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Case No. : 1284/5/7/18 (T) ; 1290/5/7/18 (T) ; 1291/5/7/18 (T) ; 1292/5/7/18 (T) ; 1293/5/7/18 (T) ; 1294/5/7/18 (T) ; 1295/5/7/18 (T)

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

Salisbury Square House,  
8 Salisbury Square,  
London  
EC4Y 8AP

6 February 2020

Before:

**The Honourable Mr Justice Roth, The Honourable Mr Justice Fancourt, Hodge Malek QC**

(Sitting as a Tribunal in England and Wales)

**BETWEEN:**

Trucks Proceedings (Case Management Conference – February 2020)

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**CMC – 6 February 2020**

Thursday, 6 February 2020

(10.30 am)

Case Management Conference

THE PRESIDENT: Good morning everyone.

The proceedings today are being live-streamed into our other courtroom so if anyone squeezed at the back feels cramped or uncomfortable, please feel free to leave at any time and watch the proceedings in court 2.

Thank you all for your skeleton arguments from counsel, but also for the very hard work that all the teams of lawyers have done and looking round the room they are obviously quite large teams in this case, even if only a portion of the teams are present today.

On confidentiality, my understanding -- and please correct me if that's wrong -- is there is nothing in the skeleton arguments for today that's confidential and there's nothing in the short statements about the expert methodologies that is confidential. Obviously there are other materials which are confidential.

And we will be taking as usual a short break mid-morning and mid-afternoon for the benefit of the transcribers.

Can I just say at the outset that these are of course heavy, complex and high value claims covering a long period of time and we are all agreed that the

1 claim for damages goes beyond the cartel period and in  
2 fact even before the cartel period, a still longer  
3 period of time and, as everyone here knows, yet more  
4 claims are being brought almost on a weekly basis. So  
5 I would like to emphasise at the outset two aspects of  
6 the way in which we need to manage these cases.

7 I have said something like this before, but I think  
8 it is worth repeating. First of all, the question is  
9 not simply what is the just and proportionate way of  
10 proceeding with a heavy, high value action, but also to  
11 have regard to the parallel issues across most of these  
12 claims so as to achieve consistent outcomes. If we  
13 don't achieve consistent outcomes as between the  
14 different actions, then that is a recipe for appeals,  
15 for potential remittal, for rehearings. It makes it  
16 much harder for other claims to settle and so forth, and  
17 we all have in mind of course the experience in the  
18 interchange fee litigation which I think is generally  
19 acknowledged is not one to be emulated.

20 That means that steps which might be obvious in one  
21 claim considered in isolation, may not be appropriate or  
22 attractive when we consider the claims overall and we  
23 need of course to be fair to all parties, including the  
24 claimants who may have suffered significant loss as  
25 a result of this very serious infringement of

1 competition law, but fairness in this context involves  
2 these overall considerations.

3 In some respects we may have to be innovative in the  
4 way that we address these issues and we are grateful for  
5 your help and proposals, even though of course the  
6 commercial interests of the parties on the different  
7 sides of the cases are different.

8 With that by way of preliminary observation, we  
9 would like to go through our agenda broadly in that  
10 order, as indeed have counsel in their skeleton  
11 arguments.

12 First, pleadings. Little I think that I need to say  
13 on that. We heard I think that in Volvo/Renault there's  
14 a wish to file an updated defence to correct various  
15 typos and one error in a date in I think the Dawsongroup  
16 action. Is that right, Mr Hoskins?

17 MR HOSKINS: That's right, it's just some tidying-up to be  
18 done. I don't think it is going to be controversial but  
19 obviously if it is we will be back before you, but we  
20 gave dates and we intend to circulate the drafts to the  
21 relevant claimants.

22 THE PRESIDENT: Well they sound fairly minor changes which  
23 then don't need any intervention from the Tribunal.  
24 I think there were also some amended contribution  
25 defences, is that right, in the Suez and Wolseley cases?

1 MR HOSKINS: That's right. That's just to ensure  
2 consistency across the three VSW claims.

3 THE PRESIDENT: Yes, thank you.

4 And Iveco, you want to make some amendments to your  
5 defences, I think, Ms Bacon, in the Ryder proceedings.

6 MS BACON: Yes, that's right and that's ongoing in the  
7 correspondence.

8 THE PRESIDENT: So no orders are being sought now?

9 MS BACON: No, the only order we suggest is directions  
10 regarding the VSW particulars on compound interest, but  
11 that applies across the board, and that's not our  
12 pleading.

13 THE PRESIDENT: Is that being asked for today?

14 MS BACON: No. VSW have said in their skeleton argument,  
15 they raised a point that they were going to file  
16 particulars of their case on compound interest but  
17 hadn't done so, so we just want to make sure that's  
18 included in the directions after today's hearing.

19 THE PRESIDENT: Yes. It is Mr Jones, is it, for VSW? You  
20 say that you are preparing to provide further  
21 particulars.

22 MR JONES: We suggested 14 days, except Veolia for which we  
23 ask 28 days.

24 THE PRESIDENT: Yes. So 14 days for Suez and Wolseley and  
25 28 days for Veolia. Is there any objection from anyone

1 to that? Very well, so we will incorporate that in the  
2 order.

3 That's the particulars as -- we haven't got a draft  
4 for that I think, do we, Mr Jones, at the moment?

5 MR JONES: There isn't a draft but it should be  
6 straightforward because it is simply to particularise  
7 their claim for compound interest.

8 THE PRESIDENT: And it is not in -- it is in response to any  
9 particular request or ..?

10 MR JONES: I think, sir, there have been some complaints  
11 that it hasn't been particularised.

12 THE PRESIDENT: But it is not to answer a particular  
13 request --

14 MR JONES: No, it is not.

15 THE PRESIDENT: -- it is just to provide further particulars  
16 of the complaint. Yes, very well.

17 Yes, Mr Lask.

18 MR LASK: Sorry, in case it assists Dawsongroup, we have  
19 received the amended defence in the form of the  
20 Volvo/Renault proceedings and we don't object to both  
21 amendments.

22 THE PRESIDENT: Yes, thank you very much. No, that's  
23 helpful. Yes, Mr Harris.

24 MR HARRIS: Just for the sake of completeness, for Daimler  
25 there are similar positions involved in that we have

1           some minor consistency and corrections and typo  
2           amendments that are going to be circulated shortly after  
3           this hearing, so no order's sought but I don't imagine  
4           it will be controversial.

5           THE PRESIDENT: Thank you. Anything else on pleadings?

6           MR BREALEY: We are seeking (inaudible). Some dates have  
7           been proposed. We seek no order. Daimler have refused  
8           to provide particulars and we may have to come back to  
9           the Tribunal with an application in that respect.  
10          I just put a marker down that we have (inaudible)  
11          defences, some defendants have refused, some are going  
12          to give us the particulars (inaudible).

13          THE PRESIDENT: Yes, well, we won't get into that now -- you  
14          don't need to put down markers. If it is raised in  
15          correspondence, it has been raised.

16          MR JONES: Sir, just to make things simple, on the Volvo  
17          front we similarly don't have any corrections. We  
18          haven't seen the (inaudible). We will be objecting to  
19          a point which is raised in the Iveco amendment but, sir,  
20          it is a point which goes broadly to pass-on and so  
21          I don't propose to spend time on it now, we can pick it  
22          up when we get to item 4 on the agenda.

23          THE PRESIDENT: Yes, thank you.

24                 Anything else on pleadings? Can we move on then to  
25          confidentiality. Paragraph 2 of the agenda concerns the

1 Scania decision. We are all aware of the position and  
2 we have seen what is said in the evidence about that.  
3 It has now been a year since I had correspondence with  
4 the then Director General of Competition on that point.  
5 I think it might be worth my writing again -- there's  
6 now a new Director General -- simply to urge that the  
7 Commission deals with this now as quickly as possible.

8 I gather it is no longer an issue involving Scania,  
9 it's now an issue involving some other addressees of the  
10 decision.

11 MR KENNELLY: Sir, that's correct. From Scania's  
12 perspective the Tribunal will recall there was an issue  
13 about redactions made by Scania. A number of those  
14 redactions were rejected by the hearing officer and the  
15 time for challenging that hearing officer's decision has  
16 now expired, so a number of the Scania redactions will  
17 need to be removed, but that will have to be done -- we  
18 don't dispute that but that will have to be done in  
19 conjunction with the outcome of the dispute between the  
20 Commission and the settling parties in relation to their  
21 redactions.

22 THE PRESIDENT: Yes. Well, I gather that's just ongoing but  
23 it is ongoing for a very long time.

24 MR HARRIS: Yes. And on behalf of the settling parties we  
25 have no objection obviously to the Tribunal writing



1           again. It is what it is.

2           THE PRESIDENT: You will of course as always receive a copy  
3           of the correspondence.

4           I don't think there is anything else we can say  
5           about that at this stage.

6           The next issue on confidentiality is any other  
7           issues on confidentiality and the point arising there is  
8           the application by Ryder for an amendment to the  
9           confidentiality orders to enable the inner ring members  
10          of the claimants and in particular the experts to  
11          discuss those documents together and before we hear from  
12          Mr Brealey, my understanding is that that is supported  
13          by the other claimants, that Daimler and Volvo/Renault  
14          are neutral, some of the defendants, DAF and MAN, want  
15          to be heard on the terms of the order, but are not  
16          actively opposing the principle, but Iveco is opposing.

17          So, Mr Brealey.

18          MR BREALEY: Can I start with the correspondence. I don't  
19          know whether you are going to go Magnum or hard copy  
20          or --

21          THE PRESIDENT: I think we're happy with Magnum on the  
22          correspondence.

23          MR BREALEY: Can I go first to the Ashurst letter of  
24          20 December and at bundle {R-D/IC1/332}. I don't know  
25          if the Tribunal has had the opportunity to see that

1 letter but that is the letter dated 20 December where  
2 Ryder make the request. I don't know if it is best that  
3 the Tribunal just reads it or ...

4 (Pause).

5 Then it goes over and the next step is asking for  
6 agreement by the 10 January. The point being made there  
7 is it is inefficient and it is incurring a waste of  
8 costs. The claimants' experts cannot discuss common  
9 disclosure.

10 THE PRESIDENT: The experts are in the inner ring, aren't  
11 they?

12 MR BREALEY: Yes.

13 THE PRESIDENT: Is it as important for the outer ring  
14 members to discuss? Because there are quite a lot of  
15 them, that's why.

16 MR BREALEY: Well, it is very important for the experts --

17 THE PRESIDENT: Yes, we understand that.

18 MR BREALEY: That's the thrust of (inaudible) needs to be  
19 able to discuss --

20 THE PRESIDENT: Yes, we've got that point. And they are in  
21 the inner ring.

22 MR BREALEY: They are in the inner ring. And it is  
23 inefficient, as the letter says, and it is incurring  
24 substantial waste of costs because there is a duplicate  
25 exercise being undertaken.

1 THE PRESIDENT: Yes.

2 MR BREALEY: So in my respectful submission when you see  
3 that letter, it is a wholly reasonable request.

4 The next -- the Volvo reply is at page 1/378  
5 {R-D/IC1/378}. So remember you wanted replies by  
6 10 January --

7 THE PRESIDENT: Have you got a date?

8 MR BREALEY: Sorry, I will give the reference. It is  
9 R-D/IC1/378.

10 So there is a bit of a stonewall objection there.  
11 And we get similar responses -- obviously the defendants  
12 are coordinated because we get similar responses on  
13 10 January.

14 I will give the references. So 1/378, that's the  
15 reply by Freshfields -- I don't know if the Magnum --  
16 page 380. {RD/IC1/380}

17 THE PRESIDENT: We don't need to see all --

18 MR BREALEY: No, but you see it is all coordinated.

19 MR MALEK: But it is not stalling, because they only just  
20 had the request, at the beginning of the year. The main  
21 thing is to see what the substantive -- the main thing  
22 is to look at the substantive response.

23 MR BREALEY: The claimants agreed, as we (inaudible)  
24 claimants agreed. And then Ashurst write again on  
25 14 January, for the note that is page 390 {R-D/IC1/390},

1 and then the disclosure ruling comes after that letter  
2 and maybe we can go to the disclosure ruling, so that is  
3 at {R-D/IC1/391}.

4 And there are various paragraphs I just -- and  
5 obviously the Tribunal knows this -- various paragraphs  
6 I just want to emphasise that are relevant to this  
7 application. The first is paragraph 1, where the  
8 Tribunal emphasises, halfway down, that it has been  
9 case-managed jointly. That's relevant to Iveco's "these  
10 proceedings have not been consolidated" point.

11 If we move on to paragraph 40, last sentence, and  
12 I will give you the reference, at 411 {R-D/IC1/411}  
13 where the Tribunal says, last sentence:

14 "... it is important to establish how in practice  
15 the issues at trial will be approached, and to do so  
16 before and not after vast time, effort and expense is  
17 devoted ..."

18 That's clearly relevant to Iveco's "premature"  
19 point: we need to start doing this now rather than  
20 pushing it off.

21 Paragraph 41, at the bottom it is said:

22 "Instead, it seems to us that the issues will  
23 probably have to be approached by the analysis of large  
24 amounts of pricing and market data ..."

25 And going over, last sentence:

1            "This has significant implications for the nature of  
2 the disclosure to be ordered."

3            Then I come to passages that I do pray in aid,  
4 halfway in paragraph 42:

5            "We would hope that the experienced experts can  
6 therefore agree on the methodology which is  
7 appropriate ..." {R-D/IC1/412}

8            Paragraph 43, it emphasises the point that  
9 (inaudible) made:

10           "..." the Tribunal made it clear at the outset the  
11 importance of ensuring consistency as between the  
12 various claims ..."

13           And then paragraph 45, which is at page 413  
14 {R-D/IC1/413} there is an expectation:

15           "... that the parties collectively should be in  
16 a better position to agree between them more details of  
17 the disclosure exercises across the various actions."

18 THE PRESIDENT: Yes.

19 MR BREALEY: Notwithstanding that clear steer, we get the  
20 response from Iveco which is at page 448 {R-D/IC1/448}  
21 where they write on behalf of all the defendants,  
22 objecting. They make various points. The pleadings are  
23 not consolidated; well, they are jointly case-managed.  
24 Disclosure is not common; well, that misses the point.  
25 They don't really pick that up in the skeleton. And

1           lack of justification; we will come on that, but we  
2           would say that's blindingly obvious.

3           So that's how it is left.

4           MR JUSTICE FANOURT: Do you have 449? {R-D/IC1/449}

5           MR BREALEY: Sorry, 449, so "Disclosure is not common to all  
6           claimants", well that misses the point. They don't  
7           really pick that up. We just want disclosure that is  
8           common and "Lack of justification", we say that is  
9           blindingly obvious but I will put some more detail on  
10          that.

11          Although they write on behalf of all the defendants  
12          as the Tribunal has picked up, Royal Mail/BT support our  
13          application. It has also been supported, VSW support it  
14          so they want to be --

15          THE PRESIDENT: Yes, well, I said that, yes.

16          MR BREALEY: And essentially the rest are neutral bar Iveco.

17          THE PRESIDENT: So just on that last point, that letter you  
18          showed us was on behalf of all defendants, but are there  
19          subsequent letters?

20          MR BREALEY: No.

21          THE PRESIDENT: It is in the skeletons.

22          MR BREALEY: Not that I'm aware of. In the skeletons they  
23          are neutral, they will leave it to the Tribunal to  
24          decide, et cetera. So there has been a massive shift  
25          between the defendants and now we have written again to

1           Iveco saying "Come on, please" and they still maintain  
2           their fairly Draconian stance.

3       THE PRESIDENT:   Yes.   Well, Mr Brealey, I think you have set  
4           the ground.  I think it is appropriate to hear from  
5           Ms Bacon now.

6           I have been asked to remind you all, or to request  
7           you all to speak clearly into the microphones because  
8           otherwise you can't be heard in court 2.

9       MS BACON:   Sir, I am grateful.  There are three points  
10           I would like to make and they are firstly what is the  
11           starting point; secondly, what are Ryder's reasons for  
12           saying that this is needed; and thirdly, the practical  
13           difficulties and risks of making the order in the terms  
14           that Ryder seek.

15           Starting with the first of those, the cases are  
16           obviously separate claims and are being managed together  
17           for convenience, but there is as yet no order that Ryder  
18           should be heard together with any other case, or that  
19           Ryder's evidence should stand as evidence in any other  
20           case, so the default position should be that the experts  
21           do their work on the basis of the evidence in each case  
22           and that just as in any other case they should not be  
23           permitted to discuss the disclosed documents with  
24           experts working on other albeit similar cases.  
25           Of course that doesn't mean that they can't discuss the

1 methodology and that's one of the points that we have  
2 raised in the correspondence. There's nothing at all  
3 stopping the experts from discussing in some detail the  
4 methodology that they propose on the basis of the  
5 documents and data disclosed to them. What this relates  
6 to is the underlying data.

7 THE PRESIDENT: But isn't their view on methodology going to  
8 be heavily influenced by the nature and quality of the  
9 documents they have had?

10 MS BACON: Yes, but --

11 THE PRESIDENT: So if they're going to discuss it and want  
12 to say why I think this is a good idea or bad idea, it  
13 is going to involve, in any sensible way, saying  
14 "Because we've got this data", or "Because there are  
15 gaps in this data" and so on.

16 MS BACON: Yes, that might well be the case and we entirely  
17 accept that an order of this sort might be appropriate  
18 if and when there is an order that Ryder should be heard  
19 with one or other of the other cases and the evidence  
20 should stand as evidence in the other, but we just  
21 haven't reached that point yet.

22 THE PRESIDENT: But aren't we at this stage now, although  
23 we're not going to make any rulings today, we're coming  
24 on to that later, but we have already indicated that we  
25 would like the experts to see if there isn't a common



1 methodology that can be used so we aren't faced with  
2 a lot of different methodologies and different actions  
3 seeking to establish the same thing.

4 MS BACON: Yes, there is --

5 THE PRESIDENT: And to do that they have to have that  
6 discussion, don't they?

7 MS BACON: Yes. The question is how much detail they need  
8 to go into in the actual underlying disclosure and we  
9 have asked -- we put Ryder on notice and said "Well,  
10 what is the reason for this particular order? Give us  
11 an example of what you actually need this for? What's  
12 the nature of the discussions you want to have?" and  
13 initially in Mr Levy's third witness statement he came  
14 back and said "Well, I'm not going to tell you", which  
15 was profoundly unhelpful because we were genuinely  
16 seeking to ascertain why Ryder needed this.

17 What was initially said was that there was a barrier  
18 to making progress, but we didn't understand that  
19 because of course others of the claims, such as  
20 Royal Mail and BT, have progressed without any request  
21 to have discussions of this nature and we were somewhat  
22 perplexed as to what actually Ryder's expert couldn't do  
23 without speaking to the other experts, so we were asking  
24 "Well, what's the problem here?" and one would normally  
25 expect that at least initially the methodology could be

1 worked out by Ryder's experts. Ryder is  
2 a well-resourced company, it has got experienced  
3 solicitors and economists acting for it --

4 THE PRESIDENT: Sorry to interrupt you, but I don't think it  
5 is a problem for Ryder's experts to work out the  
6 methodology they might want to use; if Ryder's action  
7 was the only action, that's what would happen.  
8 Similarly, in Royal Mail/BT of course the experts can  
9 work out the methodology. But if there's going to be  
10 a question of a common methodology, or, for example, at  
11 some point we might have to consider whether we will  
12 permit Ryder to run a margin analysis as well as an  
13 econometric analysis, as apparently their expert would  
14 like to do, and approach it consistently across all  
15 actions. Well, for that decision to be reached, it  
16 seems to me there does need to be discussion between the  
17 experts.

18 And, as I said a moment ago, an informed discussion  
19 is not just an abstract discussion of what are the  
20 hypothetical, or theoretical methods one can use for  
21 claiming cartel damages, they all know that very well,  
22 it's what works in this case given the nature of the  
23 data.

24 MS BACON: Yes and it may be that after the Tribunal has  
25 given directions regarding the expert disclosure -- and

1 we haven't come to that bit in the agenda -- that might  
2 inform what might usefully be done, but at the moment  
3 the only example that Ryder has given is not really of  
4 that ilk. The example that we have now had -- and that  
5 was in the correspondence yesterday -- and I'm just  
6 going to give you the reference to that -- yes, we got  
7 a letter yesterday from Ryder's solicitors and that  
8 should be at {R-B/451/1} if that could be brought up on  
9 the Magnum system.

10 Yes, and on the second page of that letter  
11 {R-B/451/2} an example is given -- finally a specific  
12 example of what the problem is and what Ryder is talking  
13 about here is not a general issue of consistency across  
14 the proceedings, but a specific issue concerning DAF.

15 Now --

16 THE PRESIDENT: Sorry, this is which paragraph?

17 MS BACON: Paragraphs 1.4 and 1.5.

18 THE PRESIDENT: Well, let's just read them, just a moment.

19 (Pause).

20 MS BACON: Sir, so we have sought to understand what the  
21 problem is and we finally, the day before the hearing,  
22 get an example, Ryder having previously refused to say  
23 what it is they want to discuss. The example is a very  
24 specific and discrete issue that concerns DAF and its  
25 data previously disclosed to Royal Mail and the economic

1 analysis that's being done by Royal Mail, and this very  
2 much seems to be running into the other application that  
3 Ryder has against DAF, which DAF have addressed in their  
4 skeleton argument. And that really, with respect,  
5 doesn't explain why in general terms Ryder's experts  
6 should need to speak to, for example, VSW's experts  
7 about Iveco's disclosure, given that the VSW disclosure  
8 is no further advanced than Ryder's, and that doesn't  
9 explain why Ryder should need to do so, given that they  
10 can, if necessary -- if they've got questions about  
11 Iveco's disclosure, they can ask us. And it is very  
12 revealing that when we say "What is it precisely that  
13 you would like to do at this point in time?", the  
14 example given is of a specific issue concerning one case  
15 which in any event is the subject of, as I have said,  
16 that different Ryder application. It seems to be to  
17 overcome a perceived problem by Ryder in getting  
18 information out of -- about DAF's experts, nothing to do  
19 with Iveco or the disclosure that Iveco has provided to  
20 Ryder.

21 In terms of consistency, Ryder haven't explained why  
22 discussions between experts at this stage are necessary  
23 insofar as those discussions need to be based on the  
24 underlying disclosed data.

25 MR JUSTICE FANOURT: You say "at this stage", but isn't the

1 reality that there's going to be a continuing process  
2 over some months of all the parties assessing in what  
3 way the expert witnesses are best able to assist the  
4 Tribunal and present the case, which is likely to  
5 require some degree of discussion between them, informed  
6 by the documents that have been disclosed to all the  
7 parties?

8 MS BACON: Yes, and the problem is that we haven't really  
9 got to that stage yet. What we first need to do is to  
10 have any directions that the Tribunal may give regarding  
11 the expert economic analyses, the three-page statements  
12 that have been filed. But the point at this stage is  
13 that when we ask Ryder what it wants to do, the only  
14 answer finally that we get is a specific issue that  
15 doesn't really concern Iveco and we're concerned that  
16 the Tribunal may make an order to deal with a quite  
17 discrete problem that has rather broader ramifications,  
18 and that was the third point in my submissions, and  
19 we're very mindful of the comments that the Chairman  
20 made at the start of the hearing regarding the broader  
21 context and the need to deal with things in a way that  
22 works across all of the cases --

23 MR MALEK: But the experts would have formed their own views  
24 as to the appropriate methodology by reference to the  
25 documents that have been disclosed between them. We all

1           want the experts to liaise with each other so we don't  
2           have inconsistent methodologies being applied by the  
3           experts when it comes to experts' reports and trial.

4       MS BACON:   Yes.

5       MR MALEK:   The experts also need to know what are the limits  
6           to what they can discuss.   So I think this debate we're  
7           having today is really useful, at least for me, because  
8           at least we will know at the end of today what the  
9           parameters are for the experts as to what they can  
10          discuss.

11       MS BACON:   Yes.   And there are some real practical  
12          difficulties with the way that Ryder has proposed to go  
13          about this because what in essence it would require is  
14          that in the first place the defendant groups would all  
15          have to check and inform the claimants of the documents  
16          that have been disclosed in whichever two sets of  
17          proceedings that Ryder wanted to refer to.   So if Ryder  
18          wants to discuss with Dawsongroup then  
19          a Ryder/Dawsongroup comparison would have to be made.  
20          If Ryder wants to discuss with VSW then a Ryder versus  
21          VSW comparison has to be made and that has to be made by  
22          each of the defendants across all of the groups and so  
23          you start to get a rather large number of permutations  
24          of crosschecks that the defendants are going to have to  
25          do to identify the common set because, as Mr Brealey

1           said, he is not asking for non-common disclosure, he is  
2           asking for us to identify what is common as between two  
3           sets of proceedings.

4           Now, if it were only Ryder and Dawsongroup, that's  
5           one thing, but we don't just have Ryder and Dawsongroup,  
6           we have a whole plethora of proceedings and, as  
7           the Chairman said, new claims being brought every day  
8           and that's the real practical problem when an order made  
9           on a seemingly innocuous basis in relation to a very  
10          specific issue concerning DAF then starts to have far  
11          broader ramifications for all of the claims.

12        THE PRESIDENT: Well, I think, as the letter goes on to say,  
13          that's just one example. So this is not seeking  
14          discussion between experts because of one specific issue  
15          concerning DAF.

16        MS BACON: Yes.

17        THE PRESIDENT: And I don't think we are concerned about the  
18          other cases coming, we're just dealing with the experts  
19          in these proceedings.

20        MS BACON: Yes.

21        MR MALEK: Can you just remind me, what's the suggestion by  
22          Ryder as to who is going to do the task of identifying  
23          which documents are common?

24        MS BACON: The defendants. It is asking the defendants to  
25          do that, so for Ryder versus Dawsongroup, the defendants

1 to that would have to identify the common disclosure.  
2 When you get to Ryder wanting to discuss with VSW  
3 experts, then all of us are going to have to do that  
4 exercise of identifying what's common and of course the  
5 problem with that is when do you do it? Because  
6 currently I'm instructed possibly about a third of the  
7 disclosure that may eventually be given. There's  
8 disclosure being given in various tranches. What's been  
9 given so far is the data that is easiest for us to  
10 obtain. We're now moving on to another stage of  
11 disclosure where we are giving far more documentary  
12 evidence rather than simply spreadsheet evidence and  
13 that's going to become very complicated to police as  
14 between the different disclosure sets, because Ryder and  
15 VSW have asked for somewhat different things. So in the  
16 next tranche of disclosure there's going to be quite  
17 a big divergence as between the data sets.

18 Ryder says in relation to what's been disclosed  
19 already there is commonality between the VSW and Ryder  
20 sets of disclosure and that's true insofar as there is  
21 a similarity -- they're not identical, but they are  
22 largely similar so far, but, as I have said, there's  
23 a lot more disclosure to come and we are envisaging that  
24 that will create a divergence between the data sets, so  
25 there is a real question going forward: do we have to do



1           it every time we hand over some disclosure? Do we then  
2           have to identify what is common as between which sets of  
3           claimants. When new claimants come along and ask for  
4           similar discussions between their experts, do we then  
5           have to go along and do all of the various permutations?  
6           So *Arla v Ryder* or *Adnams* --

7           THE PRESIDENT: Well, I say, we are not at the moment --  
8           because there are no experts before us, those cases are  
9           not before us, we are not managing them with these cases  
10          so don't worry about those, but just deal with what  
11          we've got.

12          Presumably in your case Herbert Smith has to keep  
13          tabs on what's been disclosed with each document, to  
14          whom has it gone and which confidentiality ring is it  
15          in: is it inner, is it outer or is it open. They will  
16          have to mark in some system, no doubt a computer system  
17          that they've got, how this is being done, so they should  
18          be able relatively easily to identify what are common  
19          documents.

20          MS BACON: On the basis of the disclosure that we have  
21          currently given, it is a manageable exercise. There is  
22          a real concern that going forward this may become quite  
23          administratively burdensome, and indeed, as I have said,  
24          do we do this in tranches, do we do it every time we  
25          hand over a set of documents, do we then have to

1 identify what has or what might be disclosed to one of  
2 the other claimant groups, or do we do it responsively,  
3 does Ryder every time they want to speak to one of the  
4 experts ask us then "Well, what have you recently handed  
5 over that might have been handed over to another  
6 claimant group?" and so on.

7 It seems to us a rather open-ended exercise and we  
8 are concerned about having quite a large administrative  
9 burden, which I totally take the point that at the  
10 moment we are dealing with a contained group of  
11 claimants, but we also do have to have in mind where  
12 this may roll-out to --

13 THE PRESIDENT: Well, no, we are dealing with the claims  
14 that we are managing together, so it is not rolling out,  
15 it is a quite separate issue. We don't envisage case  
16 managing together 40 actions.

17 MS BACON: Yes, I'm grateful for that indication.

18 THE PRESIDENT: So we are just dealing with these actions.

19 MS BACON: Yes, but there is a practical problem about how  
20 this exercise is going to work.

21 THE PRESIDENT: Yes, I understand the practicality that you  
22 have raised.

23 MR JUSTICE FANCOURT: Every time there is a tranche of  
24 documents disclosed is there not a list of documents  
25 that's provided as well as the electronic or hard copies

1 of the documents themselves?

2 MS BACON: Well, I anticipate that, but it may be that for  
3 example within a data set different data are provided  
4 and that's one example that I'm aware of, that if you  
5 provide a specific set of data, for example on  
6 a spreadsheet, that will be tailored to be responsive to  
7 the request and depending on what is requested, you may  
8 get different data within that so you then have to go  
9 and actually manually identify what lines of data have  
10 been disclosed to the other claimant.

11 With documents, there will inevitably be lists of  
12 documents, but again the question is when do you do that  
13 exercise? We have done some disclosure now, do we do it  
14 next time we give anybody any disclosure? What happens  
15 if we then give a tranche of documents and then some  
16 time later give it to one of the other parties?

17 So there is a practical problem with this which we  
18 haven't yet managed to resolve and Ryder has not put  
19 forward any suggestions for dealing with that.

20 THE PRESIDENT: Yes. Can you pause just a moment.

21 (Pause).

22 Ms Bacon, subject to hearing from Mr Brealey and  
23 indeed any other of the defendants, I mean suppose it  
24 were to proceed this way -- you say it is manageable on  
25 the basis of disclosure so far, so it is done for the

1 disclosure so far. Going forward, if any defendant  
2 receives documents and considers those are documents  
3 they would like to discuss with the representatives of  
4 another party, they then go to you and say "These are  
5 the documents we would like to discuss, can you tell us  
6 to whom have they been disclosed?". Presumably that's  
7 something you can work out pretty quickly.

8 MS BACON: Did you mean claimant in that?

9 THE PRESIDENT: I meant claimant, I'm sorry.

10 MS BACON: Yes, we would be content with that rather than  
11 having some open-ended obligation upon us.

12 THE PRESIDENT: Yes, so do it now with what's been disclosed  
13 to date and that would be a method going forward to deal  
14 with the practical problem.

15 MS BACON: Yes.

16 THE PRESIDENT: It may also assist -- again we will hear  
17 from Mr Brealey but I did ask him about that -- if it is  
18 confined to the inner confidentiality ring because that  
19 reduces the number of documents and I think his concern  
20 was really, and it has been put that way, it is about  
21 discussion between experts.

22 MS BACON: Yes. Can I just take instructions on one point?

23 THE PRESIDENT: Yes of course. If anyone wants to take  
24 instructions please do.

25 MS BACON: Yes. I know that Mr Beard wants to address you

1 but before I sit down, one request is that we then have  
2 liberty to apply in case for some reason the arrangement  
3 isn't working.

4 THE PRESIDENT: Yes of course.

5 MS BACON: Yes and I will let Mr Beard address you.

6 MR BEARD: Thank you. The only reason I pop up is merely  
7 because we are into practicalities and what we are  
8 conscious of is the fact that obviously the Tribunal, in  
9 relation to the cases that are before it today that are  
10 being jointly case-managed, you have been through  
11 a process of rather carefully identifying what  
12 appropriate disclosure is for each of those cases.

13 Now, as it currently stands one of our concerns is  
14 that there shouldn't be any presumption that scope of  
15 disclosure for any particular case is expanded by this  
16 mechanism and we don't hear Mr Brealey to press that  
17 point.

18 What he referred to in his submissions was looking  
19 for common disclosure, but as Ms Bacon has pointed out,  
20 the way the order is currently drafted, it's common  
21 between pairs of defendants and claimants and what we  
22 think will be a practical issue is if this is targeted  
23 at the inner confidentiality ring, targeted at experts,  
24 you may get a strange situation where the different  
25 experts have different sets of disclosure that they are

1           able bilaterally to discuss, as compared to  
2           multilaterally discuss, and that seems to us to be  
3           a practical issue that the experts will struggle with  
4           and generally will be a difficulty.

5           So what we were thinking might be the sensible way  
6           forward, which would enable what Mr Brealey wants, which  
7           is experts to talk about the broad swathe of material in  
8           the inner confidentiality ring, is to allow this in  
9           relation to what is common disclosure amongst the cases  
10          that are going to be governed by this, in other words,  
11          a core set of disclosure, and then all of the experts  
12          know that they are talking about the same stuff, we  
13          avoid these problems of different categories, or cohorts  
14          of disclosure between different experts.

15          We recognise that that exercise would have to be  
16          done by defendants, but we thought that that might be  
17          a better way of facilitating what Mr Brealey wants,  
18          avoiding some of the practical difficulties and  
19          of course, picking up on what Ms Bacon has already said,  
20          we are concerned about there being an automaticity in  
21          relation to future disclosure orders and we think  
22          therefore, as the Tribunal was canvassing a moment ago  
23          with Ms Bacon, the focus should be on the position now  
24          and then we consider it in relation to each future set  
25          of disclosure as appropriate.

1           So there would be a need for a modification of  
2 Mr Brealey's order in order to have the same set of  
3 disclosure for the inner confidentiality ring.

4           So that was our practical suggestion as to how to  
5 deal with this and reduce the risk that experts could  
6 end up talking to one another about material that the  
7 other expert shouldn't know about.

8 THE PRESIDENT: Yes. Mr Jowell for MAN, did you want to add  
9 anything?

10 MR JOWELL: No, it has already been said really. Our key  
11 concern is really that which Mr Beard has just  
12 articulated just now, which is the risk that there may  
13 be a spillover into -- with the experts discussing  
14 matters that have not been disclosed to that party.  
15 That wouldn't be appropriate.

16 THE PRESIDENT: Yes. Well, Mr Brealey, so I think two  
17 points are being made. One is that if it were to be --  
18 initially it is the disclosure you have had to date and  
19 going forward you make requests (inaudible) saying this  
20 is what we would like to discuss (inaudible).

21           Secondly, the point made by Mr Beard and Mr Jowell  
22 to avoid in part the risk of inadvertent disclosure by  
23 an expert of something he or she shouldn't mention and  
24 to just make it more practical that it should be limited  
25 to disclosure that's common to these claims, in other

1 words which all the claimants in these cases have  
2 received.

3 MR BREALEY: Well, the second one -- I have had various  
4 notes passed to me and I might have to take  
5 instructions. The second one to my mind looks to be  
6 where we are heading, which is that if there is common  
7 disclosure then the experts, in order to achieve the  
8 consistency, need to be able to discuss it.

9 THE PRESIDENT: Yes, but it is common to all the claims,  
10 not -- so if there is a document, or a set of data  
11 that's been disclosed in Ryder and Dawsongroup --

12 MR BREALEY: I see.

13 THE PRESIDENT: -- but not disclosed in Royal Mail/BT then  
14 that's not within this arrangement. That's what has  
15 been said as I understand it.

16 MR BEARD: Yes, that's precisely the suggestion and the  
17 defendants would identify what that common core is.

18 THE PRESIDENT: Well, I think --

19 MR BREALEY: This is important --

20 THE PRESIDENT: We see that. Mr Holmes is shaking his head  
21 vigorously, so you may wish to talk to him.

22 MR BREALEY: We are against obviously Ms Bacon's --  
23 disclosure is still ongoing and really that does cut  
24 across the tribunal's ruling on consistency if every  
25 time there's been disclosure, we're going to have to



1 identify segments of the disclosure. We are trying to  
2 ascertain a practical solution here and you are probably  
3 seeing disclosure is actually very slow at the moment  
4 and it is very difficult and we're trying to cut through  
5 it.

6 So Ms Bacon's suggestion, 100% in our submission no,  
7 that is impractical and I would need to discuss with my  
8 team, if the Tribunal allows me, why Mr Beard's  
9 suggestion does not work.

10 THE PRESIDENT: Yes. I think it is a bit early to take  
11 a break.

12 MR BREALEY: Yes.

13 THE PRESIDENT: Shall we park that matter rather than  
14 interrupting now and go on to something else --

15 MR BREALEY: I would be very grateful.

16 THE PRESIDENT: -- and allow you to take instructions and  
17 come back to it.

18 We will move on then to deal with preliminary  
19 issues. We can say straight away we are not going to  
20 make any order for preliminary issues today. What we do  
21 think is valuable is to make some comments in the light  
22 of the observations we have received in the skeletons,  
23 again emphasising that this is not like an ordinary  
24 isolated case.

25 Several of the defendants have cited in their

1 skeletons those well-known authorities about the caution  
2 of the court ordering preliminary issues. I can assure  
3 you all members of this Tribunal are very familiar with  
4 those authorities. It is not a typical case. In this  
5 case some of the preliminary issues we are considering  
6 are precisely because of the fact that we have these  
7 different actions and to achieve consistency.

8 The first one we raise was the question of the  
9 liability of non-addressees. Several parties have said  
10 "Well, it's actually not very significant in this case".  
11 We have an open view on that, but in any event I think  
12 it is clear in the light of the reference from the  
13 Barcelona court in the Sumal v Mercedes case, it  
14 wouldn't be appropriate to order anything now and we  
15 should await the outcome of that reference.

16 We also thought that this is a possible candidate  
17 for dealing with the question a different way. If it  
18 turns out that it is significant in these actions then  
19 several parties have pointed out it is quite fact  
20 dependent in terms of what knowledge subsidiaries had,  
21 whether their actions could amount to implementation and  
22 so on. One way one might think about approaching it is  
23 to say it won't be a preliminary issue, there will be  
24 the separate trials finding the facts, and then after  
25 that there is a joint hearing, as it were, a subsequent

1 issue, determining, well, on the facts as found, what is  
2 the legal position. Then having found the facts  
3 separately one can have a consistent legal answer by  
4 hearing the legal argument together.

5 So that's an idea that I would just like to throw  
6 out for people to think about. But given that the  
7 reference from the Barcelona court was only made I think  
8 just before Christmas and the timeframe for references,  
9 it will be some time until we return to that matter.

10 The second candidate was pass-on and I think there  
11 is a general consensus that we now should await the  
12 decision of the Supreme Court in the Sainsbury's case  
13 because pass-on became rather more prominent there.  
14 Whether or not it is an appropriate candidate for  
15 a preliminary issue is something we should revisit when  
16 we have received the judgment of the Supreme Court. And  
17 I don't think one needs to say more about it at this  
18 stage unless anybody has a burning desire to do so.

19 Mr Lask, you do.

20 MR LASK: I may be premature in raising this but we have an  
21 application for a hearing within six weeks of the  
22 judgment of the Supreme Court to deal with this and it  
23 may be that you prefer to deal with that later.

24 THE PRESIDENT: I think we have in mind that there should be  
25 a further CMC listed. It may not be after the

1 Supreme Court's hearing, probably before in any event,  
2 so we can come back to it, but this is not the last CMC,  
3 clearly, before trial, so you need not worry about that.

4 There is another aspect which is not strictly  
5 pass-on, but we were alerted to because of the statement  
6 in the Daimler summary of its experts' methodology,  
7 which is described as not pass-on but mitigation and if  
8 I could just ask the parties to look at the statements  
9 in response to our ruling, the three page statements,  
10 they are in common bundle C, volume 2. The Daimler  
11 statement is at tab 23 and for those on Magnum this is  
12 {COM-C/23/1}.

13 If one turns to the second page {COM-C/23/2},  
14 paragraph 9. It is the next page on the electronic  
15 bundle, in the middle of paragraph 9 -- well, the whole  
16 of paragraph 9:

17 "At the outset, a distinction needs to be drawn  
18 between mitigation and pass-on."

19 Reference to what the Court of Appeal said in  
20 Sainsbury's. And then the next sentence:

21 "Mitigation, on the other hand, involves reducing  
22 'other' costs such as negotiating with suppliers or  
23 employees or cutting spending or long-term investments."

24 Then it talks about disposing of a truck and  
25 buy-back, but that is perhaps resale pass-on.

1           Then at paragraph 11, the next page please  
2           {COM-C/23/3}.

3           "On the current state of English law, pass-on and  
4           mitigation by way of reducing costs require a detailed  
5           understanding of a claimant's business, including how  
6           the costs associated with Trucks were recovered in the  
7           claimant's business over time."

8           Et cetera.

9           Raising a lot of matters. Now, pass-on, we  
10          understand. Mitigation, what concerned us, Mr Harris,  
11          is there seemed to be there an argument on mitigation  
12          that's being put which we did not see from your client's  
13          pleaded defence and at the moment it did not appear to  
14          us was open to you on the defence as it stands.  
15          Mitigation as you know has to be pleaded, if a defendant  
16          is raising mitigation. We can look at your defences,  
17          but it is not clear to us on what basis that's being  
18          advanced.

19         MR HARRIS: Well, sir, I accept entirely that it needs to be  
20          clear in the pleading and so may I respectfully suggest  
21          that we take the opportunity over the short adjournment,  
22          or any adjournment, we can go back and if that's  
23          a debate that you would like to further explore this  
24          afternoon or tomorrow, I'm happy to do so, but it is  
25          clearly a point that we wish to take, so if it is not

1           sufficiently pleaded then we will promptly make it  
2           sufficiently pleaded.

3       THE PRESIDENT: Well, you will need to seek permission to  
4           amend your pleading and it may be that it is opposed.

5       MR HARRIS: Yes, I understand that.

6       THE PRESIDENT: But the question of whether that is an  
7           argument that's open to you as a matter of law will then  
8           come not as a preliminary issue but on your application  
9           to amend the pleading.

10      MR HARRIS: Yes, I accept that as well. What I would say is  
11           that this is clearly foreshadowed, this argument, in the  
12           witness statement of Mr Grantham. That was one of the  
13           two witness statements that were put in for the purposes  
14           of the economic disclosure hearing. As you will  
15           appreciate and recall, we didn't reach the full, if you  
16           like, battle on pass-on disclosure and I don't  
17           believe -- I'm not saying that this impacts unduly upon  
18           what you have just say said, sir, on behalf of the  
19           Tribunal, but I don't believe any claimant has  
20           previously said "Oh, well, hang on a minute, we don't  
21           understand this to be part of your case" and nobody  
22           objected back in the context of Mr Grantham's statement  
23           to --

24      THE PRESIDENT: Well, in any event, as I say, our view when  
25           we looked at -- albeit quickly I have to say -- your

1           defence in the Ryder case, and I imagine your case in  
2           the Dawson group case is similar, was it didn't appear to  
3           be pleaded and it does seem to be -- nor did we see any  
4           other defendant making that point and if it is going to  
5           be therefore the subject of a draft amended pleading, we  
6           might want to hear argument on it.

7           MR HARRIS: I entirely accept that.

8           MR MALEK: Just one point, which is ordinarily you have  
9           a situation where someone has done a wrong, you suffer  
10          a loss and you expect the claimant to mitigate as  
11          a result of knowing that you have suffered a loss. Here  
12          you have a situation whereby the claimants weren't aware  
13          for a very long time that they had suffered a loss at  
14          all, or there had been any wrong at all because it is  
15          only after a very long period of time that they actually  
16          realised that something had happened. So it is very  
17          hard to see how you could expect someone to mitigate at  
18          a time when they weren't aware of a loss or a wrong.

19          MR HARRIS: Well, Mr Malek, I accept that that is likely to  
20          be a relevant consideration in the legal argument, but  
21          if there is to be a legal battle about it then there  
22          will be counterpoints as well.

23          MR MALEK: Of course.

24          MR HARRIS: But the first point I entirely accept. If it is  
25          not sufficiently pleaded then that will have to be

1 regularised and if that precipitates a battle in the  
2 context of an amendment application -- if -- then so be  
3 it.

4 THE PRESIDENT: Yes. And that is really said for the  
5 benefit of the claimants and in particular of course  
6 Ryder and Dawsongroup who are the parties claiming  
7 directly against Daimler and therefore we think it  
8 needn't be approached by way of preliminary issue, it  
9 may be on the amendment and permission to amend.

10 MR LASK: Sir, we will obviously wait and see whether an  
11 application to amend is made and we will consider it  
12 very carefully, but may I just remind the Tribunal that  
13 there was a lively debate on this point between  
14 Dawsongroup and Daimler in advance of the September  
15 disclosure hearing where we made the point forcefully  
16 that we thought the disclosure being sought by Daimler  
17 was based on a misapprehension of the relevant legal  
18 tests, so just to lay down that marker if it is not  
19 already clear enough, that we do have concerns about the  
20 legal basis for the foreseen mitigation argument.

21 MR MALEK: As I understand it Daimler have used the word  
22 "mitigation" in their pleading. It is not necessarily  
23 the arguments are being put in such an expansive way as  
24 currently done. So I think what we need to do is after  
25 the break look at the pleading and see where we are, see



1           whether that pleading needs amendment, if he is going to  
2           make that argument, but also whether it is a pleading  
3           that at some stage parties may want to have considered  
4           as a preliminary issue, or a strike-out.

5           THE PRESIDENT: And I don't think it arises, Mr Lask, on  
6           from what we have seen as regards DAF and Volvo/Renault.

7           MR LASK: We don't understand it to arise in relation to  
8           either of those defendants. It is a pure Daimler point.

9           THE PRESIDENT: Yes. Yes, Mr Jones.

10          MR JONES: Sir, I mentioned earlier that a point arises in  
11          the Iveco amended defence and that also I think is  
12          a mitigation point and, sir, could I show you that  
13          because it is linked and I also want to address the  
14          question of how we deal with these and whether it should  
15          be by way of strike-out?

16          THE PRESIDENT: Yes.

17          MR JONES: The Iveco amendment at VSW-D1/405 and I wanted to  
18          go to page 9 {VSW-D1/405/9}. Should I have said --  
19          shall we go there in Magnum?

20          THE PRESIDENT: Yes please.

21          MR JONES: This is in the Wolseley proceedings and you will  
22          see at paragraph 36 what is said in 36.1 is:

23                 "In the event that any claimant was acquired  
24                 subsequent to the commencement of the relevant period,  
25                 the purchasing claimant must give credit for any lower

1 purchase price that may have been paid as a result of  
2 the admitted conduct ..."

3 MR MALEK: Yes, well, that's completely separate from the  
4 mitigation point.

5 MR JONES: The reason I said it comes within that broad  
6 umbrella is that as I understand it it is essentially an  
7 argument that "You paid less for an entity that you  
8 bought than you otherwise would have done".

9 MR MALEK: It is saying "You have paid less", it's not  
10 a question of you taking an active step to mitigate your  
11 loss.

12 MR JONES: Sorry, yes, I absolutely accept that, although  
13 Mr Harris' points are also, lots of them, points about  
14 "You have paid less for other costs".

15 MR MALEK: That's a different point, yes.

16 MR JONES: So that's the argument which is made and looking  
17 at this paragraph, what it has in mind there is  
18 a situation where there are two claimants, two claimants  
19 in the claim and the reason there would be two claimants  
20 is that they both bought trucks and they both suffered  
21 loss and one of the claimants happened to have purchased  
22 at some point -- maybe a corporate restructure, maybe  
23 acquiring from elsewhere -- the other claimant, but they  
24 are both pursuing their own loss, and what is said is --  
25 as one can see -- the purchasing claimant has to

1 "give credit" and the credit which they have in mind, on  
2 their hypothesis, is you may have bought the claimant  
3 which you acquired for less because it may have been  
4 making a lower profit because of the cartel. That's the  
5 hypothesis. And that's the way it is put here and we  
6 don't accept that there is any basis in law for that, we  
7 don't accept there is any link sufficient to make any  
8 sort of mitigation or other argument for giving credit.

9 There has been quite a lot of correspondence on this  
10 and the reason for that, sir, is that it was actually  
11 initially pleaded by Daimler who then deleted it and we  
12 don't have the clean Daimler version in the bundles, we  
13 have only got the deleted one, but because of that it  
14 gave rise to disclosure requests. My clients -- I don't  
15 think it is necessary, sir, to show you all of this.

16 THE PRESIDENT: No.

17 MR JONES: But my clients said that they were considering  
18 striking it out. Daimler then dropped it -- although as  
19 I understand it they say they haven't quite dropped it,  
20 but it is certainly deleted from their pleading and then  
21 Iveco take up the argument here and they want to run it.

22 Now, sir, we are then back to scratching our heads  
23 as to the best way of dealing with it. I said at the  
24 outset we may just object to the amendment, that might  
25 be the easiest way of dealing with this point. On the

1 other hand, as I say, it does in some respects touch on  
2 mitigation, so on reflection it occurred to us it may  
3 be, if the Tribunal is going to wait until the  
4 Supreme Court's judgment on pass-on and then possibly  
5 have preliminary issue hearings on pass-on, this might,  
6 although it is not -- we have not thought of it as  
7 pass-on as such, but it may be sensible for this to be  
8 at the same time, but, sir, I'm in your hands. We want  
9 it resolved --

10 THE PRESIDENT: I don't think this is pass-on and I don't  
11 think it is featured -- there are counsel here who were  
12 in that appeal but I suspect it is not, but what you --  
13 at the moment this amended or re-amended defence, has it  
14 been subject to an order giving permission?

15 MR JONES: No, no. It has been circulated and it has caused  
16 us to wonder whether to agree and then apply to strike  
17 out, or to simply not accept it and at the moment we are  
18 proposing not to accept this, which will then bring  
19 about an argument. But, sir, for reasons I have  
20 explained, it won't I think only be an argument of  
21 interest to Iveco, it will clearly be of interest to  
22 Daimler who have raised the point before and some of the  
23 other defendants who have also said although it is not  
24 pleaded they want disclosure on it.

25 So there it is, sir, and we will we think probably

1           require a day to have argument over this.

2       MR MALEK:   And obviously the relevant defendants will have  
3           to consider anyway were they to blow out the candle to  
4           pursue this.

5       MR JONES:   Well, yes, sir.

6       THE PRESIDENT:  It is slightly odd if they are both  
7           claimants then the other claimant could claim for the  
8           lower price it received, the loss resulting --

9       MR JONES:   I'm not sure about that, sir, because of course  
10          the company which sold the other claimant wouldn't be  
11          a claimant in these proceedings.

12      THE PRESIDENT:  Yes, I see.

13      MR JONES:   So no.

14                I should say also, as it has transpired in  
15                correspondence the point is put also in a slightly  
16                different way, which is where one claimant purchases not  
17                another claimant but another business entity and in the  
18                course of that transaction acquires the causes of action  
19                from that business entity in a similar way, as  
20                I understand it, as is said you have to "give credit"  
21                for that.  So those two points -- very similar, but they  
22                deal with slightly different issues -- are what we would  
23                like to bring on and, as I say, sir, it may well be that  
24                we simply do that by way of objecting to this  
25                application and then have the argument.

1 THE PRESIDENT: Yes, just a moment.

2 MS BACON: I can confirm it is completely unrelated to  
3 either pass-on or mitigation. It is a quantification  
4 point and it is simply providing further particulars of  
5 matters that will need to be taken into account when the  
6 claim is quantified. It goes to the loss that is shown.

7 THE PRESIDENT: Yes, but it may involve disclosure about --

8 MS BACON: Yes, it may involve disclosure but it is not  
9 a new point of either pass-on or mitigation, it falls  
10 squarely within the requirement for the claimants to  
11 show their loss and it raises several issues which will  
12 need to form part of that quantification.

13 THE PRESIDENT: Yes.

14 (Pause).

15 We think it is up to the relevant claimant when they  
16 receive an application to amend -- in your case, this  
17 was Wolseley, I don't know if it applies to the  
18 others -- and for Ryder and Dawsongroup, when Daimler  
19 applies to amend, to decide either they consent to the  
20 amendment and seek to strike out, or they object to the  
21 amendment and it is argued on the application to amend  
22 or they do neither, but we have made it clear that these  
23 issues can be addressed now and they are not affected by  
24 the point I made before, that on other issues of pass-on  
25 we're going to wait until the Sainsbury's judgment.

1 MR JONES: Yes. Very grateful, sir.

2 MR BREALEY: Can I just make one point?

3 THE PRESIDENT: Yes.

4 MR BREALEY: I can do this after --

5 THE PRESIDENT: No, do it now.

6 MR BREALEY: To assist Mr Harris, which is -- it may be best  
7 to wait for any application to amend until the  
8 Supreme Court judgment. The reason for that is that the  
9 Supreme Court may delve into the relationship between  
10 pass-on and mitigation and mitigation takes at least two  
11 forms: avoidable loss and avoided loss, and pass-on  
12 doesn't fall within the first, it is no duty because you  
13 don't know where, but it may fall within the second,  
14 that is avoided loss.

15 So before we put Mr Harris and his clients to  
16 expense, it may be desirable to wait until the  
17 Supreme Court because it may give some guidance as to  
18 what actually the domestic law on pass-on is grounded  
19 on. Is pass-on grounded on mitigation, avoided loss and  
20 so on. I just throw that out because --

21 THE PRESIDENT: Yes, well, there we are. It seems on that  
22 basis, Mr Harris, there's an invitation to you to wait  
23 and know what (inaudible) against Daimler if they do  
24 wait and produce whatever amendment they think  
25 appropriate following the Supreme Court judgment.

1 MR HARRIS: I'm grateful for that indication, thank you. We  
2 will have a look over the short adjournment but it may  
3 be we don't need to revisit that orally in this hearing.

4 THE PRESIDENT: I suspect we don't.

5 MR LASK: Sir, I'm sorry to rise. We can see the sense --  
6 based on what Mr Brealey has just said, we can see the  
7 sense in Daimler waiting until it has seen the  
8 Supreme Court's judgment, but we would ask the Tribunal  
9 to lay down a timetable within which Daimler has to  
10 apply to amend following that judgment, rather than  
11 just --

12 THE PRESIDENT: I don't think we need lay down a timetable.  
13 The later they do it, they then face objections it is  
14 too late as a reason the amendment won't be allowed and  
15 they will be well aware of that.

16 The next point was foreign law. That arises only in  
17 VSW. It may be appropriate, given that there is  
18 a German law limitation issue, but I think those parties  
19 involved all pointed out that this is a matter pending  
20 before the federal Supreme Court of Germany and it would  
21 be inappropriate to do anything before the Supreme Court  
22 has given its judgment and that, it is clear, is not for  
23 some considerable time because I think I saw somewhere  
24 that the oral hearing in the Supreme Court is only  
25 next October/November, so that's quite a way down the



1 line and I don't think we need say any more about it and  
2 just park that issue.

3 Finally, before we take a break, on preliminary  
4 issues, there is the very isolated question arising in  
5 the VSW action of the Iveco Daily range, which was  
6 mentioned before, and I think, Mr Jones, Iveco is really  
7 seeking clarification from your clients of your  
8 position.

9 MR JONES: Sir, they are, and we will give it. I should say  
10 we don't accept the criticisms that are made, but it may  
11 not matter. We will do what they have asked, which is  
12 confirm within 14 days, I think was asked, whether we  
13 agree to the number and whether we pursue them and  
14 I think that -- that I think is what's been asked for  
15 and then following from that, sir, we are back into the  
16 procedure which you outlined at one of the earlier CMCs  
17 which is we then liaise on a possible preliminary issue  
18 and the evidence that would be required and so on and so  
19 forth.

20 THE PRESIDENT: Yes, because it was thought -- it is purely  
21 because of the volume of disclosure and the cost that it  
22 gives rise to -- that it is worth deciding as  
23 a preliminary issue. That was the intimation we had.  
24 We can revisit that at the CMC before the summer.

25 MR JONES: Yes. I think, sir, you set in train discussions

1 with a view to us essentially telling the Tribunal what  
2 would be involved in a PI hearing. There was no final  
3 decision.

4 THE PRESIDENT: No, we haven't decided it, to have such  
5 a hearing, but we could see the logic.

6 MR JONES: Yes.

7 THE PRESIDENT: So within 14 days whether you agree to --  
8 well, not just whether you agree to a number and if not  
9 what you say the number is.

10 MR JONES: Precisely.

11 THE PRESIDENT: What the number is and secondly whether you  
12 are going to pursue the claim in respect of those  
13 vehicles and on that basis, if appropriate, we can  
14 return to Ms Bacon. That seems a sensible way forward.

15 MS BACON: Yes, and that is what we would like from this  
16 hearing.

17 THE PRESIDENT: Well, in that case I think it is now --  
18 sorry, Mr Beard.

19 MR BEARD: I'm sorry, Mr President. Just so that it doesn't  
20 drop off the radar, we're not seeking any direction at  
21 the moment but there is the Royal Mail/BT hurdle rates  
22 issue that has been canvassed at previous hearings.  
23 There's correspondence going on, the Tribunal doesn't  
24 need to worry about it today but I didn't want it to  
25 just completely drop off the radar. Thank you.

1 THE PRESIDENT: Yes, thank you.

2 We will rise, I think to give Mr Brealey a proper  
3 opportunity we should rise for ten minutes. A lot of  
4 the issues have, by sensible cooperation, fallen away so  
5 we're not under particular time pressure. So we will  
6 come back at 12 noon.

7 (11.48 am)

8 (Short Break)

9 (12.10 pm)

10 THE PRESIDENT: Yes, Mr Brealey.

11 MR BREALEY: As usual the devil is in the detail and maybe  
12 I was giving too much charity to Mr Beard, but the  
13 position is that we define "common" as common between  
14 a pair of claimant groups -- this is actually quite  
15 important -- between any pair.

16 As I understand Mr Beard's proposal, it has to be  
17 common to DAF, so the only documents that would be  
18 common would be those where the claimants -- is DAF  
19 because the claimants were all suing DAF. And that  
20 significantly reduces the ability of the claimant  
21 experts to achieve consistency and can I illustrate that  
22 by two examples.

23 If we go first to Iveco's three-pager, which is at  
24 Magnum {R-A/120}.

25 THE PRESIDENT: Yes.

1 MR BREALEY: And go to page 2 {R-A/120/2}, paragraphs --  
2 this is Iveco, so paragraphs 3, 4 and 5 essentially are  
3 talking about the before infringement data.

4 THE PRESIDENT: Yes.

5 MR BREALEY: "Iveco agrees with the Tribunal ... agreed  
6 methodology would be preferable ... Iveco's Economic  
7 Advisor agrees with the VSW and Ryder claimants'  
8 experts ... temporal comparison using regression  
9 analysis. However, different analyses may ultimately be  
10 appropriate.

11 "As acknowledged by the VSW claimants ... data  
12 availability is very limited ..."

13 Therefore they doubt whether a before  
14 infringement -- but it would mean on Mr Beard's proposal  
15 as we understand it, that Ryder's expert NERA would not  
16 be able to discuss it with VSW and Mr von Hinten-Reed.  
17 Now, on our definition of common, it would, be because  
18 both VSW and -- maybe Mr Beard is going to get up and  
19 say we've got that wrong. When I was listening to him  
20 I thought that he was having a pragmatic approach to  
21 what was common, which is very similar to ours, so it  
22 would be any pair. But I see him rise. If he is of the  
23 view that common is the lowest common denominator, so it  
24 has to be common to all the claims today, then it  
25 significantly reduces the ability for us to discuss with

1           other experts as regards the other claimants' data.

2           MR BEARD: I just want to be clear what I was saying. If

3           I somewhat solipsistically just focus on that. What

4           I was talking about was the common disclosure that we

5           have given to the relevant claimants that are being

6           case-managed together. So we're not talking about VSW

7           material here, we're just saying there's a common core

8           of disclosure that has been given to all the claimants,

9           that can be identified, that can be the focus of the

10          discussion between the experts and yes, as Mr Brealey

11          says, we do have concerns about their definition of

12          "common" only on a bilateral basis in the order because

13          of the problems with multilateral expert discussions but

14          I won't go back into that.

15          THE PRESIDENT: Yes. I mean, Mr Brealey, it seemed to us

16          the problem is not so much for Ryder's expert because

17          your client has brought proceedings against all five,

18          but the problem is more for Mr Harvey who is the expert

19          for, as it happens not just Royal Mail and BT but also

20          Dawsongroup, because Dawsongroup have not sued two of

21          the five, and therefore as I understand it Mr Beard's

22          proposal -- and this is therefore, Mr Lask, your clients

23          would not have received any disclosure from Iveco or

24          MAN. So you won't have had any at all.

25          MR LASK: That's right.

1 THE PRESIDENT: Also there won't be any -- under Mr Beard's  
2 qualification and Mr Jowell is aligned with that --  
3 opportunity for the two other experts to discuss with  
4 Mr Harvey any thoughts they have as a result of the  
5 disclosure they have seen from MAN or Iveco.

6 MR LASK: We see that and whilst, as we have said in our  
7 skeleton, we support Ryder's application, we haven't  
8 pursued the application in our own right and we haven't  
9 yet identified any difficulties in our inability so far  
10 to discuss disclosure emanating from defendants that  
11 aren't involved in our claims, so whilst the observation  
12 is correct, it is not something that we have identified  
13 as a difficulty for us so far.

14 THE PRESIDENT: Yes, but it may make the discussions between  
15 experts a little constrained.

16 MR LASK: Well, I can see that. It may be that the Tribunal  
17 is intending to come on to discuss what it envisages  
18 experts discussing, but at the moment again we haven't  
19 necessarily pursued any application at this stage that  
20 the experts should be coming together to discuss the  
21 various three-page methodology statements, so whilst we  
22 will wait and see what the Tribunal may have in mind in  
23 that respect, no difficulties have arisen on our part to  
24 date.

25 THE PRESIDENT: Yes.

1 MR BREALEY: I am still not clear from Mr Beard's statement,  
2 sir, whether if one takes paragraphs 4 and 5 of the  
3 Iveco three-pager, whether NERA, our expert, can discuss  
4 Iveco's data with Mr von Hinten-Reed who is VSW's, so,  
5 as I understand it, the defendants -- there are separate  
6 confidentiality rings and I think everyone has  
7 acknowledged that they have to be amended if the  
8 claimants are going to speak.

9 THE PRESIDENT: Yes.

10 MR BREALEY: But clearly there is going to be an issue on  
11 the before infringement regression and that depends to  
12 a certain extent on the data that is provided and in  
13 order to achieve consistency, the claimants' experts  
14 have to cooperate on that.

15 THE PRESIDENT: Well, as I understood Mr Beard what he is  
16 saying is that insofar as DAF has disclosed to VSW  
17 documents that they have also disclosed to Ryder, then  
18 your expert, Dr Wu, can talk to Mr von Hinten-Reed in  
19 the knowledge, as it were, or expressing views resulting  
20 from their review of those documents.

21 MR BREALEY: Then I'm most grateful because that would then  
22 support how I had understood it, which was it is how the  
23 Commission file disclosures is discussed, which is it is  
24 common to at least two claimants.

25 THE PRESIDENT: Yes.

1 MR BREALEY: And that would mean, on Mr Beard's  
2 interpretation, that indeed, if our confidentiality ring  
3 was amended in the way he suggests, we could discuss  
4 this with Mr von Hinten-Reed of VSW. So it is not DAF  
5 data any more, this is VSW's data. So our  
6 confidentiality ring would need to be amended -- so  
7 leave DAF out of the picture for a moment, this is just  
8 if NERA want to discuss with Mr von Hinten-Reed Iveco's  
9 position on before infringement and the nature of the  
10 data, they need to have that conversation. And what we  
11 are trying to do is achieve a situation, a practical and  
12 pragmatic situation that Mr von Hinten-Reed and Dr Wu  
13 can discuss the nature, the quality of Iveco's data so  
14 as to come to a position on the before infringement  
15 price regression.

16 THE PRESIDENT: On the basis of data that both of them have  
17 received.

18 MR BREALEY: Exactly, it is received --

19 THE PRESIDENT: And Iveco has provided and Ryder has  
20 received.

21 MR BREALEY: Correct.

22 THE PRESIDENT: Yes, that's my understanding and the only  
23 question is what then happens if they want to bring  
24 Mr Harvey into the discussion, who is not advising  
25 anyone who has sued Iveco?



1 MR BREALEY: No, because, as the Tribunal is aware, the  
2 Royal Mail -- not Dawsongroup, but Royal Mail -- has  
3 only sued DAF.

4 THE PRESIDENT: Yes, but as it happens it makes it rather  
5 easier --

6 MR BREALEY: It does.

7 THE PRESIDENT: -- that Dawsongroup has the same expert  
8 as~...

9 MR BREALEY: Very difficult --

10 THE PRESIDENT: So he has seen those documents anyway.

11 MR BREALEY: Absolutely.

12 THE PRESIDENT: But not Iveco and not MAN, so that's where  
13 he can't be party to the discussion between  
14 Mr von Hinten-Reed and Dr Wu.

15 MR BREALEY: So from Ryder's perspective clearly we want to  
16 be able to discuss with the other claimants' experts as  
17 much as possible because it is inefficient and it is  
18 causing extra cost. Clearly if Mr Harvey can be brought  
19 in somehow -- it is consistent with the tribunal's  
20 disclosure ruling.

21 THE PRESIDENT: Well, one possibility would be -- because  
22 not to limit the -- think in terms of the inner ring,  
23 which is, despite its name, actually quite large,  
24 several hundred people, as we understand it, but to say  
25 this is really to facilitate discussion between experts.

1           They're not actually going to see the documents which  
2           have not been disclosed to the party who has instructed  
3           them, they just want to have a discussion based on their  
4           knowledge of those documents and what it suggests in  
5           terms of method and what problems it shows up in terms  
6           of method to say that there should be a much tighter  
7           ring of the experts.

8           MR BREALEY: Plus maybe one or two representatives from the  
9           legal advisors.

10          THE PRESIDENT: Maybe. I'm not sure about that. Possibly  
11          just the experts, in which case they should be able to  
12          speak freely, even with knowledge of documents that they  
13          have had in another case. They can have that discussion  
14          and that will inform their view of how to get  
15          a consistent approach. And it may be one can't have  
16          a consistent approach. It may be that Dr Wu and  
17          Mr von Hinten-Reed say "Well, we think we need to do  
18          this because of the nature of our client's case against  
19          Iveco" and Mr Harvey said "Well that doesn't concern  
20          me".

21          MR BREALEY: I see the sense of that. I would still say  
22          that you may need one or two people to give instructions  
23          to the experts so there is some sort of communication  
24          back, but certainly a much tighter inner ring relating  
25          to the quantum disclosure, we would welcome.

1 THE PRESIDENT: Yes. I think there are problems when you  
2 get a lawyer receiving information in a case in which  
3 their client is not a party -- I think they can get  
4 instructions separately from their lawyers, but for the  
5 purpose of this discussion -- I speak for myself, but we  
6 have discussed this over the short adjournment as  
7 well -- I am not persuaded that any lawyers need to be  
8 there for the purpose of the discussion. Then  
9 afterwards they report back of course saying "This is  
10 the view I have come to". And that that might be  
11 a feasible way of doing it.

12 MR BREALEY: Well, certainly -- then we could maybe -- we  
13 could see how it goes. If it doesn't work, it doesn't  
14 work, because clearly experts need to have some sort of  
15 instruction, they can't -- rather than independent --

16 THE PRESIDENT: Rather than sharing it with the whole of the  
17 inner ring, because these inner rings are very big now.

18 MR BREALEY: From our perspective in the light of the  
19 disclosure ruling, and it is common sense we would  
20 respectfully submit, it is important for NERA to be able  
21 to discuss ...

22 THE PRESIDENT: Yes, we understand that.

23 Let's hear from Ms Bacon first because it is really  
24 your --

25 MS BACON: Yes. I am concerned that we are sort of creeping

1 beyond the scope of the application, which was that the  
2 discussion should take place between experts who had  
3 received common disclosure to both of them, so as far as  
4 we were concerned and what we were discussing at the  
5 start of this morning was for Iveco's part that Ryder's  
6 expert can talk to VSW's expert and that's really it  
7 because we're not in any of the other proceedings and  
8 I am concerned that there is now a suggestion that other  
9 experts could be brought in when those -- Dawsongroup  
10 hasn't actively, as we have heard, pursued this  
11 application itself, nor has Royal Mail and BT. They  
12 have supported Ryder's application but they have not  
13 said that they need their expert to be in on any of  
14 these discussions, so I would be concerned going  
15 significantly beyond what Ryder is asking and suggesting  
16 that an expert who has not specifically said that they  
17 need to see our disclosed data, in a case in which we  
18 are not party yet, to be having discussions of that  
19 nature.

20 We would be content, as I said before the  
21 adjournment, if this were confined to Ryder and VSW,  
22 which are the two cases that we're in, and documents  
23 that we have already disclosed for the time being.

24 MR MALEK: But no one is suggesting that an expert is going  
25 to be given disclosure from the other case, from the

1 other actions, that has not already been disclosed in  
2 his case. What the suggestion is is that the expert  
3 should be free to discuss methodology by reference to  
4 the documents that they have, that have been disclosed  
5 to them, even if the other expert doesn't have copies  
6 himself because what we are looking at is results at the  
7 end of the day.

8 MS BACON: Yes.

9 MR MALEK: And if you look at the disclosure ruling it is  
10 pretty clear, we do want the experts to freely discuss  
11 methodology and come up with something that works across  
12 the board.

13 MS BACON: Yes and if it is a question of them saying "Well,  
14 having seen what we have seen, we think this is  
15 an appropriate methodology", but I thought the purpose  
16 of this order was that they could actually sit down  
17 there and look at the underlying data and if that's  
18 what's going to happen then that would involve the  
19 experts seeing those underlying documents and that's the  
20 problem, because Mr Brealey was saying -- and  
21 the Chairman put to me -- this is not just about a high  
22 level discussion regarding methodology, but the data on  
23 which that's based.

24 THE PRESIDENT: I think there is a distinction between on  
25 the one hand them seeing the documents, and I understand

1           your point they shouldn't see documents that the party  
2           that's instructing them hasn't received, and being able  
3           to have a discussion in which they can make reference to  
4           the nature of the data that they have seen, but not  
5           actually producing it.

6           MS BACON:   Yes.

7           THE PRESIDENT:  Because the terms of the disclosure rings  
8           and the confidentiality is quite strict.  It's not just  
9           that you don't hand over the document, you also don't  
10          talk about it.

11          MS BACON:  Yes.  The problem is policing that and what do  
12          you mean by making reference to the data.  And I would  
13          emphasise that neither Royal Mail/BT nor Dawsongroup  
14          have said that they need to be party to those  
15          discussions and Mr Brealey's application for his part  
16          really concerns his ability, as I understood it from the  
17          example that he gave, the ability of his expert to  
18          discuss with VSW's expert and within those confines, as  
19          I have said, we can manage that.  We would be concerned  
20          if it went beyond that.

21          THE PRESIDENT:  Mr Beard, you wanted to ...

22          MR BEARD:  I think Ms Bacon has made the key points.

23          Policing this becomes very difficult, because it is one  
24          thing to be saying these experts can refer to this  
25          material to inform their discussion and methodology, but

1 as soon as it gets into talking about the specific data  
2 that's in documents and the quality of that data and  
3 problems with analysing that data, you are in the  
4 territory of parties' experts receiving material that  
5 otherwise those instructing them haven't received and  
6 indeed their clients haven't received quite properly and  
7 we think that is inappropriate in the circumstances. It  
8 was why we put forward the proposal we did and we do  
9 adopt the point that Ms Bacon has made that this appears  
10 to be a point that is not hampering any other experts in  
11 terms of the development of their methodology. After  
12 all, these experts are receiving an awful lot of  
13 material through disclosure and they have an awful lot  
14 to look at.

15 THE PRESIDENT: I think we will rise for five minutes.

16 (12.30 pm)

17 (Short Break)

18 (12.36 pm)

19 THE PRESIDENT: Well, we have considered all we have heard.

20 We think that the terms of the confidentiality ring  
21 should be amended to allow only the experts and that of  
22 course includes not just the main expert, but also those  
23 assisting them from within their respective economic  
24 consultancies, to discuss between them documents that  
25 are commonly disclosed to the parties by whom they have

1           been instructed.

2           Therefore that would mean that the experts from NERA  
3           could discuss with the experts from CEG, documents that  
4           the claimants, by whom they are instructed, have  
5           received, when both the claimants have received that,  
6           but they could not discuss those documents with the  
7           experts from Economic Insight instructed on behalf of  
8           Dawsongroup and others, except insofar as Dawsongroup  
9           had received those documents. For the present it should  
10          be experts only who are given that permission. If that  
11          proves problematic then we can hear a further  
12          application.

13          As regards disclosure that has been made to date, we  
14          think the defendants should identify, by a date to be  
15          specified, which documents or category of documents has  
16          been disclosed to other claimants, in other words  
17          commonly disclosed, and to whom.

18          As regards disclosure going forward, we think the  
19          defendants, when making disclosure to any claimant,  
20          should inform that claimant whether the documents are  
21          also being disclosed to another claimant, either  
22          concurrently or have already been disclosed to another  
23          claimant and we do not see that in this age of computer  
24          programmes and the way these cases are being managed by  
25          sophisticated and highly experienced solicitors, that



1           that should cause a practical problem and we think that  
2           should deal with the matter for the time being.

3           The only question is how long the parties, the  
4           defendants want to supply that information.

5       MR HARRIS: Sir, just for the complete avoidance of doubt,  
6           that's only claimants within these currently  
7           case-managed --

8       THE PRESIDENT: Oh, yes. We're not making any orders about  
9           anyone who is not before the Tribunal.

10      MS BACON: Sir, I am instructed to ask for three weeks for  
11           that.

12      THE PRESIDENT: Yes, that seems reasonable.

13      MR BEARD: I was going to suggest that it might be sensible  
14           if there was liaison over the short adjournment and we  
15           came back --

16      THE PRESIDENT: Yes, if you let us know after the lunch  
17           adjournment. Thank you.

18           Moving on, on disclosure applications I think that  
19           between Dawsongroup and Volvo/Renault the issue has now  
20           been agreed and there is a consent order.

21      MR HOSKINS: That's correct.

22      THE PRESIDENT: Which we have been asked to make and we are  
23           happy to do that in the terms that have been supplied to  
24           us.

25           We understand, Mr Brealey I think, Ryder is asking

1           for an equivalent order, is that right?

2       MR BREALEY:   Yes.

3       MR HOSKINS:   They are and we have written and said we are  
4           happy for them to be in the same position.

5       THE PRESIDENT:  So if that can be drawn up and we will make  
6           an order in those terms.  Thank you very much.

7           There is the only other matter I have noted as  
8           regards disclosure is that I think, Mr Kennelly, you  
9           have said that because VSW have floated the suggestion  
10          of test cases, although they are not asking us to do  
11          anything in that regard at the moment, you want a stay  
12          of part of an existing order for disclosure concerning  
13          Sweden, is that right?

14       MR KENNELLY:  Sir, yes, that's correct.

15       THE PRESIDENT:  Can you just explain how that arises.

16       MR KENNELLY:  Yes.  Again, it is a short point and most of  
17          the references are in our skeleton, I shan't take you to  
18          every single document, but the Tribunal will be aware  
19          that Scania consented in the consent order to give  
20          market-wide disclosure to the claimants and VSW for  
21          the UK, France and Sweden.  The disclosure in relation  
22          to the UK and France has been done; Scania and its  
23          advisors took it in stages.  And so significant  
24          disclosure has been given in relation to the UK and  
25          France.  There are some outstanding issues for France

1 but in large part they are now completed and Scania is  
2 turning now to do its Swedish disclosure, which is due  
3 by 31 March 2020. That is going to be a very intense  
4 exercise and I am instructed that it will cost about  
5 £300,000.

6 Before those costs are incurred, we wish to raise  
7 with the Tribunal the question of whether it is  
8 appropriate to incur them now, because when Scania  
9 signed up to this and agreed to the consent order the  
10 test case approach had not been sought. As soon as the  
11 test case approach was sought Scania wrote to the  
12 claimants -- when the application was made Scania wrote  
13 and said "We don't think it is appropriate now to give  
14 the Swedish disclosure because that is not one of the  
15 core countries covered by your test claimants proposal"  
16 and, I submit, in whatever proposal is made or  
17 whatever -- if a test claimant approach is adopted,  
18 Sweden will not be one of the core countries in that in  
19 view of its very limited importance.

20 THE PRESIDENT: Can I just understand Sweden. Scania is  
21 based where?

22 MR KENNELLY: In Sweden.

23 THE PRESIDENT: So is Scania's Swedish disclosure as you  
24 have described it, is it only about sales of trucks in  
25 Sweden or does it also cover Scania head office

1           involvement in setting prices on a pan-European or other  
2           market, non-Swedish market? The basis.

3           MR KENNELLY: 90% of the disclosure that's sought that is  
4           now about to be undertaken relates to the sale of trucks  
5           in Sweden, specific trucks sold in Sweden -- yes -- or  
6           to be, sorry, shipped into Sweden.

7           THE PRESIDENT: Yes.

8           MR KENNELLY: That's the expensive part of the exercise.

9           THE PRESIDENT: Are you seeking to stay also what one might  
10          describe as sort of head office disclosure concerning  
11          pan-European gross pricing, for example?

12          MR KENNELLY: There is a narrative aspect to this which is  
13          called category O4 which is a much smaller category.  
14          That is we say parasitic in part on the much more  
15          onerous task, but if the Tribunal is against me on that,  
16          we will provide that. That is far easier to do.

17          THE PRESIDENT: Yes.

18          MR KENNELLY: It is the truck-specific data which is the  
19          most costly and that's our main focus of our application  
20          for a stay.

21                 The point is that -- as is obvious -- if at the next  
22          CMC the Tribunal decides to go with the test claimant  
23          approach and that has all the benefits for which the  
24          claimants contend and ultimately leads to settlement  
25          potentially, these costs will have been wasted, whereas

1 if at the next CMC the Tribunal decides not to go with  
2 the test claimant approach and we revert to our original  
3 plan, Scania can do the work in the same timeframe, so  
4 within the timeframe between now and what would be seven  
5 weeks, and do it then, and so no prejudice will be  
6 caused to the claimants or anyone else, but this  
7 approach allows us at least to save some money in this  
8 enormous set of proceedings.

9 THE PRESIDENT: Yes. Mr Jones.

10 MR KENNELLY: Sorry, before Mr Jones gets up, I want to make  
11 sure I haven't said anything incorrect.

12 Sorry, I'm told disclosure on price setting by head  
13 office has not been ordered. This is all truck-specific  
14 data. But I maintain what I meant about O4 being  
15 a narrative part that is less costly but it is not in  
16 relation to head office price setting.

17 THE PRESIDENT: Yes. Mr Jones.

18 MR JONES: It is truck sales data and it is also, just to be  
19 clear, as I understand it, not -- we're not here talking  
20 about particular sales to my clients, it's the general  
21 exercise which all the defendants have done across the  
22 three core countries where they have disclosed  
23 information related to all of their sales in those  
24 countries.

25 When Scania first signed up to this, as Mr Kennelly

1 put it, in September, sir, all of the other parties were  
2 focusing on the three core countries and it was  
3 absolutely clear that all of us have been looking at an  
4 overcharge analysis focused on the UK, on France and on  
5 Germany. It is true that the test claims idea hadn't  
6 been floated, but plainly that was the focus of  
7 everyone's attention.

8 Nonetheless, it was sensible for Scania to extend  
9 its disclosure to Sweden then and it remains sensible  
10 now for the same two reasons. The first one is that it  
11 is relevant to the overcharge analysis which is  
12 currently being done -- let me explain that. The  
13 economists are seeking to pull together a data source  
14 which is as rich as possible and that will include,  
15 for example, sales to lots of different purchasers, it  
16 will include sales from different defendants, but it  
17 doesn't follow from that that the experts are simply  
18 coming up with one average overcharge figure, they will  
19 be building models which have variables in them to  
20 distinguish between different defendants, different  
21 purchasers possibly, and although one might be  
22 interested in what did this particular defendant charge,  
23 the model when it produces that prediction will be  
24 drawing on the rich data from other defendants.

25 Now, I start with that example because the same is

1 true of different countries, which is to say one can  
2 include in the model data from different countries  
3 pooled across different countries. It doesn't mean that  
4 you necessarily come up with one average overcharge  
5 estimate across Europe, or across three or four  
6 countries, it simply means you've got a richer pool and  
7 you distinguish between the different defendants,  
8 possibly different purchasers, different countries and  
9 so on. So it feeds into that analysis.

10 Now, what I have said is slightly controversial in  
11 the sense that some of the defendants in their  
12 three-pagers have identified that they think a country  
13 by country approach is appropriate and so it may be that  
14 not all experts will be pooling data in the way that  
15 I have just described. Scania, however doesn't fall  
16 into that category because -- sir, can I take to you  
17 Scania's three-page document. It is at {COM-C/26/2}.  
18 You will see there at paragraph 8 "Pooling data across  
19 markets may be valid". The context here of course is  
20 that Scania's obligations are focused in -- as far as is  
21 relevant to us -- France and Sweden. It will add  
22 materially to the richness of our data to have Scania  
23 data in Sweden as well as in France, notwithstanding  
24 that we think the focus should be on overcharge in those  
25 other three countries.

1           Sir, as I have said, that was true in September when  
2           Scania agreed to it and it is true now for exactly the  
3           same reasons.

4           The second reason why it has always been sensible is  
5           settlement, because of course the way these claims tend  
6           to move towards settlement -- not always, but often is  
7           on defendant by defendant agreements with the claimants,  
8           even where one of the defendants is a Part 20, as Scania  
9           is, and where one of its biggest markets is not in the  
10          data which it would otherwise be disclosing, it is  
11          sensible for that reason also to cover Sweden.

12          So, sir, those are my submissions.

13         THE PRESIDENT: What proportion of your clients', taking the  
14          three of them together, trucks are actually Swedish?

15         MR JONES: Sir, someone may be able to pass me an answer to  
16          that. Can I give a slightly different data point which  
17          is we do know more than half of our purchasing claimants  
18          purchased trucks from Scania. I know that because that  
19          was the question I asked my solicitor but I didn't ask  
20          the question in precisely the same way that you have  
21          just framed it, sir, so I don't know ... sir, it may  
22          take some time. I'm not sure of the answer to that.

23         THE PRESIDENT: They purchased trucks from Scania but that  
24          may have been in Germany or France.

25         MR JONES: Some of them definitely in France, yes,



1           absolutely.

2           THE PRESIDENT: Clearly in France in any case.

3           MR KENNELLY: Whilst Mr Jones is waiting, can I just -- on  
4           that point about -- because it is a point I would submit  
5           in my favour. True it is that there's a great deal of  
6           relevant data from Scania. That's in relation to the UK  
7           and France which has been given, in respect of 200,000  
8           trucks about 15 million data points have been provided  
9           and that is more than adequate for the rich data set  
10          which my learned friend refers to.

11          The German sales are de minimis. There are I think  
12          about 40 trucks sold, or 40 trucks which are in issue  
13          for Germany, but it is not realistic to say that the  
14          Swedish set makes a material difference.

15          THE PRESIDENT: Do you know how many trucks are in issue in  
16          Sweden?

17          MR KENNELLY: Swedish specific, I will be told. But the  
18          point is -- it is a short point of response to  
19          my learned friend -- obviously one always wants the  
20          richest possible data set, but not at any cost and not  
21          at a cost that isn't necessary.

22          I'm told it is in the hundreds, the sales into  
23          Sweden.

24          THE PRESIDENT: Yes.

25          (Pause).

1           Thank you. We are not going to amend the order that  
2           was made. It was consented to at the time for Scania,  
3           they did not think it unreasonable. We have not  
4           decided, nor are we going to decide today whether there  
5           should be any test cases in the VSW action so that may  
6           never arise and indeed we think this information may  
7           indeed assist VSW when deciding what may be appropriate  
8           test cases, if it chooses to pursue that application at  
9           a future time.

10       MR JONES: I am grateful.

11       THE PRESIDENT: I think given the time the next item would  
12           be to consider the experts' methodologies and rather  
13           than starting that at 5 to 1, we will start that at 5 to  
14           2.

15       (12.55 pm)

16                               (The luncheon adjournment)

17       (1.55 pm)

18       THE PRESIDENT: I think the next matter to which we come  
19           concerns the expert methodologies. Every party,  
20           pursuant to the ruling that we gave, has produced  
21           a brief summary. May I say on behalf of all the members  
22           of the Tribunal, we found these extremely helpful.  
23           Their assistance was enhanced not hindered by the fact  
24           that they were no more than three pages long, although  
25           we did note that the font size in some of the three page

1 offerings did seem to reduce slightly.

2 We are not going to make any orders or rulings that  
3 result from that, but we thought it might be helpful if  
4 we just made some comments that result from our reading  
5 of those.

6 First of all, it does seem clear that econometric  
7 analysis, or some have referred to it as a time series  
8 regression analysis, involving at least during and after  
9 data is going to be a method applied across all cases.

10 There is evidently a question whether the data used  
11 should also cover the pre-infringement period. We note  
12 DAF has disclosed that material, so it is being used  
13 by -- in particular in the Royal Mail/BT case, and we  
14 think we should wait to see what the experts make of  
15 that with regard to the other cases and whether it is  
16 appropriate or not to look at pre-infringement data.  
17 Obviously ideally one would wish to, there's no question  
18 about that, and the problem really is the potential  
19 deficiency in that data and, to a lesser extent, the  
20 expense of recovery and we will see what emerges as the  
21 experts look at that data.

22 Other issues as to exactly how a regression analysis  
23 should be conducted, what variables should be included,  
24 what control factors to employ and so on, our present  
25 view is that it would not be appropriate for the

1 Tribunal to prescribe those. That's a matter for each  
2 individual expert and their judgment and if, as  
3 a result, we get, as we no doubt would, these  
4 econometric analyses conducted in slightly different  
5 ways producing different results, then the reasons for  
6 the differences are exactly what one would explore at  
7 trial and the Tribunal then will decide which method  
8 seems more robust, most are reliable and so on, but that  
9 would not be appropriate for us to get into and seek to  
10 get to that level of detail once the overall method is  
11 agreed.

12 Secondly, it appears that it is probably appropriate  
13 to do it separately by country in that the way prices  
14 move in different national markets may be different.

15 The third point that came out of it was the view of  
16 Ryder's expert NERA that they think that complementary  
17 methods will assist. They talk about margin analysis  
18 and using the separate pricing series from like  
19 commercial vehicles. We note other claimants do not  
20 seem so attracted by that and all the defendants are  
21 opposed to it.

22 As I said at the outset of this topic, we're not  
23 going to rule on it. All we will say is we are at the  
24 moment not persuaded and we will need quite a bit of  
25 persuasion that that is appropriate. We can see it may

1 have use if there are material gaps in the other data  
2 and that then it might have some attraction. If that is  
3 not the case then just as a complementary method that we  
4 think becomes disproportionate and that's our present  
5 feeling about it.

6 We note that I think both VSW on the claimants' side  
7 and Iveco on the defendants' side have reserved the  
8 question of whether some different method might be used  
9 to consider the effects of the arrangements on Euro  
10 emission standards. They have simply said "Our experts  
11 want to think about this further". We wait to see what  
12 comes out of that. At the moment we are not -- we have  
13 some trouble understanding why some different method  
14 should be needed given that the question is what's the  
15 effect of all of this on price, which is exactly what  
16 the regression analysis is looking at.

17 We have noted that DAF proposes that its experts  
18 want to do a first stage analysis which they have  
19 described as a causative mechanism analysis, which  
20 sounds to me a little bit like what one more usually  
21 talks about as a theory of harm, whether there is  
22 a plausible way that these arrangements could have  
23 caused an increase in transaction prices. As we  
24 understand it that doesn't lead to any additional  
25 disclosure -- and I see Mr Beard is shaking his head; it

1 doesn't -- and it is clearly open for a defendant to run  
2 that argument through its expert if it wants to.

3 Then there is pass-on. Clearly we've got to await  
4 the judgment of the Supreme Court to see what light it  
5 sheds on this issue. For resale pass-on it appears  
6 again that regression analysis might be the appropriate  
7 route and again we would need some persuasion that  
8 a profit margin analysis is relevant or helpful. It  
9 opens up a lot of uncertainties and difficulties once we  
10 start looking at cost allocation.

11 Supply pass-on is a big question, but we await the  
12 judgment in Sainsbury's.

13 Then we have talked about the other issue of  
14 mitigation earlier, which is a separate matter.

15 That was, for the moment, we thought, all that we  
16 would propose to say about these very helpful statements  
17 and we hope that's of some assistance to everyone going  
18 forward.

19 We did want to mention another set of statements  
20 which were ordered in our September order, which were  
21 the statements provided in the Ryder case about how the  
22 defendants approach their pricing and we thought those  
23 statements were very helpful and we think it would be  
24 appropriate for equivalent statements to be filed in the  
25 other actions as well. Given that in the Ryder case all

1 five of the defendants -- or I should say all five of  
2 the OEMs are defendants in Ryder, they have all gone  
3 through that exercise and we are minded to direct that  
4 they should file equivalent statements in the other  
5 actions.

6 Now, that was not on the agenda so you have not had  
7 a chance to take instructions on that, which is  
8 something that occurred to us last night.

9 MR JOWELL: When you say, sir, the equivalent statements, we  
10 assume that would be just referring to the  
11 United Kingdom market, as in Ryder.

12 THE PRESIDENT: Yes.

13 MR JOWELL: Because obviously it would be a vast exercise to  
14 start talking about how they priced German trucks and  
15 Swedish trucks and so on. It would effectively be the  
16 same --

17 THE PRESIDENT: Essentially it goes to -- I think they were  
18 put into one of the confidentiality rings, those  
19 statements, and that would apply similarly in the other  
20 cases, but if you are able to take instructions -- you  
21 have all done the exercise and I don't think it is --  
22 but I haven't studied each statement, whether it is very  
23 Ryder specific, I think it is about how you go about  
24 pricing your trucks, but we won't make a ruling now  
25 because I think you need time to consider that, but we

1           would like to do that well before the next CMC, so if  
2           that's something you could each take instructions on and  
3           perhaps let the Tribunal know on Monday.

4       MR JOWELL: We will do so.

5       THE PRESIDENT: Then we could make the appropriate order to  
6           cover the confidentiality. I think you all know the  
7           statements identify in mind.

8       MR JOWELL: Yes.

9       THE PRESIDENT: We think that may assist the other  
10          claimants.

11      MR JONES: Sir, it certainly would assist and I'm being  
12          reminded that that order has only been made in the Ryder  
13          proceedings, so I think --

14      THE PRESIDENT: That's the point.

15      MR JONES: No, but some of the defendants haven't given  
16          statements, was the point, sir, so I think --

17      THE PRESIDENT: Well, Ryder proceedings I thought involved  
18          everyone except Scania.

19      MR JONES: Scania may be the only one then, sir.

20      THE PRESIDENT: Yes. I mean Scania are not a direct  
21          defendant, of course. They have come in as a Part 20  
22          defendant for the moment.

23      MR JONES: That's right.

24      THE PRESIDENT: But you are -- well, yes. It probably would  
25          be helpful to have it from Scania as well as regards



1 the UK market at least.

2 MR JONES: We think it would be, sir, yes.

3 THE PRESIDENT: You may not be up to speed on this,  
4 Mr Kennelly, what they are.

5 MR KENNELLY: For Scania we have resisted this in the past.  
6 The correspondence is in the bundle, but rather than  
7 address you on it now, unless I'm corrected we are in  
8 principle opposed to providing that statement so I think  
9 we will have to make submissions to the Tribunal since  
10 that's the tribunal's preference, but we will do that in  
11 due course.

12 THE PRESIDENT: Yes. Well, it may be that in your case it  
13 is put back to the next CMC in that case.

14 MR KENNELLY: I'm grateful.

15 THE PRESIDENT: But at least VSW will get it from the others  
16 which will get you going.

17 The next item on the agenda I think is the  
18 application by Royal Mail and BT seeking directions  
19 setting down a timetable for witness statements and  
20 expert evidence on all issues except pass-on.

21 MR BEARD: Sir, before we move to that, I apologise, just  
22 two quick points I wanted to pick up. One was from  
23 before lunchtime on timings, in relation to the common  
24 confidentiality arrangements. You will recall, sir,  
25 that you gave me the short adjournment to take

1 instructions in relation to that. I have done so. The  
2 position for DAF is rather more complicated than it is  
3 for Ms Bacon and her client because of course we have  
4 essentially ten pair permutations that we have to  
5 identify by way of overlaps, which was why in part we  
6 suggested the sort of common core approach, so we have  
7 it in relation to Royal Mail/BT and Dawsongroup and VSW  
8 and Ryder and then with Dawsongroup and VSW and  
9 Dawsongroup and Ryder and so on and there are ten  
10 permutations.

11 What we propose is that we could provide an  
12 indication of what is common to all of those parties  
13 within four weeks, but to provide the detailed account  
14 of the overlap will take us substantially longer because  
15 you get into the details of what differences in  
16 disclosure are between the parties and we would ask for  
17 ten weeks to do that, so we do a core within four.

18 We will of course in saying that try and see whether  
19 there are more pragmatic solutions we can reach with the  
20 claimants in relation to this, but if we are actually  
21 trying to identify exactly what is common and not  
22 common, that is a more extensive exercise and sadly the  
23 miracles of computer programmes don't quite take us to  
24 the level of easy precision that, Mr Chairman, you  
25 envisaged before the short adjournment.

1 THE PRESIDENT: We are concerned about ten weeks, Mr Beard,  
2 because we would like this to have been done and then  
3 the discussions to take place before the next CMC.

4 MR BEARD: Understood.

5 THE PRESIDENT: So we would have thought common you should  
6 be able to do in three weeks and the rest, eight weeks.

7 MR BEARD: I'm grateful for the tribunal's indication so  
8 those behind me hear that. Thank you.

9 MR BREALEY: If it is going to be that period can it run  
10 from today, because last time the order took ten weeks  
11 to agree and then the time started from the order, so --

12 MR BEARD: Yes, today, that's fine.

13 THE PRESIDENT: So from today.

14 The totality?

15 MR HOSKINS: Yes.

16 THE PRESIDENT: So it is DAF -- this is Volvo/Renault,  
17 right?

18 MR HARRIS: Daimler would please like the same, four weeks.

19 THE PRESIDENT: So four weeks for everybody else?

20 MR JOWELL: Likewise.

21 THE PRESIDENT: Four weeks for everybody else for  
22 everything.

23 Then can I turn to the Royal Mail/BT application,  
24 directions to trial. Mr Lask, we have looked at what  
25 you have said of course about this already and we do

1 take the point that your client's claims are the  
2 furthest advanced, you have only one defendant and no  
3 Part 20 claims, so we are quite sympathetic to the  
4 application. However, we think that witness statements  
5 and their content will be significantly affected by the  
6 ruling we are shortly to give on binding recitals, which  
7 we hope very much we will be able to hand down judgment  
8 within a couple of weeks.

9 However, it is not impossible that one party or  
10 another may seek to appeal judgment. Of course we hope  
11 they won't, but life being what it is we think one can't  
12 exclude that as being a realistic possibility and if  
13 there were to be an appeal we think it would be  
14 important that that appeal is heard and determined  
15 before witness statements are produced because clearly  
16 if certain things are binding, or not, it will affect  
17 what has to be given by way of evidence.

18 So what we have in mind -- and I am just telling you  
19 what we have in mind, I haven't heard from you, you may  
20 seek to persuade us otherwise -- is that we won't either  
21 accede or dismiss that application, but that we should  
22 fix another CMC for potentially May, or early June --  
23 obviously it has to be a time everyone can attend, but  
24 that sort of time period -- and that we will revisit the  
25 matter then when we will know what is the appeal

1 position on those rulings. So that is where we have got  
2 to. If you are not content with that then you need to  
3 address us.

4 MR LASK: Thank you, sir. I am grateful for that early  
5 indication. I will, if I may, open the application in  
6 any event and seek to persuade you that it is not  
7 necessary or appropriate to wait for not only the  
8 binding recitals ruling to come out, but potentially for  
9 any appeal to be resolved before making directions for  
10 evidence.

11 THE PRESIDENT: Yes.

12 MR LASK: If I may I will start at the beginning and then  
13 pick up the points you have just been making, sir, as  
14 I come to them.

15 As you are aware, the issue before you is an  
16 application for directions for witness and expert  
17 evidence on all matters other than pass-on and I should  
18 emphasise, if I may, that as far as my clients are  
19 concerned this isn't simply a case management issue,  
20 it's actually of the utmost importance for them,  
21 Royal Mail and BT. As the Tribunal is aware, they  
22 brought their claims early and have worked exceptionally  
23 hard to get them into a position where they can move  
24 forward to the next stage.

25 We heard what the Tribunal said at the outset of

1           today's hearing about the need for consistency across  
2           the claims and indeed we had that firmly in mind when  
3           formulating this application and we submit that the  
4           application is precisely the sort of pragmatic solution  
5           that the Tribunal has invited and that will allow the  
6           claims to proceed, notwithstanding some of the common  
7           issues that remain outstanding.

8           Royal Mail and BT see their draft directions as  
9           a pragmatic and critical means of maintaining momentum  
10          in their claims, whilst also accommodating those common  
11          issues.

12          So we do say that notwithstanding the concerns that  
13          you have flagged up, sir, the case for setting down  
14          directions now is compelling and if I may I will outline  
15          the reasons for that in four points and I will take it  
16          briefly, having heard what you have had to say.

17          The first is that the Royal Mail and BT claims are  
18          ready to progress to the preparation of witness and  
19          expert evidence. The pleadings are closed, disclosure  
20          is complete and there are no outstanding applications on  
21          either side. We have discussed already today the  
22          outstanding pass-on issue and the draft directions  
23          accommodate that by providing for pass-on to be dealt  
24          with separately. So in those circumstances the  
25          directions for evidence that we seek are the natural and

1 obvious next step in the proceedings, so that's point 1.

2 The second point is that pressing ahead with witness  
3 and expert evidence has significant advantages for the  
4 future conduct of the claims. Starting the work now on  
5 non-pass-on evidence not only makes effective and  
6 efficient use of the time that's available now, but also  
7 reduces the amount of work that will have to be  
8 completed later and in doing so it should be possible to  
9 set an earlier trial date once the trial is ready to be  
10 listed.

11 The third point, which is really the flip-side of  
12 the second point, is that the alternative contended for  
13 by DAF -- and if I may say so, sir, the alternative  
14 envisaged currently by the Tribunal -- is in my  
15 submission likely to generate significant delay. Just  
16 dealing first with DAF's approach, they say that the  
17 preparation of non-pass-on and pass-on evidence should  
18 proceed in parallel --

19 THE PRESIDENT: Well, we're not attracted by that point.

20 You need not address it.

21 MR LASK: Okay, my Lord, thank you. I will move on.

22 I am going to come on to the binding recitals point  
23 that you have raised, sir.

24 THE PRESIDENT: You might want to focus on that.

25 MR LASK: I will.

1 THE PRESIDENT: Obviously we would have to hear from DAF on  
2 their point, but we don't have to hear from you.

3 MR LASK: I will move on from the pass-on point. That was  
4 my third point, significant delay. And the fourth point  
5 is, which leads me on to the binding recitals issue, is  
6 that there are simply no good reasons, in my submission,  
7 why these directions shouldn't be made.

8 Now, DAF raised a number of objections in their  
9 response to our application. I'm not going to go  
10 through them in turn, we have dealt with them in the  
11 skeleton argument, but the binding recitals point was  
12 one of them and the point being made -- certainly the  
13 point made by DAF -- was that the preparation of  
14 evidence can't even begin until the ruling has been  
15 handed down on binding recitals and the tribunal's  
16 position, as I understand it, is that actually the  
17 process should potentially be pushed out even further,  
18 until any appeal has been resolved and in my submission,  
19 sir, that's simply unnecessary, not to mention the  
20 significant delay that it will entail.

21 May I ask the Tribunal to turn up the list of  
22 witnesses that the parties have provided quite some time  
23 ago. DAF's is in the RMBT file, {RMBT-B1/10}.

24 THE PRESIDENT: On what page?

25 MR LASK: Sorry, I thought it was that tab but I may have



1 got the reference wrong. Sir, if you will just bear  
2 with me.

3 THE PRESIDENT: Sure.

4 (Pause).

5 MR LASK: Yes, sir, it is actually in the RMBT file C1 and  
6 it is tab 7, which is the exhibit to Mr Coulson's eighth  
7 statement and it begins on page 17 {RMBT-C1/7/17}.  
8 Schedule 1, "The defendants' list of witnesses of fact  
9 (as at 12 October 2018)".

10 So what both DAF and the claimants have done in this  
11 case is identify their witnesses and the issues the  
12 witnesses are going to cover and in my submission there  
13 are various matters that will need to be covered by the  
14 factual witnesses that won't be affected necessarily by  
15 the binding recitals ruling. For example --

16 THE PRESIDENT: Can we see the next page please  
17 {RMBT-C1/7/18}. Thank you.

18 MR LASK: The first example I was going to take you to, sir,  
19 was actually item 1. Before I go on I should check  
20 there is nothing confidential in this document.

21 MR BEARD: I don't believe so. It is not in a marked  
22 confidential bundle.

23 THE PRESIDENT: Thank you.

24 MR LASK: So item 1, the issue on which the witness intends  
25 to speak is the sales relationship between Royal Mail

1 and the first defendant during the relevant period. We  
2 find it difficult to see why that, for example, should  
3 be affected by the binding recitals ruling.

4 Similarly over the page, internal page 17,  
5 {RMBT-C1/7/18}, item 4, the issue there is the setting  
6 of standard MLO costs and IKP costs, ie the setting of  
7 an additional amount added to MLO costs and number 2,  
8 "The calculation of the average MLO for CF/XF and LF  
9 trucks".

10 THE PRESIDENT: What is MLO?

11 MR LASK: MLO -- this is the explanation that DAF have  
12 provided to us:

13 "The MLO costs of a specific truck are the sum of  
14 the standard material and labour overhead variable costs  
15 for all the components of the truck plus standard  
16 transportation costs and if relevant the additional  
17 costs of additional products and services."

18 So those are just two examples of issues which in my  
19 submission don't on any view need to be held up pending  
20 either your ruling on binding recitals, or indeed any  
21 appeal and it would be most regrettable in my submission  
22 if all of the factual witness evidence and as a result  
23 all of the expert evidence were now to be held up  
24 potentially for a period of many months while any appeal  
25 is resolved.

1 THE PRESIDENT: But are you saying -- I appreciate you can  
2 point to some witnesses whose evidence is not affected  
3 by binding recitals, but are there other witnesses whose  
4 evidence may be?

5 MR LASK: We would accept that there are witnesses whose  
6 evidence may be affected by the outcome of the ruling,  
7 but it seems to us that the outcome of the ruling,  
8 insofar as it is in the claimants' favour, can only  
9 serve to narrow the scope of the witness evidence, so  
10 all that would need to be done on the defendants' part,  
11 if ultimately they are unsuccessful at first instance  
12 and indeed on any appeal, would be for the witness  
13 evidence to have been prepared, to then not be adduced.

14 THE PRESIDENT: But isn't that a bit wasteful?

15 MR LASK: Well, it depends on the scope of the evidence and  
16 if DAF was able to tell us today that there are huge  
17 swathes of their evidence that depend on  
18 binding recitals and that would need to be excised  
19 depending on the outcome of the ruling then we can  
20 listen to that and hopefully try and find a way of  
21 working round it. But the prospect of waiting not only  
22 for the tribunal's ruling but then for any appeal to be  
23 resolved is going to be very hard for my clients to  
24 stomach given just how long it has been since these  
25 claims were issued and the stage which they have

1 reached, which, as I say, is one in which they are ready  
2 to move forward, save for pass-on and potentially the  
3 binding recitals ruling.

4 I should say, sir, that if the Tribunal were minded  
5 to accept the application for directions in principle,  
6 but tweak the timetable so that the time for evidence  
7 doesn't start to run until the binding recitals ruling  
8 is available, we could live with that, but what  
9 Royal Mail and BT would find very difficult to stomach  
10 is the idea that it should all be put off until any  
11 appeals against the binding recitals ruling have been  
12 resolved. That could be many months indeed.

13 THE PRESIDENT: Yes.

14 MR LASK: So I will listen to what Mr Beard has to say in  
15 response.

16 THE PRESIDENT: Well, just give us a moment.

17 (Pause).

18 Well, that was very attractively put, Mr Lask, and  
19 we understand the feelings of your clients, but we do  
20 remain of the view that the ruling on recitals -- and if  
21 it is an important ruling it's not just clearly our  
22 decision, it's when that's decided definitively. There  
23 may be no appeal, in which case it is soon, and that to  
24 consider this also after there have been these expert  
25 discussions that were considered just a short while ago

1 on methodology, and that a delay between early February  
2 and May in the overall context of these cases is, while  
3 perhaps unfortunate, not of such concern that it is not  
4 justified. So we are not going to grant the application  
5 now. We will revisit it at the next CMC when (a) there  
6 will be a tribunal's ruling, (b) if there is an appeal  
7 one can look at the grounds of appeal and assess how  
8 matters proceed and so we are not going to make an order  
9 now.

10 MR LASK: Sir, I am grateful. May I make some brief  
11 comments. Firstly, you mentioned the expert meetings  
12 that we have been discussing --

13 THE PRESIDENT: Not meetings, just the discussion on  
14 methodology based on the -- which I appreciate your  
15 clients are not directly involved in, but DAF are with  
16 some of the other experts and we are seeking to get to  
17 a position where there is a common approach to  
18 overcharge across all the actions.

19 MR LASK: Sorry, it may be I have missed it but we hadn't  
20 understood the Tribunal to have indicated that there  
21 should be meetings now between the experts off the back  
22 of the three-pagers.

23 THE PRESIDENT: No, that's correct, but there are going to  
24 be discussions based on the amendment to the  
25 confidentiality ring that will enable common disclosure

1 to be considered so that claimants' experts -- not  
2 experts from the two sides, not that sort of meeting,  
3 but discussion between claimants' experts.

4 MR LASK: Right. Thank you, sir.

5 The second point is this. In case we get to the  
6 next CMC and we find that there are no appeals against  
7 the binding recitals ruling, it may be helpful if at  
8 that stage we are able to make directions for evidence  
9 and for the way forward and to that end it may help if  
10 the Tribunal were to indicate that it would welcome  
11 discussions taking place between the claimants and DAF  
12 in the interim so that we can present hopefully an  
13 agreed set of directions, but if not, two  
14 alternatives --

15 THE PRESIDENT: Yes.

16 MR LASK: -- that the Tribunal could then make at the next  
17 CMC, if at that stage it is possible to move forward.

18 MR BEARD: If it helps they know where we are, they can  
19 write us a letter, we will reply, rather than rehearsing  
20 the points we have on these directions now, which seems  
21 pointless. If at some point Royal Mail/BT want to write  
22 to us, we promise we will reply.

23 THE PRESIDENT: Yes. Well, I mean if you propose  
24 directions, as indeed you have at this hearing, at the  
25 next hearing we would expect DAF to engage with that and

1 explain what they would agree to and what they wouldn't,  
2 or if they oppose it completely, why, and we will come  
3 back with an informed position from both sides.

4 MR LASK: Certainly we welcome that.

5 THE PRESIDENT: But I don't think it is something we need  
6 direct. That's what we would expect to happen.

7 MR LASK: They didn't reply this time round --

8 THE PRESIDENT: Yes, I see. Well, I'm sure they will next  
9 time.

10 Then we go to the question of directions for trial,  
11 as it were, raised by VSW but you are not actually,  
12 Mr Jones, seeking an order but you have set out the  
13 possibility of there being test claims and at one point  
14 I think most defendants thought you were seeking an  
15 order. It is now clear you are not.

16 All we would say is the trials in VSW are probably  
17 the most delayed because of the involvement of Scania  
18 and we cannot have a hearing involving Scania until  
19 after the appeals, or at least the appeal to the  
20 General Court is determined -- if there is a further  
21 appeal it may depend on the grounds of any further  
22 appeal and that's not immediate.

23 We can see that it may be sensible to have test  
24 claims, but we haven't reached a view and we would just  
25 invite the parties in the VSW actions to consider that

1 further and consider how test claimants can properly be  
2 identified in a way that it is useful.

3 MR JONES: Yes.

4 THE PRESIDENT: And whether it is appropriate to do it in  
5 a way that the outcome of the test claims is binding, or  
6 to do it in a way that I think your clients proposed,  
7 that it is not binding, which is another issue, so we  
8 would suggest that that is something considered between  
9 the parties in the VSW case so we can revisit it on the  
10 next occasion.

11 MR JONES: Sir, I'm very grateful for that and part of the  
12 reason for wanting it on the agenda was in case the  
13 Tribunal had thought at first blush it is not even worth  
14 the parties liaising on, so it is very helpful to know  
15 we can at least discuss it.

16 THE PRESIDENT: We think it may very well be sensible --  
17 given that the very large number of claimants in two of  
18 the three cases, it may be a much more practicable way  
19 to proceed, but it depends on identifying, of course,  
20 the suitable test claimants.

21 MR JONES: Sir, could I just make a couple of further  
22 observations.

23 THE PRESIDENT: Yes.

24 MR JONES: One is a big picture point, which is there have  
25 of course been other proposals floated for how to take



1           these claims forwards: country by country, deferring tax  
2           interest. There may be other ideas. We think test  
3           claims at the moment is the best one on the table, but  
4           there needs to be a discussion.

5           But, sir, the big picture point I wanted to make is  
6           this, that we think it would be very sensible if  
7           a decision could be taken about which of those routes,  
8           if any, the Tribunal thinks the VSW claimants should go  
9           down before we all come back before you with more  
10          detailed disclosure requests because the first stage of  
11          disclosure has been done -- there will be some targeted  
12          requests now arising out of that, that's not what we're  
13          concerned about. The next big disclosure issue between  
14          VSW and the defendants will be resurrecting major issues  
15          around tax disclosure, interest, pass-on of course  
16          importantly, possibly overcharge in the other countries  
17          and so what has happened on previous occasions is that  
18          we have all come to the Tribunal prepared to argue on  
19          the detail of those requests and at the same time making  
20          our points about how we think some of them should be  
21          deferred because it would be sensible case management  
22          and so on.

23          So, sir, it is perhaps a somewhat prosaic point but  
24          it requires on our part -- and I imagine on the other  
25          parties' parts as well -- an awful lot of attention and

1 preparation on details in advance of those hearings  
2 which actually may ultimately turn out to be pointless  
3 because there is the prior issue to be decided. So that  
4 is why we have suggested not only deferring our  
5 application, possibly until the next CMC, but also it  
6 seems to us very desirable, if at all possible, that at  
7 the same time as that application is considered other  
8 parties could say whether they have preferred solutions  
9 and so we can also make submissions on the alternatives  
10 which the Tribunal has suggested and that that could be  
11 done helpfully, we think, before as I have called it the  
12 next big stage of disclosure comes around.

13 THE PRESIDENT: Yes, thank you.

14 Mr Jowell.

15 MR JOWELL: Yes. If I may respond to that. I think I speak  
16 for all the defendants in saying that of course we are  
17 all willing to engage in seeking to develop and progress  
18 the efficient progress of these actions, but we do have  
19 some reservations, both about the test claimant proposal  
20 generally and also about what has just been suggested,  
21 namely that it should be combined with a freeze on  
22 disclosure.

23 I think the starting point is to consider what does  
24 the test claimant proposal really mean and what it means  
25 in practice is that certain of the claims, of the VSW

1 claimants, should be stayed and others should go forward  
2 because it is not being proposed that these claims that  
3 go forward will bind those that are stayed and when one  
4 considers the various issues in the case -- volume of  
5 commerce, overcharge, pass-on and interest and tax --  
6 broadly speaking it is really only when it comes to  
7 pass-on that we can see that there's a valuable role for  
8 this type of -- or potentially a valuable role for this  
9 type of representative claimants going forward alone,  
10 because for matters like volume of commerce, of course,  
11 every claimant is going to have to provide that  
12 information and that's going to have to be ascertained  
13 in any event before those issues are resolved, and the  
14 same also applies really for overcharge because, as was  
15 mentioned previously, what one is going to have for  
16 overcharge is a market-wide model. Now, that may be  
17 a model that is then applied and when applied comes out  
18 at different overcharges for different defendants and  
19 different claimants, but it is nevertheless going to be  
20 based upon a set of disclosure that is market-wide and  
21 that's I think common ground.

22 So the only advantages we see is really in relation  
23 to -- it boils down to pass-on and the suggestion, as we  
24 see it, is that seeing how pass-on is resolved for  
25 certain claimants is then going to provide a useful

1           example, or framework for the resolution of pass-on for  
2           other claimants. But of course that is only going to be  
3           a useful example if those claimants are representative  
4           and the difficulty, as we see it, is that what we see  
5           with some alarm is that the VSW claimants in the annex  
6           to their skeleton argument appear to be proceeding on  
7           the basis that they are going to self-select the  
8           claimants that they take forward and that is of  
9           course -- it raises the spectre that what they are going  
10          to be doing is effectively selecting what they see as  
11          their strongest claims and cherry-picking and that is  
12          not something that is actually -- although one can  
13          understand that as a litigation tactic, it's not going  
14          to be conducive to the efficient resolution of these  
15          claims, because the defendants will perceive that and so  
16          therefore those claims that go forward will lose their  
17          representative quality.

18                 So what is required is really a dialogue whereby we  
19                 consider what are the criteria by which one can judge  
20                 whether something is indeed a representative claim and  
21                 for that purpose it is likely that we will also require  
22                 some at least targeted further disclosure from the  
23                 claimants in order to know more about their claims, both  
24                 the ones that they propose as test claimants and more  
25                 generally.

1           So bearing that in mind and also the fact that one  
2           of course has to wait for the Supreme Court's judgment  
3           in Sainsbury's, the Tribunal isn't in a position to  
4           adjudicate on this, or even give any indications at the  
5           present time as to whether this is an appropriate or  
6           efficient method for resolving the issues of pass-on in  
7           these proceedings.

8           A final point that we would raise is this, that we  
9           don't really think that it is sensible to resolve this  
10          in relation to the VSW claims in splendid isolation.  
11          One has to bear in mind also whether it is going to be  
12          a sensible approach for other claims with which it is  
13          being jointly case-managed and in that regard of course  
14          one has to bear in mind the fact that coming up -- and  
15          I understand in this -- in the room today there are  
16          representatives of indirect claimants, such as DS Smith,  
17          who have indirect claims in respect of the same trucks  
18          as some of the Ryder and other claimants, and so clearly  
19          what one can't have is a situation where one has one  
20          overcharge for the indirect claimant and potentially  
21          a different one for the direct claimant, that's my  
22          submission.

23          THE PRESIDENT: We are going to come on to that. I think  
24          that's a slightly separate point.

25          MR JOWELL: It is slightly separate but I think it does

1           emphasise the general point that one can't consider the  
2           VSW claimants in isolation, in our submission, one has  
3           to consider also the Ryder claimants and other claimants  
4           as well.

5           THE PRESIDENT: I think the difference about the VSW  
6           claimants is those are the actions with a very large  
7           number, several hundred I think, in two of the cases, of  
8           claimants. That's not the case for anyone else.

9           MR JOWELL: Well, that is so --

10          THE PRESIDENT: And that's why, it is to avoid having to go  
11          through 300 different claims looking at 300 different  
12          companies in the course of a trial, if in fact looking  
13          at three of them, or five of them or however many it is,  
14          will actually -- whether binding, that's one  
15          possibility, or even not binding, they are so similar  
16          that then once those are decided the parties will say  
17          "We're not going to fight about the rest, we will apply  
18          that as a model".

19          MR JOWELL: It might be -- I see that.

20          THE PRESIDENT: That's what's behind it and I think that is  
21          distinct for VSW.

22          MR JOWELL: Yes, we see that, Mr Chairman, respectfully.

23                 I can see that that is a point of distinction with the  
24                 other claims, but nonetheless we don't see this as being  
25                 necessarily a silver bullet for the resolution of

1 pass-on because the devil lies in the detail and one has  
2 to see whether one can in fact select representative  
3 claimants and, as I have mentioned, that depends upon  
4 first identifying the criteria and then obtaining the  
5 information and if necessary disclosure in order to see  
6 which are the appropriate claims.

7 THE PRESIDENT: What we were suggesting, Mr Jowell, is  
8 that -- and it is very much picked up by what you said,  
9 that VSW should, between now and the next CMC, engage  
10 with the defendants about what the criteria should be  
11 for selecting representative claimants, how many then  
12 one might have and see if you can come to some common  
13 understanding. We did not have in mind that VSW  
14 unilaterally will say "These are the claims that will be  
15 taken forward" and you just have to accept that.

16 We fully take on board and have always envisaged  
17 that it will be something they will discuss with you and  
18 give you the opportunity to -- and we may end up with  
19 a situation where you all agree it is sensible to have  
20 some test claims, but you think it should be these five  
21 and they think it should be those five and then we may  
22 have to decide, but that's not unusual.

23 MR JOWELL: No. Well, we are grateful for that indication,  
24 but what we would also respectfully suggest -- again  
25 I don't seek a ruling on it now, but we would also

1 respectfully suggest that far from freezing disclosure  
2 at this stage, VSW should actually be responding  
3 proactively to any targeted requests that we have for  
4 disclosure in relation to pass-on, because without that  
5 information we are simply not going to be in a position  
6 to identify which are or are not the appropriate  
7 representative claimants. So I just -- I make that  
8 point and of course they will have to decide.

9 THE PRESIDENT: Yes. Well, look, I don't think at the  
10 moment that there is any application by VSW to stay any  
11 of the outstanding disclosure orders, is that right?

12 MR JONES: Sir, that's right, and Mr Jowell may have  
13 misunderstood on two quite fundamental points. We have  
14 always said dialogue and so the starting point that we  
15 are trying to cherrypick is frankly bizarre from our  
16 point of view because I think we have said dialogue very  
17 clearly and the examples are presented as examples, no  
18 more, in the skeleton.

19 Similarly freezing -- bizarre the suggestion that we  
20 said we should freeze disclosure. I think I made clear  
21 there will be more targeted applications, we are well  
22 aware on that. Indeed on the point Mr Jowell makes, we  
23 have said we are very happy to discuss further questions  
24 and how to take things forward on the test case  
25 proposal. If in the course of that there is a dispute



1           between us as to whether it is proportionate to give  
2           information just so that they can take a view on test  
3           claims, there's the Friday application procedure which  
4           has been discussed before.

5           THE PRESIDENT: So what we would ask you to do -- it doesn't  
6           have to be in a ruling -- is to start the process of  
7           suggesting what are the criteria by which test claimants  
8           are suggested. I know you have said one per country,  
9           but I think it goes -- then the details matters, how do  
10          you choose which one, as it were. I think most people  
11          can understand you might need one from each national  
12          market, but then you have quite a number in various  
13          national markets. And send the criteria to the  
14          defendants and engage with them constructively so that  
15          by the time we have the next CMC at least some of the  
16          criteria are agreed and insofar as they are not agreed,  
17          we can decide, or if indeed as a result of that process  
18          some of the parties think: no, this isn't going to work  
19          at all, they can address us on it.

20          MR JONES: Yes.

21          MR JOWELL: We are entirely content to take it forward on  
22          that basis.

23          MR BEARD: I won't add to anything Mr Jowell said on pass-on  
24          or test claimant engagement, but I did note Mr Jones  
25          referring to tax disclosure and interest disclosure. We

1           wouldn't want that at all to be confused with issues to  
2           do with pass-on being dealt with by the Supreme Court.  
3           Those issues in relation to which we will be expecting  
4           disclosure from VSW are rather different matters and  
5           should not be wrapped up together.

6           THE PRESIDENT:   Yes.

7           MR JONES:   Well, sir, that is quite an important point,  
8           because the point which I was making was some of these  
9           proposals for the management of these claims would  
10          result in my clients not having to do the tax disclosure  
11          at this stage and not only that, it would result in all  
12          of the parties here not having to analyse what would be  
13          that disclosure.

14          THE PRESIDENT:   Why are you saying -- sorry to interrupt  
15          you.   Are you saying not having to do any tax  
16          disclosure, or not having to do it for anything other  
17          than a limited number of claims?

18          MR JONES:   Sir, if it was -- different proposals have been  
19          floated and this is partly my point.

20                 On the test claimants proposal it would be of course  
21                 just those that went forward as test claimants where it  
22                 would need to be done.   One of the other ideas which has  
23                 been floated for the management of these claims is that  
24                 there might a trial on all issues apart from tax, or  
25                 apart from tax and interest.   Now, of course within that

1           there might be scope for some limited further tax  
2           disclosure, but if that was the route that the Tribunal  
3           was to adopt, leaving tax, or a test claimants proposal,  
4           it wouldn't make sense in my submission -- before you  
5           have reached a view on those big points of principle it  
6           wouldn't make sense for us to be back here at another  
7           CMC facing applications for tax disclosure from all the  
8           claimants because it may well be unnecessary. It would  
9           defeat part of the purpose of these big picture  
10          suggestions which have been made.

11                 So, sir, it's not an attempt to dodge disclosure,  
12           it's an attempt to ensure that if these proposals are  
13           put into effect, they achieve what they are supposed to  
14           achieve.

15          MR BEARD: Just to be clear, we understand that Mr Jones and  
16           his client can come forward with proposals in relation  
17           to specific test claimants and how that process is to be  
18           dealt with. If he is suggesting that there should be  
19           a separate trial in relation to tax issues, interest  
20           issues, or any part of those issues, he needs to make  
21           very clear what is being proposed in order that we can  
22           deal with it.

23                 One of the problems with what has happened at this  
24           hearing in relation to the test claimants proposal is  
25           that it really was very generally formulated and it was

1           difficult to understand exactly on what basis these  
2           matters were being put forward, save on a country by  
3           country basis. We do not want that at the next CMC and  
4           I think it is important that if Mr Jones and VSW are  
5           talking about some very different structure to the trial  
6           process in relation to interest and tax, we understand  
7           that very clearly as a detailed proposal.

8       THE PRESIDENT: Well, I think you have had your marker,  
9           Mr Jones, so before the next CMC I think we will  
10          consider there really how -- which we haven't  
11          specifically done -- how the VSW claims should be  
12          managed.

13       MR JONES: Yes.

14       THE PRESIDENT: And it may be -- and it has been productive  
15          I think to set down two days, even if it may turn out we  
16          don't need the full two days -- for the next CMC that we  
17          will take part of one day dealing with the VSW trial  
18          issues which the other claimants may not be concerned  
19          with.

20       MR JONES: Absolutely, sir. I'm very grateful.

21                 Sir, before I sit down could I make just one very  
22          short point and it is just on Scania, which is, sir, you  
23          may recall that at the first and the second CMC there  
24          was this debate about whether or not my clients' claims  
25          could proceed against the main defendants before the

1           Scania appeal has been resolved because of course we  
2           haven't sued Scania, they're a Part 20.

3           THE PRESIDENT:   Yes.

4           MR JONES:   And there was a debate about that and it was  
5           parked and the reason it was parked was because it  
6           hasn't become a live issue suggestions because we can  
7           progress the claims and keep progressing them and it  
8           won't need to be decided until we're at the point of  
9           trial.

10                    In short, my clients' position is that if necessary  
11           their claim could proceed against the main defendants  
12           for reasons which were canvassed at the previous CMCs  
13           but in brief it is because the decision against Scania  
14           only binds Scania and, by extension, courts deciding  
15           cases against Scania.  It doesn't, we say -- it wouldn't  
16           bind a court if Scania wasn't involved in our claim  
17           against the --

18           THE PRESIDENT:  Can I interrupt.  Let's consider all that in  
19           the context of the management of the VSW claims and I'm  
20           sure all the defendants will wish to be heard on that --

21           MR JONES:  I'm grateful, sir.

22           THE PRESIDENT:  -- next time.

23           MR JOWELL:  May I add one postscript on that last point,  
24           which is if I could ask the following document to be  
25           drawn up, it is RAOC19.2.  It is the amended reply of

1           Ryder.

2           THE PRESIDENT: Can you repeat the reference please?

3           MR JOWELL: I have been told it is RAOC19.2, page 17.

4           THE PRESIDENT: For my note, what is it?

5           MR JOWELL: It is Ryder core volume 2, tab 19.2 --

6           THE PRESIDENT: No, sorry, what is the document?

7           MR JOWELL: It is the amended reply of Ryder.

8           THE PRESIDENT: To? To all the defences or ..? The  
9           consolidated reply or --

10          MR JOWELL: I believe it is a consolidated reply. It is not  
11          coming up.

12                 Let me make the point. It is simply this, that  
13          Ryder's reply expressly refers to and relies upon the  
14          Scania decision and invites the Tribunal to give weight  
15          to the Scania decision and in that respect the same  
16          actually applies to the VSW pleadings as well, which  
17          also refer and rely upon the Scania decision and so in  
18          relation to both of these claims, both the VSW claims  
19          and the Ryder claims, we say there is a fundamental  
20          difficulty which even leaving aside Mr Jones' point is  
21          that they've got pleaded reliance on the Scania decision  
22          and we say, very simply, how can one possibly have  
23          a trial at which reliance is placed upon the Scania  
24          decision when that decision is still under appeal? So  
25          we would ask Mr Jones to reconsider whether this really

1 is a sensible --

2 THE PRESIDENT: Yes, well, we will consider that next time  
3 and obviously it affects Ryder as well.

4 MR JOWELL: Indeed.

5 THE PRESIDENT: But we're not going to get into that now.

6 MR HARRIS: Sir, a quick remark, if I may, on test claimants  
7 before we move on, appreciating that there are no orders  
8 sought today, but in our skeleton argument at  
9 paragraph 17 we respectfully draw the tribunal's  
10 attention back to the judgment of Mrs Justice Rose as  
11 she then was in the Air Cargo litigation and her  
12 provisional view about --

13 THE PRESIDENT: Yes, I saw that.

14 MR HARRIS: You will recall that in that litigation there  
15 was one major group of, shall I put it like this,  
16 variegated claimants, but then there were the others,  
17 La Gaitana, Kodak, Hyundai and Allston and we  
18 respectfully endorse and share the provisional view she  
19 expressed on that occasion when the claimants were  
20 suggesting test claimants, that for reasons essentially  
21 of consistency, where there are lots of other claims  
22 going on it would make sense for -- if there is to be  
23 a test claimant approach that is intended to be if not  
24 actually binding then at least highly persuasive across  
25 other claims, then it would make sense for the claimants

1 to be liaising amongst the other claimant groups so that  
2 it is not limited to just VSW.

3 Now, I appreciate that if it is Ryder alone then it  
4 is really just Ryder companies, and likewise with  
5 Dawsongroup, but that doesn't hold true for some of the  
6 other claims that are already even before this Tribunal,  
7 let alone ones that have been issued in the last week.  
8 Take, for example, Adnams. Adnams is transferred to the  
9 Tribunal. They're not here today but they have ten  
10 claimant groups and there are others that are in  
11 a similar category and what we respectfully -- although  
12 no order is being sought what I'm really saying is this:  
13 insofar as there is liaison amongst the claimants and  
14 then between the claimants and the defendants about test  
15 claimants and criteria to adopt and come back before the  
16 next CMC, then it shouldn't come as a surprise to the  
17 claimants that the defendants may well be saying "Well,  
18 that's all very well and good for the group of claimants  
19 that you happen to represent, but we also think that if  
20 test claimants is going to be advanced it should apply  
21 to other claims as well", so that there can be  
22 consistency of approach across these issues and a proper  
23 and true span of claimants in the test claimant cohort.

24 THE PRESIDENT: Well, we are not dealing with Adnams or  
25 anybody else. The way one approaches selecting test



1 claimants and whether it is a good idea or not is very  
2 action dependent. It may be a good idea in some other  
3 action, it may not. The criteria for selection may be  
4 quite different.

5 I think we are just concerned with the management of  
6 the VSW proceedings and so whatever you wish to say  
7 about other actions which are not before us, it really  
8 doesn't help us. I think we are going to concentrate on  
9 VSW but we would like them to engage with you about test  
10 claimants in those cases and that I think gives us quite  
11 enough to get on with.

12 MR HARRIS: Well, I understand that, sir.

13 THE PRESIDENT: Yes, thank you.

14 MS BACON: I'm sorry to rise, just one postscript on the  
15 test claimant discussions, just to make clear the nature  
16 of the discussions that we are having. Those behind me  
17 are concerned that nothing that the Tribunal has said  
18 should rule out the possibility that we may need further  
19 disclosure, indeed probably will need some further  
20 disclosure, in order to engage in those discussions and  
21 I just wanted to raise that just in case the Tribunal  
22 had something else in mind.

23 MR JUSTICE FANCOURT: That is a point Mr Jowell made.

24 MS BACON: Yes, I just wanted to make sure that was the  
25 case.

1 MR JUSTICE FANCOURT: And the disclosure can be requested  
2 and if there's a difficulty it can be brought back  
3 before us --

4 MS BACON: On the Friday application.

5 MR JUSTICE FANCOURT: Exactly.

6 MS BACON: I'm grateful.

7 THE PRESIDENT: The next item is about the Ryder and  
8 Dawsongroup and we asked in the provisional agenda  
9 whether they might be heard together. We fully  
10 understand the problem in that they are direct  
11 competitors and the difficulty that presents. We note  
12 that Ryder wants to consider that further and to revert  
13 at the next CMC and several defendants have also said  
14 that, that this is premature, and we think it is  
15 sensible to put that back to be considered at the next  
16 CMC and not to advance that now.

17 But then there is the next question, which is the  
18 issue of the trucks that are the subject of those claims  
19 and are also the subject of other pending claims. And  
20 this is not really a concern about the VSW action where  
21 the overlap is not so significant. It is a concern that  
22 has arisen because of the new claims being brought, in  
23 particular, we understand, and you will be aware that we  
24 have had correspondence from the solicitors for the  
25 DS Smith claims, and evidentially there is a real issue

1 when there are a large number of trucks for which Ryder  
2 and Dawsongroup are claiming from the defendants and the  
3 defendants are saying pass-on and Ryder and Dawsongroup  
4 are saying very little or no pass-on and DS Smith may be  
5 claiming many of the same trucks and saying "Yes,  
6 there's an overcharge and there's not a pass-on" and if  
7 those are heard quite separately, we can have completely  
8 inconsistent results.

9 We haven't come to even any sort of provisional view  
10 as to how we resolve that conundrum, but we think we are  
11 at some point going to have to think about what is  
12 a sensible way of dealing with that. We think that,  
13 first of all, one needs to wait for -- as has been said  
14 on so many issues -- the Supreme Court in Sainsbury's to  
15 see exactly how the law or procedure or burden of proof  
16 on pass-on is to be dealt with.

17 Secondly, we think it is sensible to wait until the  
18 pleadings in the DS Smith case have closed and that case  
19 is before us. There is at the moment an order for  
20 conditional transfer once proceedings have closed, so  
21 that case will be before us soon and there may be one or  
22 two of the other actions that have just been started  
23 that raise this issue.

24 So we think that the best course now is that we have  
25 raised the issue, we invite those parties most affected

1 by it to think about it and that we put this on the  
2 agenda for the next CMC and for that item that we  
3 involve counsel or the legal representatives of DS Smith  
4 and any similarly placed claimant to attend and give  
5 their views, so informed by them, informed by what you,  
6 Mr Brealey, Mr Lask, have to say on this, we can then  
7 find, we hope, a sensible solution and that's what we  
8 were proposing as the best way forward.

9 But there is one thing, as Mr Justice Fancourt  
10 reminds me, that will be necessary for this. For, as it  
11 were, the new claimants, if I can put it that way, to  
12 participate in that discussion they will need to see the  
13 pleadings in the Dawsongroup and Ryder cases and so we  
14 would ask that non-confidential versions of those  
15 pleadings can be made available to in particular the  
16 representatives of DS Smith, well before the next CMC,  
17 and if they say there are some confidential bits that  
18 they wish to see, well, then you can consider if some  
19 confidentiality arrangements can be made, but so they  
20 understand how the issue is raised in your cases.

21 MR BEARD: We agree with that.

22 THE PRESIDENT: Let me hear from Mr Lask first.

23 MR LASK: Sir, I am very grateful for the indication you  
24 have given on this item. If I may, I would like to set  
25 out in summary what Dawsongroup's initial view is on

1           this matter because if the Tribunal has any immediate  
2           reaction it would be helpful for us to be able to take  
3           that into account in advance of the next CMC.

4       THE PRESIDENT:   Yes, by all means.

5       MR LASK:   So as we understand it the issue concerns claims  
6           by indirect purchasers, such as DS Smith whose claim is  
7           on its way.  We see this as essentially a case  
8           management issue and it seems to us that the way in  
9           which Dawsongroup's claim has been managed so far  
10          doesn't give rise to any difficulties in this respect  
11          and the reason we say that -- and we note that this is  
12          potentially subject to the Supreme Court's judgment in  
13          Sainsbury's, but the reason we say that is because it  
14          seems to us that logically the overcharge paid by  
15          Dawsongroup as a direct purchaser, together with the  
16          extent of any pass-on by Dawsongroup, has to be  
17          established before one can assess the extent of any loss  
18          suffered by an indirect purchaser such as DS Smith.  
19          Logically you look first at what loss Dawsongroup has  
20          suffered and you look at Dawsongroup's evidence on  
21          pass-on to establish whether Dawsongroup has passed any  
22          of those losses on and then you can go on to assess the  
23          losses of any indirect purchaser.

24       THE PRESIDENT:   Can I interrupt you.  You talked about two  
25          stages.  First one has to assess the overcharge, if you

1           have paid an overcharge.

2       MR LASK:   Yes.

3       THE PRESIDENT:  I understand that, but then the question of  
4           whether you have passed on the overcharge to DS Smith,  
5           your evidence may be no you didn't, DS Smith's evidence  
6           may be yes you did.  We don't see at the moment quite  
7           how we can resolve that first without the risk that then  
8           there is a separate trial with DS Smith arguing the  
9           contrary and they are of course not bound if they are  
10          not involved in the first trial.  So the fact that you  
11          may have persuaded the Tribunal that you didn't, doesn't  
12          prevent DS Smith subsequently persuading a Tribunal that  
13          there was pass-on and if that happens then the  
14          defendants are having to pay twice.

15                So there is a real risk of inconsistent outcomes, so  
16                that is the concern that we have.  So we think it is  
17                more than a case management issue, it's a more  
18                fundamental issue and that's the problem that we have  
19                raised and I don't pretend that we have a ready answer.

20       MR LASK:  Well, sir, we hear that and that's precisely the  
21           sort of indication that I had in mind, so we will take  
22           that away and give that some thought.

23                One potential problem though, I should flag up, is  
24           this of course may not just be about DS Smith.  There  
25           may be a huge number of indirect purchasers out there,

1           some of whom have issued, some of whom haven't issued,  
2           and the idea that we would have to wait until the end of  
3           the limitation period to see who has issued a claim and  
4           to case management jointly would be a matter of concern  
5           to Dawsongroup and that's something that would need to  
6           be taken into account.

7           THE PRESIDENT: We fully appreciate that. We understand  
8           that.

9           MR LASK: Thank you, sir.

10          MR HARRIS: It is just on that point that I can update the  
11          Tribunal. The Tribunal mentioned a moment ago that  
12          perhaps the issue is quite limited in VSW, but the  
13          current information is that there are 87 overlapping  
14          Ryder trucks in VSW and I accept that at the moment it  
15          is only two in the Dawsongroup, but that's not an  
16          insignificant number and then it seems as though  
17          although investigations are ongoing, there are  
18          overlapping trucks in Arla and then there is the point  
19          that Mr Lask makes.

20          THE PRESIDENT: Yes. I think 87 is very much smaller than  
21          the number of some of the ...

22          MR HARRIS: I do accept that, but it is not --

23          THE PRESIDENT: Yes, I realise that it may be an issue  
24          there, but it is -- in any event, it is something we're  
25          going to have to address and we are basically asking you

1 all to think about it and think of what may be  
2 a sensible way forward and DS Smith's representatives  
3 will no doubt study the transcript and consider this as  
4 well.

5 MR BREALEY: I am told DS Smith is three, but we will  
6 respond in writing.

7 THE PRESIDENT: Yes, Mr Brealey.

8 MR BREALEY: I know we are kind of at miscellaneous now, but  
9 we did skip I think the --

10 THE PRESIDENT: Yes, you have an application about the  
11 economists' meeting which I skipped over, which I should  
12 have done before, which is item 7, between Ryder and  
13 DAF.

14 MR BREALEY: That's between Ryder and DAF, yes. I thought  
15 you may be doing it on purpose but ...

16 THE PRESIDENT: Well, can I ask before that, as regards  
17 translations, I think the impression we had is that  
18 no one is seeking any ruling and that the parties are  
19 proceeding in a sensible and cooperative manner on  
20 translations. Are we being asked to do anything about  
21 translations?

22 MS BACON: No, not at all. I can speak for the defendants  
23 on this. We are all content to deal with this sensibly  
24 between ourselves.

25 THE PRESIDENT: Yes. Then before we come to the Ryder/DAF



1           issue, are there any other further issues, directions  
2           that anyone is inviting us to deal with?

3       MR HOSKINS:   Sir, you referred to the next CMC and  
4           potentially being in May or June and we would have  
5           a concern that that would be too soon and I would like  
6           to address you on that at an appropriate moment.

7       THE PRESIDENT:   The last item before the Ryder/DAF issue  
8           I have is when should we have the next CMC.

9       MR HOSKINS:   Shall I ..?

10      THE PRESIDENT:   Yes, do you want to open the batting,  
11           Mr Hoskins.

12      MR HOSKINS:   I think the concern is that May and June is  
13           probably too early for two main reasons.

14           First of all, in terms of the existing disclosure  
15           orders, you will be aware that there is a lot of work  
16           going on, there's a lot of disclosure taking place  
17           across the various claims and, for example, in relation  
18           to Volvo and Renault, we gave a large amount of  
19           disclosure on 29 November.   We have provided other  
20           information.   We gave more disclosure very recently on  
21           31 January.

22           Coming ahead, there are upcoming disclosure  
23           deadlines already set on 28 February, 6 March, 10 April,  
24           22 May, so the process of disclosure that has already  
25           been ordered isn't completed, it's still ongoing and

1 of course one of the purposes of the phased disclosure  
2 approach which the Tribunal has said should be adopted  
3 in the disclosure ruling is that people should have time  
4 to go through the disclosure they receive before making  
5 other disclosure requests, so certainly if one is  
6 looking just at -- I know there are other issues, but if  
7 we're looking at the disclosure issues, May/June is  
8 probably going to be potentially a bit early to have new  
9 disclosure applications coming in in that sort of  
10 focused way.

11 The second point about May/June is of course the  
12 famous or infamous Sainsbury's judgment which  
13 underscores a lot of the issues we have all been  
14 canvassing today. Now, nobody knows exactly when that  
15 judgment is going to come. The hearing was a couple of  
16 weeks ago. We have been asked to put in some written  
17 submissions which are due a week tomorrow, but  
18 a reasonable guess for that judgment is probably May,  
19 unless you have any information that we don't have.

20 So again if the Sainsbury's judgment is coming  
21 around May, then a CMC in May or June, giving the number  
22 of things it affects, seems to be a bit premature.

23 The final point is just the obvious objective one  
24 that each of these CMCs is incredibly labour intensive  
25 and costly and therefore it is obviously in everyone's

1 interests that when they do come up they should be as  
2 efficient as possible and really, because of the two  
3 main reasons I have just described, we would be worried  
4 that we would turn up in May and June with the cohorts  
5 and their work done but really not that much to get our  
6 teeth into and our submission would be that early after  
7 the summer. I think we can guarantee we would have the  
8 Sainsbury's judgment then, we can guarantee everyone  
9 would have been through the disclosure orders --  
10 disclosure, sorry, provided. We would have had a chance  
11 to actually consider and formulate what further  
12 disclosure applications they wished to make and they  
13 could actually have made those disclosure requests in  
14 writing to the other relevant parties, so you will have  
15 allowed time for that process to take place as well,  
16 which is obviously very important. With the best will  
17 in the world I can't see that being possible for a CMC  
18 in May or June.

19 Those are the submissions I wish to make.

20 MR JOWELL: May I add one postscript to that which is in  
21 MAN's case our disclosure is still ongoing and important  
22 further tranches are due to be given at the end of March  
23 and then again on 1 May, so that really would be very  
24 close indeed to a May CMC.

25 MR HARRIS: Sir, a further reason may be that you adverted

1 to the fact that there is a judgment in the binding  
2 findings issue coming fairly soon and it may be that  
3 some of the parties will seek to persuade this Tribunal  
4 for permission to appeal, but if that isn't given then  
5 there is the process of applying to the Court of Appeal  
6 and that can take a while and it would be highly  
7 beneficial if not only at the date of the actual CMC  
8 itself the question of permission to appeal that binding  
9 findings ruling is known, but that it had been known in  
10 sufficient time that we could actually take stock of it  
11 and then present case management options. So I would  
12 respectfully endorse the notion that May/early June is  
13 going to be a little bit too early for that and to  
14 guarantee that having been dealt with, straight after  
15 the summer would be more appropriate.

16 THE PRESIDENT: Just one moment.

17 (Pause).

18 We see the points being made, but we think a further  
19 CMC shouldn't be thought of particularly in terms of  
20 disclosure. We think that maybe talking about May was  
21 too ambitious, but there are all the other issues such  
22 as the overlapping trucks issue, there is the  
23 Royal Mail/BT wish to progress their action and so on.  
24 We think maybe early July will have every prospect of  
25 a ruling in Sainsbury's. Even if your hope of May is

1           optimistic, Mr Hoskins, I would have thought there's  
2           a fair chance for early July. And we think any issue of  
3           permission to appeal on the recitals ruling will have  
4           been resolved and one will know what's happening on the  
5           appeal to some extent. So I think that should take care  
6           of the concern about delay.

7           Of course there will be ongoing disclosure issues,  
8           but we are not thinking of it particularly as a CMC to  
9           deal with details of disclosure. I think there will be  
10          a lot of headline issues, as it were, if I can put it  
11          that way.

12         MR HOSKINS: I think that's very helpful and hopefully  
13           everyone in the room has heard that because obviously as  
14           you are aware a problem we have had before is having  
15           very large disclosure applications made without being  
16           allowed to bend in, without parties being allowed to  
17           have a chance to correspond properly. I think you have  
18           already given that message and hopefully reinforced it  
19           but that's not going to be very helpful --

20         THE PRESIDENT: Yes, and we hope that in particular  
21           disclosure applications can more profitably be done on  
22           a Friday hearing and sometimes only involve indeed a few  
23           parties and not everybody.

24         MR HOSKINS: Absolutely, but I think there was envisaged  
25           that the bigger, the heavier disclosure applications in

1           general were to come at CMCs.

2       THE PRESIDENT: That is correct.

3       MR HOSKINS: I'm stating the obvious, they shouldn't be

4           rushed but I'm sure --

5       THE PRESIDENT: If we did early July and we might need

6           another one in October, that's quite possible. Mr Lask,

7           so we don't want to push you back until after the

8           summer, which goes back to the point you made about your

9           Royal Mail/BT action but we think early July should deal

10          with that.

11       MR LASK: I'm grateful, sir, subject to one point and

12          I float this as an idea as much as anything else, which

13          is there has been mention of the Friday disclosure

14          hearings and we do wonder whether given the delay we are

15          already envisaging now in the Royal Mail and BT

16          proceedings whether it might be possible, subject to

17          when the binding recitals ruling is available, to use

18          one of the Friday windows as an opportunity to address

19          any application for permission to appeal against that

20          ruling and make directions in the Royal Mail/BT claims

21          if possible.

22       THE PRESIDENT: I think normally permission to appeal is

23          done in writing in this Tribunal, so we would deal with

24          the application in writing and we don't need a hearing.

25       MR LASK: But perhaps we could then have a hearing following

1 up from any decision on permission to appeal to deal  
2 with our renewed application for directions for  
3 evidence, rather than wait until July, which does seem  
4 a long way off.

5 THE PRESIDENT: No, I think we will wait until July,  
6 Mr Lask.

7 MR LASK: Thank you.

8 THE PRESIDENT: That leaves I think then the Ryder  
9 application against DAF. If that is an appropriate time  
10 to take a short break and then those parties who are not  
11 concerned with that application are free to leave.

12 MR KENNELLY: That would mean me leaving. Before I do --

13 THE PRESIDENT: You don't have to leave.

14 MR KENNELLY: -- I have some information for the Tribunal  
15 before I go which is that the General Court has notified  
16 Scania of the date of the hearing of its application,  
17 which is 2 April of this year.

18 THE PRESIDENT: Yes, thank you very much. They haven't told  
19 you the date they will give judgment.

20 MR KENNELLY: I would have mentioned that much sooner if  
21 I had that.

22 THE PRESIDENT: Thank you, that's very helpful. So we will  
23 return at half past.

24 (3.20 pm)

25 (Short Break)

1 (3.30 pm)

2 THE PRESIDENT: Yes, Mr Brealey.

3 MR BREALEY: This is an application which we hoped we didn't  
4 have to make but we do want to make it because again we  
5 say it is good to talk and what I would like to do,  
6 before I get to the correspondence, I would like to go  
7 to what DAF has actually disclosed. So for that can we  
8 go to the 26 November order, which for Magnum is  
9 {R-D/IC1/142}. So that is the order that actually took  
10 quite a few weeks to perfect. If one goes over the page  
11 to page 144 {R-D/IC1/144} you see at the bottom the  
12 disclosure by DAF. And:

13 "DAF shall disclose by list ... no later than 14  
14 4 October 2019 ..."

15 So we got quite a lot of disclosure at the beginning  
16 of October. I am going to give an example a bit later  
17 on relating to MLO data, which is the material, labour  
18 and overhead. So just if one goes on, I think it is to  
19 page 150 {R-D/IC1/150} there we see DAF giving  
20 disclosure of material, labour and overhead data. That  
21 is something that Mr Lask referred to.

22 MR JUSTICE FANOURT: It is a request for disclosure, is it?

23 MR BREALEY: So this is the -- and the disclosure was given  
24 to a large extent as regards the MLO.

25 MR JUSTICE FANOURT: I see.



1 MR BREALEY: Basically DAF gave disclosure that it had  
2 already provided in the Royal Mail and Dawsongroup.  
3 Now, not surprisingly the disclosure was a mass of  
4 data, just spreadsheets, and accompanying this  
5 disclosure was a series of notes which DAF accepted  
6 yesterday in correspondence that its experts had either  
7 signed off on or were directly involved in and if  
8 necessary we will come to that letter, but they accepted  
9 yesterday that Compass Lexecon either signed off on  
10 these notes, or were directly involved in their  
11 preparation, and just to see these notes can we go to  
12 bundle {R-A/IC89.1}. Again it is difficult to see when  
13 it is not in hard copy. This is a new document, so it  
14 is {R-A/IC89.1/1}.

15 So there are lots -- it is very difficult to get a  
16 sense of what is going on here, but if one goes to the  
17 hard copy bundles MLO you will see lots of notes that  
18 accompanied the hard data.

19 THE PRESIDENT: And this note is produced by whom?

20 MR BREALEY: It is produced by DAF. As I understand it, it  
21 is in-house counsel or -- I'm sure we will be told, but  
22 we were told yesterday that these notes were signed off  
23 by Compass Lexecon, DAF's experts, and to some extent  
24 Compass Lexecon had drafted them or had a substantial  
25 input in them.

1 THE PRESIDENT: When you say you were told that, that's  
2 a letter, is it?

3 MR BREALEY: That's a letter and we will give you the  
4 reference to that.

5 MR JUSTICE FANCOURT: Judging by the reaction on the other  
6 side of court, I think you probably need to show us  
7 that.

8 MR BREALEY: Okay, well, maybe we can get the reference for  
9 that, because that came in yesterday.

10 MR BEARD: It is {R-B/453/1}. Then at paragraph 3(e) on  
11 page 2 {R-B/453/2}. You see there, if that paragraph  
12 could be read.

13 (Pause).

14 The sentence beginning "However" is obviously the  
15 pertinent one in connection with these submissions.

16 (Pause).

17 THE PRESIDENT: Yes.

18 MR BREALEY: So I don't think I have said anything wrong.

19 If one goes back to the previous page, (e), if we go  
20 back to letter (e), halfway, we get the actual MLO cost  
21 figures, were provided to Compass shortly before they  
22 were disclosed to Compass in order that they provide  
23 a sense check. So that's why I said they signed off on  
24 them. If Mr Beard prefers "sense check" I'm happy with  
25 that.

1 MR BEARD: It is the carrying-out in the preceding sentence.

2 I mean, it is absolutely clear:

3 "The calculations were carried out by DAF and the  
4 relevant guidance notes were prepared by DAF and this  
5 team."

6 MR BREALEY: Mr Beard can have his say after. We get this  
7 yesterday and we see that Compass Lexecon have sense  
8 checked this and they have, over the page {R-B/453/3},  
9 been involved together with DAF "in the preparation of  
10 these notes", that's in regard to item 6 of the proposed  
11 agenda, which is the agenda.

12 So let's just take it that the economists have been  
13 to some extent involved in preparing the notes that  
14 accompanied the data. I'm not in DAF's head but we have  
15 to basically accept what they have told us and clearly  
16 their economists have had a degree of input into the  
17 notes.

18 MR MALEK: What sort of timescale are we talking about for  
19 answers in writing, if that's going to be possible?

20 MR BREALEY: That's a very good point, because we still  
21 haven't (inaudible) as, sir, you picked up. October we  
22 got the data. 20 November we said "Can we meet?".  
23 A week after that we raised the NERA questions and we  
24 still haven't had a date by which we can get any  
25 answers --

1 MR MALEK: I have just asked Mr Beard roughly if he can give  
2 us a rough idea.

3 MR BEARD: I have taken instructions. I will take you to  
4 the questions and answers. Partly because of  
5 preparation for this CMC, but I think the date by which  
6 we will be able to give answers -- and I should say that  
7 doesn't mean that we are going to accede to all the  
8 requests, I will go to them in due course -- will be by  
9 the end of March. And so we will provide all of this,  
10 these responses. They can then be digested by Ryder.  
11 If they have particular questions that arise thereafter  
12 and they can specify what it is that needs further  
13 dealing with, we can then work out who it is that is  
14 appropriate to deal with these matters. At the moment  
15 these questions and the issues being raised, as we have  
16 set out, they are for DAF, they are concerned with  
17 factual matters, matters in relation to which DAF has  
18 done the preparation, that's why we're going to answer  
19 them in that way.

20 MR JUSTICE FANCOURT: How many questions are there?

21 MR BEARD: 43 I think is the answer.

22 MR BREALEY: I would like to also say that Ms Edwards in her  
23 witness statement, paragraph 12 I think it is, said that  
24 the NERA questions were "relatively narrow and they are  
25 all explicable". So "They are relatively narrow and

1           they are all explicable". That's {R-C/IC5/6}.

2           Paragraph 12, she says:

3                 "They are relatively narrow and they are all

4                 explicable."

5           MR BEARD: No, that is the criticisms made by Mr Brealey's

6                 own solicitor that is being referred to there. He is

7                 simply misread --

8           THE PRESIDENT: Mr Beard, let Mr Brealey get on and then you

9                 will have your full chance to respond.

10          MR JUSTICE FANCOURT: Can we have the next page, please

11                 {R-C/IC5/7}.

12          MR BREALEY: (inaudible) the guidance --

13          THE PRESIDENT: Just a minute. You took us to paragraph 12.

14                 We just want to look at it.

15          MR BREALEY: We need to go back a page {R-C/IC5/6}

16                 If Mr Beard says the points raised and they are

17                 points raised by Mr Levy, we have read it in our

18                 skeleton that they are not taking issue with the

19                 questions themselves.

20                 Can I go to the three-pager.           That is at

21                 {R-A/119/2}.

22          MR JUSTICE FANCOURT: I have it somewhere else. Is this

23                 DAF's you are going to?

24          MR BREALEY: Yes it is.

25          THE PRESIDENT: So this is {COM-C/25/2} and you want us to

1           look at which paragraph?

2       MR BREALEY: Paragraph 4.

3       THE PRESIDENT: "Alongside the causative mechanism  
4           analysis ..."

5       MR BREALEY: Yes. We have always seen this mechanism.

6           (Pause).

7       THE PRESIDENT: Yes.

8       MR BREALEY: And also the footnote which refers to the MLO  
9           data, the cost data.

10           So if the Tribunal is with me so far in the sense of  
11           following what I'm saying, there has been disclosure,  
12           guidance has been given, some input -- let's just say  
13           some input from the economists and it is quite clear  
14           that their economists are using the data that has been  
15           provided to carry out its regression analysis, so their  
16           economists know exactly what this data is about and they  
17           know exactly the explanations for the data. NERA don't  
18           and that is a problem of equality of arms.

19           If I can perhaps illustrate this by reference to the  
20           pricing schedule. This is just one example. If the  
21           Tribunal will just allow me, it concerns a difference  
22           between IKP cost and MLO cost price data and for that  
23           can we go to {R-A/IC96}. So these are the -- this is  
24           the DAF, at 96; it's a pricing statement.

25       MR BEARD: Sorry, I just stand up, I'm not going to make any

1 points, save to say at this stage we really may be  
2 drifting into dealing with inner ring confidentiality.

3 MR BREALEY: I appreciate that and I'm going to --

4 MR BEARD: I'm grateful.

5 THE PRESIDENT: Can I just ask in terms of the screens this  
6 is a document that contains confidential information.  
7 I don't know if it now appears on all screens throughout  
8 the courtroom and it is not something we have actually  
9 addressed before, but we're going to have to find  
10 a mechanism whereby if counsel wants to refer to  
11 confidential information and we're working in  
12 a paperless way, it doesn't appear on every screen and  
13 I'm not sure we have addressed that --

14 MR BREALEY: We haven't, no.

15 THE PRESIDENT: -- technically. We're going to have to do  
16 that at some point clearly, find a means of doing it,  
17 but at the moment I think all the screens are on one  
18 system, as it were. Maybe we need to look at it, sadly,  
19 in paper form. We've got our bundles, so -- it may be  
20 there is no alternative.

21 MR BREALEY: It is in my Ryder bundle A5 and it is tab 96.

22 The electronic screens are great, but there is no  
23 substitute for paper, there really isn't.

24 We start -- I will just identify the document. So  
25 this is the DAF defendants' pricing statement and I want

1 to distinguish between the MLO, I don't think this is  
2 confidential, and IKP. It won't mean anything to  
3 anybody.

4 We go to paragraph 34, on page 14, so we don't need  
5 to put it up on screen, just on hard copy, I can read  
6 that out, this is in section D:

7 "The importance of DAF's production costs to sales  
8 prices."

9 Pretty simple proposition.

10 Paragraph 34 then says that DAF used two costs  
11 metrics.

12 MR BEARD: I am concerned that we are drifting into  
13 discussing what cost metrics are. I don't know who is  
14 in the courtroom.

15 THE PRESIDENT: Yes, well, if you want us to -- perhaps the  
16 safest thing, because I don't think this has been  
17 highlighted, is if you direct us to the paragraph and  
18 ask us to read it.

19 MR BREALEY: Okay.

20 I will explain the problem. So we saw the  
21 disclosure relates to -- and we have already said this,  
22 Mr Lask said it -- to what is referred to in 34(a).

23 THE PRESIDENT: Yes.

24 MR BREALEY: There is something called what is referred to  
25 in 34(b). Very, very important cost metrics. If one



1           then goes to paragraph 54, you see there an explanation  
2           of the second cost metric. Now, this cost metric is  
3           going to be critical to any regression analysis and  
4           that's a given, so you need to input the right cost  
5           metric.

6           THE PRESIDENT: Shall we just read 54 to ourselves?

7           MR BREALEY: Yes, so it is 54 and it is footnote 53.

8           THE PRESIDENT: Yes. We will read that.

9                     (Pause).

10                    Yes.

11           MR BREALEY: The point is we saw from the disclosure that's  
12           been given, the methodology that we saw at tab 119,  
13           which must have had Compass Lexecon's input in it  
14           because it's about the methodology they are going to  
15           use; it is of the first metric. And NERA, having seen  
16           the pricing statements and the disclosure, want to know  
17           what about this second cost metric. Because they don't  
18           want to start doing something which is completely  
19           unnecessary, at vast expense -- as we know, these  
20           regression models take millions of pounds.

21           THE PRESIDENT: Yes.

22           MR BREALEY: And they need to know what is the relevant  
23           input. And so they ask: what happens to this second  
24           cost metric? And it is not an unreasonable request in  
25           my submission.

1 MR MALEK: And you have asked that already in writing?

2 MR BREALEY: Yes.

3 MR MALEK: And they say that they are prepared to give you  
4 an answer.

5 MR BREALEY: Well --

6 MR MALEK: And when you say you are proposing that the  
7 experts meet, are you proposing that they meet on a WP  
8 basis?

9 MR BREALEY: I understand yes, because they don't want to,  
10 at this preliminary stage, sign off on anything. NERA  
11 just need --

12 MR MALEK: You then have a problem, because if I had  
13 a choice of having information which is in black and  
14 white and I can use in a case and rely upon, which is  
15 what they're offering, and a choice between what is said  
16 in a meeting orally, which is WP --

17 MR BREALEY: Well, sorry, they don't have to sign off on it.  
18 They need to discuss it. So clearly they can --

19 MR MALEK: But I would have thought that the first type  
20 would be preferable to me, but everyone has different  
21 preferences, but you would need the first one to even  
22 determine whether or not the second one is something  
23 that you necessarily have to go through.

24 MR BREALEY: Sorry, I'm --

25 MR MALEK: Well, you need to have an answer in writing to

1 your query which will be an answer that's inputted no  
2 doubt both from the client side, your side and maybe the  
3 expert will help, so it should be a reliable and  
4 concrete answer, you need that and then if you are  
5 saying you still need some further explanation and you  
6 are saying that can only be given through the experts  
7 then we can consider that at that stage, but how can we  
8 say now we need that second stage, because all I'm  
9 saying, from my point of view I like things in black and  
10 white in a form that I can use.

11 MR BREALEY: Well, we certainly haven't ruled that out, so  
12 can I just -- I take that point but I want absolutely no  
13 criticism on Ashurst, because the way it has panned out,  
14 in my respectful submission, it has been lamentable on  
15 the part of DAF not to even give us a date when they  
16 will give a response to the NERA questions. So they are  
17 genuine concerns. We are just -- I will give you, sir,  
18 the timeline. You have probably got it, but Ashurst  
19 requested a meeting on 20 November. That's {R-B/IC297}.  
20 So if you just bear with me for two or three minutes.  
21 {R-B/IC297/1}. So we can go into Magnum now so that is  
22 where they mentioned the meeting:

23 "We have a number of questions/queries in relation  
24 to the data you have provided."

25 So that is the request. A week MLO DAF refused the

1 meeting and that is at {R-B/314}. They don't say --  
2 they say it is not an efficient means and basically  
3 although Mr Justice Roth ordered a previous expert  
4 meeting, what they say is set out the questions in  
5 writing. So we're not going to have a meeting. You  
6 will note there that the last sentence:

7 "This ensures that both DAF and Compass Lexecon are  
8 able to provide necessary input on any questions ..."

9 So that slightly betrays Mr Beard's I think  
10 submission that it should only be DAF who has got any  
11 input in this.

12 On 20 December, so we get what we call the NERA  
13 questions, and that's {R-D/IC1/335}. That's R-D,  
14 inner confidentiality one, 335.

15 THE PRESIDENT: Is that confidential?

16 MR BREALEY: No, I don't think it is. Is it? Well, the  
17 questions are, the letter isn't.

18 MR BEARD: They are because it deals with a bunch of  
19 technical issues in relation to some of these costs  
20 measures.

21 MR BREALEY: So we won't go to the questions.

22 THE PRESIDENT: Well, they enclose, so that's when they sent  
23 the questions with the letter of 20 December.

24 MR BREALEY: So again these are genuine requests. No one  
25 has said they are not.

1 THE PRESIDENT: Yes, can we just -- just a moment, I think  
2 we want to look at the questions.

3 MR MALEK: Where do we find the questions in hard copy?

4 THE PRESIDENT: RD.

5 MR BREALEY: I don't know whether the Tribunal has -- I have  
6 them completely redacted.

7 THE PRESIDENT: No, we've got them.

8 (Pause).

9 MR BREALEY: Section A -- I don't think it is necessary, but  
10 section A is all concerned with seeking clarification on  
11 that first cost metric, which we ...

12 THE PRESIDENT: I don't think we have a problem, speaking  
13 for myself, with the questions.

14 MR BREALEY: No.

15 THE PRESIDENT: Obviously we haven't gone through them in  
16 great detail, we are not saying every one necessarily  
17 has to be answered. We can see just -- this is the  
18 first time I have looked at it -- but I can see why  
19 these questions are being posed. The real issue is how  
20 should this matter properly be resolved.

21 MR BREALEY: Correct. Can I then --

22 THE PRESIDENT: Is it by, as you suggest, an experts'  
23 meeting, or is it, as DAF suggests, by a written  
24 response and if so by what date?

25 MR BREALEY: That's --

1 MR MALEK: I also note that you repeated your request for  
2 the management accounts on the last page, which is  
3 a disclosure issue. That sort of issue we could easily  
4 resolve on a Friday application because one way forward  
5 on this is that we get the answers in March, if you're  
6 not happy with those answers you can go one of two ways:  
7 one is to say "I want to have a Friday application to  
8 get an order that the answers be provided by a certain  
9 time", or you may try to persuade the Tribunal that as  
10 an alternative that the experts meet, as you are  
11 suggesting at the moment.

12 MR BREALEY: Can I just -- I just want to correct the  
13 impression that the Tribunal I think has got. It is not  
14 that we don't want answers in hard copy and then -- and  
15 we just want the experts meeting. We have said "Give us  
16 the answers, but we think that it is going to be  
17 necessary to have an experts' meeting", so can I just --  
18 so on 15 January -- and this is the last piece of  
19 correspondence, then I will explain where we are coming  
20 from. On 15 January, if we go to {R-B/397}, this is the  
21 festive period letter, so this is "As to timing" at the  
22 bottom:

23 "... your letter requests a response by close of  
24 business on Friday 17 January ..."

25 Okay.

1            "In any event, it would not be practicable for our  
2 clients to provide responses within four weeks ..."

3            Okay, well, they can come back and say that. If you  
4 go over the page {R-B/397/2} and then the last paragraph  
5 before the translations:

6            "We will consider the questions and requests  
7 enclosed with your letter ... we do not currently expect  
8 to be in a position to do this until after the February  
9 CMC. We will provide a further update following  
10 the February CMC in relation to the expected timing ..."

11 MR MALEK: Well, we've got that now already.

12 MR BREALEY: But only because I'm standing up here. We got  
13 a letter yesterday -- well, DAF can -- we got a letter  
14 yesterday talking about the agenda for the experts. We  
15 still didn't get a date by which they would give the  
16 written responses to the questions, so one has to look  
17 at it from Ryder's perspective. We are in  
18 correspondence, it is almost five months since we have  
19 had this data and NERA is in the dark to a large extent  
20 as to its detail, its meaning, the assumptions made, the  
21 cleansing of the data and it needs to get a response.

22            So, sir, yes, you are right we have now got March,  
23 but we didn't get that yesterday, we get that at about  
24 10 to 4 today.

25 MR MALEK: That's why these hearings are so useful, because

1           the issues become concrete and you have a hearing like  
2           this that can resolve the timetable.

3       MR BREALEY: Now can I come to the submission on the  
4           meeting.

5       MR MALEK: Yes.

6       MR BREALEY: Yes we have now got a March date, but I hope  
7           the Tribunal will be sympathetic to the fact that it has  
8           been a very long and slow process in trying to get the  
9           responses in writing and the last thing we want to do is  
10          to get a response in writing, in correspondence, and  
11          then it is insufficient and we then have to respond  
12          again and we've got another five months down the line,  
13          or it may be in July when we have to deal with it in the  
14          CMC.

15       MR MALEK: I haven't suggested dealing with it in the CMC.  
16          What I'm suggesting is deal with it on a Friday.

17                If I thought for one moment that Mr Beard's clients  
18                were deliberately delaying things, there would be  
19                a different approach that I would take, but I realise  
20                they've got 101 other things, everyone has other cases  
21                to deal with and not just this, and that I also  
22                appreciate for you this is an important issue, but we  
23                are going forward -- I can see at the moment we are  
24                going forward and you should be able to get the answers  
25                that you are seeking, maybe a bit longer than you had



1           hoped, but you will get them and we are trying to offer  
2           you a mechanism where you can get it as reasonably  
3           quickly as possible and the mechanism I have suggested  
4           is we get the answers by the end of March, if you're not  
5           happy with those answers you come back on a Friday and  
6           I'm happy, or any of the other members of the Tribunal  
7           will be happy to go through them one by one and say  
8           "Answer that", "Not answer that", and as regards to  
9           disclosure of the management accounts, my current view  
10          is I do have some sympathy that those management  
11          accounts should be disclosed. I'm taking a very keen  
12          interest in what's happening on disclosure. I have read  
13          all the correspondence, I have seen the reasons why you  
14          want the management accounts. At the moment my view is,  
15          subject to being persuaded otherwise, that those  
16          management accounts should in principle be disclosed at  
17          some stage.

18                 So I think we should be able to move forward.

19       MR BREALEY: Okay. I'm sure we will take a pragmatic  
20          approach, but we are concerned about the slow pace.  
21          Clearly they've got other cases, but they are -- they  
22          have admitted wrongdoing, so there's only so much leeway  
23          you can give them. That is a sensible approach, but at  
24          some stage it is in my submission going to be necessary  
25          for NERA to talk to Compass Lexecon and just try and

1 find out the basis upon what are the assumptions they  
2 have made.

3 MR JUSTICE FANCOURT: I was going to ask about that. If  
4 those questions in due course are conscientiously  
5 answered in detail, are you saying it is obvious, even  
6 making that assumption, that a meeting will be necessary  
7 in order to enable your clients to properly understand?

8 MR BREALEY: I'm not sure I can go that far, no.

9 MR JUSTICE FANCOURT: So it might not be.

10 MR BREALEY: It might not be. I think -- to put it the  
11 other way round, I think it is more likely than not that  
12 there will have to be some dialogue to explain what are  
13 very complex matters. But I can't say the other way  
14 round.

15 THE PRESIDENT: And it might be then rather narrower and  
16 more focused than all these issues because, as Mr Malek  
17 has pointed out. I mean the last question, "Can we have  
18 disclosure of management accounts?", I mean that's not  
19 for discussion between experts at all, that's the sort  
20 of request you make to the defendants and it's what  
21 gets --

22 MR BREALEY: That's essentially a request of DAF to disclose  
23 the management accounts.

24 THE PRESIDENT: It is a request of DAF, absolutely. So  
25 that's not going to involve the experts. But it may be

1           that when you get an answer to some of these, some of  
2           the answers either are not sufficiently clear, or you  
3           think it has reached a point where it is most sensibly  
4           explored by discussion rather than a lot of ping-pong  
5           question and answer, I can see that, but as we are  
6           today -- and you have explained why you have made the  
7           application -- it does seem I think to all of us  
8           sensible that now you've got a date, that DAF should  
9           provide its response by that date and then you are  
10          free -- if it is a disclosure request it can come on  
11          Friday, if it's something more fundamental it may need  
12          a hearing, but you will then be able to explain exactly  
13          why discussion of this answer that you've got is really  
14          necessary.

15       MR BREALEY: I see that. We see that.

16       THE PRESIDENT: Just one moment.

17                   (Pause).

18           We think any one of us could deal with any problem  
19          arising, if it does, from the answer you receive on  
20          a Friday application --

21       MR BREALEY: I'm very grateful. Maybe we will take that up  
22          as the best way forward.

23       THE PRESIDENT: -- and that we move it forward that way.

24           Mr Beard, March is a month. Can you tell us when  
25          in March you expect --

1 MR BEARD: I said the end of March.

2 THE PRESIDENT: End of March?

3 MR BEARD: Yes. I said the end of March.

4 THE PRESIDENT: So if we say by 27 March, which is the  
5 Friday.

6 MR BEARD: Friday, yes.

7 THE PRESIDENT: And we are not going to --

8 MR BEARD: I should be clear --

9 THE PRESIDENT: Will give such response as it considers  
10 appropriate.

11 MR BEARD: Yes, absolutely. Because as has been noted in  
12 relation to those questions -- and we haven't gone  
13 through them in detail, some of them are very detailed  
14 questions, clearly, for DAF individuals to look at, some  
15 of them are much broader, they are really not questions  
16 at all, they are requests for disclosure put in a list  
17 of questions which is itself inappropriate. We will  
18 respond to those. If a disclosure application is going  
19 to be made, it needs to be -- whether or not it is going  
20 to be heard at a Friday hearing or otherwise, we are  
21 going to need proper notice of that.

22 MR MALEK: Well, we've got the direction in the disclosure.

23 MR BEARD: Yes, of course.

24 MR MALEK: That procedure should be followed.

25 MR BEARD: Yes, but it may be that some of these disclosure

1 applications are (inaudible). I suppose one could  
2 euphemistically put it, some are heavier than others.

3 We hear the point, and we are not objecting. We  
4 have maintained all along we will answer the questions.  
5 Mr Brealey has frankly not been fair in his  
6 representation of our responses. When he said that our  
7 initial response referred to Compass Lexecon as  
8 appropriate being involved, it was at a time when we  
9 didn't even have the questions. When he takes you to  
10 the letter of 15 January, we said we would update  
11 following this CMC. It is striking that there has been  
12 no request, no application for a date for responses to  
13 these questions made at any point and frankly this  
14 expert meeting application was just misconceived, in  
15 circumstances where we had --

16 THE PRESIDENT: Well, Mr Beard, fine, we've got your  
17 indignation.

18 MR BEARD: As long as it is fully noted, sir, that's fine.

19 THE PRESIDENT: We are not going to make any orders for  
20 costs one way or another on this, or indeed of any other  
21 matters raised in the CMC, which indeed has been  
22 completed in one day not two, with some saving we  
23 imagine as a result.

24 We will make the order that by 27 March DAF provides  
25 such response as it considers appropriate to the

1           questions annexed to the letter from Ryder's solicitors  
2           of 20 December and there is liberty to Ryder to make  
3           further applications based on the answers received.

4   MR BREALEY:   Maybe in the covering letter they can clarify  
5           whether they have consulted their economists for the  
6           responses.

7   THE PRESIDENT:   Well, I think, no, you will get your answers  
8           and then you can pursue it and pursue it as you think  
9           necessary.   And some may involve the economists, some  
10          seem to me very specific factual questions which won't  
11          and it can be taken forward that way and we will look at  
12          it if we need to thereafter.

13   MR BEARD:   I'm most grateful.

14   THE PRESIDENT:   Is there anything else?

15   MR BEARD:   We have nothing else.   I'm grateful.

16   MR MALEK:   We encourage everyone to cooperate and as far as  
17          I can see on all the applications we have heard today,  
18          everyone has been working in the right direction and  
19          cooperative -- I know sometimes you feel there is too  
20          much delay but at the end of the day I do get the  
21          impression everyone is working in the same direction.  
22          It is not one of those cases where someone is  
23          deliberately blocking someone else to delay the --

24   MR BEARD:   Appreciated.

25   THE PRESIDENT:   And we realise that it is not proceeding as

1 fast as claimants would wish, but equally in certain  
2 respects it may be proceeding faster than defendants  
3 would wish.

4 Thank you all very much.

5 (4.15 pm)

6 (The hearing concluded)

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