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Case No. : 1284/5/7/18 (T) ; 1290/5/7/18 (T)

IN THE COMPETITION
APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London
EC4Y 8AP

1 March 2021

Before:

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

(Sitting as a Tribunal in England and Wales)

BETWEEN:

ROYAL MAIL GROUP LIMITED v DAF TRUCKS LIMITED & OTHERS

BT GROUP PLC & OTHERS v DAF TRUCKS LIMITED & OTHERS

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

**Hearing (Expert Evidence and
Pleading Amendments) – Day 1**

Monday, 1 March 2021

(10.38 am)

THE PRESIDENT: Good morning everyone. Some of you are joining us on the Microsoft Teams platform and many others through the live stream of these proceedings, so I will start with a warning: these proceedings are being recorded by the Tribunal and that will lead to an authorised transcript, but it is strictly prohibited for anyone else to make any unauthorised recording, whether audio or video of these proceedings. To do so is a contempt of court, punishable as such, and that is no mere idle threat as some will know. The BBC no less were found to be in contempt of court less than a month ago for making an unauthorised recording of a planning appeal and, despite its fulsome apology, received a significant fine. So everyone has been warned.

We will take a short break mid-morning, both for the assistance of the transcribers, and indeed for the benefit of everyone, and similarly in the middle of the afternoon.

Thank you on both sides for the skeleton arguments which we have read of course and for those in your respective teams in preparing the bundles. It has been very helpful to have just very limited physical bundles with some of the key documents and the rest in

1 electronic form, and that combination, I think I speak
2 for all of us, has worked well.

3 This is of course just as much a formal court
4 hearing, although being conducted remotely, as if
5 everyone was here in the courtroom in Salisbury Square
6 House where the three members of the Tribunal are now
7 sitting.

8 Can I just mention confidentiality. There is a very
9 limited amount I think of confidential material in the
10 witness statements, though of course a lot of
11 confidential documents. As I understand it, those
12 joining on Teams, the Teams link, are all within the
13 Inner Confidentiality Ring, so there is no problem
14 there. If at any time it should be necessary for
15 counsel to actually speak about a confidential document,
16 if you let us know that and the live link will be
17 suspended. But as I understand it also, the electronic
18 documents being provided by Opus, that is not through
19 the Tribunal, they do not go automatically to anyone
20 outside the Inner Confidentiality Ring but as
21 I understand it those arrangements have been made and
22 documents that are brought up electronically by Opus do
23 not get seen on the live link, so there should not be
24 a problem there.

25 If I can just mention we have had some of the

1 witness statements in both confidential and
2 non-confidential versions. I did note that
3 Mr. Pritchard's statements, that is dealing with the
4 Royal Mail tax issue, we have got which is one of the
5 areas where there is some confidential financial
6 information regarding Royal Mail, we have got them in
7 I think both versions, although at least in my bundle B3
8 at tab 12 is the confidential witness statement, tab 13
9 is also referred to as the confidential witness
10 statement but I think it is actually the
11 non-confidential witness statement and I think we have
12 the same thing with Mr. Pritchard's second witness
13 statement at tabs 24 and 25 -- I think 25 although it is
14 labelled confidential is actually the non-confidential
15 version. Unless anyone corrects me, I shall assume that
16 is the position. We may not get to that witness
17 evidence anyway.

18 It seemed sensible to start with the question of
19 those experts where there has been agreement, because
20 you will need an order, a direction from the Tribunal,
21 because you need permission to call expert evidence and
22 on what.

23 As we understand it on the overcharge the claimants
24 wish to call Mr. Harvey and the defendants to call
25 Professor Neven -- is that how I pronounce it,

1 Mr. Beard?

2 MR BEARD: "Neven", yes.

3 THE PRESIDENT: And that is agreed between you and we are
4 content with that, so I shall make that direction.

5 On used truck pass-on, again the claimants want to
6 call Mr. Harvey, the DAF defendants Professor Neven and
7 we will make that order.

8 Supply pass-on, there is an issue about a second
9 expert from DAF which we will come back to, but we are
10 certainly prepared to direct that the claimants can call
11 Mr. Harvey and DAF can call Mr. Bezant.

12 Loss of volume only in the Royal Mail proceedings,
13 again Royal Mail wants to call Mr. Harvey, DAF
14 Professor Neven and we make that order.

15 Financing losses, again Royal Mail proceedings only,
16 and compound interest, I think for that Royal Mail wish
17 to call Mr. Earwaker and DAF to call Mr. Delamer and
18 that is agreed between the parties, we are content with
19 that.

20 Again only in the Royal Mail proceedings, truck
21 leasing and financing, here we are a little puzzled
22 because from what we have seen, the claimants want to
23 adduce evidence on that issue both from Mr. Harvey and
24 Mr. Earwaker and DAF wants to adduce evidence both from
25 Professor Neven and Mr. Delamer and we are not clear at

1 the moment why each of you need two experts to deal with
2 that issue. So we would like to hear from you at some
3 point on that, because we would have thought that could
4 be dealt with by one expert, but you may persuade us
5 otherwise. So if you could come back to that at some
6 point.

7 Then we have of course issues that are at the
8 moment -- there is the tax question which we will come
9 on to where we see there is a dispute, again only in the
10 Royal Mail proceedings, about whether DAF should be able
11 to call an expert and then of course there are issues
12 which depend on the amendments being sought.

13 On disclosure we have seen a note just a short while
14 ago with some proposals regarding the PO4 and PO5
15 categories. Now, I do not know, Mr. Lask, whether you
16 have had a proper chance to consider that with your
17 clients. We are in a sense in the hands of the parties
18 on this. We can either deal with PO4 and PO5 today and
19 the disputed issues, but if you would like time to take
20 instructions -- and these are quite involved issues and
21 getting instructions is slightly more complicated when
22 everyone is working remotely, we appreciate that, we can
23 put that off until tomorrow and leave you time to
24 consider what has been proposed, if necessary, go back
25 with some modified proposal and see what can be agreed.

1 Would that assist, Mr. Lask?

2 MR LASK: It would, sir, thank you. We have not had
3 a chance to take proper instructions from the clients
4 yet. We will be doing that during the course of today
5 so to be able to revert to this tomorrow would be very
6 helpful, thank you.

7 THE PRESIDENT: Well, we will do precisely that then and we
8 will not get into the detail of P04 and P05 today.

9 It did, may we say, occur to us that it may be of
10 assistance to the defendant to have a statement, both
11 from Royal Mail and from DAF, a witness statement rather
12 than a general statement, from a senior financial
13 officer in each of those groups explaining how the
14 prices are determined with a view to cost recovery, both
15 at a general level and specifically how costs of trucks
16 are dealt with within the group and to have that by
17 means of witness statement to explain what went on,
18 which might assist if there is later going to be some
19 refinement and narrowing down of categories of evidence,
20 categories of documents and databases and so on that are
21 needed and indeed might substitute for some of that. So
22 we would be amenable to making that sort of order and
23 that is something you might want to think about on both
24 sides and we would see that as, as it were, coming
25 before some of the categories of evidence because on the

1 basis of that it may be clearer what is most relevant
2 and useful.

3 MR LASK: Sir, may I just ask a question about that.

4 I think what the Tribunal is envisaging are witness
5 statements in advance of the main factual witness
6 statements that are due later this spring, is that
7 right?

8 THE PRESIDENT: Exactly. It is witness statements simply to
9 assist then the process of narrowing the categories for
10 disclosure and to assist the experts in preparing their
11 work, so it is quite separate from the other aspects of
12 factual evidence.

13 MR LASK: Thank you, sir. If it pleases the Tribunal what
14 we will do is give that some thought during the course
15 of this morning and address you on it in due course.

16 THE PRESIDENT: Yes, well, you can address us on it tomorrow
17 with -- it is part of the consideration of what to do
18 about PO4 and PO5.

19 MR LASK: Thank you.

20 THE PRESIDENT: So in the light of that it may be that the
21 sensible thing to turn to next is the question of the
22 expert evidence on supply pass-on where the defendant
23 wishes to adduce separate evidence from Professor Neven
24 by way of a regression analysis and that, as we
25 understand it, links to their disclosure request at PO7,

1 so I think Mr. Beard, that is your application I think.

2 Application by MR. BEARD

3 MR BEARD: Yes, it is, I am grateful to the Tribunal for the
4 indications in relation to those matters. I think we
5 have made clear in previous exchanges that the sort of
6 witness statements that you have just canvassed would be
7 a very sensible course in order to assist the process of
8 disclosure due to the asymmetry of information.

9 Now, we are where we are in relation to these
10 matters, but the Tribunal's indication is extremely
11 helpful in that regard.

12 In relation to supply pass-on, I am very happy to
13 deal with that first.

14 The essential position is that there is no dispute
15 about the pleading on supply pass-on and of course the
16 only issue relates to the way in which experts should
17 analyse the issue and the implications for the scope of
18 disclosure. Now, there is an extent of common ground
19 which is that it is recognised that using forensic
20 accountancy analysis -- that is analysis of Royal Mail
21 and BT's disclosure and how they treat truck costs
22 within their business, that can give rise to an estimate
23 of the extent of pass through. It is to some extent
24 somewhat more qualitative and it is what Mr. Bezant and
25 Mr. Harvey would do in these circumstances. But it is

1 also I think common ground that one can in principle
2 carry out a more substantial exercise in measuring
3 pass-on using a regression analysis. Of course that is
4 the mode that we are talking about using in relation to
5 the overcharge analysis.

6 Now, Mr. Harvey suggests in his statement at B3,
7 tab 74, paragraph 3.2 that the increase in precision is
8 small. We do not accept that. We do not accept that he
9 is in a position to assess the degree of change of
10 precision that we are talking about and obviously this
11 is a matter of some significance, the extent to which
12 there is supply pass-on.

13 When we are looking at price changes in relation to
14 cost changes, which is what we are hypothesising here --
15 because this is all done on the basis that there is some
16 sort of positive overcharge -- then a regression
17 analysis, as we are going to be using in relation to the
18 overcharge itself, is the key method for essentially
19 controlling for other factors that exist and that is not
20 something that the forensic accounting analysis that
21 Mr. Bezant and Mr. Harvey will be able to do in the same
22 way.

23 The Tribunal well understands that what a regression
24 is doing is analysing factors which determine price and
25 try to seek to control the factors so as to isolate

1 a particular relationship and here of course the issue
2 is going to be between variable costs and customer
3 prices, which will inform the Tribunal's assessment of
4 whether an increase in truck costs caused an increase in
5 customer prices.

6 Professor Neven sets this out in his first
7 statement, just for your notes, it is {B3/11/4}
8 paragraph 16.

9 Now, just to be clear, we are not proposing that
10 this is an analysis done for the regulated side of the
11 business. On the regulated side of the business we
12 recognise that the analysis will be focused on the
13 process of regulation and the means by which price is
14 determined under that and the ability to recover costs
15 that are permitted by the regulator. So where prices
16 are determined through a charge control process where
17 the regulator is determining that permitted price which
18 enabled costs to be recovered, it is obviously changing
19 the lense through which you analyse the relationship
20 between inputs, costs and prices, but on the unregulated
21 side it is clear that regression is a more precise way
22 of measuring the relationship between costs and customer
23 prices. It is, as I say, just using the same basic tool
24 that is going to be used to measure any overcharge, and
25 I will be coming back to the Sainsbury's judgment in the

1 Supreme Court later, but obviously we have seen there
2 that one of the points that the Supreme Court rejected
3 was that you should have an asymmetry of the
4 requirements of precision in relation to the analysis of
5 overcharge and pass-on.

6 THE PRESIDENT: Can I just interrupt you. You just made the
7 point you are not proposing this for the regulated side
8 of the business.

9 MR BEARD: No.

10 THE PRESIDENT: Is that not the great bulk of the business
11 as regards for Royal Mail generally and indeed BT where
12 trucks are used?

13 MR BEARD: Well, we think on the basis of the evidence that
14 may well be right, but we do not know, is the answer,
15 because --

16 THE PRESIDENT: Well, I mean when you say you do not know,
17 if Royal Mail through its witness evidence says that,
18 whatever it is, "90% of our business is in regulated
19 sectors", is there reason to doubt that?

20 MR BEARD: Well, we do not quite understand how that figure
21 has been come up with and we are concerned that we do
22 not understand the sources for that information and we
23 do recognise that Royal Mail does have rather extensive
24 business that is unregulated.

25 There are two points to be made in relation to

1 Royal Mail: one is we do not understand the basis for
2 the 90% figure, but even if we are talking about the 90%
3 figure we are still talking about a very substantial
4 amount of money that is being claimed in relation to
5 these matters. We are talking about figures that are
6 going to run into many millions of pounds. I think the
7 rough figure that we are talking about in relation to
8 this is in the region of £8 million and that is before
9 one moves on to add compound interest.

10 THE PRESIDENT: Sorry, the 8 million represents what?

11 MR BEARD: Well, that is 10% of the Royal Mail claim and
12 then of course you have got compound interest which
13 elevates the claim by multiples and therefore even if
14 one is just talking about 10% you do have
15 a free-standing and very substantial --

16 THE PRESIDENT: Sorry, it is not 10% of the claim, the
17 damages being claimed that is the relevant point, is it?
18 It is that if you are looking at -- it does not mean
19 that 10% of the trucks are being used in unregulated
20 business --

21 MR BEARD: Well, we just do not know.

22 THE PRESIDENT: I thought they say that as the business
23 generally but maybe --

24 MR BEARD: This is the difficulty because as soon as one
25 starts probing it -- I accept, sir, your point that one

1 cannot necessarily equate 10% of the business with 10%
2 of the claim, but we do not have any better metrics
3 because of the vagueness of what has been asserted in
4 relation to these matters and all I am saying is if it
5 were to be an equation between the two, you are still
6 looking at a very significant number.

7 Now, it may well be in fact that the claim is more
8 heavily based on unregulated business, in which case the
9 figure I am giving you is an underestimate. It may be
10 it is less, but we just do not have any handle on that.
11 We have scepticism about the 90%, we do not have any
12 details in relation to it and, on the basis of what we
13 have got, we say even if that were right at 90% we have
14 a substantial claim that we are dealing with and as
15 I say the 8 million is the starting point and then we
16 are running into multiples once we add in compound
17 interest, so even if one were just saying "Well, let us
18 just treat unregulated business as a free-standing claim
19 here", you have got a very significant, multi-million
20 pound claim and in those circumstances say "Well, do not
21 worry too much about the precision of this pass-on
22 argument", we would say "No, that is quite unfair and
23 wrong in these circumstances".

24 If you have got a methodology that is able to look
25 at and control for other factors, a methodology akin to

1 the one you will be using for the prime analysis in
2 relation to overcharge, you really should be permitting
3 the defendants to exercise that function of their
4 experts to look at those issues, unless there are very
5 compelling reasons why that would not be fair in the
6 circumstances. So we do say that the split of regulated
7 and unregulated is material, but we say that when you
8 are looking at what you are talking about here, it is
9 potentially a very substantial claim and therefore these
10 things matter, is the simple point.

11 Now, in this relation to BT, things just get vaguer
12 and vaguer because it is said that the position is that
13 the trucks are used for regulated business but we are
14 very unclear what that actually means. We are all
15 conscious that parts of BT and Openreach's business is
16 regulated and part of it is not. Sometimes that is by
17 reference to geography, not just in relation to
18 services. One is well aware of that from the price
19 control mechanisms that are put in place by Ofcom in
20 relation to BT and Openreach and so --

21 THE PRESIDENT: That is a smaller claim, the BT claim, is it
22 not?

23 MR BEARD: Yes, absolutely. I am not for a moment
24 demurring. It is undoubtedly a smaller claim and
25 I cannot give you anything like a parallel indicative

1 figure because we do not have any sense of why it is
2 being said that all truck costs are all going into the
3 regulated business and therefore should be treated
4 accordingly.

5 Now, if it turns out that actually in relation to BT
6 all of the truck costs are being dealt with through the
7 regulated business and are fed into the price control,
8 we do recognise that in those circumstances, consistent
9 with the approach we are taking, one would not need
10 evidence from Professor Neven on these matters.

11 So we are not taking issue with that. We have made
12 our position clear. In relation to the regulated sector
13 exercise, we do not think it would be necessary and
14 proportionate to carry out the sort of regression we are
15 talking about and other exercises are appropriate. That
16 is certainly the position we understand to be the case
17 at the moment, but that is not the case in relation to
18 unregulated and, as I say, it is substantial and there
19 is a significant difficulty that we are getting evidence
20 that is entirely vague in relation to these matters.

21 So we are happy with a situation that we are
22 permitted to adduce evidence if and insofar as it
23 relates to only unregulated matters, and if it turns out
24 that none of these costs fall within the unregulated
25 part of the business then of course that will fall away.

1 We do not have an issue with that, but at the moment the
2 position is wholly unsatisfactory.

3 THE PRESIDENT: Yes. I do not think they quite say "none",
4 they say "minimal".

5 MR BEARD: Yes, but look I am just going to raise the
6 sceptical eyebrows about exactly what is being said
7 here, because this is evidence that is being put forward
8 not by someone from BT, not by someone from Openreach
9 and not by someone who has explained how it is these
10 costs work within the business. We have significant
11 concerns about what is being put forward in relation to
12 this. We have had proposals in relation to disclosure,
13 for instance, in respect of BT that did not even relate
14 to BT Fleet until last week and BT Fleet is the
15 purchaser of trucks in relation to these matters.

16 Now, if we have got a situation where what is being
17 put forward by the other side and the experts'
18 suggestions and the witness evidence from their
19 solicitors is not even covering the relevant purchasing
20 entity, we do have some concerns about how this business
21 is being presented to us in this litigation.

22 So it is with sceptical eyebrows that we deal with
23 these matters, but obviously for the purposes of today,
24 what we are saying is, in relation to unregulated, we
25 think that this is necessary and appropriate and we also

1 think it is wholly proportionate, particularly given the
2 scale of the claims that do relate to unregulated,
3 particularly in relation to Royal Mail, but also on the
4 flip-side, the fact that although there are lots of
5 protestations about the nature of the data that is being
6 sought and the disclosure that is being sought, and the
7 number of data points that we are talking about, and
8 some vague references to legacy systems, actually most
9 of what we are talking about is the sort of data one
10 would expect to be available on any system that can be
11 sensibly interrogated.

12 Now, we have the very unsatisfactory position that
13 on Friday we had a letter from the claimants saying
14 "Well, actually this legacy system material is going to
15 be very difficult to get hold of". Now, it is in
16 relation to that we put in, in part, the supplementary
17 submission that you received this morning and of course
18 on which Mr. Lask can take further instruction, albeit
19 it is the latter part of that, so it is in relation to
20 P07 starting at page 3, that we have put in material in
21 relation to that.

22 Now, the position that has been adopted throughout
23 is that the claimants just resist this category of data
24 on principle and then they have also purported to object
25 on proportionality, but, as we have noted in our

1 skeleton, the evidence that has been provided to date is
2 extremely vague. Mr. Coulson's witness statements
3 asserted that the information is voluminous and, in
4 part, held on legacy systems and the legacy systems are
5 unlikely to hold data for much of the cartel period.

6 Now, this is a very unsatisfactory position even in
7 relation to the witness statements where the claimants
8 have had five months to marshal their arguments in
9 relation to that, but it is made all the more
10 unsatisfactory that the comments in relation to legacy
11 systems are being provided to us on the Friday afternoon
12 before this hearing, but we have looked at that and, for
13 all the protestation in the letter that came across on
14 24 February, we say actually it is not at all clear that
15 there is any problem with obtaining sufficient data
16 under P07 and that the effort involved in doing so would
17 be in any way disproportionate given the value of the
18 claim that we are talking about, because Professor Neven
19 is talking about a more limited regression analysis that
20 is carried out in relation to overcharge in any event,
21 so it is not that we are seeking the sorts of level of
22 data or granularity of data that has been sought by the
23 claimants in relation to the overcharge issues in this
24 case, but actually what we have is a situation where
25 actually adequate information appears to have been

1 identified as available, but it is asserted in very
2 general terms without any explanation. There may be
3 limitations to the data or difficulties accessing it.
4 Five months after this was put forward, that is a wholly
5 unsatisfactory position to be in at this hearing.

6 That is in relation to Royal Mail. The position in
7 relation to BT is just utterly vague. So we say that in
8 circumstances where what Professor Neven has tried to do
9 and tried to explain in his witness statements is
10 actually produce a more focused approach to carrying out
11 a regression. There is no doubt that a regression
12 analysis can provide a more precise figure and that such
13 an approach is in the circumstances proportionate, that
14 this tribunal should be extraordinarily slow before it
15 says "No", to defendants, "you cannot carry out this
16 sort of analysis, you cannot have an expert do it", when
17 you are talking about a multi-million pound element of
18 the claim in relation to Royal Mail, at least on the
19 face of the material we have got, and an unclear claim
20 in relation to BT.

21 THE PRESIDENT: Can we just look at the evidence or data
22 rather and documents that you are seeking at the
23 initiative of Professor Neven. That is your PO7 as
24 amended.

25 MR BEARD: Yes.

1 THE PRESIDENT: Which is in the revised Redfern schedule on
2 disputed disclosure categories. I think it is document
3 C3/10 at page 362 {C3/10/362}, if that can be brought
4 up.

5 MR BEARD: Yes, that is the reference I have. I am not sure
6 if there is anything confidential in any of these parts
7 of it.

8 THE PRESIDENT: It is not marked confidential.

9 MR BEARD: No, I do not believe so.

10 THE PRESIDENT: Now, it should start with a page which says
11 PO7 on it.

12 MR LASK: I am sorry to interrupt, the reference I have is
13 349. The page I am seeing on the screen -- yes, that is
14 the right one.

15 THE PRESIDENT: Thank you, right.

16 MR BEARD: 349 is the start of the document, 362 is PO7.

17 THE PRESIDENT: I think we have got PO7 come up now. So it
18 is:

19 "Detailed monthly sales data for the claimants'
20 unregulated products at the lowest level of product line
21 aggregation recorded by the claimants by individual
22 units as applicable for the claimants' sales which
23 reflect directly or indirectly a charge for the cost of
24 trucks."

25 Now, this is over what period of time, Mr. Beard?

1 MR BEARD: It is over the period of the alleged claim, so it
2 is over the period going back to --

3 THE PRESIDENT: 1996, is it?

4 MR BEARD: No, it is to 1996 I believe.

5 THE PRESIDENT: Yes, 1996, and you take it forward -- is it
6 23 years?

7 MR BEARD: I think that is the nature of the claim, yes.

8 THE PRESIDENT: So 23 years of monthly sales data at the
9 lowest level of product line.

10 MR BEARD: Yes.

11 THE PRESIDENT: By individual units -- I mean this is
12 a vast -- on any view, for a group this size, when you
13 say it is -- we have had vague statements that that is
14 "voluminous", I mean it is obviously voluminous,
15 is it not?

16 MR BEARD: No doubt it is voluminous. It is the vagueness
17 of assessability. Bigness of data sets is not the issue
18 here. It is not that they are all going to be printed
19 out and put in files and flicked through with people
20 using a wet thumb, that is not what we are talking
21 about. The scale of data sets is not the issue here,
22 because processing large data sets is exactly what the
23 sort of analysis is that economists and all sorts of
24 other businesses engage in, because we use computer
25 tools to do that. That is why we are concerned that

1 saying "Well, there are lots and lots of data points
2 here"; we do not care. That is no the issue. If you
3 have got them accessible because you hold them on
4 systems -- which you would expect are held by a company
5 like Royal Mail because that monthly sales data is
6 extremely important one would expect to them for a whole
7 range of business purposes and in those circumstances
8 being able to say "Well, we want that chunk of data so
9 it can be transferred across and analysed by our
10 economists", is a matter of identifying the scope of the
11 data set and then sending it electronically. It is not,
12 in those circumstances, some great exercise in
13 interrogation.

14 Now, if there are particular issues with the way in
15 which data is stored that, Royal Mail or BT want to
16 raise with us and they say "Well, actually this precise
17 wording gives rise to particular difficulties in
18 relation to us extracting data from our data sets and
19 sending it across to you", obviously we will listen to
20 that, but that is not what is being said here.

21 What has been said so far is "Well, there is lots
22 and lots of it and some of it might be difficult to
23 obtain going back over a certain period of time", to
24 which we say "Okay, what is it you can actually
25 produce?" and it is wholly unsatisfactory on the Friday

1 before the hearing to be saying "Well, actually because
2 it goes back a long way there will be legacy systems and
3 there might be some difficulty getting into them". That
4 is not sufficient at this stage in proceedings.

5 So the difficulty we have -- and you can see it from
6 the columns in that table that, sir, you have taken us
7 to --

8 THE PRESIDENT: But when you say it is just a question of
9 accessing the data, there is the qualification, is there
10 not, which reflect directly or indirectly a charge for
11 the costs of trucks, so the data then has to be looked
12 at to see, well, yes, they have all this cost data
13 perhaps, certainly in more recent years, but which part
14 of it reflects indirectly the cost of trucks and someone
15 has to start looking at it.

16 MR BEARD: Well, that is to do with categories of data
17 potentially and I think what we are saying is: look, to
18 say "No, no, no, it is disproportionate because there is
19 lots and lots of it" is not good enough. If there are
20 particular problems in saying "Well, actually we cannot
21 tell whether or not this would indirectly take these
22 matters into account", then obviously our experts will
23 engage with that process. That is not something that we
24 are unwilling to discuss, but what has happened is that
25 there has just simply been a degree of obstruction in

1 relation to this because there has not been an
2 explanation of what is going on, notwithstanding how
3 many months we have been asking for this and simply
4 saying "Well, it is all terribly big" is not
5 a sufficient answer in these circumstances.

6 It is worth noting that Professor Neven in his first
7 witness statement at footnote 2 has already indicated
8 that -- and he says:

9 "Should the claimants have particular difficulties
10 in providing more historic data, it may be possible to
11 proceed on the basis of a more limited date range."

12 So it is not as if Professor Neven has been sitting
13 here saying "No, no, no, we have to have it throughout
14 the relative period, that is imperative, I cannot do
15 anything unless I have everything".

16 Mr JUSTICE FANCOURT: Mr. Beard, it is a rather
17 unconventional approach to disclosure, is it not, to say
18 it is extremely difficult to identify in relation to
19 each and every data set whether it is relevant to the
20 particular issues, therefore all the documents should be
21 handed over to the receiving party so they can carry out
22 whatever exercise they please on it?

23 MR BEARD: Well, with respect, sir, I do not think that is
24 what is being said. I think what is being said here is
25 the relevance of the documents that we are talking

1 about, in other words the data sets that we are talking
2 about, is that we want to understand the data in
3 relation to the lowest level of product line
4 aggregation. We want to understand at what prices they
5 are selling these products and what we are interested in
6 assessing, and what Professor Neven is interested in
7 assessing, is how truck costs might feed through into
8 those prices and that is what he is testing in relation
9 to the regression.

10 Now, in those circumstances, asking whether the
11 truck costs feed through directly or indirectly into
12 those prices and then, in those circumstances, giving us
13 that data is actually specifying what is relevant for
14 the regression analysis, so it is not, with respect,
15 saying, "Give us the data and we will work out what is
16 relevant", it is actually setting the out the criteria
17 of relevance here. The criteria of relevance is
18 necessarily broad particularly in these circumstances,
19 particularly where we do not know how they do these
20 things -- I mean this is part of the problem we have --
21 but we do also recognise that in carrying out this
22 regression analysis we would expect there to be a large
23 amount of data, but it is also important to think
24 cautiously about the idea that this is a voluminous set
25 of documents, as if they are emails that have to be

1 reviewed by people.

2 What they are doing is providing you with numbers
3 essentially --

4 Mr JUSTICE FANCOURT: I follow that, but you are asking for
5 the complete data set effectively for Royal Mail's
6 business for 23 years.

7 MR BEARD: Well, we are asking for that data set. If
8 Royal Mail tells us that the truck costs influence
9 directly or indirectly the costs in relation to all of
10 its products then necessarily that would be the
11 parameters of relevance. If they turn round and say
12 "Well, actually no that is not the way that we run
13 things and therefore this category of information is not
14 going to be relevant", obviously we are very much
15 willing to listen and also we are not insensitive to the
16 facts that difficulties do arise when you are going back
17 in time in relation to legacy systems. Indeed that is
18 what footnote 2 to Professor Neven's expert report is
19 saying.

20 What we are saying today is it is wholly
21 unsatisfactory to have vaguely raised these points in
22 witness statements and then on Friday be saying "Oh, it
23 is very, very difficult", still without any real
24 precision about these matters because it leaves
25 Professor Neven not able to be engaged and say "Okay,

1 well, I can think about cutting my request in this way
2 given what you have told me about what you can access
3 and the way you work". That is the story that is not
4 being told, so how on earth is he supposed to engage in
5 those circumstances? That is what leaves you with this
6 sort of breadth because of the lack of engagement by the
7 claimants in relation to this. He is not being
8 inflexible --

9 Mr JUSTICE FANCOURT: I take you back to the President's
10 point earlier about a statement from each of these
11 claimants to clarify what documents are likely to
12 contain helpful --

13 MR BEARD: As I say, we have said all along "If you can tell
14 us the story -- we are not obsessed with document
15 disclosure, if you can give us particulars of these
16 things and plead particulars" -- and it has happened in
17 other cases where people have told stories effectively
18 through the medium of pleadings or early witness
19 statements -- "then yes, of course we can engage more".
20 But we suffer from ignorance. It is obviously the sort
21 of second form of Rumsfeldian ignorance, it is known
22 unknowns we are dealing with here, but nonetheless it is
23 a problem for us and the lack of engagement and the lack
24 of clarity causes us a difficulty and it does not render
25 anything we are asking for inherently irrelevant or

1 unreasonable or indeed disproportionate, because if you
2 have an SAP type sales system that holds all this data
3 and what you are doing is that you are essentially
4 providing that obviously, obviously on a confidential
5 basis, to external economists to be able to interrogate
6 it and what is being said against us is that somehow we
7 are being imprecise.

8 We are being as precise as we can be in these
9 circumstances. We are willing to be pragmatic about
10 these matters but we do recognise that we would expect
11 that there is an awful lot of data that should be held
12 by -- will be held by a company of this sort, both
13 companies in fact, and that instead of protesting how
14 difficult it is in general terms about legacy systems,
15 we should be knowing what sort of systems this data is
16 held on, how long it would take to interrogate these
17 systems, what are the problems they identify if there
18 are any in picking out the sorts of data that we are
19 talking about and what data they could actually readily
20 provide because that is the thing that is missing in all
21 of this. There is no sense of cooperation, there is no
22 attempt to say "Yes, well, we can give you this, but
23 would struggle with the other". That has never been
24 said by them. It is all about "You are too imprecise,
25 we cannot do it, it is too big" and that is not a fair

1 approach in these circumstances.

2 So that, as I say, is our position. We recognise
3 that going back to 1996 may be completely impossible and
4 we are going to have to look at a more limited date
5 range. But turning up and saying "Well, it is all
6 terribly difficult before 2012" without any detail,
7 which is what they are doing, on Friday, is just not
8 a sufficient basis on which to proceed at this stage.

9 As I say, none of this detracts from the fact that
10 this exercise would enable a specialised and experienced
11 economic expert to provide a salient piece of evidence
12 in these proceedings which is a regression analysis,
13 a more limited regression analysis he accepts, but
14 a regression analysis that goes well beyond the sort of
15 forensic accountancy story that we are talking about
16 because of course a forensic accountancy story is saying
17 "Well, broadly this is how we run our business, this is
18 how we deal with costs, therefore you would expect them
19 to be fed in in the following ways", but it is not
20 carrying out the same sort of economic control exercise
21 that a regression does, but that means --

22 THE PRESIDENT: Sorry to interrupt you, but I do not think
23 Mr. Bezant is simply saying "You would expect it to be
24 controlled in the following ways", he is going to be
25 looking at a vast amount of data to try and see how it

1 was in fact controlled. It is not at the level of what
2 you would expect. He is getting, for his analysis --
3 MR BEARD: That is perfectly fair, sir, he is, but the
4 difference is it is a qualitative story that he is
5 taking and then extrapolating from it. What we are
6 trying to do here is actually carry out some sort of
7 quantitative analysis and that is robust and it is not
8 duplicative and it is something that I think this
9 tribunal recognises by dint of the way that these sorts
10 of techniques are used in relation to overcharge and in
11 other circumstances, that it does produce a very
12 different approach to these sorts of assessments and it
13 is a significant amount of money and therefore justifies
14 this sort of exercise.

15 THE PRESIDENT: Yes.

16 MR BEARD: So let us bear in mind that in relation to
17 Mr. Bezant's account -- this is important -- that what
18 is being said by the claimants is they do not consider
19 that is a satisfactory means of identifying pass-on,
20 supply pass-on, so we should not be under any illusion
21 about that. It is not that they are saying "Okay, we
22 accept in principle that Mr. Bezant's is a good way of
23 doing things", they are saying "No no no, you will not
24 be able to tell from that material. We will let him do
25 it, we will accept that he can go off on this exercise,

1 but we are not going to accept that that turns out
2 meaningful answers". That is their position.

3 THE PRESIDENT: I thought Mr. Harvey was using a similar
4 approach to Mr. Bezant.

5 MR BEARD: Well, he says he is, but the position they have
6 adopted --

7 THE PRESIDENT: Well, I thought you say he is?

8 MR BEARD: That is exactly right, but they do not accept
9 that Mr. Bezant's approach is going to produce any
10 robust answer in relation to this. That is their
11 position. So we are left with this situation where they
12 are saying "We are not going to accept that Mr. Bezant's
13 outturn will be meaningful but we do not want you to do
14 something that will be more precise in these
15 circumstances".

16 THE PRESIDENT: I thought Mr. Harvey is not saying "Well,
17 I am going to do something similar, but it is actually
18 not going to be meaningful".

19 MR BEARD: The position that has been adopted by them, and
20 I will provide you with the references, is that in
21 relation to these matters the situation that has been
22 put forward is that they will not accept that the
23 analysis provided by Mr. Bezant will be sufficient. We
24 have dealt with this in our skeleton argument, if
25 I may -- it is paragraph 34 and the reference is to

1 Mr. Coulson's sixth witness statement at paragraph 2.17,
2 the reference is {B3/15/14}:

3 "The claimants have made clear that they intend to
4 argue ..."

5 THE PRESIDENT: Just a minute.

6 (Pause).

7 Yes, I think one needs to read that in context, what
8 he says. It is paragraph 2.17.

9 MR BEARD: Yes.

10 THE PRESIDENT: Yes, of what Mr. Coulson says in his sixth
11 witness statement. Just pause a moment.

12 MR BEARD: Of course.

13 (Pause).

14 THE PRESIDENT: Speaking for myself, Mr. Beard -- and
15 Mr. Lask will no doubt correct me if I am wrong -- all
16 the claimants are saying is not that we see anything
17 flawed in Mr. Bezant's methodology or technique of
18 looking for supply pass-on, it is just doing all that is
19 not going to establish that there was supply pass-on
20 because it is their position that there was not, but
21 they are not saying it is because there is some gap or
22 deficiency in the methodology. Indeed they are using
23 the same methodology.

24 MR BEARD: Yes, and they are saying we will never show
25 pass-on and they are saying that we will never show

1 pass-on, and in particular, they are saying we will
2 never show pass-on in relation to this using
3 Mr. Bezant's methodology.

4 Now, it is perfectly right that they are saying that
5 they will use a methodology, through Mr. Harvey, that is
6 similar to Mr. Bezant's. But what they are saying is
7 "You will never prove it using this sort of forensic
8 analysis" and we say well --

9 THE PRESIDENT: You will not prove it not because this kind
10 of analysis is not adequate to capture it, you will not
11 prove it because their case is it didn't happen.

12 MR BEARD: I understand that that is their position, I am
13 not demurring from that.

14 THE PRESIDENT: It's a methodological point that they are
15 making.

16 MR BEARD: No, no, but it is obvious that what is going to
17 be said is if Mr. Bezant comes out with a methodology
18 that suggests that there is a positive pass-on in
19 relation to these issues then, in those circumstances,
20 they are going to take issue with it, of course they are
21 entitled to, and one of the things that they will be
22 able to do is take issue with the way in which he has
23 interpreted matters, which of course they will be
24 entitled to and they will be able to criticise his
25 story, which of course they are entitled to, and what we

1 are saying is in those circumstances where they have
2 made clear that that is what they are intending to do
3 and we have open to us a methodology that moves beyond
4 that and looks at the quantitative assessment of pass-on
5 and can do so with more precision and that data is
6 available, then in those circumstances to be kept out of
7 the ability to do that would be quite inappropriate.

8 One of the other criticisms that is leveled --
9 I think it is important to deal with -- is that it is
10 suggested that Mr. Neven's analysis will be as weak as
11 Mr. Bezant's, they suggest, because it relies on
12 Mr. Bezant's work. Now, that is not correct. That is
13 simply a misunderstanding.

14 THE PRESIDENT: Yes, I see that.

15 MR BEARD: What Professor Neven --

16 THE PRESIDENT: It is a different approach.

17 MR BEARD: It is a different approach, yes.

18 HODGE MALEK QC: This case has gone on for quite a long
19 time. Are you telling us at this stage you do not
20 actually know whether Mr. Bezant's approach is going to
21 bear fruit?

22 MR BEARD: Yes, we do not know whether it is going to bear
23 fruit because we are waiting for disclosure.

24 HODGE MALEK QC: Okay.

25 MR BEARD: So we just cannot tell. That is the problem.

1 That is why there is an argument about the disclosure
2 and why it is so frustrating that notwithstanding the
3 fact that we were asking about these things and
4 suggesting that it needed to be got on with in October
5 we are here again with documents not having been
6 provided under the relevant heads that go to what
7 Mr. Bezant would deal with so yes, is the answer,
8 unfortunately we are in that position.

9 HODGE MALEK QC: And the claimants' position is that whether
10 you use Bezant or Neven, you are not going to come up
11 with anything to show supply pass-on.

12 MR BEARD: That is right.

13 HODGE MALEK QC: I do not know whether that position is
14 based on them having done their own analysis with their
15 own documents and so they are able to say "Look, this is
16 a no hoper because we have looked at it preliminarily,
17 we have got our data, we have got our figures, this case
18 that Mr. Beard's clients want to bring is just
19 a non-runner", or is it just merely "Well, we just deny
20 and we do not know ourselves"?

21 MR BEARD: Well, if it is the former, they have been
22 incredibly coy about explaining it to us, because none
23 of that has come forward. We have not had any of that
24 material, if they have done that sort of analysis, put
25 forward and we do not understand what it is Mr. Harvey

1 has done. Obviously there have been without prejudice
2 meetings but I think it is very clear from the witness
3 evidence you have seen that there is not a hint from
4 Mr. Harvey that he had done that sort of exercise in the
5 material he has put forward, nor from Mr. Coulson. So
6 they are making bold assertions about what the outcomes
7 are going to be on the face of, as far as we can see, no
8 analysis on the forensic accountancy approach and then
9 telling us that we cannot possibly prove anything in
10 relation to a regression analysis; and we simply do not
11 buy either story. But that is not really the core
12 question for today. The core question for today is
13 should we be entitled to test these matters and consider
14 evidence in relation to a quantitative assessment not
15 really a forensic accountancy assessment and we say
16 absolutely we should and these bold assertions that are
17 being made are quite inadequate to suggest that it is an
18 inappropriate way of proceeding so that is really where
19 we are.

20 If Mr. Lask can tell me that Mr. Harvey has done
21 this exercise and can set us straight in relation to
22 these matters, we look forward to being provided with
23 a statement in relation to that. So that is where we
24 are in relation to these matters and it is the degree of
25 frustration that my clients have in relation to these

1 issues.

2 THE PRESIDENT: Well, unless there is something else you
3 want to add to that I think we should hear from
4 Mr. Lask.

5 MR BEARD: No, unless I can assist you further, no.

6 Submissions by MR. LASK

7 MR LASK: Thank you, sir.

8 As has been made clear, the only issue in relation
9 to supply pass-on, at least at this stage of the
10 hearing, is whether DAF should be permitted to adduce
11 the expert evidence from Professor Neven, in addition to
12 the expert evidence from Mr. Bezant on the basis that
13 the Neven evidence would require PO7 disclosure and the
14 claimants object for two broad reasons. The first is
15 that Professor Neven's evidence would be duplicative
16 because it would address the same issue of supply
17 pass-on and any increase in precision would, we say, be
18 small; and the second is that the PO7 disclosure that
19 Professor Neven would require is enormous and providing
20 it would be both hugely time-consuming and extremely
21 expensive.

22 I will take those two reasons in turn, so dealing
23 first with duplication. It is common ground, as we
24 understand it, that Mr. Bezant and Professor Neven will
25 address the same essential issue, namely whether and if

1 so to what extent there was any supply pass-on. There
2 is no suggestion of any gaps in Mr. Bezzant's analysis,
3 rather the sole purpose and alleged benefit of
4 Professor Neven's additional analysis is that it is said
5 to enable a more precise estimate for unregulated
6 products.

7 Now, the short answer is that this does not justify
8 the significant additional work and cost that
9 Professor Neven's analysis would generate, particularly
10 given the extensive disclosure which it would require.

11 Now, this short answer is re-enforced by the fact
12 that any increase in the precision is likely to be
13 limited and Mr. Harvey gives five reasons for that and
14 it may be helpful to turn up his ninth statement which
15 is at B3, tab 17 and it is page 4 where he deals with
16 this, paragraph 3.2 {B3/17/4}.

17 Given that this is in the hard file, sir, do you
18 want me to wait for the document to appear on the screen
19 or shall I proceed?

20 THE PRESIDENT: I think we can proceed with the paper
21 document, yes, in bundle B3 at tab 17.

22 MR LASK: Yes. Now, Mr. Beard said at the outset of his
23 submissions that they do not accept that Mr. Harvey had
24 any position to opine on the additional precision if any
25 that Professor Neven's analysis would bring, but

1 Mr. Harvey has set out the basis for his opinion quite
2 carefully at paragraph 3.2 and it may be most helpful,
3 sir, if I allow you to read those five reasons to
4 yourselves.

5 THE PRESIDENT: Yes. We will do that.

6 (Pause).

7 Yes, thank you, we have read that.

8 MR LASK: Thank you, sir. Mr. Beard rather skated over
9 these reasons that Mr. Harvey has given but you will see
10 he has thought about it carefully and he does have what
11 we would say are good reasons for doubting any material
12 increase in precision. One of the reasons -- well, the
13 final, the fifth reason he gives is that since
14 a relatively small proportion of the claimant's products
15 are unregulated and that this is all Professor Neven
16 proposes to look at, any increase in the overall
17 precision of the pass-on estimate will be limited, and
18 Mr. Beard says they do not understand the source of that
19 opinion and they are sceptical about it -- he said he
20 had sceptical eyebrows. But the sources are cited by
21 Mr. Harvey at 3.2 and no query has been raised before
22 today about the reliability of that publicly available
23 information.

24 So it is for these reasons that Mr. Harvey does not
25 envisage doing a regression analysis on this issue and

1 it is for these reasons that he doubts that
2 Professor Neven's analysis, if it went ahead, would
3 materially increase the precision, that being the only
4 alleged benefit of his analysis.

5 Now, it is fair to point out that Professor Neven
6 responded to some of these points in his third witness
7 statement at paragraphs 12 to 14 and the claimants
8 pointed out the gaps, or some of the gaps, in his
9 response in their letter of 26 February which is at
10 {D4/840}. I do not propose to take you to that but just
11 to give you an example, Professor Neven says that he
12 will rely on publicly available information to control
13 for external factors, that being one of Mr. Harvey's
14 concerns, but there is no indication from
15 Professor Neven as to whether the necessary information
16 is available in the public domain or, if it is, whether
17 it is accurate.

18 Now, Mr. Beard said that "Well, the claimants say
19 Mr. Bezant's analysis will not establish pass-on so we
20 ought to be able to adduce Professor Neven's analysis as
21 well", but as the Tribunal pointed out, sir, Mr. Harvey
22 is doing a similar analysis to Mr. Bezant and it is not
23 a methodological objection that the claimants have, it
24 is that we do not expect that any analysis will
25 establish supply pass-on because we think it is

1 implausible and that view is not based on us yet having
2 done our own analysis because we have not. But we do
3 think it is implausible because trucks were such a small
4 input relative to the claimants' overall business.

5 So what this comes down to, we say, is DAF saying
6 "Well, we expect the claimants will challenge
7 Mr. Bezant's analysis so we would like a second bite at
8 the cherry please" and we do not think that that is an
9 adequate basis at all to seek or obtain permission to
10 adduce a second expert analysis. So that is
11 duplication.

12 Then dealing with the P07 disclosure -- and the two
13 points are obviously inextricably linked because in
14 order to do Professor Neven's analysis they need the P07
15 disclosure and we do say that it is clear on its face
16 that the P07 category is enormous. As you said, sir, it
17 is vast on any view and it is no answer to say "Well,
18 there are fancy computer tools that allow you to extract
19 the relevant data". The computer tools are never going
20 to be a complete solution and when you have many
21 millions of records that is invariably going to increase
22 the size of the ultimate task.

23 That is re-enforced by the qualification that we saw
24 to the P07 category that it be limited to documents that
25 reflect directly or indirectly the price of trucks and

1 the difficulty with that is, whilst we recognise the
2 motive behind it, which was to try and narrow down the
3 category, in fact what it does is requires qualitative
4 judgments to be made in extracting any relevant data
5 from this disclosure category and it is not obvious that
6 that could be achieved by computer tools.

7 As Mr. Coulson explained in his 11th witness
8 statement, we think the exercise would be hugely
9 time-consuming and it would be extremely significant and
10 it gives the example that just three months worth of
11 data in one subcategory amounts to millions of records
12 and so we make the obvious point that a requirement to
13 provide such disclosure for an analysis offering, at
14 best, a more precise estimate than a parallel analysis
15 on the same issue would not be proportionate or indeed
16 compatible with the approach set out in the Tribunal's
17 disclosure ruling.

18 Now, DAF has sought to play down the scale of the
19 task. We say that that is a rather ambitious
20 submission. They first raised it in their skeleton
21 argument of last Thursday and we say that points are
22 wrong and that is why we sought to correct them in our
23 correspondence from Friday.

24 Now, Mr. Beard made great play of Friday's letter,
25 having only been sent on Friday, but it was only sent on

1 Friday because Thursday's skeleton argument from DAF was
2 the first time they had cast doubt on the availability
3 of this data. It was the first time they had said that
4 the data would be relatively -- readily available. That
5 is why we sought to correct that misapprehension in
6 Friday's letter.

7 THE PRESIDENT: Can I just interrupt you to say speaking for
8 myself -- I do not know about my colleagues -- I have
9 not seen Friday's letter. If you want us to see it it
10 should be brought up. Maybe you do not, but you have
11 been referring to it.

12 MR LASK: No, I do, sir, and that is where I was going to
13 next. It is at {D4/833} I think, and I hope. I do not
14 have that in a hard copy so that should be the Opus
15 reference.

16 THE PRESIDENT: Right, well, wait a moment.

17 MR LASK: Yes, that is right.

18 THE PRESIDENT: Letter of 26 February.

19 MR LASK: Sir, what might be helpful -- I am sure the
20 Tribunal will want to read it, but can I just summarise
21 it at a high level for you before you do?

22 THE PRESIDENT: Yes.

23 MR LASK: What is explained in this letter is as follows.
24 Firstly, that the request being for detailed monthly
25 sales data for all unregulated products over the period

1 96 to 2018 is vast and it amounts to thousands of
2 products over a period of 276 months, that is the first
3 point.

4 The second point is that the data is not easily
5 accessible, not least because various structural changes
6 that the claimants have undergone means that search and
7 retrieval would be complex and that it is highly
8 unlikely that consistent data will be available.

9 The third is to make the point that even attempting
10 to identify where this disclosure has been held or may
11 be held has been time-consuming and has confirmed the
12 scale and difficulty of the task.

13 Fourthly, the vast majority of the available data it
14 seems would relate to the post-cartel period and for
15 Royal Mail in particular there are serious doubts as to
16 the availability of accurate data in the pre-2012 period
17 and the final point, which is an obvious one, is that
18 the scale of the disclosure obviously impacts on the
19 scale of the work that the experts would have to carry
20 out to produce their analyses and I will pause in just
21 a second to let you read the letter sir, but given that
22 this is essentially the end of my submissions on this
23 point, I just close by saying this: in our submission it
24 is abundantly clear that this disclosure would be
25 disproportionate and unjustified and for that reason the

1 disclosure should be refused and so too should
2 permission for Professor Neven's additional duplicative
3 analysis.

4 MR BEARD: May I reply briefly?

5 THE PRESIDENT: Well, probably we should read the letter.

6 MR BEARD: Of course.

7 THE PRESIDENT: Yes, if we read the letter. We cannot
8 scroll down I think. Thank you.

9 (Pause).

10 Yes, Mr. Lask, we have read that.

11 MR LASK: Thank you, sir. Unless I can assist you further
12 on this issue, those were my submissions on it.

13 THE PRESIDENT: Yes. Mr. Beard, you can reply briefly.

14 Reply submissions by MR. BEARD

15 MR BEARD: Briefly. So three brief points. First of all,
16 it is wrong to focus on the idea that the exercise to be
17 carried out by Professor Neven is filling in gaps in
18 relation to Mr. Bezant's approach. That is not what we
19 are talking about. We are talking about a different way
20 of analysing, a quantitative regression analysis.

21 Second of all, in relation to Mr. Harvey's comments
22 in 3.2, they do not provide a good basis for suggesting
23 there would be a small change of imprecision at all.

24 His first point in (a) at 3.2 is concerned with whether
25 or not Professor Neven's request for disclosure are

1 adequate to the job and whether or not the requisite
2 information could be provided proportionately. Well,
3 that is not a question that goes to whether or not there
4 would be an increase in precision at all.

5 The second is that there are a number of products
6 and services that may overlap and so the price of one
7 could affect the other. That point is at 3.2(b).
8 Professor Neven explicitly recognises that and deals
9 with that issue in his second statement at paragraphs 12
10 to 14 and explains how he will take that into account in
11 relation to these issues.

12 Indeed, the third point about there being
13 relationships between regulated and unregulated pricing
14 is again precisely something that Professor Neven takes
15 into account in relation to this analysis in his second
16 statement and recognises that that is something that he
17 can and will factor into his regression analysis.

18 The fourth reason is one that I have already dealt
19 with, which is the fallacy that Professor Neven's
20 approach is going to be flawed in the same way as
21 Mr. Bezant's approach is flawed because it relies on
22 Mr. Bezant. That is a misrepresentation of the
23 position.

24 The fifth takes us back to the regulated/unregulated
25 and the reason we have sceptical eyebrows is because

1 what we are talking about here is material from public
2 sources which do not give the sort of level of precision
3 about the business over time even in relation to
4 Royal Mail and the position in relation to BT is just
5 wholly unclear, as one can see from --

6 THE PRESIDENT: Sorry, can you just --

7 MR BEARD: I am so sorry.

8 THE PRESIDENT: No, I interrupted you. But you were saying
9 that the Postal Services Commission price control
10 statements are not reliable?

11 MR BEARD: No, I am not saying they are not reliable --

12 THE PRESIDENT: What are you saying?

13 MR BEARD: -- but let us see what is said:

14 "The Postal Services Commission estimates that just
15 10% of Royal Mail's UK turnover was made up from
16 products not subject to price control in this period."

17 What we are saying is that does not give you a clear
18 indication of what the scale of unregulated business is
19 in respect of which this sort of regression analysis
20 could sensibly be carried out and in respect of which
21 the claim is being made, because the Postal Services
22 Commission exercise is being done for other purposes.

23 So taking that 10% figure does not carry across,
24 that is why we say that relying on these figures and
25 suggesting that this means that the regulated and

1 unregulated business split, for the purposes of the
2 claim can be seen to be small, is something in respect
3 of which we raise sceptical eyebrows because it is only
4 for that reason these figures are being referred to and
5 I have already directed the Tribunal to the fact that
6 even if you are taking that 10%, that is £8 million --

7 THE PRESIDENT: That is a separate point.

8 MR BEARD: -- plus a significant amount.

9 So we are saying you cannot just read it across, it
10 is not clear enough from this and it is still
11 a significant amount.

12 Then when we get to BT we just get: the vast
13 majority of network and wholesale activities have been
14 subject to economic regulation. Now, in relation to
15 that, it is inordinately vague and we do have real
16 doubts about it because of what we know from public
17 sources about the way that BT is regulated and has been
18 over time, so for those reasons we say are far from good
19 in explaining why it is that a small degree in change in
20 provision would be expected. We see regression analysis
21 as a different type of methodology that can engender
22 a very different and much more significant degree of
23 precision.

24 Professor Neven rightly accepts that there is always
25 a trade-off between the level of precision and the

1 proportionality of gathering data. He completely sees
2 that, but he says the sorts of data that we are talking
3 about will give him confidence that he can provide the
4 sorts of levels of precision that will be of material
5 assistance to the Tribunal and indeed to DAF in relation
6 to that. He concludes at paragraph 18 of his second
7 statement:

8 "I am confident that my reduced form regression
9 analysis will be capable of producing a robust estimate
10 of the extent to which any overcharge was passed-on
11 through increases of the prices of the goods and
12 services sold by the claimants."

13 So specialist economists saying "I take into account
14 the relationship problems, I take into account the scale
15 of unregulated business issues that have been raised,
16 but in those circumstances we have a situation where
17 I still consider that this reduced form regression
18 analysis can increase the level of precision in relation
19 to significant amounts of money", on a very important
20 issue where in the interests of fairness the defendants
21 should be, all things being equal, entitled to carry out
22 this sort of analysis as the claimants are in relation
23 to overcharge where of course they have drawn on a vast
24 amount of data.

25 That then takes me, I think, to the proportionality

1 of the disclosure point because Mr. Lask placed great
2 weight on this and says "Well, PO7 is a vast amount of
3 data" and he now says "Well, a qualitative exercise
4 might actually be required to identify which bits of the
5 data sets would be available". Well, we do not know
6 whether or not or to what extent that is true. We do
7 not demur that some sort of qualitative analysis would
8 be required. As I said in my opening comments, we would
9 expect that you do have to look at what categories
10 answer the criteria, but that does not mean it is
11 disproportionate, the fact that you have to engage in
12 some sort of qualitative exercise and he now places
13 great weight on this letter that was served on Friday
14 and with respect to Mr. Lask, to say that it is served
15 in response to our saying in our skeleton for the first
16 time that this material should be readily available is,
17 with respect, somewhat glossing the situation.

18 We asked for this disclosure in October last year.
19 If the position was that in fact they were not going to
20 be able to get the material and that there were
21 particular enquiries they had undertaken that meant that
22 that material would not be available in any sensible
23 form, then they should have said so.

24 In fact what this letter does say is "Well, we have
25 been carrying out these sorts of enquiries, we did not

1 put them in Mr. Coulson's statement, we did not spell
2 out what we have been doing to date, we provided them to
3 you the day before the hearing and what we are saying is
4 that there appear to be difficulties in relation to
5 these issues."

6 Now, what we have not had the opportunity to do is
7 discuss with Professor Neven whether in the light of the
8 indications of difficulty that are being set out in this
9 letter, in fact he would still be able to carry out
10 a reduced form regression analysis.

11 Furthermore, if this tribunal was thinking "Well, on
12 the basis of this letter it does feel like it is
13 unlikely that you are going to get the relevant
14 material", it would be imperative that this set of
15 enquiries that are outlined in this letter was set out
16 in witness evidence, properly explaining what had been
17 done, where the problems arose, in respect of which
18 periods and which categories of data, in order that this
19 tribunal could properly consider whether or not these
20 matters were proportionate in the light of input from
21 Professor Neven as to whether or not these more limited
22 data sets could in fact properly inform this reduced
23 regression analysis. To say it is unfortunate that this
24 was provided on Friday afternoon is understating the
25 position when this request has been pending

1 since October.

2 In those circumstances the somewhat ambiguous
3 comments that are made -- although obviously the tenor
4 of the letter is "It is all very difficult, these bodies
5 have undertaken various structural changes over time and
6 it will be difficult to get hold of the documents", in
7 fact what it is saying is that certain amounts of
8 revenue and volume data would be available under the
9 various heads for certain periods, more may be
10 available, we do not know what levels of difficulty that
11 would be, there are concerns about accuracy referred to
12 in relation to earlier data, we do not know what those
13 might be; we simply do not have a proper picture of what
14 has been done and what could be done reasonably in
15 relation to these data categories.

16 Now, that is precisely what should have been
17 articulated previously. This letter on Friday is not
18 adequate. If the Tribunal is concerned about whether or
19 not this process of disclosure should go forward, it
20 seems to us that at the very least a full witness
21 statement spelling out the steps should be provided and
22 Professor Neven then afforded an opportunity to consider
23 whether or not in the light of that information and
24 questions we might have about it, it means that his
25 further more refined analysis, the reduced regression,

1 could be undertaken.

2 It goes back, sir, as Mr. Justice Fancourt
3 mentioned, that the absence of an explanation in
4 relation to so many of these matters by Royal Mail, by
5 BT in relation to stuff they know about, is hampering us
6 and delaying this process and causing battles before
7 this tribunal that could probably have been resolved in
8 discussion if they had been engaged in properly, early
9 enough.

10 Unless I can assist the Tribunal further those are
11 my reply submissions.

12 HODGE MALEK QC: I have a couple of questions for Mr. Lask.
13 The first question is if we give permission for
14 Professor Neven to do his limited regression analysis,
15 how is your side intending to respond to that. Would
16 you want to do your own analysis, or at least have some
17 expert evidence in reply? Perhaps you can answer that
18 first before I ask you the next question.

19 MR LASK: Thank you, sir. I do not have the answer to that
20 to hand. That is something I would need to take
21 instructions on if I may and perhaps I might do that
22 over the short break that I anticipate is coming soon.

23 HODGE MALEK QC: Okay. The next question is that often in
24 large-scale litigation where one party says it is going
25 to be disproportionate to carry out the disclosure

1 exercise they specify or at least give a back of
2 envelope analysis of what the cost is actually going to
3 be. On this there is certain data which you say is more
4 readily available than other data. One would ideally
5 want to know what the cost would be of getting the data
6 which appears to be more readily available than the rest
7 and what the cost would be if you want to go -- if you
8 are ordered to go further and produce, let us say, more
9 difficult areas of disclosure, but I thought we had made
10 it clear on previous occasions that where someone is
11 alleging disproportionality we would like to have
12 a rough estimate of what the costs are going to be.

13 MR LASK: Sir, I will check on that. I think the answer is
14 that we do not have an estimate of the costs involved
15 and at least one reason for that is because we have been
16 objecting to this disclosure as a matter of principle,
17 not least because it is really required for an expert
18 analysis that we object to itself. But I will check on
19 that point, if I may.

20 HODGE MALEK QC: For my own part, often when someone says
21 there are millions of documents, it is fairly
22 meaningless to know -- just giving that figure, without
23 knowing how those documents are being held and how
24 easily they can be searched, because you can have
25 databases which can actually look at billions of

1 documents all at the same time and come up with answers
2 if it is all properly organised, but others where it is
3 a complete nightmare where, for example, if you are
4 giving disclosure of hard copy documents, even a few
5 thousand documents can be a huge burden to get the data
6 out of it, so just being told what the number of
7 documents is does not really assist when you are dealing
8 with data which is held electronically, but that is just
9 an observation, you do not need to answer that.

10 MR LASK: Thank you, sir. I will take instructions on those
11 two questions.

12 HODGE MALEK QC: Yes. Thank you very much.

13 THE PRESIDENT: Well, we will take a break now. It is 10
14 past, so we will come back at -- if we come back at 20
15 past will that give you time, Mr. Lask, to take
16 instructions?

17 MR LASK: It will, sir, thank you.

18 THE PRESIDENT: Yes, so we will rise, metaphorically, until
19 20 past.

20 (12.10 pm)

21 (Short Break)

22 (12.22 pm)

23 THE PRESIDENT: Mr. Lask, I think you were going to taking
24 instructions on some points.

25 MR LASK: Yes, thank you, sir, and I have. Dealing with the

1 first question, how would Mr. Harvey respond to
2 Professor Neven's regression analysis if it was
3 permitted, Mr. Harvey would still do his intended
4 analysis on supply pass-on, which is the one he has
5 described in his eighth witness statement at
6 paragraph 5.3 and onwards, but in all likelihood he
7 would also seek to engage with Professor Neven's
8 regression analysis and probably conduct a similar
9 regression analysis of his own and in my submission that
10 underlines the unattractiveness in this application by
11 DAF and indeed the claimants' concerns because it
12 underlines the increase in work that this would
13 generate. It would not only be DAF conducting two we
14 say duplicative analyses but it would be us too.

15 THE PRESIDENT: Yes, we understand that.

16 MR LASK: In addition, sir, you will have seen at
17 paragraph 3.2 of Harvey 9 where he set out his concerns
18 with the regression analysis, one of his concerns was
19 the difficulty in controlling various external factors
20 and in light of that concern one thing he might have to
21 do is request further costs disclosure from the
22 claimants which would have the effect of actually
23 enlarging the PO7 disclosure category because that
24 category has narrowed somewhat as a result of this
25 discussion between the parties, but one of Mr. Harvey's

1 concerns about Professor Neven's analysis is that he is
2 not seeking the disclosure that would be necessary to
3 properly control for these factors, so if Mr. Harvey was
4 going to have to properly engage with this and conduct
5 his own analysis, he may well need that disclosure, or
6 he may well want to seek it from the claimants.

7 THE PRESIDENT: Yes.

8 MR LASK: That is the first question. The second inquiry is
9 do we have a costs estimate for P07 disclosure. We do
10 not I am afraid and one reason is the one I gave, that
11 we have been really objecting on a point of principle,
12 but the second is a more practical reason which is that
13 this has been an iterative process. The parameters of
14 P07 disclosure have been changing, as I have said, as
15 a result of discussion, but also we have not had access
16 yet to some of the databases, the legacy databases
17 described in the letter, so there are a number of
18 categories of cost that are just simply unknown and then
19 dealing with Mr. Malek's point about sometimes you can
20 have disclosure that involves a very large number of
21 records but is quite straightforward, we recognise that
22 but we do not think it applies in this case, again for
23 the reasons set out in the letter, which are that there
24 are multiple sources, including legacy sources, spread
25 across the businesses and so this is not one of those

1 tasks that would be enormous but straightforward, we
2 think it is one of those tasks that would be enormous
3 and very complicated.

4 THE PRESIDENT: Yes, thank you.

5 We will take just a moment so we will withdraw just
6 for a few minutes.

7 (12.25 pm)

8 (Short Break)

9 (12.30 pm)

10 THE PRESIDENT: For reasons that we shall set out briefly in
11 a judgment that we will produce very shortly, we refuse
12 permission for the defendants to call Professor Neven as
13 an expert on supply pass-on and we therefore refuse the
14 application for the category of disclosure described as
15 P07, which related to his evidence.

16 I think if we are postponing P04 and 5, it may be
17 sensible to turn then to the applications to amend the
18 defence.

19 MR BEARD: I am entirely in your hands. I can deal with
20 that, or the tax.

21 THE PRESIDENT: No, let us deal with the defence and deal
22 with the tax afterwards.

23 We have got the draft re-re, whatever it is, amended
24 defence -- defences --

25 MR BEARD: Yes, defences.

1 THE PRESIDENT: -- in tab 14 of B3 {B3/14} and I think both
2 sides have been referring to the Royal Mail one for
3 convenience.

4 MR BEARD: Yes, that is right, paragraph 30, page 163
5 {B3/14/163}.

6 THE PRESIDENT: So on page 163. Now, as I understand it
7 from your skeleton, Mr. Beard, in fact the wording now
8 that you seek is revised so if we start on page 163 at
9 subparagraph (a) (a):

10 "Further and in the alternative, to the extent that
11 the claimant purchased or acquired trucks together
12 with ..."

13 And is it right instead of "other complementary
14 products or services" it should say "bodies and/or
15 trailers", is that the position?

16 Submissions by MR. BEARD

17 MR BEARD: I think in relation to bundles it will only ever
18 be bodies in relation to these issues but I do not have
19 any objection to "bodies or trailers".

20 THE PRESIDENT: Right. Well, it is your pleading, so it is
21 a question of what you say.

22 MR BEARD: Yes, I am just saying in practical terms. You
23 are quite right, sir, that what was indicated in
24 Mr. Jenkins' witness statement was that we were limiting
25 it to bodies and trailers and it is probably sensible to

1 include both references because that then carries
2 through into paragraph 30(d).

3 THE PRESIDENT: I see, but in practical terms, for the
4 bundles, it is -- I see, it is essentially bodies,
5 because the claimants did not buy trailers from you.

6 MR BEARD: Yes.

7 THE PRESIDENT: Then it goes on:

8 "It is for the claimant to plead and prove that it
9 paid an inflated price for the trucks and those other
10 products ..."

11 And we delete "all services", yes?

12 MR BEARD: Yes.

13 THE PRESIDENT: "... in aggregate see further 30(d)
14 below ..."

15 Ah, I am being told there is a problem at Opus with
16 the transcript. I am not sure whether the live
17 transcript is essential.

18 Mr JUSTICE FANCOURT: I am getting it. I have got the live
19 transcript.

20 THE PRESIDENT: I am told it is now working.

21 Then 30(b) is not objected to.

22 MR BEARD: That is right.

23 THE PRESIDENT: Then (c), there is no change to that. Then
24 we have got (d) --

25 MR BEARD: I should say (c) is objected to, yes.

1 THE PRESIDENT: It is objected to, but the wording stands.

2 MR BEARD: No, quite so.

3 THE PRESIDENT: Then (d):

4 "Further or in the alternative DAF contends any
5 overcharge was off-set by reductions in the prices which
6 the claimant paid for ..."

7 And it is again "bodies and/or trailers".

8 MR BEARD: Yes.

9 THE PRESIDENT: Perhaps it should be "which are
10 complementary to the purchase of a truck whether
11 required as part of the same transaction as the truck or
12 not", is that right?

13 MR BEARD: Yes, that must be right.

14 THE PRESIDENT: Yes, so that is the amendment you wish to
15 make?

16 MR BEARD: Yes.

17 THE PRESIDENT: So there are two aspects, although they may
18 be related, but one is the complements, as it has been
19 called, and the other is the general mitigation plea.

20 MR BEARD: Yes.

21 THE PRESIDENT: If you can just explain for my benefit the
22 difference between (a) (a) and (d)?

23 MR BEARD: Yes. The reason there are two pleadings which
24 refer to complements is because in relation to (a) (a)
25 what you are talking about is a situation where a bundle

1 has been bought and there is an allegation that there
2 has been an overcharge in relation to it and obviously
3 the primary burden lies on the claimants to show that
4 there was an overcharge and that overcharge occurred in
5 respect of some or all of that bundle.

6 THE PRESIDENT: This is a bundle bought from your clients
7 you mean?

8 MR BEARD: Yes.

9 THE PRESIDENT: Is that right?

10 MR BEARD: Yes.

11 Mr JUSTICE FANCOURT: So the key words in (a) (a) are
12 "together with", that distinguishes (d).

13 MR BEARD: Yes, that is one way of looking -- well, it is
14 the fact that it was a bundle bought from us in those
15 circumstances.

16 THE PRESIDENT: Yes, "purchased required trucks" -- well, it
17 had probably better say "together with bodies and
18 purchased or acquired the trucks from the defendant", or
19 "from one of the defendants", is that it, "together
20 with ..."

21 MR BEARD: Yes, we will review the transcript, but I think
22 that is it is -- we have tended to refer to this
23 internally as the bundle complements plea and obviously
24 this relates to what we have got set out subsequently
25 down in (g) about the burden of proof.

1 THE PRESIDENT: Yes.

2 MR BEARD: Whereas we recognise that in relation to 30(d)
3 where we are talking about complements falling in price
4 in circumstances where you are hypothetically
5 considering an overcharge in relation to the truck, one
6 in some ways can see that as a special example of
7 mitigation and, as we will come on to explain, the
8 reason it is a special example is because, as
9 Professor Neven has explained, when you are talking
10 about strict complements there is an economic
11 relationship between the demand for and pricing of the
12 two elements, so you get a sort of waterbed effect
13 between the two.

14 THE PRESIDENT: Yes. Do you then want to deal, now that you
15 have explained them, with the complements amendments
16 first and then go on to (c)?

17 MR BEARD: I am happy to deal with them in either order.
18 I was going to deal with mitigation first but I am happy
19 to deal with complements first.

20 I do not know to what extent the Tribunal needs
21 reference to relevant legal principles. Obviously in
22 the skeleton argument from the claimants we have got
23 a great deal of citation of case law as to the
24 circumstances and criteria for accepting amendments in
25 circumstances where permission is required.

1 I think the situation in broad summary is the
2 Tribunal have generally applied or considers it
3 appropriate to apply an approach akin to summary
4 judgment or indeed the amendment criteria that are
5 applied under the CPR and if those are captured
6 succinctly, save in relation to very late amendments,
7 then in those circumstances you should only refuse an
8 amendment if it really has no real prospect of success
9 and that has been referred to in authorities as meaning
10 that it is inherently implausible, self-contradictory or
11 not supported by contemporaneous documentation and we
12 saying that it is plain and obvious that that is not the
13 case here.

14 THE PRESIDENT: So it is the reverse summary judgment test
15 really.

16 MR BEARD: Yes, I mean it is very much akin to that,
17 absolutely.

18 Now, I do not know to what extent you want me to go
19 through any of that case law in relation to those
20 tests --

21 THE PRESIDENT: I think it is common ground, is it not, that
22 that --

23 MR BEARD: It is common ground save that we say it is very
24 clear from the authorities, for instance the TfL
25 Management Services Authority -- if I just give you the

1 references to them rather than taking you through the
2 cases, that is in bundle E at tab 6 {E/6}. The approach
3 adopted there by the Court of Appeal, paragraph 26 at
4 page 7, was there a realistic as opposed to fanciful
5 prospect of success, you do not undertake a mini trial
6 in those circumstances and so on. The court should
7 obviously be extremely hesitant about making any further
8 decision without a trial where a fuller investigation
9 into facts could add to or alter the position and
10 particularly where there may be further evidence
11 forthcoming in relation to these matters.

12 THE PRESIDENT: Is that not really the summary judgment
13 test? I mean if the amendment were made and the other
14 party could then get summary judgment disposing of it,
15 adverse to the amending party, you do not allow the
16 amendment.

17 MR BEARD: Yes.

18 THE PRESIDENT: If they could not get summary judgment then
19 the amendment should be allowed.

20 MR BEARD: Yes, sorry, I think I was intending to capture
21 that sentiment by the particular references to the
22 decision which summarises the situation and obviously
23 where you are dealing with short points of law or
24 construction the situation is rather different: if
25 a point is bad in law, it is bad in law.

1 But it is worth noting, as the Court of Appeal did
2 there at paragraph 27, that where you have got difficult
3 issues of law it is obviously better that they are
4 decided against actual rather than assumed facts and of
5 course we have the further issue here, as I will come on
6 to, that we are dealing with issues here that have not
7 been tested following the Supreme Court decision in
8 Sainsbury's. I want to come back to that decision in
9 a moment.

10 Obviously we accept that pleadings must comply with
11 ordinary standards, not embarrassing and so on, cannot
12 be entirely speculative, and it is said against us
13 "Well, there must be some evidence to justify the
14 pleading", but obviously we have put forward our best
15 position in relation to these issues in the evidence we
16 have been able to provide and obviously this is
17 a situation where we do suffer from a very significant
18 asymmetry of information and so the issue arises about
19 how we could plead further facts and particulars without
20 disclosure.

21 Now, in the claimants' skeleton there is
22 a suggestion that there is a whole range of balancing
23 points that have to be then taken into account even if
24 the pleaded case is reasonably (inaudible) pleaded and
25 otherwise discloses an arguable and non-fanciful case

1 and they suggest in very broad terms that those
2 balancing considerations are about prejudice and not
3 being mucked around by amendments, but I think it is
4 important that all of the authorities that they are
5 referring to there are all about very late amendments in
6 the process, not amendments put forward 18 months before
7 a trial was fixed and being considered well over a year
8 before a trial was fixed.

9 Now, of course we are not demurring that obviously
10 the Tribunal has to deal with cases justly and at
11 proportionate cost, but really these sorts of
12 considerations that are being prayed in aid now that
13 somehow these are very late amendments, or late
14 amendments are just not plausible. I will not go back
15 through the history of them being put forward post
16 Sainsbury's -- and I can do if you want, but that just
17 is not the case here.

18 Just to zip through the case law that is relied on,
19 the Enron case {E/9}, that was concerning amendments
20 that were being made three months before trial, just
21 three months before trial, but even then it was
22 considered at paragraph 25 that actually refusing is
23 a form of discipline in relation to those amendments
24 should be a discipline used cautiously and indeed in
25 that case they were permitted because the parties at

1 trial would be able to properly answer them.

2 The next case at {E/10}, Pearce, which sets out
3 again the relevant principles at paragraph 10 for your
4 notes, that was all concerned with an inability properly
5 for a party on the other side of an amendment to prepare
6 for trial when they were very late indeed.

7 THE PRESIDENT: Yes, I think the point -- we will hear from
8 Mr. Lask in due course. At the moment we are not so
9 impressed by the point about delay, or lateness.

10 MR BEARD: No, I thought not.

11 THE PRESIDENT: But going back to the point you made about
12 they must not be speculative or vague and so on, dealing
13 with complements, bodies and trailers, well, (a) (a) are
14 bodies that were sold by you, your clients, and (d),
15 they may cover bodies bought from others, but you also
16 sold bodies to these claimants as well as to others. So
17 you know what the price of bodies relative to the price
18 of the truck is and how they moved relative to each
19 other. I mean you will have all that information.

20 MR BEARD: Well, we have some information in relation to
21 those elements in the sense that we sold packages at
22 a particular price. How those packages were put
23 together when we were selling as a single element is
24 a somewhat separate proposition, but I think it is
25 important --

1 THE PRESIDENT: You know about the -- if the elements of the
2 package are internally priced separately in DAF, you
3 know how the price of one moves relative to the price of
4 another.

5 MR BEARD: Well, of course that is to some extent true. The
6 difficulty we have here is we are dealing with
7 a contingent plea where we say there is no overcharge so
8 there is something profoundly flawed about the criticism
9 that we should be identifying where pricing moves in
10 circumstances where we say that the primary elements of
11 this did not move.

12 THE PRESIDENT: But just a minute, we are talking about
13 a long period. Prices go up and sometimes maybe they
14 come down. You say there is no overcharge because the
15 cartel had no effect, we understand that, but
16 nonetheless you move your prices, you will say for
17 entirely legitimate reasons, and you move your prices of
18 trucks and you move your prices of bodies and you know
19 how they are related to each other so you could tell --

20 MR BEARD: Yes, but --

21 THE PRESIDENT: -- how an increase in the price of one
22 affects the price of the other.

23 MR BEARD: Well, we undoubtedly accept that the price of one
24 can affect the price of the other. Indeed, it is the
25 predicate of Professor Neven's analysis.

1 THE PRESIDENT: Yes, so we need particulars of that. We do
2 not want it at a theoretical level, I am talking about
3 particulars.

4 MR BEARD: Well, let us just deal with it -- because we are
5 not just dealing with these matters at a theoretical
6 level. The Tribunal has evidence from Professor Neven.
7 It is actually worth perhaps turning up his statement in
8 relation to this, his first statement at paragraph 28 to
9 29 which is {B3/11/7}. if I may I will just invite the
10 Tribunal to read paragraphs 28 and 29.

11 (Pause).

12 HODGE MALEK QC: Mr. Beard, I understand what the theory is
13 that is one possible thing that may happen but there are
14 other possibilities and what concerns me at the moment
15 is the principle that if you are going to amend you have
16 to have some evidential basis and that what you are
17 telling me is that you do not currently have the
18 evidential basis, you hope to get that from disclosure,
19 which looks as though you are hoping something may turn
20 up and you may be right and you may be wrong and what
21 the President is saying is that is it enough really just
22 simply to say "Well, there is this theoretical
23 argument", when your clients are in possession of
24 certain evidence which you will be able to particularise
25 and tell the Tribunal as to whether or not what the

1 theory that you are propounding at paragraph 28 actually
2 applied in practice in this case.

3 MR BEARD: Well, let us take it in stages. First of all,
4 there is not any good reason to dispute the evidence
5 being put forward. This tribunal has this clear
6 evidence which sets out -- and it is just a sort of mere
7 theory.

8 THE PRESIDENT: Well, this evidence is theory. It is
9 working on a basis of economic theory and I think
10 Mr. Harvey explains why the theory might not apply. It
11 is not actually factual evidence about DAF's prices at
12 all.

13 MR BEARD: No, it is not factual evidence, I completely
14 accept that, but it is powerful evidence because it is
15 based on fundamental principles of economic theory that
16 are not challenged by Mr. Harvey and his response is
17 speculative.

18 But I think I also need to take you to bundle D4,
19 inner confidentiality, page 829.

20 THE PRESIDENT: So just a minute. This is a confidential
21 document, is it?

22 MR BEARD: Yes. It is 829. Tab 829, I am sorry, not page.

23 THE PRESIDENT: Is it a confidential document?

24 MR BEARD: Yes, it is.

25 THE PRESIDENT: Well --

1 MR BEARD: It is labelled as such.

2 THE PRESIDENT: Should we then disconnect the live stream?

3 MR BEARD: No, I do not think we need to for these purposes.

4 I think it will be enough for you to read it and I think

5 the proposition I am putting forward is not itself

6 confidential.

7 THE PRESIDENT: So {D4/829}. This is a letter from your

8 instructing solicitors of 24 February, is that right?

9 MR BEARD: Yes, that is right.

10 (Pause).

11 Mr JUSTICE FANOURT: Which paragraphs did you want,

12 Mr. Beard?

13 MR BEARD: I think it is worth just briefly scanning through

14 it, because it is dealing with the evidence we are

15 talking about here. The central proposition that I want

16 to draw from it is that in fact DAF does not have the

17 data available to it to carry out this exercise that

18 you, sir, are referring to in order to further

19 particularise the position beyond the position as set

20 out by Professor Neven.

21 THE PRESIDENT: Right, so --

22 HODGE MALEK QC: Let me see if I understand it. You are

23 supplying trucks, but you are also supplying trucks with

24 bodies and trailers, at least in part.

25 MR BEARD: Yes. Not trailers, I am so sorry, we do not --

1 HODGE MALEK QC: Bodies, okay. So you supply the bodies and
2 you have got the economic theory at paragraph 28 which
3 we have looked at. Are you not able to say that when,
4 for example, the price of trucks has gone up, there has
5 been some impact on the price of bodies? You are not
6 able to say that one way or another? Because if you are
7 not able to say it how are you going to prove it in the
8 long-run?

9 MR BEARD: Well, it is because of the way that we are
10 selling the particular bundle in those circumstances
11 that we have pricing information in relation to the
12 bundle. We do not have pricing information that enables
13 us to control for how the different prices move between
14 the two components. That is the difficulty with our
15 data.

16 THE PRESIDENT: But you are not only selling bundles, are
17 you?

18 MR BEARD: Well, no, we also sell trucks, that is true.

19 THE PRESIDENT: So you know the price of your truck without
20 a body and you know the price of your bundle of trucks
21 with a body.

22 MR BEARD: Well, yes, but they are not the same truck in
23 those circumstances.

24 THE PRESIDENT: It's not rocket science.

25 MR BEARD: Well, I think unfortunately this is where we do

1 end up in the world of rocket science given all the
2 variations that exist in relation to trucks and the way
3 in which one has to control for the variance in the
4 trucks and how you then try and compare some sort of
5 price for a truck that would be identical without the
6 body with a truck with a body and that is an exercise
7 that we are not able to carry out.

8 I think that is the problem. I mean that is what is
9 driving much of the complexity in relation to the
10 overcharge analysis as well, but what we do not have is
11 some sort of neat control where you can say "Well, it is
12 that truck there that you can either have with or
13 without a body and therefore we can compare the two".
14 We do not have data that enables us to do that because
15 what we have are, particularly for Royal Mail,
16 specialist trucks where we were providing bodies in
17 relation to them and we were providing a single price in
18 relation to the truck with a body on, but what we do not
19 then have is a relevant comparative just truck price so
20 that we can then control for the change in truck price
21 against that type of truck against the aggregated bundle
22 price we are providing which is what this letter is
23 providing, because we do not have those separate strands
24 of data. That is why we cannot particularise, is the
25 simple answer.

1 THE PRESIDENT: I think we had better read the letter. Give
2 us a moment.

3 (Pause).

4 Yes, we have read that, but he is not doing
5 a regression analysis for the purpose of this plea
6 anyway.

7 MR BEARD: No, I completely accept he is doing a simulation
8 analysis, I agree, but we are dealing with the
9 suggestion that we could have somehow particularised
10 this contingent plea, so we are saying there would not
11 be any overcharge so we would not be expecting to find
12 any changes, but given what you have said, we have
13 actually gone and looked at what data we have and the
14 problem we have is we cannot unpack that data in order
15 to do anything that is robust to provide us with
16 anything that would carry out the sort of comparison
17 that, sir, you are suggesting in these circumstances,
18 because we cannot --

19 THE PRESIDENT: I thought that Professor Neven is saying
20 that he is going to do it by looking at the average
21 prices of bodies and of what he calls naked trucks,
22 ie trucks without bodies.

23 MR BEARD: He is, he is.

24 THE PRESIDENT: You will have those prices, will you not,
25 yourself for starters?

1 MR BEARD: Well, we have separate prices for naked trucks
2 when we sell naked trucks yes, absolutely, so yes that
3 is true, but what we are really interested in is what
4 the prices were that were being paid by Royal Mail in
5 particular and BT in particular for trucks and bodies so
6 that we can carry out this analysis but in fact one can
7 do it on a wide basis and what Professor Neven is coming
8 along and saying is "I am not going to try and do a full
9 regression in relation to this because I recognise this
10 will be a colossal exercise. What I am intending to do
11 instead is carry out the simulation model exercise",
12 because it is that that will enable us to (inaudible) as
13 being compelling economic theory based on very
14 fundamental principles (inaudible) the nature of
15 strict --

16 THE PRESIDENT: Mr. Beard, there is something happening with
17 your sound.

18 MR BEARD: I am so sorry.

19 THE PRESIDENT: Your microphone, it is distorting.

20 MR BEARD: I am so sorry.

21 THE PRESIDENT: I do not know, perhaps if you just --
22 sometimes it works, if you just mute and unmute, maybe
23 that will -- it is just the last few seconds.

24 MR BEARD: Is that better?

25 THE PRESIDENT: At the moment, yes.

1 MR BEARD: Okay, I am really sorry, I do not know what that
2 was.

3 THE PRESIDENT: It is not your fault obviously.

4 MR BEARD: Yes, so as I say, Professor Neven is taking into
5 account considerations of proportionality and that is
6 why he is not seeking to carry out a regression analysis
7 but he is seeking to test, using the calibrated
8 simulation model that he has put forward and explained
9 in his witness statement in order to test whether or not
10 the economic theory, which is a very robust economic
11 theory, notwithstanding what Mr. Harvey says, is
12 something that can properly be taken into account here
13 and the question we are really asking is, is there
14 an arguable case that these fundamental principles of
15 economics actually stack up and the point is it is more
16 than slightly arguable that those are the correct basis
17 for analyses here.

18 Now, Mr. Harvey may argue the toss about them, but
19 that is not a good reason for refusing the amendment.

20 As for the approach that we want to take in relation
21 to these matters -- I will perhaps come back to this
22 after the short adjournment -- the irony is that
23 Mr. Harvey is saying "Well, actually you should be
24 asking for more disclosure". Professor Neven is saying
25 "No, actually I can do something useful with a lesser

1 set of disclosure using this simulation technique" and
2 in due course of course Mr. Harvey and the claimants can
3 criticise that if they wish to do so, that is obviously
4 their right during a trial, but to suggest either that
5 it is not something that can be pleaded or secondly that
6 it is something that should not be tested by an expert's
7 own view as to how these things should be sensibly done,
8 seems to us to be a contention that falls miles short of
9 anything like the summary judgment threshold, but
10 perhaps I will pick that up further at 2 o'clock, if
11 this is a convenient moment.

12 THE PRESIDENT: Yes. I think we will break off there and we
13 will resume at 2 o'clock.

14 MR BEARD: I am most grateful, thank you.

15 THE PRESIDENT: Thank you.

16 (1.03 pm)

17 (The luncheon adjournment)

18 (2.10 pm)

19 MR BEARD: Sir, I do not know whether you want me to begin
20 for the afternoon.

21 THE PRESIDENT: No, if you can just wait for the live stream
22 I am told.

23 MR BEARD: Ah, we are waiting for the live stream.

24 I misunderstood.

25 THE PRESIDENT: It looks as though it is running, is it not?

1 I am just getting clearance.

2 Yes, yes, Mr. Beard, you can resume.

3 MR BEARD: I am grateful, sir.

4 So before the short adjournment we were picking up
5 the issues to do with the complements amendments and the
6 question we were considering was whether or not
7 essentially we had put forward a reasonably arguable
8 case that there was the potential for an off-setting
9 effect in relation to complements that would reduce the
10 net level of damages in relation to the overcharge and
11 we say that our pleading puts that forward and there is
12 a reasonably arguable case and, sir, you raised, and
13 other members of the Tribunal raised, the fact that we
14 rely on certain albeit basic principles of economic
15 theory.

16 Now, that is obviously true, but we also rely on
17 what is also a very, very basic fact in relation to this
18 which underpins the application of economic theory as
19 Professor Neven set out, which is that here we are
20 dealing with a situation where -- and I do not think it
21 is disputed -- that trucks and bodies and trucks and
22 trailers are strict complements and so in circumstances
23 where you are dealing with strict complements -- and
24 that is a factual matter that has been put forward and
25 not challenged in evidence -- then these means of

1 considering the economic analysis are entirely sound.

2 Now, Mr. Harvey comes back and he seeks to argue
3 about whether or not in the particular circumstances
4 here those basic economic propositions hold true, but
5 this is a matter of conflicting expert evidence; it is
6 not a question whether or not the plea is arguable and
7 to be fair to Mr. Harvey he does not say it is not --
8 obviously those acting on his behalf impliedly do, but
9 we say that is not justified and plainly this tribunal
10 cannot adjudicate on these matters.

11 The further point that was raised before the short
12 adjournment was: well, what evidence beyond the basic
13 facts of complementary and the underlying fundamental
14 theory are you putting forward? Surely you could have
15 done more because you have data, because you make and
16 sell bodies. But we say we could not have put forward
17 any clear and compelling data to support this for two
18 reasons first of all because we say this is not going to
19 be borne out on the evidence because it is a contingent
20 plea so we would expect not to see anything and it
21 cannot be reasonable to criticise us in those
22 circumstances, but more than that we can only deal with
23 two sets of circumstances that pertain to us. One is
24 the circumstance where we manufactured a body --
25 I should be clear, in relation to trailers we just do

1 not have this sort of material and so in relation to
2 trailers none of this matters at all and our position is
3 very clear, but you raised before the short adjournment
4 this question about bodies: surely you could have done
5 more in relation to bodies?" Well, where we
6 manufactured bodies and sold the body and the truck
7 together, as I said, we dealt with it as a single price
8 in relation to these matters and I should say we did not
9 sell any of those manufactured body bundles entities to
10 the claimants during the cartel period in any event, but
11 we could not separate out a different price and so you
12 would then be into the hypothesis that, sir, you were
13 putting to me: "Surely you can identify a truck price
14 and then essentially subtract that from the bundle price
15 and then you get the body price impliedly" and we say no
16 that is not feasible because the varyings of what has
17 going on in relation to Trucks mean that that would be
18 incredibly difficult and very unlikely to achieve and
19 certainly if you did it over many trucks even if you
20 could find one or two it would be very hard, but you
21 also have a more fundamental issue in relation to this,
22 that you have also got to be controlling for cost issues
23 in relation to these matters and therefore you would
24 have to take into account that sort of data as well in
25 order to be not just saying these prices were as they

1 are and trying to build a plot of parallel prices, but
2 trying to identify whether or not there is any causal
3 relationship and that is also true in circumstances
4 where we sold bodies that we had bought from third
5 parties, so we bought the body from someone else, we put
6 it together with the truck and then we sold the truck
7 together with that body and I think that in some of
8 those cases we actually separated out in the contract
9 what the price of the body was from the price of the
10 truck but we would have to go back and actually check
11 that and I am not sure that we always did it, but even
12 if we did all that you would end up doing if you tried
13 to analyse that data would be a plot of prices that you
14 had either bought the bodies for or sold the bodies for
15 and a plot of prices for those trucks but you would
16 still, in order to be able to identify whether or not
17 there was any sort of interrelationship between the two,
18 have to control for relevant costs in relation to trucks
19 and bodies and of course control in relation to all of
20 the variations in relation to the trucks which are many
21 and multifarious and cause the truck prices to vary
22 significantly and indeed you are dealing with a period
23 of time and prices change over time due to demand
24 conditions and supply conditions and costs underlying
25 and so on.

1 Of course what you are immediately driving towards
2 there is carrying out a grand regression analysis and we
3 say it was not reasonable to do that. Indeed our
4 economist has looked at this and said "That is not the
5 way I think is a sensible way of approaching this
6 issue", and essentially what we would be being
7 criticised for is not putting forward of evidence of
8 particular relationships in relation and regression we
9 would not have carried out, just as essentially the
10 situation would be one where a similar criticism could
11 be leveled at any pleading in relation to the overcharge
12 and in all of that it is worth bearing in mind that we
13 do not have the data in relation to third party costs
14 for third party bodies and so even hypothesising the
15 possibility, we would not be able to do that maths, and
16 so in those circumstances the idea that we should have
17 put forward some kind of tested examples just does not
18 stack up. The data was not available, we could not have
19 done it, any plots we would have provided would not have
20 been meaningful and in those circumstances it cannot
21 possibly be a criticism of our putting forward the
22 pleading and evidence that we have done that we have not
23 undertaken that sort of analysis that we do not think we
24 could complete and indeed we think, given the omissions
25 in data, would be futile.

1 So in those circumstances, sir, going back to where
2 we are, it is plain that there is a good arguable case
3 that we are pleading, it is entirely legitimate for us
4 to be permitted to pursue that and Mr. Harvey's concerns
5 that he does not agree with some of the foundational
6 propositions that we put forward in evidence are clearly
7 matters that are going to be aired in due course but
8 they are not good grounds for objecting to the pleading
9 and indeed what is instructive is that when we look at
10 Mr. Harvey's statement beyond the sections where he
11 criticises the idea of how you go about this analysis
12 talking about whether or not you do it on a claimant
13 focused basis or a market-wide basis and just to be
14 clear, the position of Professor Neven is that it should
15 be carried out on a market-wide basis, and then his
16 critiques of whether or not the approach to market-wide
17 analysis is correct.

18 What he then goes on to say is how you should do
19 this, what it is you should do if you are going to carry
20 out this analysis and what he says is that you have to
21 gather all the negotiating material and when he says
22 that you have to gather all the negotiating material,
23 what he is actually saying is that one should work
24 through the way in which the negotiations were
25 undertaken and look at these various issues and we say

1 that cannot be right in any event, but I will come back
2 to that further in relation to mitigation.

3 The key point here is we have an arguable case in
4 relation to these matters. He does argue about it, but
5 if it assists the best references in relation to these
6 issues may be found in his third statement in section 6.

7 THE PRESIDENT: Tab 22 --

8 MR BEARD: Where he picks up at 6.4 the plausibility of the
9 defendants' alleged complements defence.

10 THE PRESIDENT: Sorry, this is the third statement of
11 Professor Neven?

12 MR BEARD: And he then talks about the impact of reduction
13 from 6.7 in the --

14 THE PRESIDENT: Sorry, just a minute --

15 MR BEARD: Yes, it should be, I am so sorry. This is
16 tab 22. I am so sorry, tab 17. I apologise for my
17 notes.

18 THE PRESIDENT: Tab 17. That is Mr. Harvey.

19 MR BEARD: No, I was dealing with Mr. Harvey.

20 THE PRESIDENT: Ah, Mr. Harvey. Yes, Mr. Harvey at tab 17
21 on the complements defence.

22 MR BEARD: Let me check my reference is right. I think that
23 is tab 17.

24 THE PRESIDENT: Yes, that is Mr. Harvey at tab 17.

25 MR BEARD: Yes, I was just picking up the criticisms of

1 Mr. Harvey in relation to this.

2 THE PRESIDENT: Professor Neven is doing it on a market-wide

3 basis; that is what you said, as I understood it, a

4 moment ago, because that was one of the queries.

5 MR BEARD: If you pick it up at page 16.

6 THE PRESIDENT: Page 16, yes.

7 MR BEARD: The point I was making was -- yes, that would be

8 his preferred methodology, to undertake it on

9 a market-wide basis.

10 THE PRESIDENT: Which is 6.11.

11 MR BEARD: But you will see there the first set of critiques

12 is about the plausibility of the defendants' alleged

13 complements defence starting at 6.4, so essentially this

14 whole section -- yes, the engagement with the

15 market-wide approach is at 6.11, you are quite right,

16 sir. What you are seeing there is a series of

17 propositions being put forward by Mr. Harvey which is

18 just arguing about whether or not Professor Neven's

19 approach is right, but this is absolutely --

20 THE PRESIDENT: We understand that --

21 MR BEARD: -- the sort of matter which is to be argued about

22 between experts. There is no basis on which one can say

23 that this (inaudible) the position. I can work my way

24 through those propositions because they are not sound.

25 I am slightly concerned not to get dragged into

1 a surrogate debate about the issues concerning -- I can
2 hear you, sir.

3 THE PRESIDENT: I can hear you. We understand your point
4 that Mr. Harvey's critique are matters to be canvassed
5 in expert evidence at trial as to whether this is robust
6 or whether it points to the conclusion that
7 Professor Neven may seek to draw from it, we see that.
8 I think our concern on the complements was whether, as
9 you said, a pleading has to be as particular as it can
10 be, in terms of rules of pleadings, so not about the
11 arguability of the basic proposition and whether, on
12 this area, it would not be appropriate if you are going
13 to amend to give some particulars based on DAF's
14 knowledge of what happens when it puts up, as it does
15 periodically no doubt, the price of trucks and it does
16 not matter therefore whether it is a contingent plea or
17 not because Professor Neven's economic theory is not
18 based on there being a cartel, it is based on the price
19 of trucks going up and these being complementary
20 products, so you can forget about the cartel. You will
21 know, and DAF will know, every time it increases its
22 prices for trucks, what is that going to do to the price
23 of bodies which it also sells and that is what we were
24 really asking about and why it cannot be more
25 particularised.

1 MR BEARD: Well, because -- I think as I have explained, in
2 relation to the trucks where it is manufacturing the
3 bodies and therefore the price of the -- the global
4 price is provided, you are not in a position to say
5 whether or not the truck price has risen or fallen
6 because it is not a case where we are talking about
7 simple price rises in relation to particular truck
8 models at particular times.

9 What we have are trucks which are being highly
10 specified and in particular for the likes of BT and
11 Royal Mail, highly specified and so they are not some
12 sort of off the shelf or standard product and one cannot
13 say that there was some sort of blanket change in
14 pricing in relation to any particular truck that you
15 could then say, well, one wants to look at that moment
16 of price increase and how it fed into bodies that were
17 being sold and, as I have explained, there are two sorts
18 of bundle that DAF would sell, one is where it would
19 manufacture the body itself and in those circumstances
20 you do not have a separate price for truck and body and
21 nor do you have some sort of benchmark change in price
22 and therefore you are not able to carry out that sort of
23 analysis and the alternative situation is where you have
24 a separate truck and a body that is been bought in from
25 a third party manufacturer and in those circumstances

1 you are not going to have a clear price rise in relation
2 to the truck that you can identify for the same reasons
3 because trucks are so differentiated as products, but
4 also you are going to have a situation where you have
5 pricing that may be dictated in large part by the price
6 you paid for the body from a third party and so in those
7 circumstances neither of those arrangements are going to
8 be providing you with examples or any sort of robust
9 story that you can tell about the reaction of body
10 prices to truck prices because what the Tribunal is
11 looking for is some sort of overall relationship rather
12 than specific anecdotal relationship depending on
13 a particular negotiation in relation to a particular
14 truck or body at a particular time and that is what we
15 cannot provide and that is why that evidence is not
16 available.

17 THE PRESIDENT: Yes, I see.

18 MR BEARD: So those I think are the key points in relation
19 to the points that were being raised.

20 It is perhaps just worth dealing with the remainder
21 of the points in the skeleton argument that have been
22 put forward. Just working through paragraph 22 of their
23 skeleton argument, I have already picked up in 22 there
24 is a sort of mismatch in the way in which the claimants
25 put their case. They talk about demand for trucks and

1 then a demand for their trucks and of course that is
2 mixing up market-wide and claimant specific analysis and
3 therefore is not a useful criticism in the circumstances
4 and, as I have said, in relation to that and in relation
5 to paragraph 23, a question is raised about how
6 Professor Neven is going to carry out this analysis,
7 claimant specific or market-wide, and he actually says
8 the focus would be on market-wide and there would be
9 a question that arises about the extent of price
10 discrimination that might arise but that is something
11 that Professor Neven considers the data he is looking
12 for will enable him to scrutinise.

13 There is speculation in 23.1 about the unlikelihood
14 on Mr. Harvey's analysis of a reduced demand by the
15 claimants, but obviously this is a paradigm of a point
16 that falls for discussion between the economists and the
17 same is really true of the second point in 23 where the
18 claimants here are suggesting that assessing reduction
19 in demand for Trucks on a market-wide basis would not be
20 possible because the only point in issue in these
21 proceedings are claims about whether the claimants
22 suffered an overcharge.

23 But with respect, the question whether the claimants
24 suffered an overcharge may well be dependent on
25 a market-wide analysis; after all the overcharge

1 regression is being done on a market-wide basis, not on
2 a claimant specific basis.

3 Then in paragraphs 24 and 25, this is the section
4 where the claimants say the complements argument is
5 bound to fail because Professor Neven's analysis does
6 not test for any causal connection between overcharge
7 and any decrease in the price of trailers and bodies,
8 but this is just based on a misapprehension about how
9 Professor Neven's analysis will be constructed.

10 What he is looking for is the analysis of those
11 fundamental propositions regarding complementarity
12 between the products and the basic economic principles
13 that he will then be testing with his simulation model
14 and that is how his analysis will proceed and there is
15 frankly no basis to say "No, no, no, that is not
16 workable in any way"; again it will be a matter for
17 argument in due course.

18 I think probably the final point to pick up because
19 the remainder of those paragraphs are simply
20 argumentative, is really in relation to 29, that the --
21 there is the suggestion that the claimant had previously
22 given undertakings that they were not going to claim any
23 damages in relation to allegations of infringement
24 pertaining to complementary products.

25 Well, we say that was perfectly reasonable and

1 sensible for them to do so since they did not have good
2 evidence in that regard. They were flying a kite at
3 earlier hearings in relation to that, they did not have
4 good support for it and they dropped those points when
5 they were seeking to make certain amendments, but the
6 fact that they gave those undertakings does not make it
7 unfair for us to maintain this economic analysis.

8 I should say that Mr. Coulson at one point in his
9 statement tries to now rely on certain documents as
10 evidence that there was a problem in relation to
11 complementary products. I will not go through those.
12 They are without foundation and the main point is that
13 the undertakings do not assist him then I think the
14 final point --

15 THE PRESIDENT: Can I ask before you leave the undertakings,
16 there is one aspect that was put there, namely it is
17 unfair because they have given that undertaking and you
18 should not be allowed to argue that there was
19 a reduction in price because they have given the
20 undertaking, but the alternative way of looking at it is
21 if now the question of the price of bodies and trailers
22 is being opened up by you and is going to be gone into
23 and examined, should not in those circumstances the
24 claimants now be entitled, if there is evidence that
25 there was an increase, to claim in respect of those

1 bodies and trailers because we are going to be looking
2 at body and trailers prices, that is what
3 Professor Neven is going to do and if the Tribunal
4 should find no, the evidence in fact does not support
5 DAF's argument that the price of bodies and trailers
6 went down because of the increase in the truck price, in
7 fact it shows the opposite, they went up together and
8 that was an effect of the overcharge on the truck;
9 should not the claimants then be entitled to say "Right,
10 we also want damages calculated on that increase in
11 price of these complementary products?"

12 Now, you say that will not happen because they go
13 inversely, but if it turns out, on looking at the
14 evidence, that the price movement is not inverse, should
15 they not be able to claim?

16 MR BEARD: Well, let us take it in stages. They have
17 decided not to pursue a case in relation to those
18 matters and they gave undertakings accordingly. We say
19 they do not have any prima facie case in relation to
20 those issues.

21 Now, Mr. Coulson clearly wants to rely on certain
22 evidence and suggest that there is. I can deal with
23 that, but there is no application before you that this
24 whole matter should be reopened and if the claimants
25 want to come forward with a case suggesting that there

1 was an infringement and they are entitled to claim
2 damages in relation to complements, then plainly that is
3 an application they need to make and they need to lift
4 the undertakings and they would need to explain on what
5 basis their theory sets out how these matters were to be
6 dealt with.

7 Now, that is going to be a real struggle for them
8 because of course all of the Royal Mail bodies that we
9 are talking about here were bought from third parties,
10 as were all of the trailers and all of the -- during the
11 relevant period -- during the infringement period --

12 THE PRESIDENT: Sorry, all -- I still have not quite got my
13 head round it.

14 MR BEARD: I am sorry, sir, I went too fast.

15 THE PRESIDENT: All the Royal Mail bodies were bought from
16 third parties.

17 MR BEARD: During the infringement the period, yes.

18 THE PRESIDENT: So then just help me because perhaps I have
19 misunderstood it. The amended plea at 30(a)(a), as you
20 explained it, and we are looking at the Royal Mail
21 defence, at 30(a)(a) is about the purchase by Royal Mail
22 of bodies from DAF.

23 MR BEARD: Yes, I am so sorry, I probably did not make
24 myself clear enough.

25 What Royal Mail bought -- when we are talking about

1 bodies, were bodies that were manufactured by third
2 parties and on-sold by Royal Mail -- by DAF, I am so
3 sorry. By DAF.

4 THE PRESIDENT: Yes. So they were bought from DAF but
5 manufactured by third parties.

6 MR BEARD: And the reason why that matters -- sorry, sir.

7 THE PRESIDENT: But they were sold as a package by DAF.

8 MR BEARD: Yes. There may have been some contracts where
9 there is an indication of what the separate prices were,
10 but the reason that matters is because if what has being
11 alleged is that there was some sort of infringement in
12 relation to complementary products, they were not -- the
13 ones that were bought by Royal Mail were not actually
14 manufactured by DAF and so I am just highlighting why it
15 is -- just as one example -- why it is that if they are
16 going to come along and say "We want to resile from the
17 undertakings and we want to bring a claim in relation to
18 these matters", it is absolutely critical that they
19 properly spell out and make an application in that
20 regard, because there are very good reasons --

21 THE PRESIDENT: No, I see they would have to apply to amend,
22 I can understand that. I do not know if it is just
23 a question of whether they should be precluded from
24 making that application and does the undertaking
25 preclude them from doing it?

1 MR BEARD: I think the undertaking was given to the Tribunal
2 and I think that the basic position must be in relation
3 to undertakings that, subject to submissions on the part
4 of the party who was the beneficiary effectively of the
5 undertaking, it lies with the court or Tribunal to lift
6 an undertaking, but we would need to consider what was
7 being alleged and the basis on which those undertakings
8 were being sought to be lifted because of course we have
9 been proceeding over the last several months in relation
10 to all of this on the basis that those undertakings were
11 sound and so it would be a serious matter now to be
12 unpicking these issues and so I could not sit here and
13 suggest that our clients would be content for those
14 undertakings to be lifted and for matters to proceed,
15 but what I cannot do is pretend that no one can make an
16 application in relation to such matters. These are
17 matters in these proceedings and of course an
18 application could be made. I anticipate that it would
19 be vigorously resisted. Certainly it is not a matter
20 that should be dealt with on the hoof today. A proper
21 application with evidence would be required in these
22 circumstances because the material that Mr. Coulson has
23 casually referred to we say is misconceived and
24 misconstrued.

25 As I say, we are in a situation where a proper

1 explanation is needed in circumstances where we are
2 focusing this debate at the moment, sir, on the bodies
3 issue, the Royal Mail bodies issue, because you, sir,
4 raised these questions with me before the short
5 adjournment but I do not want to lose sight of the fact
6 that that is only part of what we are dealing with here
7 and so these issues to do with undertakings would
8 obviously be affected by that as well. So I think there
9 are a whole range of issues, but I think to go back to
10 our application the point I make is a simple one:
11 arguable case, economist trying to argue the toss about
12 things, we think Mr. Harvey is fundamentally wrong but
13 that is not for today, could we have put forward
14 specific particulars, no we could not, they would not
15 have been informative, it would be akin to asking that
16 particulars were put forward of specific overcharges in
17 relation to particular trucks on the part of the
18 claimants, that is not something we insist upon, we
19 recognise that further economic analysis would be
20 appropriate before those matters were specifically dealt
21 with.

22 THE PRESIDENT: Yes, that is it, is it not?

23 MR BEARD: Unless I can assist you further in relation to
24 those matters --

25 THE PRESIDENT: Yes, I think that is -- yes.

1 MR BEARD: I am grateful.

2 MR LASK: Sir, shall I begin?

3 THE PRESIDENT: Mr. Beard. Mr. Justice Fancourt just asked
4 you a question. I do not think you heard it.

5 Mr JUSTICE FANCOURT: I was just asking for clarification
6 that there was no additional or discrete disclosure that
7 you are seeking in relation to the complements defence
8 over and above the disclosure you are seeking anyway in
9 relation to the pass-on defence, is that right?

10 MR BEARD: No, there is some. The complements disclosure
11 was dealt with in two short Redfern schedules that are
12 found in D4/831, tab 4.

13 Mr JUSTICE FANCOURT: I will have to get that up, because we
14 do not have that in paper copy I think.

15 MR BEARD: Sorry, it is D4, tab 831 {D4/831/1}, I apologise.
16 Then it is -- I will direct you to the pages if that is
17 of use. I do not know if you have electronic access,
18 Mr. Justice Fancourt?

19 Mr JUSTICE FANCOURT: It may be the ones we have got paper
20 copies of.

21 THE PRESIDENT: No, I do not think we do, do we? It is on
22 the screen. Yes, it has come up.

23 MR BEARD: That does not look like the right document to me.
24 Let me just double check my references. If you could
25 bear with me one moment, I am so sorry.

1 Mr JUSTICE FANCOURT: Sure.

2 (Pause).

3 MR BEARD: I apologise, it is the right document but it
4 starts at page 3 for the first schedule in relation to
5 bodies and then the second schedule is at page 14, so my
6 notes were correct. Have I got the two the wrong way
7 round? I may have done, I apologise, I think it is
8 trailers first and bodies afterwards. But in broad
9 terms what these two Redfern schedules are doing is
10 asking for information about the purchase of trailers
11 and members from third parties. Obviously in relation
12 to bodies that we sold Royal Mail we are not asking for
13 any disclosure at all because we have that. We are
14 asking for the disclosure in relation to the information
15 pertaining to third party sales to Royal Mail.

16 THE PRESIDENT: This is category C1, is one of them, is that
17 right?

18 MR BEARD: C1 is bodies, that is right, and C3 is trailers,
19 as I recall.

20 THE PRESIDENT: C1 is bodies, then it says "any body
21 purchased either from DAF or a third party ..."

22 This is BT.

23 MR BEARD: Yes, that is BT.

24 THE PRESIDENT: It is a little difficult -- can we go to
25 page 2 please?

1 MR BEARD: I think one needs to be clear that the bodies
2 material has only gone to BT.

3 THE PRESIDENT: This includes sales by DAF, as well as third
4 parties I think.

5 MR BEARD: Yes, I am just checking with those besides me
6 whether or not in fact that issue has been dealt with.

7 (Pause).

8 I think this may be one of those situations where
9 there is a concern about gaps in our own information
10 going back in time and that is why we are asking for it
11 and that is why we are covering DAF, but it is a very
12 small number of bodies we believe would be concerned in
13 relation to BT and bodies.

14 Mr JUSTICE FANCOURT: And is the disclosure sought in those
15 categories opposed other than on the basis that the
16 amendment should not be allowed for other reasons?

17 MR BEARD: I think that the primary objection is in relation
18 to the amendment. I am not sure that there are
19 significant objections in relation to the disclosure
20 other than that.

21 Insofar as those objections are made, again in
22 relation to any of this material if there are
23 overwhelming difficulties with obtaining it then of
24 course we are willing to consider whether or not the
25 account being given means that we would not pursue these

1 issues. If it is just impossible to get the material or
2 just wholly disproportionate, but broadly speaking we
3 understand that that is not the position in relation to
4 these categories. I do not think the similar sort of
5 issues arise in relation to this material as arose in
6 relation to the supply pass-on material we were dealing
7 with previously and one can see from the headings you
8 are dealing with a completely different several orders
9 of magnitude level of data.

10 Mr JUSTICE FANCOURT: Perhaps we will hear from Mr. Lask in
11 due course whether there is any sustained objection.

12 MR BEARD: I do think it is also worth just noting that we
13 have indicated we will take particulars in relation to
14 this sort of material if there were problems with it, so
15 again going back to where we started with all of this,
16 it is not that we are simply obsessed with hunting down
17 documents; we want the information by whatever means is
18 feasible.

19 Mr JUSTICE FANCOURT: Thank you.

20 THE PRESIDENT: Yes. Thank you. Mr. Lask.

21 Submissions by MR. LASK

22 MR LASK: Thank you, sir. Before addressing you on the
23 merits of the application I would like to briefly
24 address you on the legal principles, which I appreciate
25 appear to be largely controversial but there are some

1 points of emphasis I would like to make and one
2 potential point of difference I would like to pick up
3 on. We have set them out at paragraphs 9 to 11 of our
4 skeleton argument and there are four points I would
5 emphasise.

6 First, an application to amend will be refused if it
7 has no real prospect of success. So if the Tribunal
8 concludes that it has no real prospect of success, it
9 need not go on to consider issues of prejudice, delay,
10 et cetera.

11 Second, the test as we have heard, is the same as
12 for summary judgment and I would ask you at this stage,
13 sir, to turn up the Tfl case in bundle E at tab 6 please
14 {E/6}. This is a Court of Appeal case dealing with
15 summary judgment and the relevant extract begins on
16 page 7 at paragraph 26, where under the heading
17 "The approach to summary judgment" the court endorses
18 the principles set out by Lewison J as he then was in
19 the Easyair case and the Tribunal will be familiar with
20 these principles so I will take it briefly, but the ones
21 I particularly highlight are at (ii):

22 "A realistic claim is one that carries some degree
23 of conviction. This means a claim that is more than
24 merely arguable."

25 And I emphasise that because a number of times

1 during his submissions Mr. Beard submitted that the
2 amendment, or the proposed defence was certainly
3 arguable. It may have been a slip of the tongue but it
4 is important to recognise that being merely arguable is
5 not enough.

6 Then at (iii) and (iv):

7 "Whilst the court should not conduct a mini trial,
8 nor must it take at face value everything the amending
9 party says."

10 And then over the page at (vii) -- and this is
11 important in relation both to complements and to
12 mitigation -- and I will summarise:

13 "Where evidence supporting the plea is not currently
14 available it is not enough to argue that the case should
15 be allowed to go to trial because something may turn up.
16 It must be shown the necessary material is likely to
17 exist and can be expected to be available at trial."

18 That brings me to my third point, which is that that
19 last proposition is echoed in the principle that
20 Mr. Malek referred to, which is that there must be some
21 evidential basis for an amendment and that is reflected,
22 among other things, in the requirement for a statement
23 of truth, but it applies in any event and one sees that,
24 for example, from the Binks case which is in your bundle
25 at tab 13 at paragraph 8. I do not need to take you to

1 that. This proposition is not disputed by DAF and, as
2 we understand it, DAF does not dispute that the
3 evidential basis must be adequate in order to establish
4 a real prospect of success. That is obvious, in my
5 submission.

6 Fourth -- and this is a potential point of
7 difference between myself and Mr. Beard -- if the
8 Tribunal is satisfied that there is a real prospect,
9 that does not mean that the amendment must necessarily
10 be allowed. What it means is that the Tribunal then
11 goes on to carry out an overall balancing exercise and
12 it may very well take account of the merits in carrying
13 out that assessment but it does not just stop at the
14 real prospect stage because in principle at least there
15 may be amendments outside the category of very late
16 amendments, and we do not see this as a very late
17 amendment, but there may be amendments outside that
18 category that do cause prejudice that need to be taken
19 into account by the Tribunal in deciding whether to
20 grant permission.

21 I do not need to take you to it, but you will see
22 the Enron case is cited in our submission. That is the
23 only Tribunal case we could find dealing with permission
24 to amend, but in that case the Tribunal sets out -- in
25 fact maybe it would be helpful just to turn it up very

1 briefly. It is a quick point. It is at tab 9 of
2 bundle E {E/9} and it is at paragraph 18, which is on
3 page 8 {E/9/8} and the Tribunal is there -- this case
4 was dealing with permission to amend a claim form but we
5 say the same principles apply to permission to amend
6 a defence and the last sentence of the main body of
7 paragraph 18:

8 "Each exercise of discretion must be undertaken in
9 the context in which it arises. The Tribunal will have
10 to consider all the circumstances which may include the
11 merits, whether they could and should have been raised
12 at an earlier stage, whether further facts might need to
13 be found, possible prejudice and the overriding
14 objective."

15 So we say that -- as I will come on to submit, we
16 say there is no real prospect of success with this
17 amendment, or indeed with the mitigation amendment, but
18 we also say that even if the Tribunal thinks there is,
19 it ought still to go on and consider the other relevant
20 issues including prejudice to the claimants.

21 HODGE MALEK QC: Mr. Lask, can we just quickly look at
22 Clarke then at tab 8, paragraph 21 and 22, because there
23 are cases where the claimant has no personal knowledge
24 of the events which form the factual basis of the claim
25 and they are not necessarily expected to have the

1 evidence at the time they put their plea in. As long as
2 they have got some basis for what they say, then they
3 can put that before the court and then it gets
4 investigated later and I think what the other side are
5 saying is that their assertion at paragraph 28 of their
6 witness statement as to the economic theory is enough of
7 a key to open the door.

8 MR LASK: Yes, sir, and I do not submit that the absence
9 of -- well, I do submit that the absence of a factual
10 basis for the claim, so the absence of some factual
11 basis -- I do say that that weighs very heavily against
12 the application in this case. I do not say that it is
13 necessarily and in all cases fatal to an application
14 because there may be cases in which a party can bring
15 forward some other form of evidence, such as in this
16 case expert economic evidence that provides a sufficient
17 basis.

18 What I do submit is that the expert evidence relied
19 upon does not provide a sufficient basis either and not
20 because there is a conflict of expert evidence between
21 Mr. Harvey and Professor Neven, but because of the
22 issues that are simply not dealt with by Professor Neven
23 at all.

24 HODGE MALEK QC: Thank you.

25 MR LASK: The final point on the balancing exercise -- and

1 this is a point made in our skeleton argument and dealt
2 with in the cases -- is that if any prejudice to the
3 amending party that might arise from disallowing the
4 amendment is self-inflicted it is much less important in
5 the overall balancing exercise and that is the Pearce
6 case at tab 10 of bundle E {E/10/1}.

7 So that is all I propose to say on the legal
8 principles and I will turn now to my submissions on the
9 merits of the application.

10 I propose to deal with my submissions under four
11 headings. The first is the absence of any factual basis
12 for DAF's proposed plea; the second is the inadequacy of
13 the expert evidence it relies upon; the third is the
14 practical implications of allowing the amendment; and
15 the fourth is delay.

16 So dealing first with no factual basis, it is clear
17 in my submission that the complements plea is advanced
18 without any factual evidence to support it and that is
19 particularly striking in this context given DAF's supply
20 relationship with the claimants in relation to bodies --
21 well, it is not just its relationship with the
22 claimants, but its role as a supplier of the very
23 products in question.

24 We have seen that the plea is now limited to bodies
25 and trailers and the argument, or the proposed argument

1 has three elements. DAF says first, as a result of any
2 overcharge demand for trucks will have fallen; second,
3 that this in turn will have led to a fall in demand for
4 bodies and trailers; and third, that this in turn will
5 have led to a fall in the price of bodies and trailers.

6 Now, DAF obviously supplied significant volumes of
7 trucks in the relevant period, but it is also common
8 ground that it supplied bodies and we have heard a fair
9 degree of discussion about that during Mr. Beard's
10 submissions and we say this is highly significant. It
11 means that DAF ought to know, or at least be able to
12 ascertain, whether there is any factual basis for its
13 proposed plea.

14 Specifically, it ought to know whether the demand
15 for its trucks fell during the cartel period. It ought
16 to know whether the demand for the bodies it sold fell
17 during the cartel period and it ought to know whether
18 the price of the bodies it sold fell during the cartel
19 period. Yet DAF has not identified evidence of any of
20 these things happening and that is despite our repeated
21 requests and despite having had several months to
22 investigate and, in my submission, that does, in this
23 case, fatally undermine its application because absent
24 any evidence that the effects alleged by DAF actually
25 occurred, or any reason why DAF could not find out --

1 and I will come on to that -- it is very difficult to
2 see how this plea can be said to have a real prospect of
3 success.

4 Now, DAF offers two answers to this which are
5 interlinked. First, it says that -- well, the
6 complements plea is contingent on the claimants proving
7 an overcharge and therefore it is impossible to see how
8 DAF could have at this stage have proven that the
9 complements plea has any prima facie factual basis, but
10 in my submission that is a non sequitur.

11 The complements plea could only succeed if there was
12 in fact a reduction in the price of bodies or trailers.
13 It being a contingent plea does not preclude DAF from
14 demonstrating that fact now. Demonstrating an actual
15 fall in the price of bodies or trailers would at least
16 establish a factual basis for DAF's plea, even if the
17 causal link to any overcharge was a matter for trial.

18 Pausing there, Mr. Beard referred a number of times
19 to the difficulty in obtaining costs information and
20 controlling for costs, but in my submission that is
21 conflating two issues that are significant --
22 a distinction, it is conflating a distinction that is
23 significant at this stage because the need for costs
24 data arises when you are carrying out an analysis that
25 seeks to establish causation. I referred to the three

1 elements of DAF's case, that the overcharge causes
2 a fall in the demand for trucks, that causes a fall in
3 demand for complements and that causes a fall in demand
4 for the price of complements.

5 Now, yes you may well need costs data to establish
6 those causal links, but you do not need costs data to
7 establish the basic facts of a fall in demand for
8 trucks, a fall in demand for complements or a fall in
9 the price of -- or a fall in the price of complements,
10 so that is what we say is the key omission in the
11 evidence at this stage.

12 Sorry, in the course of doing that I have dealt with
13 the second point which is DAF says that establishing
14 whether the price of complements reduced as a result of
15 any overcharge would involve extensive analysis. That
16 is the very point I have just been dealing with.

17 We say to obtain permission DAF does not need to
18 establish that the price of complements fell as a result
19 of any overcharge, but it does need to establish that
20 they fell and that is what it has not done.

21 Now, there was extensive discussion during
22 Mr. Beard's submissions about -- I am sorry, I heard
23 someone else speaking there, should I pause for
24 a moment?

25 THE PRESIDENT: No, I think someone had an unmuted

1 microphone for some reason. No, continue.

2 MR LASK: Thank you, sir.

3 There was extensive discussion about DAF's ability
4 to ascertain whether there was any change in the prices
5 of the bodies that it sold and I must confess to having
6 some difficulty in keeping up with that, but in an
7 effort hopefully to clarify the position, my
8 submission -- and I will take you to the evidence, but
9 my submission is that DAF certainly should know, or
10 could find out whether there were changes in the prices
11 of the bodies that it sold over the cartel period and,
12 sir, we did virtually hand up two example contracts over
13 the short adjournment to deal with this point. Has the
14 Tribunal received those?

15 THE PRESIDENT: Yes.

16 MR LASK: These are contracts between DAF and Royal Mail.

17 One is pre-2007 and one is post 2007.

18 THE PRESIDENT: Just a minute. Mr. Beard, have you got
19 those? Mr. Beard? Have you --

20 MR BEARD: I am just looking. I do not know whether I have
21 got them. Let me see if I do. I have just been told
22 that they were sent by email. I am so sorry, just let
23 me check.

24 (Pause).

25 Sorry, the answer is: not yet. They are apparently

1 coming through to me immediately.

2 THE PRESIDENT: Mr. Lask, do you want to park that point and
3 come back very shortly, or would you prefer to -- would
4 that take you out of order? Would you prefer to wait
5 for five minutes?

6 MR LASK: I can deal with a related point while we are
7 waiting for those to come through to Mr. Beard and it
8 relates to trailers actually because at one point
9 Mr. Beard said "Well, none of this concerns trailers
10 because obviously we cannot have known the price of
11 trailers because we did not supply them", and in my
12 submission that is not quite right.

13 Could I ask you to go to the correspondence bundle
14 please. D4, tab 841 {D4/841}.

15 Just before this comes up this is a letter we sent
16 to DAF at the end of last week concerning trailers
17 because it appears from publicly available information
18 that DAF runs a trailer financing business and that
19 suggests to us -- I think you will see the letter on the
20 second page actually has a print-out from the website,
21 but perhaps you would like to read the first page first,
22 but just in summary it runs a trailer financing
23 business. That seems to us, at least on the face of it,
24 to give DAF access to information about the prices of
25 trailers and so we wonder why DAF cannot, as it can for

1 bodies, bring forward evidence as to whether the prices
2 of trailers went down or not, as it says they did.

3 I should say this letter was only sent on Friday, so
4 we have not had a response yet, or at least not
5 a substantive response. We make no criticism. It may
6 be --

7 MR BEARD: 7 pm I think on Friday, Mr. Lask.

8 I am sorry, the email has just arrived, so I am just
9 downloading it now.

10 Mr JUSTICE FANCOURT: Mr. Lask, can I just clarify with you
11 before you move on, on what basis you say the facts
12 should be pleaded by DAF. Is it facts relating to the
13 supply of bodies by DAF to Royal Mail and BT
14 specifically, or the fall in demand for bodies and
15 trailers, if that is a live issue, generally in terms of
16 supplies by DAF, or is it across the whole industry?
17 I think it is the second, is it not, a fall in demand
18 and fall in price in relation to any trailers or bodies
19 supplied by DAF?

20 MR LASK: What we would expect DAF to bring forward in
21 support of its application is at the very least evidence
22 that is within its control and knowledge, or ought to be
23 within its control and knowledge, which -- and that --
24 the obvious category it seems to us is in relation to
25 bodies that it supplied, so did demand for the bodies it

1 supplied fall, did the price of the bodies it supplied
2 fall. That is not limited to bodies that it
3 manufactured and that is not limited to bodies that it
4 supplied to the claimants because it is relying on
5 a broader theory that there would have been a general
6 reduction and we say it could and should have brought
7 forward evidence to that effect, if it exists.

8 Mr JUSTICE FANCOURT: But not facts related to an overall
9 fall in demand across the industry or anything that
10 wide.

11 MR LASK: If it maintained that that was outside its not
12 direct knowledge then I think we could appreciate that,
13 but what we cannot really get our heads round is the
14 idea that this information which ought to be within its
15 control simply is not available. If it is not
16 available, it may be because it does not exist and if it
17 does not exist that may say quite a lot about the
18 likelihood of DAF's proposed plea being correct.

19 Mr JUSTICE FANCOURT: Thank you for clarifying that.

20 MR BEARD: I am loathe to intervene but if I might ask the
21 Tribunal, Mr. Lask in response to that question referred
22 to us pleading to demand falling. It would be
23 interesting to understand what he actually means by
24 demand falling being a pleaded matter. Is he asking
25 whether or not the prices of certain products were lower

1 and if he is doing so, is he asking us to plead what the
2 prices of products were just as a matter of the pricing
3 of products, or is he trying to suggest that there has
4 to be some kind of linkage with the alleged overcharge,
5 which is in fact what this case is about. It is not to
6 do with generalised issues to do with changes in demand
7 which cannot be just considered in abstract in any
8 event, it is to do with the counterfactual situation of
9 an overcharge being imposed by, it goes without saying,
10 we deny, so we do not actually understand what is
11 actually being asked of us so I am sorry to intrude but
12 it really is very unclear.

13 THE PRESIDENT: As I understand it, Mr. Beard, he is looking
14 at paragraph 28 of Professor Neven's first statement
15 which says it is a -- and Mr. Lask will correct me if it
16 I have misunderstood him. Professor Neven says:

17 "It is a fundamental principle of micro economics
18 that the demand for complementary products depend
19 negatively on each other's prices. If the price of
20 product X increases the demand for product Y will
21 decrease."

22 Which is well-known negative cross-elasticity of
23 demand.

24 "As demand for product Y falls, suppliers of
25 product Y adjust the price downwards."

1 So I think what is being said is that you will know
2 whether demand for bodies which you were selling, albeit
3 they were manufactured by someone else, over this period
4 was falling.

5 MR BEARD: I will come back to this in reply. It is
6 compared to what, but I will deal with it in reply.

7 THE PRESIDENT: That was my understanding of what is being
8 said, that you know how many bodies you typically sell
9 and it is not just to the claimants but across the
10 market and what happened to your sales volumes.

11 MR BEARD: I will come back to (inaudible).

12 THE PRESIDENT: Have I misunderstood it, Mr. Lask?

13 MR LASK: No, that is correct, sir, and, as I said earlier,
14 we would not expect DAF, in order to obtain permission
15 to be able to establish the relevant causal links
16 because we can see that that would require further
17 analysis. What we do say is at the very least it has to
18 establish the basic facts upon which this plea relies
19 and those are the basic facts that you have just
20 mentioned, sir.

21 THE PRESIDENT: Yes, well, they could not --

22 MR BEARD: Cannot possibly do that it is a cogent plea.

23 THE PRESIDENT: It would not say the causal link is anything
24 to do with a cartel, but it is the particular prices
25 that are being charged.

1 MR LASK: We see that, yes. It is the basic facts that we
2 refer to.

3 Is this a convenient moment for me to go to the
4 contracts that have been sent up? Okay. So the first
5 one I wanted to take you to is the shorter one which is
6 headed "Master purchase agreement vehicles call off
7 contract" dated 1 August 2004.

8 THE PRESIDENT: Yes.

9 MR LASK: This is the period before DAF began manufacturing
10 bodies and some of the pages are numbered. Do you see
11 at the bottom of the first page 1 of 34?

12 Mr JUSTICE FANCOURT: Yes.

13 THE PRESIDENT: Yes, I think it has been -- yes, we have got
14 a covering sheet with it, that is why, yes. But it is
15 the call off contract -- yes, I see, TC02011A.

16 MR LASK: That is the one.

17 THE PRESIDENT: Yes, 1 of 34, yes.

18 MR LASK: If you go forward to 7 of 34, that is
19 unfortunately where the page numbering stops and the
20 page I would like to show you is the next page, which is
21 a schedule, schedule 2, part 1, price matrix, payment
22 dates, et cetera, and then at the top in the dark grey
23 you have supplier, make, model, spec, et cetera. Then
24 the first non-grey line is "Cost of chassis cab:
25 18,523". So we understand that to be the cost of the

1 basic truck and then you have got a number of add-ons or
2 options and whether they are inclusive, standard or
3 whether they cost a bit extra.

4 Then you have a subtotal, 18,758 and then you come
5 on to bodies and under the heading "Body" the first
6 line, 740CF box VS et cetera, 4,504. So that is the
7 price of the body.

8 Then at the beginning of the next page you have
9 alternative body options and the first three lines give
10 you three different body options and their prices. So
11 those are the prices of the bodies separately
12 identified.

13 THE PRESIDENT: Yes.

14 MR LASK: And then the second contract is headed "Master
15 purchase agreement vehicles call off contract" dated
16 1 January 2008 and the relevant page I would like to
17 take you to is page 27. At the top you will see
18 15-tonne rigid and then vendor, make, model, spec, and
19 then the first line, ref 2.3, base chassis,
20 price 27,737.82. And then again a number of add-ons or
21 options and you will see that some of them -- some of
22 those options have a price, some of them are indicated
23 as being included in the base chassis price, some of
24 them are indicated as being included in the body base
25 price and then you get to 14.9, which is six lines up

1 from the bottom, you will see the words "Box body" and
2 then the price, 7,030. So there again you have the body
3 prices separately identified.

4 Now, I think we can take as a given that for the
5 earlier contract that must have been a third party body
6 because it was before DAF started manufacturing its own
7 bodies. It is not clear on the face of the later
8 contract whether that is a DAF body or a third party
9 body.

10 Mr. Beard said that for bundles it did not attribute
11 a separate transaction price and I have to say we find
12 it quite surprising to hear the submission that DAF sold
13 bundles, including both a truck and a body, but it
14 cannot say what the price of the body was, and, sir, you
15 made the point that "Well, why cannot you compare the
16 price of the bundle with a body to the price of a truck
17 on its own in order to deduce the price of the body",
18 and we agree that that ought to be possible and in order
19 to illustrate the point may I ask you to turn up
20 a document in file C3 --

21 THE PRESIDENT: Before you move on, these two contracts,
22 have they been disclosed already in the proceedings?

23 MR LASK: Yes. I think these are DAF's disclosure to us.

24 THE PRESIDENT: Yes.

25 MR BEARD: Yes they are and just if it helps, Mr. Lask,

1 I understand that that is a third party body in the
2 second contract, it is not a DAF body.

3 MR LASK: Thank you.

4 Then turning to the next document, which the Opus
5 reference is {C3/10/178} and this is one of the
6 documents cited by Mr. Coulson in relation to the
7 undertakings point, so this is one of the documents that
8 was identified on the commission file as giving rise to
9 a suspicion as to the extent of the cartel because while
10 this is a DAF price list it was in Volvo Renault's
11 possession, but that is not the purpose for which I am
12 taking you to it now. The purpose is to illustrate the
13 point that you made, sir, which is that you ought to be
14 able to deduce the price of the body by looking at the
15 bundle price compared to the truck only price and at the
16 top of this page you will see -- it is the second and
17 third lines I draw your attention to. The second line,
18 this is all to do with the LF45 truck and you see the
19 second line, 36,200, that is the FAL45, 8-tonne, and
20 then the next line, 42,800, FALF45, 8-tonne box body, so
21 that is the bundle price.

22 So it seems to us that you simply subtract one from
23 the other in order to deduce the body price and I note
24 that this is -- this price list is valid from
25 15 March 2010, so in principle at least it could be DAF

1 bodies, but I am not sure it really matters whether it
2 is DAF bodies or not at this stage because even if it is
3 DAF selling third party bodies, DAF can identify the
4 price and it can tell us --

5 MR BEARD: It is a DAF body, if it assists.

6 MR LASK: It is a DAF body, that is helpful, thank you.

7 So for both DAF bodies and non-DAF bodies, DAF can
8 identify the prices, so it ought to be able to say
9 whether or not those prices went down over the relevant
10 period.

11 Sir, that was all I was going to say under the first
12 heading and the second heading is the inadequate expert
13 evidence. Now, I do say that DAF's failure to identify
14 a factual basis for its plea, despite being in a strong
15 position to do so, is in this case so significant that
16 the adequacy of its expert evidence does not even arise
17 because in my submission it is implausible to contend
18 that economic evidence which suggested that any
19 overcharge would have been expected to cause a reduction
20 in the price of truck bodies, could be sufficient to
21 prove DAF's defence in the absence of evidence that such
22 a reduction in fact occurred. That is the starting
23 point, but insofar as it is necessary to address the
24 adequacy of DAF's proposed expert evidence we say it
25 suffers from two deficiencies.

1 First, it is a generic theory presented without any
2 assessment of its plausibility by reference to the
3 relevant economic context; and, second, it is a method
4 of analysis that does not even purport to be capable of
5 proving causation.

6 Now, in my submission both are inadequate but in my
7 further submission you the Tribunal need only be with me
8 on one or the other to dismiss the application, if we
9 even get this far, because on the one hand it is not
10 enough to have a robust method of analysis if the
11 economic theory relied upon is entirely generic and
12 there is no reason at all for thinking it is likely to
13 be proven because that does not provide you with a real
14 prospect of success. It is just a fishing expedition
15 with a high spec rod.

16 On the other hand, if the economic theory is sound
17 but the proposed analysis is wholly unsuitable for
18 meeting the appropriate legal test that is just as bad,
19 the other way round: it is a fishing expedition with the
20 line missing.

21 With that introduction I will turn first, if I may,
22 to the economic theory and in my submission if a plea
23 relies solely on economic theory there has to be some
24 basis for thinking that the theory is likely to be
25 proven at trial, otherwise it is impossible to conclude

1 that the plea has a realistic prospect of success.

2 Mr. Harvey identifies a number of flaws in DAF's
3 theory and I will ask you, if I may, to turn up his
4 ninth statement, which is at B3, tab 17. You will be
5 becoming familiar with these passages so I will not
6 dwell unnecessarily on them but the first point he makes
7 is at 6.2 -- sorry, this is page 17 {B3/17/17}. He says
8 there -- this starts about halfway through the
9 paragraph:

10 "... I do take issue with any conclusion that an
11 increase in the price of trucks is inherently likely to
12 lead to a reduction in the claimant's demand for trucks
13 and therefore trailers and bodies which in turn would
14 lead to a reduction in the pricings of those trailers
15 and bodies. The question of whether or not this is
16 likely to have occurred needs to be assessed by
17 reference to the facts of how the claimants used their
18 trucks, trailers and bodies and how if it at all an
19 increase in the price of trucks would affect this."

20 So what he is saying there -- and I appreciate he is
21 referring to the claimant's demand and it has now been
22 clarified that actually we are talking about market-wide
23 demand, but the point he is making is a general one,
24 which is that the likelihood of any overcharge on trucks
25 causing a reduction in the price of bodies and trailers

1 depends on the economic context and DAF does not
2 contradict that, yet its evidence fails to identify any
3 feature of the present context that would suggest the
4 alleged effect on the price of complements was likely to
5 have occurred.

6 The only factual point identified by Professor Neven
7 and identified by Mr. Beard in his submissions is that
8 trucks and bodies are strong complements, but
9 Mr. Harvey's uncontradicted evidence is that that is not
10 enough. So this is not, as we see it, a conflict
11 between experts. It is Mr. Harvey identifying matters
12 on which the likelihood depends which simply have not
13 been addressed by DAF.

14 It has now been clarified that the relevant -- or
15 the proposed plea is based on a market-wide fall in
16 demand for bodies and trailers, but that brings us on to
17 the other point made -- or one of the other points made
18 by Mr. Harvey, which is at 6.11. This is where he deals
19 with his concerns insofar as the theory is concerned
20 with a market-wide reduction and he says this at
21 6.11(a):

22 "The first issue is that Professor Neven and I are
23 tasked with estimating a claimant specific overcharge
24 not a market-wide overcharge. Although we will rely on
25 market-wide data as part of our analysis, our task is

1 narrower and our conclusions would only determine
2 whether there has been an overcharge caused to the
3 claimants in these proceedings as a result of the cartel
4 not whether there has been a market-wide overcharge
5 suffered by all purchasers of trucks in the cartel
6 period.

7 "Therefore it is not clear to me that a market-wide
8 reduction caused by a market-wide overcharge will be
9 proven as part of this case. Without this it is not
10 clear that there will be the evidential basis for
11 a market-wide analysis."

12 That seems to us to be a rather obvious point, which
13 is that on DAF's theory there would need to be
14 a market-wide overcharge in order for there to be
15 a market-wide fall in demand. That seems obvious. But
16 the overcharge analysis that will be carried out in this
17 case will only be seeking to determine whether there was
18 an overcharge to these claimants.

19 Now, unless DAF were to concede a market-wide
20 overcharge which is unlikely, there would be no basis
21 for assuming a market-wide fall in demand for bodies or
22 trailers.

23 Mr. Beard made the point that the claimant specific
24 overcharge analysis will depend on market-wide data and
25 we accept that and Mr. Harvey recognises that in 6.11(a)

1 but the output of that analysis on our case will be that
2 there was a claimant specific overcharge and so we ask
3 the question how do you get from a claimant specific
4 overcharge to a market-wide fall in demand for trailers
5 and bodies.

6 So we do say that the complements theory is simply
7 too generic and divorced from the particular context to
8 provide an adequate basis for the proposed plea.
9 Expressed at a very high level of generality, the theory
10 does not indicate that the defence would have a real
11 prospect of success.

12 That brings me on to Professor Neven's proposed
13 analysis and in our submission that is unsuitable too.
14 It is common ground I think that causation is an
15 essential ingredient of the complements defence yet it
16 is also common ground that Professor Neven's proposed
17 simulation model does not address causation at all and
18 in my submission that is an unusual state of affairs.
19 What DAF says instead in its skeleton is that causation
20 will be proved by reference to the economic theory on
21 complements and what we understand that to mean is that
22 DAF will use the economic theory to argue that the
23 overcharge was likely to have caused a fall in the price
24 of complements and then it will use the simulation model
25 to estimate the expected level of such a fall and in my

1 submission that is not sufficient to justify the grant
2 of permission.

3 First, in my submission, it is unrealistic to
4 suppose that the Tribunal would reduce the claimant's
5 damages at trial on the basis of a theoretical argument
6 that the price of complements was likely to have fallen
7 without any evidence or assessment of whether that was
8 in fact the case. Causation is primarily a matter of
9 fact and the facts cannot simply be disregarded in
10 favour of a theoretical approach.

11 Second, and in any event, as already submitted, the
12 theory, as currently articulated at least, is too
13 generic and divorced from the facts, so even if a theory
14 could in principle suffice for causation purposes the
15 Tribunal cannot be satisfied on the basis of what is now
16 before it that Professor Neven's analysis would have
17 a real prospect of establishing causation.

18 Now, DAF's response to this is to say that this is
19 the only practical way of assessing the complements plea
20 since the costs data required for a regression analysis
21 is not available and we do not agree with that because
22 we say that as a manufacturer of bodies DAF would hold
23 the relevant costs data and therefore it would in
24 principle be possible to do this analysis properly if
25 there were time to do it and a simulation model is not

1 the only game in town and it is not the only way you can
2 ever deal with this sort of defence and it is certainly
3 not right to say that causation in this sort of
4 context -- the causation for this sort of defence can
5 only ever be proven by theory. That is simply not
6 right.

7 In any event, the fact that a particular method may
8 be the best available option in the limited time
9 available does not mean it is good enough. If, as we
10 say, it does not disclose a real prospect of success
11 then that is the end of the matter.

12 That brings me to my third heading, which is the
13 practical implications and Mr. Harvey has explained --
14 you may still have it open, sir. He has explained at
15 paragraphs 12 to 14 the sort of analysis that he thinks
16 would be necessary in order to test the complements
17 defence properly. Mr. Beard at one point --

18 THE PRESIDENT: Sorry, 6.12 this is you are looking at?

19 MR LASK: Yes. Mr. Beard at one point said "Well,
20 Mr. Harvey says you need to get into the negotiations".
21 That is not right. That is what Mr. Harvey's evidence
22 is in relation to the mitigation defence, not
23 complements. But at 6.12 to 14 he is identifying the
24 sort of analysis that he thinks would be required in
25 order to test the complements defence properly and

1 Mr. Coulson's evidence is that that analysis is unlikely
2 to be achievable in the time available before trial,
3 there is just not enough time, so the difficulty with
4 this amendment -- and this is where we do get into
5 questions of prejudice which only arise if you think
6 there is a real prospect of success, which we say there
7 is not, but we say there is prejudice because the
8 amendment risks leaving the claimants in an invidious
9 position where we do not think DAF's methodology is fit
10 for purpose but we would not now be able to produce the
11 analysis we say is required and it needs to be
12 remembered that we are claimants claiming for the losses
13 caused by a serious and prolonged price fixing cartel
14 and in my submission it is wholly unfair for DAF to gain
15 a tactical advantage by forcing us into a purely
16 defensive role and the position is particularly bad in
17 relation to the bundled complements plea because DAF
18 says that we bear the burden, so on its case we bear the
19 burden of proving that bundled bodies were not cheaper
20 than they would have been absent the cartel.

21 Now, we say that is wrong. We say DAF is wrong on
22 the burden, but supposing it is right, then we are left
23 in a position of having to prove that bodies did not
24 fall in price as a result of the cartel, but without
25 having a proper opportunity to do so.

1 In my submission, DAF's position in that respect is
2 most unattractive and given Mr. Harvey's legitimate
3 concerns -- you will see he says, sir, that he would not
4 envisage conducting a simulation model because he does
5 not think it is appropriate, but given those concerns if
6 the amendment were allowed we would be in a scenario --
7 would be at risk of the kind of scenario that the
8 Tribunal has been anxious to avoid, where a great deal
9 of effort and expense is devoted to a methodology,
10 namely Professor Neven's, which is then challenged at --
11 I am quoting from the disclosure ruling, sir -- which is
12 then challenged at trial as unsound or unreliable, with
13 an invitation to the Tribunal to reject it entirely.

14 The amendment, if allowed, would also prejudice the
15 claimants in the second way and this is the undertakings
16 point which is that the claimants gave these 2019
17 undertakings not to pursue damages for an increase in
18 the price of complements and so the position would be
19 that DAF would be able to rely on any reduction that was
20 proven on the evidence but we would be prevented from
21 claiming damages from any increase and in my submission
22 that is obviously unjust but it is also difficult to
23 solve because again, as Mr. Coulson explains in
24 paragraphs 4.4 to 4.6, the additional analysis and
25 disclosure required to establish that any increase in

1 the price of complements was caused by the cartel is
2 going to be difficult and hugely expensive in the time
3 available.

4 Now, in its skeleton argument DAF offered three
5 answers to this. The first was to say that the
6 undertaking applied only to Royal Mail which is
7 incorrect because BT gave the same undertaking and that
8 is in the bundle at A2, tab 27, page 4 {A2/27/4}. The
9 second is to say that DAF only sold to us bodies
10 manufactured by third party body builders and that is
11 correct but irrelevant because if the cartel that DAF
12 participated in extended to bodies and of course it is
13 entirely possible that DAF was involved as a reseller as
14 well as a manufacturer.

15 The third, which Mr. Beard alluded to, is that the
16 four documents identified in Mr. Coulson's statement do
17 not establish an infringement. Well, obviously they do
18 not on their own and they are not put forward in order
19 to establish an infringement. What they do is provide
20 a legitimate basis for concern and at least justify
21 further inquiry. The DAF price list I showed you was
22 found in Volvo's possession, but the claimants have
23 never undertaken a full enquiry because they gave the
24 undertakings, but it is something they may well have
25 wanted to do if they had not been bound by those

1 undertakings and if they had known that the price of
2 bodies was going to be an issue in this litigation and
3 sir, I do -- it is worth recalling at this stage that
4 DAF now says that the bundled complements plea was
5 implicit in its defence from the outset, but if it had
6 a complements defence in mind all along it is troubling
7 that it extracted the undertakings before making that
8 clear and, sir, you had a discussion with Mr. Beard
9 towards the end of his submissions about what would one
10 do if permission were granted. Of course we would say
11 at the very least the undertakings ought to be lifted at
12 the same time as permission being granted and then it
13 would really be a matter for us to decide whether we
14 wanted to amend in order to claim damages for these
15 products.

16 Sir, I am conscious of the time --

17 THE PRESIDENT: Which you would then need permission to do
18 even if the undertaking was lifted, would not you?

19 MR LASK: We acknowledge we would still need permission,
20 yes.

21 THE PRESIDENT: Good.

22 MR LASK: What I say is we should not have to seek
23 permission to lift the undertakings first and then
24 permission to make the amendment. The undertakings
25 should be lifted at the very least.

1 Sir, I can probably finish on complements very
2 quickly if you can indulge me another maybe three
3 minutes.

4 THE PRESIDENT: Yes and then we will take our break because
5 we have slightly overrun.

6 MR LASK: Just to deal with the fourth heading which is
7 delay and I heard what you said at the beginning about
8 not being very keen on the delay point so I will not
9 dwell on it for too long but we do say that the
10 prejudice to which I have been referring is caused
11 partly by DAF's delay in raising the complements
12 amendment, because we are left in a position now where
13 it is very difficult if not impossible for the claimants
14 to undertake the analysis they consider necessary. This
15 amendment was first raised in October 2020, 23 October,
16 over three years after DAF's original Royal Mail defence
17 and two and a half years after its initial BT defence
18 and it offers two arguments in an effort to avoid this.
19 It says the bundled complements plea was already
20 explicit in paragraph 33 of the defence -- I do not
21 know, sir, if you have your bundle B3 to hand still.

22 THE PRESIDENT: Yes.

23 MR LASK: The amendments are at tab 14 and paragraph 33 is
24 on page 169 {B3/14/169}, where DAF says:

25 "Paragraphs 29 and 30 are denied. The claimant is

1 required to prove the alleged overcharge, its amount and
2 the causal mechanisms by which it occurred."

3 Now, we say it is stretching credibility to say that
4 the complements plea is explicit in that plea. There is
5 obviously no reference to complementary products or any
6 off-setting and DAF only sought complements disclosure
7 after they provided their draft amendments in October
8 and they said they were explicitly seeking this
9 disclosure off the back of their amendments, so we think
10 that is a non-starter that argument.

11 The second is that DAF says "Well, it is a form of
12 mitigation so we can rely on Sainsbury's as
13 a justification for our delay" and it may be we are
14 going to discuss Sainsbury's later and I will be
15 submitting that that does not provide any justification
16 for the delay on mitigation, but even if it did that
17 justification does not extend to complements because
18 complements had nothing to do with the Sainsbury's
19 litigation. It was no part of it and indeed it is
20 conceptually different because the way it is put by DAF,
21 the complements defence, is that the effect on
22 complements arises as a matter of market forces, whereas
23 mitigation is to do with proactive efforts by the
24 claimants to negotiate costs reductions. So the two are
25 different things.

1 here and we have talked about the basis for our case set
2 out in the reasoning provided by Professor Neven, who is
3 extremely experienced in relation to these matters.

4 The case law that was referred to, for instance
5 Enron, does not assist the claimants at all. Indeed it
6 illustrates just how slow a tribunal should be to
7 exclude a legal plea and indeed the case of Clarke to
8 which Mr. Malek referred Mr. Lask not only illustrates
9 that in situations of asymmetry it is only to be
10 expected that limited evidence will be provided, but it
11 also helpfully illustrates the fact that having to
12 engage with submissions made by a party in these
13 circumstances does not itself constitute prejudice
14 because in the end a lot of what Mr. Lask was saying
15 towards the end of his submissions was simply "Well, it
16 will all be rather prejudicial to us because we will
17 have to engage with what is put forward by defendants in
18 these circumstances".

19 So Mr. Lask then had four points which he said were
20 of substance: absence of factual basis, inadequacy of
21 expert analysis, practicality and delay.

22 Actually may I just take the second of those points
23 first because I would like just very briefly to go back
24 to the statement -- the first statement of
25 Professor Neven that we have referred to previously,

1 which I believe is at tab 22 in the bundle.

2 THE PRESIDENT: Sorry, the first statement? Tab 11.

3 MR BEARD: I am sorry, it is tab 11. I apologise, tab 22 is
4 his second. There is a reason I just want to take it
5 out of order.

6 So I referred you to page 7 and in particular
7 paragraphs 27 and 28 and just picking it up at 29
8 Professor Neven talks about this negative
9 cross-elasticity of demand which, sir, you referred to,
10 and talks about the strength of that and then in 30:

11 "In the light of these strong economic underpinnings
12 and given the significance of the bodies and trailers as
13 complements to naked trucks and tractors, I therefore
14 consider the complements analysis is necessary to obtain
15 a reliable estimate of damages. The failing to do so
16 would result in a damage estimate that would
17 overestimate the damages borne by the claimants. In the
18 event that an overcharge is found to have been caused by
19 the infringement."

20 So an experienced economist is reaching a very
21 strong conclusion in relation to the situation where
22 there is a clear factual linkage that he is setting out
23 and is not challenged as well as strong economic
24 underpinnings.

25 But I would also like to refer you to paragraph 31:

1 "In principle, the changes in the prices of trailers
2 and bodies could be estimated by implementing a reduced
3 form regression in which the prices of the complements
4 would be explained by their cost, other control
5 variables and an indicator variable for the
6 infringement.

7 "In the absence of cost data from the manufacturers
8 of bodies and trailers such an approach is not feasible
9 because cost is very likely to be one of the key drivers
10 of the price of bodies and trailers. Unless you can
11 have costs data for the manufacturers of bodies and
12 trailers which could be used to control for this
13 variable it is not possible to produce a robust or
14 reliable regression model, hence in order to estimate
15 the likely effect of the increase in trucks I intend to
16 implement a model which simulates how the price of
17 complements like trailers and bodies can be expected to
18 change in the event of an increase in the price of naked
19 trucks."

20 And then he goes on to explain how and why one
21 calibrates that sort of model in circumstances where the
22 data you can obtain is the sort of data that is sought
23 in those Redfern schedules in relation to the
24 complements analysis.

25 THE PRESIDENT: Am I right in understanding this, Mr. Beard,

1 that to create that model, you do not have to assume
2 a cartel overcharge at all? Is not that right?

3 MR BEARD: Yes, you are not assuming the cartel overcharge,
4 because he is -- this is one of the other fallacies of
5 Mr. Lask's approach. He says "Well, Professor Neven
6 does not deal with causation". Well, of course he does
7 not deal with causation here because the problem we have
8 got is we are dealing with a situation where we say
9 there is no overcharge so we are not expecting to find
10 any causation. We are dealing with things contingently
11 or alternatively and his simulation model is trying to
12 look at the interrelationship between the -- well, as he
13 puts it better above, the differences in changes in
14 price in relation to trucks with the impact on price in
15 relation to the complementary bodies and changes and
16 those changes are not cartel --

17 THE PRESIDENT: Yes, so you can have the factual basis of
18 looking at how movements in the price of trucks affect
19 movement in the price of trailers even if there is no
20 cartel?

21 MR BEARD: Well, that is right, that is what this sort of
22 analysis --

23 THE PRESIDENT: That is why we are suggesting that when you
24 say it is a contingent plea that does not affect the
25 fact that DAF will have data that can show some factual

1 basis for saying you can see the beginnings of how the
2 price movements are related.

3 MR BEARD: Well, that is where I think we probably part
4 company, sir, because that takes us back to the adequacy
5 of fact points, but before I -- well, let me deal with
6 those and I will cycle back to Mr. Harvey's further
7 criticisms of Professor Neven, but the question that you
8 are posing I think is "Well, look, if Professor Neven is
9 taking a situation where you can take prices and you can
10 look at the interrelationship between prices of trucks
11 and prices of complements, surely you can do that on
12 a factual basis with individual identified prices of
13 particular trucks and particular bodies or trailers and
14 you must have the data in relation to that", and what we
15 say is that that does not work because what you have are
16 a series of problems in relation to identifying whether
17 or not the prices of trucks are going up and down and
18 what is causing them to go up and down and you have
19 equally got problems with the price of bodies going up
20 and down and what is causing them to go up and down and
21 the difficulty you have is if you just extract the
22 prices of the trucks and the prices of the bodies --
23 assuming you could do so, and I will come back to why
24 you cannot, but assuming you could do so you are not
25 going to be able to properly test for this because, say

1 in a particular period it is actually the price of steel
2 which drives both the price of trucks and the price of
3 bodies, now in those circumstances you might get
4 a situation where the impact of that significant
5 component cost is what is changing the prices and in
6 those circumstances it is not clear that you are going
7 to get any informative account of how the price of
8 trucks if it were otherwise to rise would impact the
9 price of bodies because of course that is what you are
10 really interested in here. You are interested in
11 controlling for, if there is just a rise in the price of
12 trucks hypothetically because of the cartel, how does
13 that impact on the price of bodies, but if it is in fact
14 steel prices that are driving both, or inflation that is
15 driving both, then you will get a suggestion that the
16 two were not interrelated but that would be a wrong
17 analysis and that is why you end up having to control
18 for these sorts of issues. In other words, as soon as
19 you start talking about plotting for individualised
20 prices for trucks and individualised prices for bodies,
21 you end up with the problems that the regression ends up
22 having to control for and that is why I took you to
23 Professor Neven's 31 because you are not going to get
24 anything meaningful from just plucking prices out, even
25 patterns of prices in relation to trucks and bodies and

1 that is the case even if you can say that you are
2 identifying the same truck along the way.

3 Just looking at the two contracts that Mr. Lask took
4 you to and they were (inaudible) --

5 THE PRESIDENT: Mr. Beard, Mr. Beard. Mr. Beard, I do not
6 know if you can hear me.

7 MR BEARD: Yes --

8 THE PRESIDENT: We are having a connection problem.

9 MR BEARD: -- I can hear you.

10 THE PRESIDENT: We are having a connection problem with your
11 microphone again. Could you mute and unmute.

12 (Pause).

13 Do you want to try again. Do you want to try again?

14 MR BEARD: Is that better?

15 THE PRESIDENT: Yes.

16 MR BEARD: Is that any better?

17 THE PRESIDENT: Yes. Can you hear me? I am not sure you
18 are hearing me.

19 MR BEARD: I can hear you but there appears to be -- there
20 is a big delay I think.

21 THE PRESIDENT: I think that is what the problem is, yes.

22 Are you watching on live stream now?

23 MR BEARD: No, I am in Teams and I do not know why the delay
24 is occurring. Apparently I am catching up, according to
25 someone else in the room.

1 THE PRESIDENT: Well, we can hear you better anyway.

2 MR BEARD: I am grateful.

3 So I was just indicating that if you were to take
4 changes in prices in trucks and changes in prices in
5 bodies and you could identify that material, it is not
6 going to tell you anything about that relationship, so
7 it is not something you can identify usefully and then
8 plead to because you would have to control for costs but
9 the further point I was making was you cannot actually
10 identify some neat cost of a truck that you identify as
11 you go along because the nature of a truck is such that
12 there are all sorts of variables that dictate what the
13 truck price is and we saw that in (inaudible) very
14 simplistic terms (inaudible) those two contracts
15 Mr. Lask took us to because they show that you have
16 a huge number of variables for a truck and therefore to
17 try and compare like with like across trucks would be
18 inordinately difficult and it becomes another aspect of
19 what you have to control for.

20 In other words, if what you are trying to do is say
21 DAF (inaudible) --

22 THE PRESIDENT: No, Mr. Beard. Mr. Beard, Mr. Beard.

23 Mr. Beard.

24 MR BEARD: -- prices of trucks go up and prices of body go
25 down, you cannot actually identify when truck prices are

1 going up without ...

2 THE PRESIDENT: I think we have lost the connection now.

3 I do not know what the problem is but it seems to have

4 got worse. I think we will exit for a few moments and

5 no doubt somebody listening will be able to communicate

6 with Mr. Beard and I imagine -- Mr. Lask, do you also

7 have the problem with the sound that we have been

8 having?

9 MR LASK: I am having the same problems with hearing

10 Mr. Beard as you are.

11 THE PRESIDENT: Yes. That he sometimes fades out completely

12 and slows right down like a slow-playing record.

13 MR LASK: Yes.

14 THE PRESIDENT: Yes. Well, if someone can communicate that

15 to him.

16 Ah, you are back.

17 MR BEARD: I am back in the guise of Ms. Edwards today, sir,

18 if you will permit me.

19 THE PRESIDENT: We did have a significant problem. You

20 would fade out and slow down and it would be like

21 a slow-playing record, if you know what I mean.

22 MR BEARD: That sounds like a very dreary ...

23 THE PRESIDENT: Right, well, you sound very clear now, so in

24 if your new guise --

25 MR BEARD: Yes, so I was just explaining -- I will go

1 through it again in case I was moving from 45 to 33 at
2 the moment I was speaking -- that you have got a series
3 of problems if you just start talking about suggesting
4 that DAF should put forward evidence that the prices of
5 trucks and the prices of bodies can be shown to be
6 interrelated because in order to do that not only do you
7 have to control for costs, as I hope I was making clear
8 by reference to in particular what Professor Neven had
9 said in relation to concerns on regression, because you
10 would get a false lack of --

11 THE PRESIDENT: Just a minute, sorry. The live stream is at
12 the moment not working.

13 MR BEARD: I seem to have a very bad effect on technology.

14 (Pause).

15 THE PRESIDENT: Right, let us try again.

16 MR BEARD: Thank you.

17 THE PRESIDENT: Series of problems if DAF were to put
18 forward evidence to show they are interrelated.

19 MR BEARD: Yes. The first -- what we are hypothesising is
20 that DAF should have put forward evidence that
21 a particular rise in truck prices caused a reduction in
22 the price of bodies and it should plead examples of this
23 or plead evidence in relation to this but, as I have
24 said, the first problem is in order to do that you have
25 to control for the costs both in relation to trucks and

1 in relation to bodies because otherwise you can get
2 false results in relation to this, because you take
3 truck prices you take body prices, they both look like
4 they are going up at the same time; it is not actually
5 anything but the fact that the cost of steel has gone
6 up, or inflation has gone up.

7 On the other hand, you can end up with problems as
8 well in relation to identifying the actual changes in
9 prices of bodies and trucks. If we just focus on trucks
10 or a moment, the hypothesis is one looks at rises in
11 truck price and sees what the impact is on bodies but of
12 course tracking through and identifying whether or not
13 there has been a rise in truck price is actually quite
14 hard because all trucks are not the same. They are
15 relevantly different and how they are priced depends on
16 the particular terms of negotiation and what is included
17 in them.

18 Now, what is included in them is a variation of
19 components: the quality of the cab, the nature of the
20 engine, the other sorts of accoutrements that are
21 attached to any truck, cab and chassis. In those
22 circumstances you have to control for all of those
23 elements when you are deciding whether or not prices are
24 actually going up or not because the difficulty you have
25 got is that what is being suggested is that we should

1 plead to examples of changes in price impacting price of
2 trucks rising impacting on the price of bodies or
3 trailers falling in circumstances where the causes of
4 those two matters may be all sorts of other factors that
5 you then need to control for, which is why, as
6 Professor Neven says, you need to get involved in the
7 difficult regression analysis if you are going down that
8 route.

9 Of course, there is sense in going down that
10 regression analysis route, for example in relation to
11 overcharge, because you want to identify whether or not
12 there is some kind of particular alleged infringement
13 effect, but here the idea that we could plead out,
14 without engaging in such a huge regression exercise,
15 particular examples and provide evidence, is not
16 sustainable and actually what Professor Neven is saying
17 is not only is it not sustainable for the purposes of
18 giving evidence as to why we should approach complements
19 issues on this basis, it is actually not the exercise we
20 should engage in it at all here and so the Tribunal's
21 thought that "Well, Professor Neven is looking at price
22 rises impacting bodies as a matter of economic theory
23 given complementarity, surely you can give examples of
24 that", in practice that is much more difficult and it is
25 indeed why he develops a simulation model which is then

1 calibrated by reference to the disclosure because you
2 cannot do that sort of thing and this is why you end up
3 with a situation where the argument that we should have
4 put forward particular pleadings illustrating these
5 matters, or giving particular evidence of particular
6 instances of changes in truck price levels impacting on
7 body price levels is just not feasible and indeed the
8 examples that Mr. Lask was giving are further
9 illustrative of the problem because he picked two
10 documents that concerned body prices from third parties,
11 so not matters under our control because they are coming
12 from third parties not from us, and second of all he
13 picked as his third document the document from bundle C
14 at page 178 that was an exhibit to Mr. Coulson's
15 statement, references to a list price.

16 Now, this is the sort of mixing and matching that is
17 highly unhelpful because we know list prices, or what
18 have sometimes been called gross prices, but the list
19 prices are very, very different from retail prices.
20 They do not provide you with any meaningful information.
21 As soon as you start feeding into any discussion replies
22 from here, prices from there, no matter what they are
23 for, no matter what the circumstance, you get a hugely
24 distorted picture and again --

25 THE PRESIDENT: These were the actual prices charged for

1 those --

2 MR BEARD: The first contracts were, the list prices, the
3 third document, were not.

4 THE PRESIDENT: I see, right.

5 MR BEARD: So you are mixing up apples and pears. So this
6 is why Mr. Lask said "Oh, well you can cut a bit off
7 here and add a bit here and it is all very
8 straightforward"; you cannot do that. That is not what
9 is possible here and it will not provide you with any
10 evidence, so even if the Tribunal were to say "It would
11 be jolly nice if DAF could provide some examples" you
12 are not going to get anything meaningful out of this,
13 for the reason Professor Neven has explained and it is
14 for that precise reason that he says use the simulation
15 model because that will give you a model to enable you
16 to study these effects by reference to calibration.

17 THE PRESIDENT: Yes. It is a market modelling that he is
18 doing, is it not?

19 MR BEARD: It is a market modelling, yes. He is recognising
20 that there are limitations to it, but it is a market
21 modelling that uses calibration for the particular
22 circumstances we are dealing with that can inform the
23 way in which one looks at this complements analysis and
24 that is perfectly reasonable and Mr. Lask, although he
25 placed at the end a coda saying "I am not very happy

1 with the disclosure requests", actually has not
2 articulated that there is any significant problem with
3 the disclosure requests in relation to this situation.

4 HODGE MALEK QC: Mr. Beard, there are so many permutations.
5 Let us assume there has been an increase in the price of
6 a truck, one permutation is the price of the body can go
7 down, it can remain the same, or whatever, but then it
8 could be the price of the particular body models remain
9 the same but the customer chooses a cheaper body model
10 and then he will still have the same overall price he is
11 paying for the truck and the body because he is saying
12 "Okay the truck has got more expensive, I do not want to
13 spend more than I did before, what I am going to do is,
14 there are ten body models on offer, model A is the one
15 I would have had normally, that is too expensive now,
16 I will go for model B".

17 MR BEARD: Yes. Essentially that is -- if you think of
18 competition as having various dimensions, that is
19 a quality reduction rather than a spending reduction.

20 HODGE MALEK QC: Exactly.

21 MR BEARD: So I accept that must be right and I do not think
22 Professor Neven is saying "Oh, no, there is only one way
23 that you can effectively have this had sort of
24 waterbedding effect", that is not the way he is
25 approaching this.

1 So I entirely accept your proposition and that is
2 yet another reason why you are not going to be able to
3 meaningfully pick particular examples, even if you could
4 say "this is a truck price rise", and then hypothecate
5 it to some sort of body drop price and say that is
6 illustrative and meaningful. The only way you can do it
7 is doing the much bigger exercise and if you do the much
8 bigger exercise you are well beyond what we are talking
9 about in pleading terms and as I say Professor Neven
10 says "Do not go down that route here" in any event.

11 HODGE MALEK QC: Yes.

12 MR BEARD: So I entirely take that.

13 The remainder of the critique that is put forward --
14 I should deal with what Mr. Lask said, which is there is
15 an overcharge, the overcharge meant the demand fell, if
16 demand fell for trucks then in those circumstances you
17 would see body prices falling. Well, with respect, that
18 is somewhat begging the answer to his own question. The
19 first question we have is, is there an overcharge. We
20 say there is not. You cannot assume the remainder of
21 that. But I recognise that the Tribunal was asking
22 a somewhat different question from Mr. Lask, which is
23 why I have tried to deal with that in rather more
24 detail? Mr. Lask's approach is just failing to deal
25 with the fact that this analysis is contingent and we

1 are dealing with a counterfactual analysis.

2 The last two points I need to pick up are just in
3 relation to Mr. Harvey. Mr. Lask really did embark on
4 the sort of mini trial that is eschewed by all of the
5 case law in relation to this sort of expert analysis.
6 He was saying "Look, Mr. Harvey has these critiques of
7 Professor Neven, he has these critiques of where things
8 go" and indeed the big bull point he had was in relation
9 to paragraph 6.11(a) where he said "And look here we
10 have the obvious proposition that we are dealing with
11 a situation where we are concerned with an overcharge on
12 these claimants and yet what we are talking about here
13 is some sort of market-wide analysis and this mismatch
14 of how poor Professor Neven's approach is".

15 With respect, that is just misrepresenting what
16 actually the overcharge analysis involves. The
17 overcharge analysis itself is a market-wide analysis.
18 Just for your notes, that is in common bundle C2,
19 tab 25, page 2, paragraph 4 {C2/25/2} and that is in the
20 experts' methodology statement. So what you will have
21 is a market-wide overcharge analysis. It is not
22 therefore shocking that one looks at market-wide issues
23 to do with complements and mitigation in relation to
24 these matters so those sorts of points they are just
25 illustrative of argumentation being put forward as if it

1 is probative at this stage. It is not, it is wrong, it
2 is a matter for another day. Mr. Harvey with respect we
3 say is wrong, but, as I say, we will debate in due
4 course.

5 Now, as to the practicalities, we say there is no
6 problem here with practicality. There is no issue with
7 the disclosure approach. Professor Neven has said we
8 are not going for a full regression analysis.

9 Mr. Harvey says "Oh, well, one has to get into the
10 details of how matters are going to be dealt with and
11 how the claimants put forward their demands in relation
12 to particular claims for bodies and trailers and how
13 they decreased in the face of higher prices", that is
14 what he is saying at 6.12.

15 It is true that they go into this in more detail in
16 mitigation, but broadly speaking he is engaging or
17 seeking to engage in a very different and very extensive
18 analysis which we do not think is likely to be
19 productive in any way.

20 Now, if that is the way that Mr. Harvey wants to
21 proceed we are not seeking to stop him, but to suggest
22 that we cannot engage in an analysis which we say is
23 relevant that is properly pleaded and is based on the
24 expert testimony of Professor Neven because Mr. Harvey
25 wants to embark on some wider exercise would be

1 completely the wrong way round. It is a sort of
2 in terrorum situation: I hold a gun to my head in the
3 form of this enormous exercise I would want to do if you
4 are allowed to proceed with this and therefore you
5 should not be able to start. It is plainly the wrong
6 way round and should not be permitted.

7 Finally, in relation to issues to do with the
8 undertakings, you have my submissions on this. The
9 undertakings were given in circumstances where the
10 claimants did not have any good case that there was any
11 infringing behaviour in relation to the complements that
12 we are talking about. It would have to be a stand-alone
13 claim. It would have to be a very substantially
14 different claim from the one that they are proceeding on
15 the basis of. They decided not to pursue that. That
16 was eminently sensible. They thought there were
17 trade-offs at the time. That does not provide any basis
18 for foreclosing us from arguing these matters now.

19 If the Tribunal wants to permit the claimants to
20 revisit those undertakings, we say an application to
21 both lift the undertakings and seek any permission to
22 amend would have to be put forward by them and frankly
23 the material that they have offered so far does not even
24 offer a whiff of any basis for any broader claim in
25 these circumstances, but it is certainly no basis to

1 refuse the amendment in relation to an arguable case and
2 allow us to pursue the expert analysis with a limited
3 disclosure that we have sought in the Redfern schedules.

4 Unless I can assist you further.

5 THE PRESIDENT: Thank you very much. It is now coming up to
6 4.30, so we will consider this overnight.

7 As I understand it the remaining issues are the
8 mitigation amendment which involves some similar
9 argument to that which we have just heard, but at
10 a higher level of generality I expect. There is the tax
11 point which is about a question of whether DAF should be
12 permitted to call an expert regarding the Royal Mail tax
13 case and I do not see those present any timing problems.

14 If we have to go through all of the P04, P05
15 categories then I am a little concerned whether we will
16 get squeezed tomorrow. It may be that it would be
17 prudent to start at 10 o'clock, if my colleagues can do
18 that, but if you tell me that we need not be concerned
19 we can start at 10.30. I do not know, Mr. Lask, if you
20 have had any conversations with those instructing you
21 yet on the latest proposals for the P04, P05 or whether
22 that is something you are planning to do now.

23 MR LASK: I have not had any discussions since. My
24 understanding was that the intention was to consult with
25 the clients during the course of today and I have not

1 had any instructions off the back of those
2 consultations, so that is something I need to address
3 overnight.

4 THE PRESIDENT: Well, I think we will start at 10 o'clock
5 just to be safe.

6 I think that is the issues we are dealing with
7 tomorrow, as I understand it. Are there any others that
8 I have not mentioned?

9 MR BEARD: I will just check, but I do not believe so. That
10 is what I have on my list, so unless there are any --

11 MR LASK: Sir, there is the truck financing leasing query
12 that you raised at the outset which we need to come back
13 to you on. I do not imagine that is going to take very
14 long at all.

15 Then if the Tribunal were to grant permission on
16 complements we would have to have a discussion about
17 complements disclosure.

18 THE PRESIDENT: Yes. Has complements disclosure -- because
19 I had not fully picked that up. Is it addressed in your
20 skeletons, complements disclosure?

21 MR BEARD: We do not specifically deal with it because in
22 circumstances where we hadn't understood there were
23 substantive objections, but if Mr. Lask is going to
24 highlight overnight that he has particular concerns then
25 I would be most grateful if he could raise them this

1 evening so that I can take instructions in relation to
2 them.

3 MR LASK: Of course.

4 THE PRESIDENT: Mr. Lask, is it in your --

5 MR LASK: It is not in my skeleton. It is in the
6 complements Redfern schedules that were sent I think it
7 was on the 24th.

8 THE PRESIDENT: Yes.

9 MR LASK: So those schedules -- they set out our concerns
10 with the complements disclosure. Some of those concerns
11 are based on the objections to the amendment so those
12 would be superseded if you were to grant permission, but
13 some of the concerns are free-standing.

14 THE PRESIDENT: Can you just give me the reference to the --
15 we have had it up a little while ago.

16 MR LASK: Yes. Just bear with me.

17 (Pause).

18 The complements Redfern schedules are enclosed with
19 the BCLP letter of the 24th, which is at {D4/831}.

20 MR BEARD: And it is pages 3 and 14 are where the two tables
21 separately start.

22 Just for your reference, in our skeleton we dealt
23 briefly with complements disclosure at 76 and 77,
24 paragraphs 76 and 77, but you will see there that we
25 indicated that we had put forward materials and we

