PRESIDENT: How long do you need to find out?

13 MR HOSKINS: I don't know. I'd need to discuss.

14 THE PRESIDENT: Well, we will have a short break before we
15 continue because we're going to sit until 5.30, so that
16 will enable you all to take instructions on whether
17 there's a problem about doing that. But it seems to us
18 it should not be particularly problematic.

19 MR PICKFORD: Sir, the initial indication I have is that
20 it's going to be really quite a difficult document to
21 put together. It's talking about the most fundamental
22 thing in the business over a very long period of time
23 and to give a complete and accurate description of
24 exactly how we went about that process is not
25 necessarily an easy matter.

1 MR HOSKINS: Can I suggest something that might work, see if
2 people like it or not. If the order were to be made on
3 a best endeavours basis, that would require people to go
4 back, insofar as reasonable and proportionate, readily
5 accessible, we've seen those sorts of things. Insofar
6 as there's a problem, then that can be stated as well.
7 We can provide that statement on that basis and then we
8 can see where we are. That would move things forward
9 because I know you're keen to do that.

10 MR BREALEY: All I'd say is they have admitted participating
11 in a price cartel. They have been investigated by the
12 Commission. The fact that these companies do not know
13 how they set these prices is astonishing.

14 THE PRESIDENT: They're not saying they don't know. They're
15 saying there's no central knowledge of that information
16 over the whole period at the moment.

17 MR HARRIS: Sir, yes, I adopt Mr Hoskins' point, we need
18 some time to find out. I have a slightly different
19 point just for clarification, which is I'm apprehended,
20 and I hope correctly, that this is going to be the
21 approach across all of the actions, so Dawsongroup and
22 VSW, for the same reasons of principle.

23 THE PRESIDENT: Well, we're not dealing with Dawsongroup at
24 the moment. They're not here so this is in the Ryder
25 action. It may be that there will be applications in

1 due course in the Dawsongroup but right now we're
2 dealing with this case where you're faced with this
3 application for descriptive documentary disclosure which
4 Mr Brealey is pushing hard, which the defendants, apart
5 from DAF but DAF in a qualified way, have not accepted
6 and this would be a way, an interim way forward and we
7 hope will reduce the need for wide-ranging documentary
8 disclosure subsequently.

9 MR HARRIS: Yes, I understand that. It's a question of
10 consistency but --

11 THE PRESIDENT: I think it certainly can be best endeavours
12 and what one wants to know is which body took the
13 decision or which official or body or employee within
14 the company, at what level and this is the -- and what
15 information they relied on in general terms.

16 MR HOSKINS: I tried to take a note verbatim, I think it may
17 be -- I just wanted to check the level that the Tribunal
18 would find helpful. I think you said something along
19 the lines of each defendant should provide a statement
20 as to how individual models were priced and any increase
21 in price from 1997 up to 2017, explaining which company
22 took the decision and what information they relied on in
23 taking that decision.

24 THE PRESIDENT: Just one correction. Not which company,
25 which body within the company took the decision.

1 MR HOSKINS: I also understand that the emphasis was on
2 explaining which body within the company took the
3 decision and what information they relied on in taking
4 that decision rather than, for example, granular
5 explanation of this particular model was priced in this
6 way because of these specific reasons. You see the
7 order of description. As I understand it, it's the more
8 general description the Tribunal is looking for and not
9 the fact that every model was priced according to this
10 basis. I want to clarify that.

11 THE PRESIDENT: That is correct.

12 MR HOSKINS: That makes things easier.

13 THE PRESIDENT: So one gets an understanding of the process
14 that was applied in those companies.

15 MR HOSKINS: I'd need to take instructions but if it's that
16 sort of high level and it's do your best by a certain
17 date, subject to those in the back shooting me, that
18 seems to me a possible way forward. We need a way
19 forward.

20 THE PRESIDENT: There is no doubt that because it's such
21 a long-running cartel, because the people who were there
22 in the early years may have retired, there is going to
23 have to be some searching about, but that is the effect
24 of having such a long-running infringement.

25 MR HOSKINS: I understand.

1 THE PRESIDENT: So Mr Brealey, that's how we propose to
2 proceed.

3 MR BREALEY: So just if I could --

4 THE PRESIDENT: That would adjourn your request beyond
5 material that is in a database and the agreement you
6 have with DAF.

7 MR BREALEY: But we will get the order in the VoC?

8 THE PRESIDENT: Yes. This is dealing with this material
9 here.

10 MR BREALEY: Sorry, we are still getting the data as
11 I understand it --

12 THE PRESIDENT: You are still getting the data from the
13 databases, yes and in addition you're getting --

14 MR BREALEY: There will be a form of words which will inform
15 everybody as to how these companies set their prices.

16 THE PRESIDENT: Yes.

17 Now, I think we're going to have to -- on
18 overcharge, because that's -- the O4A was to some extent
19 the subject of the same discussion with Dawsongroup, was
20 it not, on their O4? Which we dealt with earlier.

21 MR HOSKINS: I was going to suggest, again if this helps, we
22 would be happy to provide on O4(a) to Ryder what we're
23 providing to Dawsongroup.

24 THE PRESIDENT: Yes, I think that's sensible because I think
25 we're going to have to, Mr Brealey, although there are

1 other categories, I think we do need to make some
2 progress with the application against you.

3 MR BREALEY: That's fine.

4 THE PRESIDENT: So that deals with those two and the rest
5 we'll have to adjourn.

6 MR JOWELL: Yes, on O4(a) we are of course not in
7 Dawsongroup and our understanding was that what you just
8 ordered in relation to the witness statement rather
9 completely overtook that category, renders it
10 unnecessary, doesn't it, surely?

11 THE PRESIDENT: I don't think so.

12 MR JOWELL: Because it is a matter of qualitative
13 information, it's not data.

14 THE PRESIDENT: But the order we made for Dawsongroup -- I'm
15 just trying to recall how it was phrased with
16 Dawsongroup earlier.

17 MR BREALEY: A representative sample.

18 MR JOWELL: It was a representative sample of documents but
19 they are still qualitative documents.

20 MR BREALEY: It still informs us as to when we get this
21 statement, it will inform us as to what is lacking or
22 whether it's -- where we're going. The fact that it has
23 been ordered in Dawsongroup, I don't understand why they
24 should be excused with Ryder. It doesn't make sense.

25 MR SINGLA: To be completely clear, sir, certainly I was

1 proceeding on the basis when making submissions that the
2 points I was making applied across the board to the
3 overcharge categories that are still live and being
4 pursued by Ryder. The logic of that approach with the
5 statement must surely apply, in my submission, because
6 what we're saying is we've got a problem with documents
7 and that's the flaw with the Ryder proposal. So we can
8 either have that debate -- it arises in relation to
9 04(a) but also in relation to a couple of the other
10 categories which are still being pursued. It's not good
11 enough for Mr Brealey to say, well, the order was made
12 in Dawsongroup because the point goes the other way, VSW
13 are proceeding in a different way so --

14 MR BREALEY: Sorry, the order in Dawsongroup can only relate
15 to the defendants in Dawsongroup proceedings. That's
16 clear. So the defendants in the Dawsongroup proceedings
17 that have been ordered to produce category 4 documents
18 could produce them to Ryder. But I fully appreciate
19 that it doesn't apply to Mr Jowell and Mr Singla --

20 MR SINGLA: I'm very grateful.

21 THE PRESIDENT: It will be an order against -- in other
22 words they're doing the work already for Dawsongroup but
23 you are not doing it so it doesn't apply to you.

24 MR JOWELL: We'll have plenty to do to create that witness
25 statement.

1 THE PRESIDENT: I think we then -- we will probably have to
2 stop and adjourn to the next occasion. We will rise for
3 five minutes and then we will turn to the defendants'
4 application.

5 (4.47 pm)

6 (A short break)

7 (4.55 pm)

8 MR BREALEY: Sir, if I may, just 30 seconds on where we were
9 and then I'll let the defendants make their
10 applications.

11 THE PRESIDENT: Yes.

12 MR BREALEY: The Tribunal has adjourned the rest of Ryder's
13 application. Clearly in our draft order there are
14 certain aspects which have been agreed which do not
15 depend on this debate about qualitative and factors --
16 the search. So there are still matters agreed. Can
17 I suggest that offline the parties try and agree as much
18 in correspondence as to whether they're still going to
19 be producing the documents which they have agreed and if
20 there is disagreement we can come back at a date soon,
21 perhaps the first Friday slot, in order to sort it out.

22 MR MALEK QC: Insofar as something has been agreed, one
23 would hope it's still agreed. You should try and agree
24 as much as possible on the order. If there's something
25 left over, we'll deal with it --

1 MR BREALEY: I'm obliged.

2 THE PRESIDENT: Our understanding is what's shown as agreed
3 in the Redfern schedule remains agreed. Certain
4 progress has been made since so that some other
5 categories may have been agreed and then it's just
6 a question of fine-tuning the wording of the order.

7 MR BREALEY: Absolutely, yes, I'm obliged.

8 MR JOWELL: On the question of the dates for the witness
9 statement, would you like us to address you on that now?

10 THE PRESIDENT: Yes.

11 MR JOWELL: For our part this is going to be a very
12 difficult endeavour because we will almost certainly be
13 speaking to -- needing to speak to former employees of
14 MAN in Germany, potentially multiple people who are no
15 longer employed by the company. So we would ask for
16 a proper length of time, until 6 March 2020.
17 I appreciate that is a long time but we believe we're
18 going to need a long time.

19 MR HOSKINS: We had hoped to do something sooner, it may not
20 be perfect, we were going to suggest two months and
21 we'll give you what we've got after two months and it
22 may well be the claimants and the Tribunal will come
23 back or we may come back and say this is what we've got
24 but we're going to do more. So we would rather report
25 to where we've got to.

1 MR SINGLA: Sir Iveco is content with two months on the
2 high-level basis that was discussed with Mr Hoskins.
3 THE PRESIDENT: Daimler?
4 MR HARRIS: The end of November for a best endeavours on
5 a generalised basis and partly conscious of the fact
6 that there's a mass of pleading to be done by then as
7 well.
8 THE PRESIDENT: Yes.
9 MR PICKFORD: Sir, our position is the same. Just to be
10 clear, we understood that we could provide effectively
11 a document representing further information, it doesn't
12 necessarily have to be a witness statement from
13 a particular person, it's going to be signed by
14 a statement of truth but it's further information.
15 THE PRESIDENT: Yes. No, it doesn't need to be a witness
16 statement. If it's got a statement of truth, that's
17 absolutely fine.
18 MR BREALEY: Clearly, sir, we would say two months and
19 6 March is unacceptable.
20 THE PRESIDENT: We say, save for MAN, for the others
21 including Volvo/Renault, we'll say the end of November,
22 whatever the last working day is in November, it may be
23 the 29th, I can't remember. For MAN, Mr Jowell, we
24 think -- we appreciate you're in a more difficult
25 position but we really think you should be able to do it

1 by the end of December.

2 MR JOWELL: We'll do our best.

3 THE PRESIDENT: That should give you ample time to sort this
4 out and this has been pointed out, you must have been
5 investigating, your lawyers in Germany, pricing given
6 the number of actions you are facing, not just here but
7 in other countries.

8 Right. Can we then turn to the application as
9 against Ryder?

10 MR PICKFORD: Sir, I don't know if there are any bids for
11 some words earlier in the schedule but I think I may
12 have the first of those which is VoC2.

13 THE PRESIDENT: This is the schedule, just to be clear, that
14 we have --

15 MR PICKFORD: Yes, so this is the schedule, you should find
16 it in the Redfern bundle, it's COM-C, tab 6 {COM-C/6/1}.

17 THE PRESIDENT: Tab 6 is headed "Daimler's request" which
18 slightly confused me. Is that the joint request or --
19 I thought there was to be one -- sorry, tab 6, no. I'm
20 so sorry, I'm in the wrong place. Yes, "Defendants'
21 request".

22 MR PICKFORD: As in Daimler preliminary remarks.

23 THE PRESIDENT: No, my mistake.

24 MR PICKFORD: No one has tried to stand up so I'm going to
25 continue. Truck use. If you turn, please, to page 9

1 {COM-C/6/9}

2 THE PRESIDENT: Quite a bit is agreed until page 9, as we
3 understand it, is that right?

4 MR PICKFORD: Quite a bit is and I'm not going to deal with
5 anything that's agreed because we've got limited time so
6 it's straight into what isn't agreed.

7 Truck use, page 9, it's VoC2/01(j):

8 "Truck use including whether the truck was leased to
9 a third party or used for business activities, and the
10 activities it was used for (eg haulage, construction
11 etc)."

12 We ask for this information, it has been agreed to
13 by Dawsongroup. Ryder has agreed to give us the first
14 part, namely whether the truck was used internally or
15 leased to a third party, but it contests the provision
16 of other information in relation to the way that the
17 truck was used.

18 Mr Andreu, DAF's economic expert, has explained why
19 the information is sought. Given the limited time I'm
20 just going to summarise.

21 THE PRESIDENT: What you want is, if it was used -- you want
22 the activities used for if it was used internally or
23 also if it was leased out?

24 MR PICKFORD: In both cases.

25 THE PRESIDENT: Right.

1 MR PICKFORD: The reasons that he seeks the information,
2 that we seek the information so that he can use it are
3 effectively twofold. Firstly, because it can be used as
4 a proxy for the characteristics of a truck where that
5 characteristics information is missing, as we understand
6 in many cases it is. And knowing the characteristics of
7 a truck is essential for the regression analysis that's
8 to be carried out in relation to its pricing. It's one
9 of the things that one needs to control for. That's the
10 first reason we need it.

11 The second is because it's also relevant to the
12 overcharge analysis and in respect of what has been
13 passed on by the claimant and that's for two reasons.
14 Firstly, the use of a truck will affect its residual
15 value, certain uses will be more punishing than others
16 and that will have an impact on what one could expect it
17 to sell for. Secondly, the use of a truck is also
18 relevant to the competitive conditions in the downstream
19 market and the likelihood of pass-on and indeed the
20 extent of pass-on in that market.

21 So Ryder doesn't disagree with our reasons for why
22 the information might be useful but what it says firstly
23 is that it lacks systematic records of this information
24 so therefore it's going to be difficult to provide.

25 As a concession, when we've been discussing this

1 matter with Ryder, we have said "Well, we're quite happy
2 for you in the first instance if you don't have
3 information on use recorded as use per se, if you can
4 tell us who the customer is and infer the use from that,
5 then we will use that information as a first approach".
6 There's no suggestion by Ryder that it's not actually
7 able to tell us who the customers were for its trucks,
8 to whom it leased its trucks.

9 So we suggest that that's a perfectly fair and
10 sensible way of proceeding and that is not going to be
11 unduly burdensome on Ryder and that meets their first
12 objection.

13 Secondly, Ryder says that whilst it effectively
14 accepts that there could be some relationship between
15 the use of a truck and the truck chassis depreciation,
16 it complains that we haven't explained what the pattern
17 of depreciation is that we expect to find. Their expert
18 has simply asserted that he thinks there will be
19 a relationship, he wants to examine the relationship but
20 we have not yet precisely set out what the relationship
21 is. We say that's clearly going too far. We shouldn't
22 have to come up with a straw man thesis to be tested.
23 We can look at the data and form a view on the
24 relationship on the basis of the data that we get.

25 The third point that Ryder offers by way of

1 resistance to this category is it says that, well, we
2 would give you instead the body type and the plated
3 weight of each truck and we're very happy to accept that
4 as part of the information that they can provide us to
5 build up a picture of use. In some cases that may
6 answer use but in other cases it won't so we still
7 maintain the application for use, albeit, as I said,
8 potentially proxied through firstly the information on
9 who the person is they leased the truck to.

10 MR HARRIS: Sir, may I add because we also pursue this
11 category that my instructions are that Ryder will
12 service if not all then a large part of its own trucks
13 and the servicing characteristics depend to some degree
14 on the level and type and extent of the service on the
15 truck use.

16 So there ought to be a readily available repository
17 of information in the service department about what the
18 truck that's being serviced has been used for.

19 Obviously you service a logistics truck that trundles
20 around town in a different way to a construction truck
21 on a mining site and likewise -- well, that's the gist
22 of the point.

23 THE PRESIDENT: I'm just trying to understand. You say this
24 goes to pass-on generally, both the value and
25 competitive conditions in the downstream market, where

1 pass-on takes place. Is that right?

2 MR PICKFORD: Yes.

3 THE PRESIDENT: How are you proposing to deal with pass-on

4 when it comes to the truck pass-on?

5 MR PICKFORD: The resale pass-on?

6 THE PRESIDENT: The resale pass-on, that's what you're

7 looking at here, isn't it, resale pass-on? Is that

8 right?

9 MR PICKFORD: Principally because it will go to the residual

10 value.

11 THE PRESIDENT: Yes. How are you going to -- what's the

12 method for working out whether a cartel overcharge on

13 new trucks had an effect on resale price of trucks?

14 MR PICKFORD: My understanding is that our experts wish to

15 explore that issue econometrically and potentially model

16 the relationship between different types of pricing.

17 I'm not sure we've set out precisely the means by which

18 we're going to do that --

19 THE PRESIDENT: I don't think you have. That's why I'm

20 asking the question. I'm just trying to understand how

21 this feeds in. I mean, are you planning to do it

22 individual truck by truck? Say, well, the resale value

23 of this truck would normally be that and it was only

24 that and in fact it's the same so there's no -- in fact

25 there's more so there's a pass-through, or are you going

1 to do it on a more generic way?

2 MR PICKFORD: Sir, may I take instructions for a moment.

3 I certainly would have an answer as to what I think is
4 likely but I would like to check.

5 THE PRESIDENT: Yes.

6 (Pause).

7 MR PICKFORD: Sir, in answer to your question, it's not an
8 assessment of each truck on an entirely disaggregated
9 truck by truck basis. There are two approaches that
10 he's identified that he would consider and they're set
11 out, it would be helpful, at paragraph 69 of his witness
12 statement in general terms and the reference is
13 {COM-C/14/19}. We see there:

14 "There are two approaches that we are considering
15 undertaking [...] The approach we ultimately decide to
16 take will be determined by the quality and
17 comprehensiveness of the data we receive from the
18 claimants.

19 "(a) The first is a regression analysis to identify
20 the effect of the infringement on the used truck market
21 [...] jointly with the identification of the effect of
22 the infringement (if any) on the prices of new trucks.
23 This econometric analysis would likely be very demanding
24 in terms of the new of input data required, as well as
25 in terms of identification, and it is presently unclear

1 whether the detailed data necessarily will ever be
2 available."

3 Over the page, paragraph (b), on page {COM-C/14/20},
4 there's also a statistical analysis to assess the
5 relationship between the price of used trucks and the
6 price of new trucks.

7 So in neither case are we proposing to go through
8 a schedule of trucks one by one saying, well, this truck
9 had a particularly bad history and therefore pass-on
10 will be X, but the information will inform the
11 econometric and statistical analyses that Mr Andreu
12 would wish to carry out.

13 THE PRESIDENT: But the -- I don't fully understand what
14 he's saying. The regression analysis, is it also
15 a during and after analysis?

16 MR PICKFORD: Yes. Well, certainly we sought before, during
17 and after information in relation to pass-on, and Ryder
18 for a number of categories has agreed to provide that.

19 THE PRESIDENT: But aren't you then looking at what was the
20 general pattern of used truck prices achieved by Ryder
21 ideally before and certainly during the cartel, what is
22 the pattern of used truck prices more recently, see how
23 that relates for those models for the new truck price in
24 general average terms and how that relationship has
25 changed?

1 MR PICKFORD: We're looking to establish what the
2 relationship is and for that we need the data that we're
3 seeking. That's the point of the data, is that we don't
4 want Ryder to tell us generalities, we'd like --

5 THE PRESIDENT: What the relationship is in terms of price.
6 I mean, you know the used truck prices, you know the new
7 truck prices, so you can see the relationship. Do you
8 need to understand in detail why it is there, that
9 relationship, truck by truck?

10 MR PICKFORD: Not truck by truck but by its use. One of the
11 things that one would need to control for in determining
12 a relationship between new truck prices and used truck
13 prices in a robust regression analysis would be things
14 that could influence that price. You need to control
15 for matters that can potentially affect the relationship
16 so that you can derive a robust relationship. One of
17 the things that will tend to affect it, and it's not
18 argued that this is incorrect by Ryder, is the use to
19 which a truck is put.

20 THE PRESIDENT: But is there any suggestion that the balance
21 of use is going to change in the after period, as
22 opposed to the during period? You're looking as
23 a generality at what's happened to used truck prices,
24 are you not?

25 MR PICKFORD: Sir, I don't think we're positing that but our

1 reasons for requesting information don't depend on that.
2 We're not seeking to establish that. What we're seeking
3 to do is establish a robust econometric model and the
4 best and most robust model that we can provide will
5 depend on the data that we can get and one of the things
6 that you do when you're trying to develop an econometric
7 model is to control for things that will influence the
8 price, so that in statistical terms we'll want a model
9 with a good R squared so that we can show you that used
10 prices are a function potentially of new prices and we
11 will want to be able to say, look, we've got
12 a regression and there's a strong relationship here
13 which we can show you that there's a function between
14 new truck prices and used truck prices and it works like
15 this, and there will be various factors that will
16 potentially influence the strength of that relationship.

17 One of the things that will do that is whether we
18 can control for variables such as use because use could
19 be something that affects the kinds of residual values
20 that someone will be able to get for their truck.

21 THE PRESIDENT: But is that going to change following the
22 cartel? Some prices go up -- you're looking to see if
23 there's any rise, that's what you're interested in, and
24 whether there's an increase for pass-through, whether
25 there's any increase in used truck prices by reason of

1 the cartel?

2 MR PICKFORD: No, sir. The point is we are not seeking to
3 demonstrate -- it might be the case, we'll have to see
4 what comes out of the analysis but we're not seeking to
5 demonstrate that it necessarily changed over the period.
6 That isn't what we need the information for. You need
7 the information in relation to truck use in order to
8 control for it to have a robust regression analysis.

9 To give an example, suppose that we are looking at
10 the relationship between new trucks and used trucks and
11 we simply approach it on the basis of trucks generally,
12 no other information about their characteristics, just
13 trucks. We might find that it's really quite hard to
14 see a robust relationship because there are all sorts of
15 characteristics of those trucks that you would want to
16 control for to be able to demonstrate a relationship,
17 for instance very, very large trucks with lots of
18 features as against trucks that are smaller and don't
19 have those features. Or trucks that have very high
20 mileage as against trucks that don't have such high
21 mileage.

22 In all of those cases what you're doing is you're
23 getting more information that is relevant to the likely
24 second-hand price so that you can control for it so that
25 when you then develop your economic model it is robust

1 to those factors. So just as we would want to know the
2 characteristics of the truck, whether it's -- how many
3 tonnes it has, what kind of options it has, we would
4 also want to know what use it was put to because it's
5 one of the characteristics of a truck that you would
6 want to control for.

7 Because, for instance, if a certain type of truck
8 had been used for haulage, you might expect that it had
9 done a very, very large number of miles as compared to
10 another type of truck that had been used in construction
11 which wouldn't have gone up and down the motorways to
12 the same extent. That is a factor that could influence
13 the relationship between the new truck price and the
14 second-hand truck price and in an econometric model you
15 want to control for that. That is a different issue
16 from trying to demonstrate that that necessarily changed
17 as between the before period and the after period.

18 THE PRESIDENT: Yes. Are you getting the mileage? Under
19 another... for the sales?

20 (Pause).

21 MR PICKFORD: Yes, in relation to used trucks we will be
22 getting mileage at the time of disposal.

23 THE PRESIDENT: So you're getting that?

24 MR PICKFORD: That was an illustration. It was not intended
25 to be --

1 THE PRESIDENT: I'm trying to understand what else is, why
2 the actual use beyond that? You can say whether it's
3 used for haulage or -- if there are a couple of major
4 categories or haulage or delivery or -- put it into one
5 of three categories.

6 MR PICKFORD: Sir, one can well imagine that a truck that's
7 been used on a construction site and done X number of
8 miles in that context, that is going to have a different
9 effect on the truck from one that has done the same
10 number of miles on a tarmac motorway. We didn't provide
11 that kind of level of detailed information on this in
12 our evidence because that wasn't the point of contention
13 between Ryder and ourselves. They accepted that there
14 could be a relationship. What they said is, well, it's
15 going to be quite difficult to find some of this
16 information, we're going to have to do it truck by truck
17 in some circumstances, to which we said, well, fine,
18 tell us who you leased the truck to and we can use that
19 to inform the use.

20 So we haven't come to the Tribunal with evidence
21 about the precise way in which the use ultimately will
22 affect the residual value because it wasn't an issue
23 between us and Ryder in preparing for this particular
24 hearing.

25 THE PRESIDENT: Mr Brealey, would you be able to provide use

1 if readily available and, if not, the sector in which
2 the customer operated?

3 MR BREALEY: Can I respond to this?

4 THE PRESIDENT: Yes.

5 MR BREALEY: Frankly the standards, double standards are
6 startling. The first thing I would like to do, I need
7 to go to two documents. The first is our skeleton, if
8 you have it to hand, it's {COM-B/1/69}. I just want to
9 put the defendants' request for disclosure from Ryder
10 into perspective. So it's a skeleton, it's the end of
11 the skeleton, it's paragraph 207.

12 THE PRESIDENT: Which page?

13 MR BREALEY: It's {COM-B/1/69}. It's an introductory point
14 but it's an important point.

15 208:

16 "As Mr Levy explains [...] Ryder had already
17 disclosed a considerable amount of information to the
18 defendants both before, and then by way of, its response
19 [...]"

20 THE PRESIDENT: We have read this.

21 MR BREALEY: Okay, what I would just like to emphasise is
22 when we are talking about resisting on the grounds of
23 proportionality, we really mean it because we have been
24 extremely cooperative in giving them disclosure so far.

25 With that introduction, can I ask the Tribunal to go

1 to Mr Levy's statement who deals with this and this is
2 at {R-C/3/28}. That is in Ryder C evidence bundle at
3 tab 3, page 28. What I would like to submit is that
4 this is a disproportionate request. Firstly, the
5 necessity, we say, is fairly nebulous but it is -- the
6 exercise we are being asked to carry out is out of all
7 proportion to what they say they want. I would like to
8 pick that up at paragraph 93 of Mr Levy's statement.

9 THE PRESIDENT: Yes, I see that, that it would be -- the
10 many customers over the lifetime of a truck and so on.

11 MR BREALEY: But we don't store the information so we're
12 going to have to go away and create a document. This is
13 not qualitative information that we already have, we've
14 got to create a document which sets out the use of many
15 hundreds, thousands of customers. If one thinks about
16 a rental truck, it will come in and out. We just don't
17 have the information. We've got to create it.

18 This is in circumstances where they have -- we were
19 providing them with a customer name so they can work
20 out --

21 THE PRESIDENT: You are providing the customer name?

22 MR BREALEY: Yes and that is a separate request, PO7 --

23 THE PRESIDENT: I thought Mr Pickford, if I didn't mishear
24 him, said he'd be satisfied with the customer name.

25 MR PICKFORD: We were satisfied with them inferring use from

1 their customers' names because they know their customers
2 better than we do.

3 MR BREALEY: So they're getting the mileage, they are
4 getting the customer and that is, for the Tribunal's
5 reference, it's {COM-C/6/65}, P07.

6 THE PRESIDENT: Yes.

7 MR BREALEY: You see the amount of information, quantitative
8 information that the defendants are asking us. One goes
9 down, so they want product characteristics, fixed and
10 variable revenues, prices and discounts, fixed and
11 variable costs, profit margins, quantities supplied and
12 then:

13 "Identity of customers whom the claimants have
14 supplied products or services to."

15 MR PICKFORD: If --

16 THE PRESIDENT: Just a minute, Mr Pickford. Let Mr Brealey
17 finish.

18 MR BREALEY: So they will get mileage, as we've established,
19 they will get the identity of the customer who we have
20 supplied products or services to. So they are big
21 companies, they can go away and create their own
22 database or qualitative document and they can infer the
23 use to which our customers have put the trucks.

24 MR PICKFORD: Sir, if Mr Brealey is saying he's going to
25 give us that on a per truck basis, then that changes

1 things. I hadn't understood P07 to be on a per truck
2 basis. Obviously his submission only makes any sense if
3 it's on a per truck basis because we couldn't do the
4 inference just by knowing that they have seven different
5 customers.

6 MR MALEK QC: If you're getting the names of all the
7 customers per truck, then you're happy with that?

8 MR PICKFORD: Can I just take instructions? But if that's
9 what he's telling us, that's different.

10 (Pause).

11 THE PRESIDENT: Is that what you're providing?

12 MR BREALEY: I'm just checking.

13 THE PRESIDENT: When you say name of customers, it has to
14 be, doesn't it?

15 MR SINGLA: Sir, can I just mention that we're in the same
16 position. I'm not intending to make submissions but
17 just formally to say --

18 THE PRESIDENT: Yes, I assume that you are.

19 MR BREALEY: If it's not by individual truck but it's for
20 example by a lease document or a rental document, we've
21 offered to do a reasonable and proportionate search.

22 THE PRESIDENT: When you say by a lease document, it will be
23 for the trucks covered by the lease?

24 MR BREALEY: Yes but what we don't have is a document which
25 says: this customer put this truck to this use. We just

1 don't have it.

2 MR MALEK QC: If what you're going to give under (j) is
3 a list of all of the trucks and against each truck to
4 whom it was leased or rented out for, then for my part
5 that's enough.

6 MR BREALEY: Standing on my feet, I can't guarantee that
7 that lease will say the chassis number. But what they
8 will be getting is the identity of the customers, our
9 customers --

10 THE PRESIDENT: For all your trucks.

11 MR BREALEY: For all our trucks. They will be able to work
12 out, well, this customer was a big customer, it's in the
13 haulage business. As I say --

14 THE PRESIDENT: Well, I think, Mr Pickford, it seems to me,
15 if you get that and you're still struggling with that
16 degree of information --

17 MR PICKFORD: Sorry, could Mr Brealey just clarify exactly
18 what it is he's going to be providing because I'm unsure
19 as to the extent to which, on a per truck basis, we will
20 be able to identify use ourselves from the information
21 that he's proposing to provide.

22 MR BREALEY: Well, I'm prepared to give the information that
23 has been requested of us in P07.

24 MR PICKFORD: But in P07 we weren't requesting it on a per
25 truck basis. If he's now saying that he'll provide it

1 on that basis, then that's --

2 MR BREALEY: I've already said I'm not going now on whether
3 it's on a per chassis basis. Clearly it's a detailed
4 monthly sales data during the relevant period by
5 individual units if applicable for the claimants and it
6 relates to the identity of customers whom the claimants
7 have supplied trucks to basically, products or services.

8 THE PRESIDENT: When it says "by individual units if
9 applicable", what does that mean?

10 MR BREALEY: I think one has to ask Mr Pickford for that.

11 THE PRESIDENT: If you're agreeing to do it, what do you
12 understand it to be?

13 MR BREALEY: Individual unit would be on a lease for
14 a truck, a rental for a truck.

15 THE PRESIDENT: And you say you can't tie that to the
16 vehicle identification number?

17 MR BREALEY: That I'm unsure of. But my overriding point is
18 that for all the customers that come into Ryder's door,
19 we don't create any sort of database which would inform
20 us of the truck use.

21 THE PRESIDENT: No, we understand that. What we're just
22 trying to pin down is whether the information that
23 you're giving there, with names of customers, can be
24 linked to the actual trucks because you're giving
25 details of the trucks and I would have thought that, if

1 you have -- and you will have indeed in your database as
2 a large rental outfit what the sales information relates
3 to which truck you sold.

4 MR BREALEY: Yes, we'll have the registration --

5 THE PRESIDENT: Of the truck.

6 MR BREALEY: Yes.

7 THE PRESIDENT: Won't that link it then to the individual
8 truck?

9 MR BREALEY: It may well but who is going to create the
10 document which says what the truck -- the use to which
11 the truck --

12 THE PRESIDENT: No, there won't be use. What I'm saying is
13 that the PO7 information will be by truck with customer
14 name and then how DAF wishes to deduce use is a matter
15 for DAF.

16 MR BREALEY: Correct.

17 THE PRESIDENT: But it will be per truck because it will
18 identify which trucks were being sold or leased.

19 MR BREALEY: Yes, leased, rented.

20 MR PICKFORD: Thank you. On that basis Ryder knows the
21 purpose for which we are seeking this information. If
22 they are able to provide as much as they can in relation
23 to this to enable us to do that and then if we can't
24 we'll obviously have to come back again. From what
25 I understand, what we've got to is they believe that

1 actually they can satisfy the request via this means.

2 THE PRESIDENT: Yes. They won't be telling you the use.

3 MR PICKFORD: No, I understand that.

4 MR MALEK QC: But they will be telling you the name of the
5 customer per truck.

6 MR PICKFORD: One final point on Mr Brealey's submissions.
7 He accused us of extraordinary double standards --

8 MR MALEK QC: Don't worry about that.

9 THE PRESIDENT: We don't need to go into the accusations, we
10 just need to get through who gives what to whom by when.

11 MR HARRIS: Sir, on this very topic can I just say Mr
12 Brealey's objections were based on proportionality but
13 he hasn't addressed the point that I raised which is we
14 understand them to have a repository of information in
15 their service department that will identify what the
16 trucks are used for which is not -- his big complaint,
17 which I understand and accept, he doesn't want to be
18 creating bespoke new documents and putting this data
19 into that, but that's not what I'm asking for.

20 Maybe the way forward, I hope constructively, is to
21 say can we take it when he's going to be providing this
22 information, he can be specifically looking by his
23 clients at the service documents, the service centre for
24 the trucks because it may well be that that is an answer
25 and he should provide the information that comes out

1 from the service, from the service centre.

2 My final point is simply I apprehend that we may
3 need to come back -- I've heard what you said and you're
4 about to order about providing the name per truck but
5 I apprehend that we might have difficulty,
6 notwithstanding what Mr Brealey says, in figuring out
7 what ABC Limited in Lanarkshire actually does. We may
8 not, but they ought to know since they're renting them
9 the truck. All I'm saying is we may have to come back
10 under the liberty --

11 THE PRESIDENT: Well, it depends how important it really is
12 which at the moment I'm not persuaded of.

13 MR HARRIS: I of course accept that point but the service
14 point is an important point so --

15 THE PRESIDENT: Yes. Well, you've heard what's said about
16 your service department. I don't know if you've heard
17 about that before this hearing.

18 MR BREALEY: I am told that it will not assist. We do not
19 have the information.

20 THE PRESIDENT: Yes. Well, there we are.

21 MR BREALEY: I think maybe we should adjourn the rest of the
22 defendants...

23 THE PRESIDENT: Is there anything else, Mr Pickford, that
24 you feel is extremely urgent that you wish to pursue
25 now?

1 MR HOSKINS: Sir, I'm really sorry, I have a very pressing
2 personal obligation that I have to go to, so I mean no
3 disrespect, Mr Leith will be here but --

4 THE PRESIDENT: Yes. Well, we have to rise. We have sat
5 five minutes beyond our deadline.

6 MR PICKFORD: I don't, sir.

7 THE PRESIDENT: I think we have to adjourn the rest of the
8 application. It may be that we will need to fix another
9 full hearing. I think for my part that may be difficult
10 before early December but we may be able to find a date.

11 MR BREALEY: One final -- there will be certain orders in
12 our favour, can we put in writing to the Tribunal or try
13 and agree --

14 THE PRESIDENT: Have we agreed dates by which you're going
15 to provide --

16 MR BREALEY: We haven't but we can -- maybe we can do this
17 in correspondence and then put it to the Tribunal in
18 writing.

19 THE PRESIDENT: Yes. It doesn't have to mirror the dates on
20 which we've required the defendants to make disclosure
21 but it's certainly difficult to see you should have
22 longer than they do.

23 MR BREALEY: We'll set it out in correspondence.

24 THE PRESIDENT: If there are minor issues on dates, you've
25 got 4 October as a hearing.

1 MR MALEK QC: On 4 October I'll be here and if there are any
2 minor things like precise wording of the orders and
3 stuff like that, I'll deal with that as well as the
4 issue with Mr Harris.

5 MR BREALEY: That's fine. Thank you.

6 MR HARRIS: May I simply close the hearing with an apology
7 to the Tribunal? If I've tried the patience of the
8 Tribunal at least once, if not more than once, I hope
9 you understand, I apologise.

10 THE PRESIDENT: There are no hard feelings, Mr Harris.
11 Have a good weekend.

12 (5.37 pm)

13 (The hearing concluded)

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