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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

2 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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**Hearing (Expert Evidence and
Pleading Amendments) – Day 2**

Tuesday, 2nd March 2021

(10.00 am)

(Proceedings delayed)

(10.09 am)

Submissions by MR LASK

THE PRESIDENT: Good morning.

Mr Lask, I think at the end of yesterday you were just taking us to the disclosure that was being requested in relation to the complements issue.

MR LASK: Yes, sir. My proposal this morning was to come on to that if the decision of the Tribunal was to grant permission on complements. The comments we have are relatively brief but they are contingent on permission being granted.

THE PRESIDENT: Yes, well, we understand that if permission is not granted, the disclosure request does not arise, as we understand it. But I think we find it helpful to understand, as with the issue of the regression analysis and Professor Neven, that we decided yesterday to just understand what the disclosure implications are --

MR LASK: Yes.

THE PRESIDENT: -- if this matter is pursued, and if we give permission. So if you could just take us through that, as we had a brief look at it, and it did not seem to be a major issue of contention. It certainly does not

1 begin to compare with what was the PO7 category.

2 MR LASK: Yes, I think that is certainly fair, sir.

3 There are two schedules that I think Mr Beard gave
4 a reference to just at the end of the hearing. They are
5 in the D bundle. It may suffice for present purposes
6 just to go to one or the other.

7 THE PRESIDENT: Yes, I think I have the Royal Mail one.

8 MR LASK: Yes, which is at D4, tab 831, I think it begins on
9 page 3.

10 THE PRESIDENT: D4, is it?

11 MR LASK: It is file D4, tab 831, page 3. {D4/831/3}

12 THE PRESIDENT: Yes, there is a letter and then we have it
13 brought up. It is C3 and C4 are the two categories; is
14 that right?

15 MR LASK: For Royal Mail.

16 THE PRESIDENT: Yes.

17 MR LASK: There are two issues from our perspective. The
18 first concerns the C3 category, which requests details
19 of any trailer purchased by Royal Mail, and what they
20 seek is a (inaudible) the price and the type of the
21 trailer. The issue here in a nutshell is that we think
22 this data is likely to be very patchy indeed, and we do
23 have concerns as to the utility of any analysis that
24 relies on this data. There are some examples given in
25 the Royal Mail column, which is column 6, about why we

1 say the data is patchy.

2 If you look, for example, on page -- internal page
3 numbering 5, which I expect is Opus page 8 -- no,
4 that is correct, that is page 7, that is fine.

5 In the final column you will see it is explained
6 there that Royal Mail is missing data completely for the
7 years 1997 to 2002. So that is six of the 15 years for
8 which the data is requested.

9 THE PRESIDENT: Yes.

10 MR LASK: So that is the -- the main concern in relation to
11 this category. Similar issues arise on BT, namely that
12 there is missing data for the period 1998 to 2002, and
13 that for the period of 2002 to 2011, the potentially
14 relevant information has only been identified in
15 disaggregated form, which will need to be reviewed and
16 may well prove to be incomplete.

17 THE PRESIDENT: I mean, in a sense, that is, if I can put it
18 somewhat bluntly, not your problem. You can only
19 provide and disclose what you have, and you can make the
20 comment you think that will mean that the simulation
21 model is not going to be easily achieved or robust or
22 reliable, but that is a matter for -- if this is
23 a matter for Professor Neven to consider, and it may be,
24 if he does go ahead, it will be a matter on which you
25 can criticise it at trial and say, look, reliance cannot

1 be placed on this because there was no data for
2 a significant period.

3 But in terms of the actual disclosure obligation, as
4 I understand it, it is not suggested for the years for
5 which data is available, it is a problem providing it.
6 Is that right?

7 MR LASK: I accept that, sir, with one qualification, which
8 is that if permission were to be granted, we would not
9 want to be held to Mr Harvey having to conduct the same
10 analysis as Professor Neven. Mr Harvey has made clear
11 in his evidence that he does not consider a simulation
12 model to be appropriate. So, provided he had liberty to
13 conduct the analysis that he considers appropriate, then
14 I agree with that observation.

15 THE PRESIDENT: Yes, well, I mean he certainly is not
16 compelled to conduct any analysis which he thinks is
17 inappropriate.

18 MR LASK: Yes.

19 THE PRESIDENT: It may be, because clearly if
20 Professor Neven can put in expert evidence on this, it
21 seems to me -- and it must follow that so can
22 Mr Harvey -- then Mr Harvey's evidence may be purely
23 a critique of what Professor Neven has done rather than
24 doing his own independent analysis. That is a perfectly
25 permissible way for him to proceed.

1 MR LASK: Yes, although I should say, sir, that is not what
2 he would envisage doing. I mean, he would envisage
3 doing the analysis he could in the time available, and
4 with the information available, and he would be seeking
5 disclosure from DAF for that purpose.

6 THE PRESIDENT: Yes. You have not formulated that
7 disclosure request yet?

8 MR LASK: We have not. If necessary I can give the Tribunal
9 the headlines and we can propose a timetable for taking
10 that forward.

11 THE PRESIDENT: Yes. I mean, can you give us the headline,
12 just to get a feel of it?

13 MR LASK: Yes. So Mr Harvey would envisage undertaking
14 a form of regression analysis in relation to
15 complementary products. Essentially he would do the
16 best possible in the time available, which he thinks
17 would still be better than the s.

18 MR JUSTIC FANCOURT: Imulation model.

19 THE PRESIDENT: Yes.

20 MR LASK: Much has been made of the availabilty of cost
21 data. Mr Harvey does not consider the absence of
22 third-party cost data is a hard barrier to a regression
23 analysis. We know that DAF has costs data on the bodies
24 it supplied at least for the post-2007 period. So he
25 would be seeking data from DAF and, just in broad terms,

1 that would include the specification and the prices of
2 the bodies they sold or resold and the trailers that
3 they financed, the costs data pertaining to the bodies,
4 and price setting information in relation to the bodies.

5 There is, sir, an additional point, which is that it
6 may be that there is relevant data on bodies that is
7 tucked away in the disclosure already provided by DAF,
8 so we would be seeking an order that, when it provides
9 its additional disclosure, DAF also identify any
10 relevant information that is tucked away in the existing
11 disclosure.

12 Sir, I skipped over -- I do not know if you want me
13 to come back to the schedule but there was a second
14 issue on the disclosure being sought by DAF, which
15 arises on the -- what is called the C4 category in the
16 Royal Mail schedule. That is the category seeking
17 details of the key characteristics that the claimants
18 considered when purchasing.

19 THE PRESIDENT: Just a minute. Let us bring that up. That
20 is on page 6? {D4/831/6}

21 MR LASK: Page 6, yes.

22 Key characteristics considered when purchasing, the
23 number of third-party suppliers typically considered and
24 the average useful life of a trailer. The concern here
25 is around proportionality and part of the problem is

1 that because this request has only come in now, and was
2 not raised alongside the procurement and communications
3 disclosure that has already been given, the claimants
4 would now have to re-review some of the repositories and
5 documents reviewed previously.

6 To give you an example of that, sir, you will see in
7 this schedule, on pages 10 and 11 {D4/831/10}, there is
8 a description of the manual searches of documents
9 archived at the Postal Museum and the archive storage
10 facility in Winchester, and those repositories would
11 need to be re-searched, and I am told that is
12 challenging in the current environment with the various
13 restrictions in place. There we are. So there are
14 proportionality concerns.

15 Now, DAF's response to this is to suggest that one
16 way of dealing would be for us to give a pleaded
17 statement explaining the issues rather than giving
18 disclosure. We do not object to that or we would not
19 object to that in principle but it is unclear at this
20 stage without making further enquiries whether that way
21 forward would be more or less burdensome. It would
22 itself involve undertaking various searches, given the
23 level of detail requested in the period involved. So
24 what we would propose, if permission were granted, was
25 that we be given the option to elect either to provide

1 that statement or the disclosure.

2 THE PRESIDENT: Yes, because presumably there may be some
3 difficulties.

4 MR LASK: Yes.

5 THE PRESIDENT: As anyone who knows now what the position
6 was, because these issues may have changed --

7 MR LASK: Indeed.

8 THE PRESIDENT: -- significantly over the long period.

9 MR LASK: Yes.

10 MR HODGE MALEK QC: Mr Lask, I presume you could do
11 a combination of both, could you not, that certain areas
12 that you can give disclosure of documents and others you
13 may feel that it is easier and simpler to do it by way
14 of a statement?

15 MR LASK: I expect that is right. I will be corrected by
16 those instructing me if it is not. I expect in
17 principle a combination approach may be possible.

18 MR HODGE MALEK QC: Yes.

19 THE PRESIDENT: Yes.

20 MR LASK: But I am asked to emphasise -- I referred to the
21 disclosure that Mr Harvey will need to seek from DAF,
22 and I am asked to emphasise that that really underlines
23 the -- some of the practical implications of granting
24 permission on complements is that there is going to be
25 a significant further disclosure exercise and

1 significant further expert analysis.

2 THE PRESIDENT: Yes. I mean, was this the notion that

3 Mr Harvey would then wish to do a regression analysis?

4 That is not something I had picked up. That may be my

5 failing.

6 MR LASK: Well, he describes the issues he would want to

7 investigate, what he calls the minimum key points.

8 THE PRESIDENT: Yes.

9 MR LASK: At paragraphs 6.12 to 6.14 of Harvey 9, which is

10 {B3/17/21}. In fairness, he does not expressly describe

11 it as the regression analysis. But we have taken the

12 opportunity overnight to have a further discussion with

13 him, and that is what he would envisage doing.

14 THE PRESIDENT: Yes, he says it would require further -- he

15 says it would require further factual information and

16 disclosure from the claimants.

17 MR LASK: Yes, that is at 6.14.

18 THE PRESIDENT: Yes.

19 MR LASK: But what you see, sir, from 6.12, is that a key

20 part of his analysis would be seeking to establish

21 causation because that is the key omission from -- what

22 we say is the key omission from DAF's approach.

23 THE PRESIDENT: I understand that. I can understand --

24 I think one can understand the questions or issues that

25 he raises at 6.12(a), (b) and (c) and all the points, as

1 he puts it, and that it is necessary to consider that
2 and to consider whether they are external factors.
3 I just do not know at the moment, because it has not
4 been considered, whether in particular cost data
5 relating to bodies is an onerous and elaborate form of
6 data retrieval, given the long period we are talking
7 about.

8 MR LASK: Yes, well --

9 THE PRESIDENT: It is not something that has been raised
10 before.

11 MR LASK: It is a long period. We would say that without
12 that data, one simply cannot assess causation. So it is
13 essential to have properly conducted analysis.

14 THE PRESIDENT: I can see that without that you cannot do
15 regression analysis. If you have not got one of the
16 most fundamental factors that can cause an increase in
17 costs, you cannot do it. Professor Neven says he is
18 not -- I think everyone can recognise that a regression
19 analysis is more robust and revealing than this sort of
20 simulation model.

21 The question is whether it can feasibly be done.
22 Professor Neven I think recognises that but says,
23 because of the lack of cost data and the problems with
24 cost data, he is not going to try and do it. That was
25 his position. He was, therefore, in a sense, falling

1 back, if you like, on the simulation model.

2 Mr Harvey has a lot of criticisms of the simulation
3 model, as Mr Beard says, whether or not they are valid,
4 and that ultimately, it seems to us, for trial. But if,
5 then, one goes back to doing the regression model, and
6 if he wants a regression model then maybe
7 Professor Neven wants a regression model, and we start
8 getting that data, and where does it end?

9 MR BEARD: Sir, might I make a couple of brief remarks?

10 THE PRESIDENT: Yes. I was going to (inaudible) in
11 a moment, because I was just going to turn to you about
12 this. Do you understand my concern? It is one thing to
13 say that this simulation model is really not going to be
14 of any use, it is not -- there are too many assumptions,
15 there is too much missing, it does not tell you the key
16 questions, it begs all these other points that Mr Harvey
17 has flagged and so on. It is a different thing to say
18 that, well, if that is going to be done, we now want
19 a regression analysis for which we need all this data.

20 MR LASK: Sir, I do see that those are different things, and
21 my primary submission is that is a very good reason not
22 to be granting permission on complements, because of the
23 extra disclosure and work it is going to generate, but
24 I also say that if permission were to be granted it
25 would be quite unfair, particularly in circumstances

1 where DAF says the burden of proof is on us in relation
2 to bundle complements, for us to be held -- or for us to
3 be placed in a purely defensive role where all we can do
4 is present a critique of Professor Neven's analysis
5 without having the opportunity to do our own.

6 THE PRESIDENT: Yes.

7 Okay, Mr Beard, you wanted to --

8 MR BEARD: Yes, if I may. I think, sir, you have the points
9 about the objections to disclosure. I mean, they are
10 not actually objections to disclosure. We recognise
11 that if people do not have documents, they cannot be
12 disclosed. That is just the way of these things.

13 We have tried to be flexible in relation to
14 statements versus disclosure, if it would be
15 disproportionate, as we have indicated in the schedules.
16 So actually there is no objection on the basis of the
17 material we are putting forward as disclosure
18 categories, and I think that was the core of the
19 question that was initially being asked.

20 We are now being led down a different and somewhat
21 garden path-ish strand of submissions by Mr Lask,
22 because Mr Harvey's witness statement does not suggest
23 that he wanted to do a regression analysis and did not
24 suggest he wanted data from DAF in relation to it. You
25 picked up precisely the point in 6.14, which talks about

1 how there would have to be further factual information
2 and disclosure from the claimants in order for Mr Harvey
3 to put into place his analysis, which -- I have referred
4 to it as negotiations analysis. Mr Lask took me to task
5 for that and said that is not what we are doing, that is
6 really about mitigation. But it is much closer to that
7 sort of analysis than it is to any sort of regression
8 being set out.

9 So the position the Tribunal is now being put in is
10 we have a legitimate argument in relation to
11 complements, we have put forward expert evidence in
12 relation to these things. There is not a real objection
13 to our disclosure on it. Mr Lask is now saying, "Oh,
14 but in order to respond to that, we would want to go
15 beyond critiquing Mr Neven's analysis, we'd want to put
16 in our own."

17 Well, we are not going to try to stop him doing
18 that. The evidence before you is that they would do
19 that on the basis not of a regression but on the basis
20 of the arrangements set out in Mr Harvey's statement,
21 and yet today it is said, "Oh, no, there will be a vast
22 degree of disclosure that will be required. I can on
23 the hoof set out what these disclosure categories would
24 be, they are terribly onerous and it will mean there is
25 an enormous exercise."

1 This is precisely what I referred to yesterday as
2 a sort of in terrorem submission. It is no proper
3 objection. Indeed, it is a remarkable submission to be
4 making today in circumstances where in fact disclosure
5 was provided to Royal Mail and BT of the materials
6 relating to bodies last week. So the disclosure process
7 that is rolling on in the background was actually
8 provided last week. So if there was --

9 THE PRESIDENT: Sorry to interrupt you, what was disclosed
10 re bodies?

11 MR BEARD: I do not have a full schedule in front of me, but
12 I understand it was details of the bodies that were sold
13 by DAF to Royal Mail, and it was also material in
14 relation to the costs of the bodies manufactured.

15 Mr Lask says, "Well, we would want lots and lots of
16 costs data". It is worth reminding The Tribunal that
17 DAF has only been making bodies since 2007, and it has
18 provided material in relation to that. It is not tucked
19 away, as Mr Lask says. We have been entirely clear
20 about what we have been providing in relation to these
21 matters. If Mr Harvey wants to come back and say,
22 "Well, actually, there is some further material I would
23 like in relation to that material", of course he is open
24 to do so. We cannot possibly prevent him from asking
25 those sorts of questions. But we have actually been

1 providing this material and what is being done today is
2 throwing up ad hoc attempts at obstacles to what is
3 otherwise a perfectly legitimate request to amend,
4 provide expert evidence, and seek what is entirely
5 legitimate and measured disclosure in relation to these
6 issues.

7 MR HODGE MALEK QC: Mr Beard, if the other side seek
8 permission for their expert to carry out a regression
9 exercise, do you envisage you would be opposing that?

10 MR BEARD: I think I would have to take instructions
11 depending what was actually proposed. All I have to go
12 on at the moment is the evidence of Professor Neven, who
13 has clearly looked at these issues, and obviously he is
14 also the expert that is dealing with overcharge and
15 therefore does have quite a wide view of what is going
16 on in terms of data availability in this case.

17 Of course, as we saw in relation to his statement
18 I think it is at paragraph 31, if I remember correctly,
19 of his second statement -- of his first statement, I do
20 apologise. So yes, it is paragraph 31 of his first
21 statement, so it is tab 11 in bundle B3 {B3/11/7}. He
22 says, "Well, I do not think you are going to have enough
23 evidence to carry out a robust regression", and of
24 course in order to do a robust regression you need
25 sufficient data.

1 So one would need to see what Mr Harvey's proposing.
2 But if what he is proposing is something that frankly
3 our experts say, "No, you are not going to get a robust
4 answer out of it because you do not have sufficient data
5 in order to do it", then we may well oppose it. But
6 that is all I have got to go on, Mr Malek. I do not
7 have more at the moment. Part of the reason I could not
8 possibly give you an answer is because we do not have
9 a proposal before us. We have several witness
10 statements from Mr Harvey. He sets out what he says he
11 would do absent -- if the complements analysis is to
12 be -- amendment is to go ahead, and it is conspicuous
13 that he does not suggest any regression analysis there.

14 MR HODGE MALEK QC: I understand that. But if there is
15 going to be a regression analysis, in the absence of
16 non-party disclosure from the actual manufacturers of
17 the bodies and the traders, it is going to be rather
18 incomplete, is it not?

19 MR BEARD: I think that is the basis on which
20 Professor Neven is saying that you will have incomplete
21 data, because he says precisely that there.
22 Unfortunately I cannot advance the matter further than
23 that, but I think, sir, that is precisely what he is
24 averting to, that you will have a big hole unless there
25 was to be a third-party disclosure exercise.

1 MR HODGE MALEK QC: Well, that would be very difficult,
2 because they have got nothing to do with the
3 proceedings, a lot of them are outside the jurisdiction,
4 you can only go back so many years, and it is unlikely
5 to be proportionate to expect a non-party to go and do
6 the same sort of exercises that the parties have been
7 doing in their own interest.

8 MR BEARD: I must -- obviously I have to accept that,
9 because that is the evidence of my own expert,
10 impliedly. It is precisely for that reason we are
11 looking at the simulation model.

12 Now, as the president rightly said, the other side
13 can come along and criticise that and say, "Well, that
14 may be all you can do but it is not good enough", that
15 is the matter for trial. But we do not --

16 MR HODGE MALEK QC: Either you have got an argument that has
17 a real prospect of success on complements, or not. If
18 you do have an argument that has got a reasonable
19 prospect of success, it would be a big thing to say, as
20 a matter of our discretion, we exclude that, because --
21 on the basis that the other side may want to do an
22 alternative analysis to your simulation analysis, which
23 would be quite burdensome and probably incomplete.

24 MR BEARD: Well, I can but concur entirely with that, and we
25 say it is more than reasonably arguable. We spelled out

1 why it is that you would ordinarily, with these sort of
2 complements, expect that sort of waterbed effect, which
3 is precisely what we would then be testing for.

4 MR HODGE MALEK QC: Okay, thank you.

5 MR LASK: Sir, may I come back on two very, very brief
6 points? The first is that we do not accept that any
7 criticism can fairly be levelled at Mr Harvey's witness
8 evidence. One sees in 6.12 the factors he says he is
9 looking at are concerned with the claimants' demand for
10 trucks and for bodies, and whether that fell, and you
11 will recall that one of the other points he raised, in
12 his ninth statement, was that it was completely unclear
13 whether what DAF were proposing to do was analyse
14 a claimant-specific fall in demand or a market-wide fall
15 in demand, and it was only yesterday that was clarified,
16 and it was in the light of that that Mr Harvey has been
17 asked to consider exactly what sort of analysis he would
18 envisage carrying out.

19 So we do not think he can be fairly criticised.

20 The second point is a wider point, which is that the
21 reason that Professor Neven is falling back on
22 a simulation model, or at least one of the reasons, is
23 because there is not time, or he does not consider there
24 to be time to do a proper regression analysis. That is
25 because this has been raised so late.

1 So, again, we do not think that should be held
2 against the claimants and certainly should not be used
3 as a reason for preventing the claimants from doing the
4 analysis they think is appropriate.

5 THE PRESIDENT: Yes.

6 Mr Beard, is there anything else you want to say?
7 I think you have replied on this whole point and I think
8 we will take just a few moments, then, to see where we
9 go, and whether we can resolve that straight away. So
10 we will rise for ten minutes.

11 MR BEARD: Yes, I do not think Professor Neven refers to
12 time, but that is another issue.

13 (10.37 am)

14 (A short break)

15 (10.51 am)^^

16 (Ruling was given)

17 Discussion re Ruling

18 MR BEARD: I am grateful to the Tribunal. Might I just
19 clarify one matter, sir?

20 THE PRESIDENT: Yes.

21 MR BEARD: You quite properly referred to categories C3 and
22 C4, which were from one of the two disclosure schedules
23 which Mr Lask took you to. I think, to be fair to
24 Mr Lask, he was making submissions in relation to both
25 C3 and C4 but also the equivalent categories in relation

1 to BT in C1 and C2. I do not think he was trying to
2 only focus on C3 and C4, but I take it that the
3 observations made by the Tribunal in relation to C3 and
4 C4 equally apply in relation to C1 and C2, just so that
5 we are absolutely clear before we move on.

6 THE PRESIDENT: Yes, Mr Beard, you are quite right. We
7 looked at the Royal Mail Redfern Schedule for
8 convenience but I think everything relates to the
9 equivalent provision of the other schedule, and when
10 I say C3 and C4, you can interpolate C3 and C4 of the
11 Royal Mail schedule and the equivalent, whatever it is,
12 C1 and C2, of the BT schedule.

13 MR BEARD: I am most grateful. Thank you very much.

14 MR LASK: Sir, may I raise two brief practical points
15 arising from the ruling?

16 THE PRESIDENT: Yes.

17 MR LASK: The first is the issue of the claimants'
18 undertakings given in 2019 that we discussed yesterday,
19 and I made the submission yesterday that if you did
20 grant permission to make the amendment, the fair and
21 appropriate course would be to lift those undertakings,
22 and then it would be for the claimants to decide whether
23 they wanted to make an application to amend the
24 particulars, so we do ask for an order lifting those
25 undertakings.

1 Then the second issue relates to the date for the
2 disclosure in C1 to C4 categories, and we would ask that
3 the disclosure be at the same time -- well, we are going
4 to come on, I suppose, later, to deal with the supply
5 pass on disclosure, but the current deadline in the
6 order that the Tribunal has made is 29 April for --
7 (overspeaking) -- to be completed, and we would ask for
8 that date to apply to this complements disclosure as
9 well, please.

10 THE PRESIDENT: Just on the date, Mr Beard, are you going to
11 push back from 29 April?

12 MR BEARD: Yes, we are, because this is material that -- the
13 29 April date was a long-stop date in relation to
14 disclosure. There are a number of categories of
15 disclosure that we would expect to be provided at least
16 in tranches before then. We do not want to have to wait
17 until 29 April. We are happy to discuss with Mr Lask if
18 there are subcategories within the four, C1 to C4, that
19 would be particularly problematic and therefore would be
20 dealt with later, and therefore April 29 might be
21 appropriate.

22 But the idea that it should all be left over to
23 April 29 we do object to. We do not think that is
24 necessary. You did not invite submissions on the
25 undertakings. Do you want any remarks on that?

1 THE PRESIDENT: No, but I will want to hear from Mr Lask on
2 dates because we are dealing with a long period. You
3 have already had the comments that it seems to be
4 unavailable, for some years, but they will no doubt have
5 to search further. They have also made the point that
6 some are in paper repositories and, even if it be dealt
7 with by a statement, anyone making the statement has to
8 satisfy themselves that the statement is accurate, so
9 they may need to look at what is there.

10 We are now on 2nd March. The end of this month is
11 Easter. So Mr Beard, I think, realistically, this trial
12 is in some -- what is it, April 2022 or something?

13 MR BEARD: It is, yes.

14 THE PRESIDENT: Yes. I see. But we have heard what you
15 have to say.

16 As regards the undertaking, Mr Lask, we are not
17 going to lift the undertaking now. We think -- we can
18 understand your position for the claimants but we do not
19 see any reason to separate lifting the undertaking from
20 granting you permission to make the amendment. If you
21 wish to apply to make an amendment to allege the price
22 increase in either form of these two complements, you
23 can apply to lift the undertaking at the same time. We
24 do not see any particular reason to deal with them
25 separately. You are certainly not precluded, as we

1 understand the undertaking, and you can take this as
2 a clear indication from the Tribunal, from applying to
3 make an amendment at the same time as you apply to lift
4 the undertaking.

5 MR LASK: I am grateful, sir.

6 THE PRESIDENT: So I do not think -- as obviously we cannot
7 deal with an amendment today, we do not have one -- that
8 your clients are in any way handicapped by the fact that
9 we are not going to lift the undertaking now.

10 As regards date for disclosure, I think what
11 Mr Beard is looking for, realistically, is for tranches,
12 and for something to come earlier. I think he
13 recognises that it would not be right to say everything
14 has got to come in three weeks or whatever. I do not
15 know if you want to take instructions, if there is
16 anything you think can reasonably be provided by the end
17 of this month for perhaps the later years.

18 MR LASK: I will take instructions on that, if I may, sir.

19 Do you want me to do that now, or shall we do it over
20 the next break?

21 THE PRESIDENT: Why do you not do it over the next break, as
22 long as we do not forget as that has to be dealt with.

23 Right. Where do we go next? Is it -- probably
24 mitigation, is it not?

25 MR BEARD: I think it is probably the logical next topic.

1 On our list we have got mitigation, tax, and then
2 disclosure, although, without getting into the how, whys
3 and wherefores, we have had some -- never mind the tone
4 but look at the content -- some progress overnight in
5 relation to some of the disclosure categories.

6 THE PRESIDENT: Right, let us turn to mitigation.

7 Submissions re Mitigation

8 MR BEARD: I am grateful.

9 If I may, with mitigation, I know the Tribunal will
10 be familiar with it, but I think it is sensible to start
11 with the Supreme Court judgment, if I may, which is in
12 {E/1}.

13 THE PRESIDENT: Yes. We have read the relevant passages in
14 preparation for this hearing, so you can draw attention
15 to anything you wish to highlight. I suspect it will
16 not come as a surprise to us.

17 MR BEARD: No, I do not anticipate I am going to say
18 anything surprising.

19 In some ways I hope I am not saying anything
20 particularly interesting, in the sense that our central
21 proposition is that the Supreme Court made it clear,
22 when it was analysing the whole nature of mitigation,
23 which it drew as a term fairly broadly covering matters,
24 including what we have been referring to as pass-on,
25 that mitigation including the impact of a putative

1 overcharge on the way in which other supplies provided
2 to a party that is claiming an overcharge were affected
3 has been recognised as a head of mitigation.

4 Allied to that, of course, is the position that in
5 considering all of these matters, there is a significant
6 asymmetry of evidence in relation to these issues. So
7 we say the plea is good in law, and, really, the
8 challenge comes in relation to factual matters, which we
9 cannot plead further to at the moment. We have set out
10 our position in relation to these issues and therefore
11 we say that plainly this is a case where an amendment
12 should be permitted.

13 The question really, then, is how does one go about
14 the proportionate disclosure exercise?

15 Obviously in relation to mitigation pertaining to
16 supplies, there are issues about the scope and extent of
17 potential relevant disclosure, but we have been
18 endeavouring to narrow that exercise and we will come on
19 to that separately. But what I want to focus on now is
20 just that basic proposition: Is it good in law? Should
21 the amendment be permitted? We say plainly the issue is
22 yes.

23 So if we could pick up the judgment of the Supreme
24 Court, it is exhibit {E/1/62}, I was going to pick it up
25 at, which is under issue (iv), the broad axe issue.

1 THE PRESIDENT: Bundle-page 62, judgment page 61?

2 MR BEARD: Yes, I am so sorry, you are quite right.

3 THE PRESIDENT: Yes, it is a mystery to me why judgments
4 that are paginated have to be repaginated for bundles,
5 but there we are.

6 MR BEARD: Perhaps another one for practice direction in due
7 course.

8 THE PRESIDENT: Yes. Issue (iv).

9 MR BEARD: I think actually the answer I may have is that
10 when you are preparing electronic bundles these
11 continuous paginations are actually useful for how they
12 are catalogued online.

13 THE PRESIDENT: Yes, I see.

14 MR BEARD: So, just picking it up at 175:
15 "The issue is concerned with the degree of precision
16 that is required in the quantification of mitigation of
17 loss where a defendant to a claim for damages arising
18 out of breach of competition law asserts that the
19 claimant has mitigated its loss through the passing on
20 of all or part of an overcharge to its customers."
21 You will recall that what was being argued about
22 here was the approach that had been adopted in the
23 tribunal and, slightly differently, in the Court of
24 Appeal about the level of precision of the passing on of
25 any loss or the quantification of any mitigation in the

1 process.

2 So the broad axe principle has been argued about.
3 Was it sufficient to operate a broad axe in relation to
4 mitigation issues, just as it was in relation to
5 overcharge issues?

6 Of course, that phraseology has been referred to in
7 a number of circumstances, but just picking up at 176
8 you see the quote from the Court of Appeal where it
9 articulates the submission that was made, and then talks
10 about:

11 "The broad axe principle is applicable where the
12 claimant has suffered loss as a result of the
13 defendant's culpable conduct but there is a lack of
14 evidence as to the amount of such loss. There is no
15 scope for the application of any such principle where
16 the burden lies on the defendant to establish a pass-on
17 of the unlawful overcharge in order to reduce the amount
18 recoverable by the claimant."

19 THE PRESIDENT: Yes, that was the only issue, really.

20 MR BEARD: Yes, it was.

21 THE PRESIDENT: On the appeal.

22 MR BEARD: Yes, it was. But of course in the Supreme Court
23 things widen out and actually the Supreme Court invited
24 further submissions in relation to issues pertaining to
25 burden of proof and these pass-on issues.

1 So in fact the Supreme Court judgment plainly goes
2 further than the Court of Appeal in terms of
3 articulating how this area of law should operate.

4 I will just skip on to 180 {E/1/63} which actually
5 makes that good:

6 "The scope of the issue expanded as a result of
7 exchanges with the bench ... On the invitation of the
8 court, [the parties] made further written submissions on
9 burden of proof."

10 THE PRESIDENT: Yes.

11 MR BEARD: (inaudible) the defendants and so on.

12 There were, therefore, further exchanges in relation
13 to these issues.

14 This is why we end up, if you see at 181 {E/1/64}:

15 "In addressing the issue in these submissions, we
16 examine, first, the requirements of EU law in relation
17 to the claims for damages which the merchants
18 advance ..."

19 So that is Sainsbury's et al.

20 "... secondly, (in order to determine whether there
21 is a question of mitigation of loss) whether the
22 merchants are entitled in law to use the overcharge
23 which is included in the MSC as the prima facie measure
24 of their losses ..."

25 Of course the Supreme Court says they do. Then:

1 "... thirdly, the burden of proof ... and, fourthly,
2 the question of the degree of precision required in
3 establishing the likely extent of any pass-on."

4 Those are the issues they ended up grappling with,
5 which were more extensive, sir, as you say, than were
6 dealt with by the Court of Appeal.

7 If we then move on to 189 {E/1/66}, what is
8 emphasised at 189, after having considered the European
9 law issues, is:

10 "... a question of fact in each case, which the
11 national court must resolve on the evidence adduced
12 before it, whether an overcharge resulting from a breach
13 of competition law has caused the claimant to suffer
14 loss or whether all or part of the overcharge has been
15 passed on by the claimant to its customers or otherwise
16 mitigated."

17 Then there is a reference to the operation, the
18 principle of effectiveness in European law.

19 Then some discussion of the damages directive.

20 Then, at 192 {E/1/67}, under the heading "The nature
21 of the claims", there is then the consideration of what
22 these claims amount to:

23 "The merchants' claims are for the added costs which
24 they have incurred as a result of the MSC, which the
25 acquiring banks have charged them, being larger than it

1 would have been if there had been no breach of
2 competition law."

3 So a counterfactual claim being made there.

4 Then at 194:

5 "It is trite law that, as a general principle, the
6 damages to be awarded for loss caused by tort are
7 compensatory. The claimant is entitled to be placed in
8 the position it would have been if the tort had not been
9 committed."

10 Then you have got Lord Blackburn from
11 Livingstone v Rawyards Coal.

12 THE PRESIDENT: Yes.

13 MR BEARD: If we go to 196, the bottom of 196 {E/1/68}, the
14 last four lines:

15 "In the legal systems of the United Kingdom pass-on
16 is an element in the quantification of damages rather
17 than a defence in a strict sense. But so long as the
18 UK's competition rules remain aligned to those of the
19 EU, the pass-on of an overcharge remains a relevant
20 factor in the assessment of damages."

21 Then 197:

22 "There are sound reasons for taking account of
23 pass-on in the calculation of damages for breach of
24 competition law. Not only is it required by the
25 compensatory principle but also there are cases where

1 there is a need to avoid double recovery through claims
2 in respect of the same overcharge by a direct purchaser
3 and by consequent purchasers in a chain, to whom an
4 overcharge has been passed on in whole or in part."

5 THE PRESIDENT: That is strict pass-on, is it not?

6 MR BEARD: That latter part is strict pass-on but I do
7 emphasise the compensatory principle references that are
8 being made here, because they obviously apply in
9 relation to issues of mitigation more generally --

10 THE PRESIDENT: Yes. Oh, yes.

11 MR BEARD: -- rather than strict pass-on. I am not
12 suggesting that these points are controversial
13 necessarily, but they are important in the sense that
14 they are making good the point that fundamentally we
15 have a good argument of law here.

16 203 {E/1/69}, just picking up:

17 "The effect of the breach on the overall
18 profitability of the claimant in each case was not the
19 relevant measure of damages."

20 So I am just picking up the interim conclusion the
21 Supreme Court was reaching, that when you assess
22 damages, you do not just look at the overall
23 profitability of a company and say, was it net improved
24 or reduced by the effect of the infringement; you look
25 more specifically at the impact alleged in relation to

1 the infringement in question.

2 THE PRESIDENT: The effect on overall profitability is not
3 relevant.

4 MR BEARD: Exactly. That is not the test to be applied.
5 One needs to look more forensically closely at the
6 arrangements involved in the alleged infringement or
7 found infringement, how they impact on the extent to
8 which specific losses were found in relation to that,
9 for instance, in the cartel overcharge, but also how
10 those particular alleged losses were mitigated.

11 Then at 204 {E/1/70}, there is a reference to
12 a comparison with, the position in the Thai Airways
13 case:

14 "... if a claimant incurs expenditure in replacing
15 items which a supplier had failed to deliver, it is
16 entitled to damages without having to show that the
17 breach of contract adversely affected its overall
18 profitability."

19 So they are illustrating the point there.

20 The key paragraph that I want to emphasise -- I will
21 go on to a couple of others but the key paragraph I need
22 to emphasise is obviously 205.

23 "In the present appeals, the merchants by paying the
24 overcharge in the MSC to the acquirers have lost funds
25 which they could have used for several purposes. As

1 sophisticated retailers, which obtain their supplies
2 from many suppliers and sell a wide range of goods to
3 many customers, they can respond to the imposition of
4 a cost in a number of ways, as the CAT pointed out in
5 [paragraphs] 434 and 455 of its judgment. There are
6 four principal options: [first of all] a merchant can do
7 nothing in response to the increased cost and thereby
8 suffer a corresponding reduction of profits or an
9 enhanced loss; or (ii)" --

10 THE PRESIDENT: Mr Beard, we have read it.

11 MR BEARD: Yes.

12 THE PRESIDENT: So you do not need to read it out line by
13 line.

14 MR BEARD: No.

15 THE PRESIDENT: Draw attention to 205 and the four options
16 that the Supreme Court mentioned.

17 MR BEARD: Of course. The reason I read 205 through is
18 simply because the first point is we are dealing with
19 "sophisticated retailers" in this case.

20 THE PRESIDENT: Yes.

21 MR BEARD: And as we will come on to make good, obviously we
22 are dealing here with sophisticated companies who are
23 claimants.

24 THE PRESIDENT: Yes.

25 MR BEARD: So the same sorts of considerations arise in

1 relation to both.

2 THE PRESIDENT: Yes.

3 MR BEARD: The four considerations that -- the four options
4 that are set out, the do nothing, the discretionary
5 spending, and (iii) -- (iii) is critical:

6 "... the merchant can seek to reduce its costs by
7 negotiation with its many suppliers ..."

8 THE PRESIDENT: Yes.

9 MR BEARD: That is really what we are dealing with here.

10 Essentially, the amendments being put forward
11 essentially to say these are sophisticated companies,
12 Royal Mail and BT, and one of the ways they can respond
13 to a putative increase in their costs in relation to
14 trucks is to reduce their costs in negotiation with
15 their many suppliers.

16 Really, to suggest that that proposition is not
17 arguable is something that is simply not understood on
18 the part of DAF, because it is plainly arguable that in
19 these circumstances, that is one of the reactions that
20 was open to sophisticated claimants such as these, and
21 in those circumstances, a plea of mitigation is
22 legitimate.

23 Obviously the fourth --

24 THE PRESIDENT: What is being said is that you see an

25 increase in the cost of the truck price and therefore

1 that prompts you to go to some or several of the people
2 from whom you are buying things, and say, "We are
3 seeking for the same goods that we are buying, a lower
4 price."

5 MR BEARD: Yes.

6 THE PRESIDENT: It is not simply you are trying to reduce
7 your costs in all your purchasing; it is actually to try
8 to go -- which you can do by switching sources and so
9 on, but you are actually then seeking to negotiate
10 a lower price on an input prompted by the increase in
11 the price of, in this case, the truck.

12 MR BEARD: Yes.

13 THE PRESIDENT: Otherwise it is looking at profitability.

14 MR BEARD: Yes, that is all absolutely correct. We have no
15 issue with that. That must be right because we are
16 dealing with that position, and indeed, your Lordship
17 then has the core point in relation to this. But before
18 I come back to the particular objections, I just
19 obviously confirm 206 {E/1/71}, where the Supreme Court
20 highlights that options (iii) and (iv) are legitimate,
21 and then we get into issues --

22 THE PRESIDENT: Rather oddly, to comment, they do not
23 actually -- they quote the CAT where the four options
24 were set out, it is taken from the CAT judgment, and the
25 CAT actually said that it is only option (iv) -- they do

1 not --

2 MR BEARD: That is why it is significant.

3 THE PRESIDENT: But they do not actually discuss that point.

4 MR BEARD: They do not discuss --

5 THE PRESIDENT: They seem to treat it as obvious.

6 MR BEARD: Yes, that is absolutely right, but it is the
7 salient difference between the CAT and the Supreme Court
8 that we place so much reliance on. If we had been
9 relying on CAT obviously we would not be in this
10 position, because the law as it stood at that time was
11 very different. We say we think the Supreme Court was
12 right; and, frankly, it does not matter whether we think
13 it is right or not, it is the Supreme Court.

14 In those circumstances it is plain that head 3 is
15 available.

16 Just to complete the points in relation to this,
17 obviously the Supreme Court then goes on to talk about
18 mitigation and burden of proof, since that was one of
19 the key issues that it was focused on to begin with in
20 the appeal, as we have already seen, and it picks up
21 these issues about who holds the legal burden and who
22 holds the evidential burden, and it concludes that the
23 legal burden lies on defendants who had raised these
24 issues, but if we could just skip through to 215
25 {E/1/73}:

1 "We are not concerned in these appeals with
2 additional benefits ... The issue of mitigation which
3 arises is whether in fact the merchants have avoided all
4 or part of their costs."

5 Then it is cited British Westinghouse. We do
6 emphasise this "in fact", because as we will come on to
7 illustrate in a moment, sire, you were quite right to
8 say what we are looking at is whether there is
9 a reaction to hypothetical heightened prices in relation
10 to trucks, but that does not mean that the process of
11 negotiation has to specifically advert to those prices
12 of trucks, nor that the supplier has to accede to
13 a request for lower prices on the basis that the request
14 has been made by reference to those higher prices of
15 trucks.

16 I will come on to deal with that in a moment. The
17 question is, in fact, as a matter of fact, have the
18 prices of supplies been reduced because of the alleged
19 higher prices of certain inputs?

20 MR JUSTICE FANCOURT: You used previously, in the
21 formulation you used with the president, the words
22 "prompted by" rather than "because of" that you have
23 just used. It is that that is the difficult area, is it
24 not? Whether there has to be a conscious adverting to,
25 and adjustment for, the increase in the trucks prices

1 or, at the opposite extreme, whether it is sufficient
2 that that simply feeds into a costs analysis which then
3 feeds into a budgeting exercise, which feeds into
4 a general business planning, and attempt to sustain
5 profits. The difficulty is, is that sufficient within
6 the formulation of the Supreme Court or does there have
7 to be something more specific addressing the increased
8 costs of the trucks in particular?

9 MR BEARD: Well, I, for my part, prompted by and because of,
10 in these circumstances, do not refer to something
11 different because it is because of the increase in price
12 that we are talking about. What you do not need to have
13 is anything explicit in that regard. It is for that
14 reason that one focuses on is how the costs and the
15 elevation of costs is fed through into the way in which
16 supplies are then priced to the putative claimant. So
17 I do not, for these purposes, think there is anything
18 different between the two. I will come on to deal with
19 the counter case that is put against us, which takes
20 "prompted by" or "because of" formulation that I have
21 been using and instead says that one needs some sort of
22 direct hypothecation and reference to these ideas,
23 because we say that is plainly wrong, it could not be --

24 THE PRESIDENT: I do not think it is said that there has to
25 be a reference in the sense that you go to your supplier

1 and say, "Well, we are now having to pay more for
2 a truck, so we would like to reduce the price of
3 switch gear", if you are BT, that you actually have to
4 refer to the truck effect --

5 MR BEARD: -- (overspeaking) --

6 THE PRESIDENT: No, I say I do not think it is suggested
7 that you do, and the Supreme Court clearly has not said,
8 and I do not think that is what Mr Justice Fancourt was
9 indicating.

10 MR BEARD: No, no, absolutely.

11 THE PRESIDENT: But it is a question of whether, in the way
12 in which you then seek to negotiate a reduced price with
13 your supplier, the direct motivation for that
14 negotiation is the fact -- the increase in the price of
15 the truck, not simply that all your costs of all your
16 inputs in the business are fed into business planning.
17 Somebody at a higher level looks at the business plan,
18 says, "Well, our total costs seem to be going up by X%
19 of -- derived from all sorts of things [of which the
20 truck might be one bit], so let us see where, with which
21 of our umpteen suppliers, we can get some reductions."
22 That is a very different thing.

23 MR BEARD: It depends on exactly what is done as a matter of
24 fact, I agree. It is certainly no part of our case to
25 say, well, the fact that businesses recover their costs

1 is sufficient to show that there is mitigation. That is
2 not the position that we are adopting and it is not the
3 position that Mr Bezant adopts. Mr Bezant has given
4 evidence very clearly. He sets out in his first
5 witness statement very clearly at {B3/10/3},
6 paragraph 13, that he is taking it as read that any
7 business that we are talking about here operated as
8 a rational business will want to recover its costs, and
9 that is the basis on which it operates.

10 The word he uses is "triggered": Are the changes in
11 supply prices triggered by the changes that are being
12 putatively seen in the costs of trucks?

13 Now, that is not "prompted to", that is not
14 "because of", and I am cautious to get into precise
15 discussions of whether or not there are differences in
16 the causation formulation here. Because, of course,
17 that may be said to be one of the legal issues that will
18 be raised against us in relation to these issues. Of
19 course, the fact --

20 THE PRESIDENT: Well, of course, that is the critical
21 question, isn't it? It is not -- one can play around
22 with different forms of words and the nuances and
23 different meanings between "triggered" or "prompted",
24 but it is actually what in fact, given the way all the
25 sophisticated businesses operate, is the requisite

1 causal connection. That, of course, feeds into, then,
2 what is the nature of the disclosure that you are
3 entitled to get.

4 MR BEARD: Yes, I think.

5 THE PRESIDENT: Because if it is simply there is an indirect
6 causal connection, as everyone recognises, every
7 business faced with an increase in the price of some of
8 its inputs will, as a result, try to reduce the costs
9 where it can of other inputs.

10 If that is mitigation that has to be taken into
11 account, every single commercial damages claim will
12 involve massive disclosure of how each claimant recovers
13 its costs across its entire activities. We do not think
14 that is what the Supreme Court was intending to open up.

15 MR BEARD: It may not have been intending to open that up.
16 One can see that there is an interpretation of the
17 Supreme Court's decision that in fact does open that up,
18 but I think it might give the Tribunal some comfort that
19 that is not the basis on which we are approaching these
20 issues. Indeed, the basis on which we are approaching
21 these issues is to say that one does need to have
22 factual evidence that it was the putative rise in prices
23 of the product that is said to be affected, the trucks,
24 that feed into and are causative of, materially
25 causative of, the rise in the -- the fall in prices

1 that is -- that are entered into with other suppliers.

2 We recognise that.

3 Now, precisely what potency of causation one needs
4 to identify as part of the legal issue in relation to
5 this, but that is why our expert is using language of
6 "triggered", and I think the important thing is that
7 this goes beyond a simple hypothecation. Sir, although
8 you say in relation to this that the position being
9 adopted by the claimants is that it is not necessarily
10 specifically to be referring to these matters, or you do
11 not need direct hypothecation between the identification
12 of a specific cost and the engagement with the supplier,
13 when we look at Mr Harvey's evidence in particular, his
14 third statement at paragraphs 5.7 to 5.15, in fact
15 that is broadly what is being put forward, and it is
16 replicated in the skeleton argument, at paragraphs 16
17 and 17, by the claimants.

18 I do not know if it is useful to go to Mr Harvey's
19 statement. It is {B3/17}.

20 THE PRESIDENT: Yes, I am looking at the skeleton now.

21 MR BEARD: Yes, the skeleton is easy.

22 THE PRESIDENT: You say paragraphs 16 and 17 of Mr Lask and
23 Ms Blackwood's skeleton?

24 MR BEARD: Yes. If we focus particularly on 17, the
25 criticism being levelled here is that the disclosure

1 being sought is essentially not broad enough, because
2 what is being said is: you, defendants, if you are going
3 to run this argument, actually need to seek disclosure
4 of all the negotiations material between Royal Mail or
5 BT, and their suppliers, if you are going to place
6 emphasis on this sense of mitigation.

7 Now, the reason they say that is embedded in the
8 material provided by Mr Harvey, who essentially says
9 that the only way one should identify price falls in
10 suppliers as being relevantly triggered by putative
11 price rises in relation, here, to trucks, is set out in
12 5.15 of his statement, to which reference is made in
13 this section of the skeleton argument.

14 I think we should perhaps go to that. So they are
15 saying you need much more disclosure in order to put
16 forward your case because you actually have to carry out
17 a granular assessment of particular negotiations.

18 THE PRESIDENT: Yes, if we look at 5.15, which is page 13
19 {B3/17/13} in the tab:

20 "... it would be necessary for the analysis to
21 identify:

22 "(a) whether truck price increases 'triggered'
23 greater scrutiny of costs ..."

24 You would accept that, as I understand it?

25 MR BEARD: Well, whether it is greater scrutiny of costs is

1 not actually the key question. It is whether the
2 putative price rise actually triggered the resulting
3 reduction in supplier costs. It does not have to be
4 greater scrutiny of costs.

5 THE PRESIDENT: The point he is making there is that if,
6 always, Royal Mail is looking to see where it can reduce
7 costs from its suppliers, and that is its standard
8 practice, year in year out, cartel or no cartel, then
9 that is not going to be sufficient. What he is saying
10 is whether the actual -- seeing that increase in truck
11 price led them to say, "Well, we have got to -- we are
12 facing this price increase, we have got to get costs
13 down from our suppliers to compensate it."

14 MR BEARD: Yes. If and insofar as that is what is being
15 talked about, there isn't a problem with the
16 proposition. But you asked me whether or not
17 proposition (a) is correct and --

18 THE PRESIDENT: Yes.

19 MR BEARD: The answer is no, because it is not actually
20 correct because it is not about greater scrutiny of
21 costs. Then (b):

22 "Whether the Claimants acted on those triggers ..."

23 So I do not think, with respect to Mr Harvey, he is
24 actually meaning the trigger of greater scrutiny of
25 costs, he is actually meaning the trigger of

1 scrutinising the increase in -- the putative increase in
2 costs, for example by attempting to renegotiate their
3 contracts with the suppliers.

4 Well, it does not have to be so bold as a full
5 renegotiation, it can just be part of a rolling process
6 with suppliers.

7 "... as a consequence of any increase in truck
8 prices ..."

9 That is the key issue {B3/17/14}.

10 "... (c) which suppliers the Claimants in fact
11 approached (if any) in order to request a reduction in
12 the costs of their supplies as a result of the increased
13 truck prices ..."

14 So the point we make is there may be a range of
15 reasons why you approach suppliers. You may be in
16 a rolling negotiation with suppliers about prices, and
17 there may be a range of reasons why you approach them
18 and seek to reduce the prices that suppliers put in
19 place.

20 So we are not saying that it has -- it cannot be the
21 case that it has to be the sole reason why you approach
22 the supplier in relation to those matters. It is not
23 clear what Mr Harvey is saying in relation to these
24 issues:

25 "(d) whether their suppliers acceded to any such

1 request for a price reduction and, if so, how and when
2 any such price reduction was implemented ..."

3 Now, (d) we do agree with. That is going to be
4 relevant in relation to these issues, because, as he
5 said, that is going to be needed to quantify the amount
6 of any mitigation.

7 What the suppliers reasons were for acceding to such
8 a request, for example were the suppliers --

9 THE PRESIDENT: Yes, I can see that.

10 MR BEARD: That cannot be right.

11 THE PRESIDENT: Yes.

12 MR BEARD: So, with respect, the problem is, and the reason
13 we see it in paragraph 17, we have effectively got
14 a proposal being put forward by the claimants that says:
15 You can only really run these mitigation arguments if
16 you have got a negotiation where you turn up and say,
17 "Look, I want my prices lower because I have got higher
18 truck prices."

19 And the supplier says: All right, well, in light of
20 the fact you have got higher truck prices, I see your
21 problem, I will reduce by prices by some margin, and
22 I will be doing it because of those truck prices."

23 Now, that just is not right. That particular aspect
24 of disclosure is not necessary for these purposes.
25 Because what we are interested in is whether or not the

1 change, the putative change in prices of trucks, impacts
2 the way in which other supplies are priced.

3 The reason why one looks at this through the lens of
4 carrying out a forensic analysis is because what one
5 does is looks at where the truck costs are taken on
6 board in the business, and then where those truck costs
7 are handed off to, effectively, to be recovered, and
8 whether, if there is an increase in those truck costs,
9 that has an impact on the way in which supplier pricing
10 is then dealt with.

11 To some extent, that will be indirect. It is not
12 simply a matter of looking at board papers on pricing.
13 Indeed, it is one of our criticisms of the disclosure
14 that has been offered, that it is at too high a level.
15 We do think it is important to be focusing on the
16 business units that actually do the truck purchasing,
17 what happens with the costs that they incur through that
18 truck purchasing, where truck prices rise -- not for
19 cartel reasons, just where truck prices rise -- one
20 looks at whether or not that impacts on other supplies
21 made.

22 Now we cannot simply say it is in relation to one
23 bit of business that that will be directly dealt with,
24 because these are complicated businesses who take in, as
25 we understand it, costs that they incur for instance in

1 relation to trucks. They incentivise people within that
2 business to try to recover those costs. They set
3 targets, they set forecasts. They then put pressure on
4 suppliers through the operation of those targets and
5 those strategies to reduce prices to them, so --

6 THE PRESIDENT: And they presumably do that all the time?

7 MR BEARD: They do do that all the time, but what we are
8 interested in identifying is how do they do that in
9 relation to rises in truck prices? That is what we are
10 concerned about here.

11 So yes, they do it all the time and, yes, they may
12 have broad policies in relation to it, but what we are
13 really interested in is: do they do that in relation to
14 truck prices? So that we can say: actually, it is the
15 rise in truck prices that has an impact on supplier
16 pricing. So it is not dealing with these things at
17 large; it is not looking just at whether or not they
18 recover their costs more generally. But equally, it is
19 not limited to some sort of direct interaction in
20 a face-to-face or email-to-email negotiation between the
21 business taking on board the costs and the supplier
22 supplying the services. That is not the right way of
23 looking at it.

24 It is for that reason that the criticism in the
25 skeleton at paragraph 17, that we should actually be

1 asking for lots more negotiations disclosure, is wrong,
2 because that is not the way that you would expect this
3 to work.

4 Those are not issues you would expect to be aired
5 between the negotiator on behalf of, say, Royal Mail,
6 with suppliers of other inputs that may be related to
7 transport matters or may in fact not be, because that is
8 actually what the Supreme Court is saying is the
9 relevant consideration to ensure that Royal Mail and BT,
10 if there is any overcharge, are not overcompensated in
11 relation to these matters.

12 MR HODGE MALEK QC: Mr Beard, where you have a business like
13 Royal Mail, where comparatively the costs of the trucks
14 is not a huge percentage, let us say they notice that
15 their costs are up 10% in one year.

16 MR BEARD: Yes.

17 MR HODGE MALEK QC: And 1% of that is in relation to trucks
18 and 9%, let us say, is staff costs, making it a very,
19 very simple example.

20 MR BEARD: Yes.

21 MR HODGE MALEK QC: And they decide, actually, we are going
22 to have to have some costs reductions here, and they
23 reduce their costs by 5% by reducing the costs of their
24 inputs just across the board. Now, how does that work?
25 Because that may be more realistic than simply saying:

1 well, we have a 1% increase in costs, well, any 1%
2 reduction in costs is attributable to that.

3 MR BEARD: Well, the question will be: how is it that those
4 matters are actually dealt with, and is there sufficient
5 evidence to show that in fact it was that 1% that was
6 critical to the process of changing the supplier costs?
7 So it will be a matter of fact that has to be considered
8 in relation to those issues. But I think --

9 MR HODGE MALEK QC: Why do you allocate that -- let us say
10 you have got the 5% reduction. Why do you allocate that
11 5% reduction to the increase in price in trucks when you
12 have got a global increase in 10%?

13 MR BEARD: Well, I am not -- we are not -- I am not assuming
14 that you do or do not allocate that. I would be looking
15 at what the evidence was of how that process was entered
16 into. But I think it is slightly dangerous to think of
17 this at too high a level because our whole point is,
18 what you that have are people in the business -- it does
19 not matter what the scale of the business is -- I mean,
20 there is actually a perversity about some of the points
21 that are being raised against us by the claimants, that
22 says: well, it is a very big business, this is a small
23 part of their overall revenue, and therefore one would
24 not assume that there is going to be any impact.

25 That is a very strange submission because it would

1 mean that someone like Google was effectively immune
2 from a mitigation argument in these circumstances,
3 because --

4 MR HODGE MALEK QC: That may explain why the mitigation
5 argument is quite difficult.

6 But what I am saying is, if you are running
7 a business and you have a -- you are facing a 10%
8 increase across the board, unless you have got documents
9 which say, ah, trucks have gone up 1%, "Because of that
10 increase, we are going to go to these other suppliers
11 and get them down", that is one possible scenario. But
12 another possible scenario is they look at it more
13 globally and say, "Actually, would an increase of 10%,
14 of which 9%, for example, is staff costs -- we are going
15 to have to see what cost cuttings we can make now in
16 order to balance the books and maintain profitability."

17 They start looking and seeing whether or not they
18 can shave stuff off, and let us say they shave off 5%,
19 I am just wondering how you deal with that situation --

20 THE PRESIDENT: I would have thought the scale of the
21 business is very relevant, Mr Beard, because each unit
22 will feed up its costs and profits to some central
23 management. They will review it overall. They may send
24 out directions to other parts of the business, having
25 looked at the totality, and say -- so that if it is BT,

1 where trucks -- I mean, Mr Malek has been quite generous
2 in saying it is as much as that, it might be a very
3 small percentage, and there are a whole lot of other
4 small percentages. They take a global view. They then
5 say, "You are buying very expensive switch gear to
6 maintain our overall profitability, which we see as
7 under -- being threatened by all these various matters,
8 of which trucks is just one part, we would like you to
9 try to get a 2% reduction in the price of switch gear."

10 How on earth do you then say that is attributable,
11 in any way, to the -- the little bit of trucks?

12 MR BEARD: I can see there may be circumstances in which
13 that -- it may be difficult to attribute it to trucks,
14 in which case, it would not be held to be the relevant
15 trigger. But I think there is a real danger of dealing
16 with this at too high a level, and, with respect, sir,
17 I think it is not right to say it is a big business and
18 therefore it makes it harder.

19 Actually, within a large business, what one sees is
20 a concern for costs control at all levels. There are
21 going to be people within Royal Mail whose job it is to
22 minimise the costs in relation to trucks,
23 transportation, supplies in relation to transportation,
24 and all other relevant elements of that business.

25 Now, that is where this is most likely to be most

1 interesting, because what you are looking at there is
2 a situation where, from on high, it may be said, "Look,
3 you in transportation, you must make sure you are
4 driving costs down", to which they say, "Okay, well, we
5 understand that is our overall position", but the people
6 within the transportation department are looking at the
7 components of the costs that they actually are taking on
8 board. They are looking at it and saying, "Okay, well,
9 actually, if our costs of trucks is higher, that means
10 we are going to push down costs of X, Y and Z other
11 supplies, we are going to be renegotiating deals,
12 perhaps, or more exactly, when we are engaged with our
13 suppliers, we are going to be conscious that that we
14 need to make sure that our costs overall as a business
15 unit do not go up, or within a sub-business unit, do not
16 go up." Indeed, it is for that reason that one would
17 expect you have key performance indicators imposed on
18 individuals within those units, segments of the
19 business, which are requiring them to consider how it is
20 they deal with costs in that segment of the business.

21 Now, Royal Mail are very interested, and BT are very
22 interested in saying, "Well, you can only deal with it
23 at -- look at it at a global level", and at that point
24 one can see that you do exacerbate the difficulties in
25 a larger organisation with identifying whether or not

1 the costs increases in trucks are having an impact on
2 other supplies. But it is precisely for that reason we
3 say no, no, no, what we are really interested in is
4 actually that lower level analysis. Obviously we want
5 policies and indications of documentary material talking
6 about costs directions coming from on high, of board
7 consideration of these issues. Yes, that is all going
8 to be part of the context. But you cannot say that
9 that is the proper approach to this exercise. You need
10 to look at where the costs are going in and where the
11 most immediate effects are.

12 The irony of the argument being put against us is
13 that we do not like the idea that we should have to deal
14 with mitigation on the basis of indirect effects, but we
15 want to give you disclosure, particularly that relates
16 to very high levels, in circumstances where at a high
17 level, you are only ever going to be talking about
18 indirect effects.

19 THE PRESIDENT: I think that is very helpful from my
20 perspective because when I read the disclosure
21 categories I did not see them being necessarily directed
22 at the particular segment or unit of the business
23 dealing with transportation. If they are directed at
24 that, well, that narrows the disclosure requests quite
25 substantially, and then I understand the point you are

1 making.

2 MR BEARD: Yes, so this is the reason why during -- the
3 difficulty -- look, let us take a step back in relation
4 to disclosure.

5 The difficulty we have is that I am drawing on the
6 expertise of Mr Bezant and FTI in relation to these
7 matters. But of course, when they go into a discussion
8 with Royal Mail and BT or their experts, of course they
9 do not know the details of how the businesses work.
10 What they want to know is: how is it you take these
11 costs, and what do you do with them? We do not know
12 where you put them and how you deal with them in terms
13 of trying to recover them specifically so an increase in
14 these costs would impact on others.

15 The main thing we did last week was we went back and
16 said: look, in most of the disclosure categories it
17 already refers to truck costs, but that is what we are
18 really interested in. What we want to know is how do
19 you deal with those truck costs.

20 It is not just in relation to one supplier, it is
21 how you deal with them in relation to how you end up
22 engaged in negotiations. We envisage that it will be
23 primarily focused on the segments that are most engaged
24 with the costs, but one will need to see how those costs
25 are then treated through the business, and that will

1 involve some of the higher level documentation.

2 But it is starting at the bottom in relation to this
3 that we are most interested in disclosure, and it is
4 that focus that then informs the way in which one
5 carries out the analysis.

6 We are not trying to be -- reach a view, precisely,
7 about what level of legal causation has to be
8 identified, because that is a legal debate for
9 another day. What we are saying is: obviously we
10 recognise there has to be some sort of causal link; how
11 do we best go about analysing this? Well, where do the
12 costs come in? What happens to them? Who is it that is
13 dealing with them?

14 I am conscious actually of the time. I do not know
15 whether or not this will be a convenient moment for
16 a quick break?

17 THE PRESIDENT: Yes. Thank you very much. I think it
18 probably would.

19 If you said there has been, because the -- as so
20 much in the CMC, one aspect is linked to another, so
21 just as the expert evidence was linked to disclosure,
22 similarly this amendment is linked to disclosure, and
23 you said there has been progress overnight on the
24 disclosure categories.

25 MR BEARD: Yes.

1 THE PRESIDENT: PO4, PO5. Is that -- we were just handed,
2 just before we opened the proceedings, a letter of
3 yesterday, and is that what we should be looking at to
4 understand? Or --

5 MR BEARD: I am not going to recommend that letter as
6 reading because it is highly tendentious, but there is
7 an annex to it, a schedule to it.

8 THE PRESIDENT: Right. The schedule --

9 MR BEARD: There is a schedule to it --

10 THE PRESIDENT: In the form of a --

11 MR BEARD: I think that is helpful.

12 So if you go to the schedule, that is a helpful
13 pointer in relation to this and identifies what remains
14 as disputes in relation to it.

15 MR LASK: Sir, I am sorry to interrupt, but just in case it
16 helps, whilst obviously the progress that has been made
17 on the supply pass-on disclosure categories is very
18 welcome, I do draw attention to paragraph 10 of the
19 supplemental note on disclosure that came in from DAF
20 yesterday morning, because what that indicates is that
21 one byproduct of the narrowing of the pass-on disclosure
22 categories is that they are now less suitable for the
23 mitigation plea. So the link you were drawing, sir,
24 between these arguments we are having at the moment and
25 the disclosure, is not quite as strong a link as it may

1 once have been.

2 THE PRESIDENT: Yes, they are saying that they might want
3 further disclosure?

4 MR BEARD: Yes, that is what we are saying.

5 THE PRESIDENT: Yes, well, that is for another day.

6 MR BEARD: Exactly.

7 THE PRESIDENT: Thank you.

8 Right, we will come back at five past 12.

9 MR BEARD: I am grateful.

10 (11.56 am)

11 (A short break)

12 (12.08 pm)

13 Submissions re the Amendment

14 THE PRESIDENT: Mr Beard, can we just turn to the actual
15 amendment that is proposed, which is --

16 MR BEARD: Yes, certainly.

17 THE PRESIDENT: -- in fact what we have to decide today.

18 MR BEARD: Yes.

19 THE PRESIDENT: Interesting though the analysis of the
20 implications of the Supreme Court judgment is, which is
21 in our bundle B3, we were looking at the Royal Mail
22 defence, and I assume the other one is the same.

23 MR BEARD: Yes, it is.

24 THE PRESIDENT: And it was paragraph 30(c).

25 MR BEARD: Yes.

1 THE PRESIDENT: "Further, or in the alternative, DAF
2 contends the Claimant mitigated any overcharge by
3 reducing the costs which it paid to its suppliers.
4 Without limitation, DAF avers the Claimant will have
5 sought to mitigation any increase in its input costs by
6 virtue of any such overcharge by negotiating lower input
7 costs and/or otherwise reducing its costs of supply."
8 {RMBT-B3/IC14/166}.

9 We did wonder, in the light of what you were
10 explaining to us what DAF means by the plea it seeks to
11 run, what is meant by the words "without limitation",
12 because it seems to us that it is limited in that
13 certainly you have sought to limit it to us --

14 MR BEARD: Well ...

15 THE PRESIDENT: -- and secondly, why the words "any increase
16 in its input cost by virtue of".

17 It seems to us what you were saying would be
18 reflected in a second sentence:

19 "DAF avers that the Claimant will have sought to
20 mitigate any such overcharge by negotiating lower input
21 costs and otherwise reducing its costs of supply."

22 Because, as we understood it, you were saying it has
23 to be direct. You accept that. It is the overcharge
24 which therefore led them not to the knowledge of the
25 suppliers, we understand that, but was what led the

1 claimant to negotiate lower input costs and/or otherwise
2 reduce its costs of supply.

3 MR BEARD: I will take instructions on the sentence, sir,
4 you are suggesting. On the face of it, just reading it
5 on the transcript, I do not see that that would cause us
6 any difficulty, but can I just pick up a couple of
7 points you raised in the course of that suggestion?

8 THE PRESIDENT: Yes. I have to say of course we have to
9 hear from Mr Lask.

10 MR BEARD: Of course.

11 THE PRESIDENT: But -- just listen -- but with those
12 deletions, it seems to us, without yet having heard from
13 Mr Lask, that that amendment should be permitted,
14 because that does reflect the Supreme Court ruling in
15 the way that you have explained it.

16 MR BEARD: Yes. Well --

17 THE PRESIDENT: So if you want to take instructions,
18 because --

19 MR BEARD: I think I will need to take instructions on that.
20 Is it sensible for me to take -- I know you have just
21 risen and we have just come back, but I do wonder
22 whether it might be sensible -- we have this text on the
23 transcript -- if I took brief instructions. I have
24 a couple of remarks about your references to limitation
25 and direct causation and so on, but I can come back on

1 those, but I think it would be perhaps helpful because
2 then we can clarify where we are, and that would
3 perhaps -- I do not have many other remarks to make --
4 and then Mr Lask can proceed on the basis of potentially
5 a further amended version.

6 THE PRESIDENT: Yes. I think it would be helpful, and
7 I know you have appeared in the guise of Ms Edwards.
8 I do not know whether that means she is close by, or
9 whether she --

10 MR BEARD: She is.

11 THE PRESIDENT: -- or whether that means that -- how long
12 will you need? Ten minutes should be sufficient, should
13 it not?

14 MR BEARD: I think ten minutes should be sufficient. We
15 just need to track back through the transcript and make
16 sure we have got clear what is being referred to, but
17 I think ten minutes should be fine.

18 THE PRESIDENT: Yes.

19 MR BEARD: Would it be sensible to give 15, just in case,
20 because I do not want to have to come back and --

21 THE PRESIDENT: Yes, let us say 12.30.

22 MR BEARD: I am most grateful, sir. That is very kind of
23 you. Thank you.

24 THE PRESIDENT: Mr Lask, equally, can take instructions, we
25 having given that indication. We can see there is a lot

1 that can be argued about at trial of whether, first of
2 all, the claimants did it anyway, and secondly, quite
3 what meaning to give to the proximate cause. We
4 understand that. But we think those have to be matters
5 for trial. So that is where we are at the moment.

6 MR LASK: Thank you, sir. I am grateful for that
7 indication.

8 (12.17 pm)

9 (A short break)

10 (12.32 pm)

11 THE PRESIDENT: Yes, Mr Beard?

12 MR BEARD: I am very grateful. Thank you very much for the
13 opportunity to take instructions. I want to make one or
14 two brief comments, but the short answer to the question
15 posed by the Tribunal, whether or not we would be
16 content with those amendments, is yes.

17 If I may, just briefly, the use of the language
18 "without limitation" was included -- it is rather
19 reflective of the comparative levels of ignorance as to
20 the structure and arrangements of the business, and how
21 matters are dealt with, which was why that general
22 phraseology was used, but we are content for that to
23 move out of the text.

24 When it comes on to "DAF avers that the Claimants
25 will have sought to mitigate any increase in their input

1 costs by virtue of any such Overcharge", the focus there
2 is on the overcharge. Obviously, the overcharge is
3 part -- this putative overcharge is part of the input
4 costs for the business, and all that is being said there
5 is that it is the overcharge as part of those input
6 costs, what is it that the over -- is the overcharge
7 part of those input costs resulting in lower input --
8 other lower inputs costs or otherwise reducing its costs
9 of supply? So we have no difficulty with those words
10 being removed.

11 Obviously, it does not carry with it any sense that
12 the claimants could have known or that the mitigation
13 requirement is dependent on the claimants knowing that
14 there was some sort of alleged overcharge. Plainly that
15 could not be possible and that is no part of the
16 ingredients of the mitigation requirements imposed by
17 the Supreme Court.

18 But I did not understand the Tribunal's suggested
19 amendment to be interpolating any such requirement.

20 THE PRESIDENT: No, that is quite correct. I think it is
21 common ground that the -- well, you say there was no
22 overcharge, of course, but it is not part of the
23 claimants' case that if there was one, they knew about
24 it.

25 MR BEARD: Yes. So that is all good.

1 I think the important thing to stress is that
2 obviously when we are talking about the evidence that
3 goes to prove this, then obviously the evidence that
4 goes to prove this will be looking at issues to do with
5 truck costs as a whole, inevitably. It does not just
6 try to focus on the notional overcharge. Indeed, that
7 could not possibly be the case where, as you say, sir,
8 our position is that there is no overcharge. But that,
9 I think, again, is read, and then it goes to questions
10 about scope of disclosure.

11 That, I think sets out our position on
12 the Tribunal's helpful suggestion as to how to amend
13 this to make sure the focus is clear.

14 I just had one or two brief remarks to make just to
15 finish my submissions in relation to this, just to
16 illustrate the position that I was actually averting to
17 in respect of the amendment, that we lack understanding
18 but we are interested in this focus where the costs come
19 in and how they are dealt with. Would it be possible
20 for the Tribunal just to turn up Mr Bezant's first
21 statement, which is found in bundle B3 at tab 10
22 {B3/10}.

23 THE PRESIDENT: We can. I am not sure what point it is
24 going to because we have an application by you to amend.
25 We have indicated that, with the changes you accepted,

1 subject to hearing obviously from the claimants, we are
2 minded to grant it, and then we come to the disclosure
3 categories, which we have not started. So we can look
4 at all sorts of things, but we have a lot to do.

5 MR BEARD: I completely understand. All I was going to
6 illustrate was one of the situations where Mr Bezant was
7 specifically saying it is these -- the specific
8 forecasts and KPIs related to these costs that --
9 (overspeaking) --

10 THE PRESIDENT: That might come into the disclosure
11 category.

12 MR BEARD: Yes, absolutely. I am happy to postpone that,
13 and, in the circumstances, I am happy to leave matters
14 for -- at this stage, given the Tribunal's indication,
15 unless I can be of further assistance.

16 THE PRESIDENT: Yes.

17 Now, Mr Lask, you have also had a chance to consider
18 this and you have heard the points the Tribunal has
19 made.

20 MR LASK: We have, sir, and I am grateful for the indication
21 the Tribunal has given. We have looked at the
22 amendment. It does not address our concerns or remove
23 our objection to the application that you are minded
24 grant. I hear that you are minded to grant it but
25 I would like to make my submissions in opposition if the

1 Tribunal would permit me to --

2 THE PRESIDENT: Yes.

3 MR LASK: -- to persuade you otherwise.

4 THE PRESIDENT: Yes, you are fully entitled to do that.

5 Submissions by MR LASK

6 MR LASK: Thank you, sir.

7 Given the way in which the discussion developed this
8 morning, I think the appropriate place to start is
9 Sainsbury's in the Supreme Court. I am not going to
10 take you back over all the same passages you have
11 already seen in detail but I want to make some brief
12 points, if I may, on what the Supreme Court was and was
13 not intending to do.

14 If I could pick it up, it is, as you will recall, in
15 bundle E, tab 1 {E/1}. I am so sorry, my bundle does
16 not have the bundle pagination, but I wanted to pick it
17 up on page 211, which is on internal page 70 {E/1/71}.

18 THE PRESIDENT: Yes.

19 MR LASK: This falls within the broad axe issue, and this is
20 where the court turns to deal with the question of
21 mitigation and the burden of proof, and of course burden
22 of proof is the way in which the issues expanded during
23 the hearing.

24 THE PRESIDENT: Yes, 211 says it is clearly on the
25 defendants. Yes, pleaded proof.

1 MR LASK: 211, it is accepted that merchants were right to
2 say the burden was on the defendants.

3 Over the page, just at the end of 211 {E/1/72},
4 after the quote from The World Beauty case, the court
5 says:

6 "But in the context of these appeals, as we discuss
7 below, the significance of the legal burden should not
8 be overstated."

9 Then that takes us to -- I go straight to
10 paragraph 216 {E/1/73}, which is key for present
11 purposes, where the court says that:

12 "The legal burden lies on the operators of the
13 schemes to establish that the merchants have recovered
14 the costs incurred in the MSC. But once the defendants
15 have raised the issue of mitigation, in the form of
16 pass-on, there is a heavy evidential burden on the
17 merchants to provide evidence as to how they have dealt
18 with the recovery of their costs in their business.
19 Most of the relevant information about what a merchant
20 actually has done to cover its costs, including the cost
21 of the MSC, will be exclusively in the hands of the
22 merchant itself. The merchant must therefore produce
23 that evidence in order to forestall adverse
24 inferences ..."

25 So what we know is that the court is only dealing

1 there with the burden of proof. That is important in my
2 submission because it is not addressing, obviously, the
3 issue of permission to amend, because that was not
4 before it, it is not addressing the ordinary rules of
5 pleading, or indeed the test for summary judgment.

6 That is critical to understand in the meaning of
7 this paragraph and its effect, because the court says
8 that there is an evidential burden on the merchants once
9 the defendants have raised mitigation, but in its proper
10 context, in my submission, raising mitigation means
11 raising it by way of a properly pleaded defence.

12 What the Supreme Court is not doing is giving all
13 defendants in any commercial litigation carte blanche to
14 plead mitigation without any evidential basis for doing
15 so. It is not conferring on defendants immunity from
16 the established rules governing permission to amend.

17 Since the Supreme Court was not addressing these
18 issues, it is highly unlikely, in my submission, that it
19 intended to rewrite the well established principles on
20 permission to amend, summary judgment, and the rules of
21 pleading. Indeed, if that was what it had intended it
22 would have said so.

23 This is reinforced by the impact -- and this is
24 a point that the Tribunal alluded to at the outset, of
25 Mr Beard's submissions. It is reinforced by the impact

1 that such a rewrite would have on commercial litigation
2 and follow-on claims in particular. Because if
3 a defendant can plead mitigation without any evidential
4 basis, in any case where a business claims financial
5 loss, this will have a profound impact, in my
6 submission, on the cost and complexity of proceedings.
7 It will give rise to extensive disclosure and probably
8 expert evidence as a matter of course.

9 It would, I say, make follow-on claims more
10 difficult to pursue, which is contrary to the principles
11 that the Tribunal has recognised, for example in its
12 disclosure ruling.

13 So, in my submission, that is not -- it is clearly
14 not what the Supreme Court intended. It was simply
15 addressing burden of proof in the particular context of
16 merchants who are members of card payment schemes, and
17 it was recognising the particular information asymmetry
18 that exists in that context.

19 So that is what I say about the Supreme Court's
20 judgment in Sainsbury's. That forms the basis for the
21 submissions I want to make on the merits of --

22 THE PRESIDENT: Just before you go on, I see they are
23 addressing this situation of card payment schemes, but
24 the information asymmetry, is that not inherent in any
25 case where you are dealing with mitigation of this sort?

1 MR LASK: There is likely always to be some level of
2 information asymmetry. As I want to come on to explain,
3 we say the information asymmetry that existed in the
4 Sainsbury's case does not exist in this case to the same
5 degree, but also the information asymmetry does not mean
6 that there does not need to be some sort of evidential
7 basis. It may not be factual. It may be expert. But
8 if the only basis for the plea is an expert economic
9 theory, then there has to be some basis -- I made
10 a similar submission yesterday -- there has to be some
11 basis for thinking that the theory is likely to be --
12 likely to have occurred. It is not enough, in my
13 submission, to say, "Well, if it did occur, this clever
14 expert analysis we have will show that." Because that
15 does not tell you there is a real prospect of success.
16 All that tells you is that it is -- I repeat the
17 metaphor -- it is a fishing expedition with a really
18 high-spec rod, but it does not tell you you are going to
19 catch anything. If you cannot have confidence that
20 there is a real prospect of the theory being proven on
21 the facts, then it is not possible to say that there is
22 a real prospect of success.

23 THE PRESIDENT: Yes.

24 MR LASK: So I will come back to that point, but just to
25 take a step back for a moment from the detailed

1 arguments around expert analysis and disclosure, I do
2 say it is important to remind ourselves of the nature
3 and context of the proposed plea. Because the plea, in
4 essence, is that the claimants responded to the
5 overcharge by reducing the costs they paid to suppliers.
6 That is, of course, the third of the four ways in which
7 the Supreme Court said merchants might have responded to
8 the MIF in Sainsbury's.

9 The first thing one notices is that even with the
10 amendment that the Tribunal proposed a little earlier,
11 the plea is extraordinarily broad and unspecified,
12 because it still applies, on its face, to all of the
13 claimants' suppliers, and has no limitation by reference
14 to categories of supplier or types of input. It still
15 applies to the whole duration of the cartel.

16 The next thing one notices is that the plea is
17 concerned with how the claimants may have responded to
18 the overcharge arising from the cartel. I emphasise
19 that because it highlights the heavy air of unreality
20 about this plea. That is obviously important when
21 considering its prospects of success.

22 Firstly, the cartel was conducted in secret. The
23 claimants did not know they had been wronged. Now, I do
24 not say that is a complete answer but it is an
25 inauspicious start for the proposed plea. It

1 immediately distinguishes the case from the classic
2 mitigation case like British Westinghouse, where the
3 claimants obviously knew the steam turbines were
4 defective because they were billowing out extravagant
5 amounts of steam. But it also distinguishes it from the
6 Sainsbury's case, because the payment of the merchant
7 service charge and every card transaction was
8 transparent in that case. It was specifically provided
9 for in the merchant services agreement.

10 So it is not obvious that a claimant can be expected
11 to have responded to a wrong it did not even know about.

12 For your note, Mr Malek made this precise point at
13 the CMC in February last year. I will just give you the
14 reference. It is {C3/3}, I think the transcript starts
15 on page 152, and it is internal page 38. We agree with
16 that and we adopt the point that Mr Malek made there.
17 So that is the first point, it is the secrecy of the
18 cartel.

19 The second is that the overcharge was a very small
20 proportion of the claimants' total annual expenditure.
21 We have given the figures in paragraph 12 of our
22 skeleton, but it was 0.08% for Royal Mail. It was
23 0.044% for the second BT claimant, and 0.3% for the
24 third BT claimant.

25 Now Mr Harvey's evidence is that even if detected,

1 an increase of this level is unlikely to have triggered
2 a successful business-wide cost reduction exercise.
3 That has not been contradicted, at least not by
4 evidence.

5 It is not enough, in my submission, to say, well, it
6 may have done so because "may have" is not the test.
7 The allegation must be more than arguable, it must have
8 a real prospect.

9 So what is there to support DAF's proposed defence?
10 We say very little indeed. There is no factual basis
11 for the plea. DAF has failed to adduce any evidence to
12 suggest that the claimants obtained cost reductions from
13 any of their suppliers. If they had, if the claimants
14 had done that, DAF may have known about it because DAF
15 itself supplied complementary products to the claimants,
16 as we heard yesterday.

17 So in my submission, DAF's own supply relationship
18 with the claimants is a bellwether for its mitigation
19 defence.

20 All we have is the most generic of economic
21 theories, that all businesses act to recover their costs
22 and make a return. But again, the uncontradicted
23 evidence from Mr Harvey is that whether a particular
24 cost rise is likely to trigger a successful cost
25 reduction exercise depends heavily on the particular

1 economic context. DAF has identified no feature with
2 the relevant context in this case to suggest that
3 mitigation by cost reduction is likely to have occurred.

4 So, in my submission, it is impossible to see how
5 DAF can establish a real prospect of success based on no
6 factual evidence and an entirely generic economic
7 theory.

8 The proposed plea is, at worst, wholly unrealistic
9 and at best, pure speculation. For that reason, the
10 amendment ought not to be allowed. Indeed, if the
11 mitigation defence is allowed in these circumstances, it
12 is very difficult to conceive of a cartel case in which
13 it would not be allowed.

14 Sir, what I wanted to do next was just deal with the
15 issues under the same four headings that I addressed to
16 you yesterday, but I will cut my cloth accordingly,
17 given that I prefaced some of those issues already in
18 that introduction.

19 The four issues are: the lack of any factual basis;
20 the inadequacy of the expert evidence; the practical
21 implications; and the delay.

22 Dealing firstly with the lack of factual basis, we
23 do say there must still be some evidential basis for the
24 pleading, and that would ordinarily be very factual, but
25 it is common ground that DAF's case is advanced --

1 I mean, Mr Beard made this plain this morning: it relies
2 wholly on the Supreme Court's judgment in Sainsbury's.
3 There is no factual evidence.

4 DAF makes the obvious point that there is
5 information asymmetry, and it cannot know about the
6 claimants' internal operations, but in my submission
7 that misses the point. I emphasise that the position
8 here is very different from the position in Sainsbury's,
9 because in that case there is no reason why MasterCard
10 would have known about any efforts by Sainsbury's to
11 negotiate cost reductions with its dairy or meat
12 suppliers. That is what lay behind the Supreme Court's
13 observation at paragraph 216. The Supreme Court is not
14 referring there to claimants and defendants in general;
15 but specifically to the relationship in that case
16 between operators of the payment card scheme and
17 participating merchants.

18 But here, as we know, DAF was the supplier of
19 precisely the sort of input that, on its own case, the
20 claimants may have sought to reduce the costs of.

21 Just to illustrate that, DAF says in its skeleton
22 argument, at paragraph 63(a), it says in terms:

23 "[Royal Mail] and BT may have negotiated lower
24 prices for trailers/bodies in response to higher Truck
25 costs ..."

1 Well, if they did, you should know about it. We do
2 not know if you have investigated it, DAF, but if you
3 have, you have not told us the outcome. But if we did
4 not negotiate those cost reductions with you, we did not
5 try to, what basis is there for thinking we did it with
6 anyone else?

7 That point is supported not only on DAF's own case,
8 but in Mr Harvey's evidence. If I could ask you to turn
9 up Harvey 9, please, at tab 17, B3. He makes the point
10 at paragraph 5.21 on page 16 {B3/17/16}:

11 "I also note that if and to the extent that the
12 overcharge did in fact 'trigger' the Claimants to
13 proactively seek costs reductions from their suppliers
14 in order to mitigate this increased cost, then one place
15 that this could have occurred would be in the
16 negotiations with the Defendants themselves for the
17 purchase of any other related goods and services."

18 Then just moving towards the end of that paragraph:

19 "If Royal Mail had, in fact, sought to negotiate
20 down the costs of its trucks and trailers ..."

21 It should probably read "bodies".

22 "... with the Defendants in this period, then this
23 would be something that the Defendants should be able to
24 confirm. If this did not occur then this would support
25 the Claimants' position that it is unlikely that any

1 increase in the purchase price for their trucks as
2 a result of the cartel in fact resulted in any attempts
3 by the Claimants to negotiate down the price of other
4 goods and services from their suppliers."

5 That has not been contradicted either.

6 The point we make is a simple one: if the claimants
7 did not achieve costs reductions for products or if
8 there is no evidence that the claimants achieved cost
9 reductions for products that were closely related to
10 trucks, they are less likely to have done so for other,
11 unrelated goods and services. That is why I say
12 that DAF's own supplier relationship with the claimants
13 is a bellwether for its mitigation defence.

14 Where that takes us is that the lack of any factual
15 basis means that the onus falls entirely on DAF's expert
16 evidence. So that is where the evidential basis for its
17 mitigation plea has to be found. I turn to that now.

18 Again, as with the complements plea, the expert
19 evidence comprises two elements: a theory and a proposed
20 analysis.

21 I made the point yesterday that DAF needs to
22 establish that both are good in order to have a real
23 prospect of success. It is not enough to have one or
24 the other.

25 So dealing first with the theory, may I ask you to

1 turn up Bezant 1 at paragraph 12, which is B3, tab 10,
2 page 3. {B3/10/3}.

3 I say paragraph 12, it is actually 13. In the
4 second sentence:

5 "As a matter of economic principle, and hence
6 observed standard commercial practice, a business acts
7 to recover all of its costs and make a suitable return
8 on its activities (which return is necessary over the
9 longer term for its continued existence). As a result,
10 when faced with an increase in any of its costs (such as
11 an overcharge) - a business will have to consider
12 whether to:

13 "a. increase its prices ...

14 "b. control its expenditure ...

15 "c. absorb the increase in costs and earn lower cash
16 profits ...

17 "d. adopt a combination of (a), (b) and (c)."

18 In my submission, it is clear that is expressed at
19 a very high level of generality. What is important is
20 that Mr Harvey explains that the likelihood of
21 mitigation -- you will see that Mr Bezant does not
22 really elaborate on which of those options he thinks
23 would have been likely in this case and whether he
24 thinks mitigation would have been likely and if so, why.

25 What Mr Harvey says, and this is going back to his

1 ninth statement, behind tab 17, pages 10 to 11
2 {B3/17/10}, he deals with this at 5.6, he says, well,
3 the likelihood depends on the economic context.

4 Again, that is uncontradicted.

5 As I say, 5.6, he refers to the "fundamental
6 economic principle" in the first sentence, and then he
7 makes the point which, again, I think the Tribunal made
8 this morning, because big businesses are always seeking
9 to cover their costs and maximise their profits:

10 "I would therefore expect businesses to pursue cost
11 reductions as a 'business as usual' activity. I would
12 not expect businesses to 'wait' for the price of one
13 input (such as trucks) to rise, before pursuing cost
14 reductions on other inputs."

15 Then he says, therefore there is:

16 "... no reason in economic theory to expect that
17 'mitigation by cost reduction' would necessarily
18 occur ... Rather, for the reasons given ... [it] depends
19 on the economic context."

20 He says at 5.7 {B3/17/11}:

21 "I recognise, of course, that an increase in the
22 price of one input could in some cases 'trigger'
23 a business to scrutinise the rest of its costs more
24 thoroughly ... However, I understand that truck
25 expenditure accounted for a negligible proportion ..."

1 That is the point I made at the outset. This is the
2 end of paragraph 5.7:

3 "... I therefore consider it unlikely that an
4 increase in truck prices of the level that allegedly
5 occurred as a result of the cartel would trigger a
6 'business-wide' increase in scrutiny of the type that
7 I understand Mr Bezant wants to investigate ..."

8 Then he makes the point, at 5.8, this is reinforced
9 by the fact that it was conducted in secret.

10 At 5.9:

11 "Even if the Claimants had identified an increase in
12 the price of the trucks ... and even if the Claimants
13 had subsequently decided to use this as a reason to seek
14 to negotiate a reduction ... it would be necessary for
15 one or more of the ... suppliers to agree to reduce
16 their prices off the back of a request ..."

17 Then he says {B3/17/12}:

18 "Aside from the arguments that Professor Neven
19 raises in respect of trailers and bodies ... there is no
20 reason to believe that the Claimants' suppliers would
21 have agreed to reduce [their] costs ... Indeed, there
22 may be many factors that would lead a supplier to refuse
23 any such reduction ... margin on the product ... general
24 market conditions", et cetera.

25 So what Mr Harvey is doing is saying well, this --

1 the likelihood of this having occurred depends on the
2 economic context, and there are reasons to believe it
3 was unlikely to have occurred. Mr Harvey is engaged
4 with some of those factual elements of the economic
5 context.

6 There is no attempt by Mr Bezant to identify any
7 features of the present context to suggest that the
8 alleged mitigation was likely to have occurred.

9 In my submission, that fatally undermines the
10 application, because there is no factual basis, and in
11 the absence of any analysis by Mr Bezant to suggest that
12 this would have been likely to have occurred, there is
13 no basis for the Tribunal to conclude that there is any
14 real prospect of success.

15 I note that Mr Bezant does not say that he was
16 unable to investigate likelihood due to a lack of
17 available information. He simply does not address, just
18 does not address the point. But we would say that he
19 could have looked at similar things to Mr Harvey. He
20 could have looked at the claimants' annual expenditure
21 compared to the overcharge, as Mr Harvey did. He could
22 have looked at factors indicating whether any attempts
23 by the claimants to negotiate on bodies would have
24 succeeded. So he could have looked at DAF's margin and
25 alternative suppliers for bodies in contractual terms.

1 He could have sought to identify other complementary
2 products which were likely targets for any cost
3 negotiation exercise. He has done none of those things.
4 As I say, what we do know about the economic context,
5 the matters identified by Harvey, they all point in one
6 direction, which is that this mitigation is unlikely to
7 have occurred.

8 MR HODGE MALEK QC: Mr Lask, do we have any feel for what
9 the relative cost is for the truck purchases in any year
10 and the fuel purchases, because when you look at fuel,
11 that is something that quite commonly will fluctuate
12 25%, sometimes more in any one year. So you have one
13 major cost input which fluctuates a considerable amount,
14 and another cost input which probably does not fluctuate
15 in the same way up and down. Do we have any idea what
16 the relative size is, in those two inputs?

17 MR LASK: Sir, I do not know the answer to that offhand but
18 we will look into that over the break, if we may, and
19 let you know if there is any evidence.

20 MR HODGE MALEK QC: I just want to have a feel for it.

21 MR LASK: Yes, thank you for that.

22 But, standing back, we have a proposed mitigation
23 plea advanced without any factual basis at all, and an
24 economic theory that is so generic as to be utterly
25 uninformative as to the likelihood of mitigation in this

1 case. In substance, the plea rests entirely on DAF's
2 hope that something will turn up in disclosure, and that
3 Mr Bezant will, via his analysis, be able to turn it
4 into a plausible mitigation story.

5 THE PRESIDENT: Sorry -- just a moment, sorry. I think
6 Mr Beard may have dropped off. Could we -- can you
7 pause a moment.

8 MR LASK: Sorry if my submissions have had that effect.

9 MR BEARD: No, I have been listening attentively. There was
10 a slight glitch but I saw the text on the transcript so
11 Mr Lask can rest assured I have heard all of his wise
12 words.

13 THE PRESIDENT: We can hear you, Mr Beard. We have been
14 deprived of the pleasure of seeing you at the moment in
15 any guise, whether as Mr Beard or one of your other
16 aliases.

17 MR BEARD: Yes, I am sorry that --

18 THE PRESIDENT: You are back.

19 MR BEARD: -- that has happened. I will try to rectify it
20 over the short adjournment.

21 THE PRESIDENT: No, you are back. With a new name, I think,
22 but yes.

23 Yes, Mr Lask go on.

24 MR LASK: So I was making the point that standing back, the
25 plea is advanced without any factual basis, and an

1 economic theory that is so generic as to be utterly
2 uninformative. It does, I say, rest entirely on the
3 hope that something will turn up in the disclosure, and
4 that Mr Bezant will turn it into a plausible mitigation
5 story.

6 DAF's submission, the way in which Mr Beard put the
7 case this morning, in my submission, what that comes
8 down to is that if mitigation occurred as a result of
9 overcharge, Mr Bezant's analysis and the disclosure we
10 have requested will show it. But in my submission, that
11 is not good enough. In fact, it is the very definition
12 of a fishing expedition. That is the very thing the
13 authorities say is not good enough.

14 Sir, I was going to come on to Mr Bezant's proposed
15 analysis. I know we have had couple of breaks this
16 morning, but I am conscious of the time, and I am in
17 your hands as to whether you want me to carry on or wait
18 until after the break?

19 THE PRESIDENT: You have made some comments on that already.
20 This is obviously a very important part of this hearing.
21 To make comments on his analysis, how long will that
22 second point take, which is I think of your four points,
23 it is the second one?

24 MR LASK: Yes, this would complete the second of my four
25 headings, yes.

1 THE PRESIDENT: Why do you not complete that?

2 MR LASK: Okay, very well. Thank you, sir.

3 So given that the submissions I have just made, we
4 say that in the circumstances, it does not matter how
5 sophisticated or suitable Mr Bezant's proposed analysis
6 is, because until that analysis is carried out, the
7 defence remains pure speculation.

8 But in case we do need to go further, we do say that
9 the proposed analysis is fundamentally flawed, because
10 it is common ground that causation is an essential
11 ingredient of mitigation. Mr Beard I think accepted
12 this morning that there has to be a direct causal link,
13 which we would say is right. Mr Harvey explains why
14 Mr Bezant's proposed analysis is unsuitable for
15 establishing causation.

16 We looked this morning at I think it was
17 paragraph 5.13 onwards. It is probably just worth
18 having that open. So this is {B3/17/12} and it is
19 starting on page 12.

20 The first point Mr Harvey makes at 5.13 is the key
21 omission is any mechanism for establishing causation.
22 He says:

23 "Without analysing this, I cannot see how
24 Mr Bezant's analysis can assist the Tribunal in
25 establishing whether the Claimants in fact chose to seek

1 a cost reduction as a result of the overcharge."

2 Then at 5.14 he draws a contrast which is not
3 something you have heard from Mr Beard on, but he draws
4 a contrast with Mr Bezant's proposed approach to supply
5 pass-on. Because his analysis on supply pass-on
6 appears, as we understand it, to be geared to try to
7 trace a link between the overcharge and a decision by
8 the claimants to increase their prices.

9 We are saying that is the sort of thing you need to
10 do in mitigation. You need to trace the link. Then
11 that is reflected in the five steps that Mr Harvey sets
12 out at 5.15. Those are the steps that he says are
13 necessary in order to establish causation in a case like
14 this.

15 Just to be clear, Mr Harvey does not say, and we do
16 not say, that it would need to be shown in any
17 negotiations or any evidence of negotiations that the
18 claimants specifically mentioned truck costs as a reason
19 for seeking to reduce the costs of their other supplies.
20 We do not say that is required, but we do say that the
21 five steps identified by Mr Harvey are required. He
22 makes the point that the trigger that Mr Bezant wants to
23 examine is only one part of the causal connection.

24 Now, because of the way that the timetable works for
25 this hearing, we do not have a response from Mr Bezant

1 to that. But we do have DAF's submissions, and the
2 essential argument that is made by Mr Beard is that
3 Mr Bezant's analysis would be able to establish
4 causation.

5 I would like to take you to what Mr Bezant says
6 about this, if I may. This is back in his first
7 statement, tab 10 of B3, page 18, paragraph 71.

8 {B3/10/18}

9 As we understand it, this is all of it. This is his
10 explanation of how he is going to do it, and this is as
11 close as he gets to explaining how he will establish
12 causation.

13 I am going to pause so the Tribunal can read it, but
14 the initial observation I make is, if nothing else, the
15 explanation is compressed. We say it is striking that
16 Mr Bezant does not explain his approach to causation
17 more clearly when it was being very clearly ventilated
18 on the correspondence. I will just pause there, if
19 I may, so you can read it, sir. (Pause)

20 THE PRESIDENT: Yes.

21 MR LASK: Sir, as we understand it, Mr Bezant proposes to
22 look at firstly whether truck price increases were the
23 sort of thing to trigger greater costs scrutiny, and
24 then whether the claimants in fact achieved costs
25 reductions. But there is no indication of how he will

1 identify whether the claimants in fact acted on those
2 triggers, or whether such efforts were successful.

3 There is no indication that he will be able to trace
4 the link between a rise in truck costs and any reduction
5 in other costs; so he will not be able to say whether
6 one was caused by the other.

7 Just to illustrate and pick up on a point that
8 Mr Malek discussed with Mr Beard, suppose trucks costs
9 do typically trigger costs reduction efforts within the
10 claimants' businesses? Suppose that Mr Bezant spots
11 a cost reduction in a particular area of the business.
12 How will he be able to say that that particular cost
13 reduction arose out of the efforts triggered by an
14 increase in trucks prices? Cost reduction may have
15 arisen, for example, as a result of competition in the
16 market for the supply of that input.

17 I raise the question, how will he establish that
18 causal link? We say it is totally unclear, because he
19 does not say. General cost-cutting measures arising
20 across a business may be very difficult to link causally
21 to the overcharge. As you put it, sir, in your exchange
22 with Mr Beard: how on earth do you attribute it to
23 trucks? All he is proposing to look at, as we
24 understand it, is overall cost and price trends.

25 We do say that actually, what you need to do if you

1 are going to do this, is you need to look at the
2 negotiations. Just as the parties will be looking at
3 the negotiations on trucks, to see whether an increase
4 in list prices is fed through to the transaction prices
5 paid by the claimants. It is common ground that that is
6 very relevant in the context of overcharge, and we say
7 it is just as relevant in this context.

8 Just for your reference -- for your notes, sir,
9 there is a letter on this in the bundle. I do not need
10 to take you to it. It is in the Inner Confidentiality
11 Ring so it is {D/IC30/1}. It is a letter that
12 acknowledges that this is an issue that needs to be
13 looked at in that context.

14 THE PRESIDENT: In the context of the overcharge?

15 MR LASK: Of the overcharge.

16 THE PRESIDENT: Yes.

17 MR LASK: DAF says --

18 THE PRESIDENT: I follow a lot of what you say, but I do not
19 quite understand how looking at the negotiations with
20 suppliers is going to help. I mean, in no
21 circumstances, I would have thought, or it would be
22 exceptionally rare, even if a purchaser knew it was
23 being subject to a particular overcharge and it wants to
24 mitigate that increase by reducing the costs of
25 something else, it will negotiate with that other

1 supplier to try to get the costs down. It will know
2 that it has an overcharge. It will know that it is
3 seeking to mitigate that specific overcharge but it is
4 not necessarily going to tell the supplier, "Well, look,
5 our truck costs have gone up, so ..."

6 I think you have just recognised that.

7 MR LASK: Yes.

8 THE PRESIDENT: "... and therefore we want a corresponding
9 reduction."

10 Most suppliers will say, "That is your problem. Go
11 and negotiate with your truck supplier."

12 In any event, it is not the kind of exchange you
13 would expect. I do not, for myself, see how looking at
14 the negotiations will help.

15 MR LASK: Sir, I say it is necessary to look at the
16 negotiations, but it is not sufficient on its own.

17 THE PRESIDENT: Why is it necessary?

18 MR LASK: Because the first thing you look at is you need to
19 look at whether the claimants in fact sought a costs
20 reduction. If you can establish that by looking at
21 evidence of their negotiations with their suppliers,
22 then you can start trying to trace back, through the
23 claimants' evidence, to see whether that can be linked
24 to a recognition or a detection of an increase in trucks
25 costs. That is how you try and trace the link from

1 the -- you almost start at the end. You trace the link
2 from the cost reduction effort and you trace it back
3 through the claimants' internal processes to see whether
4 it can be linked to a detected increase in truck prices.

5 THE PRESIDENT: Well, you could start either way. There is
6 no magic way you start.

7 MR LASK: I accept that.

8 THE PRESIDENT: Because equally, looking at negotiations,
9 you might find that in every negotiation, the claimants
10 try and seek a cost reduction.

11 MR LASK: Yes. Well, you might, but if you do not see that
12 at all, if you do not have any evidence of that, it
13 becomes very difficult to see how you get a case on
14 causation off the ground.

15 Just a final point under this heading, sir, is --
16 I mentioned previously the byproduct of the narrowing of
17 the supply pass-on disclosure categories. As you saw
18 from DAF's supplemental submission, it is apparent now
19 that the disclosure being sought may well not be
20 sufficient for Mr Bezant's analysis, and for the
21 mitigation defence. That has two implications, in my
22 submission: the first is that it becomes even more
23 difficult to see how Mr Bezant's analysis could
24 establish the mitigation defence, because now the
25 disclosure is simply not there for him.

1 afraid.

2 Coming on to the third heading in my submissions,
3 which concerns the practical implications of allowing
4 the amendment, and in particular prejudice, as
5 I submitted yesterday, if the Tribunal -- if I have
6 persuaded the Tribunal that DAF has failed to establish
7 a real prospect of success, that is the end of the
8 matter and the amendment should be disallowed.

9 But even if I have not, I do say it is necessary to
10 weigh up still the prejudice to the claimants in
11 allowing the amendment compared to the prejudice to DAF
12 in disallowing it. We do submit that allowing the
13 amendment would cause substantial prejudice to the
14 claimants because it would result in a very large
15 increase in the work and the costs involved, and
16 a potential diversion of resources.

17 That would be exacerbated by the fact that the
18 Tribunal has granted permission to run the complements
19 defence, so it is not just one additional defence now,
20 it would be two.

21 Just to make the point good, and I can take this
22 point briefly, sir, but going back to Mr Harvey's
23 statement in {B3/17/14}, we have looked at the five
24 steps that he says would be required in order to do what
25 he regards as a robust forensic accountancy analysis,

1 and then he says at 5.19, at the bottom of page 14:

2 "Whilst my view is that each of the five steps set
3 out in paragraph 5.15 above are necessary in order for
4 any forensic accounting mitigation analysis to properly
5 assess the question ... this would require detailed
6 factual analysis and further information from the
7 Claimants. This is particularly the case given the
8 absence of any limitations being placed upon the
9 suppliers that Mr Bezant proposes to investigate as he
10 and the Defendants appear to consider that an analysis
11 of the whole of the Claimants' supplier base is
12 necessary in order to determine whether any of those
13 suppliers' prices were decreased. I do not, therefore,
14 share [his] view that a probative and reasonable
15 mitigation analysis can be conducted in these
16 proceedings without requiring significantly more
17 disclosure from the Claimants than has been requested in
18 the PO4 and PO5 ..."

19 Just pausing there, sir, that needs to be seen in
20 the context of what Mr Bezant was saying in Bezant 1
21 about the scope of his analysis. If I can ask you to
22 turn up Bezant 1 at {B3/10/3}, you will see
23 paragraph 11:

24 "In this statement I address three issues which are
25 relevant to the determination of certain aspects of

1 DAF's application ..."

2 (a) supply pass-on, (b) PO4 and PO5 disclosure, and:

3 "(c) My proposal to assess the extent to which any
4 alleged increase in the price of Trucks would have been
5 successfully mitigated ... This analysis is based on
6 paragraph 205(iii) of the [Sainsbury's decision] ..."

7 Then this is an important sentence:

8 "I note that my proposed Mitigation Analysis is
9 limited to negotiations with suppliers other than those
10 suppliers from whom the Claimants purchased goods and
11 services alongside the Truck (ie non-complements
12 suppliers)."

13 So Mr Bezant says his analysis is only looking at
14 the effects on the prices of non-complements inputs.

15 There are a number of implications to that. First,
16 that appears to be the intention with the submission
17 made in DAF's skeleton, at 63(a), where it says that:

18 "[Royal Mail] and BT may have negotiated lower
19 prices for trailers/bodies in response to higher Truck
20 costs: this point is covered by the Mitigation Plea,
21 addressed above."

22 That is 63(a) of DAF's skeleton.

23 At the very least, there is uncertainty about the
24 scope of the mitigation plea. I do not know, sir, if
25 that has any impact on the amendments to the amendment

1 that you were discussing with Mr Beard this morning. We
2 have looked back over the transcript of that exchange,
3 and to be frank, we are not entirely clear on what the
4 Tribunal's thinking is behind the amendments and what --
5 in what way, if any, the amendment narrows the scope of
6 the plea.

7 As I say, I do not know whether this has any impact
8 on that, but at the very least it is a lack of clarity,
9 we say, in DAF's mitigation case that would need to be
10 sorted out. But also, Mr Harvey said that, you know, he
11 would need to do a significant additional factual
12 analysis and seek additional further disclosure from the
13 claimants. But if DAF is saying that the mitigation
14 defence does cover complements as well as
15 non-complements, then it may -- and I lay this down as
16 a marker -- it may well be that Mr Harvey needs to seek
17 disclosure from DAF, because if the mitigation plea is
18 being expanded to cover potential negotiations with DAF
19 and other suppliers of complements, then at the very
20 least the claimants may want to seek disclosure
21 from DAF.

22 Before we get to that, I do say that that needs to
23 be clarified, and as I say, it may or may not have an
24 impact on the amendments you were discussing, sir, with
25 Mr Beard earlier.

1 THE PRESIDENT: I do not think the amendment that -- the
2 revision of the draft amendment impacts on the point at
3 paragraph 63(a). That would be within the scope of
4 a revised paragraph 30(c). So I do not think there is
5 any knock-on effect on the point at 63(a).

6 MR LASK: Very well. But, at the very least, in my
7 submission, there does need to be some clarity from DAF
8 as to whether complements are in or out. I accept your
9 point, which is that it would be permissible on the
10 amended pleading, but we need to know for the purposes
11 of expert analysis and disclosure whether they are in or
12 out.

13 The other point I wanted to make from Mr Harvey's
14 statement is at -- this really goes to the scale of the
15 additional work that this amendment will give rise to or
16 would give rise to. It is 5.20 of Mr Harvey's statement
17 where he describes the additional work involved simply
18 in responding to Mr Bezant's analysis; never mind doing
19 his own, simply in responding to Mr Bezant's analysis.
20 Perhaps I could ask the Tribunal to just read over
21 paragraph 5.20, please.

22 THE PRESIDENT: That is at page 15?

23 MR LASK: Yes, I am sorry.

24 THE PRESIDENT: Tab 17, yes.

25 MR LASK: {B3/17/15}.

1 (Pause)

2 Sir, has the Tribunal read that?

3 THE PRESIDENT: Yes. Thank you.

4 MR LASK: Thank you.

5 If one reads those paragraphs of Mr Harvey together,
6 5.15 to 5.20, it is clear, in my submission, that
7 allowing this plea would give rise to significant
8 additional work and significant additional costs, and
9 indeed raise the spectre of significant wasted costs,
10 and importantly, a diversion of the claimants' resources
11 that are required for the preparation to trial. In my
12 submission, those points militate strongly against
13 allowing the amendment even if you accept that it has
14 a real prospect of success, which we say it does not.

15 Finally, I will deal with this briefly, the question
16 of delay. We do say there has been a significant delay
17 in DAF raising these amendments over three years, in the
18 case of Royal Mail, two-and-a-half years in the case
19 of BT. We do not accept it can be justified by
20 reference to the Sainsbury's litigation. I am not going
21 to take you to the Tribunal's judgment but we do say
22 that the rejection of MasterCard's mitigation defence
23 was a decision on the facts, and it was not something
24 that was significantly changed by the Sainsbury's --
25 sorry, by the Supreme Court's judgment in the same case.

1 It is noticeable that the Tribunal rejected
2 MasterCard's pass-on defence on much the same basis as
3 it rejected the mitigation defence. Yet DAF felt
4 perfectly well able to plead pass-on from the outset.
5 So we do not think there is any merit in the submission
6 that Sainsbury's justifies their delay.

7 We do say the delay is not only significant but it
8 has a practical implication, because if the amendment
9 were now to be allowed, there is much less time
10 available in which to do the necessary work, and it
11 causes the claimants a much greater headache than it may
12 have done if it had been raised earlier.

13 THE PRESIDENT: Yes. I thought that this Tribunal, having
14 set out the four categories of potential "recovery" in
15 the broadest sense that a business can use, or resort
16 to, faced with an increase in costs, which are the four
17 categories that the Supreme Court repeated and adopted
18 in its judgment, I thought that the Tribunal had said
19 that it is only category 4, namely pass-on, that is
20 legally permissible. So on legal grounds they excluded
21 category 3.

22 MR LASK: Sir, your recollection may well be right. That is
23 not my recollection of the judgment, and I was not going
24 to take you to it but -- I was focusing on
25 paragraphs 475 onwards, where the Tribunal rejects

1 MasterCard's mitigation defence on what we say is -- on
2 the evidence, and on the facts. But if there is
3 a passage somewhere -- I mean, it is a very long
4 judgment -- if there is a passage in there somewhere
5 where they say it is impermissible as a matter of law,
6 then I stand corrected.

7 THE PRESIDENT: Yes, I do not want to take time, we can look
8 into that, but that was my understanding of it. They
9 talk about passing on as a form of mitigation, and ...

10 MR LASK: 475 to 478 are the paragraphs I focus on.

11 MR BEARD: It is paragraph 461 as well, the relevant
12 consideration starts at 459 and does run right through
13 to 478.

14 THE PRESIDENT: Perhaps we will have a look at it
15 afterwards. As you say, it is a long judgment. That
16 was my recollection, and it may be, but I am not
17 suggesting that that is in any way infallible.

18 They set out the four options a number of times, and
19 I think at some point they draw a distinction between
20 what is legal mitigation, as it were, and what an
21 economist would regard as litigation.

22 MR LASK: They do draw that distinction specifically in
23 relation to pass-on, which they deal with separately
24 from mitigation. I am just trying to find where
25 that is. I cannot immediately find it.

1 THE PRESIDENT: We will look at that later. Yes. Thank
2 you.

3 MR LASK: Sir, unless I can assist you further?

4 THE PRESIDENT: Mr Beard, would you like to respond, please.

5 Submissions in reply by MR BEARD

6 MR BEARD: Certainly.

7 Taking it in stages, we have seen the position in
8 relation to Sainsbury's --

9 THE PRESIDENT: Mr Beard, you have suddenly muted.

10 MR BEARD: Am I back now?

11 THE PRESIDENT: You are.

12 MR BEARD: Thank you.

13 Just taking it in stages, in relation to Sainsbury's
14 in the Supreme Court, we have the clear position that
15 this is arguable as a matter of law, and in those
16 circumstances, the idea that an amendment should not be
17 permitted where it is plainly arguable ...

18 I am sorry, Mr Williams was indicating I may have
19 dropped out again.

20 The Supreme Court clearly indicated it was arguable
21 as a matter of law. That is the position here. In
22 those circumstances, it is plain an amendment should be
23 permitted. The countervailing considerations I will
24 come back to but they clearly do not outweigh the
25 appropriateness of this matter being aired.

1 Indeed, it would be the first case potentially in
2 which these issues were tested, albeit that the remitted
3 matters in relation to interchange are back before
4 the Tribunal. Nonetheless, in relation to these
5 matters, there isn't an extant judgment following on
6 from the Supreme Court, and it is plain in those
7 circumstances that we should be permitted to proceed in
8 relation to this matter.

9 Obviously, there are limits as to what we can plead
10 given the asymmetry of information in relation to these
11 issues. I am not going to rehearse the submissions
12 I made in relation to complements yesterday, but the
13 points being made again about how we could somehow have
14 identified from either the bundle sales we made or the
15 sales with bodies from third parties that we made,
16 somehow, an indication as to how they dealt with costs
17 and how they negotiated in relation to changes in truck
18 prices, in any way, is simply not tenable.

19 I go back to the points I made about controlling for
20 those prices and costs and trying to identify trends.
21 But I add to that, in relation to mitigation, the fact
22 that what we are talking about is their reaction to the
23 higher truck costs, which plainly we cannot have any
24 indication of. What we do see is not some clever,
25 clever economic analysis from an expert being put

1 forward by Mr Bezant. What he is seeking to do
2 identify, in recognition of the fact that companies such
3 as Royal Mail and BT will be seeking to drive down
4 costs, how you make the enquiry as to whether or not
5 there is a sufficient causal link between any putative
6 overcharge and supply prices, and in that regard, he is
7 looking at where truck costs would be identified, the
8 types of conduct, direction, documentation that one
9 would expect to see that might indicate why it was that
10 companies such as these would react to higher truck
11 costs, and how they would react at a business unit
12 level, and how those impacts at a business unit level
13 could then carry through into the way in which they
14 interacted with their suppliers.

15 Indeed, all of the narrative he is giving in
16 relation to the various disclosure categories is
17 articulating this, because broadly speaking, what we are
18 looking at, taking the Supreme Court's framework, is if
19 there were to have been an overcharge here, what did the
20 claimants do with it? Did they absorb it? Did they
21 pass it on to customers? Did they put further pressure
22 on their suppliers?

23 That is why Mr Bezant looks at these things,
24 particularly the customer pass-on and the mitigation
25 issues, as part of almost a single exercise. Obviously

1 he is separating out how he approaches these two things
2 but, as we will come on to see in relation to the
3 disclosure schedule, that disclosure schedule is
4 primarily to do with the pass-on categories, and there
5 have been some additions in relation to mitigation. But
6 a lot of those additions in relation to mitigation we
7 have said: look, rather than having a fight about that
8 now, let us have the pass-on material, that will provide
9 us with instruction in relation to many of the
10 mitigation issues, and if we need to ask you for more,
11 we will do.

12 But it is all to be considered in the round. The
13 idea that we should not be able to come forward and say,
14 "Well, there are two ways the Supreme Court has
15 identified you might have mitigated customer pass-on or
16 supplier mitigation, and you should only be able to
17 plead to one of them", is just not a tenable position.

18 The idea that we should have particularised more, as
19 I say, is not something that we could have done.

20 Mr Lask started talking about the types of input and
21 the duration of these arrangements. I do not understand
22 how that could ever inform the sort of evidence we are
23 supposed to have put forward to support the position in
24 relation to this plea.

25 He again went back and resorted to decimalised place

1 figures saying, "Well, look, these are tiny amounts in
2 the overall revenues of these businesses." Well, I hope
3 in opening this issue I explained why that is not the
4 germane consideration here. What you are asking
5 yourself is: when these costs get taken into the
6 business, how are they then dealt with? So that if they
7 are higher than they would otherwise have been on this
8 assumption, what would have been the reaction in
9 relation to passing on to customers or here in relation
10 to mitigation in respect of deals with suppliers?

11 Saying that they are a small part of the business
12 overall just is no answer to that. That is no more than
13 trying to draw a veil over what is plainly a very
14 significant issue.

15 MR HODGE MALEK QC: But, Mr Beard, is that right? Because
16 where you are dealing with something which is a small
17 part of the overall costs, and there are other, very
18 substantial variables such as fuel, which will be going
19 up a lot, up and down throughout the year, and staff
20 costs, which are probably much higher as well, there is
21 no evidence before us, apart from the economic theory,
22 that as a result of overcharge that the claimants put
23 pressure on suppliers to reduce their prices and hence
24 reduce the claimants' costs.

25 You are a supplier of trucks. You -- for part of

1 the period at least, you were a supplier of bodies.

2 I am sure you were a supplier of accessories, et cetera.

3 But you put before the Tribunal no evidence of actual

4 pressure on you to reduce the costs of other items.

5 I understand the theory, I understand what

6 Sainsbury's is saying, but I am trying to get to grips

7 with how likely it is that what you are seeking, which

8 is a causal link, is going to appear. I think it is

9 a highly speculative plea and it is a contingent plea.

10 Because your case is there has been no overcharge. It

11 is saying: well, if there has been an overcharge, then

12 they will have tried to deal with it a number of ways.

13 MR BEARD: Yes.

14 MR HODGE MALEK QC: The pass-on is relatively

15 straightforward and easy to understand. But when you

16 are talking about the other side, a reduction of costs,

17 in the context of a complex business with other costs

18 inputs which are much, much larger, and a large number

19 of items going into that, trying to pin down a reduction

20 of one item to the increase in trucks is going to be

21 extremely difficult as a matter of fact. Even if you do

22 have access to the documents.

23 Now, there is another aspect of this, which is that

24 you are saying, "No, what I need to do is to look at the

25 data, let us say on a fleet level, see what is going on,

1 and until I have that, I will not know whether this is
2 a good point or not." So I honestly do not know whether
3 this is a good point or not as a matter of fact, and you
4 probably do not know either.

5 You are trying to say, "Well, let me look at -- have
6 enough of a plea so I do get disclosure, so I can see
7 whether this theory actually works and I can show
8 causation." That is where I am at the moment. You
9 know, I am not convinced that you are going to be able
10 to do that and how realistic that is going to be as
11 a possibility.

12 MR BEARD: I cannot give you a guarantee that we are going
13 to be able to do that. Can I say it is a realistic
14 possibility? Yes, I can. Because what I can point to
15 is in the analysis being put forward by Mr Bezant,
16 that is not seeking to deal with this all at the level
17 which you, sir, start off dealing with it, at the
18 overall business level. What we are looking at is the
19 particular costs centres. It was for that reason
20 I talked earlier about the truck costs and the
21 transportation costs, because it is going to be in
22 relation to that sort of consideration, at that level of
23 the business, that one anticipates that you are most
24 likely to find that actually, parameters as to how that
25 cost centre operates and whether or not it keeps its

1 costs under control drive its interaction with suppliers
2 such that the supplier prices are driven down because of
3 the impacts of the cost there.

4 There we are not talking about 0.08 or whatever it
5 is, we may be talking about very substantial parts of
6 the business. If we are talking about BT Fleet, one
7 imagines that the clue is in the name and it is running
8 the vehicle fleet and therefore trucks are going to
9 be -- truck costs are going to be a significant part of
10 its overall costs. Therefore, insofar as it takes on
11 board other supplies, it might well be expected that
12 that business segment or unit has a number of costs
13 requirements imposed on it. It imposed key performance
14 indicators on its staff in order to drive down costs, as
15 a whole, and in doing so, one can immediately see that
16 if there were to be a rise in truck prices for that
17 costs centre, for that segment, it would have
18 ramifications for other supplier prices, and it is for
19 that --

20 THE PRESIDENT: I thought we were told -- sorry to interrupt
21 you -- that BT Fleet, specifically, truck costs, are
22 0.3%?

23 MR BEARD: No. I --

24 THE PRESIDENT: Do I misunderstand that? I thought that
25 was -- and that is why it was higher than the other --

1 MR HODGE MALEK QC: My understanding is that it was across
2 the board, rather than --

3 MR BEARD: Yes, I do not think it is BT Fleet, sir.
4 I think --

5 THE PRESIDENT: It was the third claimant in the BT action.
6 Mr Lask, just a simple point of fact.

7 MR LASK: Yes?

8 THE PRESIDENT: Is that right or wrong? I think it is in
9 your skeleton.

10 MR LASK: Yes, the point we have made in the skeleton,
11 I think it is paragraph 12, is that the proportion is
12 0.3% in the case of third claimant, which is BT Fleet
13 Limited.

14 THE PRESIDENT: Yes, that is what I was referring to. Thank
15 you.

16 MR BEARD: One moment, if I may.

17 I do not think that is right, with respect. I have
18 just lost my copy of the skeleton.

19 THE PRESIDENT: It is also in a witness statement somewhere.
20 That is where it has come from.

21 MR BEARD: I will just read it {B3/25/5}:

22 "The Claimants were unaware of the cartel, which was
23 conducted in secret, and the claimed overcharge
24 represents a negligible proportion of their total
25 expenditure during the cartel period (... 0.3% in the

1 case of the Second and Third BT Claimants)."

2 So it is not the truck costs --

3 THE PRESIDENT: No, 0.004% in the case of the second
4 claimant?

5 MR BEARD: Yes, and 0.3 in third.

6 THE PRESIDENT: Yes, so 0.3%. Yes, the claimed overcharge.
7 Yes, 0.3%.

8 MR BEARD: Yes, only the overcharge, not the overall truck
9 costs.

10 THE PRESIDENT: Yes, but that is the bit you are saying
11 would have been so significant that they would have
12 sought to mitigate it.

13 MR BEARD: Well, we are saying that in relation to those
14 elements of that business, in relation to those cost
15 centres, because there will be further cost centres
16 within BT Fleet as well, because that is what we are
17 seeking to identify. The truck costs and the overcharge
18 that is claimed is very substantial. It is a very large
19 amount of money. In those circumstances, what we are
20 dealing with is how are those costs -- when they are fed
21 into that part of the business where inevitably they are
22 going to be a significant cost, how are they dealt with
23 at that point?

24 In those circumstances, we do not consider it in any
25 way speculative to suggest that, in relation to that

1 exercise, in relation to those parts of the business --
2 which we cannot identify because inevitably they are
3 internal -- yes, Mr Williams points out -- no, I am
4 sorry. I am not sure that is right.

5 That in relation to BT Fleet we do not have the
6 information in relation to the subgroups with which we
7 would be concerned in relation to these matters. So
8 simply giving those headline figures do not give us an
9 insight into this, because there is a point within
10 a business where, if you are incurring what they claim
11 is a very significant increase in cost, you will take
12 that into account in your decision making.

13 What we are trying to do is identify where that
14 would be and look at how that is dealt with. That is
15 the best we can do because we do not understand the
16 breakdown of these businesses externally.

17 Now, if that means that the disclosure requests have
18 to be more refined in order to target those relevant
19 entities and how they pass those costs through, then we
20 accept that that may well be right. But we do not have
21 the insight in order to be able to do it.

22 But the key point here is that in order to say, "Is
23 there a legitimate issue here?", it is not good enough
24 to say it is a small part of the overall costs of any
25 business. Because as I say, what you would end up with

1 is a contention that a mitigation claim was less and
2 less plausible the larger and larger the business was
3 that we were concerned with, and because we cannot
4 identify the breakdown of that business, we cannot take
5 matters any further.

6 What is being said against us is: well, you should
7 have been able to hypothesize, from other data that you
8 have, information that could indicate whether or not
9 there was a reaction by another business in respect of
10 a cost component for that business when it dealt with
11 you.

12 I have explained how that is simply impossible.
13 Since we cannot do that, we cannot provide any sort of
14 other meaningful particulars, it is necessary that there
15 is some disclosure in order to be able to test this.

16 Now there are two issues here. One is, is it
17 arguable as a point of law and as an amendment? It
18 plainly is. The points, sir, Mr Malek, you raised,
19 clearly go to the factual assessment of these matters.
20 We cannot take those matters further without insight
21 into the business that we are talking about here. That
22 necessarily requires some sort of disclosure or
23 provision of information. That is what we do not have.

24 We cannot progress the matter further at this stage.

25 MR HODGE MALEK QC: So you put together what the Supreme

1 Court says in Sainsbury's, where it says it is a high
2 evidential burden on the other party to produce the
3 evidence that you need once you have raised the legal
4 plea, and the passage in Clarke, where they say that
5 there are certain circumstances where you can make
6 a plea, even though you do not have the facts and you do
7 not actually know what the answer is, because you are
8 just not in a position to know. But what you are
9 putting forward is a number of possibilities, and you
10 say that the possibility that you want to put forward is
11 one that is capable of being found on the evidence once
12 it has been reviewed.

13 MR BEARD: Well, it is more than that, because it is
14 obviously applying the reverse summary judgment test of,
15 is it self-contradictory or implausible? There we say,
16 no, we have done our best to look at what it is are the
17 sorts of things one would anticipate would be relevant
18 to this, how a business would consider these sorts of
19 issues. We cannot take it further because this is
20 material that is exclusively on the other side.

21 So to that extent, yes, we do rely on Clarke, yes,
22 we do rely on the Supreme Court, and in those
23 circumstances, we should not be kept out of that as
24 a plea. Because plainly, as a matter of the summary
25 judgment test, it is not self-contradictory. To the

1 contrary, it is actually one of the two parts of the
2 mitigation analysis the Supreme Court is putting forward
3 in this circumstances.

4 What would be extremely unfortunate is, whilst
5 I take, sir, your point that on the face of it pass-on
6 to customers seems more straightforward, if you ended up
7 with a situation where this Tribunal was only
8 considering that element and was to conclude that,
9 actually, what the evidence showed was that costs were
10 dispersed elsewhere, but that there was no plea in
11 relation to those matters, that would be a very
12 unsatisfactory outcome and would be precisely ending up
13 in a situation of a risk of overcompensation, which in
14 fact the Supreme Court counsels against. It does not
15 want undercompensation or overcompensation, which is why
16 it was explicitly advertent to categories 3 and 4 being
17 relevant categories that you can rely on in these
18 circumstances.

19 MR HODGE MALEK QC: Which are not mutually exclusive because
20 a company may try to deal with the increase in price in
21 more than one way.

22 MR BEARD: Precisely.

23 MR HODGE MALEK QC: It may recover it, some on your input
24 side, and then --

25 MR BEARD: Yes.

1 MR HODGE MALEK QC: -- some on your output side.

2 MR BEARD: Exactly.

3 MR HODGE MALEK QC: So we have to take a view, looking at it
4 globally, as to whether or not it is plausible that the
5 outcome that the economic theory indicates is
6 a possibility.

7 MR BEARD: Yes. I think that is undoubtedly right, because
8 that is the application of the summary judgment test in
9 circumstances where we are dealing with these particular
10 situations.

11 I think just to reinforce that, when we come on to
12 look at the disclosure issues, as I say, what the
13 disclosure categories in P04 and P05 are focused on are
14 primarily pass-on issues, but they are the same
15 documents, in the main, that one will be using for
16 mitigation analysis. Therefore, it is not that you have
17 got two entirely separate exercises going on in relation
18 to pass-on and mitigation. You have the expert looking
19 at this material to consider how this separation of
20 distribution of any putative increased costs might have
21 occurred.

22 So it is considering it in the round. So there is
23 an extent to which, although the nature of the exercise
24 may be different in relation to mitigation, nonetheless,
25 one can see this as two sides of that coin in relation

1 to distribution of costs subsequently.

2 So, yes, plausible. Yes, legally founded. No, we
3 do not have detailed evidence. Yes, we do have an
4 evidential account from our expert as to the sort of
5 material that would be germane, and, yes, it is a factor
6 one takes into account when one considers the
7 proportionality of disclosure. Which is precisely what
8 we have done by trying to focus the disclosure
9 categories down such that we are not asking for lots
10 more material in relation to mitigation; we're focusing
11 on the stuff that we think is going to be relevant for
12 pass-on and will inform us in relation to mitigation.

13 MR HODGE MALEK QC: So there is one possibility that if you
14 do not get permission to amend now, that your expert
15 looks at the material in any event for the pass-on, and
16 comes up with some evidence, saying, "Now I have
17 looked at it, I can see exactly how they have sought to
18 reduce their costs as a reaction to an increase in
19 price."

20 MR BEARD: Well, it is possible. It is possible that is
21 exactly what would happen. But what we are saying is,
22 in circumstances where you have -- I mean, as very
23 clearly explained by the Supreme Court, these options
24 for a sophisticated business as to how it lays off its
25 increases in costs, that the sensible thing to be doing

1 here is recognising the plausibility of mitigation and
2 ensuring that proportionate disclosure is provided
3 following permission to amend. But there isn't a good
4 reason not to permit amendment here. As I have dealt
5 with when I was talking in relation to the complements
6 matters, in circumstances where we are over a year from
7 trial, and in circumstances where it is a plausible not
8 self-contradictory plea, the idea that we should be kept
9 out of the amendment is one that we think is just --
10 would be plainly unfair and unjustified on the relevant
11 legal tests given the Supreme Court.

12 Then the question is one of what disclosure is
13 appropriate in these circumstances. With respect to
14 Mr Lask, that is not something that should act as a bar
15 to any sort of amendment, because the prejudice he talks
16 about here is not real prejudice in the sense that is
17 referred to in all those cases about very late
18 amendments, where you just cannot deal with it. The
19 prejudice he is referring to is the risk that his expert
20 actually has to deal with these things. But as Clarke
21 himself made clear, that is not real prejudice. That is
22 simply engagement with the litigation process, and you
23 are not at a disadvantage by this amendment being put
24 forward; you are simply ensuring that these issues are
25 properly aired.

1 It is for that reason we say that there is no good
2 reason to refuse the amendment, and -- as amended by --
3 following the discussion earlier, but on the other hand,
4 one should not -- one then looks at how disclosure is to
5 be dealt with.

6 There are a couple of other brief points, if I may,
7 just to pick up.

8 Mr Lask looked at Mr Harvey's evidence, in
9 particular at paragraph 5.21 in his third statement, and
10 referred there to issues to do with the level of
11 disclosure that he would want to take on and review.
12 I should say, sir, just for reference, that the
13 preceding paragraph, 5.20, which sets out what the
14 nature of the prejudice would be to Mr Harvey, actually
15 culminates in a statement in 5.20(d) {B3/17/16} from
16 Mr Harvey saying: well, if I had to deal with both
17 pass-on and mitigation, I might need to "unwind" the
18 analysis when I came to reply in relation to it.

19 Well, that may well be absolutely right, but that
20 does not amount to prejudice to Mr Harvey. That is
21 exactly what the Supreme Court was envisaging might well
22 be needed given the potential heads of mitigation.

23 In 5.21 {B3/17/16}, there are issues again being
24 raised about evidence, further evidence being required,
25 particularly from the claimants, and particularly in

1 relation to negotiation. In relation to those matters
2 we say well, look, it is a matter for Mr Harvey and the
3 claimants how they want to react to these matters. We
4 have made clear that we do not think negotiation
5 evidence is relevant. If they want to pursue those
6 matters, we will deal with them in due course.

7 But again, not prejudice and not something creating
8 problems for the overall process.

9 Perhaps the last couple of points I should make in
10 relation to these issues. The criticisms of Mr Bezant
11 not trying to conjure up imagined relationships from
12 incomplete data that would not tell you about
13 relationships, and how costs might move between
14 different sorts of products and supplies, is no proper
15 criticism of Mr Bezant. Mr Bezant has set out
16 a dispassionate analysis of how it thinks cost
17 recovering companies work and, through his account of
18 why it is that certain disclosure categories would be
19 relevant, explains how he would carry out the analysis
20 that would show whether or not there was a causal
21 relationship through the various entities in relation to
22 these matters.

23 There was a reference to it being a direct causal
24 link. Well, it needs to be a sufficient causal link but
25 if it does not need to be simply costs into one entity,

1 and it is that entity that negotiates the prices
2 directly. But again, that is an obvious point in
3 relation to these issues.

4 So, in conclusion, we end up with a situation where
5 the argument that somehow there has been a gross delay
6 in relation to these matters is just not fair. Whether
7 or not one reads the Tribunal judgment as saying, "As
8 a matter of law you cannot have mitigation", or "The
9 factual circumstances in which mitigation can ever be
10 considered are so limited as to render it vanishingly
11 implausible as a plea", it does not matter. The point
12 is that the Supreme Court clarified that situation. It
13 was perfectly sensible and indeed recognised by this
14 Tribunal on previous occasions that it was sensible to
15 wait until the outcome of that Supreme Court judgment
16 before we proceeded to make amendments in relation to
17 such matters, or pursue cases in relation to these
18 issues.

19 That is what we have done. There has not been
20 substantial delay, there would not be substantial
21 prejudice, and we can deal with disclosure issues in due
22 course.

23 I will just check, if I may, whether or not any of
24 those near me have any other additional points.

25 I do not have any further submissions, unless I can

1 assist the Tribunal further on any matters arising?

2 MR JUSTICE FANCOURT: Can I ask you, Mr Beard, about the
3 direct or sufficient causal link that you just referred
4 to.

5 MR BEARD: Yes.

6 MR JUSTICE FANCOURT: In connection with the reverse summary
7 judgment test of plausibility or implausibility.

8 MR BEARD: Yes.

9 MR JUSTICE FANCOURT: Is it your case that what is required
10 is a causal connection between the putative overcharge,
11 as you call it, and some cost reduction at some stage by
12 the claimants as part of their business, provided that,
13 at an earlier stage, at a lower level, the putative
14 overcharge has been fed in, in some way, to an analysis
15 of costs? Is that what you call a sufficient causal
16 link or does it have to be something as a direct -- more
17 direct response to the particular overcharge?

18 MR BEARD: I am slightly concerned that -- I recognise that
19 there can be a number of situations here, for instance
20 you could have a situation where the initial costs go
21 into a regulated entity, which is engaged in regulated
22 activities, and that there the cost is baked in very
23 clearly and the increase in cost is baked into the
24 prices that are then fed through, and that feels like
25 a very direct causal connection, and that would be

1 relatively straightforward.

2 You might have a situation where that sort of
3 regulated entity actually deals with another internal
4 entity and then that internal entity simply transfers
5 those costs onwards. Again, that would feel like it was
6 a fairly clear situation, albeit I suppose, in those
7 circumstances, one would say it was indirect.

8 Once you have moved out of that and into unregulated
9 activities, where you have not necessarily got the
10 direct reliance on the regulator taking increases in
11 forecast costs into account, then it is right that one
12 would have to look at how those heads of costs were
13 taken into account and where they were then dealt with,
14 and it is possible -- and I completely recognise -- that
15 the chain that those costs pass through mean that they
16 are far too diffused, such that the end interaction with
17 the customer is sufficiently indirect that one cannot
18 see causal potency.

19 But I think, as the president indicated before the
20 short adjournment precisely where one draws the line on
21 the extent of causation in cases like this, it remains
22 a live legal issue. What we say is that there are
23 clearly instances here and examples we are dealing with
24 here where it appears to us that, whatever causal
25 mechanism you are talking about, there is good reason

1 and plausibility dealing with these entities that you
2 will have sufficiently approximate causation. But we
3 also recognise that there may well be arguments about
4 how approximate those causes have to be and then factual
5 issues about where the proximity lies.

6 I know that is perhaps not an entirely satisfactory
7 and complete answer, but I think that, to some extent,
8 it is anticipating some of the legal issues that may
9 well arise in relation to this issue in this case, and
10 potentially others, about the mitigation head of claim
11 or head of -- mitigation head under paragraph 205(iii)
12 that the Supreme Court has set out.

13 Sir, I recognise that is not a "yes" or "no" answer.

14 MR JUSTICE FANCOURT: Thank you.

15 MR HODGE MALEK QC: I think Mr Lask's hand is up, if you
16 look at his --

17 THE PRESIDENT: Mr Lask, your hand is up.

18 MR LASK: Thank you, sir.

19 My virtual hand was up. It was really just to raise
20 one brief point, which is that I mentioned in my earlier
21 submissions that there was a lack of clarity about DAF's
22 case, and Mr Beard's most recent submissions have, in
23 our view, exacerbated that lack of clarity, because
24 Mr Beard was focusing on BT Fleet and talking about the
25 need to see whether things such as BT Fleet's KPIs drove

1 its interaction with suppliers.

2 The question that begs is: well, is the proposed
3 mitigation defence concerned only with cost reductions
4 achieved by BT Fleet, which are going to involve inputs
5 such as complements -- and as I mentioned earlier, it
6 seems that complements is off Mr Bezzant's menu -- or are
7 DAF saying that they are going to be looking at the
8 costs reductions achieved by the BT business as a whole,
9 with suppliers of stationery and electricity and things
10 like that?

11 That is a huge difference in terms of the scope of
12 the proposed plea, and I do say that is something we
13 need some clarity on.

14 MR BEARD: If it assists at all in relation to the question
15 that was raised about Mr Bezzant's evidence at 11(c),
16 I think the clarification is that what Mr Bezzant was
17 referring to at 11(c) was the exclusion of bundled
18 complements, which is what we have been referring to
19 complements, as in strict complements, and that those
20 would be dealt with differently. So I think -- if that
21 assists Mr Lask.

22 In relation to whether or not it is business-wide
23 offsetting of costs, as we have indicated, it is not
24 that we expect that we will necessarily see some kind of
25 impact on, if there is such a thing, a BT globally

1 negotiated electricity price with an electricity
2 supplier across the whole of the BT business, but what
3 we would be interested in, and what we do think is
4 relevant and what Mr Bezant is interested in, is that if
5 someone like BT Fleet, or a subgroup within BT Fleet,
6 does have particular other inputs which are not just
7 going to be complements but are going to be all sorts of
8 other supplies, and may include, for example, I suppose,
9 the electricity that it uses at its factory or
10 warehouse, that in those circumstances, that is
11 potentially relevant.

12 That is why I have intended to try to focus on the
13 place where the truck costs come into the business, as
14 being the key place where one focuses on these issues.

15 THE PRESIDENT: Yes, thank you.

16 We will take just five minutes. So we will come
17 back at five past three.

18 (3.00 pm)

19 (A short break)

20 (3.06 pm)

21 THE PRESIDENT: Mr Beard, are you back in the hearing?

22 MR BEARD: I can hear. Unfortunately I have just lost
23 video. I am just going to change screens. I can hear
24 what is going on. I apologise.

25 THE PRESIDENT: We can pause a moment.

1 This is obviously an important question. You have
2 both given us a lot to think about and we are going to
3 take time to consider our ruling, and it will be handed
4 down in writing in due course.

5 So we now move on. I think we have to come back to
6 the question of timing for the disclosure that was
7 raised before lunch. Would that be a sensible thing to
8 wrap up now?

9 I think, Mr Lask, you were going to take
10 instructions. That is the complements disclosure.

11 MR LASK: Yes.

12 THE PRESIDENT: The question was whether some of it could be
13 given earlier --

14 MR LASK: Yes.

15 THE PRESIDENT: -- (overspeaking) -- 29 April.

16 MR LASK: We have investigated and we would be able to
17 provide C1 and C3 disclosure by the end of March, and
18 then C2 and C4 by the end of April.

19 Ruling Order

20 THE PRESIDENT: So C1 and C3, 31st March, and C2 and C4 by
21 29th April.

22 Mr Beard, are you going to push against that?

23 MR BEARD: No, I am not. I am grateful for the instructions
24 being taken, so thank you very much.

25

1 Discussion re Tax Issue

2 THE PRESIDENT: So that is the order we will make. Thank
3 you.

4 If we go then next to the question of the tax issue
5 which arises only in the Royal Mail proceedings, where
6 it is DAF that would like to adduce expert evidence.
7 I think at the moment they have put it as being either
8 from Mr Bezant or Mr Pritchard. They are not seeking
9 both on tax. They have explained or Mr Pritchard has
10 explained some of the tax issues involved.

11 Mr Lask, it did seem to us there are some real tax
12 issues here, and that it does, on what we have read,
13 seem there appear to be good reasons why expert evidence
14 might assist, even if the underlying questions are to
15 some extent factual. But the analysis of that in terms
16 of the applicable tax and how it might have been done is
17 the sort of thing that a tax accountant would deal with.

18 So that is where our provisional view is on that.

19 So perhaps you would like to explain why it is that
20 you are opposing the tax evidence. It is quite
21 a distinct part of the Royal Mail case, I think.

22 MR LASK: Yes, if I may, I will give you Royal Mail's
23 position in a nutshell. We say that whether expert tax
24 evidence is required depends on the correct approach to
25 accounting for tax.

1 Our position is that the correct approach is to make
2 adjustments to the claim based on Royal Mail's actual
3 tax position in each year of the relevant period, and
4 that has been described as approach 3. Whether the
5 adjustments are correct is a matter of fact, we say,
6 that can be tested by reference to the contemporaneous
7 documents and the factual witness evidence and that does
8 not require expert tax evidence at trial because, as
9 I say, it depends on Royal Mail's actual position at the
10 relevant time, which is a matter of fact. It does not
11 depend on issues of expert tax judgment.

12 Just to be clear, our concerns about DAF's proposal
13 to appoint a tax expert are driven by a concern as to
14 the approach that it may be seeking to adopt, and the
15 concern is that it may be seeking to adopt a detailed
16 counterfactual analysis examining what Royal Mail ought
17 to have done, had it not suffered the overcharge.

18 That is our essential concern.

19 Now, DAF previously insisted that expert tax
20 evidence would be required in any event, but it has now
21 modified its position, as you say, sir, and it now
22 acknowledges in its skeleton that it may be possible to
23 address tax issues through Mr Bezant. So the issue for
24 the Tribunal is whether DAF should have permission to
25 adduce tax evidence from either Bezant or Pritchard at

1 its election, or whether there should be a structured
2 process for resolving the issue, either by agreement or,
3 if necessary, by the Tribunal.

4 We would be very happy for the Tribunal to indicate
5 today that Royal Mail's proposed approach is the
6 appropriate one to tax. But, failing that, we submit
7 the Tribunal should adopt the approach we have set out
8 in the draft order at paragraphs 7 to 11. That is an
9 approach that essentially requires DAF, in the first
10 instance, to explain what issues it thinks expert tax
11 evidence is required on.

12 THE PRESIDENT: This is, just so we look at it, this in B3
13 at tab 18, I think. Page --

14 MR LASK: Yes, page 5.

15 THE PRESIDENT: Page 5, yes. {B3/18/5}

16 MR LASK: Sir, you will see that we are proposing that there
17 be a tax statement produced in short order addressing
18 the issues that they contend have to be resolved in
19 order to determine the case on tax, whether and to what
20 extent those issues are matters which are capable of
21 being verified by reference to factual evidence, and, to
22 the extent that they cannot be determined by reference
23 to factual evidence, what, if any, expert evidence they
24 say is necessary.

25 I would say that to appoint a tax expert before

1 understanding what it is he would propose to address is
2 putting the cart before the horse. In relation to all
3 the other experts that the parties have been discussing,
4 the parties have only consented or sought the Tribunal's
5 permission once an explanation has been provided of what
6 the evidence will consist of.

7 Granting DAF open-ended permission to instruct a tax
8 expert would, it seems to us, give it liberty to adopt
9 any approach it wants, including the counterfactual
10 approach that we strongly oppose.

11 It would also allow the issue to drift, because
12 there is no indication from DAF as to when we would have
13 any clarity as to what sort of approach it was proposing
14 to adopt. That is why we have proposed a structured
15 process that provides for the swift resolution of this
16 matter according to a strict timetable.

17 Once it is clear what DAF's position on expert
18 evidence concerning tax actually is, then we can try to
19 resolve the matter between us, or, if necessary, we will
20 come back to the Tribunal. That is the position in
21 a nutshell, sir.

22 What I was not proposing to do was take you through
23 the evidence explaining in detail the approach that
24 Royal Mail has adopted to assessing tax.

25 THE PRESIDENT: Yes. I mean, Mr Pritchard in his latest

1 statement suggests that he should meet with Mr Harvey to
2 discuss the appropriate approach, to try to agree --

3 MR LASK: We would be very happy with that, but we say that
4 should be part of the process we propose rather than for
5 him -- for DAF to be given permission to call him as an
6 expert witness at trial before they have had that
7 discussion.

8 THE PRESIDENT: I mean, I can see the desire for a -- to
9 have a common approach, if that is possible. But even
10 if it is -- I mean, if you say they are just questions
11 of fact, the factual computations are to be carried out,
12 no doubt it could be presented by counsel, and then
13 various schedules of calculations could be produced and
14 explained to the Tribunal by counsel.

15 It is often more convenient if it is done in the
16 form of an expert's report and then, insofar as there
17 are differences between -- if there are different ways
18 of handling, for example, capital allowances -- I have
19 no idea what the difference might be -- for that to be
20 explained through the experts rather than by counsel
21 addressing the Tribunal.

22 MR LASK: Indeed, sir, and we are proposing to have
23 Mr Harvey do that.

24 THE PRESIDENT: Yes, well, that is fine. But, I mean, if
25 Mr Harvey does it -- clearly, you can have your own

1 accounting tax expert, but what DAF is saying, they want
2 to have their own accounting tax expert to do that. It
3 seems to me a slightly different issue from the question
4 of, well, what will be the correct approach.

5 MR LASK: But sir, Mr Harvey does not hold himself out as
6 a tax expert as such, but someone who can -- who is well
7 placed to do the calculations and to verify the approach
8 that has been taken to the calculating of Royal Mail's
9 claim. So that is an approach we have no difficulty
10 with. If DAF were to appoint an expert to do the same
11 approach, there would not be a problem. But the concern
12 is that appointing a tax expert such as Mr Pritchard
13 will inevitably mean that DAF's approach evolves into
14 precisely the sort of counterfactual, detailed
15 counterfactual analysis that we say is inappropriate
16 and, as we have mentioned in the skeleton, we say is
17 contrary to authority.

18 The concern is, as I say, the concern about the
19 appointment of a tax expert, which DAF now accepts is
20 not essential, but the concern is driven by the concern
21 about the approach that will end up being adopted.

22 THE PRESIDENT: Well, is it not -- there seem two actually
23 slightly distinct aspects to this. One is whether both
24 sides should have permission to have a tax expert, and
25 then it is up to each of you to decide, within limits,

1 who it should be. If you feel confident and Mr Harvey
2 feels confident, and he is an experienced accountant,
3 that he can do it, so be it. If Mr Bezant is confident
4 he can do it, equally, and if he says "No, this is
5 getting into complexities of tax calculations that I am
6 not comfortable with", then one would have thought it
7 should be undertaken by someone else.

8 That is one aspect. The other aspect is, well, what
9 is the right approach to adopt to calculating the tax
10 position? That is a quite separate point. I do not
11 think we are in a position to decide that now. The
12 question is then, should it be decided before trial, so
13 they go off in the same way, or is it something that is
14 to be argued out at trial? If it is to be decided
15 before trial, that might have to be in the form of some
16 sort of preliminary issue, where we hear argument about
17 which approach is, as you say, permitted by authority or
18 contrary to authority.

19 That is clearly not something we can address at the
20 moment.

21 MR LASK: No, sir. I am not inviting the Tribunal to rule
22 now on what the correct approach is. What I am inviting
23 the Tribunal to do is adopt the process we have
24 proposed, which would provide for DAF to indicate to us
25 what approach it proposes to adopt, for us to try to

1 reach a measure of agreement on that, by which time it
2 should be clear whether, indeed, a tax expert is
3 required or not. Because, as I say, DAF says it may not
4 need a tax expert.

5 THE PRESIDENT: Well, what I think it says is it will want
6 expert evidence but it might not have to be a separate
7 expert. It could be the same expert as it is using for
8 other aspects of the case. He would still be giving
9 evidence on tax.

10 MR LASK: The distinction I am drawing is between an expert
11 such as Mr Bezant and a tax expert such as Mr Pritchard,
12 who, as we say, we fear, would be seeking to adopt this
13 approach for counterfactual analysis.

14 THE PRESIDENT: Yes.

15 MR LASK: All we are really asking for is to put the horse
16 before the cart, which is to -- let us establish the
17 correct approach and then work out whether -- what sort
18 of expert is needed.

19 THE PRESIDENT: Yes. I see.

20 I think we will -- sorry, we have to keep breaking
21 off, but that is the nature of a CMC with a lot of
22 issues, and we obviously have not heard from Mr Beard,
23 but let me just have a word with the two other members
24 of the Tribunal. So we will withdraw for just a few
25 moments.

1 (3.22 pm)

2 (A short break)

3 (3.24 pm)

4 (Ruling was given)

5 Further Discussion

6 THE PRESIDENT: So Mr Lask, I will go back to you. It is
7 not quite the proposal that is in your paragraph 7, but
8 it seems to us to flow from what you have been
9 submitting. Is that something that you find
10 problematic?

11 MR LASK: Sir, may I just mute for 30 seconds to take
12 instructions on that?

13 THE PRESIDENT: Yes, and Mr Beard likewise. We have not
14 heard from you, but I think you can see the logic of it.
15 So you both may want to mute while you take instruction.

16 (Pause)

17 Mr Lask, have you been able to take instructions?

18 MR LASK: I have, sir. We are broadly content with the
19 proposal, subject to one possible wrinkle, which is
20 this: we would hope that, following a meeting between
21 Mr Harvey and whoever is appointed by DAF, some
22 agreement could be reached on the proposed approach.
23 But if DAF do opt for Mr Pritchard, and Mr Pritchard and
24 Mr Harvey are unable to reach agreement and then
25 statements have to go to the Tribunal, and the Tribunal

1 rules that a detailed counterfactual analysis proposed
2 by Mr Pritchard is the correct approach, it may be in
3 those circumstances that Mr Harvey is not able to give
4 evidence for us because we are now into expert tax
5 territory. So we would need the option, in those
6 circumstances, to appoint a tax expert instead of
7 Mr Harvey.

8 THE PRESIDENT: Yes. I think that was implicit in what
9 I was indicating.

10 MR LASK: I am sorry.

11 THE PRESIDENT: No, that would be understandable.

12 Right, Mr Beard?

13 MR BEARD: Yes. Thank you. We are content to proceed on
14 that basis. I am not going to get into the fact that
15 there are plainly expert matters here. There is just
16 one point I think it is worth emphasising.

17 Mr Lask keeps referring to the analysis his expert
18 is proposing to put forward and a counterfactual
19 analysis. There will only ever be a counterfactual
20 analysis in these circumstances. The facts have passed.
21 We are dealing with counterfactual issues now. The
22 question is how you deal with them. We think that is
23 paradigmatically a matter of expertise and in particular
24 tax expertise.

25 We think the claimants have got themselves into

1 a very odd position suggesting that on tax questions
2 they have a non-tax expert, but that is something that
3 they have chosen to do and this process will deal
4 with it.

5 THE PRESIDENT: Yes, well, we are not directing who the
6 expert may be, and the claimants have the option to
7 reconsider. They have seen what Mr Pritchard said. So
8 we shall say that both sides have permission to adduce
9 evidence from an expert dealing with -- in the
10 Royal Mail proceedings, dealing with the tax position as
11 regards any damages. The two experts -- that the two
12 experts should meet on a without-prejudice basis to
13 discuss what approach should be adopted insofar as they
14 do not agree. They should file statements with the
15 Tribunal. The Tribunal will then decide, which will
16 leave open the question of whether it needs an oral
17 hearing, and, depending upon the decision, the claimants
18 have permission to appoint a different individual as
19 their tax expert.

20 MR BEARD: Can I just interpolate one point? Would it be
21 sensible to set a date by which the experts meet?

22 THE PRESIDENT: Yes, I was about to do that.

23 MR BEARD: I am sorry, sir. Right.

24 THE PRESIDENT: I wanted to get the -- I just want to be
25 clear, there is no disclosure required for any of this

1 now, is there? We have not detected there is
2 a disclosure application that is related --

3 MR BEARD: I think not now. We have a great deal of the
4 relevant material, which is why Mr Pritchard has been
5 able to point out various (inaudible) in the expert --

6 THE PRESIDENT: Right, okay. So that can then proceed.

7 So if we say a date by which there should be -- I do
8 not know if we have to do each step, but if we say
9 a date for the meeting and a date for any statement to
10 the Tribunal, that will be sufficient. What would be
11 a reasonable time for a date for a meeting? Can it be
12 done before Easter? By 31st March? Is that reasonable?

13 MR LASK: Sir, we would certainly hope so. On our proposal,
14 we were proposing the parties write to the Tribunal
15 setting out their respective positions by 23rd March,
16 and we would be retaining that date as the date for the
17 filing of the statements that you envisage, and so the
18 meeting -- the without-prejudice meeting would need to
19 be before that.

20 MR BEARD: I am sorry, that is simply not going to be
21 feasible. We got the tax disclosure from the claimants
22 very recently. We are still in the process of reviewing
23 it. There is no point in having this meeting to discuss
24 the approach until that has been digested. I think the
25 sensible course would be to be setting a meeting before

1 the end of April, and then any statements two weeks
2 thereafter would seem to be the sensible course.

3 If there is a convenient date during April by which
4 time we have digested the disclosure and our expert is
5 able to join the meeting, then obviously we will do
6 that, and try to bring things forward. But it is
7 obviously sensible that we are entitled to review that
8 disclosure. It may be that Mr Harvey has sought to just
9 be reviewing it in the background, but there has been
10 a long delay in disclosure of tax returns and --

11 THE PRESIDENT: Well, it is not a pressing urgency for the
12 trial, but I would have thought that -- I mean, he does
13 not -- Mr Pritchard does not have to get on top of
14 every -- all the information. He has got to understand
15 the general approach and therefore the general approach
16 he wants to adopt.

17 MR BEARD: Yes.

18 THE PRESIDENT: He is not going to have to produce any
19 calculations.

20 MR BEARD: No.

21 THE PRESIDENT: So if we were to say it should be, for
22 example, 16 April, it would ensure that there is --

23 MR BEARD: Yes, I am sure --

24 THE PRESIDENT: -- plenty of time and that any --

25 MR LASK: Sir, I am so sorry to interrupt, but may I remind

1 the Tribunal that the deadline for witness statements is
2 29th April, and the scope, certainly on our side -- oh,
3 sorry, May. So the scope of our factual witness
4 evidence will depend in part on the outcome of this tax
5 process, because we are going to be adducing factual
6 witness evidence on tax. So that does have to be built
7 in to the timetable, and we need to have enough time for
8 the expert process, the outcome of the expert process,
9 to feed into our factual witness evidence. So we are
10 concerned about the current time frames being
11 considered.

12 THE PRESIDENT: Well, it may be that the witness statements
13 purely on tax matters -- which is a rather discrete
14 aspect, is it not, of the factual evidence -- can be put
15 back, because you have got a lot of evidence dealing
16 with everything else that we have been talking about,
17 and I do not think that would cause any disruption to
18 the trial if we were to revise that date, because if
19 the Tribunal has to meet and rule and so on -- and if
20 they were to have the meeting on 16th April, then they
21 could produce their statements, could they not, by
22 30th April?

23 MR BEARD: That seems entirely feasible, yes.

24 THE PRESIDENT: At that point the Tribunal will have to
25 decide what to do. I would have thought that the

1 sensible course is not to change the date now, but if it
2 turns out -- and you will know this from your expert
3 following the meeting -- that there is material issues
4 on the correct approach to tax which affect your factual
5 evidence, and therefore you will await the Tribunal's
6 ruling, that both sides should write in saying they
7 suggest that specifically any factual evidence that
8 relates to the tax matters should be put back to several
9 weeks after the Tribunal has ruled, and deal with it
10 that way.

11 MR LASK: Sir, thank you. I think, subject to any contrary
12 indication from those instructing me, I think we would
13 agree that any amendment to the timetable for factual
14 witness statements should await further -- should allow
15 for the process to run at least part of its course.

16 Just to flag up that any movement on the deadline
17 for factual witness statements will have a knock-on
18 impact on the deadline for expert reports, at least
19 insofar as they relate to tax.

20 THE PRESIDENT: Yes. I mean, it is only the -- it will only
21 affect any experts' reports on tax, of course. Not on
22 anything else. We are not generally extending time for
23 factual witnesses. It is only insofar as they concern
24 the Royal Mail handling of its tax affairs.

25 MR LASK: Yes. Subject to there may be some overlap with

1 expert evidence on financing because there is
2 a financing aspect to the tax claim.

3 THE PRESIDENT: Yes. Well, you can look into that if
4 necessary.

5 MR LASK: Thank you.

6 THE PRESIDENT: But it is not going to affect the -- any of
7 the main part of the claim?

8 MR LASK: No.

9 THE PRESIDENT: Namely overcharge, pass-on --

10 MR LASK: No.

11 THE PRESIDENT: -- loss of volume and so on. Yes.

12 Well, if that can be put into the order. Would that
13 then be a sensible moment to go back to the question we
14 left you with, which is the truck leasing financing
15 expert issue, where you both seem to want two experts?

16 MR BEARD: We indicated in correspondence that we would
17 stick with Mr Delamer. We have received a letter
18 overnight indicating that it is possible that the
19 claimants want to maintain two experts. Even in the
20 face of that, we are content to be using Mr Delamer,
21 albeit that if something is raised specifically by
22 Mr Harvey that Mr Delamer aware cannot cover in reply,
23 we might have to use Mr Bezant for those purposes. I am
24 sorry, Professor Neven. I apologise. I misspoke.
25 Professor Neven in relation to that. But our intention

1 is just to use Mr Delamer for those matters. We do not
2 fully understand the claimants' position.

3 THE PRESIDENT: Yes.

4 Mr Lask?

5 MR LASK: Yes, sir. Thank you.

6 We note the letter that came in overnight indicating
7 DAF's change of position. Prior to that, both parties
8 were agreed that it may be necessary to have two.
9 I will explain why, from the claimants' perspective.

10 Just by way of context, a relatively small number of
11 lease trucks are involved in the claims, but they do
12 raise specific issues in relation to assessing the loss,
13 and, broadly speaking, there are three questions. The
14 first question is: what is the relevant value in the
15 value of commerce for leased trucks? We take it to be
16 the rental instalment payments less any maintenance
17 charges.

18 The second question is: well, how do you assess the
19 point in time at which the overcharge was incurred,
20 where rental payments would have been paid over a number
21 of years? That is the second question. It is those
22 first two questions that we propose Mr Harvey will deal
23 with.

24 Then there is a third question, which is whether
25 there was a specific financing cost associated with

1 renting leased trucks. Because obviously if the rental
2 payments were higher, then it is possible that the
3 financing costs may have been higher too.

4 It is that question we envisage Mr John Earwaker
5 potentially dealing with if it is necessary to do so.
6 So there certainly would not be any duplication. It is
7 just a feature of the specific issues that arise in
8 relation to assessing the loss on leased trucks.

9 THE PRESIDENT: Yes, I see.

10 So it is -- Mr Earwaker is on the financing costs
11 associated with leased trucks?

12 MR LASK: Yes.

13 THE PRESIDENT: Harvey is on the value to be attributed to
14 leased trucks --

15 MR LASK: Yes.

16 THE PRESIDENT: -- and the assessment of the point in time
17 when the overcharge was paid?

18 MR LASK: Yes, well, the overcharge, the overcharge on the
19 leased trucks. The way you articulated it, sir, which
20 reflected the way I articulated it, just explains why
21 the approach to overcharge on leased trucks is different
22 from the approach to overcharge on purchased trucks.

23 THE PRESIDENT: Yes. It has to be a particular point in
24 time? It is not incurred every time a lease payment is
25 made?

1 MR LASK: I think that is the question or one of the
2 questions Mr Harvey will be looking at.

3 THE PRESIDENT: Yes. We will take just a moment to
4 consider.

5 (3.41 pm)

6 (A short break)

7 (3.42 pm)

8 Order Made

9 THE PRESIDENT: We see the point that Mr Lask has made. We
10 will allow you -- give you permission -- to have -- we
11 note that Mr Earwaker is giving evidence anyway on the
12 financing losses, the Royal Mail case. So as long as
13 they are non-duplicative, we will give you that
14 permission, and similarly, then, if so advised, DAF has
15 permission to do the same.

16 Given the split that you have explained ...

17 MR LASK: Thank you, sir.

18 MR BEARD: Thank you.

19 Discussion re Disclosure Categories

20 THE PRESIDENT: That then takes us to the disclosure
21 categories, I think, as the remaining issue, where there
22 has been some movement, and I think we have been sent
23 a revised schedule.

24 MR BEARD: Yes, I was going to refer to the schedule you
25 asked about over the short adjournment, since that is

1 the schedule that deals with matters that essentially
2 are not agreed. Obviously we have the longer Redfern
3 Schedules, but they cover matters that are agreed, and
4 I was --

5 THE PRESIDENT: Am I looking at the right -- I have an
6 annex 1 to Royal Mail BT's letter dated 1st March?

7 MR BEARD: That is right, and it should have --

8 THE PRESIDENT: Is that the schedule I should be looking at?
9 The column is in red. The entry is in red.

10 MR BEARD: That is right. At the bottom it should have in
11 the middle of the page "01/03/21".

12 THE PRESIDENT: Yes.

13 MR BEARD: In very small writing. Yes.

14 So this is essentially abbreviated in the sense that
15 there are a number of categories of disclosure that are
16 effectively agreed in relation to these issues.

17 I think we can go through this relatively quickly,
18 because I think in the main, we can identify where the
19 issues lie, and where in fact further agreement can be
20 reached.

21 In relation to the red, these are changes that are
22 being suggested by DAF and respectively Royal Mail/BT in
23 the second and third columns in relation to these
24 matters.

25 So DAF --

1 THE PRESIDENT: Well it starts on --

2 MR BEARD: It starts with definitions, yes.

3 THE PRESIDENT: And previously -- yes, I see.

4 MR BEARD: So I think the only issue that really arises in
5 relation to this is that -- well, I want to make just
6 a brief introduction to it, because this Redfern
7 Schedule was initially put forward dealing with pass-on,
8 and in doing so, would also deal with any request for
9 disclosure in relation to mitigation.

10 Now, as you will have heard and realised from seeing
11 the correspondence, what DAF has sought to do is try and
12 narrow the categories in the light of concerns and
13 objections raised by Royal Mail and BT, and what it has
14 done is sought to do so to ensure that it continues to
15 be able to have sufficient material coming forward in
16 order to deal with supply pass-on; but also that process
17 will ensure that we obtain, we hope, material in
18 relation to mitigation, albeit we have left the caveat
19 that in relation to mitigation there may be further
20 requests that would follow up. But in the main, we
21 would hope that these categories would also cover the
22 gist of the mitigation disclosure that would be needed.

23 Indeed, it would be more than the 'gist of'. We
24 think that it is likely the mitigation disclosure --
25 that the principal mitigation disclosure that will be

1 required will be covered by these categories. As I say,
2 I think it is going to be feasible to identify
3 relatively small differences in relation to these
4 issues.

5 So the first issue that actually arises is in
6 relation to definitions, but I am going to pick that up
7 in relation to PO5(a) and (b) categories in due course,
8 because we think that it is likely only to be in
9 relation to those. There are particular definitional
10 issues as to the scope of the disclosure in those
11 categories. So we are content to use these definitions
12 all the way down to PO5(a) and (b).

13 Then in relation to PO4(e), there is a broad
14 agreement in relation to DAF's amended category. There
15 are some clarifications that are being made by
16 Royal Mail and BT in relation to the right-hand column,
17 but in relation to those, we are content to proceed on
18 the basis of that definition. So I think we have
19 agreement in relation to that row.

20 THE PRESIDENT: So PO4(e), the comments of Royal Mail and BT
21 reflect the point about the definitions, do they?

22 MR BEARD: No. Well, in part. They are slightly different
23 issues, but mostly they reflect definitions, yes.
24 That is how we understand it.

25 In relation to this category, we are not taking

1 issue with the definitions. I think that, in practice,
2 that means there is no issue here.

3 THE PRESIDENT: Yes.

4 Mr Lask, I think we will take them point by point,
5 is probably the easiest.

6 Mr Lask, is that right from your understanding of
7 PO4(e), if it is accepted that for Royal Mail it
8 excludes Royal Mail relay services, and for BT it
9 excludes BT Retail Global Services and TSO?

10 MR LASK: Yes. That was the only point we were making in
11 that column. So that is agreed.

12 THE PRESIDENT: Yes. Can you just help me? I probably
13 should know, what is "TSO"?

14 MR BEARD: If it helps, I think it is Technology Services
15 and Operations.

16 THE PRESIDENT: Thank you.

17 MR LASK: Thank you. Those instructing me confirm that is
18 correct.

19 THE PRESIDENT: Right. That is PO4(e). PO4(g)?

20 MR BEARD: There is one thing I should mention. The terms
21 "business units" and "segments" that is used, obviously
22 we are not entirely sure what is being said by Royal
23 Mail and BT about how they are defining those units and
24 segments, but we are not going to get into arid
25 discussion at this stage about what is precisely being

1 defined. I think it is one of those ones where we have
2 explained where we are coming from in relation to those
3 matters. BT and Royal Mail will have their own
4 organisation in relation to these issues, and no doubt
5 they will conscientiously look at these points.

6 THE PRESIDENT: Yes, well that is just a shorthand.

7 MR BEARD: Yes, it is.

8 THE PRESIDENT: -- as I understand it, for the parts of your
9 client's business for which truck costs etc, etc?

10 MR BEARD: Yes, that is how we understand it.

11 THE PRESIDENT: That is what you mean.

12 MR BEARD: Yes, exactly.

13 THE PRESIDENT: That is what the definition is.

14 Now PO4(g)?

15 MR BEARD: PO4(g) is in relation to profit margins. Again,
16 we think there is no issue here.

17 We understand the reference in the right-hand column
18 to "contemporaneous documents" simply to mean that the
19 claimants are not expected to generate new documents in
20 relation to this category. It is only pre-existing
21 documents that they would gather. If we are wrong on
22 that, we would like to understand what is being referred
23 to as "contemporaneous documents", but we imagine
24 that is just a matter of clarification of language and
25 that otherwise, again, this row can be agreed.

1 THE PRESIDENT: Yes. Mr Lask?

2 MR LASK: Mr Beard is not wrong. That is what was intended.

3 MR BEARD: We are happy. That is on the transcript. As
4 long as we both understand what we are talking about,
5 that is a happy place.

6 THE PRESIDENT: Pre-existing contemporaneous documents.

7 Yes.

8 PO4(h)?

9 MR BEARD: PO4(h), the first concern -- it says "not
10 agreed". The first concern is in relation to the
11 addition of the words "metrics and targets" rather than
12 "performance indicators".

13 For reasons we are not entirely clear about,
14 Royal Mail and BT want "metrics and targets" removed.
15 Frankly, we do not think that makes any difference to
16 the scope of this disclosure category, because key
17 performance indicators is not some sort of defined term.
18 We were just trying to be clear about what we were
19 talking about, but if they want those words out, we are
20 entirely happy to take them.

21 We are also happy to make sure that this category --
22 which does not, we recognise, specifically refer to
23 trucks or categories of costs including trucks --
24 includes such words. So where it is saying,
25 "Information and explanations in respect of the key

1 performance indicators reached by each claimant or
2 relevant business unit to measure performance insofar as
3 applicable to a relevant business unit or segment in
4 relation to trucks costs or categories of costs
5 including trucks, including information as to targets
6 for those key performance indicators", now we think that
7 by including that language, we would be dealing with the
8 concerns that Royal Mail and BT are raising, and should
9 be able to reach agreement in relation to this category.

10 MR LASK: Sorry, I am just taking instructions, if I may.

11 MR BEARD: I am grateful. I understand we are trying to put
12 forward, in the light of the schedule, what works.

13 I mean, obviously key performance indicators are an
14 important category of disclosure. I do not think there
15 is actually any dispute about that. I think the concern
16 is about the phraseology. There is a statement by
17 Royal Mail and BT. We do not consider Mr Bezan's
18 suggestion that KPI information is important in the
19 context of organisations which operate business units
20 and segments as cost centres.

21 I think the concern there is it is not sufficiently
22 focused. It is not that KPIs are inherently irrelevant,
23 and that is why we have included the focus words.

24 MR LASK: I am told -- and this may just be necessary for
25 the record -- that we do take an issue on the relevance

1 of this category, but in light of the amendment that
2 Mr Beard has described, we are content with it.

3 THE PRESIDENT: Thank you.

4 MR BEARD: Then I think we get into PO4(i), and I think we
5 are willing to agree to the minor modifications that
6 Royal Mail and BT are putting forward in relation to
7 that category.

8 THE PRESIDENT: So that is then agreed. Yes, PO4(k).

9 MR BEARD: PO4(k). I think the concern here, as we
10 understand it again, is rather like the situation in
11 relation to PO4(h): that there is not a specific
12 reference to truck costs or categories of costs
13 concerning truck costs. So this is "concerning
14 a representative sample of documents or information
15 setting out financial budgeting methodologies and
16 process for each claimant in each relevant business unit
17 or segment separately for regulated and non-regulated
18 business activities."

19 But we do see that it would be right, given what we
20 have indicated previously, that it should refer there to
21 "each claimant and each relevant business unit or
22 segment concerned with truck costs or categories of
23 costs including truck costs."

24 So we understand that that needs therefore to be
25 narrowed, and we think that that actually captures

1 broadly what has been suggested in the right-hand column
2 by Royal Mail and BT.

3 You will see the third paragraph down, they propose
4 that "the category be limited to budgeting methodologies
5 and processes in respect of truck or vehicle costs."

6 I think we are capturing the same sentiment. It is
7 slightly different wording, but I am not sure it matters
8 for these purposes.

9 THE PRESIDENT: Yes, it is the wording that has been used
10 before.

11 MR BEARD: Yes, exactly.

12 THE PRESIDENT: So Mr Lask, that is the wording you have
13 used in PO4(i)?

14 MR LASK: That is right, sir.

15 What we were seeking to essentially exclude were
16 methodologies that did not relate to trucks, which is
17 why we drafted it as we did. I do not think Mr Beard's
18 modification had a different effect, but if it is
19 intended to then perhaps he can --

20 THE PRESIDENT: No, I do not think it is. It is the way he
21 explained it. It is just following through, and it
22 might not be exclusively trucks.

23 MR BEARD: No, it is truck costs or cost centres involving
24 truck costs.

25 THE PRESIDENT: So that concludes PO4.

1 MR BEARD: That does conclude PO4. Then we get into PO5.

2 So PO5(a):

3 "In respect of each of the Claimants' products and
4 services where price lists exist, documents showing
5 a description of how prices are set or agreed with the
6 Claimants' customers by references to those price
7 lists."

8 So initially, what was being envisaged was some sort
9 of description or statement. The proposal that is being
10 put forward is modified by Royal Mail.

11 "In respect of each of the claimants' products and
12 services where price lists exist, price lists, generic
13 non-customer specific documents containing a description
14 of how prices are set and agreed with the claimants'
15 customers by reference to those price lists ..."

16 And then "board papers", talking about prices as set
17 for specific customers.

18 "This description should include, insofar as it is
19 recorded in pre-existing documents can be identified,
20 information on the policies regarding the setting of
21 customer prices and any authority limits. For example,
22 of discounts that can be given against price lists."

23 So I think in relation to this, we are content to
24 move over to the Royal Mail/BT approach here, subject to
25 a couple of issues. In (b), you see there is this

1 reference to "generic non-specific customer documents".

2 Now we are only concerned about essentially how this
3 definition is going to be approached. What we do not
4 want is if a document talks about things generally but
5 refers to customers, that somehow it is excluded,
6 because obviously that would be unfortunate and wrong.

7 Equally, if, when searching for these things, you do
8 actually come across documents that are customer
9 specific, although we do not want a search to be carried
10 out, again, it would be wrong to just exclude those
11 documents if you had actually encountered them.

12 So we have just a concern about this phraseology,
13 "Generic non-customer specific documents", and we would
14 want to just make sure that it was covering those
15 matters.

16 Otherwise, the particular threshold that they are
17 applying that is set out in number 2, which is
18 a threshold of 5 million for Royal Mail -- that we have
19 no objection to, given the circumstances that are
20 spelled out there, because that is an internal threshold
21 that is used within Royal Mail.

22 When we come to BT, we have a couple of additional
23 issues. In relation to --

24 THE PRESIDENT: Sorry.

25 MR BEARD: I am so sorry.

1 THE PRESIDENT: So there is a qualification, because we need
2 to be clear for the purpose -- and I think we will leave
3 it to you to draw up the order, which will append the
4 schedule -- I am not clear where the 5 million threshold
5 is incorporated in the second column here with the
6 Royal Mail.

7 MR BEARD: To be fair to Royal Mail's drafting, I do not
8 think in fact it is. It is just the definition of board
9 papers I think, in (c), implicitly imports that
10 threshold because only deals above a particular value
11 would fall within it, if I understand the language of
12 Mr Lask's comments correctly.

13 THE PRESIDENT: Yes, I see. So it is an explanation of what
14 you will get, an explanation of what will be in the
15 board papers that you will get on the scene.

16 MR BEARD: That is right. Yes.

17 THE PRESIDENT: I see. So that is fine.

18 So for Royal Mail on that basis, that is agreed, is
19 it?

20 MR BEARD: Yes. Subject to that point about generic
21 non-customer specific documents that I raised. I mean,
22 it may be useful, before I move to BT, for Mr Lask to
23 just clarify that when they talk about "generic
24 non-customer specific", if these documents concerning
25 price lists and price setting include generic material

1 but also customer material, they are not going to be
2 excluding those documents. Equally if, when searching,
3 they come across material relating to customers -- this
4 is the second point -- we can see a benefit in those
5 being disclosed as well. But we are not asking them for
6 search separately for them. It would just be odd
7 exclude them, I think is the point we would put it,
8 actively to exclude such documents when you had
9 encountered them.

10 MR LASK: Sir, we will not exclude those documents.

11 MR BEARD: I am grateful. That makes life a lot easier.

12 MR HODGE MALEK QC: I think that should be reflected in the
13 order, though.

14 MR BEARD: Yes, we will make sure that the definitions used
15 pick that up, and that we are not imposing a further
16 search obligation.

17 MR HODGE MALEK QC: Yes, okay.

18 THE PRESIDENT: Yes, then BT?

19 MR BEARD: Then BT.

20 So in relation to BT there are just a couple of
21 issues. It is phrased in very much a similar way. So
22 in (c) it says, "Any available documents relate to deals
23 with specific customers value 5 million and over."

24 Now we do not understand why that threshold is
25 taken. We understand it in relation to Royal Mail

1 because it is spelled out that that is what pricing
2 strategy board papers will cover. But we were just
3 slightly concerned this felt like a slightly arbitrary
4 cut-off point being used here.

5 Obviously it is the same point in relation to
6 generic non-customer specific documents arises, but
7 there is a further point here, and this is where the
8 issue just in relation to definition arises.

9 If we go back to the front page of this schedule,
10 you will recall that there is an exception in relation
11 to BT Retail Global Services and TSO.

12 THE PRESIDENT: Yes.

13 MR BEARD: The reason this arises here is because we are
14 talking about price setting to customers, we think this
15 needs to cover BT Retail and Global Services.

16 I think TSO, that we referred to earlier, that is an
17 internal business, and it will only really engage in
18 transfer pricing, as we understand. But BT Retail and
19 BT Global Services, which we stand to be corrected, but
20 we understand is the business focus retail part of BT,
21 will obviously be setting prices to customers. In those
22 circumstances, it would be very odd to exclude those
23 entities from the consideration in P05(a). We say they
24 should not be, because obviously businesses like
25 Openreach, they are selling wholesale and they are not

1 necessarily selling anything retail.

2 Since we are here talking about supply pass-on, and
3 therefore pass on through to external customers, and we
4 also say mitigation issues, but particularly in relation
5 to supply pass-on, we say that it is obvious that those
6 entities should be included for these purposes. But as
7 I say --

8 THE PRESIDENT: Is not BT Global Services just dealing with
9 customers abroad?

10 MR BEARD: I thought that, sir. That was my understanding.
11 Then I was corrected. If I am told that in fact my
12 initial understanding was right, and it was only
13 overseas, then I think there may well be reason to
14 revisit what I have just said; but we are not clear on
15 that. The concern I have just articulated is if we are
16 talking about passing on to customers in relation to
17 various cost centres where the flow of business will
18 involve trucks, effectively, then we think that this
19 price list category needs to cover that.

20 Now if Mr Lask tells me --

21 THE PRESIDENT: Is BT Retail what consumers -- deals with
22 consumers?

23 MR BEARD: Yes, it deals with consumers in the UK.

24 THE PRESIDENT: Phonelines and --

25 MR BEARD: Yes, exactly.

1 THE PRESIDENT: -- and all the tariffs that BT charges?

2 MR BEARD: Yes, that is right. That is what BT Retail does,
3 as I understand it.

4 I am not in a position to give more detailed
5 evidence in relation to that, but obviously when we are
6 talking about prices to customers, we want some sort of
7 handle on that.

8 THE PRESIDENT: So, I mean, does that mean you are looking
9 to see if the price of trucks might have been passed on
10 in the phone tariff that consumers pay?

11 MR BEARD: Well, it is not going to -- given the level, the
12 number of tariffs, what we are really interested in is,
13 as can be seen here, "In respect of each of the
14 claimants' products and services where price lists
15 exist, documents showing a description of how prices are
16 set and agreed."

17 So it is the question of whether or not any of these
18 costs are taken into account in those price settings.
19 So we are trying to look behind it. We are not trying
20 to --

21 THE PRESIDENT: But you are trying to get all the price
22 lists as well. So you wanted all the tariffs all the
23 time.

24 MR BEARD: Yes, well, we asked for a description in relation
25 to this, and the response from Royal Mail and BT has

1 been "We will give you price lists."

2 Now, if what we will be talking about here is going
3 back to some sort of description of these issues, then
4 obviously that is something we could consider. The
5 reason it arises is because at the same time as we have
6 shifted to price lists on Royal Mail BT's proposal, they
7 have also excluded BT Retail and Global Services, and
8 that is what we are concerned about.

9 THE PRESIDENT: Yes.

10 MR BEARD: We will move to their approach, but we cannot
11 then just carve out BT Retail in its entirety from this
12 exercise. That is the issue that arises here.

13 THE PRESIDENT: Mm. Yes.

14 So two points, Mr Lask: the 5 million and the
15 business units.

16 MR LASK: Yes, they are both proportionality points. The
17 5 million threshold is identified essentially by analogy
18 with Royal Mail, where there is a 5 million threshold
19 for these issues to go to the board.

20 We applied that analogy to BT in order to ensure
21 proportionality but if, on further enquiry, we identify
22 that there is an internal BT threshold such as there was
23 in Royal Mail, but at a different level, then we would
24 be content to apply that. But at this stage, based on
25 our current knowledge, we have to try to identify some

1 measure for avoiding disproportionality, and we have
2 done it by using the 5 million threshold from
3 Royal Mail.

4 THE PRESIDENT: Yes.

5 MR LASK: That is the first point.

6 Then the second point is really explained on the
7 first page of this schedule under the definitions
8 section. Again, it is about proportionality. You will
9 see in the third -- sorry, the fourth column, under the
10 heading "BT", second paragraph, refers to the fact that
11 only around 5% of the trucks in BT's claim were used by
12 Retail Global Services and TSO.

13 So again, it is a proportionality issue. You will
14 see in the final paragraph that BT Global Services used
15 only seven trucks during the relevant period, against
16 net operating costs of a lot.

17 So in the context where we are looking to see
18 whether truck costs were passed through to supplies,
19 non-truck supplies made by BT, we do think it would be
20 disproportionate to have to search for documents within
21 those entities, given the very small proportion of
22 trucks that they were responsible for.

23 Can I deal with --

24 THE PRESIDENT: Just a minute. The total number of trucks
25 in the BT claim is about 1,800, is it? Is that right?

1 MR LASK: We think that is about right, but we are just
2 checking.

3 THE PRESIDENT: That is a figure I picked up from something.

4 MR BEARD: I think that is probably right, yes.

5 THE PRESIDENT: So when you say 5%, it is about 90 trucks
6 out of the 1,800, yes?

7 MR LASK: Yes, that is right.

8 THE PRESIDENT: Yes, I see.

9 Can you just tell me, BT Retail, is that right --
10 that is the arm of BT that sets all the phone and
11 broadband tariffs to consumers; is that correct?

12 MR LASK: We think so, sir, but we are just checking on
13 that.

14 THE PRESIDENT: Right. I thought you would be an expert on
15 BT by now, Mr Lask. Yes.

16 MR BEARD: Can I just deal with a couple of those points?

17 THE PRESIDENT: Yes.

18 MR BEARD: We understand, in relation to 5 million, we
19 understand the imposition of a proportionality threshold
20 of some sort. It is disappointing that the knowledge
21 the claimants appear to have of BT's business about
22 where this threshold is set is not as per Royal Mail,
23 and we are slightly concerned that it is arbitrary. But
24 if there is no better way of doing that, it may be
25 that is what we have to live with at the moment. But we

1 do think that it would be appropriate for them to look
2 as to whether or not there is a relevant threshold for
3 board papers for BT in the way that there is for
4 Royal Mail, because it seems to us a much better way of
5 doing these things than merely on the basis of carrying
6 one price threshold across.

7 More importantly, in relation to the BT Retail
8 issue, it is not just a matter of the 90 trucks we are
9 talking about. What we are talking about here is
10 whether or not in relation to trucks that, for instance,
11 go into the regulator business, for instance if they go
12 into Openreach, and Openreach, as you know, is the part
13 of BT that is providing wholesale services -- so
14 substantial access to telecommunications routes -- it
15 does that to a number of people, including BT Retail.
16 Indeed, that was the purpose of the separation of
17 Openreach and BT Retail within the BT group when Ofcom
18 did it.

19 The concern we have is that Openreach may well take
20 on board a large quantity of truck costs. It may well
21 be essentially re-charging BT Retail, and BT Retail is
22 then re-charging customers for those costs.

23 Now, as I picked up in exchanges with
24 Mr Justice Fancourt, one of the issues that may arise,
25 albeit we were talking about it in terms of mitigation,

1 a similar issue arises in relation to pass-on. If you
2 have regulated businesses taking on board costs setting
3 prices and then those prices being taken by an internal
4 BT company, strictly speaking, it may be said by BT,
5 "Well, that is not passing on; that is just one of our
6 other businesses taking this notional loss on itself."

7 At that point, we need to understand what that
8 business is doing with those costs, in terms of
9 potentially passing them on to customers.

10 What we are trying to do is identify a proportionate
11 way of assessing that. It may well be that it is
12 provision of price lists. They may be readily
13 available. It may well be that it is, by some means,
14 a description or statement. But the idea that one
15 should simply eliminate BT Retail from this because it
16 directly takes a limited number of trucks is not the
17 right way of analysing this. It is for that reason we
18 say you cannot simply eliminate BT Retail, as is sought
19 to be done.

20 As I say, if I am wrong about Global Services and
21 Global Services are all overseas, then I recognise that
22 that may well not be a germane submission in relation to
23 Global Services.

24 If, on the other hand, it is involved in actually
25 retailing to business, the same issue arises in relation

1 to Global Services.

2 THE PRESIDENT: But it would involve a huge number of tariff
3 lists over this long period, which we all know was
4 consumers, that BT has a range of tariffs, it changes
5 its tariffs.

6 MR BEARD: Well, I accept that, sir. I am not going to
7 demur that there are lots of tariffs. It was for that
8 reason we started with the description process.

9 THE PRESIDENT: Yes.

10 MR BEARD: So all we are saying is that we started with
11 a description we thought was the proportionate way of
12 dealing with this. We understand why Royal Mail and BT
13 have come back with this alternative suggestion, but we
14 cannot have a situation where you lose that bit in the
15 middle, effectively. That is really what I am dealing
16 with, because the Royal Mail BT response does not deal
17 with it.

18 If the order is that Royal Mail/BT have to provide
19 a description in relation to these matters, then that
20 may well be the best way of dealing with it in the first
21 instance. In other words, to retain some part of what
22 we had suggested previously just in relation to them.
23 We are content to proceed on that basis, but we cannot
24 just leave a hole there. The Tribunal is not going to
25 want a hole there, given that we all know the pass-on --

1 THE PRESIDENT: The description was what sort of description
2 that you were looking for previously?

3 MR BEARD: Let me just ...

4 If one looks at column 1, you can see the sorts of
5 issues that we are looking at.

6 This, I should say, is a further iteration, because
7 it was initially completely a description. It is
8 information on the policies regarding the setting of
9 customer prices and any relevant authority limits.

10 I mean, to be clear, as it sets out at the start, it
11 is relating to the claimants' products and services and
12 describing how prices are set and agreed with customers.
13 Normally we would see prices accompanying that and one
14 would expect it, but we just cannot leave a hole there.
15 That is the difficulty.

16 THE PRESIDENT: Yes. I mean, where they are regulated
17 businesses, they are not really agreed with customers,
18 are they?

19 MR BEARD: Well, no, that is true.

20 THE PRESIDENT: Set by regulation.

21 MR BEARD: Well, yes, certainly the amount they are allowed
22 to charge is set by regulation, and since they will
23 charge up to the regulated cap, that is obviously true.
24 Therefore that element will be more straightforward.
25 I can see that. At the moment, we do not have any of

1 this covered.

2 I am so sorry, Mr Malek.

3 MR HODGE MALEK QC: Mr Beard, is the idea that BT is going
4 to, for example, provide that information in any event
5 as part of its -- and so Royal Mail -- as part of its
6 witness evidence? Because it says that "Royal Mail
7 does, however, confirm that it intends to address
8 Royal Mail's approach to pricing during as much of the
9 period of '96 to 2018 as possible" in its witness
10 evidence.

11 MR BEARD: Yes.

12 MR HODGE MALEK QC: And they say the same in the other.

13 MR BEARD: Yes. The problem we have --

14 MR HODGE MALEK QC: Yes, but you need to have the disclosure
15 earlier, do you not?

16 MR BEARD: Yes, that is exactly it. It is a timing issue at
17 that point.

18 MR HODGE MALEK QC: I am sympathetic that you should have
19 that description, but that is subject to what the other
20 members say.

21 THE PRESIDENT: Yes, yes. You are content to have it by
22 description rather than, in the case of BT Retail, by
23 price list?

24 MR BEARD: Yes. As I say, I am just trying to fill in that
25 gap. I am not trying to monkey with what Mr Lask and

1 his clients have put in in the remainder of it for the
2 other entities. It is just in relation to BT Retail,
3 and, as I say, Global Services if that relates to stuff
4 in the UK. If it is just overseas then we understand
5 this may be a different issue.

6 THE PRESIDENT: Yes.

7 Well, Mr Lask, I think what is being said is that
8 they will accept the 5 million for the moment, if you
9 find there is an internal threshold, then they will
10 expect you to vary that.

11 MR LASK: We are content with that, sir.

12 THE PRESIDENT: As far as BT Retail, they are content,
13 instead of price lists, to have the descriptive
14 statement as to how prices are set. I think it can only
15 be -- in this case, it is presumably a non-regulated
16 price list that you are concerned with. Is that right,
17 Mr Beard? I mean, regulated prices you will see from
18 the various statements --

19 MR BEARD: No.

20 THE PRESIDENT: No?

21 MR BEARD: I am not sure whether -- I mean, there may be
22 a difference between what is set out in a regulator
23 statement as to what the price cap is for a basket of
24 prices and what is actually charged by the regulated
25 business.

1 THE PRESIDENT: Right.

2 MR BEARD: So I do not want to say yes, and recognise that
3 actually, it could vary.

4 THE PRESIDENT: Well, it might --

5 MR BEARD: It may not matter, but I am just concerned I am
6 not --

7 THE PRESIDENT: It might be easier anyway than in the
8 statement.

9 MR BEARD: It should certainly be easier, yes.

10 THE PRESIDENT: Yes, that you provide a statement on
11 BT Retail.

12 Mr Lask, is that something that --

13 MR LASK: Sir, the concern we have is that providing that
14 sort of statement, particularly given the time frame at
15 issue, which I understand is over 20 years, is itself
16 going to be a very onerous task, and may not be much, if
17 any, less disproportionate than providing the disclosure
18 itself.

19 Mr Beard explained his concern that there may be
20 some interrelationship between a unit such as retail and
21 other business units within the BT business, such that
22 even if retail was only responsible for a small number
23 of trucks, there may be passed through the business.
24 That is what I understood his submission to be.

25 Our current understanding is that there was not that

1 sort of interrelationship between these carved-out units
2 and the rest of the BT business. But we would be,
3 I think, happy to look into that further so that we can
4 confirm that. Because if that is right, it seems to us
5 that Mr Beard's concern falls away.

6 MR BEARD: No, I am sorry; that is not going to be feasible.

7 I do not understand what it is that Mr Lask is
8 suggesting could be done by way of an investigation and
9 assurance that costs are not passed through in relation
10 to a business.

11 That is the very issue that is being tested by this
12 court in relation to pass-on. So I am sorry, that is
13 not going to be sufficient. It needs to be
14 a description of the factual matters.

15 If Mr Lask is saying, "I would like to break this
16 down so that I do the most recent 10 years of the claim
17 by X date and the preceding 15 by Y date", that is one
18 thing. I mean, it is his claimants that have set the
19 parameters of the total claim. If they are going to
20 come forward with these things, it must be expected that
21 we are going to make enquiries in relation to these
22 issues. It is entirely proper that those are
23 investigated. If there is a way of doing it that breaks
24 it down into sections, we are willing to listen.

25 THE PRESIDENT: What is it you intend to do, Mr Lask, in

1 your witness evidence? Because you say you intend to
2 address the approach to pricing during as much of this
3 period as possible in your factual witness evidence. So
4 at some point you are going to produce a statement of
5 how you dealt with pricing.

6 MR LASK: I am sorry, sir; could you just give me 30 seconds
7 to answer that, please?

8 THE PRESIDENT: Yes. Yes.

9 (Pause)

10 MR LASK: Sir, as far as the interrelationship between the
11 units are concerned, we would envisage in the witness
12 evidence for trial explaining the extent, if at all, to
13 which Openreach and wholesale sold goods and services to
14 the other units, the units that we are intending should
15 be carved out from the disclosure exercise. But if that
16 has to be done sooner, if that explanation has to be
17 given sooner in order to ensure a proportionate approach
18 to disclosure, then we will endeavour to do that.

19 MR BEARD: I think we will need to set some deadlines in
20 relation to it, and it is -- just to be clear, it is not
21 just about the sale by those units to BT Retail. It is
22 what BT Retail does in relation to setting its prices.
23 So it is those two elements.

24 So if it was intended to put forward witness
25 statement evidence without that material, that would

1 have been a gaping hole in the relevant evidence in
2 relation to these matters, which lies only within the
3 knowledge of BT, and it is something that it is good
4 that has been identified at this stage and needs to be
5 rectified extremely quickly.

6 THE PRESIDENT: Can I then ask you -- we will come back to
7 that -- about BT Global Services? Do they supply
8 businesses in the UK under UK contracts?

9 MR LASK: Sir, we are still in the process of trying to find
10 an answer to that. The member of the team who is on
11 that point is not with me. That is why it is taking
12 a bit of time.

13 THE PRESIDENT: Well, I think what is sensible and pragmatic
14 at the moment is we will keep the definition in this --
15 in the disclosure that we ordered, and the 5 million.
16 That is accepted for now. But we will ask you to liaise
17 with DAF for BT regarding what you propose by way of
18 statement on BT Retail and to clarify the position from
19 BT Global Services. We hope you can reach agreement.
20 If you cannot, that is a classic matter for a Friday
21 application. I think it really does not make sense to
22 take up time on a small matter like that now.

23 We are running into -- we can try to do one other
24 item, but we have not determined, or is that agreed, the
25 date by which the agreed categories or the categories we

1 have decided will be provided. Is that in issue or is
2 that agreed? The PO4 categories, for example.

3 MR BEARD: The difficulty at the moment is that although
4 Royal Mail and BT have said they will give us tranches
5 of disclosure prior to the long-stop date of the end of
6 April, they have given no indication of what those
7 tranches will be. They have suggested that they could
8 provide material by the end of March, and that is
9 excellent. But we do not have any sense of what that
10 material will be and, frankly, we are concerned about
11 leaving the CMC without an indication of what those
12 categories of disclosure would be by the end of March,
13 even if, best endeavours, it turns out that actually,
14 they cannot hit all of the material by 31st March.

15 But we do think that some sort of indication of what
16 is going to be provided by that date should be provided
17 today so that it can be put in an order even if it is on
18 a best endeavours basis. Because what we are gravely
19 concerned about is that by focusing only on the
20 long-stop date of the end of April, what is actually
21 happening is that we are going to get, at most, dribs
22 and drabs before then, and in the end we will only get
23 all of this material towards the end of the period or,
24 indeed, on the long-stop date.

25 So we want to have -- we are willing to be

1 reasonable, we are willing to be flexible about what it
2 is, but we do want material so that we can start our
3 process in dealing with it sooner rather than later, and
4 we do not think this in any way unreasonable given the
5 length of gestation of this discussion.

6 MR LASK: Sir, just to be clear, what we have agreed to do
7 is provide the disclosure in three tranches. The first
8 tranche is as early as 5th March. It is the second
9 tranche that is by the 31st, and the final tranche by
10 the end of April.

11 We cannot today give an indication of what is going
12 to be in the 31st March tranche, not least because --
13 and this is no criticism of DAF -- but not least because
14 the categories have been changing over the last few
15 days -- this is a moving feast -- and we are not in
16 a position to say which of those modified categories are
17 going to be supplied when.

18 But we are doing our best. We have agreed to give
19 it on a rolling basis, and they are going to get the
20 first tranche in three days.

21 THE PRESIDENT: I do not think, Mr Beard, that realistically
22 we can take that further forward today.

23 We now have for all but I think, is it, three
24 categories, a position that has been determined. There
25 is P05(b), (k) and (o) that are still to be resolved.

1 They have now been qualified and there has been a lot
2 of, no doubt, late night work to get to the compromised
3 position.

4 I think you have got to, both sides, go away now and
5 look at what has been finally agreed or determined.
6 I think that the claimants should then write by the end
7 of this week, or -- to clarify what of these -- they are
8 proposing to give. They will obviously know by
9 5th March what they intend but what they can do by
10 31st March and what by 29th April.

11 If you are dissatisfied with that, then you should
12 write to the Tribunal and say, no, you think further
13 material should come by 31st March. Otherwise -- you
14 are on mute, Mr Beard -- otherwise, you know, we can be
15 here until 6 o'clock trying to work out which category
16 can come by which date, and which subcategory could come
17 earlier.

18 MR BEARD: No, no, it is a beautiful prospect to spend the
19 evening discussing those, but I think that is
20 a temptation to be resisted, and we are very happy with
21 the idea of a letter by the end of this week to
22 accompany the first tranche of disclosure setting out
23 what is intended by 31st March.

24 Just to be clear, those last two categories, P05(k)
25 and P05(o), in the light of the approach we have been

1 adopting to try to speed the process of actually getting
2 some documents out, we are willing not to be pursuing
3 those.

4 Indeed, the final one, PO5(o) has in fact just been
5 broken out of a previous category and was trying to be
6 clarificatory, but we will just leave it to one side --

7 THE PRESIDENT: So you are not pursuing (k) and (o)?

8 MR BEARD: No.

9 THE PRESIDENT: That leaves PO5(b) to be determined.

10 MR BEARD: Yes.

11 THE PRESIDENT: Well, just give me a moment, then. I shall
12 just withdraw for a moment to have a word with my
13 colleagues.

14 (4.32 pm)

15 (A short break)

16 (4.36 pm)

17 THE PRESIDENT: Mr Lask, are you there?

18 MR LASK: Yes, I am, sir.

19 THE PRESIDENT: Right. We can see you now.

20 The position is Mr Justice Fancourt has had to go to
21 a meeting in the Rolls Building and so has left this
22 hearing. Mr Malek and I can continue for about
23 ten minutes, at which point I have to go to a meeting.

24 But we hope that might be just enough so we can
25 complete PO5(b), and we think it sensible to sit with

1 the two of us to try to wrap this up.

2 MR LASK: Thank you, sir.

3 THE PRESIDENT: So we are looking at PO5(b). You said,
4 "a reasonable and proportionate search", and again,
5 the 5 million threshold for specific customers,
6 guidelines, and then for BT, it is again the issue about
7 the business segments, I think. So there are two
8 qualifications.

9 So, Mr Beard, on the -- well, any search for
10 documents for disclosure is limited to reasonable and
11 proportionate --

12 MR BEARD: Yes.

13 THE PRESIDENT: -- search. The 5 million, I think you know
14 the reason for that, for Royal Mail.

15 MR BEARD: Yes.

16 THE PRESIDENT: As I understand it, you accepted that.

17 BT you were less happy about because it is simply
18 taken on the basis of equivalence, and made the point,
19 well, if they have actually a threshold for
20 customer-specific pricing or guidelines, they should
21 apply that threshold and not simply this figure. But
22 subject to that, as I understood it, you accepted that
23 qualification?

24 MR BEARD: Yes.

25 THE PRESIDENT: So we are left with the business unit

1 segment issue as regards BT.

2 MR BEARD: Yes. We have the issue in relation to BT Retail
3 and Global Services, which arises again in relation to
4 PO5(b). The only other issue that arises in relation to
5 BT particularly, and this is a query that probably can
6 be dealt with by Mr Lask when considering these things
7 further, is what is actually intended to be done in
8 relation to BT Fleet rather than BT PLC in relation to
9 the statements, because obviously we want to make sure
10 BT Fleet is covered.

11 I think that may be a matter for clarification
12 rather than a specific piece of wording. But yes, sir,
13 you have exactly the points there. The same points
14 essentially as arose in relation to PO5(a).

15 THE PRESIDENT: So it is a question, Mr Lask, of how we are
16 going to deal with BT Retail?

17 MR LASK: BT Fleet I thought was the query that Mr Beard
18 raised.

19 THE PRESIDENT: There was a query about BT Fleet.

20 MR LASK: Yes.

21 THE PRESIDENT: There is a query, yes.

22 MR LASK: BT Retail I envisage we will deal with in the same
23 way as we are under PO5(a).

24 THE PRESIDENT: Via statement.

25 MR LASK: Yes.

1 THE PRESIDENT: BT Fleet probably is a relevant business
2 unit, is it not?

3 MR BEARD: That is what we envisaged, which is why I thought
4 it was probably only going to be a clarification that
5 was required. It was very difficult to see why that
6 would not be the case.

7 MR LASK: I do not think we would quarrel with the
8 proposition that BT Fleet is a relevant business unit.

9 THE PRESIDENT: Yes.

10 MR LASK: Sir, can I raise one point before I risk
11 forgetting it, which is that under the Royal Mail
12 heading, you will see it refers to the "Claimants'
13 products". That ought to have been amended in the same
14 way as under the BT heading, which is -- I was going to
15 say I thought that was done on PO5(a) but I see that
16 that has not been done on PO5(a). But I think it ought
17 to have been done and that was just an oversight on our
18 part.

19 MR BEARD: That is fine. We take no issue with that.

20 THE PRESIDENT: So that will happen for both.

21 MR LASK: Thank you.

22 THE PRESIDENT: So then have we in fact reached
23 a compromised position on PO5(b)?

24 MR LASK: From our perspective, yes.

25 MR BEARD: I agree, yes. As I say, it is very similar.

1 The last one is P05(e), but that is actually agreed,
2 and --

3 THE PRESIDENT: Yes, it is agreed --

4 MR BEARD: -- although it says only -- "Royal Mail only",
5 there is an equivalent in relation to BT, which
6 I understand there is some query arises in relation to
7 it, but we can leave that for today. That then
8 resolves, so far as we are concerned, the presently
9 outstanding issues in relation to supply pass-on and
10 indeed, we would say, in relation to mitigation, were
11 you, for the reasons we have already articulated, to
12 grant us permission in relation to the amendment.

13 THE PRESIDENT: Yes.

14 MR HODGE MALEK QC: Just one point if I could just raise it.

15 Mr Lask, in relation to the draft order at
16 paragraph 15, you have a provision of the disclosure
17 statements by reference to rule 31.10(vi), et cetera.
18 What we have been doing on all the cases and orders is
19 setting out what the requirement is following
20 paragraph 47 of the disclosure ruling of last year. So,
21 instead of that wording, just follow the wording that we
22 have used for all the other orders.

23 MR LASK: Thank you, sir. We will.

24 MR HODGE MALEK QC: Thank you.

25 THE PRESIDENT: If you can draw up the order, obviously you

1 will not be able to include the question of the
2 amendment as regards the mitigation, and that will be
3 done separately.

4 Good. Is there anything else we need to deal with?

5 MR LASK: Sir, I had one other matter, which was just to
6 respond briefly to the question Mr Malek raised before
7 the lunch adjournment on the relationship between fuel
8 spend and truck spend.

9 THE PRESIDENT: Yes.

10 MR LASK: We do have an answer but what we have not
11 established yet is whether the information is
12 confidential. So, rather than ask the Tribunal to
13 switch into a closed session, I would propose that we
14 write to the Tribunal, copied to the defendants, with
15 that information.

16 THE PRESIDENT: Yes. That seems very sensible.

17 Thank you.

18 MR BEARD: We have nothing else. Thank you very much.

19 THE PRESIDENT: Well, thank you both, and to all those
20 assisting you, on what has been quite a demanding CMC,
21 I think, for all involved.

22 We will let you know when our ruling is ready on the
23 amendment, and it will, I think, be in the same
24 judgment, the reasons for the refusal to allow
25 Professor Neven to give a separate report on pass-on.

1 MR BEARD: Grateful. Thank you.

2 MR LASK: Thank you, sir.

3 THE PRESIDENT: Thank you.

4 That concludes this hearing.

5 (4.45 pm)

6 (The hearing adjourned)

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