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

IN THE COMPETITION
APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London
EC4Y 8AP

5 May 2021

Before:

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

(Sitting as a Tribunal in England and Wales)

BETWEEN:

RYDER LIMITED & ANOTHER v MAN SE & OTHERS

DAWSONGROUP PLC & OTHERS v DAF TRUCKS N.V. & OTHERS

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Case Management Conference – Day 1

Wednesday, 5 May 2021

(10.30 am)

Hearing via Microsoft Teams

Case Management Conference

(In public)

THE PRESIDENT: Good morning everyone. I should start, as always, with a warning, particularly as there are so many participants in this hearing, attending through the Teams platform, and no doubt others on the live stream. This is being heard remotely but it is, of course, as much a Tribunal hearing as it would be if heard in person in Salisbury Square House in the courtroom, where all three members of the Tribunal are sitting.

An authorised recording is being made of the proceedings but it is strictly prohibited for anyone else to make any unauthorised recording, whether audio or video, of these proceedings, and that is punishable as a contempt of court.

Because of the number of participants, if any of you lose connection at any time, please send a message through to the Tribunal Registry and if necessary we will pause until you rejoin.

We shall also, in the usual way, take a short break mid-morning and mid-afternoon for everyone's convenience.

1 Thank you all for your skeleton arguments, which
2 have been helpful, particularly as you have adhered to
3 the Tribunal's directions, except, I am sorry to say,
4 for DS Smith.

5 Mr. O'Donoghue, we gave directions that the
6 skeletons should have a 15-page limit. Why was it
7 ignored in your case?

8 MR. O'DONOGHUE: Well, Sir, it certainly was not deliberate.
9 I mean, the main reason for the additional length is we
10 have put forward a new proposal 1B which has not been
11 ventilated in full, or indeed at all in correspondence;
12 we wanted to set that out as fully as possible, so that
13 everybody was well aware of the proposal, but of course
14 I apologise for exceeding.

15 THE PRESIDENT: You say it was not deliberate. You
16 obviously knew you were going beyond 15 pages and
17 I cannot for myself see any reason why you could not
18 have explained your proposal 1B within the overall page
19 limit. If we give a direction it is to be kept, and if
20 you need additional length you must apply for
21 a variation.

22 MR. O'DONOGHUE: Sir, the point is well taken. Again, I can
23 only apologise.

24 THE PRESIDENT: We have read your skeleton, but I make it
25 clear that in future if a direction as to skeleton

1 length is ignored, the Tribunal Registry is instructed
2 to return the skeleton unread, and it will not be looked
3 at by the Tribunal.

4 MR. O'DONOGHUE: Sir, that point is well made and
5 understood.

6 THE PRESIDENT: One additional point about skeletons which
7 applies to everyone. You all submitted your skeletons
8 by the deadline, but what then happens is that we get
9 revised skeletons with bundle references added, some
10 days later. The reason for the deadline for skeletons
11 is so that the members of the Tribunal can start
12 preparing, which we do, and of course the effective
13 conduct of these CMCs, particularly in a complex
14 multi-party litigation like this, is dependent upon the
15 Tribunal having prepared, and for that we do need the
16 bundle references before we start marking up the
17 skeletons and it is very disruptive if we then get
18 a replacement skeleton with references. So I think
19 it is a question of effective co-ordination between the
20 teams of counsel and the solicitors preparing the
21 bundles, so that you, as counsel, get your bundles such
22 that you can put in the references when you complete
23 your skeletons. I would hope that in future that can be
24 better co-ordinated, so we do not have the problem that
25 we faced with some of the skeletons this time.

1 Right, there is, as always in these cases, a fair
2 amount to deal with. We will postpone any disclosure
3 issues until tomorrow and we will see how much time is
4 available and what disclosure issues can be dealt with
5 tomorrow. I think there is general recognition that
6 it is most unlikely that we can deal with all the
7 disclosure matters the various parties have raised
8 tomorrow and some can be dealt with on a Friday
9 application.

10 But we are at this disadvantage at the moment, that
11 the Redfern Schedule that has been prepared for this
12 hearing is now out-of-date, which is not helpful. We
13 would like the teams assisting you, please, to prepare
14 a replacement, an updated schedule, to be lodged with
15 the Tribunal by 9.00 am tomorrow morning so that
16 disclosure can be looked at sensibly.

17 I think Mr. Malek wants to add some observations in
18 that regard.

19 MR. MALEK: In relation to the schedule, it would be helpful
20 if it could be highlighted in yellow those points which
21 are outstanding between the parties, and in blue those
22 parts which the parties feel are necessary to be
23 resolved at the CMC tomorrow.

24 I have been through all the requests and the
25 evidence on that, and it seems to me that there is still

1 some room for the parties to continue liaising with each
2 other on the precise form of requests. I can see there
3 has been a great deal of give and take already, whereby
4 one party says they want something, the other parties
5 say they want something else and then they have
6 a compromise. What I want to avoid is a situation
7 whereby we end up having to sort of cherry-pick, whereby
8 one party has all his requests being dealt with, without
9 the other party, whom he is seeking documents from,
10 without their disclosure being considered at the same
11 time. Because it is going to frustrate the normal
12 inter-solicitor dealing on disclosure if one side has
13 all his requests dealt with by the Tribunal without the
14 other side being dealt with.

15 As I said, there is a lot of room still for
16 discussion, and I can see from the skeletons and the
17 correspondence there is still an element of being able
18 to agree things. Even if we do not deal with any
19 particular requests tomorrow, we can deal with them on
20 a Friday application if it is going to be less than half
21 a day per party; I am happy to have one in the morning
22 and one in the afternoon. So we do not necessarily have
23 to deal with everything tomorrow. Thank you.

24 MR. HOSKINS: Can I ask a question, please?

25 THE PRESIDENT: Yes, Mr. Hoskins.

1 MR. HOSKINS: In terms of the schedules, and I hope I am not
2 getting this the wrong way round, I am guessing it is
3 probably going to be easier to produce new schedules
4 that have just the items which are still in dispute,
5 rather than, you know, the whole works, if you see what
6 I mean. Then we will all have far less paper in front
7 of us.

8 MR. MALEK: That is fine, that is absolutely fine. Yes,
9 that would be helpful. So the schedules will be just
10 the items which are in dispute, and the different colour
11 categorisation, depending on ones which are felt to need
12 to be resolved tomorrow in blue.

13 MR. HOSKINS: Thank you.

14 THE PRESIDENT: As I said, if we could have that by 9.00 am
15 tomorrow morning.

16 We thought the first of the matters that we should
17 address is the shape of the trial, and the question of
18 the involvement of DS Smith.

19 We have obviously read what all the various parties
20 said about this. We have, as you would expect,
21 discussed the matter between ourselves and our
22 provisional view, obviously without having heard further
23 submissions from you, is this: that we think it is
24 important that DS Smith, if they are to participate, are
25 bound by the result of stage 1 as regards the Trucks

1 involved in the pass-through from Dawsongroup and Ryder.
2 We of course recognise there are many more in the case
3 of Ryder than Dawsongroup, but their interest in stage 1
4 is no different from that of Dawsongroup and Ryder as
5 regards the overcharge. We therefore provisionally
6 think that the proper approach is that they should be
7 permitted to have the status of interveners, which is as
8 we understand it what is sought, and therefore to attend
9 by counsel to ask any supplementary questions, if
10 appropriate, of the witnesses, but not to file any
11 evidence themselves, either factual or expert. We do
12 not see any reason for there to be permission for
13 DS Smith to have an expert report, whether at the outset
14 or by way of reply.

15 DS Smith of course can appoint its own expert.
16 Indeed, it seems it has already done so. It may be that
17 they would like him to confer with the experts for
18 Dawsongroup and Ryder and give them his thoughts. We
19 see no problem with that, that is done outside court,
20 and their expert can be admitted to the
21 Confidentiality Ring. But we cannot see any
22 justification for a separate expert's report.

23 That is as regards stage 1. I think it is common
24 ground that DS Smith can participate fully in stage 3,
25 which is the Ryder stage, and we were attracted by the

1 suggestion from DS Smith that there are likely to be
2 some common issues of pass-through regarding the way the
3 leasing market worked, which will be common to both
4 stages 2 and 3. If that is so, it does not make sense
5 for that evidence to be heard twice and, therefore,
6 having what has been described for convenience as stage
7 1B, where there are common pass-through issues, in which
8 DS Smith could participate, might be a very sensible way
9 forward.

10 That is where we have got to on the DS Smith
11 involvement in the trial. I think it sensible to ask
12 Mr. O'Donoghue to address us first, and then to hear
13 from the other parties.

14 Submissions by MR. O'DONOGHUE

15 MR. O'DONOGHUE: Sir, I am obviously extremely grateful for
16 those provisional indications.

17 Starting with stage 1, of course, Sir, we understand
18 and make a virtue of the fact that our role in stage 1
19 would necessarily be limited, and I think it is
20 understood by everybody we certainly will not be
21 advancing factual evidence at stage 1. So, I can give
22 that firm commitment. At no stage did we intend to
23 either advance primary evidence of an economic or
24 econometric nature.

25 Sir, we hear you loud and clear in relation to any

1 expert evidence. Just to clarify, I mean, our intention
2 was not simply to add to the seven or eight reports,
3 whatever the final number would be. Our intention was
4 simply that, in relation to the expert evidence, we
5 would put our cards on the table at an appropriate
6 juncture. Now, it did seem to us that if
7 Mr. Veljanovski is admitted to the Confidentiality Ring
8 that is obviously a start, but we did think that one
9 possibility is that he would participate, perhaps as an
10 observer, in the joint experts' meeting, and could at
11 that stage add his observations where he
12 agrees/disagrees.

13 The reason, Sir, that we made a suggestion that at
14 the reply stage he would set out in writing his
15 observations, it was really out of fairness to the other
16 parties, which is that they should be aware sooner
17 rather than later of where DS Smith stands on all these
18 things, and springing that on them, either for the first
19 time during the joint meeting or even at trial in
20 supplemental questions or submissions, it did seem to us
21 there was an element of unfairness. So we did think if
22 the message on non-duplication was heard loud and clear,
23 and if, having read the first round of reports, he was
24 limited to certain observations in writing, that would
25 actually assist everyone going forward, including the

1 Tribunal. Because then we would have to nail our
2 colours to the mast, on a non-duplicative basis, as to
3 where we agreed or disagreed, and it did seem to us that
4 that struck a balance between not ensuring that we bung
5 up the process, frankly, by putting cards on the table
6 as to where we stand on particular issues, rather than
7 being ambushed at a late stage.

8 That was really the thinking in relation to that.
9 So the Tribunal is under no illusions, we certainly were
10 not suggesting at any stage that we would come along
11 quite late in the day with some form of new, primary
12 economic or econometric evidence; it would be limited to
13 observations on the evidence which had been filed and it
14 would, frankly, Sir, be in the nature of "We think", "We
15 agree with this", "We disagree with this", "There is
16 a gap in the following respects". So it would be
17 something quite truncated, but we did want to have some
18 clarity, as I said in part also to help the other
19 parties and the Tribunal.

20 That is all I wanted to say on stage 1.

21 THE PRESIDENT: Can I interrupt you on that before we move
22 on?

23 I mean, that is all very well from your point of
24 view, but the difficulty, of course, is if Professor or
25 Dr. Veljanovski expresses his view, however truncated,

1 the other side must be able to challenge it and to
2 cross-examine it, otherwise his evidence is
3 unsatisfactory, and therefore we have another expert
4 cross-examination; and for him to say "I agree with
5 Dr. X", well then it is corroborative evidence and again
6 it can be challenged, so we get then duplicative
7 cross-examination, and that is exactly what we wish to
8 avoid.

9 I do not actually, speaking for myself, see why you
10 need an economic expert giving any separate evidence in
11 stage 1 at all. You are as keen as Dawsongroup and
12 Ryder to argue for a large overcharge. They have each
13 got, no doubt, to some extent, overlapping economic
14 experts. One might even say that is one too many
15 already, but they almost certainly are going to be
16 allowed one each. You are simply an intervener on that,
17 and you can talk to them outside any without prejudice
18 meeting.

19 MR. O'DONOGHUE: I perfectly understand the practical
20 concern. To some extent, in my submission, it may be
21 tied up with something which remains at large, which is
22 how exactly the expert evidence will be heard at trial.
23 Because if, as is the Tribunal's practice in many cases,
24 it were hot-tubbed, then the incremental difficulty, if
25 I can call it that, caused by Mr. Veljanovski would be

1 something relatively minor. But even if there were some
2 cross-examination, or indeed only cross-examination,
3 then there would of course be a direction that anything
4 we do or say would be strictly non-duplicative. So if,
5 for example, I were asking questions of other witnesses
6 which had already been covered in some detail by the
7 main parties, then I would be quickly guillotined.
8 Likewise, if there had to be questioning of
9 Mr. Veljanovski, then that, in my submission, can be
10 effectively case managed on a significantly truncated
11 basis. We are, after all, talking about a trial of
12 something like at least 24 weeks. There is a repeated
13 suggestion by Daimler that it could be 40 weeks, which
14 is slightly terrifying for many of us. But there is
15 bandwidth in the current timetable for what would, in my
16 submission, in the scheme of things be a relatively
17 small accommodation of Dr. Veljanovski.

18 Again, if the choice is between us putting cards on
19 the table at an earlier stage and making clear our
20 position, or some of this surfacing for the first time
21 at trial, then there is a balance to be struck, and we
22 do out of fairness to the other parties want to make
23 clear our position at an early stage.

24 The final thing I would say, Sir, is that there is a
25 provision in Trial 1 for supplemental reports; I think,

1 Sir, you have set out a deadline of something like three
2 to four weeks. That would obviously be one way where,
3 for the most part, the main parties could deal with
4 anything said by Mr. Veljanovski.

5 Sir, I do wish to reiterate that his evidence, if it
6 were written, is likely to be highly truncated, and is
7 not going to open up some new flank in the case and
8 cause disruption to the timetable or to the balance
9 within the trial.

10 Sir, that is all I wanted to say on stage 1.

11 THE PRESIDENT: Yes.

12 Now go on, would you please, to the other stages.

13 MR. O'DONOGHUE: Yes. We have elaborated our proposal on
14 stage 1B in some detail, and I am extremely grateful for
15 the Tribunal's provisional indication that that might be
16 something worth exploring.

17 Just to flesh out exactly what would occur in
18 relation to stages 2 and 3. We have made clear I think
19 at the last CMC that we would put forward no more than
20 two to three factual witnesses for stages 2 and 3,
21 I think that is something which has been made aware to
22 the parties since at least the last CMC, and we have set
23 out at paragraph 43(b) of our skeleton specifically what
24 that evidence would go to.

25 Secondly, Sir, it does seem prudent, in our

1 submission, given that I think it is common ground that
2 DS Smith, in relation to stages -- in relation to
3 pass-on mitigation, should play a somewhat fuller role
4 than it would in stage 1, and we do say that in relation
5 to these common issues on pass-on that it should at
6 least be provided for at this stage that DS Smith,
7 perhaps in contrast to stage 1, may submit short primary
8 economic evidence on the issues of pass-on mitigation.

9 Our preference, as with stage 1, is that if the main
10 parties have dealt with this adequately, and we have no
11 reason to think that they would not, we may decide that
12 there is no incremental value in adding evidence on this
13 basis.

14 THE PRESIDENT: Yes. Well, I think we understand your
15 distinct position on stage 1B and stage 3, and as we
16 understand it, if stage 1B is provided for you are
17 content then not to participate in stage 2, given the
18 very small number of trucks you leased from Dawsongroup.
19 Is that right?

20 MR. O'DONOGHUE: Sir, that is absolutely right. To be
21 clear, I mean, we never suggested that simply on the
22 basis of 19 trucks we would have a seat at the table.
23 That is absurd, frankly.

24 THE PRESIDENT: No, we understand. I think we have got the
25 point. The only thing we wanted to say about the

1 stage 1B suggestion is it is somewhat difficult to be
2 absolutely firm as to how well that can be structured
3 until one actually sees the evidence and how it comes
4 out. But an indication that that is a favoured course
5 if possible would help the parties to structure their
6 evidence accordingly to try and assist the holding of,
7 as it were, a common pass-through issues section of the
8 trial.

9 MR. O'DONOGHUE: Sir, that would be right.

10 THE PRESIDENT: We apprehend that otherwise in any event one
11 would get, for those Defendants who are Defendants to
12 both the Dawson group and the Ryder claims, that is to
13 say DAF, Daimler and Volvo/Renault, they would be using
14 some of the evidence in both stage 2 and stage 3, and
15 one wants to avoid clearly, the evidence being heard
16 twice.

17 MR. O'DONOGHUE: Sir, yes.

18 THE PRESIDENT: That is our thinking.

19 I think it might be sensible if we just confer for
20 a moment on the question of your involvement in stage 1,
21 having heard from you, so we will withdraw for just
22 a moment. (Short pause)

23 Mr. O'Donoghue, we heard what you said about
24 stage 1. We are against you on that. We will not
25 permit you to adduce any expert evidence at stage 1 or,

1 therefore, to have an expert participating in without
2 prejudice meetings. You can, subject to hearing from
3 the other parties, participate, as we indicated, as an
4 intervener, attend by counsel, ask supplementary
5 questions, and if you want to put your cards on the
6 table in any way, you can always write a letter to the
7 other parties. But you will not have expert evidence at
8 that stage.

9 We will now hear from the others as regards both our
10 indication of the limited involvement of DS Smith at
11 stage 1, and then the question of whether there might be
12 a stage 1B, and I think we will go through in order
13 taking the Claimants first and then the various
14 Defendants.

15 For Ryder, Mr. Holmes.

16 Submissions by MR. HOLMES

17 MR. HOLMES: Thank you, Sir.

18 We are very happy with the position that the
19 Tribunal has arrived at in relation to DS Smith's
20 participation at stage 1. We respectfully agree that
21 that strikes the right balance.

22 As respects the subsequent stages, you have seen
23 from our skeleton argument that we are content for
24 DS Smith to participate at stage 3 in relation to
25 pass-on issues regarding overlapping trucks within our

1 client's claim.

2 As regards stage 1B, we agree with your
3 observations, Sir, that it is premature at this stage to
4 attempt to delineate a set of issues which can
5 conveniently be heard commonly and prior to the
6 commencement of stages 2 and 3 on the downstream issues.
7 That is something that can be considered most
8 conveniently later in the light of the evidence, and can
9 perhaps be left as late as the pre-trial review, by
10 which stage the parties' positions will have
11 crystallised.

12 That leaves the questions of disclosure and
13 confidentiality in relation to DS Smith. I do not know
14 if it is your intention, Sir, to deal with those
15 subsequently.

16 THE PRESIDENT: It is. Not now.

17 MR. HOLMES: Sir, yes.

18 THE PRESIDENT: Thank you.

19 For Dawsongroup, Mr. Palmer.

20 Submissions by MR. PALMER

21 MR. PALMER: Thank you, Sir.

22 Like Mr. Holmes and Ryder's position, we are
23 entirely content with the Tribunal's position on stage 1
24 and have nothing to add on that.

25 So far as stage 1B is concerned, we certainly adopt

1 what Mr. Holmes has just said, that it would be
2 premature to delineate a set of issues that could be
3 dealt with in the proposed stage 1B at the moment.

4 We would go further though, and say we find it
5 difficult to envisage whether any issues can in fact,
6 when boiled down to specifics, be dealt with at
7 a stage 1B at all. I appreciate that the Tribunal may
8 prefer to wait and see on that, but I do note that the
9 evidence which Mr. O'Donoghue indicated might be
10 produced at a stage 1B was the evidence he said which is
11 outlined at paragraph 43 of his skeleton argument, and
12 so far as factual statements are concerned that means
13 43(a), which includes evidence, for example, relating to
14 specification of individual vehicles leased or rented
15 from Dawsongroup and Ryder. It is difficult to see how
16 that will assist an examination of how the leasing
17 market operates generally.

18 THE PRESIDENT: Yes. Can I interrupt you just to say, I am
19 not sure that Mr. O'Donoghue actually said that the
20 paragraph 43(a) factual evidence, was what he thought
21 was appropriate for stage 1B.

22 MR. O'DONOGHUE: Sir, that is right. This is purely factual
23 evidence.

24 THE PRESIDENT: Yes, I think DS Smith's position is that
25 there may be evidence, and I understand and hear what

1 you say that we may not know at this stage, about how
2 the leasing market worked generally, and it is that kind
3 of generic evidence about the economic way in which
4 a company that is involved in leasing will recover its
5 costs through its hire and leasing charges, for example.
6 That kind of more generic evidence, if it is produced,
7 would be the stage 1B issues, and it is on that that, as
8 I understand it, DS Smith would want to, may want to put
9 in its own evidence, whether economic or indeed
10 potentially an industry expert.

11 MR. PALMER: It is certainly right that any evidence heard
12 at stage 1B would have to be of that general nature and
13 all-applying nature, but again we have difficulty in
14 seeing why it is that DS Smith, itself only a small
15 customer of a claimant like Dawsongroup, would be able
16 to bring a perspective as to how the leasing market
17 operates generally, rather than simply give evidence of
18 its own interactions as a leaser or renter of vehicles
19 with providers such as Dawsongroup.

20 I appreciate that can be examined when there is
21 actual evidence to look at, but you will understand the
22 nature of our concerns is a concern voiced by Mr. Harvey
23 in his eighth witness statement at paragraph 4.6, which
24 is a concern that this is actually just going to shed
25 a light on one corner of the leasing market, and

1 actually what he is interested in doing in the context
2 of calculating average pass-on rates is controlling in
3 any economic, econometric pricing analysis for the
4 trends of the leasing market generally, rather than
5 distorting that picture through the particular practices
6 of one operator.

7 So those are our concerns. Our other concern is
8 that it may be artificial to seek to deal with those
9 sorts of issues at a level of generality away from the
10 brass tacks of the Dawsongroup and Ryder specific expert
11 evidence and the econometric analyses which they have
12 produced, which of course, as I have mentioned, will be
13 controlling for these factors. It may well be difficult
14 in fact to examine and test what is said on behalf of
15 DS Smith while preserving the lines which have been
16 carefully drawn by identifying two separate stages,
17 stages 2 and 3, between Ryder and Dawsongroup. So we
18 are concerned that will have to be held very firmly in
19 mind at that stage as well.

20 It may be, and I just float this for the moment,
21 those general issues might more comfortably be dealt
22 with in the context of stage 3, linked to actual hard
23 evidence and the actual context of a particular operator
24 in the market, rather than dealt with in isolation.

25 So those are our concerns, Sir, and we would

1 certainly say it would be premature at this stage to
2 identify stage 1B in the manner that Mr. O'Donoghue has
3 proposed.

4 THE PRESIDENT: Yes, thank you.

5 Now if we take the Respondents..

6 MR. HOLLANDER: I think it is for me to go first.

7 THE PRESIDENT: Yes, Mr. Hollander. For the purpose of the
8 transcript, I think it is right, is it, that you are for
9 Iveco?

10 MR. HOLLANDER: That is exactly right, Sir.

11 Submissions by MR. HOLLANDER

12 MR. HOLLANDER: It was Iveco that was originally a proponent
13 of DS Smith coming into this trial for the purpose of
14 pass-on, in particular in relation to overlapping
15 trucks. As you know, the Tribunal made clear last time
16 their initial view was that DS Smith should -- had
17 agreed to -- well, they had indicated they understood
18 DS Smith were agreeing to be bound by overcharge
19 findings, and certainly in his submissions to the
20 Tribunal last time Mr. O'Donoghue did not demur from
21 that in any way, and that was the basis on which they
22 were allowed in.

23 That was the starting point. Our concern about them
24 being involved in part 1 is the costs, and it is very
25 hard indeed to see what, in circumstances where

1 Dawsongroup and Ryder have big teams, DS Smith are
2 likely to be able to add to any of that on overcharge,
3 as interveners.

4 We understand the Tribunal's view that they should
5 not be allowed to call witnesses, either factual or
6 expert. You will have noticed that VSW, who have
7 recently taken the decision that they do not want to be
8 involved in Trial 2, have said they estimated that their
9 own costs if they had been involved in Trial 2 would be
10 £1 million pounds, and that is not taking into account
11 the costs spent by other parties as a result of VSW's
12 involvement.

13 Our real concern, and I know you said that you would
14 deal with the question of DS Smith disclosure later,
15 Sir, but in a sense they are bound up, because the real
16 cost that is going to arise and the real concern about
17 that is if they are given disclosure.

18 Now, so far as pass-on, there is no great problem,
19 that is a much narrower issue and there is not really
20 a great problem there. It is disclosure in relation to
21 overcharge. If it is the case that they are to receive
22 disclosure in relation to overcharge, they will no doubt
23 spend many hundreds of thousands of pounds reading and
24 considering that disclosure. That will then involve --
25 and it may be that the Tribunal would say that they are

1 not permitted to make applications or ask or correspond
2 with the Defendants about that disclosure, because if
3 they were, that obviously is going to cause significant
4 additional costs. It does seem to us that if they
5 are -- if the position is that they are not going to
6 receive the disclosure in terms of overcharge, then that
7 obviously mitigates any costs concerns. If they are,
8 then that is a serious problem and a serious costs
9 issue, and it seems to us that that is going to
10 exacerbate the costs problem very significantly.

11 THE PRESIDENT: Can I just ask you, you referred to VSW, and
12 VSW of course are not participating and they are not
13 bound by anything in this trial.

14 MR. HOLLANDER: No.

15 THE PRESIDENT: If DS Smith are not permitted to participate
16 at all in any way in stage 1, are you saying they should
17 nonetheless, as regards their trucks, be bound by the
18 result at stage 1 on overcharge?

19 MR. HOLLANDER: I think the starting point, Sir, is that on
20 the last occasion they said they would be bound, and
21 that was the whole premise of the Tribunal. They have
22 actually changed their position since then, and there is
23 no explanation as to that and there is not even an
24 acknowledgment of that. I went through the transcript
25 of Mr. O'Donoghue's submissions to you last time in

1 respect of that, and there was not a suggestion of push
2 back in terms of your initial comment that they would be
3 bound by the overcharge if they were going to be there.
4 So that is the starting point, in a sense.

5 MR. MALEK: On your starting point, Mr. Hollander, I think
6 it is fair to say that I think we should be resolving
7 this whole issue of disclosure for DS Smith today,
8 because I think you are perfectly right that a decision
9 does have to be made as to whether or not they are going
10 to get disclosure on overcharge. I do not think there
11 is going to be an issue on pass-on and mitigation.

12 MR. HOLLANDER: No, I agree, Sir.

13 MR. MALEK: But on the overcharge, that really is up for
14 grabs.

15 MR. HOLLANDER: I do think that is a major concern. I mean,
16 I completely understand the President's comment, that if
17 they are going to be bound then obviously certain things
18 follow from that; but I do not see, with respect, why
19 they need to have that disclosure in respect of
20 overcharge. That is going to be a very, very
21 significant cost for them to get it, for them to deal
22 with it. Who is going to pay the costs of them reading
23 it and dealing with it? Are those going to be costs in
24 the action, and so forth?

25 MR. MALEK: At the very least they will have the trial

1 bundle, will they not?

2 MR. HOLLANDER: Yes, I accept that.

3 MR. MALEK: That will include the documents on overcharge
4 which either of the other parties consider should be
5 before the Tribunal to decide the issues in the case.

6 MR. HOLLANDER: Sir, in a sense, with respect, that is
7 a very helpful halfway house which -- I mean, as I said
8 at the outset, we were the ones who initially proposed
9 their involvement in stage 2. We are just concerned
10 about the costs, really unnecessary and disproportionate
11 costs in respect of that.

12 I have made my point in respect of that. So far as
13 1B is concerned, I think the answer is it is simply too
14 early, with respect. The Tribunal will, I think at the
15 next CMC, have to grapple at a stage where everyone is
16 further down the line in preparation of expert issues
17 and the like, to see in more detail the shape of this
18 trial and exactly how it is going to be case managed.

19 I would have thought it is far too early, with
20 respect, to be able to be reaching those decisions
21 today. In a sense the President has identified the
22 point, identified that it is something that in principle
23 the Tribunal has a measure of sympathy with, and I would
24 respectfully submit that is all one needs for the
25 present CMC.

1 Those are my submissions, unless you have any
2 further questions.

3 THE PRESIDENT: No, thank you very much.

4 Who wishes to go next? I do not know if you have
5 agreed any order between you. If not, I shall just, as
6 it were go, down the list.

7 Submissions by MR. HOSKINS

8 MR. HOSKINS: I am happy to go next, for Volvo.

9 In relation to stage 1, we are happy with the
10 Tribunal's -- I must admit I thought you actually ruled
11 on it in relation to stage 1, and it is clear that
12 DS Smith must be bound. There are then the questions
13 which flow from disclosure, et cetera, but I am
14 absolutely happy with what the Tribunal has proposed in
15 terms of participation.

16 THE PRESIDENT: I do not want to interrupt you. No, we
17 ruled against Mr. O'Donoghue's wish to have expert
18 evidence. We did not rule in favour of his limited
19 participation; we said that is as far as we are prepared
20 to go with him, but we would not rule before hearing
21 from the parties. So we have not ruled, and
22 Mr. Hollander was fully entitled to make his points, as
23 are you.

24 MR. HOSKINS: Sorry. We are very happy with the Tribunal's
25 suggestions.

1 On stage 2, it is obvious we cannot delineate --
2 sorry, stage 1B, it is obvious we cannot delineate the
3 parameters now. It seems to us the PTR is potentially
4 too late; the prospect of having to manage this a few
5 weeks potentially before the trial does not fill me with
6 great joy.

7 I just suggest, as a practical measure, perhaps we
8 put this on the agenda at each subsequent CMC to keep an
9 eye on it, are we ready to delineate or not, at each
10 CMC. Almost certainly we are going to need some sort of
11 process between the parties to have a discussion, so
12 that it comes to the Tribunal with an agreement or at
13 least the disputes clearly delineated.

14 That is all I wanted to say on behalf of
15 Volvo/Renault.

16 THE PRESIDENT: Thank you, that is very helpful.

17 Then if I take the other Respondents to the
18 Dawsongroup claim. DAF next. That is Mr. Williams.

19 Submissions by MR. WILLIAMS

20 MR. WILLIAMS: Yes, Sir.

21 We support the Tribunal's observations, in
22 particular in relation to stage 1. If DS Smith is going
23 to have the status of an intervener, that does have
24 implications for the management of various aspects of
25 its claim and we support what Mr. Hollander said about

1 that. It also has implications for the position in
2 relation to the draft amended pleading, which is an
3 issue which I anticipate the Tribunal will want to come
4 back to separately, but we put down that marker. That
5 is another area where its status as an intervener will
6 need to be taken into consideration.

7 So far as pass-on and stages 2 and 3 are concerned,
8 or stage 1B, again we have supported and do support
9 DS Smith's participation in relation to that issue, but
10 we agree with what Mr. Hollander and Mr. Hoskins have
11 said about it being premature to seek to delineate that
12 at this stage.

13 Overall, Sir, we support the position as you
14 outlined it at the beginning, subject to your subsequent
15 observation that this will need to be kept under review.

16 THE PRESIDENT: Yes, thank you.

17 Mr. Harris for Daimler.

18 Submissions by MR. HARRIS

19 MR. HARRIS: Good morning, Mr. President, members of the
20 Tribunal.

21 I adopt the submissions of Mr. Hoskins and
22 Mr. Williams. As you know from our skeleton, we also
23 have a concern about the size and shape of the DS Smith
24 pleading, and I apprehend that that will be addressed
25 later on. As you know, we would like to draw your

1 attention to the Order of Mrs. Justice Cockerill but
2 I do not need to do that now.

3 THE PRESIDENT: Yes, thank you.

4 Then for MAN, Mr. Jowell.

5 Submissions by MR. JOWELL

6 MR. JOWELL: Sir, members of the Tribunal, we also endorse
7 fully the comments of Mr. Hoskins and others, and we
8 have nothing further to add on these points.

9 THE PRESIDENT: Thank you very much.

10 Finally -- is there a finally or have I covered
11 everybody? I think I have heard from you all. Yes.

12 I think before we return to Mr. Hollander we shall
13 confer, so we will withdraw for a few moments.

14 MR. O'DONOGHUE: Sir, would you mind if I made a couple of
15 quick remarks? No more than two minutes.

16 THE PRESIDENT: Yes, if you want to. Yes, okay, and if you
17 want to say something else about the issue of disclosure
18 if you are to be an intervener at stage 1, which was the
19 concern that Mr. Hollander explained.

20 Further submissions by MR. O'DONOGHUE

21 MR. O'DONOGHUE: Sir, at stage 1, the fundamental point
22 which nobody has grappled with is that if we are to be
23 bound at stage 1, the suggestion that we would
24 effectively sit there mute at trial, with access to no
25 documents and with no role at all, is completely --

1 well, it is not only unrealistic, it is fundamentally
2 unjust. If we are to be bound, we have to have
3 a proportionate right to participate. That is the
4 fundamental point.

5 On disclosure, I mean we will obviously come to
6 disclosure in more detail, but in principle as
7 a starting point it is wrapped up in the same point
8 about a fundamental injustice. If we are to be an
9 intervener and to be bound by these findings, then in
10 principle we should be put on an equal footing.

11 There will be some devil in the detail, as Mr. Malek
12 pointed out, as to exactly how much we should get, but
13 again in principle we should be entitled to some
14 equality of arms. I will come back to that.

15 On stage 1B, I take the point that it may be
16 difficult at this stage to delineate. I would simply
17 make two observations. First of all, the main parties
18 have proposed a period over the next two or three months
19 whereby they would engage in deeper co-operation on the
20 contours of expert evidence, and it may be in the
21 context of that process where I hope DS Smith can get
22 some visibility, at least in stages 2 and 3, that
23 greater clarity does emerge.

24 Finally, Sir, just for your note, we have set out at
25 paragraph 46 of our skeleton, and 47, at least one

1 example where we think DS Smith could play a distinctive
2 role, if not a unique role. If the Tribunal has that,
3 it is paragraph 46. So Mr. Harvey, as Mr. Palmer just
4 adverted to, you will see in 46(b) he says "a central
5 and detailed focus on ... market share, relevant
6 competitors, demand conditions or structural changes in
7 the market ... and ... buying power ..." (As read)

8 Then at 47, we would be the only leasing customer
9 present in Trial 2. So on Mr. Harvey's own scoping of
10 his evidence, we would have directly relevant evidence
11 to give, and indeed an unique perspective or at least
12 a distinctive one. So Mr. Palmer's point, with respect,
13 is actually a point against him.

14 Mr. Harvey may well think, "I do not need to know
15 what DS Smith thinks", but the Tribunal or the parties
16 may feel differently.

17 THE PRESIDENT: Yes. Thank you. We will now withdraw for
18 five minutes.

19 (11.20 am)

20 (Short break)

21 (11.25 am)

22 THE PRESIDENT: We have considered the submissions on this.

23 As regards stage 1B, as proposed we agree that it is
24 too early to rule on that at this stage, we will see how
25 matters develop. We also agree with Mr. Hoskins that

1 the PTR would be much too late. It does seem sensible
2 to keep this as an agenda item on CMCs for this trial,
3 and the position may be much clearer when we see how the
4 experts for those parties are proposing to address this.
5 We have indicated that we think it may well be feasible
6 and that it seems a sensible idea, but we are not going
7 to reach a decision today, and that can be kept under
8 review.

9 As regards stage 1, it is clearly important, for
10 this process to be effective, that DS Smith is bound by
11 the results of stage 1 as regards the overcharge in
12 respect of those trucks which DS Smith then leased from
13 Dawsongroup and Ryder. It is for that reason that we
14 have decided they should be permitted to intervene but
15 not call any independent evidence. We think that if
16 that right is to be effective, they should be given the
17 disclosure that is given to Ryder and Dawsongroup. That
18 is no additional cost in itself to the Defendants,
19 because it is exactly the same disclosure as they are
20 providing. We do not think that it would be
21 satisfactory for DS Smith to have to wait some 20 months
22 or so without documents until they receive trial
23 bundles. But we do have concerns about costs that have
24 been raised on behalf of the Defendants by
25 Mr. Hollander. It would not be an effective use of

1 resources for DS Smith to trawl through all these
2 documents at the costs of no doubt many hundreds of
3 thousands of pounds, and we would expect them to
4 approach them in a moderate and proportionate way, and
5 we can do no more than lay down that warning as to how
6 their costs of dealing with such disclosure might be
7 assessed at the end of the day.

8 The point was raised about applications for specific
9 disclosure and whether DS Smith should be permitted
10 independently to make any applications. We would not
11 expect that DS Smith should make any independent
12 applications. If they have concerns about disclosure,
13 we would expect them to raise those with Dawsongroup and
14 Ryder, and if necessary a joint application can be made.
15 But we think it would be wrong to exclude in advance by
16 ruling out any independent application by DS Smith.
17 Such application, if made, would have to be considered,
18 what is raised, but they would have to justify why it is
19 that they are making an independent application. So we
20 give that warning, without any prohibition on such
21 applications.

22 That is how stage 1 will be handled.

23 MR. HOLMES: Sir, I am grateful for that indication. I am
24 sorry to interpose. I had understood that the question
25 of the disclosure already sought by DS Smith was not yet

1 to be dealt with, and for that reason I held back my
2 submissions about that.

3 The Tribunal will appreciate that the disclosure to
4 be given in relation to overcharge would come not only
5 from the Defendants but also from the Claimants.

6 We hear what you say about documentary disclosure
7 relevant to overcharge, and we do see the sense of that.
8 If the Tribunal will permit me, however, may I seek to
9 persuade you that as regards the substantial volumes of
10 data concerning overcharge, which have been disclosed by
11 all of the parties to the Ryder proceedings, it would
12 not be appropriate for that material to be disclosed to
13 DS Smith given the scope of its involvement at stage 1
14 of the trial.

15 The data is disclosed for the specific purpose of
16 enabling the parties' experts to analyse and assess
17 overcharge, and given that the Tribunal has held that
18 DS Smith will not be bringing forward expert evidence
19 either in the first round or in reply, such disclosure
20 is unnecessary and disproportionate.

21 Our concern echoes that of Mr. Hollander, that there
22 is obviously a risk of significant expense being
23 incurred by DS Smith, but also of expense to the
24 parties. That expense arises as a result of the process
25 of disclosure, but also the process of attending to

1 questions and queries that often follow upon disclosure,
2 in our experience, in order to enable a party's expert
3 team to make sense of the data and to interrogate it.
4 We say that to have to engage in that type of a process
5 with another party would be unnecessary and
6 disproportionate given the nature of DS Smith's
7 involvement.

8 THE PRESIDENT: Yes, I understand. Your point is you are
9 not objecting to documentary disclosure, you are drawing
10 that distinction between the documents and the sort of
11 data that are needed for, for example, regression
12 analysis.

13 MR. HOLMES: Exactly, Sir.

14 THE PRESIDENT: Yes, I understand.

15 Does any other party want to comment, before we go
16 to Mr. O'Donoghue, on what Mr. Holmes has said?

17 MR. PALMER: Yes, if I may on behalf of Dawsongroup. We
18 certainly share what Mr. Holmes has said about stage 1
19 and have the same concerns.

20 May I, if I may, just say something on stage 2 at
21 this stage as well, because as I now understand
22 DS Smith's proposal, that is to deal with generic issues
23 only, whether in a stage 1B as proposed and to be ruled
24 on at a future occasion or by some other route, its
25 interest in the Dawsongroup proceedings and the 19

1 trucks is to be limited to the general issues only, if
2 I can put it that way, and not otherwise to participate
3 in stage 2.

4 That, of course, has a consequence for disclosure.
5 We would not want any consequence of that to be
6 a requirement to provide 5,000 documents, 20,000 rows of
7 data relevant to our pass-on disclosure, if in fact
8 DS Smith is not to play a role in that. That would
9 simply be on proportionality grounds; it is the 19
10 trucks points, the vast cost of that sort of exercise
11 compared to any pass-on which could be recovered
12 ultimately by DS Smith in relation to Dawsongroup's
13 trucks.

14 It may be that the Tribunal does not want to deal
15 with that now, but I wanted to make it clear that we do
16 have that objection to wide disclosure as well.

17 THE PRESIDENT: Yes, we will come back to pass-on
18 disclosure. We are dealing at the moment with
19 disclosure on stage 1, and the point made by Mr. Holmes
20 distinguishing data from documents.

21 Mr. Hollander, you raised a point about disclosure.

22 MR. HOLLANDER: I just wanted to draw your attention to
23 paragraph 8.10 of the CAT Guide, Sir, I am sure you know
24 it already, which is the general position that an
25 intervener does not either pay or get costs. That is

1 a starting point. It may be -- I am sure you will not
2 want to actually make a formal ruling on that today, but
3 it may be an indication that DS Smith may well not be
4 able to recover their costs. As a marker, it might be
5 relevant.

6 THE PRESIDENT: Yes, I mean that is a general statement. Of
7 course, costs are always, as the rules say, in the
8 discretion of the Tribunal, but it is right that you
9 highlight that observation in the Guide.

10 Anyone else?

11 Mr. O'Donoghue, on the distinction between data and
12 documents. You will get all the documents. The raw
13 data is the data of the kind that is grist to the
14 expert's mill in producing its analysis or his or her
15 analysis and report. You will not be producing an
16 expert report. No doubt Dawsongroup and Ryder will. So
17 what is suggested is that it is not proportionate and
18 appropriate that you should receive the data, which will
19 then need lots of explanation.

20 MR. O'DONOGHUE: Sir, I obviously understand the point.

21 The starting point, Sir, is the point you made at
22 the outset, which is the actual cost of providing these
23 disclosures is zero or next to zero. That is the
24 starting point. In my submission -- I understand the
25 distinction, but in my submission, Sir, the three

1 caveats that you put forward, which are important, first
2 of all that the Tribunal would in general not expect
3 DS Smith be interrogating these documents in detail
4 prior to trial, that is well understood. Second, the
5 caveat that the Tribunal would not expect independent
6 applications and would expect that if applications are
7 made they would, at most, be joint applications. That
8 would also apply. Third, Sir, as you say, which is
9 really an answer to Mr. Hollander's tentative
10 invitation, I mean, ultimately on the question of costs
11 all of this gets dealt with at the end.

12 So we think those caveats, we understand they would
13 apply a fortiori in the context of data and we hear that
14 loud and clear, we have that well in mind, but the final
15 point, Sir, is that in many ways this distinction may
16 create as many problems as it solves.

17 First of all, there is the basic point that we
18 should have equality of treatment if we are to be an
19 intervener at trial. Second, the disaggregation of the
20 documents in this way, there is at least as good
21 a chance that it causes more problems than it solves.

22 Certainly we have no interest in principle in
23 reinventing any wheels. If there are existing
24 explanations of the data, we will take those at face
25 value. We have absolutely no interest in racking up

1 costs in the interim in relation to things which will be
2 far better catered for by other parties. But to suggest
3 that in principle we should have no sight or only
4 partial sight of the disclosure documentation, it seems
5 to me, first of all, wrong in principle, and second, not
6 to be very pragmatic. Because, as the Tribunal has
7 already effectively ruled in the context of stage 1,
8 I mean, it would not be good enough for us to have
9 visibility on these issues on the eve of trial, that
10 will limit the effectiveness of our preparations; and if
11 we are to ask proportionate or supplemental questions,
12 it is better that we do so on a fully informed basis,
13 because if nothing else it may avoid us asking questions
14 that turn out to be unnecessary, and so there may be
15 a benefit for the parties and the Tribunal.

16 For all those reasons, whilst we understand the
17 distinction which has been put forward, it does not seem
18 to us, in the circumstances, to be a compelling one, and
19 it can and should be dealt with subject to the caveats
20 that you have outlined, Sir.

21 THE PRESIDENT: Yes, thank you. I think it sensible that we
22 deal with these things as we go along, so once again we
23 shall briefly withdraw.

24 (11.43 am)

25 (Short break)

1 (11.45 am)

2 THE PRESIDENT: Yes. We think there is a clear distinction
3 between the raw data on costs and prices and so forth,
4 which really are not intelligible in themselves without
5 analysis and no doubt explanation that will be
6 considered and analysed by the experts for Dawsongroup
7 and Ryder. We have held that DS Smith is not entitled
8 to adduce expert evidence at stage 1 and we have the
9 concern about costs very much in mind. We think in
10 those circumstances it is not appropriate that they
11 should receive disclosure of the raw data, but only of
12 the documents which in themselves are voluminous. So we
13 accept the point made by Mr. Holmes and that is what we
14 hold.

15 Before going to disclosure on stages 2 and 3 and any
16 stage 1B, it may be sensible to deal with the
17 application by DS Smith to amend its pleading.

18 We have a draft amended particulars of claim.
19 I think the Opus reference is {DS-D/OC2/1}. If that can
20 be brought up.

21 I do not know, Mr. O'Donoghue, are there any
22 confidential passages in this pleading?

23 MR. O'DONOGHUE: Sir, I do not think so, but let me just
24 double-check.

25 THE PRESIDENT: It says at the top "refers to the content of

1 Outer Confidentiality Ring information", but as I
2 understand it the Opus retrieval is only going to those
3 within the Confidentiality Ring. If that is not the
4 case, I hope someone will inform us promptly. That has
5 previously been the way that these things work,
6 otherwise we obviously have problems.

7 I think we have that pleading in hard copy in the
8 second DS Smith bundle at tab {DS-D/OC2/1}.

9 Can I ask you to mute your microphone if you are not
10 speaking, because we get a lot of feedback otherwise.
11 Thank you.

12 The point has been made that it is a very lengthy
13 pleading and some may wish to say something about that.

14 Can I ask Mr. O'Donoghue also to clarify something
15 about this. I noted that at the outset at paragraph 5,
16 which is on page {DS-D/OC2/4}, there is in the second
17 line you have inserted "leasing or renting Trucks" and
18 "or renting" has been added. Similarly on page 6
19 {DS-D/OC2/6} at subparagraph (f) on page 6, you have
20 similarly added the word in the second line from the end
21 "purchased, rented or leased", as if you are suggesting
22 that there is some distinction here. But when we come
23 and look at the end of your pleading, you actually
24 particularise the quantum. That is on page
25 {DS-D/OC2/134}. At A2 you say:

1 up in paragraph 54.3 of Ms. Dodds' statement for this
2 CMC.

3 THE PRESIDENT: But just as a pleading, we will not be at
4 trial looking at Ms. Dodds' witness statement for the
5 CMC, you are asking for permission to make this
6 amendment and I am just trying to understand how to read
7 the pleading, which should be a self-contained document.

8 If you say there is some different category ...

9 MR. O'DONOGHUE: Yes. Some of the trucks were leased, some
10 were purchased out right and some were rented. That is
11 the correct position, and the details are given in
12 Ms. Dodds' statement. So, Sir, you are absolutely right
13 that the appendix should have added the words "leased or
14 rented". That is an omission which needs to be
15 corrected.

16 THE PRESIDENT: But also, if you say some were leased and
17 some were rented, then the figures in table 1 on
18 page 135 will need elaboration, will they not?

19 MR. O'DONOGHUE: No, Sir. Well, they may need to be broken
20 down --

21 THE PRESIDENT: Yes.

22 MR. O'DONOGHUE: -- but the overall number does not change.

23 THE PRESIDENT: No, it is the breakdown.

24 MR. O'DONOGHUE: Yes.

25 THE PRESIDENT: So any amended pleading should please

1 include an appendix that gives that breakdown, and you
2 say should add the word "rented" in A2.

3 MR. O'DONOGHUE: That is correct, and the information in
4 Ms. Dodds' statement needs to be in the appendix.

5 THE PRESIDENT: Yes.

6 MR. O'DONOGHUE: I am very grateful.

7 THE PRESIDENT: The other aspect in this pleading which is
8 important in the trial is how you deal with pass-on or
9 pass-through. There is a lot of the pleading dealing
10 with the collusion and overcharge. Is it the position
11 that at the moment the best particulars you can give as
12 regards pass-through are simply what is said on page 131
13 at subparagraph 6?

14 Page 131 {DS-D/OC2/131}, subparagraph 6 at the
15 bottom.

16 MR. O'DONOGHUE: Sir, yes, because the amendments set out
17 before you are really the product of the Commission case
18 file and we have had zero disclosure in relation to
19 pass-on issues at this stage.

20 THE PRESIDENT: Yes, I see. So that is the application that
21 you have to make for this amendment with the
22 qualification about "rented" that we have just
23 discussed.

24 MR. O'DONOGHUE: Yes. Sir, I am in your hands. There have
25 been some complaints about length. I am happy to say

1 a couple of words on that, or happy to respond.

2 THE PRESIDENT: I think it is better if you reply when we
3 have heard from those who want to address us on that.

4 This is the application by DS Smith to amend the
5 particulars of claim in the form that we have just been
6 looking at, subject to this qualification about that
7 annex.

8 Am I right, Mr. Hollander, in your skeleton you had
9 observations about it, is that right? Perhaps not. You
10 are muted.

11 MR. HOLLANDER: I certainly want to say something about
12 this. I think counsel for DAF were going to say
13 something first on this, and perhaps I can go next.

14 THE PRESIDENT: Yes, certainly.

15 Submissions by MR. WILLIAMS

16 MR. WILLIAMS: This is Rob Williams for DAF.

17 DS Smith has sensibly indicated that it is prepared
18 to take a back seat on the overcharge question, and that
19 is a position which we have encouraged it to take, and
20 the Tribunal has now ruled that it will have the status
21 of an intervener in stage 1 of the trial. Our position
22 is, in short, that we do not think that status is
23 consistent with this draft amended pleading, which we
24 have noted in our skeleton argument is the second
25 longest pleading in the Trucks litigation, and the

1 important point is that the new pleading is for the most
2 part, or certainly in large part, directed at the
3 infringement issue rather than the issue of pass-on, in
4 which it has a particular interest. In other words,
5 most of the new pleading goes to stage 1, where DS Smith
6 is merely going to be an intervener.

7 We understand the objective or DS Smith's objective
8 of adopting the Dawsongroup and Ryder's pleadings so
9 that it advances that case as part of the overall
10 umbrella of Trial 2, and if the pleading were a copycat
11 pleading, if I can put it that way, which allowed us to
12 replicate our Dawsongroup and Ryder defences on an
13 almost cut and paste basis, then we would not have
14 raised the concerns which we have raised; but that is
15 not what we have got in this document.

16 You may have seen from the first page of the
17 document, Sir, it is probably worth going back to page 1
18 to see that the document is colour-coded.

19 THE PRESIDENT: Yes.

20 MR. WILLIAMS: The new text is red -- this is all noted at
21 the top of the document. The new text is red, the blue
22 text is adapted from the Dawsongroup pleading and the
23 purple text is adapted from the Ryder pleading; and what
24 we see in large parts of the document are large chunks
25 of red, which is obviously new and distinct pleading by

1 DS Smith, going, as I say, to the infringement issue, to
2 the overcharge issue, and then a jumble of different
3 colours which mixes and matches different bits of the
4 pleading from the Dawsongroup and Ryder pleadings.

5 If we can look at page {DS-D/OC2/20}, for example,
6 you can see there that there is a long section of red
7 that starts on page 20, which then carries you through
8 I think almost entirely in red through to about page
9 {DS-D/OC2/28}, and there is a little bit of text in blue
10 on the way.

11 It is really at page 28 that you start to see the
12 jumbling up.

13 THE PRESIDENT: Page {DS-D/OC2/27} I think, is it not?

14 Because 30(d) is blue.

15 MR. WILLIAMS: Yes, that is right, Sir, it starts at that.

16 That starts in blue, and it is obviously not that easy
17 to turn the pages using the Opus software, but I think
18 the Tribunal may have it in hard copy, and you can see
19 as you turn the pages through that there is a mixture,
20 and in particular when you get to pages 33 to 37,
21 {DS-D/OC2/33} what you have is an absolute jumble of all
22 of the different colours, where paragraphs,
23 subparagraphs and sentences and even parts of sentences
24 are mixed in from the different pleadings.

25 Just for the Tribunal's note, if you then turn on to

1 page {DS-D/OC2/53} there is another long section of
2 about seven or eight pages of brand new text.

3 So the Tribunal will understand that pleading is not
4 like a jigsaw, where we can just take the pieces of the
5 Dawsongroup and Ryder defences and put them together in
6 a new pattern that will plead back to this document; the
7 pleading does not follow the same structure and there is
8 in any event new drafting to incorporate.

9 So what we have is a document which requires us to
10 reconsider, Sir, our existing pleas paragraph by
11 paragraph, and even sentence by sentence, and pleading
12 back to that would inevitably be labour intensive and
13 costly. Obviously each plea in the defences has been
14 considered, and the Defendants will now need to consider
15 how far changes to the text in the DS Smith document or
16 changes to the source they have relied on put a new
17 complexion on the plea. So if we are going to plead
18 back to this, we are going to have to do an awful lot of
19 the primary work again.

20 It does seem to us that this is an onerous and
21 inefficient way of pleading the case, but it is worse
22 than that, Sir, if DS Smith is not even a primary
23 participant in the overcharge issue at all. The
24 likelihood is that many hours will be expended on
25 preparing a defence to this document by all of the

1 Defendants to the DS Smith claim, and at the end of it
2 we would not really have taken the case forward at all.

3 If the aim is to make sure that DS Smith covers off
4 the Dawsongroup and Ryder pleadings, it does seem to us
5 there are easier ways to achieve that. We have thought
6 about how to resolve the issue. Obviously one can think
7 about ways that the document can be recast so we could
8 plead back to it in a more efficient way, there may be
9 other solutions, and we have not actually discussed
10 those options with DS Smith yet, pending the Tribunal's
11 ruling on their role at Trial 2. But if the Tribunal
12 shares our concern about the likely cost and complexity
13 of pleading to all of this, and the amount of paper that
14 will be generated for trial, then we are very happy to
15 take the issue away and engage with DS Smith to see how
16 we can arrive at a sensible set of pleadings which
17 serves its purposes whilst not driving up unnecessary
18 costs.

19 Those are the observations we wanted to make, Sir.

20 THE PRESIDENT: Thank you.

21 I think, Mr. Hollander, you said you want to go
22 next.

23 Submissions by MR. HOLLANDER

24 MR. HOLLANDER: Yes, please.

25 Sir, now that the Tribunal has clarified the role of

1 DS Smith on overcharge as an intervener, the question
2 arises as to really whether it is proportionate or
3 sensible that we should be required to spend what are
4 going to be very, very substantial costs in responding
5 to the amendments. It has gone up from 15 to 133 pages;
6 it is a huge and unsatisfactory document which pleads
7 vast quantities of evidence. If one thinks that the
8 normal purpose of a pleading is to identify the case
9 being put forward, so that the party responding knows
10 what evidence to call and the like in response, now it
11 has been determined that DS Smith are not going to be
12 permitted to call evidence on the overcharge issue, then
13 the purpose of actually having a substantive pleading in
14 respect of overcharge falls away, in my submission.

15 We have never pleaded -- what this is, as you have
16 been told, is a farrago of the Dawsongroup pleading, the
17 Ryder pleading and a bespoke DS Smith pleading.

18 The particular concern is the particulars of
19 infringement, which are now -- there are 296 either
20 paragraphs or subparagraphs in relation to particulars
21 of infringement. 66 of those are, according to our
22 calculation, entirely new pleas, never seen before; 114
23 are repetition of Dawsongroup pleadings that we have
24 never pleaded to before or had to; 28 are Ryder pleas
25 that we have pleaded to previously; 51 paragraphs or

1 subparagraphs are a combination of Dawson plus DS Smith
2 new pleas mixed up; 33 are a mixture of Ryder and
3 DS Smith new pleas; one paragraph is a mixture of
4 Dawson, Ryder and a new plea. Therefore, 293 of the
5 296 paragraphs or subparagraphs have amendments.

6 Now, we are concerned that pleading to every single
7 one of these 296 paragraphs and subparagraphs is going
8 to involve a totally unnecessary, huge amount of costs.
9 One raises the question, given that the Tribunal have
10 clarified the status as intervener, why should we plead
11 to that? As you quite rightly said at the outset, Sir,
12 their role in terms of substantively as opposed to the
13 intervener is in relation to pass-on, which is dealt
14 with very shortly.

15 The Commercial Court has a 25-page limit. I mean,
16 this is just pleading vast amounts of evidence in
17 circumstances where DS Smith are not going to be
18 permitted, on overcharge, to call evidence at all. We
19 are appalled at the idea of having to plead to this, and
20 we would respectfully suggest that at least so far as
21 the overcharge element and the vast body of this new
22 pleading it serves no useful purpose for us to be
23 required to do so.

24 Now, it may be that a short pleading which
25 essentially deals with the pass-on issues and the point

1 such as the point that the President put to
2 Mr. O'Donoghue would be unproblematic, but it is
3 completely disproportionate, in my submission, for us to
4 have to plead to this extraordinary document.

5 THE PRESIDENT: Any of the other Respondents? Mr. Harris.

6 Submissions by MR. HARRIS

7 MR. HARRIS: Sir, I adopt the submissions of Mr. Williams
8 and Mr. Hollander. In Daimler's submission, we need in
9 the circumstances only proportionately to respond to the
10 pass-on plea by DS Smith.

11 My second point is simply that, as you will have
12 seen, we have put into the bundle a recent order on
13 a similar topic from Mrs. Justice Cockerill in the
14 Commercial Court. If anyone wants to see it, or if the
15 Opus assistants want to bring it up, it is at HS1
16 {COM-A1/18.1/1}, and it is simply a three page document.
17 It does not contain any surprises, Sir, I only do it
18 simply because it is so recent and germane.

19 At paragraph 6 of the order, which is at page 2 of
20 the 18.1 tab, {COM-A1/18.1/2}, I am not going to pause
21 because these points are so straightforward. I see
22 it is not yet on the screen. Mrs Justice Cockerill, in
23 the Commercial Court, unsurprisingly makes the point
24 about things like not pleading swathes of evidence and
25 tables, pleading extracts from transcripts, putting

1 footnotes and side bars and lengthy introductory
2 comments.

3 THE PRESIDENT: Can I just ask, this is in our authorities
4 bundle, is it?

5 MR. HARRIS: Yes. Do you want the reference again?

6 THE PRESIDENT: I have got the judge's order.

7 MR. HARRIS: There are two different things. There is a two
8 page order, which is not relevant, and then a three page
9 document entitled "Decision".

10 THE PRESIDENT: I see, yes.

11 MR. HARRIS: It should be at tab 18.1.

12 THE PRESIDENT: Yes, I have got that now. Yes, 18.1. Yes.

13 MR. HARRIS: I am grateful. You may be aware of this case,
14 it is a cartel damages follow-on case in the FX
15 litigation.

16 THE PRESIDENT: Yes, Sir Nigel Teare.

17 MR. HARRIS: What had happened was very, very lengthy
18 pleadings were put forward, as you will see if you cast
19 your eye over 3. But none of the bits in paragraph 6
20 come as any surprise, it was just a frustration
21 expressed, that with great respect we share, certainly
22 on Daimler's part, no other Defendants, certainly as
23 indicated by Mr. Williams and Mr. Hollander, about
24 unnecessary prolixity of claimant pleadings, and in
25 certain key respects.

1 THE PRESIDENT: Yes.

2 MR. HARRIS: As it happens, the key respect for the DS Smith
3 proposed pleading is the one about pleading vast swathes
4 of evidence. So if you were, for instance -- just as
5 a for instance -- to turn up in DS Smith's proposed
6 pleading internal page 108, you will see that there are
7 actual extracts from the evidential documents cited.
8 There is a table which is replicated into a pleading.
9 That is simply an example.

10 Anyway, the point is, the concrete suggestion for
11 this case I have already made, which is Daimler and the
12 Defendants with respect should only be made to plead to
13 the pass-on case, in which DS Smith are playing a more
14 central role, but going forward, either in a recast
15 DS Smith pleading and certainly for future Trucks
16 litigation, which as you know are being issued day after
17 day, and typically then proceed on the basis that they
18 get similar Commission bundle disclosure with a view to
19 updating the pleading, we respectfully contend that
20 there ought to be some guidance, perhaps in a ruling
21 from this CMC, as to future pleadings, along the lines
22 of the Mrs. Justice Cockerill order, so as to introduce
23 a little more discipline into the pleading process, and
24 certainly a length discipline.

25 I have nothing further to add unless I can be of

1 further assistance.

2 THE PRESIDENT: Yes, thank you.

3 I do not think counsel for the other Respondents
4 need to address us simply to adopt what has been said by
5 Mr. Williams, Mr. Hollander and Mr. Harris, but any
6 additional points.

7 Mr. Jowell.

8 Submissions by MR. JOWELL

9 MR. JOWELL: May I just stress one point, which is that we,
10 like Iveco, are not Defendants to the Dawson group claim.
11 So in order to plead back to these pleadings, it is
12 going to take us many, many months to investigate the
13 specific new allegations that have been adopted and
14 carried across from Dawson group, together with the new
15 DS Smith allegations, and get to the bottom of those
16 allegations in order to plead back.

17 THE PRESIDENT: We understand. We have that point, yes,
18 that you are not --

19 MR. JOWELL: Just to emphasise that.

20 THE PRESIDENT: I understand.

21 I think before returning to Mr. O'Donoghue we will
22 again withdraw and confer.

23 (12.12 pm)

24 (Short break)

25 (12.19 pm)

1 THE PRESIDENT: Mr. O'Donoghue, we obviously have not heard
2 from you yet, but I think it may be helpful if I tell
3 you the way we are thinking.

4 This trial is not a trial of DS Smith's fundamental
5 claim.

6 MR. O'DONOGHUE: Yes.

7 THE PRESIDENT: It is a trial of Dawsongroup and Ryder's
8 claim and of pass-through of the Dawsongroup and Ryder
9 trucks. Therefore, it is that part of your claim that
10 is at issue, but about two-thirds of your claim
11 regarding trucks, plus your separate claim for
12 logistics, is separate and is not going to be heard in
13 this trial.

14 MR. O'DONOGHUE: Sir, on that point --

15 THE PRESIDENT: Can I just finish, please?

16 MR. O'DONOGHUE: Sorry, yes.

17 THE PRESIDENT: That is the first point. It seems to us,
18 subject to what you have to say, that what is important
19 for this trial is that we have a pleading from you on
20 pass-through, and that the issues of overcharge are
21 being pleaded by Dawsongroup and Ryder and that is what
22 the Defendants are responding to as regards overcharge.
23 They do not need to respond to separate overcharge
24 allegations that you may wish to advance in a subsequent
25 trial, to be held potentially at some time in the future

1 that has not been listed yet and is several years away.

2 That seemed to us the parameters within which we
3 consider both your application and what sort of
4 responsive pleading should be required at this stage of
5 the other parties.

6 MR. O'DONOGHUE: Sir, yes.

7 Submissions by MR. O'DONOGHUE

8 MR. O'DONOGHUE: The first point is just to pick up on the
9 point you have just made. Of course, from our
10 perspective this pleading was intended to stand as
11 a pleading for the entirety of the claim; it was not
12 intended to be a pleading in relation to one third or
13 part of the claim. So it was intended, it was always
14 understood to be a general pleading. That is an
15 important starting point. If the goalposts now wish to
16 be moved by the Defendants, it must be recognised that
17 that is a new point. It would have been open to them
18 back in October to say: well, we do not want you
19 pleading out your general case, we just want you to
20 plead out part or one third of your case.

21 The second point, I mean, we were not ordered to
22 align with Dawsongroup and Ryder, but we actively raised
23 the point with the Defendants that we would seek to do
24 so where possible, and we did so. That was intended to
25 help the Defendants and the other parties and the

1 Tribunal. Subject to two important points I will come
2 to, I mean, by and large that is what the pleading has
3 done.

4 Mr. Williams makes a bit of a point that: well, when
5 we see the text from Dawsongroup and Ryder you have
6 interposed some sentences here and there. With respect,
7 that is an exaggerated point, because they will be
8 responding to the Dawsongroup and Ryder pleading on that
9 very issue, say in relation to an email, and if in that
10 context they need to address a further sentence, with
11 the greatest of respect to Mr. Williams that is a storm
12 in a teacup.

13 THE PRESIDENT: Sorry, can I interrupt you, because the
14 point I was indicating, which perhaps I did not make
15 very clear, is that it does not seem to us at the
16 moment, whatever allegations in your underlying claim
17 you wish to make as against the Defendants, that that is
18 a matter that will be arising and pursued at a separate
19 trial concerning DS Smith and all your other trucks.
20 Trial number 2, in which you are intervening and then
21 participating in the pass-on issues, is only concerned
22 with the trucks that you rented or leased from
23 Dawsongroup and Ryder.

24 MR. O'DONOGHUE: Yes, Sir, I understand that.

25 THE PRESIDENT: On that, you are not permitted to call

1 separate evidence on overcharge.

2 So on that, it seems to us, there is no reason why
3 the Defendants need to respond to your pleading on
4 overcharge for the purpose of Trial 2.

5 MR. O'DONOGHUE: Sir --

6 THE PRESIDENT: Just let me finish. What will be important
7 for Trial 2 is to have your pleading on pass-on. Do you
8 appreciate the distinction?

9 MR. O'DONOGHUE: I do.

10 THE PRESIDENT: Do you accept that, that whatever separate
11 allegation, and you are entitled, of course you are
12 bringing a separate action, you can have a separate
13 trial if it follows through, you can make your own
14 allegations, subject to any rules regarding pleadings
15 and their form, which we will come back to, and then the
16 Defendants in due course will have to respond to them.
17 But that does not govern Trial 2.

18 MR. O'DONOGHUE: Sir, can I just complete the point I was
19 going to make, because it does address the point you
20 have just raised.

21 Of course, at the point we pleaded this out we had
22 fully intended playing a meaningful role also in
23 stage 1. Now, if things have been modified in the light
24 of the Tribunal's ruling so be it, but certainly at the
25 time we pleaded this we had intended playing

1 a meaningful role in stage 1.

2 Sir, just back to the pleading itself, so for the
3 most part to assist the Defendants and the Tribunal we
4 have adopted Dawsongroup and Ryder's pleadings. There
5 are two exceptions, which I will come to, and they are
6 important.

7 The first exception, which is really the text in
8 red, the Defendants have relied on a point that the
9 cartel meetings were insufficiently regular to have had
10 an overall impact. We say that is obviously wrong based
11 on the Commission finding alone, which shows a very high
12 frequency across the cartel period, and what we have
13 done is we want to give the Defendants the relevant
14 particulars so they know the case they have to meet on
15 frequency, so what we have done is essentially collated
16 the reference to frequency of meetings in the documents
17 for this purpose. We actually think this assists them
18 and should not be criticised, and we note that more than
19 one Defendant has pleaded. No admission is made as to
20 the precise frequency of exchanges, which will be
21 a matter for evidence in due course.

22 So they clearly understand the question of frequency
23 will be an important issue at trial. They propose, as
24 matters stand, to deal with that by way of evidence,
25 rather than pleading, which they may be entitled to do.

1 We simply wanted to avoid a situation where we said:
2 meetings were frequent. That was immediately met with
3 the request for further information. We wanted to cut
4 to the quick and give what detail we could provide on
5 the question of frequency.

6 So that is not duplication of Dawsongroup and Ryder.
7 It is an important part of the defences' cases on
8 frequency. Again, we wanted to put all our cards on the
9 table at an early stage, because you can imagine the
10 outcry if this was raised for the first time at trial or
11 in cross-examination of witnesses.

12 So insofar as you see red text, Sir, that is one of
13 the explanations, and it seems to me entirely correct
14 and proportionate that we would give that
15 particularisation on frequency at this stage, so the
16 Defendants can deal with this in evidence if so advised.
17 So they may not actually need to plead to this, but on
18 their own pleading it is a point which will arise and
19 they will need to deal with at some point.

20 The second point where we do depart from Dawsongroup
21 and Ryder, this is paragraph 30(b) of the current draft;
22 and we have set out there, Sir, the inferential basis on
23 which we would be inviting the Tribunal to infer that
24 meetings and contacts took place more frequently than
25 contemporaneous documentary records show.

1 So there is, Sir, quite a lot of detail there. But
2 again, we do not think it is a fair criticism to say
3 that we have particularised the basis for the inference.
4 Indeed, again, had we put the inference in purely
5 general terms, without particularisation, the
6 application before you today, Sir, would have been
7 a request for further particulars.

8 If one is bringing an inferential case, it is
9 obviously correct that to the extent possible it must be
10 particularised, and we wanted to front load that process
11 so it can be dealt with effectively by the Defendants,
12 again whether as a matter of evidence or as a matter of
13 pleading.

14 Those are the two exceptions. Apart from that, by
15 and large we have adopted Dawsongroup and Ryder's
16 pleadings, and what we find rather bizarre is that no
17 point is made by the Defendants in relation to the
18 length of the Dawsongroup and Ryder's pleadings, and in
19 fact Ryder's pleadings are exactly the same length as
20 ours, so we do not understand why there is
21 a discriminatory approach, and for what it is worth,
22 even before responding to these amendments, most of the
23 Defendants' defences were already close to 100 pages and
24 indeed MAN's defence is already 138 pages. So we are
25 not the odd man out here.

1 Mr. Hollander makes some forensic point based on the
2 fact that we have gone from 15 pages to what is before
3 you, but that is also true of virtually all the defences
4 of the Defendants.

5 In relation to Iveco and MAN, they are in a position
6 whereby they are not a party to the Dawsongroup case and
7 therefore for the first time have to contend with this
8 material. But that, with respect, is not our fault,
9 it is something they will have to contend with in any
10 event; and the answer to that issue, if it is an issue,
11 is that they are given a bit more time than the other
12 Defendants.

13 So we did, Sir, genuinely try to adopt Dawsongroup
14 and Ryder where at all possible. I do not accept
15 Mr. Williams' points that to the extent we have added
16 a sentence here or there that presents any difficulty.
17 They are going to have to look at this in any event.
18 That is completely overblown.

19 Where we have not adopted those pleadings in two
20 specific respects, it is fully in line, in my
21 submission, with our supplemental role, seeking to add
22 value and not to duplicate. We have raised two very
23 important points, which can and should be
24 particularised, and in my submission we should be
25 credited for doing so and not keeping this up our

1 sleeve, and it does afford the Defendants a significant
2 period of time, probably by way of witness evidence,
3 frankly, to deal with these points. We just wanted to
4 put our cards on the table because it is a point on
5 frequency which has been taken against us time and time
6 again, and we want to say from our perspective there is
7 nothing to it. In fact, these meetings were incredibly
8 frequent and there is a continuum. So we wanted to put
9 those cards on the table at this stage.

10 Now, in relation to the Allianz case raised by
11 Mr. Harris, first of all it is in a different league.
12 That was a case where Mr. Harris' solicitors had put in
13 a pleading I think more than 250 pages, and the order of
14 Mrs. Justice Cockerill was that it should be limited to
15 110 pages. So it is not exactly a quantum leap from
16 what we have put forward in this case.

17 Obviously in that case, Sir, it was based on the
18 Commercial Court guide, which does not apply in this
19 Tribunal. The key point, Sir, is that insofar as our
20 pleading departs from Dawsongroup and Ryder, in my
21 submission it is more appropriately treated as
22 essentially the provision of voluntary particulars and
23 not something in the traditional sense of a pleading.

24 THE PRESIDENT: In that case can I interrupt you, because we
25 do not want to spend so long on this.

1 MR. O'DONOGHUE: No, Sir, of course not.

2 THE PRESIDENT: Insofar as Trial 2, which is really all we
3 are concerned with at the moment, and we appreciate your
4 separate action and that there will have to be
5 directions for trial in that at some stage, but so far
6 as Trial 2 is concerned, if it is just voluntary
7 additional particulars to what has been said by
8 Dawsongroup and Ryder --

9 MR. O'DONOGHUE: Sir, with respect, it is not. The two
10 distinct points I have raised have not been raised by
11 Dawsongroup and Ryder. That is my point.

12 THE PRESIDENT: But they are points that you want to
13 possibly explore with the Defendants, insofar as
14 Dawsongroup and Ryder do not. But there is no need for
15 the Defendants to plead to this for Trial 2, because
16 your separate involvement in Trial 2, and your distinct
17 involvement, is on pass-through.

18 MR. O'DONOGHUE: Sir, that is true, but they do take a point
19 on frequency and inference. That is a point we will be
20 making at Trial 2. It is a matter for them as to
21 whether they want to deal with this by way of evidence
22 or pleading. It is clear, based on the pleadings I have
23 quoted to you, that it looks like it will be a matter of
24 evidence. That will be an important issue in Trial 2,
25 and if Dawsongroup and Ryder for whatever reason, and

1 I think the answer is they will be raising this, but if
2 for whatever reason they choose not to raise these
3 frequency and inferential points, we will be raising
4 them because they are important and it is
5 non-duplication.

6 THE PRESIDENT: These are evidential points, essentially,
7 are they not?

8 MR. O'DONOGHUE: Well, partly, Sir, but it does go to
9 questions of substance, because of course the
10 Defendants' argument is: if we did not meet very often,
11 it cannot have had much impact.

12 THE PRESIDENT: Yes, of course, evidential points have to be
13 relevant to the issue. But the contested issue is
14 whether there was any effect and to what extent, and was
15 it only occasional or was it throughout the period.

16 MR. O'DONOGHUE: Sir, I think the important question is if
17 the only pleading we were to put forward was in relation
18 to Trial 2, would it look the same as is currently
19 constituted? My submission, for the reasons I have
20 given, is that yes it would, because we have not
21 duplicated Dawsongroup and Ryder, we have raised two
22 distinctive points which will be issues for Trial 2, and
23 the way to deal with this, in my submission, is that it
24 is a choice for the Defendants as to whether they wish
25 to plead to this, which sounds unlikely, or whether

1 it is better dealt with by way of witness evidence, and
2 that, in my submission, is the way forward.

3 These points cannot be avoided. They will be
4 raised. In fact, they have been raised by the
5 Defendants already. We have set out our case and they
6 will have to respond.

7 THE PRESIDENT: But it will be important for Trial 2 that
8 there are full pleadings, and at the moment you may say
9 you cannot give better particulars of your allegation of
10 pass-through --

11 MR. O'DONOGHUE: I entirely accept that, Sir.

12 THE PRESIDENT: -- to which not only the Defendants but
13 indeed Dawsongroup and Ryder may wish to plead in
14 response, and you then to reply.

15 MR. O'DONOGHUE: Of course, yes, we have had no disclosure
16 on that.

17 THE PRESIDENT: No, we appreciate that. So the question is
18 what is the most sensible way to proceed given your
19 role, as we have held, in Trial 2. I think we will
20 perhaps again take a moment to decide that.

21 MR. O'DONOGHUE: Sir --

22 THE PRESIDENT: Is there anything else you want to add?

23 MR. O'DONOGHUE: No, Sir. The fundamental point is that if
24 the question is would this be a pleading just for
25 Trial 2, my answer would be yes. Of course it will have

1 to be supplemented by pass-on, but we have avoided
2 duplication, we have added value on two points, they
3 seem to me pretty fundamental, and we should be
4 commended for giving details at this stage, not
5 criticised, and the question is how do the Defendants
6 want to respond. They do not have to plead to this, but
7 it will have to be grappled with at some point, probably
8 in witness evidence.

9 THE PRESIDENT: Yes, thank you. We will now briefly
10 withdraw for five minutes.

11 (12.35 pm)

12 (Short break)

13 (12.43 pm)

14 THE PRESIDENT: Mr. O'Donoghue, we do not accept that this
15 is an appropriate pleading for Trial 2. We think
16 a distinction is to be drawn between the independent
17 DS Smith action and the involvement of DS Smith in
18 Trial 2, which is only concerning the Dawsongroup and
19 Ryder trucks, with a limited role by way of intervener
20 on overcharge.

21 We think it is appropriate for DS Smith to serve
22 a separate pleading which will, apart from identifying
23 and explaining the nature of its businesses, as at the
24 start of this draft, state the number of trucks that
25 DS Smith has rented or leased from Dawsongroup and Ryder

1 with a schedule, insofar as possible, identifying them.
2 Secondly, to state that insofar as Dawsongroup and/or
3 Ryder establish an overcharge you allege that it has
4 been passed on; in other words, the plea that is made at
5 the moment at paragraph 40(a)(6). You can, in addition,
6 say that in addition to the allegations alleged by
7 Dawsongroup and Ryder, DS Smith states -- and you can
8 in, it seems to us, a couple of paragraphs make the
9 point that an inference can be drawn and/or that
10 meetings were more frequent than appear from the
11 documents, that is the allegation, and voluntary
12 particulars of the basis of the inference in the
13 allegation are set out in an annex to your pleading.

14 On that basis, the Defendants will not have to
15 respond to those particulars. They can respond in short
16 order to the two additional points, if there are two
17 points; it was not entirely clear to us if the frequency
18 and the inference are two points or two sides of the
19 same point. It will then be for the Defendants and for
20 Dawsongroup and Ryder to respond to the allegations of
21 pass-through, and we will have very much confined
22 pleadings regarding DS Smith.

23 Quite separately, you can apply to amend your claim
24 for the separate trial where you will be a claimant, and
25 that at the moment is a separate trial of your own. It

1 has not been fixed; it will not happen, clearly, for
2 some considerable time.

3 We will not grant permission for you to amend this
4 claim in this form. We think it is unnecessarily
5 disproportionately prolix, and we do not think that the
6 Ryder and Dawson group pleadings are necessarily an
7 example that should be followed. We will not fix a page
8 limit, we do not think that is appropriate, but we
9 invite you to reconsider the way in which you frame the
10 claim and to follow the same approach of putting
11 detailed particulars of an allegation in an annex.

12 On that basis, the parties will know what it is, on
13 the evidence, you have got that you are relying on. As
14 you say, I think in paragraph 30, you do not in fact
15 know the full facts. A lot more may come out on
16 disclosure. We do not see any reason that you then have
17 to start amending your particulars of claim to allege
18 a lot more evidential points that emerge from
19 disclosure. There is then no end to it. Those are
20 matters that will be explored in evidence.

21 But it is for you to produce a separate, amended
22 pleading for that action, with an application for
23 permission to amend which will be considered separately,
24 and it is no part of Trial 2, which is what we are
25 concerned with today.

1 The question then is what time you need to produce
2 this shorter pleading of the kind that I have specified.
3 It seems to us it should not be very long, because of
4 nature of the pleading that I have indicated and, as you
5 have said, you at the moment are not in a position to
6 plead much more about pass-on.

7 MR. O'DONOGHUE: Sir, yes. Might I make the suggestion that
8 over the lunch period I will take instructions on that
9 and I can come back to you after lunch.

10 THE PRESIDENT: Yes. As I have indicated, it should be
11 fairly soon because we want to direct time for responses
12 from all the other parties and see in what sequence that
13 is to take place.

14 I think we would like before lunch to deal with the
15 issue of disclosure regarding pass-through, that is to
16 say involving DS Smith for stages 2 and 3, or 1B and 3.
17 That involves, clearly, an issue of a Confidentiality
18 Ring, and we have very much in mind that DS Smith is
19 a customer of Ryder and to some extent Dawsongroup, and
20 also then how disclosure should be managed.

21 Would it be appropriate to hear first from Ryder and
22 Mr. Holmes?

23 Submissions by MR. HOLMES

24 MR. HOLMES: Sir, we accept, given their participation at
25 stage 3, that it would be appropriate for DS Smith to

1 receive disclosure going to the issue of pass-on, and
2 that that will require confidentiality arrangements to
3 be put in place which encompass DS Smith's legal team
4 and its external economic consultants.

5 Subject to any questions you have, Sir, that is our
6 position.

7 THE PRESIDENT: Yes.

8 For Dawsongroup, Mr. Palmer.

9 Submissions by MR. PALMER

10 MR. PALMER: Sir, Dawsongroup is in a different position
11 from Ryder in this respect, now it has been clarified
12 that the extent that DS Smith wish to intervene in
13 respect of Dawsongroup's claim is to make its general
14 points as to the operation of the leasing market, so
15 that that can be factored in, if you like, to the
16 Tribunal's final determination as to the average rate of
17 pass-on in relation to Dawsongroup's trucks.

18 As we see it, now that it is clear that that is the
19 extent of the ambition of DS Smith's intervention on
20 proportionality grounds in Dawsongroup's claim, any
21 disclosure which is provided ought to be on the basis of
22 targeted requests for disclosure which are relevant to
23 those general issues, and that there is no case for
24 providing the 5,000-odd documents and more in relation
25 to the detail of pass-on, which is being provided to the

1 Defendants. That would be an onerous obligation. It
2 would necessitate the setting up of confidentiality
3 arrangements all for what would amount to a relatively
4 small claim for damages against the Defendants in
5 respect of the Dawsongroup trucks, if I can put it that
6 way, and the costs of managing that wide disclosure
7 process will far exceed any relation of proportionality
8 to that level of damages sought.

9 We have emphasised, obviously, not only the small
10 number of trucks but also, in our evidence, how brief
11 the periods for which they were rented often were;
12 nearly half of those 19 trucks were rented for only
13 three months. So this is a very small aspect of the
14 overall claim and it would be quite wrong in principle
15 to order full disclosure of pass-on in respect of all of
16 Dawsongroup's trucks, given the limited role which is
17 now expected to be played. That is all the more so, if
18 I can put it this way, in the context of not only the
19 cost but also the confidentiality concerns that arise
20 given the relationship of customer that we have.

21 So for all those reasons, we would ask that
22 following the pleading which is to be served consequent
23 upon the order that you have just made, Sir, that
24 targeted requests for disclosure be made relevant only
25 to those general state of the market issues.

1 Whilst I am on that subject in relation to the
2 pleading, may we just clarify the nature of the pleading
3 for the purpose of this Trial 2.

4 This is, we anticipate, more in the nature of
5 a statement of intervention than a pleading which would
6 be against Dawsongroup as a Defendant. We are not
7 a Defendant to any claim by DS Smith. They have their
8 separate claim against the Defendants. We see their
9 role in our trial as that of an intervener. We would
10 not propose to respond, ordinarily, by a full pleading
11 in response to a statement of intervention, but perhaps
12 that much can be judged once we have received the
13 statement of intervention, if that is what it is
14 intended to be, by the Tribunal.

15 THE PRESIDENT: Yes. It obviously would not be a defence to
16 DS Smith, but clearly if DS Smith make allegations about
17 pass-through and bring those out, it seems right that
18 you should be able to set out in a pleading, whatever
19 heading we give it, stating your position in so far as
20 you disagree.

21 MR. PALMER: Sir, that is understood, but what we do not
22 want to be led into, given the role that is to be played
23 by DS Smith, is having to plead out a full pass-on
24 defence which will generate requests for disclosure
25 which go beyond any role that DS Smith themselves

1 propose to play.

2 THE PRESIDENT: Yes.

3 MR. PALMER: What we anticipate will come out of the trial
4 on the subject of pass-on is to the extent that the
5 Tribunal finds that there is any pass-on at all, it will
6 identify an overall average rate and DS Smith would in
7 effect have the benefit of that outcome in respect of
8 their 19 trucks and would be able to make a claim, bring
9 their claim against the Defendants in respect of that
10 proportion of the value of that commerce, bearing in
11 mind the overcharge by which they would be bound so far
12 as those trucks are concerned.

13 THE PRESIDENT: Yes.

14 MR. PALMER: So we just see that overall average rate being
15 informed by the evidence which they wish to bring, if
16 they can bring material evidence as to the general state
17 of the leasing market. We of course may wish to respond
18 to that evidence, but we do not see any more detailed
19 nitty-gritty approach to the 19 trucks being engaged in
20 at all, just on the proportionality grounds, which
21 I know the Tribunal understands.

22 THE PRESIDENT: Yes. You will have to plead, obviously, on
23 pass-on if it is raised, and it is raised by the
24 Defendants against you.

25 MR. PALMER: Yes.

1 THE PRESIDENT: Thank you.

2 Mr. O'Donoghue, on disclosure.

3 Submissions by MR. O'DONOGHUE

4 MR. O'DONOGHUE: Sir yes.

5 First of all, on confidentiality of course we see
6 the concern. That concern is adequately protected by
7 this being inner Confidentiality Ring material.

8 THE PRESIDENT: You are content that will be your external
9 lawyers and experts?

10 MR. O'DONOGHUE: At this stage, yes. Of course there is
11 a mechanism within the order whereby if there is to be
12 some disapplication for a particular category we would
13 have to put in a reasonable request, but in the first
14 instance it would be Inner Ring, yes.

15 THE PRESIDENT: Yes. Has such an order been prepared yet?

16 MR. O'DONOGHUE: Sir, you may have picked this up at the
17 back end of our skeleton, we do think that -- so there
18 is obviously an order in respect of my claim, but we did
19 think that there should be some synchronisation between
20 the order in our case and the order in Dawsongroup and
21 Ryder's case. I can come back to that, but there is
22 a small point there. But on the point of principle,
23 yes, we completely accept that, that if we want to go
24 out of the Inner Confidentiality Ring we have to make an
25 application. That really meets the confidentiality

1 concern.

2 On the question of costs, in terms of handing over
3 ready-made material there is no cost, so at least to
4 that extent that point does not go anywhere.

5 I mean, thirdly in relation to Mr. Holmes'
6 submissions, we obviously welcome his indication that we
7 should get their disclosure at least. Indeed, if we are
8 to play a significant role in the Trial 2 stages 2 and
9 1B, it is obviously essential, and particularly for our
10 expert, that we have the fullest possible access to
11 those materials.

12 In principle for Dawsongroup, we say the same
13 principles should apply by parity of reason.
14 Mr. Palmer's only point in effect is: well, you are just
15 19 trucks and we have a much wider claim.

16 Now, with respect to Mr. Palmer, I mean if one looks
17 at how his evidence has been pitched, if we can go
18 quickly to Mr. Harvey, it is in the common bundle,
19 {COM-C1/12/5}. It is Mr. Harvey's 8th statement and he
20 says at 4.6.1:

21 "I intend to estimate the level of pass-on by
22 Dawsongroup at the level of Dawsongroup's business as
23 a whole, rather than estimating pass-on on
24 a customer-by-customer basis."

25 So it is a market-wide approach, as Mr. Palmer

1 outlined. If that is his approach, and there may be
2 questions of forensic accountancy as to whether in
3 principle that is the correct approach, but if that is
4 his approach, then to a good extent Mr. Palmer's point
5 of the 19 trucks collapses, because his expert's
6 approach will be an aggregated market-based approach, it
7 will not be a disaggregated approach on
8 a customer-by-customer basis.

9 Now, if that is the case, then in principle
10 Dawsongroup's disclosure on pass-on will as a whole be
11 relevant to my client, and his point about the 19 trucks
12 fizzles out completely in that context.

13 The final point, Sir, which I am sure you have well
14 in mind, given that we have no disclosure on pass-on and
15 we have not even received copies of the correspondence
16 on pass-through issues, it is extremely difficult at
17 this stage for us to conduct a targeted disclosure
18 process on that, or a targeted application process on
19 that, because we have no visibility whatsoever as to
20 what has been disclosed, the description of sub-division
21 of the materials, and if it were intended we go down the
22 route of a targeted application, at the very least to
23 attempt to start that exercise we would need
24 a comprehensive description by category of what exactly
25 has been disclosed by Dawsongroup so that we can begin

1 to grapple with that. At the moment we would be feeling
2 around in the dark.

3 THE PRESIDENT: Yes.

4 MR. O'DONOGHUE: In principle, we say what is true for Ryder
5 on pass-on should apply to Dawsongroup.

6 Just to conclude, the point I made earlier in the
7 context of stages 1, 2 and 3, in many respects it may be
8 simpler and more proportionate to give us the corpus of
9 documents. There is a very high likelihood that the
10 process of targeted applications will simply lead to
11 satellite litigation and disputes and in fact increase
12 the costs. We certainly have no interest in reading
13 a single document more than we need to. Apart from
14 anything, we will have to cashflow all these costs in
15 the interim. It is very much in our interests to read
16 no more than we need to, and we do have a significant
17 concern that if we are to go down a granular approach,
18 just replying to the categories, it will actually end up
19 being far more expensive and therefore less
20 proportionate.

21 THE PRESIDENT: Yes, thank you.

22 I do not think this disclosure issue on pass-on
23 concerns the Defendants. The Defendants are raising
24 pass-on by way of mitigation or quantum arguments in
25 defence, but they obviously do not have documents,

1 I assume, on pass-on. So unless someone from the
2 Defendants thinks this is relevant to them, it seems to
3 me it is not.

4 MR. HOSKINS: Sir, can I just raise one point, which is all
5 the focus is on the disclosure that DS Smith are going
6 to receive, but it may well be that the Defendants need
7 to see documents from DS Smith insofar as there are
8 issues that concern the Defendants.

9 I do not want to take a lot of time on that, but
10 I just flag that as an issue that seems to have not
11 surfaced yet, and I would suggest probably some
12 Redfern Schedule type process, which has worked well to
13 date in this procedure, be adopted with DS Smith now
14 that we also know what role they are playing, but
15 clearly there is potentially some disclosure which will
16 be needed from DS Smith. We will potentially want to
17 ask questions at stage 1B and 3 of the DS Smith factual
18 witnesses and we have to have the documents to do that.

19 THE PRESIDENT: Yes. No, I think that is a fair point.

20 Submissions by MR. WILLIAMS

21 MR. WILLIAMS: Sir, this is Rob Williams for DAF. Could
22 I just make one point.

23 We do not take a position as between DS Smith and
24 Dawsongroup on the issues that were canvassed in
25 argument but, looking ahead, practical issues will arise

1 in relation to the sharing of information when we start
2 to get in particular into the expert process, because
3 I think for the purposes of stages 2 and 3 and stage 1B
4 of the trial there may well be sharing of expert
5 evidence, and there may have to be without prejudice
6 discussions between experts who have seen different
7 material.

8 We simply wanted to make that practical point, that
9 although Mr. Palmer may have objections to the sharing
10 of information for the sorts of reasons he was giving,
11 that sort of flow of information is going to have to be
12 considered and managed in due course, and obviously the
13 position would be quite different, and simpler, frankly,
14 if the different parties had the access to the same
15 material.

16 THE PRESIDENT: Yes, thank you.

17 Anyone else before we ... I think the sensible thing
18 is that we deal with this before lunch and then adjourn.
19 So we will take five minutes and have a slightly later
20 lunch adjournment.

21 (1.05 pm)

22 (Short break)

23 (1.07 pm)

24 THE PRESIDENT: We understand the point you made,

25 Mr. Palmer, for Dawsongroup about proportionality, but

1 we think this is going to be approached by the experts
2 for not only Dawsongroup but also Ryder and potentially
3 DS Smith by looking at the position in the market. We
4 think it is likely to create significant practical
5 difficulties if there is a carving out of part of the
6 disclosure being given. Therefore we think that the
7 disclosure that Dawsongroup is giving on pass-through
8 must be provided to DS Smith, and that it would not be
9 appropriate to treat Dawsongroup differently in that
10 respect from Ryder.

11 As regards the disclosure from DS Smith, we
12 appreciate that also may be required for the Defendants,
13 and certainly also to Dawsongroup and Ryder, and that
14 the Redfern Schedule process has worked well and should
15 be operated.

16 So that is how we think it should be taken forward.
17 We shall now adjourn until 10 past 2.

18 We would ask the parties to consider first the time
19 period for the pleading that we have directed from
20 DS Smith and any responses to it and, secondly, what
21 timescale should be applied for disclosure on pass-on
22 that we have just ruled upon.

23 Mr. Holmes.

24 Submissions by MR. HOLMES

25 MR. HOLMES: Sir, may I raise two very brief points, I am

1 very conscious of the time, but about the
2 Redfern Schedule for tomorrow --

3 THE PRESIDENT: Yes.

4 MR. HOLMES: -- and to make that as helpful as possible for
5 the Tribunal. I am conscious there is limited time, and
6 it may affect use of time over the short adjournment.

7 That is the only reason to raise this now.

8 THE PRESIDENT: Yes.

9 MR. HOLMES: By way of context, all but one of the live
10 applications now is brought by the Defendants against
11 either or both of Ryder and Dawsongroup, and so
12 depending on what is involved the burden will, we
13 apprehend, fall upon us to update the schedule, and we
14 want to be sure that we get it right.

15 We understand from Mr. Malek's response to
16 Mr. Hoskins' question that the schedule should be
17 limited to those applications that remain live and to be
18 determined at the CMC tomorrow.

19 We would be grateful for confirmation that as
20 regards the update that is required to the schedule it
21 will be sufficient to add brief and telegraphic
22 references to the correspondence which has arisen since
23 the witness evidence insofar as it is relevant.

24 We apprehend that it will not be possible in the
25 time available to have any kind of a sequential process.

1 In order to facilitate the process it would also be
2 extremely helpful for us during the course of this
3 afternoon's business if we could have a brief roll call
4 from the Defendants of the applications which remain
5 live.

6 We received a letter yesterday from
7 Slaughter and May but we can see that that has already
8 been partially superseded. At least one of those
9 categories has fallen and we suspect others have as
10 well.

11 There is also a slightly unsatisfactory aspect to
12 this in that new categories which were raised at an
13 earlier stage but they are not the subject of
14 submissions in skeleton arguments are now being revived
15 by the Defendants, and it would be very helpful for us
16 so we can prepare efficiently if the Defendants could
17 simply identify briefly the categories that they intend
18 to pursue against us during the course of tomorrow's
19 hearing so that we can prepare overnight. Thank you.

20 MR. MALEK: For me the ideal would have been to have
21 a schedule which concentrates on what is outstanding not
22 just to be dealt with tomorrow but what is outstanding
23 generally, because I would like to see what the full
24 picture is and not just look at those which we need to
25 determine tomorrow. So I would rather have a schedule

1 that covers everything that is outstanding so we have
2 a round picture.

3 As regards cross-referring to other documents that
4 is not particularly helpful because we are not going to
5 really want to look at inter-solicitor correspondence on
6 this. I would rather you put in the schedule, at least
7 in very brief form, what your point is, what the
8 objection is, rather than saying, well, the objections
9 are set out in some letter that is somewhere in the
10 bundle.

11 MR. HOLMES: That is very helpful, Sir.

12 MR. MALEK: I think it is probably sensible that the
13 solicitors and counsel all speak sooner rather than
14 later to see where they are, so when you start putting
15 these schedules together probably between 6.00 pm and
16 10 o'clock tonight we are all focusing on the same
17 things.

18 So I do not think we need a roll call in front of
19 the Tribunal. What needs to happen is that the parties
20 start talking as to what is really in issue.

21 MR. HOLMES: That is understandable and --

22 MR. MALEK: I am also very conscious that a lot of
23 categories still need further discussion between the
24 parties before you get a crystallised position. We have
25 always made it very clear that we want the parties to go

1 through the process of crystallising a position before
2 you come to the Tribunal for a ruling, otherwise we end
3 up dealing with very minor things and things which quite
4 frankly should be capable of an agreement.

5 MR. HOLMES: That is very helpful.

6 MR. MALEK: As regards some of the suggestions in the
7 correspondence which is that we should initially have
8 some form of statement to explain how things are done
9 rather than having the documents first, I am very much
10 in favour of that because that can end up being a lot
11 cheaper, and then at the end of the day you will only be
12 arguing about what is really, really needed.

13 In a case like this I have found, for example, the
14 pricing statements have been really, really helpful. So
15 you do not necessarily want to have masses of documents.

16 So much money has already been spent on this case on
17 disclosure. So you have got to the stage whereby the
18 Tribunal is not inclined to be ordering wide-ranging
19 disclosure on things. We are not going to be
20 reinventing the wheel now. We are getting quite far
21 down the line on disclosure. But I do understand that
22 when we are talking about passing on any overcharge
23 there is an element that really does need to be worked
24 out, and there may well be significant further
25 disclosure on that level.

1 MR. HOLMES: That is very helpful, Sir, and we will take
2 those points into account and we will set out our
3 position. I doubt there will be time for a sequential
4 process. But in order to do this, Sir, may I just
5 attempt one more time to persuade you of the need to
6 know fairly soon which points are pursued by the
7 Defendants for good order tomorrow.

8 We would ask either that that could be done during
9 the course of tomorrow's business or at the very least
10 within a short period following today's hearing so we
11 know what points are pursued. That would be immensely
12 helpful, certainly from my perspective as counsel, in
13 understanding what needs to be argued tomorrow.

14 MR. MALEK: Look, what you need to be doing is talking
15 amongst yourselves, either counsel or solicitors, as to
16 what points you want to be dealt with tomorrow, and work
17 that out amongst yourselves. There is no point in
18 having a roll call before the Tribunal. This is
19 something that should be happening between counsel. You
20 are all well-known counsel. You are all very
21 experienced. I cannot see any real difficulty in you
22 having a conference call amongst yourselves to work
23 through these issues.

24 THE PRESIDENT: It is not a very productive use of the
25 Tribunal's time for you, as it were, to communicate with

1 each other during a Tribunal hearing.

2 One of the disadvantages of remote hearings of
3 course is that you do not all congregate outside the
4 courtroom where you could have a brief discussion and
5 resolve this, but there is nothing to prevent you
6 setting up, if that is the way you wish to do it,
7 a video call between you all without the Tribunal being
8 there to take place at 5 o'clock, when you can run
9 through in the way that you envisage and tick off what
10 are the points that are outstanding. I do not think you
11 need the three Tribunal members sitting there while you
12 do that.

13 MR. HOLMES: Very good, Sir. We will liaise with the other
14 parties and try to set such a call up. I am very
15 grateful.

16 THE PRESIDENT: Yes. We will return at 2.15.

17 (1.16 pm)

18 (The short adjournment)

19 (2.25 pm)

20 THE PRESIDENT: Good afternoon. I think we left matters
21 that Mr. O'Donoghue, you would take instructions about
22 the time for the pleading that we have ordered.

23 MR. O'DONOGHUE: I have been able to do that. We obviously
24 want to get this right and we would respectfully request
25 six weeks.

1 THE PRESIDENT: So you are saying then --

2 MR. O'DONOGHUE: 16 June, Sir.

3 THE PRESIDENT: 16 June. You said there is not a lot that

4 you can plead on pass-through at the moment.

5 MR. O'DONOGHUE: Sir, that is right. We have not had the

6 disclosure.

7 THE PRESIDENT: Yes. I do not quite understand why you need

8 that long in the circumstances. I would have thought

9 four weeks should be adequate, is it not?

10 MR. O'DONOGHUE: Sir, there has been some criticism and we

11 want to take that on board and reflect on it, and we do

12 not want to be back to square one.

13 THE PRESIDENT: Yes. As I understand it, you will not at

14 the moment be saying much about pass-through until you

15 get disclosure.

16 MR. O'DONOGHUE: Sir, yes.

17 THE PRESIDENT: Yes. Okay, well I will not firmly decide

18 that. We understand what you say. We will look at

19 everything together.

20 Then as regards the pass-through disclosure from

21 Ryder, Mr. Holmes, when can that be provided?

22 MR. HOLMES: Sir, within two weeks.

23 THE PRESIDENT: Yes, that is very helpful. So that is to

24 say by 19 May, yes?

25 MR. HOLMES: Yes, Sir.

1 THE PRESIDENT: 19 May.

2 Mr. Palmer, Dawsongroup disclosure?

3 MR. PALMER: We can do the same, by 19 May, Sir.

4 While I am here, might I raise one brief point
5 arising out of the Tribunal's ruling just before lunch
6 and indeed the Tribunal's indication that it is
7 attracted to the stage 1B procedure, albeit with the
8 precise ambit of stage 1B to be decided when we have
9 more detail in due course?

10 THE PRESIDENT: Yes.

11 MR. PALMER: The Tribunal made clear that it was mindful of
12 our points on proportionality but they had to give way
13 on this occasion to grounds of practicality in ordering
14 this disclosure.

15 We would be grateful for a steer and if you like
16 a marker at this stage, no more than that, from the
17 Tribunal that that order for disclosure, made on
18 practical grounds primarily, does not invite DS Smith to
19 produce full and expert evidence going beyond the common
20 issues yet to be identified which will arise in
21 stage 1B, and that what is not expected to be made use
22 of in this disclosure is an opportunity to provide a
23 full on critique of Dawsongroup's expert or to provide
24 a full on expert report on the market-wide pass-on rate
25 for Dawsongroup. Because otherwise we are concerned

1 that stage 1B will simply become a rebranding of stage 2
2 and will not, in substance, be distinguishable from it.

3 Our understanding from the Tribunal's orders is that
4 it is attracted to dealing with genuine common issues in
5 stage 1B, and that the wide order for pass-on disclosure
6 has been made for practical grounds to facilitate that,
7 but not as an invitation to really have a stage 2 which
8 is only stage 1B in name.

9 THE PRESIDENT: Yes, I think we understand your point and
10 you have laid down your marker, and we shall bear that
11 in mind.

12 MR. PALMER: I am very grateful, Sir.

13 THE PRESIDENT: Yes --

14 MR. O'DONOGHUE: Can I raise one additional point, Sir?

15 Obviously we will get the pass-on disclosure on the
16 basis as ordered. That is historic disclosure. There
17 may be further pass-on disclosure today or tomorrow as
18 we go forward, and we assume it is implicit in what the
19 Tribunal ordered that, subject to any future decision on
20 stage 1B, we would get forward-looking disclosure as
21 well on pass-on. Because otherwise we would still be
22 subject to an asymmetry; other parties would have
23 documents that we would not have seen.

24 THE PRESIDENT: I am not sure what you mean by
25 "forward-looking disclosure".

1 MR. O'DONOGHUE: Sir, the disclosure we will get in a couple
2 of weeks will be the disclosure to date on pass-on.
3 There are ongoing applications in relation to further
4 pass-on disclosure, and I just wanted to make sure that
5 in principle we would not be precluded from seeing those
6 materials, subject of course to what the Tribunal may
7 decide in due course on stage 1B.

8 THE PRESIDENT: Oh, of course, that is right. What is being
9 ordered is that the pass-on disclosure being made by
10 Ryder and Dawsongroup should be provided to you, and
11 that means the disclosure made to date and any
12 disclosure going forward.

13 MR. O'DONOGHUE: Sir, yes, I just wanted to clarify that.
14 Thank you.

15 THE PRESIDENT: Yes. Very well.

16 Then the question of a Redfern Schedule on DS Smith
17 disclosure to be prepared. This in the first stage
18 would be disclosure that may be sought from DS Smith.
19 Are there any proposals on dates when ...

20 MR. O'DONOGHUE: Sir, might I suggest that we first set out
21 with the parties our proposal, and then we can deal with
22 dates on the back of that.

23 THE PRESIDENT: Yes, I think that is sensible.

24 MR. O'DONOGHUE: I know what we agreed, but we will not be
25 a source of delay, I can assure you.

1 THE PRESIDENT: I think that it is sensible that you have
2 a discussion between yourselves, and if you cannot agree
3 I think that can be dealt with by paper application --

4 MR. O'DONOGHUE: I am grateful.

5 THE PRESIDENT: -- to the Tribunal.

6 MR. O'DONOGHUE: Thank you.

7 THE PRESIDENT: I would like to move then beyond matters
8 specific to DS Smith, and the next point now that we
9 have clarified the scope of Trial 2 is to consider the
10 question of trial length. We have previously directed
11 that this should be a trial of 24-26 weeks. We see that
12 I think it is Daimler that has asked that it be
13 re-listed with an estimate of is it 30-40 weeks,
14 Mr. Harris?

15 Mr. Harris, you are muted. Mr. Harris, you are
16 still muted. Can you hear me?

17 MR. HARRIS: (Nods).

18 THE PRESIDENT: You can hear me. We cannot hear you.

19 MR. HARRIS: I am ever so sorry, we were struggling to
20 unmute.

21 THE PRESIDENT: Yes.

22 MR. HARRIS: Yes, that is correct. It is not so much that
23 we are making an application to re-list with an extended
24 estimate, it is more that we have, as in our skeleton,
25 identified what appear to be very considerable numbers

1 of witnesses, and we thought it wise to bring to the
2 attention of the Tribunal much earlier rather than later
3 the fact that with that number of witnesses, and having
4 drawn a comparison with the ten week estimate in
5 Royal Mail/BT, the current time estimate may be
6 insufficient. That is as high as I put it.

7 I am not thrilled at the prospect of a 30-40 week
8 trial, but I am less thrilled, and I apprehend that
9 potentially the Tribunal may be less thrilled at the
10 notion of having say 26 weeks, or whatever the current
11 listing is, and then finding that we need another ten
12 and that cannot be managed for another six months. That
13 was the reason for drawing it to your attention, and
14 that is as high as I put it.

15 THE PRESIDENT: Well, I understand that. I doubt that it
16 will be practicable to have a 40 week trial, and I think
17 it will be a case of simply tailoring the witness
18 evidence to fit within the 26 weeks, because I think
19 that the Tribunal will be booked for that period, the
20 High Court judge chairing it will be allowed that period
21 and it will be a fixed length trial, and
22 cross-examination and so on will have to be curtailed
23 and targeted so it fits within that estimate. We do not
24 think that longer than 26 weeks is reasonable for this
25 case.

1 MR. HARRIS: So be it.

2 THE PRESIDENT: The next matter then is I think the
3 amendments to the defences from the Defendants, what one
4 might loosely refer to as the Sainsbury's mitigation by
5 the Defendants, but Mr. Hoskins are you wanting to say
6 something about trial length?

7 MR. HOSKINS: No, I was simply about to volunteer myself to
8 start on the amendments, because we agreed between among
9 ourselves that I could do that.

10 THE PRESIDENT: That is fine. It seemed to me that the
11 first question is, under the order that was made
12 following the last CMC, drawn up on 3 December of 2020,
13 whether permission is needed to amend; that is
14 paragraph 3 of the order. In a sense, it is a question
15 of when any argument comes. If permission is needed,
16 then the amendment cannot stand until permission is
17 granted. If permission is not needed, then the
18 amendment can be made and then an application can be
19 made to strike out and the test is exactly the same.
20 It is just a question of when it is heard and who goes
21 first.

22 I can tell you that it did seem to us, having read
23 what everyone said, that the order as drawn up means
24 that you do not need permission to amend, provided that
25 the amendment is indeed a proper amendment in light of

1 the Sainsbury's judgment.

2 We can hear the parties on that, but we did have
3 points on some of the specific defences that have been
4 raised. So it might be helpful, unless you are wishing
5 to argue, Mr. Hoskins, that permission is needed, which
6 I suspect is not the submission you were going make, if
7 we can just raise some points on the pleadings that we
8 have seen, and then we can hear from Dawsongroup and
9 Ryder.

10 I think there are, of course, separate defences in
11 the different cases, but if we look at the defences to
12 the Dawsongroup claim and the defence of Volvo/Renault,
13 whom you represent, which is at {DG-A1/OC30.21/37}. It
14 is paragraph 50A.1. That, as we understand it, is the
15 mitigation defence by way of re-amendment. It is still
16 not on my screen. It is an Outer Confidentiality Ring
17 document, but this is not a confidential paragraph. It
18 should be on OC30.21/37.

19 Do you have it in hard copy?

20 MR. HOSKINS: I have a hard copy in front of me, Sir, yes.

21 THE PRESIDENT: It is the passage that you put here in the
22 pleading:

23 "... they passed on those increased costs or other
24 burdens to their customers and/or otherwise mitigated or
25 avoided their loss including (without limitation) by

1 reducing other costs ..."

2 We do not understand how "including (without
3 limitation)" as a broad and, we felt, rather vague plea,
4 is it within the scope of what is said in Sainsbury's?

5 MR. HOSKINS: My understanding, it is not intended to go any
6 further than Sainsbury's paragraphs 205 and 206.

7 Sir, if you think back to your days at the Bar and
8 pleading, you know that one tries to make sure that all
9 possibilities are covered. I think this is probably
10 a safety first issue rather than a substance issue.
11 It is not intended to go further than paragraphs 205 and
12 206 of Sainsbury's.

13 THE PRESIDENT: I think it is important, because otherwise
14 it becomes vague and open-ended. If you say "avoided
15 that loss by reducing other costs", but including, as
16 what Sainsbury's makes clear is that certain things on
17 any view, however one interprets it, which businesses
18 do, are not within the scope of a mitigation defence.
19 So can the words "including (without limitation)" be
20 struck out and omitted?

21 MR. HOSKINS: I should take instructions just to make sure
22 I have not missed something, and I will come back to
23 that. Can I say at the moment my understanding is that
24 yes, that can go, as long as it is on the basis that we
25 are trying to reflect the issue that Sainsbury's

1 paragraph 205 and 206 raises.

2 Let us leave it that that is the position unless and
3 until I raise it again with you if I am told I have made
4 a mistake, Sir.

5 THE PRESIDENT: Yes. I should make clear that we are not,
6 by indicating that, saying it is not open to the
7 Claimants to apply to strike out the remainder of the
8 plea, but on any view we thought that was hard to square
9 with Sainsbury's and, therefore, the permission under
10 paragraph 3 of the order.

11 MR. HOSKINS: I have just had instructions that that is
12 fine, we are happy to take those words out.

13 THE PRESIDENT: Yes. So it is "avoided their loss by
14 reducing other costs". Yes.

15 MR. HOSKINS: Yes.

16 THE PRESIDENT: Thank you.

17 Then on ... yes, certain points can be made on other
18 defences being vague, but we think, as I say, that the
19 position is that permission was granted and it is then
20 a matter for argument.

21 Reference has been made in a number of the skeletons
22 to the pending judgment regarding a mitigation defence
23 in the Royal Mail/BT v DAF action. That judgment will
24 be issued within two weeks and you will be able to take
25 account of that, and if we take the course that I have

1 indicated, then the Claimants can make any applications
2 they wish to arising from the view expressed by this
3 Tribunal, albeit not having heard arguments from anyone
4 other than DAF.

5 That is where we provisionally think the question of
6 amended defences stand, but that is subject of course to
7 hearing from Mr. Holmes and Mr. Palmer.

8 Mr. Holmes first.

9 MR. HOLMES: We are content with that, Sir. If we need to
10 do so, we will proceed by way of application.

11 THE PRESIDENT: Yes. Thank you.

12 Mr. Palmer.

13 Submissions by MR. PALMER

14 MR. PALMER: Sir, as you will know, our position and
15 understanding is that permission is required to amend,
16 and has not been granted by the order. The order was
17 drafted in a manner which faithfully reflected the
18 intention and indeed language of the Tribunal at the
19 last CMC, but if I may I would like to just remind you
20 of that language last time.

21 In the bundle at {COM-A1/12}, that is the HS1-A1
22 bundle, the authorities bundle for this hearing, and
23 within that {COM-A1/12} was the draft rulings last time,
24 and if one goes within that to page 7 so it is
25 {COM-A1/12/7}.

1 THE PRESIDENT: Yes.

2 MR. PALMER: You will see paragraph 11 of your first ruling
3 and you turn to the question of pleadings next, and you
4 say various parties have said they may need to amend
5 their pleading after the Court of Appeal judgment and in
6 light of the Supreme Court judgment in Sainsbury's, and
7 you say:

8 "... we would suggest that any draft amendment
9 application then should be served within three weeks of
10 the Court of Appeal's judgment being handed down."

11 There was then argument, if one goes back to the
12 transcript, and I will not turn it up now but there was
13 argument in which Mr. Harris said that three weeks was
14 not enough and it would take months before they could be
15 ready, and the upshot was a ruling at the beginning of
16 ruling 2 on the same page:

17 "We will direct that any amendment should be served
18 by 18 December, or four weeks after the Court of Appeal
19 hands down its judgment ..."

20 There was no discussion in the interim as to whether
21 permission should be granted there or then; there was no
22 application, prospectively or otherwise, for permission;
23 and there was certainly no decision to grant permission.
24 What there was, was a variation from three weeks to four
25 weeks after the Court of Appeal's judgment being handed

1 down, by which any draft amendment application should be
2 served.

3 Now, the order which was then drafted reflected the
4 language that was used, "We will direct that any
5 amendment should be served by 18 December", but that
6 should be read and interpreted, in my submission, in the
7 context in which the ruling was made and the Tribunal
8 were thinking, which was that any draft amendment
9 applications should be served by then. That is what,
10 certainly on our behalf, we expected, and indeed wrote
11 promptly to the Tribunal on 22 January when we received
12 pleadings from DAF and Volvo not in draft form. It is
13 fair to say DAF had provided a draft earlier. But the
14 key point is that no application for permission to amend
15 was made at that time, just argument as to how long
16 after the handing down of the Court of Appeal's judgment
17 would be needed in order to bring a draft amendment
18 application. That is how the matter was left.

19 In those circumstances, our position is that it is
20 incumbent upon the Defendants who wish to re-amend their
21 defences either, of course, to obtain consent for those
22 amendments or to apply to the Tribunal for permission in
23 respect of them. That is the right way of managing
24 this.

25 I have further submissions to make about the

1 particular re-amended pleadings on mitigation, and
2 indeed on what has been referred to as complements and
3 bundled products as well, and I am in your hands, Sir,
4 whether you want me to move on to those points as to why
5 we say any application for permission in due course
6 should be refused, or whether you want to hear from
7 others on that point on permission.

8 THE PRESIDENT: Yes, thank you. I think we will withdraw
9 for a moment.

10 MR. HOSKINS: Sir, could I make two quick points in
11 response, please?

12 The language of the order which was made by the
13 Tribunal is absolutely clear on its face. If
14 Dawsongroup believed that --

15 THE PRESIDENT: We have got that point, Mr. Hoskins.

16 MR. HOSKINS: That is fine.

17 THE PRESIDENT: We will withdraw for a moment.

18 (2.50 pm)

19 (Short break)

20 (2.54 pm)

21 THE PRESIDENT: Yes, we think that the order is clear,
22 Mr. Palmer, and indeed we have gone back and we have
23 looked into it, it was actually submitted as an agreed
24 order by the parties at the time, with no suggestion in
25 the drafting that was put to the Tribunal that it would

1 be a draft amendment. But as I say, we are not in any
2 way shutting out an application, and the same test
3 applies. Moreover, we can indicate to the parties that
4 we can set aside 21 and 22 July as dates on which we can
5 hear any application resulting from the mitigation
6 pleas, because that will be important in governing the
7 way that the evidence proceeds; and we shall keep those
8 dates.

9 You may wish to consider this when you receive the
10 judgment, given that it is the same constitution of the
11 Tribunal which explores this matter.

12 MR. PALMER: Sir, I am grateful.

13 By way of clarification of that, it is our position
14 that there are certain amendments which have been made
15 which in fact exceed the permission which you have
16 decided was granted, because they do not flow from the
17 Sainsbury's decision or indeed the Court of Appeal's
18 decision, and the scope, on any view of the permission
19 granted, was limited to that.

20 THE PRESIDENT: Yes.

21 MR. PALMER: Is that a matter which you would intend should
22 be dealt with on 21 and 22 July or is that a matter
23 which you would like to hear about today?

24 THE PRESIDENT: Have you identified those particular
25 passages in your skeletons?

1 MR. PALMER: Yes, indeed. We say none of it flows from
2 Sainsbury's, properly construed, apart from DAF's
3 mitigation defence, which we do accept falls within the
4 corner of the Sainsbury's decision. But the vague,
5 imprecise and general assertion set out in the Daimler
6 and Volvo defences, with no link to negotiations with
7 suppliers, but aimed at cost cutting generally, we say
8 fall outside the terms of the Sainsbury's decision,
9 crucially in failing to distinguish between that which
10 was caused by the overcharge and that which were
11 independent commercial decisions, and apparently seeking
12 to treat any cost cutting which happened at the relevant
13 time as mitigation for the overcharge which they levied
14 on Dawsongroup.

15 We say that simply falls outside the scope of
16 Sainsbury's, and if you recall Sainsbury's, you will
17 understand the basis for that submission.

18 THE PRESIDENT: Yes, I understand completely. I think, and
19 I see where you are going, probably it is sensible if
20 it is all dealt with together on 21/22 July.

21 MR. PALMER: Yes.

22 THE PRESIDENT: Because the scope of Sainsbury's and how
23 Sainsbury's should be interpreted is absolutely at the
24 heart of that issue, and whether it technically falls
25 within the terms of the permission or whether the

1 permission is -- or it gives rise to a pleading that can
2 then be struck out, it depends quite how you interpret
3 what "permission in the light of Sainsbury's" actually
4 means, as long as it is dealt with soon, and the
5 Tribunal rules whether this is a proper mitigation plea
6 or not, I think dealing with it, as it were, piecemeal
7 does not make sense. So it is better that we deal with
8 it all together, with full argument on Sainsbury's and
9 the implications of Sainsbury's. But I quite understand
10 the point that you are making, and I think everyone else
11 will as well.

12 MR. PALMER: Yes.

13 THE PRESIDENT: So the fact that the pleading stands does
14 not mean, as I said indeed with regard to even
15 Volvo/Renault, that we therefore have accepted that the
16 amendment can stand and cannot be struck out.

17 I have just been told that Mr. Harris may have lost
18 connection, so we will just pause for a moment.

19 MR. HARRIS: Sir, I am pleased to say that we did lose
20 connection but we are now reconnected.

21 THE PRESIDENT: Good, I am pleased to see you. I do not
22 know if you heard --

23 MR. HARRIS: I have managed to catch up on the transcript,
24 Sir. I am very grateful, thank you.

25 THE PRESIDENT: The fact that it falls within the terms of

1 the order, which of course was made at a time that we
2 had not seen the pleading that was put forward, is not
3 in any way saying that therefore we have granted
4 permission for the plea as drafted as one that is
5 properly arguable and cannot be struck out. That is
6 a matter to be considered in July, if any applications
7 are made.

8 MR. HOSKINS: Thank you very much. Clearly understood.

9 THE PRESIDENT: It is fairly clear that an application will
10 be made, and possibly two.

11 Right, on that basis -- and I do not know if there
12 are other passages dealing with other matters that are
13 completely separate in the amendment that are objected
14 to, but I think those are the key passages, the
15 mitigation points that have been pleaded.

16 MR. PALMER: Sir, for clarity, then, we would include within
17 the amendments to which we object and would propose to
18 deal with in the manner that you have directed, we would
19 include our points on the so-called complements or
20 discounted bundles or total value defences which are
21 said by some to amount to mitigation, but which we treat
22 as separate, we would propose to deal with at the same
23 time, if that is in line with your intention, Sir.

24 THE PRESIDENT: Yes, that is right. It is only, as I say,
25 if there is anything else. For example if I look, just

1 to take one example, at Daimler's defence, or rather
2 re-amended defence, one has on pages 19 and 20, at
3 paragraph 11G, (a) and (b), one has subparagraph (aa)
4 about exchange of gross prices and an allegation about
5 how that relates to net prices, well that has nothing to
6 do with Sainsbury's and it has nothing to do perhaps
7 with binding recitals; it is a plea that has been put
8 in, and I take it that, although you may disagree with
9 it, it is not being objected to as an amendment. That
10 is not something we are expecting to look at in July.

11 MR. PALMER: No, sir, we have not raised any point about
12 that.

13 THE PRESIDENT: So it is mitigation, complements, cost
14 reductions and those issues.

15 Can we then turn to expert evidence? There are, as
16 it were, two stages of this. One is the procedure for
17 the submission of names and the issues that the experts
18 will discuss, and then there are the dates for experts'
19 reports.

20 We note that the Claimants would like us to set
21 dates for and grant permission for specific expert
22 evidence now. I think all the Defendants say that that
23 is premature, and that there should be first
24 a discussion between the parties about the nature of the
25 expert evidence and issues through a mutual discussion

1 and then, insofar as there is disagreement, put
2 proposals to the Tribunal, that we can set dates for
3 expert reports, but we should not grant permission on
4 any particular expert evidence at this stage.

5 I hope I have summarised the position correctly. So
6 I think it is the Claimants who are asking that we
7 should go further and actually deal with expert evidence
8 more directly other than setting out a timetable, which
9 is also in dispute but we will then look to that.

10 Mr. Holmes first. You want us to go beyond that,
11 I think.

12 Submissions by MR. HOLMES

13 MR. HOLMES: We had hoped that directions could be made for
14 expert evidence at this CMC, but in the light of where
15 the Defendants are and the evolving position in relation
16 to the expert evidence that they wish to call on certain
17 downstream issues, we reluctantly accept that it would
18 be fruitful to have a short period of further discussion
19 between the parties before directions are made as to
20 expert evidence.

21 The Tribunal may have seen that in mid April the
22 Defendants explained that they did plan to share an
23 expert on pass-on. We learned yesterday that this would
24 be a forensic accountant. It is unclear to me at least
25 whether they also propose to lead evidence from an

1 econometrician on the question of pass-on. My
2 understanding from my learned friend Mr. Harris'
3 skeleton argument is that that is at least Daimler's
4 intention. Matters are therefore in flux and we accept,
5 reluctantly, that further time would be helpful.

6 We would, however, very much hope that a more
7 concentrated timetable could be fixed than is proposed
8 by the Defendants, who would leave this for resolution
9 in November. Our concern is that all parties are in the
10 process of preparing expert evidence and there is a real
11 risk of wasted costs if people proceed on a wrong
12 footing. So any issues in relation to expert evidence
13 should be resolved promptly. We have proposed in our
14 skeleton argument a more concentrated timetable; for
15 your note, that is at paragraph 22.

16 Our suggestion is that by 20 May the parties should
17 notify each other of their proposals as to the issues to
18 be addressed and the fields of expertise those issues
19 engage.

20 By 17 June, the parties should notify the Tribunal
21 of the position arrived at, indicating what is in
22 dispute.

23 Then, to the extent needed, any contested matters
24 could be resolved at the hearing which the Tribunal has
25 proposed for 21/22 July. It should be a short matter

1 which could be dealt with then, so that we all know
2 where we are going, so to speak.

3 THE PRESIDENT: Yes. Thank you.

4 Mr. Palmer, do you have the same reluctant
5 acceptance?

6 Submissions by MR. PALMER

7 MR. PALMER: It is very much a fallback for us, Sir.

8 As you will have seen from our skeleton argument,
9 what we had hoped was that we could have our application
10 for Mr. Harvey's evidence and his methodology approved
11 today, having made a timely application to bring it. We
12 do, of course, accept that the Defendants have not made
13 similar applications at this stage for their experts,
14 and we say that is a matter of regret. But it is also
15 a matter giving rise to an acute danger that the
16 Tribunal's warnings given in the ruling, Sir, that you
17 made and Mr. Malek made back in January last year on the
18 subject of disclosure, that the warnings you gave are
19 effectively being lost and falling on stony ground.

20 I am sure I need not turn it up. If it is necessary
21 to look at it, it is in bundle {COM-D1/1/533}, but it is
22 paragraphs 39 through to 42 which you will recall,
23 noting the necessity to consider the methods that would
24 be used to determine issues of causation and quantum so
25 that disclosure can be tailored accordingly. Of course,

1 you emphasised that disclosure will only be ordered in
2 relation to a specific category of documents if the
3 Tribunal is satisfied that they are relevant and
4 proportionate and necessary in the light of that
5 methodology.

6 At 42 {COM-D1/1/535} you said:

7 "We would hope that the experienced experts can
8 agree on the methodology ... If very different methods
9 were to be used, requiring vast amounts of different
10 data, only for one or other method then to be challenged
11 at trial as unsound or unreliable with an invitation to
12 the Tribunal to reject it entirely, that would be
13 conducive to a massive and hugely expensive waste of
14 effort on disclosure." (As read)

15 Now, the applications that you are going to hear
16 tomorrow, if they proceed, and in particular those
17 brought by Daimler against Dawsongroup, are premised
18 upon a forensic accounting methodology being adopted to
19 assess the extent of supply pass-on. Whereas as
20 Mr. Harvey has explained, he considers that the
21 appropriate methodology is one of econometric pricing
22 analysis.

23 We say that these issues of disclosure can only
24 properly be dealt with on the basis of some indication
25 at least, and preferably permission as to an expert,

1 from the Tribunal as to what the appropriate approach
2 is. But far from taking that approach, Daimler have in
3 these proceedings and for the purposes of this CMC filed
4 witness evidence effectively seeking to rubbish
5 econometric pricing analyses for this purpose and saying
6 this can all be dealt with at trial. Meanwhile, Daimler
7 want to proceed by inviting the Tribunal tomorrow to
8 grant permission for its disclosure to fuel that
9 analysis.

10 Now, we say the appropriate thing to do is to hear
11 argument today, Mr. Harvey has filed evidence and
12 Mr. Grantham has filed evidence in response, as to the
13 appropriate approach which should be taken, so that the
14 disclosure applications due to be heard tomorrow can be
15 determined, if it is still necessary, in the light of
16 the Tribunal's views on the appropriate methodology and
17 hence on the necessity and proportionality for various
18 of those categories. But you are faced at the moment
19 with a direct invitation to leave all of this to trial
20 while two different experts go off down two different
21 routes, racking up costs and causing huge disclosure
22 burdens on all parties, without an issue in principle
23 being decided.

24 We wrote in March seeking to invite applications for
25 this to be made, we thought that was timely and obvious

1 that we had reached that stage. The Defendants have
2 taken a different view; I will not trouble you with the
3 correspondence on all of that. But may I make two
4 matters clear.

5 The first is that Ryder are adopting the same
6 approach as Dawsongroup in this respect, so far as
7 supply pass-on is concerned, contrary to what has been
8 said on behalf of the Defendants. They propose an
9 econometric pricing analysis to assess supply pass-on.
10 It is true that they have sought permission to call
11 a forensic accountant as well, but that is for
12 a different purpose; that is to support their evidence,
13 firstly, on loss of volumes and, secondly, on loss of
14 profit, which is a head of claim that they make but
15 Dawsongroup does not.

16 So far as this discrete topic of supply pass-on is
17 concerned, we both propose econometric pricing analysis.
18 Secondly, we are supported in that by the Commission
19 guidelines.

20 THE PRESIDENT: I understand where you are going, but I do
21 not think we need to hear argument about it. The
22 reality is, for better or worse, and you would say for
23 worse, the Defendants are not in a position to set out
24 the way they wish to deal with things. You have pointed
25 out that in our ruling we said this is something the

1 Tribunal ought to consider, not just be left to trial,
2 when you can get a whole lot of different methodologies,
3 and we certainly propose to consider it before trial.
4 We cannot consider it for all sides today. You may say
5 tomorrow that therefore it is premature for Daimler to
6 receive the disclosure they are seeking. You have put
7 down your marker on that point. We are not going to
8 deal with that until we get to the disclosure issues.

9 But right now what we have got to decide is whether
10 we should grant you permission to have Mr. Harvey as
11 your expert to do the sort of analysis he is proposing
12 or whether that should be held back until we get the
13 exchanges between the parties and some joint proposals
14 or the statement of where you differ.

15 MR. PALMER: Sir, that is understood. I appreciate you
16 cannot possibly determine applications which have not
17 yet been made, but what we say is that the fact that the
18 Defendants have chosen not to make those applications on
19 a timely basis should not stand in the way of our
20 application being dealt with. If you are against me on
21 that and it must be held back so that all applications
22 can be considered together, then in that context we
23 certainly adopt what Mr. Holmes has said for Ryder, that
24 the Defendants' proposals to leave all of this
25 until November, but at the same time to press on

1 applying for disclosure, spending months preparing these
2 expert reports, only to arrive in November with a sort
3 of fait accompli and saying "We have done all of this
4 work and you cannot possibly knock us all out now", we
5 say that is entirely the wrong way round, and that this
6 must be dealt with at the soonest opportunity.

7 If Mr. Holmes' suggestion is July, then so be it, it
8 can be added to that hearing for July, it need not take
9 long. But we certainly do object to Mr. Grantham's
10 suggestion that this should be simply put off and that
11 he continue on his merry way without the guidance of the
12 Tribunal.

13 THE PRESIDENT: Yes. I think we cannot deal with it today,
14 and we think that to grant one side permission to adduce
15 a certain kind of evidence when we have not heard from
16 the others just is not appropriate in a case of this
17 nature and trial; although a lot of work has been done,
18 it is not until the year after next. But we hear what
19 you say about the timing, and the Defendants have
20 proposed a timetable, I think, of notifying proposals to
21 each other by 15 July and then to the Tribunal on
22 30 September.

23 We would like to deal with this at the two-day
24 hearing in late July, and I want to ask the Defendants
25 if there is any reason why they cannot notify proposals

1 between the parties by 17 June, and then put something
2 to the Tribunal by 9 July. That will give time for this
3 to be considered and dealt with on 21/22nd July. So
4 that is to say instead of the Claimants' proposal, or
5 maybe Ryder's proposal of 20 May and 17 June, it will be
6 17 June and 9 July.

7 Mr. Williams.

8 Submissions by MR. WILLIAMS

9 MR. WILLIAMS: Yes, Sir.

10 We are keen to make progress on these issues and to
11 reach a resolution, really for the reasons that
12 Mr. Palmer has given. There is no question of the
13 Tribunal's previous guidance having been forgotten or
14 ignored. In fact, you will have seen in our submissions
15 and in Ms. Edwards' evidence that we too are very keen
16 to avoid the ships in the night problem. Indeed, that
17 is in large part what is driving the process which we
18 have proposed. But we proposed the dates
19 in July, September and November for good reason and we
20 do say that a hearing in July is not going to be
21 workable.

22 Of course we, DAF, have the experience or the
23 benefit of the experience of the process in Trial 1, in
24 Royal Mail and BT; that process took from the end
25 of October to early March, which is a period of just

1 over four months, and the Tribunal may recall that at
2 the October CMC it directed that the parties should
3 exchange proposals within a period of a month at that
4 stage, so there was a date fixed towards the end
5 of November, and in fact that date was extended and
6 I think extended again, so that the parties only really
7 reached crystallised positions at the end of January.
8 The benefit of those exchanges was seen by the Tribunal,
9 I think, because the issues narrowed and continued to
10 narrow as that process continued.

11 So we are concerned about compressing the period
12 allowed to deal with these difficult issues because of
13 a concern that we then would come before the Tribunal
14 when there is still further room for common ground.

15 Of course, in Trial 2 we have many more parties to
16 consider, and the complication of the shared expert to
17 resolve first. The position on that front is that the
18 Defendants are liaising, I think you have seen from the
19 submissions, we are liaising to appoint a shared expert
20 on what we have called the downstream issues, in
21 particular pass-on and mitigation. So that process
22 needs to reach a landing first. We anticipate that will
23 happen very soon, but --

24 THE PRESIDENT: You say it has to reach a landing first.

25 Why cannot these go on simultaneously? Pass-on and the

1 overcharge are different issues, you can be considering
2 them at the same time, can you not?

3 MR. WILLIAMS: You are right. I think the main area of
4 controversy that has crystallised so far is in relation
5 to the downstream issues, Sir, and I think there is
6 broad consensus that the overcharge analysis will be
7 done by competition economists and using econometrics,
8 I think amongst all parties that are going to do that
9 work.

10 You have seen from the evidence submitted by
11 Dawsongroup and the responsive evidence put in by
12 Daimler that it is in relation to pass-on that the main
13 area of debate exists at the moment.

14 So, having in place the shared expert to deal with
15 those issues is really the first stepping stone in
16 dealing with that side of it. I do not mean to suggest
17 that the appointment is going to be a significant delay
18 from this point on, but we do need that expert
19 appointed, and then we start from there.

20 THE PRESIDENT: Yes.

21 MR. WILLIAMS: I mean, it is important to say as well that
22 although Dawsongroup has put forward sort of polar
23 opposites, diametrically opposed poles, that is to say
24 the possibility of a regression on the one hand, as
25 against the possibility of forensic accounting evidence,

1 the Tribunal I think heard our argument and will have
2 seen from our three page document in the past, that at
3 least as far as DAF is concerned we in the past have not
4 seen this as necessarily a binary choice. Our proposal,
5 which was considered at the Trial 1 CMC, was that there
6 would be a regression analysis, which would build on
7 aspects of a forensic accounting analysis in a manner
8 which was complementary but non-duplicative. It may be
9 that we take a position like that in Trial 2 or that we
10 take some variation on that position, but ...

11 THE PRESIDENT: Sorry to interrupt you. We did refuse
12 permission for that.

13 MR. WILLIAMS: That is right, Sir. We have not seen your
14 reasons for refusing permission for that yet.

15 THE PRESIDENT: Yes.

16 MR. WILLIAMS: It does seem to us, and I do not want to put
17 this too high, that in circumstances where Dawsongroup
18 itself is proposing that there should be a regression
19 carried out, and that that evidence comes from
20 Mr. Harvey, who in the Trial 1 CMC recommended
21 a forensic accounting analysis and deprecated the
22 regression, that there are going to be arguments for
23 both approaches and there may be arguments for
24 a combination of approaches, and the difficulty is that
25 as things stand, those issues have not been ventilated

1 yet.

2 Dawsongroup has sought to suggest that we are
3 holding the process up, and they set out their stall on
4 this long ago, and that we are dragging our heels.
5 I mean, the impression they have given is not really
6 quite right, Sir. The background is that Dawsongroup
7 first wrote to us on 19 March setting out their position
8 at a headline level, saying that they wanted to rely on
9 an expert in competition economics on pass-on.

10 THE PRESIDENT: I do not think we want to hear too much
11 detail of what happened and who said what to whom in
12 correspondence, but your position is you say, for all
13 those reasons, what, that you cannot set out proposals
14 before 15 July; is that really your position?

15 MR. WILLIAMS: Yes. If the position -- yes, the date that
16 you suggested I think was 17 June, Sir.

17 THE PRESIDENT: Yes.

18 MR. WILLIAMS: The difficulty we have, as I say, the shared
19 expert will be in place soon, at that point we can
20 really start to develop our position, and in my
21 submission it really is not enough time for us to have
22 reached a landing, possibly taking a position across all
23 of the Defendants, within I think that would be five
24 weeks or so from now. Of course, the timetable that you
25 proposed, Sir, it is compressed at that end and then it

1 is compressed again at the next stage, because you would
2 require that all of the dialogue between the parties
3 would need to happen in that period between 17 June and
4 9 July, and that is a very short period, Sir, based on
5 the experience in Trial 1. It is a very short period,
6 with many more parties' positions to consider.

7 That is why we proposed 15 July for the first stage.
8 It is a little more than two months from this CMC, which
9 in my submission, Sir, is not a long period for issues
10 of this nature and this complexity. It is a realistic
11 period, and it is also realistic having regard to the
12 experience in Trial 1.

13 Of course, it is right to say that not every party
14 is in the same position. The Tribunal has determined at
15 this hearing that DS Smith is going to be involved in
16 the downstream issues, and I anticipate that they will
17 need to be involved in these discussions too.

18 That is the 15 July date. The 30 September date
19 follows from our July date. It is a period of ten
20 weeks, but of course that ten weeks includes August. As
21 I said a few moments ago, this is the period in which
22 there can be dialogue in relation to the parties'
23 proposals, so that is where there is the opportunity to
24 narrow the issues and time does need to be allowed for
25 that.

1 I think Ryder initially proposed a four week period
2 for that process in its skeleton, and I think the period
3 on the timetable the Tribunal just outlined would be
4 even shorter.

5 Sir, that is why our timetable takes us to a hearing
6 after the summer, and having reached a point after the
7 summer it seemed to us that there being broad consensus
8 that there ought to be a CMC in November that that would
9 be the opportunity to draw a line under this.

10 We hear what the Claimants say about how they want
11 to get on with things, but of course again the
12 experience in Trial 1 is that these matters were
13 resolved a year before trial and I do not think at the
14 moment that is causing jeopardy to the timetable. It
15 has not prevented disclosure from being dealt with. Of
16 course we understand that some disclosure may sit behind
17 those decisions, but again that has been manageable in
18 Trial 1 as well.

19 So, broadly speaking, Sir, we say that it is not
20 realistic to try and resolve this before the summer, and
21 if one gets to the period after the summer then it is
22 a question of whether we have a hearing
23 in October/November and, as I say, our proposal was that
24 it be dealt with at the CMC which the parties are
25 broadly in favour of.

1 THE PRESIDENT: Yes, thank you.

2 Anyone ... Mr. Harris.

3 Submissions by MR. HARRIS

4 MR. HARRIS: Two short additional points. We adopt the
5 submissions of Mr. Williams.

6 The first additional point is that we are somewhat
7 surprised by the criticism of Daimler's proposal to
8 adopt forensic accountancy evidence at all. I make this
9 point now because a marker was very expressly put down
10 by Mr. Palmer that because of his wholesale criticism of
11 that approach we might not be able to deal with the
12 disclosure issues at all tomorrow on this topic, and we
13 firmly and emphatically reject that. For your note, it
14 does not need to be brought up on to the screen but at
15 {DG-C1/IC26/581} is Daimler's three-page expert
16 methodology statement dated as long ago as
17 31 January 2020, so well over a year ago, and amongst
18 a number of references there is the following at
19 paragraph 14 {DG-C1/IC26/583} that Daimler proposed, and
20 I quote, "a fact-specific enquiry, combined
21 with forensic accounting analysis".

22 Never, prior to a few weeks ago, in advance of this
23 CMC, has Dawsongroup, or for that matter anybody else,
24 suggested that it was wrong in principle to have
25 anything to do with a forensic accountancy analysis.

1 Moreover, the disclosure to date has proceeded on the
2 back of none other than Mr. Grantham's evidence, the
3 said forensic accountant.

4 I do not pursue that further now, but we put down an
5 equally clear marker that there is nothing in the point
6 that I apprehend will be pursued tomorrow, that
7 disclosure cannot proceed absent the final resolution of
8 these detailed questions about which expert does what.

9 I note and echo Mr. Williams' comment, just in
10 passing, that of course in Trial 1, with which I am less
11 familiar, there had not been a final resolution of the
12 names and identities and scope of expert evidence, and
13 it equally did not prevent disclosure issues from being
14 pursued.

15 That was the first of the two short points.

16 The second one is more a housekeeping point, just
17 that it looks as though there is now going to be
18 a hearing in July, principally about pleadings but it
19 may be possible that either this or something else might
20 get added in, and I have been respectfully requested to
21 ask, if at all possible, that anything and everything
22 that gets scheduled for that hearing could please be
23 timetabled by the Tribunal for the preparatory steps,
24 especially because it is not that far away. In other
25 words, if there is to be an application about A, can it

1 please be done by date Y, and reply evidence by date Z,
2 and that type of thing?

3 THE PRESIDENT: Yes.

4 MR. HARRIS: Thank you.

5 THE PRESIDENT: That is a separate point and very helpful.

6 Mr. Hollander.

7 Submissions by MR. HOLLANDER

8 MR. HOLLANDER: Sir, the earliest date that anyone is
9 currently suggesting for first round expert reports is
10 15 July next year.

11 I have two points. First of all, I think you have
12 already got the point that the Defendants are in the
13 process of instructing a joint expert.

14 THE PRESIDENT: You said 15 July next year?

15 MR. HOLLANDER: 2022.

16 THE PRESIDENT: Reports, yes, I am sorry.

17 MR. HOLLANDER: You are aware that the Defendants are in the
18 process of seeking to instruct a joint expert forensic
19 accountant on an aspect of pass-on. He has not yet been
20 instructed and we are not going to be able, with the
21 best will in the world, to identify who is going to deal
22 with what in what area until we have had a chance to get
23 views from that individual, and that is going to take
24 some time. That is the first problem.

25 The second problem, which is that as I -- the issue

1 that has so far been identified as likely between the
2 parties is whether parts at least of pass-on should be
3 dealt with by econometrics or forensic accountancy.

4 Now Ryder, with whom my clients are concerned, first
5 said that they had in mind dealing with part of pass-on
6 by econometrics on 16 April of this year. That was the
7 first indication we had on that.

8 I am not quite sure how the Tribunal -- I think it
9 has been envisaged, from suggestions, that the Tribunal
10 will rule as to whether those matters should be dealt
11 with by an economist or a forensic accountant. Now, if
12 that really is going to be done, that sounds potentially
13 quite a complicated issue for the Tribunal to resolve.
14 I assume there is going to be some quite significant
15 evidence, if that really is what is going to be debated,
16 as to the respective -- it goes way beyond what would
17 normally be thought of by way of directions.

18 That is going to involve, I would have thought, in
19 itself, if one really is going to have some sort of
20 argument of that nature, a pretty decent lead time in
21 terms of preparing evidence. Because if it really is
22 being suggested that the Tribunal should exclude one or
23 the other, or might be, because that is certainly what
24 seems to be suggested, that is quite a knotty matter for
25 the Tribunal to grapple with and would certainly

1 understand your concern to get on, but it clearly is
2 desirable that there is consultation about methodology
3 and we do understand that these things take time. In
4 addition, there is the particular problem faced by
5 DS Smith in getting up to speed and taking part in this,
6 as they will need to on the pass-on aspect, and we think
7 on reflection that Mr. Hollander is right that it will
8 be too difficult to accommodate this in the July
9 hearing, because there may be substantive argument on
10 the amendments.

11 So, bearing in mind that the experts' reports will
12 not come at the very earliest until the summer of 2022,
13 it ought to be workable if the dates are later. That is
14 where we are at the moment, but you have not had
15 a chance to respond to the points being made, so I think
16 we will follow the same order. Mr. Holmes.

17 I should say that we think there might be a bit of
18 flexibility in the dates and it may be that this can be
19 heard at a CMC in the first part of October rather
20 than November, and we can look at that. But to get it
21 all done before the summer, just thinking about it, does
22 not seem realistic, and what we would like is for there
23 to be as much agreement as possible, which given the
24 number of parties here will take time.

25

1 Submissions by MR. HOLMES

2 MR. HOLMES: We hear what you say, Sir.

3 As a first point, we certainly would favour having
4 the next CMC sooner, if there is availability and the
5 Tribunal can accommodate that.

6 We are obviously not parties to the Royal Mail
7 proceedings and we are slightly perplexed about the
8 extent of time that appeared to be required in those
9 proceedings to resolve points that seemed, to us at
10 least, relatively straightforward.

11 What we had in mind was simply to identify by
12 reference to broad issues the economic fields of
13 evidence that would be engaged. In large part we
14 understand it to be common ground that as regards
15 overcharge the parties will be proceeding by way of
16 econometric analysis. This is, of course, something in
17 relation to which DS Smith will not be involved, and
18 therefore there is no concern to delay matters in
19 respect of that. The parties have all been working with
20 experts for some time, and we hope that at least some
21 directions might be given in relation to the overcharge
22 analysis.

23 As regards the so-called downstream issues, there
24 equally appears to be a position which is coalescing
25 fairly clearly on the Defendants' part that they will

1 proceed in part by way of a joint expert in the field of
2 forensic accountancy in relation to pass-on, and some of
3 them at least have already indicated that they will be
4 seeking to adduce econometric evidence in relation to
5 downstream issues. So it does not appear to us to be
6 such a thicket as was suggested in particular by DAF's
7 counsel in submission.

8 We therefore wonder whether some progress could be
9 made ahead of the summer in relation to areas that look
10 more straightforward. But if not, we do at least
11 strongly endorse a proposal for a CMC in October rather
12 than in November.

13 THE PRESIDENT: Yes, thank you.

14 Mr. Palmer.

15 Submissions by MR. PALMER

16 MR. PALMER: Certainly, yes, Sir, I adopt what Mr. Holmes
17 has said in those respects, and emphasise that if the
18 Tribunal feels it cannot determine these issues in July,
19 then as soon as possible would be appropriate. I say
20 that because of the related disclosure applications as
21 well, which we will continue to submit should follow the
22 decision in principle as to which fields of economic
23 evidence and approach and methodology should be adopted
24 in relation to which issue.

25 I am conscious that Mr. Harris, an animated

1 Mr. Harris, indicated he would be pushing back hard on
2 that, in part by reference to again what happened in the
3 Royal Mail and BT case, but I do emphasise that this is
4 a very different case, and the extent and amount of
5 disclosure which would be required were what we
6 apprehend to be Mr. Grantham's approach to be adopted in
7 relation to supply pass-on is so extensive that it
8 raises real proportionality concerns in a way which did
9 not arise in Royal Mail and BT, so far as those
10 claimants were concerned, in providing evidence by way
11 of disclosure ahead of the appointment of an expert.

12 Although Mr. Harris harks back to January 2020 in
13 his three page statement, which has never been agreed by
14 Dawsongroup at all, he fails to address the point which
15 I made at the outset, which is that also in January 2020
16 the Tribunal gave its very clear ruling on disclosure to
17 the effect that the cart should not be put before the
18 horse, that we do need principled rulings on what
19 methodology is to be adopted, and for disclosure to
20 follow on a necessary and proportionate basis following
21 that.

22 All of that weighs very heavily in favour of an as
23 early as possible resolution of this issue.

24 We do not underestimate the importance of the
25 discussion, and appreciate the Tribunal's concern to

1 allow for time, but on this particular issue, which is
2 the focus of my submissions to you, the approach to
3 supply pass-on and the extensive disclosure which is
4 being sought in respect of it, we do seem already to
5 have reached an impasse with two different methodologies
6 being put forward with little shared ground between us.

7 I am sure we will continue to try to engage, but
8 I do indicate that we do seem to have reached a point
9 where the battle lines are drawn, and in those
10 circumstances as early as possible a resolution of that
11 battle, the better for all.

12 THE PRESIDENT: We understand that. We do not know,
13 I think, as yet what approach DS Smith's expert may take
14 to the supply pass-on, and it is helpful, when we do
15 have to decide these things, actually to hear from the
16 experts, albeit in writing, and of course until the
17 Defendants have agreed between them who their joint
18 expert will be, even if we all know on what lines they
19 are thinking, they will not be able to put forward
20 anything from him or her.

21 So I think in the end we will go with a 15 July date
22 but, Mr. Williams, we think two months should be
23 sufficient, even with holidays, and that you should be
24 able to put forward the position to the Tribunal by
25 16 September, rather than 30th. We do not see that even

1 with people having a holiday in August, and in the hope
2 they can perhaps go somewhere warm and attractive this
3 year, that should preclude those steps being completed
4 within two months.

5 MR. WILLIAMS: Thank you, Sir.

6 The only point to add is that the proposal for a CMC
7 in November was I think in part related to the fact that
8 there is a Trial 3 CMC at some time in October. So
9 I think the thinking was simply to try and avoid
10 clashes, given that many of the same parties are
11 involved. Other than that, we have no difficulty with
12 the proposal for a CMC in October, Sir.

13 THE PRESIDENT: Yes, and what we are thinking, we have in
14 mind the dates of the other CMC on Trial 3, obviously
15 the same three members of the Tribunal are involved so
16 we cannot hear this at the same time, and we are
17 thinking of potentially the following week, but this is
18 not a firm date because we need to check on matters, 11
19 and 12 October may be possible dates for this.

20 That is what we shall do. So 15 July is for the
21 proposals, then 16 September for any statement of what
22 you agree on or do not agree on, and any applications to
23 the Tribunal that result from that.

24 We do also agree with Mr. Harris that it is
25 desirable that there should be a timetable for

1 applications for the hearing in July, and on the basis
2 that you will receive the judgment of the Tribunal,
3 I think I can fairly say now, by the middle of next
4 week -- well, it will go out possibly in draft in the
5 middle of next week, so it will be issued by the end of
6 next week, that is to say by 14 May, if we say that any
7 applications concerning the amendments are made -- and
8 this is a question meant for Mr. Palmer and
9 Mr. Holmes -- can we say 11 June, giving you four weeks?

10 Would that be sufficient, Mr. Holmes?

11 MR. HOLMES: For my part, yes, but I am conscious that
12 Mr. Palmer, his view of this may be more significant
13 simply because his client has taken a stronger interest
14 in the pleadings.

15 THE PRESIDENT: Yes, yes.

16 MR. PALMER: 11 June is fine from our perspective, Sir,
17 thank you.

18 THE PRESIDENT: So any application by 11 June. Then any
19 responses, if we say 25 June, two weeks, from the
20 Defendants. Then skeleton arguments by 16 July, limited
21 to 15 pages, which means, Mr. O'Donoghue, if you are
22 involved in this, and I am not sure you are, that
23 15 pages means 15 pages.

24 MR. HOSKINS: Sir, can I just say on the responsive
25 evidence, given that the skeletons are not due until

1 16 July, can I ask for an extra week, please?

2 THE PRESIDENT: Yes, all right. That is 2 July, is it?

3 MR. HOSKINS: Yes, the Wednesday ...

4 THE PRESIDENT: No, the Friday I think.

5 MR. HOSKINS: Yes, 2 July is a Friday. Yes, that is right.

6 THE PRESIDENT: Very well.

7 Right, then there is the question of dates for
8 reports, and without prejudice to any meetings and so
9 on, bearing in mind the trial date and whether and what
10 should be done. We do not want to move the trial date.
11 Various dates have been put forward; Daimler has put
12 forward two options, and the Claimants have put forward
13 I think a different series of dates.

14 If the trial starts in mid March 2023, it seems,
15 working backwards, that the joint statement should come
16 no later than the first week of February 2023, or joint
17 statements from the different experts. If that is the
18 case, then their without prejudice meeting could take
19 place near the beginning of January, and it seems to us
20 that supplementary reports could come in mid December.

21 The question that was raised was about the relation
22 of the first report to a judgment in the Royal Mail v
23 DAF trial. We think that it is in practice -- well,
24 that is really how matters have been framed in some of
25 the skeleton arguments and how this will relate to

1 judgment. But we are not at the moment sure that it is
2 necessary to have a judgment before the first reports of
3 the experts are produced, so long as they can supplement
4 their report in the light of a judgment.

5 Shall we hear first from the Claimants and then from
6 the Defendants? Mr. Holmes.

7 Submissions by MR. HOLMES

8 MR. HOLMES: Thank you, Sir. We agree that the dates that
9 you have suggested for joint experts' statements,
10 supplemental expert reports and the expert meeting are
11 workable, I say supplemental reply expert reports, and
12 we would be content with those.

13 As regards the timing of the first round of experts'
14 evidence, we think a good period needs to be allowed
15 between first round and second round experts' evidence.
16 That is partly because the Claimants will be facing
17 a number of expert reports that will need to be
18 considered and addressed by the Claimants' experts,
19 given the number of Defendants, each with their own
20 expert at least on matters of overcharge.

21 There is no particular need, in our submission, for
22 the first round expert reports to come after the
23 Royal Mail judgment. We agree with the Tribunal about
24 that. The experts have been working already on their
25 expert evidence and will continue to do so up until the

1 trial, so they will not be beginning from a standing
2 start when the Royal Mail judgment lands, and they are
3 perfectly able to take account of the Royal Mail
4 judgment in the second round evidence.

5 We are also mindful that the Royal Mail trial is
6 determining a different overcharge between different
7 parties, in their own particular factual context, and
8 the decision reached will not be binding in these
9 proceedings, although of course developments in the
10 Royal Mail trial may be of interest to these
11 proceedings. But that can be taken into account
12 perfectly comfortably in the reply expert reports and
13 indeed in the joint expert statements.

14 For those reasons, we would commend a first round of
15 expert reports early in the autumn. We would suggest
16 either the date we have proposed, 26 August, or if that
17 is to be adjusted at all, a date in the early part
18 of September.

19 THE PRESIDENT: Yes.

20 Mr. Palmer.

21 Submissions by MR. PALMER

22 MR. PALMER: Thank you, Sir, yes. We also endorse the
23 Tribunal's provisional view that it is not necessary for
24 the first expert reports to await judgment in the first
25 trial.

1 There has been some historical revisionism going on
2 on behalf of the Defendants in their approach to this
3 issue. The Tribunal may recall the extended debate at
4 the last CMC as to the gap which should be left between
5 judgment and this trial, and the Tribunal was persuaded,
6 at the Defendants' invitation, to increase the proposed
7 gap from around four months to around six months, so
8 that the trial would start in March, and not in January
9 as had been the Tribunal's provisional thinking.

10 The rationale for that was that it was appropriate
11 for two reasons. One was it was appropriate to take
12 stock, for the experts to take stock of the judgment and
13 to adjust their evidence. As Mr. Harris put it at the
14 time, there may need to be more reports and more
15 meetings and, as Mr. Hoskins put it at the time,
16 potentially supplemental expert reports to go in, and
17 all agreed that six months was the appropriate interval.

18 We endorse that approach, as the Tribunal accepted
19 on that occasion, that there should be an opportunity
20 following judgment for supplemental reports to go in, so
21 that the methodology can be adjusted.

22 What is being said now is that, actually,
23 potentially what needs to be done is not just an
24 adjustment but some sort of reinvention. That is
25 unrealistic, we say. The work is being done now, the

1 work towards appointing experts, methodology being
2 agreed, disclosure ordered; we are going to take a year
3 to get all of that done. It is unrealistic to think
4 that following first judgment if, as the Defendants now
5 suggest, there was to be criticism of the methodology of
6 one expert or the other, that all of that could go back
7 to square one and reinvent that methodology.

8 There will not be time to turn around the oil
9 tanker; there will be time to adjust course. That is
10 what the Tribunal had in mind on the last occasion, and
11 we say it is perfectly appropriate for that now as well.

12 The second rationale for the six month interval, of
13 course, was also to allow time for an appeal on an
14 expedited basis, if it happens, against the first
15 judgment. Of course, if the Defendants were right that
16 there could be a need to revise even the first
17 statements in the light of the first judgment, the
18 logical extension of that would be you would have to
19 wait for the outcome of that expedited appeal as well.

20 None of this makes any sense. The first trial is
21 not intended to be a dress rehearsal for the second
22 trial. What is intended is that some of the learning
23 can be taken on board by the experts, by way of
24 supplementary report and adjustment.

25 In terms of the timetable, the Tribunal may find it

1 helpful to have open on the Opus screen {COM-C1/7/4},
2 which is page 4 of Mr. Burrows' seventh statement, which
3 does have a helpful table setting out the various
4 parties' proposed dates. I will just wait for that to
5 come up. COM-C1/7/4. That is the wrong bundle, I am
6 sorry, I am still negotiating this. I am in bundle
7 HS1/C1, that is the witness statements being prepared
8 for this hearing today, the hearing specific bundles,
9 non-confidential documents, HS1-C1, and within that
10 COM-C1/7/4, {COM-C1/7/5}, I am sorry. My mistake. We
11 were in the right bundle, it is just the next page that
12 we need. Thank you.

13 That may assist. That is Mr. Burrows' attempt to
14 reduce the various proposed courses to one helpful
15 table.

16 You will see the Daimler options, which propose only
17 serving experts' reports after the anticipated judgment;
18 we urge you to reject that.

19 As between Dawsongroup and Ryder, the variations are
20 minor and I am not going to fall on my sword in respect
21 of any of those variations.

22 You will see that working backwards, as you did
23 a moment ago, Sir, from the trial date, you did not
24 mention the PTR but going up from the bottom, we had
25 both suggested joint expert statements mid-January,

1 rather than early February, but broadly in line with
2 your suggested proposals with the expert meeting
3 in December rather than January, the supplemental or
4 reply reports in December or November, and expert
5 reports in July or August.

6 That all follows, of course, the exchange of factual
7 witness statements. You can see some slight difference
8 between our proposals, December and January, and that
9 again is very much for the Tribunal to decide, but we
10 recommend either of those courses as providing an
11 orderly progress towards trial, with experts able to
12 adjust their evidence and take account of the first
13 judgment at the appropriate stage.

14 Anything else, as Daimler in fact implicitly
15 recognises, delaying those expert reports, with the
16 trial date starting in March, will lead to an unseemly
17 crush at the back end of this long run up to the trial,
18 everything will be being done at the last moment, and so
19 we would urge that those proposals are not adopted and
20 that something like the Dawsongroup or Ryder proposals
21 are.

22 THE PRESIDENT: Yes, thank you. That is a helpful table.

23 Yes, then for the Defendants. Who is going first?
24 Mr. Harris.

25

1 Submissions by MR. HARRIS

2 MR. HARRIS: Thank you. The principal concern on the part
3 of the Defendants that prompted the putting forward of
4 what became known as Daimler's option 1 and Daimler's
5 option 2 was the manageability of the trial in the
6 interests of the Tribunal. It had allied with it
7 a concern about costs, but the principal driver was the
8 convenience of the Tribunal, and the manageability of
9 this trial process on the part of the Tribunal.

10 What we apprehend would be of no use to the Tribunal
11 is a situation in which experts' reports are produced,
12 well in advance of the handing down of the Trial 1
13 judgment, and then having to be substantially and
14 materially revised in light of what will be the first
15 judgment on these critical issues of overcharge.

16 Now, we accept that they are not necessarily binding
17 on all future parties, but there will be a constitution
18 of the Tribunal which means that the first judgment is
19 going to be of highly persuasive effect thereafter.

20 What we sought to avoid by putting forward what we
21 contend are responsible alternate case management
22 proposals is a situation where this Tribunal receives,
23 on Dawsongroup's proposed date or Ryder's, at least
24 seven expert reports on economics in August, together
25 with yet to be decided but in all likelihood some

1 further expert reports on forensic accountancy, then the
2 parties taking stock of the judgment that is likely to
3 come out a month or two after that, from Trial 1, and
4 having to say there need to be fundamental revisions or
5 material supplements. Because then what will happen is
6 that this Tribunal will be faced with the
7 unmanageability of all of those, let us say there are
8 ten expert reports at that first stage in say August,
9 with then ten material additions, supplements or
10 variations to those ten after the Trial 1 judgment.

11 With the greatest of respect and with the greatest
12 will in the world, and perhaps just putting it on
13 a purely personal level, I would find that incredibly
14 difficult to manage. If I would find that, and bearing
15 in mind that I am employed to deal with these cases,
16 I venture to suspect that it might be even more
17 difficult to deal with on the part of the Tribunal.
18 What would be much easier to deal with is the first set
19 of ten reports dealing with the material substance of
20 the ruling that has been dealt with in Trial 1. That
21 was what was driving this proposal.

22 It goes without saying that the supplementary driver
23 of costs is that if large swathes of the first ten
24 reports become otiose or overtaken, then there will have
25 been wasted costs.

1 It is not a fair characterisation of that, we hope,
2 responsible case management suggestion to say that
3 everything will all happen in a great rush, that was the
4 submission that was just made, at the back end. To the
5 contrary, a great deal of work will have been done prior
6 to the Trial 1 judgment, but what will not have been
7 done is the creation of what may then become materially
8 outdated and unhelpful ten sets of reports. That will
9 not be done.

10 THE PRESIDENT: Can I just clarify one thing about your
11 submissions? There is both overcharge and there is
12 pass-through, and they are different. The overcharge
13 issue will be a big issue in the Royal Mail/BT trial.
14 Pass-through will be an issue, but the pass-through in
15 Ryder/Dawsongroup, given the very different nature of
16 the Dawsongroup/Ryder businesses from Royal Mail/BT, is
17 likely to be a very different kind of exercise, is it
18 not?

19 MR. HARRIS: I accept that to some degree, but it is at
20 least conceivable that there will be different
21 approaches of principle that have been adopted into the
22 judgment of this Tribunal in the Trial 1 judgment that
23 then need to be taken into account in the downstream
24 reports in Trial number 2, bearing in mind that they are
25 both economists as regards resale pass-on, and, what we

1 will be submitting, forensic accountancy reports for
2 other aspects of downstream pass-on.

3 So I accept they are different circumstances, but
4 the issues of principle will have to be grappled with
5 and dealt with in the Tribunal's Trial 1 judgment.

6 I say again, and I will then move on to the next
7 point, it will be unwieldy and unhelpful for this
8 Tribunal to have ten reports first time round and then
9 large chunks having to be overtaken. It would be much
10 more helpful, in my respectful submission, if the first
11 ten reports are the grounds that are then going to be
12 traversed in the trial. That is the driver.

13 I accept the Tribunal said a moment ago that it was
14 not attracted to moving the end date. That was
15 option 2, and I accept that. We were not particularly
16 advocating that as the outcome. All we were pointing
17 out, and again I do so orally and then move on, is that
18 it does not give -- if I am right in my first submission
19 that it is going to be a lot more manageable and helpful
20 for this Tribunal to have only one set of ten, if you
21 like, original or founding expert reports, then it does
22 not give a lot of room for slippage on the Trial 1
23 timetable. But if that is a consequence, if that is
24 a fact of life with which this Tribunal is perfectly
25 happy to contend, then so are we. I say no more about

1 that.

2 THE PRESIDENT: Just to be clear, you are saying you think
3 your option 2 you consider more realistic, but option 1,
4 you think, is possible although tight.

5 MR. HARRIS: That is right.

6 THE PRESIDENT: Is that right?

7 MR. HARRIS: Option 2 is more realistic in the sense that it
8 builds in the flexibility for the Tribunal, this is
9 again for the Tribunal, of slippage in the intended date
10 of delivery of the Trial 1 judgment. We are conscious
11 that, of course, it is a 10 week trial, some big new
12 issues, and it sets the groundwork for the entire Trucks
13 litigation. In the real world, this is. I am not
14 talking about res judicata and issues such as that.

15 THE PRESIDENT: I understand.

16 MR. HARRIS: There is quite a lot of pressure on the
17 Tribunal as regards that judgment, and it wants to get
18 it right, and with the best will in the world it may
19 take a bit longer than it had hoped. That is how I put
20 it. Option 2 builds in a bit of flexibility and it is
21 certainly achievable.

22 Option 1 is definitely achievable, but I now need to
23 turn to the detail of that because it is tight, though
24 it will not have been preceded by nothing, far from it.
25 I am working off -- I do not know if we can do this off

1 the one on the screen. I have a table in landscape
2 format at the back of our skeleton argument that I find
3 a little bit easier to use. Either way, what will
4 happen on my learned friends' for the claimants
5 suggestions is that we will get the first round of
6 reports well before the Trial 1 judgment, as I said, and
7 then there will be, on their proposal, experts' reports
8 but in reply, probably after the Trial 1 judgment, so
9 that is said to be November. But then only a month
10 after that there is intended to be a without prejudice
11 expert meeting.

12 Now, in the Ryder proposal, or at least the one that
13 is in front of me, there is no provision at all for
14 supplemental expert reports. I have been told that our
15 table is at, I guess it is HS1, is that right?

16 THE PRESIDENT: I have it at R/E/4/17.

17 MR. HARRIS: I think it may be in a number of places. For
18 the benefit of anybody who is using the main screen from
19 Opus, I have got HS1 {COM-B1/6/17}.

20 That is the second page of a table which is annex 1
21 of Daimler's skeleton. I am now looking at the second
22 page of that, so the next page down in the Opus bundle,
23 please.

24 If you just note the right-hand most column is the
25 Ryder column, and then the one next to it on the left,

1 so the second furthest over to the right, is
2 Dawsongroup. Daimler's option 1 is the first column and
3 Daimler's option 2 is the second column.

4 I was just drawing attention, if you look on this
5 page that is on the main screen, so the second page of
6 my annex 1, that in Ryder's proposal the experts'
7 reports are 26 August 2022, and Mr. Holmes a moment ago
8 said that might slip into say the first week
9 of September. In any event, on any view that is well
10 before the Trial 1 judgment. On Dawsongroup's proposal
11 it is significantly sooner than that even. Then it is
12 an experts' report in reply; so not taking stock and
13 revising the main experts' reports by dint of the
14 Trial 1 judgment, that is not what is proposed by the
15 Claimants, instead it is an expert report in reply on
16 14 November. Then in Ryder's proposal there is no
17 proposal for a supplemental expert report, though we
18 have just been told by Ryder and Dawsongroup counsel
19 that in fact all of the variations, material though they
20 may turn out to be, have to be dealt with in
21 supplemental experts' reports.

22 THE PRESIDENT: That is what the table says. We are not
23 tied to that table. The main point that you are making
24 is that it would be more beneficial to have it after the
25 experts have considered the judgment.

1 MR. HARRIS: That is right. In that regard it is column
2 number 1. So what we say is that if one flicks over to
3 the previous page and then back to this one you will see
4 how it fits together. There is the Royal Mail/BT
5 judgment, this is in red near the bottom of that page.

6 THE PRESIDENT: Yes.

7 MR. HARRIS: Option one was early October 2022; that is what
8 was mooted in the Tribunal's prior indication on the
9 previous occasion. Then option 2 is if it slips by
10 a month; but I am not going to develop option 2 any
11 further in the light of Tribunal's indications earlier.

12 Then if we go back to column 1, giving an interval
13 of only four weeks from a judgment in
14 early October 2022, that is why it says four weeks'
15 interval from early October, that gives you a without
16 prejudice expert meeting on 31 October. We say that
17 that is doable, if it does not give a great deal of
18 time, but it will be time that is preceded, obviously,
19 by a vast amount of work, just not having written it all
20 out into reports.

21 The major advantage of this, Mr. President, members
22 of the Tribunal, is that then this Tribunal gets
23 a working report that will in fact then be used at
24 trial. You will not have had to read some other report
25 and then discard it, or discard it in part, or get

1 a second report that then cross refers to bits of the
2 first report but not to other bits and then says "Please
3 re-read page 7 of the report that came three months
4 ago", et cetera, et cetera.

5 Then what we say is that experts' reports to be
6 exchanged a month after the without prejudice meeting.
7 We did this deliberately. In other words, there is
8 a without prejudice expert meeting following the Trial 1
9 judgment, so it can be further refined as to what the
10 experts are going to do. That takes you to 28 November.
11 Then, critically, the experts' reports in reply are
12 genuinely reports in reply to the reports that are in
13 fact going to be used at the trial. That is the third
14 row down on the left-hand column.

15 That way you do not need supplementals. That is why
16 in our left-hand column it says N/A. We are not
17 suggesting that there be supplementals at all, because
18 on this approach you do not need them. They are not
19 supplemental, because everything has already happened
20 correctly first time round, in sharp contrast to my
21 learned friends' proposals.

22 Then we say, and I recognise that you provisionally,
23 Mr President, said maybe supplementals in mid December,
24 but just to be quite categorical about this, we say on
25 our approach that will not be needed.

1 But what will be needed is a further without
2 prejudice meeting, and you had mooted early January, but
3 on our proposal instead we can have the without
4 prejudice meeting at the end of January, the expert
5 reports in reply having occurred the week before.

6 Then we get to the joint experts' statements in
7 early February, which is exactly what I wrote down as
8 you having proposed in leading up to a trial on
9 13 March. So from that point on I think we were ad
10 idem, if I could put it like that.

11 THE PRESIDENT: Yes.

12 MR. HARRIS: So the bit that gets compressed is, I accept,
13 between the end of October and the end of January, but
14 it has the major plus that I have previously identified.

15 We also point out, whilst we are on the table, that
16 if I am now looking at the two right-hand columns, as
17 I mentioned a moment ago the Ryder proposal does not
18 have supplementals, I take your point about that. The
19 Dawsongroup does have supplementals, but they may have
20 very material changes, as I have already said, and yet
21 the without prejudice meeting that is supposed to follow
22 these potentially material changes setting out actual
23 trial positions is only ten days later.

24 With respect, we suggest that that is not enough
25 time and therefore not a sensible timetable.

1 THE PRESIDENT: Yes. I think we have your points.

2 MR. HARRIS: The last point is simply the appeal is
3 a non-point. That was mooted last time round, about
4 having to have more time between the Trial 1 judgment
5 and the Trial 2 starting because the Trial 1 judgment
6 might get appealed. Those are facts of life, it may or
7 may not happen, it was already dealt with. Our proposal
8 does not make any reference to or pay any attention to
9 any possible appeal.

10 THE PRESIDENT: We cannot factor in a possibility. Trial 1
11 might settle. All sorts of things can happen. So I do
12 not think we can allow for appeals and further hearings.

13 MR. HARRIS: The last point is that if, contrary to my
14 submission, which is I understand adopted by the other
15 Defendants in writing, if, contrary to my submission,
16 there are to be supplementals with these material
17 changes, then there will definitely have to be replies
18 to the supplementals, and yet that is not catered for in
19 either of the Claimants' proposals. That is obvious,
20 because if there are going to be material changes
21 setting out actual trial positions for the first time in
22 supplementals as late as is suggested here, then there
23 will be replies, and then the process becomes yet more
24 unwieldy for the Tribunal because -- you have the point.

25 THE PRESIDENT: No, we have the point.

1 We have an eye on the time. We do of course have
2 tomorrow, but we want to leave time for disclosure.
3 I think this is obviously a very important point,
4 dealing with the whole manageability of what will be
5 a very heavy trial. So I think we will hear from any
6 other Defendants if they want to make any supplementary
7 points, and then a brief reply from the Claimants, and
8 indeed Mr. O'Donoghue may want to say something. Then
9 we will consider it overnight and we will give a ruling
10 tomorrow.

11 First, any of the other Defendants, if they want to
12 say something additional to what Mr. Harris has just put
13 very forcefully. Mr. Hollander.

14 MR. HOLLANDER: I do not want to add to the debate that you
15 have just heard.

16 Can I just mention that by August 2022 it may be
17 possible for us to have real holidays, and I would urge
18 the Tribunal not to give any directions which are likely
19 to jeopardise those holidays.

20 THE PRESIDENT: Yes, well I am always against any date, any
21 deadline in August for precisely that reason.

22 Yes, Mr. Williams.

23 Submissions by MR. WILLIAMS

24 MR. WILLIAMS: Sir, can I adopt what Mr. Harris said and
25 particularly adopt what Mr. Hollander said?

1 The central point from our perspective is that DAF
2 is a Defendant to both Trials 1 and 2, and in important
3 respects the case which we intend to advance in Trial 2,
4 at least as matters stand, significantly overlaps with
5 the case which the Tribunal is going to hear in Trial 1.

6 The expert evidence will be the same or similar on
7 a number of core issues, including what has been
8 referred to as the plausibility analysis going to the
9 theory of harm or the question of causation, the core
10 econometric analysis of DAF data on the question of the
11 overcharge and the approach taken by DAF's economists to
12 that exercise, which is obviously a hugely important
13 question for DAF, and also the approach to used trucks.
14 There will be other issues that we apprehend, for
15 example the Tribunal has already heard about DAF's
16 approach to complements in the Trial 1 CMC and the
17 Tribunal is familiar with the particular approach
18 Professor Neven proposes to take to that, and that will
19 be advanced in Trial 1, and we at least at the moment
20 apprehend it will be relevant in Trial 2 too.

21 There I have focused on, for want of a better
22 phrase, the upstream issues. We do not disagree with
23 Mr. Harris that observations made in relation to
24 downstroke or downstream issues may also be relevant,
25 but the really core overlapping issues are the upstream

1 issues I have just referred to.

2 Of course, we very much hope the Tribunal will
3 accept our case on those issues in full in Trial 1, and
4 will be able to attend Trial 2 and make the same case,
5 but of course the Tribunal is going to consider our case
6 and make findings about it, and it is realistic to
7 recognise that aspects of our case may require
8 reconsideration. Of course, we cannot say now what that
9 might involve; it might be limited and manageable, it
10 might be more significant.

11 But in my submission, Sir, it is really not
12 realistic for Mr. Palmer to say: well, by the time you
13 get the judgment the oil tanker will be far out at sea
14 on its course and I am afraid what has gone wrong has
15 gone wrong. It is more realistic to think that the
16 parties are going to want to make every effort to take
17 account of what the Tribunal says about their cases in
18 Trial 1.

19 Of course, Mr. Harvey is going to be carrying out an
20 econometric analysis of DAF data for Trial 1, and we
21 apprehend will want to rely on much of the same work in
22 Trial 2 too, so this cuts more than one way.

23 So it does seem to us that Mr. Holmes in particular
24 has seriously understated the significance and the
25 relevance of the Trial 1 judgment as far as Trial 2 is

1 concerned, and in thinking about this issue it is
2 important to have in mind the number of DAF Trucks in
3 the various claims.

4 Of course, DAF is the only Defendant in Trial 1. So
5 far as Trial 2 is concerned, you can get the picture
6 from Ms. Edwards' evidence. I do not know if Opus can
7 bring up {DG-B1/69/3} please. I am going to want to go
8 back to Mr. Harris' timetable in a few moments.

9 THE PRESIDENT: Can you give the reference again?

10 MR. WILLIAMS: You can see there that if you look along the
11 line, of a total of 32,000 trucks in the Ryder claim,
12 and this is on Ryder's numbers, some 20,000 of them are
13 DAF Trucks. Then the proportion is a bit lower in
14 Dawsongroup but it is still pushing a third, perhaps
15 closer to a quarter, somewhere between a quarter and
16 a third. But one can see the significance of findings
17 made about DAF's case in Trial 1 and the number of
18 trucks -- for the number of trucks in Trial 2, and you
19 can see from that it is very significant.

20 THE PRESIDENT: Yes.

21 MR. WILLIAMS: Sir, our point is that there is a real risk
22 of prejudice to DAF if important aspects of our expert
23 evidence require revision after we have the Trial 1
24 judgment, material revision, and we have to use
25 secondary reports to represent our primary case. That

1 would be prejudicial to DAF in terms of its --

2 THE PRESIDENT: I think we have got your point.

3 MR. WILLIAMS: Yes. The point I wanted to emphasise is that
4 it would also be prejudicial to the parties responding
5 to DAF's case, because they would then get our revised
6 case in a later iteration. So it does seem to us to be
7 a recipe for disorder, Sir.

8 On the specific dates, Sir, if we could just go back
9 to Mr. Harris' table, which I do not have the reference
10 for I am afraid. I do not know if Opus can remember it
11 or whether Mr. Harris might -- here we are. Thank you.
12 {COM-B1/6/18}.

13 We endorse a version of option 1, Sir. The
14 suggestion I wanted to make, if you are not in favour of
15 the specific dates that Daimler has put forward in its
16 option 1, in particular because we can see that it is
17 somewhat compressed towards the back end, we did want to
18 suggest a variant on that.

19 THE PRESIDENT: Yes.

20 MR. WILLIAMS: Which is that the date that is proposed for
21 the without prejudice meeting, that is to say
22 31 October, could become the date for the first expert
23 report, which would at least give all of the parties
24 a fighting chance of having the judgment for a month or
25 so before they put in those first reports. That would

1 mean that the work on the without prejudice meetings
2 would have to go back before the judgment, but in the
3 grand scheme of things that seems to us a compromise
4 worth making, if the Tribunal thinks that the dates in
5 this column are a bit compressed. Then the dates after
6 that need not be quite so compressed; so expert reports
7 in reply need not be quite so close to the WP expert
8 meeting.

9 I put that forward for your consideration as
10 a further way to navigate the difficulties which we have
11 been addressing this afternoon.

12 THE PRESIDENT: Yes, thank you very much. That is very
13 helpful.

14 Any other Defendant?

15 Mr. O'Donoghue, do you want to say something on
16 this?

17 Submissions by MR. O'DONOGHUE

18 MR. O'DONOGHUE: Sir, one minute, if I may.

19 Sir, in my submission, first of all I think,
20 speaking candidly, this is a difficult issue. It may be
21 a case of what is the least worst option, rather than
22 necessarily having a sure fire winner.

23 From my perspective, one has to look at the right
24 end of the telescope. The premise of Mr. Harris'
25 submissions, and to some extent Mr. Williams', is that

1 following the judgment on Trial 1 we will be left with
2 a semi car crash in Trial 2., but in my submission that
3 gets it the wrong way round.

4 In my submission, one can and should front load as
5 much as possible. So in my submission, following
6 Ryder's submissions, the first round of expert reports
7 clearly come well in advance of that judgment, and
8 indeed, speaking personally, I would favour July. There
9 is then a question as to what can be done following the
10 judgment. Mr. Harris makes a fair point that having
11 a reply report, then supplemental reports, it may result
12 in some redundancy. But the reply reports will be for
13 the first time responding to a substantial volume of
14 material in the first reports, and in my submission that
15 should happen in any event.

16 Then if there is a third stage there needs to be
17 refinement in supplemental reports, taking into account
18 the judgment. That is not perfect from the Tribunal's
19 or the parties' perspective, but it seems to me the
20 logical sequence.

21 What I would be very concerned about is the idea
22 that the supplemental reports in reality become the
23 de facto reports for trial. If that is only to surface
24 say in December, it is far, far too late for a trial
25 starting in March.

1 So there needs to be a balance between what can be
2 front loaded and what can only come at the back end, and
3 in my submission we should get on with doing what we can
4 by way of first and reply reports. There need to be
5 supplemental reports, that is clear, but it should not
6 be the tail wagging the dog.

7 So I would reiterate a point that you made, which is
8 on pass-on it is obvious that the pass-on issues in the
9 Royal Mail case will be fundamentally different to this
10 case. So that really is a non-point.

11 On overcharge, the Defendants have known about this
12 case for a decade. The SO was issued in 2011. I do
13 find it a bit disingenuous that the overcharge evidence,
14 given that it is their own data, must not already be
15 effectively ready.

16 THE PRESIDENT: Yes, thank you.

17 I think then Mr. Holmes and Mr. Palmer, if you would
18 like to respond.

19 Submissions by MR. HOLMES

20 MR. HOLMES: Thank you, Sir. The Daimler option 1 as set
21 out in the table is, in my submission, not remotely
22 realistic. The core of this case is the economic
23 evidence, and the proposal that Daimler is advancing is
24 that the entire process of expert evidence should be
25 crammed into a period of around two months, which would

1 include the Christmas period, from 28 November to
2 3 February when joint expert statements are due. We say
3 that that is simply unworkable.

4 Among the difficulties, the period allowed between
5 first and second round of expert reports is seriously
6 unfair and prejudicial to the Claimants and their
7 experts, who will only see the Defendants' economic case
8 in the trial when the first round of expert reports are
9 released, and will be left to seek to deal with all of
10 that in a period which is simply too compressed.

11 One then looks at the joint expert statements and
12 one sees that the Claimants' written opening
13 submissions, on the proposal that Daimler is putting
14 forward, would come one week after the joint expert
15 statement.

16 Now, that document, in my experience, Sir, and
17 perhaps in yours as well, is an extremely important
18 document in clarifying and refining the economic matters
19 at issue, and that is simply an inadequate period for
20 the Claimants to be able to take on board the points
21 which emerge from the joint experts' statement.

22 Equally, the process of drafting the joint experts'
23 statement is a delicate and a difficult one which, in
24 order to produce a document which is of maximum benefit
25 to the Tribunal, takes several rounds and cannot

1 realistically be accommodated in the space of one week.

2 To point out a small error in Mr. Harris' table, it
3 suggests that there are two weeks between the without
4 prejudice expert meeting and the joint expert statement.
5 That is not the case. The dates suggest a one week
6 period --

7 THE PRESIDENT: One week, yes.

8 MR. HOLMES: -- from 27 January to 3 February. That is, in
9 my submission, manifestly inadequate.

10 To attempt to accommodate the whole process of
11 economic evidence in this trial, the centrepiece of the
12 trial, in a two-month period cannot be done and carries
13 a very serious risk of derailment at a subsequent stage.

14 We respectfully endorse the submissions of
15 Mr. O'Donoghue that this is an issue that has no perfect
16 solution.

17 The solution that we have attempted to arrive at
18 ensures that all parties reveal their primary economic
19 case at a decent distance from the trial allowing
20 sufficient time for reply reports to grapple fully with
21 it, and to ensure that the issues are properly explored.

22 There is ample scope to introduce supplemental
23 reports into the Ryder proposed timetable, if that is
24 considered desirable by the Tribunal. But, as we saw
25 matters, developments arising out of the Royal Mail

1 trial could conveniently be dealt with alongside points
2 in reply, in the expert reports in reply, and there will
3 be further opportunity as the parties' experts continue
4 to reflect to set out their position in the joint expert
5 statements.

6 Inevitably in this process there is refinement and
7 reflection and the parties' experts continue, their
8 positions do continue to evolve in trial situations
9 ordinarily where there is not this issue of
10 a supervening judgment.

11 The final point to note is that we of course do not
12 know on what date the Royal Mail/BT judgment will be
13 delivered. It may be October. It may be September. No
14 doubt the Tribunal will be alive to this issue and will
15 seek if possible to produce a judgment in good time.
16 The Royal Mail trial finishes on 5 July 2022, and it is
17 therefore possible that a judgment may be produced
18 sooner than early October. We simply cannot know. But
19 doing the best we can, we do commend as our primary
20 position a timetable along the lines set out in the
21 Ryder column of the table.

22 At the very least, if the Tribunal were to seek to
23 accommodate expert reports subsequent, first round
24 expert reports subsequent to a Royal Mail judgment, we
25 do say that the date would need to be varied from that

1 which is proposed by Daimler to allow a more significant
2 gap between first round and second round expert
3 evidence, and that could be a date if necessary at some
4 point in October. But if that were the case we would
5 need to keep expert reports in reply in January in my
6 submission so that there is enough of a gap.

7 But, Sir, you have my submissions.

8 THE PRESIDENT: Yes, thank you. Mr. Palmer.

9 Submissions by MR. PALMER

10 MR. PALMER: Sir, I adopt Mr. O'Donoghue's submissions, and
11 also Mr. Holmes' submissions. May I just add a very few
12 points.

13 Daimler in their correspondence have expressly said
14 that one of the disadvantages of their first option was
15 that if the judgment was to be delayed by even a few
16 weeks beyond early October then that would derail the
17 entire trial because there would no longer be time to
18 take account of the judgment and to produce the expert
19 reports and follow through all the consequential steps
20 before trial.

21 That is a further indication of the risk attached to
22 delaying the service of expert reports until
23 after judgment.

24 But there is no good reason why that should be done
25 in my submission. Mr. Harris' submissions had two

1 premises, each of which should not be (inaudible) taken
2 for granted, and indeed may be unlikely.

3 The first premise was that large chunks of expert
4 reports served in say July would be overtaken by the
5 judgment.

6 There is no reason to think that from
7 a methodological perspective that is true. Sir, as you
8 pointed out, it is important to distinguish between the
9 overcharge analysis and the passing on analysis.

10 So far as the overcharge analysis is concerned, all
11 parties are approaching this by means of an econometric
12 pricing analysis. There is going to be no fundamental
13 methodological challenge to that approach to the
14 calculation of the overcharge.

15 What may be quite likely is that in distinguishing
16 between two experts giving different evidence the
17 Tribunal might do so by pointing out that one expert has
18 taken account of a certain factor and another expert has
19 not taken into account that factor, or not controlled
20 for that part of the analysis, and that is a reason to
21 prefer one expert over another, for example.

22 It is absolutely right, if the Tribunal comes to
23 that sort of judgment, that there should be an
24 opportunity before Trial 2 for an expert to look back
25 and adjust and take account of that factor, but there is

1 no reason to think when that essential common
2 methodology is being followed for overcharge that large
3 chunks are going to be overtaken.

4 So far as pass-on is concerned, we are dealing with
5 completely different cases.

6 Sir, as you adverted to earlier, Ryder and
7 Dawsongroup are not just purchasers of trucks but their
8 business is supplying trucks. The pass-on issues look
9 completely different than in the Royal Mail and BT
10 context, where you will be looking at regulated products
11 largely, across a wide range of different products, none
12 of which involve the supply of trucks to --

13 THE PRESIDENT: I suppose there is a little overlap, in the
14 resale value of the truck at the end.

15 MR. PALMER: Resale to an extent. But again, on that
16 everyone is agreed econometric pricing analysis for
17 that; no great variants of methodology or anything of
18 that sort.

19 The second premise that Mr. Harris put forward was
20 that the Tribunal will be faced with an unmanageable
21 situation as it reads original reports alongside
22 supplementary reports, and will find it very difficult
23 to disentangle where they are.

24 May I respectfully suggest that it is in every
25 party's interest to make that task as easy as possible

1 for the Tribunal, in the presentation not only of the
2 expert reports but also in the skeleton arguments,
3 opening submissions and so forth, to really get down and
4 present in as clear a fashion as possible exactly where
5 each expert has come out after this process.

6 It is not the position that the Tribunal will be
7 facing Mr. Harris' nightmare, scratching its head
8 looking at 20 different reports and trying to work out
9 what had come out of them all by itself. Every party
10 will be keen to present its own case in as legible and
11 understandable way as possible.

12 All that leaves you with is this suggestion of
13 Mr. Williams that in effect the first trial and the
14 first run of evidence, both for his evidence and indeed,
15 in our case, Mr. Harvey's evidence, should in effect
16 have a dress rehearsal, with an ability to put on
17 a different performance in the second trial if the first
18 run did not go so well.

19 He is absolutely right to say what is sauce for the
20 goose is sauce for the gander on that one. It applies
21 as much to Mr. Harvey as it does to DAF's experts.

22 The whole point of using a common expert in both
23 trials is that it entails a certain amount of risk. If
24 one expert were, in Mr Harris' most extreme case, to be
25 thoroughly discredited in the first trial, it is right

1 that any subsequent revision of views should then be
2 legible for the Tribunal. They can see to what extent
3 that ground has shifted in response to what the Tribunal
4 has said, which the Tribunal will be able to see from
5 looking at the reports which were initially filed and
6 then looking at any supplemental report.

7 But that is an extreme scenario, and one might think
8 it would be a much more credible scenario for
9 adjustments to be made, for refinements to be made as
10 the experts respond to the means by which the Tribunal
11 in the first trial distinguished between the two experts
12 and decide which expert is to be preferred on any one
13 particular issue.

14 So this is not rewriting; it is not large chunks
15 being rewritten. There is no reason to anticipate that
16 from the outset. The prejudice that would be caused by
17 holding back what may turn out to be unrevised,
18 perfectly adequate evidence given first time, holding
19 that back until a late reveal in November/December is
20 unpalatable, unacceptable, prejudicial and unfair.

21 We ask you, for those reasons, to adopt a timetable
22 as proposed by the Claimants.

23 THE PRESIDENT: Yes.

24 Thank you all very much. As I said, it is now 10 to
25 5. We will consider this and rule tomorrow morning,

