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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

6 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 2

Thursday, 6 May 2021

(10.30 am)

Hearing via Microsoft Teams

Case management conference (continued)

(In public)

THE PRESIDENT: Good morning. These proceedings are again being live streamed, and for the benefit of anyone who is watching on the live stream who was not participating yesterday I should just repeat the warning that it is strictly prohibited to make any recording, whether audio or visual, of the proceedings, and that would constitute a contempt of court and punishable as such.

Among the directions which the Tribunal has to give at this CMC concerning the trial of the claims by Ryder and Dawsongroup, which has been referred to as Trial 2 among the first wave of Trucks claims, is a direction for the timetable of expert evidence. That is important because it is acknowledged by all parties that the expert evidence is likely to play a central role at the trial.

There is no ideal answer to the question of what dates should be specified for the various stages of expert reports and meetings. Every alternative option which has been put forward in the helpful submissions of the parties is open to objection.

1 However, for a trial of this length and substance we
2 consider it important to keep the trial date; the trial
3 has been fixed to commence on 13 March 2023, no doubt
4 with reading time for the Tribunal.

5 In deciding upon dates we have to bear in mind
6 several considerations which have been pointed out in
7 the helpful submissions of counsel.

8 First, that there should be sufficient time between
9 the various stages in the timetable.

10 Secondly, that the experts should have an
11 appropriate opportunity to take account of the
12 Tribunal's judgment in what has been referred to as
13 Trial 1, that is the claim by Royal Mail and British
14 Telecommunications v DAF.

15 Thirdly, that the experts' reports and joint
16 statements should be in a form that is helpful to the
17 parties' representatives and the Tribunal.

18 Fourth, and above all, that the process is fair, and
19 that includes fairness to the Defendant which is a party
20 in Trial 1, that is DAF, and to the individual experts,
21 who are themselves involved in giving evidence in
22 Trial 1.

23 Having regard to these considerations, and taking
24 into account all the submissions we have received, we
25 have decided that the timetable should be as follows:

1 There should be an initial without prejudice meeting
2 between experts dealing with the same issues to take
3 place by 15 July 2022. We emphasise that that is an end
4 date. The meeting can be earlier, and we recognise that
5 Mr. Harvey and DAF's experts are involved in Trial 1
6 which is taking place at that time, so some of the
7 meetings will have to be scheduled taking that into
8 account.

9 Second, the experts' initial reports are to be
10 exchanged by 19 September 2022.

11 Third, the experts may submit amended reports to
12 take account of the judgment in Trial 1 by
13 7 November 2022.

14 Fourth, reply reports are to be exchanged by
15 9 December 2022.

16 Fifth, the without prejudice meetings between
17 experts dealing with the same issues is to take place by
18 10 January 2023.

19 Sixth, joint statements by experts dealing with the
20 same issues are to be submitted by 28 January 2023.

21 In the light of that timetable, and to leave counsel
22 sufficient time to prepare written openings, we suggest
23 that the Claimants' opening submissions should be filed
24 by 17 February 2023, and the Defendants' written
25 openings by 3 March 2023.

1 We have not given a direction as regards a written
2 opening by DS Smith, which would be confined to
3 pass-through issues. That can be revisited at a later
4 CMC.

5 I think we then move on to other issues. There is
6 a question raised in one of the skeletons, I think for
7 Iveco, about the need for an amendment to the
8 Confidentiality Ring in the Dawsongroup case to enable
9 in particular the joint expert on pass-on to be admitted
10 to that ring.

11 The point is raised in Mr. Hollander's skeleton but
12 I assume it would also concern MAN, would it not,
13 Mr. Jowell? Is your position the same on that, or ...

14 MR. JOWELL: We have the same position.

15 THE PRESIDENT: Yes.

16 MR. JOWELL: If I can --

17 THE PRESIDENT: Mr. Hollander, do you want to just explain
18 that very briefly?

19 Submissions by MR. HOLLANDER

20 MR. HOLLANDER: Yes.

21 You are aware that we are instructing a joint expert
22 and he will be instructed in relation both to the
23 Dawsongroup claims by others, not ourselves or MAN, and
24 in the Ryder claims by ourselves and others. We are not
25 members of the Dawson ring, so the problem does not

1 affect the expert, because the expert will be a member
2 of the Dawson ring in relation to the joint instruction
3 by the Defendants to that claim and will be a member of
4 the Ryder ring as a result of the instruction by all
5 those who are parties to the Ryder claim.

6 The trouble is that we, those who instruct him, from
7 Iveco and MAN, will not be a member of the Dawson ring.
8 So what is going to happen, we would suggest, the expert
9 wants to address a joint meeting of those who instruct
10 him, some who are being sued by both Dawson and Ryder
11 can attend the whole meeting, others, Iveco and MAN,
12 will not be able to. So what happens? The expert may
13 want to discuss, for example, questions of methodology
14 with the Defendants relevant to Ryder but which draws on
15 materials from Dawson. Now, that seems to us to give
16 rise to all sorts of problems and inefficiencies. We,
17 the Iveco representatives and the MAN representatives,
18 may have to leave the room for part of the discussion.
19 It seems to us a rather complicated question to work out
20 in any particular sentence which is spoken by or written
21 by the joint expert whether there is a possible breach
22 or not.

23 What we have suggested to Dawson in the light of
24 that, is there be a narrow amendment to the Dawson
25 Confidentiality Ring to bring Iveco and MAN into that

1 for the limited purpose of instructing that joint
2 expert.

3 So we drafted it, and I do not know whether the
4 Tribunal have seen it, it may be that you want to
5 consider the point in principle first, rather than go
6 into the detail of the drafting, but the draft which is
7 exhibited to Farrell 6, says:

8 "For the purpose solely of the joint instruction by
9 the Defendants and the defendants in the Ryder
10 proceedings of an expert to give evidence in these
11 proceedings and the Ryder proceedings on pass-on and
12 other issues consequential on any overcharge ..."

13 So it is as narrow as we could make it,
14 deliberately, in recognition of concerns about that.

15 We raised this with Dawson.

16 THE PRESIDENT: Sorry, could I interrupt you? Sorry for
17 doing that. Have you got the reference, the Opus
18 reference for the document?

19 MR. HOLLANDER: The document is at {COM-D1/6/13}, if Opus
20 want to put it on the screen I can just take you through
21 it briefly.

22 THE PRESIDENT: You read it out and it is helpful to see it.

23 MR. HOLLANDER: The bit that I read out is on page
24 {COM-D1/6/19}. If I could ask Opus to turn up page 19
25 and you can see the scheme of it from that if you look

1 at paragraph 4C which is the point I was seeking to make
2 that it is as narrow as we could make it.

3 That was the purpose of doing it. Now, Dawson's
4 response to that is: we need to know exactly who it is,
5 what subjects exactly the expert is going to cover and
6 what he is going to deal with before we can consider
7 this application further. That was their response.

8 However, we responded in detail to that, and I can
9 give you the reference to the letter but you may not
10 want to see it at the moment.

11 I mean, it seems to us first of all, it is in
12 everybody's interest that there be a joint expert.
13 It is going to save everybody costs, hopefully. In
14 a sense, Dawson's point has it the wrong way round. We
15 want to speak freely with the expert, in order to
16 discuss actually so we can sort out exactly what the
17 expert's views are, what issues he may be able to deal
18 with jointly, and the problems that are going to arise
19 if we do not have this, in our submission, are quite
20 unnecessary, and it is obviously beneficial to everyone,
21 it just simply makes the whole process unnecessarily
22 complicated and expensive. The real purpose is not only
23 to facilitate communications but also to avoid
24 inadvertent breaches, in circumstances where one can
25 envisage that actually unless we have this amendment

1 there are going to be all sorts of practical
2 complications in dealing with the expert on a day-to-day
3 basis in a way that is efficient and cost saving.

4 That is the purpose. I can obviously take you
5 through the other parts of the draft order if you would
6 like, but that is the key. I just emphasise the point
7 that we have tried to make the amendment as narrow as we
8 could.

9 THE PRESIDENT: Yes, I understand.

10 I think it is probably sensible for us to hear from
11 Mr. Palmer.

12 Submissions by MR. PALMER

13 MR. PALMER: Thank you, Sir.

14 There are two points in opposition to this
15 application. The first is it is unnecessary and
16 unjustified, and the second is that it is in any event
17 premature.

18 Let me deal with the necessity for it, the claimed
19 necessity and claimed justification. For context, one
20 bears in mind at all times that there are two claims
21 before the Tribunal and there are two separate
22 Confidentiality Rings. So obviously Dawsongroup are not
23 in Ryder's ring and vice versa. We have joint access
24 only to limited, identified common disclosure only.
25 Dawsongroup, of course, is not suing Iveco or MAN, and

1 in principle it is difficult to see why their lawyers
2 should have access to Dawsongroup's confidential
3 information, in circumstances where Ryder's lawyers
4 obviously do not.

5 Now, the consequence of those arrangements is if
6 there is to be a jointly instructed expert by the
7 Defendants to the Ryder claim, then that jointly
8 instructed expert will have to produce two different
9 reports, one for the Dawsongroup claim and one for the
10 Ryder claim; and the confidential information in the
11 Dawsongroup report will not be shared with Ryder, and
12 vice versa. The importance, obviously, of keeping that
13 evidence segregated is the reason why there are separate
14 stages, stages 2 and 3, for the trial for Dawsongroup
15 and Ryder, who of course are competitors.

16 Now, the proposal made by Mr. --

17 THE PRESIDENT: Can I just interrupt you a second. That may
18 be right, there may need to be two reports, but it is
19 quite possible, even if that course has to be followed,
20 that significant parts of the two reports are the same,
21 insofar as the expert is looking at the market more
22 generally with regard to truck rental.

23 MR. PALMER: Yes, Sir, but not the parts including
24 Dawsongroup confidential information or Ryder
25 confidential information. They will obviously have to

1 be set out and distinguished, even if there are common
2 themes.

3 This proposal is said to be justified, by
4 Mr. Hollander, first of all because of the risk of
5 inadvertent disclosure in those circumstances to Iveco
6 and MAN's solicitors of confidential information and
7 secondly, as I understand it, because it would be
8 inefficient for Iveco and MAN's solicitors to be
9 excluded from discussions with the joint expert which
10 concern Dawsongroup.

11 That has to be put in context. Because of the need
12 to provide two separate reports and to keep the
13 confidential information entirely separate, we say there
14 is no good reason why the appropriate Defendants should
15 not have separate meetings with the expert in relation
16 to each separate claim. MAN and Iveco's lawyers simply
17 should not be in the room when the Dawsongroup claim is
18 being discussed; and when the Ryder claim is being
19 discussed, there should not be any reference to
20 Dawsongroup's confidential material. There is
21 nothing --

22 THE PRESIDENT: Can I just try and understand that?

23 Dawsongroup and Ryder are to a certain extent
24 competitors. I think that is why indeed we have had to
25 separate the trials, and that is why the confidential

1 information of one is sensitive to the other, and vice
2 versa.

3 If the expert is forming a view, for example, of the
4 extent to which any increased costs in the price of
5 trucks can be passed on in hire charges, which may be
6 one of the issues that he or she has to consider, they
7 will be looking at the truck rental market generally,
8 the competition that both Dawsongroup and Ryder face
9 from others who are not party to these proceedings, all
10 these general points, and they will arise in both
11 proceedings in the same way.

12 The expert will want to discuss that with the
13 lawyers, and it may be informed by the information that
14 he or she has received and he may want to refer to some
15 of that in drawing these general conclusion. So having
16 these sort of segregated meetings of the kind that you
17 have suggested, with the lawyers for some and then with
18 the lawyers for others, discussing the same point for
19 what will be identical sections of their report does
20 seem rather cumbersome and impractical, does it not?

21 MR. PALMER: No, because I am not suggesting that no joint
22 meetings should happen at all; just a joint meeting
23 where it is necessary to discuss confidential
24 information. So if, for example, to take the example
25 you have just given me, Sir, they are talking about the

1 general state of the leasing market, that can be done
2 entirely without reference to Dawsongroup's confidential
3 information.

4 THE PRESIDENT: Maybe it can, but it is very hard to police,
5 in practice, for certain discussions so that if a point
6 is made the expert will want to say, "Well, actually
7 I know from what I have seen that that is not how
8 Dawsongroup operates, so that point does not seem to me
9 to be right. From what I have seen, one of the major
10 players, i.e. Dawsongroup, has to take these matters
11 into account". And they may want to refer to that in
12 meetings where Ryder is present. You have no problem
13 with that, I think. The Ryder representatives. Well,
14 you would have a problem, because you say some of them
15 have not been sued by Dawsongroup. That is the kind of
16 sort of messy issue you can get into.

17 MR. PALMER: Of course the expert can say, "Well, I do not
18 think we can make that point because that is
19 inconsistent with evidence I have seen from
20 Dawsongroup", but what he should have the discipline to
21 do is not then go on in front of people to then disclose
22 that confidential information and share it with people
23 who are non-parties to the Dawsongroup claim.

24 It is an objection of principle. This information
25 is confidential not only as between Dawsongroup and

1 Ryder as competitors, it is just confidential
2 information, full stop.

3 Confidentiality Rings are set up as a necessity to
4 manage litigation between parties. They are not set up
5 really to avoid the need for discrimination and care
6 when claims overlap and a jointly appointed expert needs
7 to be able to say, "Well, I cannot make that point
8 because it is inconsistent with evidence I have seen".
9 There is no reason why he should need to go on or
10 anticipate the need go on to discuss Dawsongroup's
11 evidence with parties who are not part of that claim.
12 If he does need to have a discussion about that
13 confidential information, of course he can do that
14 without those solicitors present. That does require
15 a discipline, but it is not an unmanageable or
16 unreasonable expectation that that level of discipline
17 be observed.

18 Indeed, as I understand Mr. Hollander, he is not
19 saying that there is a need to discuss that information
20 on all occasions, but he is concerned with the
21 inadvertent disclosure. The problem of inadvertent
22 disclosure should not be dealt with by saying, "You can
23 disclose anything you like to these people" or expand
24 the ring so there is no inadvertent disclosure, the
25 problem with inadvertent disclosure, as in the

1 management of confidential information within
2 confidential rings is that those who are party to it
3 undertake certain responsibilities and accept a certain
4 discipline, and it is not unreasonable to hold those
5 people to the discipline that they have accepted by
6 signing a confidentiality undertaking.

7 So our concern is that it is not shown to be
8 necessary by what Mr. Hollander says. I entirely
9 understand your point to me, Sir, that there will be
10 issues in common, but I do not accept that discussion of
11 those common issues require reference to Dawsongroup's
12 confidential information.

13 That is the point about necessity and justification.

14 MR. JUSTICE FANCOURT: The practical effect of that is that
15 there would have to be three different categories of
16 meeting between the joint expert and the legal teams:
17 one a general meeting that everyone can attend to
18 discuss general issues; one a Dawsongroup
19 confidentiality only meeting; and one a Ryder
20 confidentiality group only meeting. You say that is an
21 acceptable discipline to impose on the parties; if they
22 structure it that way, there is no difficulty with
23 inadvertent breaches. Is that the practical effect of
24 what you are suggesting?

25 MR. PALMER: Yes, just as that is the practical effect of

1 how the Tribunal will have to manage this hearing.

2 That is why those obvious steps which the Tribunal
3 has already taken is to structure the trial with stage 2
4 and stage 3. But even in stage 1 there may be
5 confidential evidence which needs to be referred to
6 which is unique to Dawsongroup or unique to Ryder and,
7 and that will just have to be managed. That is
8 a discipline that we all accept, and when we are making
9 submissions to the Tribunal on our feet we will have to
10 be alive to that, as signatories to the
11 Confidentiality Ring, that we should not stray into
12 confidential territory without first asking to go into
13 private without Ryder present, in our case.

14 I mean, there are cumbersome obligations which need
15 to be undertaken, but that is because of the value which
16 is placed on protecting confidentiality. Of course that
17 is particularly acute as between Dawsongroup and Ryder,
18 but it is not non-existent in respect of others, and we
19 say it is an extraordinary step to take non-parties'
20 representatives into a Confidentiality Ring imposed in
21 one claim, simply to alleviate the need for them to
22 observe that discipline when preparing the case.

23 That is my point on necessity and justification. We
24 have also a point on prematurity, which is it is not
25 clear yet to Dawsongroup, it has not been fully

1 explained, what downstream issues the proposed joint
2 expert will be instructed on, what analysis the expert
3 would undertake and indeed, ultimately, whether the
4 Tribunal will permit that evidence to be given.

5 We have had confirmed during the course of this
6 hearing that the expert would be a forensic accountant,
7 but we do not know anything more than that, and yet we
8 are being asked to grant access to confidential
9 information to non-parties in those circumstances where
10 we do not even know if this matter is going to progress
11 and this evidence is going to be given.

12 Mr. Hollander, in the last CMC, made submissions to
13 the Tribunal, quite rightly, that the Confidentiality
14 Rings are already of a significant size, that should not
15 be widened prematurely, in particular given the risks of
16 inadvertent disclosures of confidential material as the
17 circle gets wider. That was his submission last time.
18 I adopt it this time. His way to say we can solve that
19 simply by bringing more people into the Confidentiality
20 Ring, in my submission is not an answer.

21 Those are my submissions. I am grateful, Sir.

22 THE PRESIDENT: Yes, Mr. Hollander --

23 I should have asked Mr. Jowell, my apologies,
24 whether you would wish to add anything. It was not
25 raised in your skeleton and as I understand it you are,

1 as it were, content to follow the points made by Iveco,
2 but is there something that you want to add?

3 Submissions by MR. JOWELL

4 MR. JOWELL: I would like to simply emphasise one point,
5 which is that the MAN representatives and the Iveco
6 representatives will have to sign up to these stringent
7 confidentiality undertakings in order to be permitted to
8 have access to this information. So we simply do not
9 really understand Mr. Palmer's deep concern about this,
10 unless he is anticipating that persons who sign those
11 undertakings are going to breach them, which seems
12 vanishingly unlikely.

13 That is the only point that I wished to add.

14 Otherwise, I very much endorse Mr. Hollander's
15 submissions.

16 THE PRESIDENT: Yes. Mr. Hollander, a brief response.

17 Reply submissions by MR. HOLLANDER

18 MR. HOLLANDER: My learned friend Mr. Palmer's submissions
19 take away much of the benefit and efficiency of
20 appointing a joint expert on behalf of all Defendants,
21 which one would have hoped would be in the interests of
22 all parties.

23 After my learned friend was pressed by the Tribunal,
24 it became apparent that he was envisaging there would be
25 three different sets of meetings with the joint expert,

1 with different parties.

2 Now, not only is that, we would submit,
3 completely -- it just adds significantly to the bill,
4 complexity, time taken. But it is worse than that, in
5 exactly -- it means the expert himself, in dealing with
6 those instructing him and in dealing with them, he is
7 going to have to walk a tightrope. He is going to have
8 to disentangle in his own mind, when he speaks to people
9 and discusses with them, exactly which piece of
10 information comes from where; and when you get to the
11 position where he says to himself "Well, I have this
12 particular suggestion or view that basically comes from
13 Dawson", is that Dawson confidential information? But
14 it affects the Ryder case. Exactly how he is going to
15 do that is going to be --

16 MR. HARRIS: I am sorry to interrupt, but we are not finding
17 it possible properly to pick up Mr. Hollander's
18 submissions on his microphone. Does anybody else have
19 that difficulty? I am so sorry to interrupt.

20 THE PRESIDENT: We do not, and people are shaking their
21 heads.

22 MR. HARRIS: In that case I will log off and come back on.

23 THE PRESIDENT: We need to sort that out, Mr. Harris, for
24 other matters. I think on this particular point are you
25 able to follow it on the transcript?

1 MR. HARRIS: Yes, we can.

2 THE PRESIDENT: As it is not a Daimler issue, perhaps we
3 will live with that.

4 MR. HARRIS: Thank you.

5 THE PRESIDENT: Yes, Mr. Hollander, can I interrupt you to
6 ask a question?

7 As things stand, the persons in this
8 Confidentiality Ring, are they limited to external
9 lawyers as well as obviously the expert?

10 MR. HOLLANDER: I think external lawyers and the expert. My
11 understanding is the way it would work is that it would
12 be in the same way as the current rings, there would be
13 an outer and an inner and different participants
14 involved in that. I think that is how it was envisaged,
15 although obviously it is a matter for the Tribunal.

16 THE PRESIDENT: Are we looking here at this paragraph 4C,
17 because I have only got the one page, is this the inner
18 or the outer?

19 MR. HOLLANDER: 4C refers to both. It talks about, if you
20 look at (a) they are permitted to add persons to inner
21 for that limited purpose.

22 THE PRESIDENT: We can only see one page at a time, you see.

23 MR. HOLLANDER: Yes, but if you look at the page which is up
24 on the screen.

25 THE PRESIDENT: Yes, I see. Outer, inner or outer.

1 MR. HOLLANDER: I think what is envisaged, and it is
2 obviously subject to the Tribunal, is that what would
3 happen is that to the extent that there are Inner
4 Confidentiality Ring members they would only be able to
5 discuss matters in relation to inner confidentiality,
6 and Outer in relation to outer. That is the way it has
7 been drafted.

8 THE PRESIDENT: As regards the character of the persons who
9 are within those rings, do they include anyone from any
10 employees or executives of Ryder or Dawsongroup?

11 MR. HOLLANDER: From Ryder and Dawson? You mean from Iveco?

12 THE PRESIDENT: First I am asking about Dawsongroup and
13 Ryder.

14 MR. HOLLANDER: Sorry. You have slightly lost me there as
15 to who ...

16 THE PRESIDENT: The rings normally have the experts, they
17 have the external lawyers, that is known persons in the
18 solicitors, and counsel. They are all inner.

19 MR. HOLLANDER: They are all in the inner.

20 THE PRESIDENT: And the outer, what character of people are
21 in the outer?

22 MR. HOLLANDER: I think in-house lawyers in particular would
23 be in the outer.

24 THE PRESIDENT: Yes. Thank you.

25 MR. HOLLANDER: You may also want to have in mind that the

1 Tribunal had some attraction towards a 1B, and I know
2 I am premature to be dealing with that, but that may
3 well itself involve some significant alteration of the
4 Confidentiality Rings. But I think you have the main
5 points I make.

6 THE PRESIDENT: Yes.

7 MR. HOLLANDER: It is going to be horrendously difficult if
8 we do not have this.

9 THE PRESIDENT: No, I think we understand.

10 MR. HOLLANDER: My learned friend does not actually give any
11 reason. The reason is his confidentiality. These are
12 reputable people who are not going to breach, they are
13 going to do everything they can to avoid breaching this.
14 This is not a case where there is any reason to think,
15 and there is no other reason given by my learned friend.
16 Those are my submissions.

17 THE PRESIDENT: Yes, we will take just a moment.

18 (11.05 am)

19 (Short break)

20 (11.09 am)

21 THE PRESIDENT: We understand the point of principle being
22 made by Mr. Palmer for Dawsongroup that any inclusion in
23 a Confidentiality Ring has to be necessary and
24 justified, but we do think that there has to be
25 a practical way of managing these things in everyone's

1 interest where a joint expert is instructed, and that is
2 a development that is clearly to be encouraged and
3 facilitated. There are, in our view, considerable
4 practical problems, quite aside from the complexities,
5 if there have to be three separate meetings.

6 We do think that the proposed wording, however, is
7 broader than it need be. Looking at the draft amendment
8 it says the MAN Defendants and the Iveco Defendants are
9 permitted to add persons as inner or outer ring members.
10 We think that should be restricted, and what we intend
11 to order is that they are permitted to add external
12 legal advisers and external experts. So that if there
13 are in-house lawyers they would wish to add, then that
14 must be the subject of a justified application.

15 We think these discussions of the kind that
16 Mr. Hollander indicated can effectively take place with
17 the external legal advisers; they can report to the
18 in-house lawyers without having to disclose Dawsongroup
19 confidential information. We think that should work in
20 practical terms.

21 MR. HOLLANDER: Thank you very much. We will amend the
22 draft order accordingly, and submit it after we have
23 shown it to my learned friend's solicitors. Thank you
24 very much.

25 THE PRESIDENT: Thank you. I think we then move on to dates

1 for witness evidence, that is to say factual witnesses
2 as opposed to experts. We have been given various
3 proposed dates that have been put forward by the
4 different parties.

5 We think that, again, there is no ideal sequence.
6 It is important that disclosure has been largely
7 completed before factual evidence is exchanged. We know
8 that DAF is involved in Trial 1 and the legal team of
9 Dawsongroup are also involved in Trial 1, but some
10 overlap is inevitable given that work for Trial 2 will
11 be going on while Trial 1 takes place. Of course these
12 are the dates by which evidence has to be exchanged;
13 there is nothing to prevent the evidence being prepared
14 earlier. Indeed, we see that DAF has indeed proposed
15 a date for reply witness statements which would be the
16 day before, literally, Trial 1 commences, when no doubt
17 DAF's lawyers will be heavily engaged in preparing for
18 Trial 1 in any event.

19 The dates that we have in mind, and again we are
20 ready to hear further submissions, are that the first
21 round of factual witness statements should be exchanged
22 on 25 February 2022, and reply statements on
23 27 May 2022; so that is leaving three months between the
24 two stages, which I think is what most of the parties
25 had envisaged as the interval.

1 Does anyone want to address us and try and persuade
2 us with earlier or later dates or amended dates?

3 Yes, we will take Mr. Palmer first.

4 Submissions by MR. PALMER

5 MR. PALMER: Thank you, Sir.

6 I do not want to try to dissuade you from those
7 dates at the moment, we would be content with those
8 dates.

9 I just wanted to flag that later on, in relation to
10 one of the disclosure applications that you are going to
11 hear, our answer to that is that the matters sought are
12 best dealt with in the factual witness statements. We
13 point out that we have proposed that factual witness
14 statements be exchanged by 17 December, which would be
15 two months earlier than the Tribunal has just
16 identified, so there would be some benefit in those
17 circumstances to the Defendants in having that evidence
18 sooner rather than later.

19 I just wanted to flag that, and it may be that the
20 Tribunal would want to keep that point in mind and
21 consider whether that justifies an earlier date for the
22 factual witness statements exchange when we get there.

23 I do not propose to go further than that now.

24 THE PRESIDENT: Yes, we saw that you had proposed

25 17 December. Our concern was that disclosure might be

1 continuing into the later months of 2021, and that is
2 why we felt it was more practical to have a date
3 a couple of months later.

4 MR. PALMER: Yes, I understand that.

5 THE PRESIDENT: Yes, Mr. Jowell, was it?

6 Submissions by MR. JOWELL

7 MR. JOWELL: Thank you, Sir.

8 We would propose that the date for initial exchange
9 should be one month later, so 25 March, but that we
10 should keep the date for reply statements of 27 May, and
11 we say that essentially for three reasons.

12 First, because it does appear that disclosure is
13 likely to go on into December or even into January, and
14 it is necessary to allow some time to assimilate that
15 disclosure fully before providing the witness
16 statements.

17 Secondly, that is still six months before the date
18 that you have handed down for the initial exchange of
19 expert reports. So well in advance.

20 Thirdly, in relation to the reply statements we
21 think that two months is likely to be ample. The reason
22 we say that is because the Claimants are not likely to
23 have anything very much to say in response to the
24 evidence of the Defendants on overcharge, and conversely
25 the Defendants are not likely to have anything much to

1 say about the Claimants' evidence on pass-on, simply
2 because those are not matters that will fall within
3 their factual witnesses' knowledge. So we think that
4 the reply evidence is likely to be limited.

5 THE PRESIDENT: Yes. But the problem is, Mr. Jowell, if
6 I can interrupt you, it is all right for MAN, but DAF
7 are involved in Trial 1. So the date of 25 March is the
8 second day of Trial 1.

9 MR. JOWELL: That is so but, as you have said, there is no
10 reason why they cannot prepare that evidence earlier and
11 just have those witness statements all ready to go.
12 It is difficult to see how a later date prejudices them
13 in any way. We do not really understand that. Again,
14 it is the first round of their factual evidence; if they
15 wish to do that a month, two months or three months
16 earlier, and therefore not to get in the way as it were,
17 they can do that. But for the rest of us, we do not see
18 why we should be held hostage to that, as it were,
19 although it is relevant.

20 Those are our submissions. We would prefer a little
21 more time to assimilate the disclosure, and we would
22 rather that than have longer for reply evidence, which
23 probably there will not be very much. Those are our
24 submissions.

25 THE PRESIDENT: Yes, Mr. Holmes.

1 Submissions by MR. HARRIS

2 MR. HARRIS: We adopt Mr. Jowell's submissions and add
3 a further reason, a fourth reason, which is that
4 the February date is over a full year before the
5 commencement of trial for the witness statements. We
6 consider that that is an exceptionally long period, and
7 if you were not attracted by the full rigour of
8 Mr. Jowell's statement we would respectfully suggest
9 that rather than 25 February 2022 it could be a year in
10 advance of the trial listing. So the trial begins
11 13 March 2023, and we could make exchange of factual
12 witnesses 13, or thereabouts, whatever the relevant day
13 of the week is, March 2022. That ought to satisfy
14 everybody, because it is before the trial, in the first
15 trial, and it gives Mr. Williams a little bit more time
16 to deal with reply statements, but it is still a very
17 long period, and we are concerned in particular with
18 Mr. Jowell's first reason, namely the proximity to the
19 finishing of disclosure.

20 That is my additional point.

21 THE PRESIDENT: Yes. We will take a moment and withdraw.

22 (11.20 am)

23 (Short break)

24 (11.22 am)

25 THE PRESIDENT: We think there can be a little movement.

1 Mr. Holmes and Mr. Williams, if we moved the date
2 for first statements to 10 March and kept the date for
3 reply to 27 May, would that cause you real problems?

4 MR. HOLMES: Sir, for my part our main concern was not the
5 date of the first round factual evidence but rather the
6 difference in time between the first and the second
7 round.

8 THE PRESIDENT: Yes.

9 MR. HOLMES: It may be that we could adjust the second round
10 factual evidence by a similar period, so as to preserve
11 a healthy gap. The reason is that we do not at all
12 accept the premise of Mr. Jowell's submission that there
13 will not be responsive factual evidence. We envisage
14 that in relation to both upstream and downstream issues
15 there may very well be a significant joinder of
16 evidence. We are the purchasing side --

17 THE PRESIDENT: We can see there may be significant
18 responsive evidence.

19 MR. HOLMES: Yes.

20 THE PRESIDENT: You do not have to persuade us of that.

21 It is really just allowing something that is sensible
22 for everyone, including of course the experts, and
23 bearing in mind the summer. It may be possible to move
24 that by a week to 3 June.

25 MR. HOLMES: I am grateful.

1 THE PRESIDENT: Then you have still lost one week out of the
2 period but I would have thought that is manageable.

3 So if it were to be 10 March and 3 June, that would
4 go somewhere to meeting, it seems to us, everybody's
5 points.

6 I apologise, I misdated the date of the first trial,
7 as Mr. Justice Fancourt pointed out to me, it is
8 26 April, not March. So that is still quite a while
9 before the first trial.

10 Mr. Williams, is that workable for you, 10 March and
11 3 June?

12 MR. WILLIAMS: Yes, it is workable, Sir.

13 While my microphone is on, could I just mention that
14 when you gave your directions earlier on in relation to
15 expert reports and openings, there was one date we did
16 not deal with, which was the pre-trial review. That was
17 a date which was I think covered in the various
18 timetables that have been put before you. I do not know
19 whether you want to fix that now or come back to it. It
20 will have to be in that window between the experts'
21 joint statements and the openings in any event, and
22 perhaps it is premature to fix that, but I simply
23 mention that.

24 THE PRESIDENT: We will come back to that. It may be
25 difficult for us to fix that now because we will not be

1 the trial tribunal for Trial 2, and it has to be
2 obviously the trial tribunal that does the PTR. We do
3 not know their availability, so we cannot actually fix
4 it. It is clear, as you say, in what window it will
5 have to take place, but enquiries will be made of the
6 chairman, it will be chaired by a High Court judge but
7 it will not be either Mr. Justice Fancourt nor myself,
8 and we will come back to you on the PTR but thank you
9 for mentioning that.

10 Unless somebody intervenes now, Mr. Holmes, on the
11 dates of 10 March and 3 June --

12 MR. HOLMES: Sorry, no, those are settled. There are two
13 other matters.

14 THE PRESIDENT: Just on that, those will be the dates for
15 the first round of statements by factual witnesses, and
16 reply statements.

17 Next, we know there are some disclosure issues to
18 come to, but before that are there other matters to deal
19 with?

20 Mr. Holmes.

21 Submissions by MR. HOLMES

22 MR. HOLMES: Two short points on the directions.

23 The first is that the Tribunal may have seen that
24 the parties have proposed longstop dates, as one often
25 now sees in orders, for disclosure to be complete or

1 substantially complete. I think it is common ground
2 there should be such a date. There are some
3 differences. Is the Tribunal content for the parties to
4 seek to settle them in the light of the rest of the
5 timetable and to insert a date, raising any issue on the
6 draft order, or is it a point you would like to canvass
7 now?

8 THE PRESIDENT: We are content for you to seek to agree
9 between you, and if you cannot, if you submit the
10 alternatives to us in writing and we will then do it.
11 I do not think we need to go through everyone in this
12 hearing.

13 MR. HOLMES: I am grateful.

14 The second point concerns an application of Ryder's
15 that was included in our draft order for provision in
16 relation to the preparation of a consolidated dataset.

17 THE PRESIDENT: Yes.

18 MR. HOLMES: It is agreed in principle that this would be
19 a sensible step. The reason is because each side has
20 data in relation to volume and value of commerce, and
21 pricing. These will be important inputs for the expert
22 in calculating the overcharge and the level of loss.

23 The proposal is for the parties to share their
24 datasets in a staged process, and for without prejudice
25 discussions led by the experts. The terms of the

1 directions are substantially agreed between the parties.
2 I can show them to the Tribunal if that would be
3 helpful. The only outstanding issue is that there may
4 be a small divergence on the dates, but again I would
5 suggest, subject to the Tribunal's views, that we might
6 park that and see what can be agreed and, again, if
7 there is an issue it can be dealt with on the draft
8 order in the usual way.

9 THE PRESIDENT: That seems to be, speaking for myself, very
10 sensible, particularly as you now have timetables for
11 experts and factual witnesses, and therefore the dates
12 you agree you will want to take that into account when
13 considering dates, and you will want to discuss that
14 with those instructing you, which you would need time to
15 do. So unless anyone urges us to grapple with that head
16 on now, I think that is a very sensible course. We did
17 see that that has been proposed and that the parties are
18 seeking to resolve that issue, and we hope that the
19 timetables we have set out will assist that.

20 Submissions by MR. WILLIAMS

21 MR. WILLIAMS: Sir, I am not going to ask you to grapple
22 with that now, but I did want to make one point.

23 Mr. Holmes' clients have proposed this process in
24 the Ryder proceedings, and the process does seem to us
25 to be a sensible and constructive one. Having seen

1 their proposal, we raised with Dawsongroup the proposal
2 that a similar process should be adopted in the
3 Dawsongroup proceedings, and Dawsongroup appear to
4 resist a similar process in their proceedings, for
5 reasons that we do not really see.

6 I simply raise that point now, because it does seem
7 to us that that is something that can equally be
8 progressed between the solicitors outside the hearing,
9 but the principle of whether there ought to be such
10 a process with Dawsongroup is one which it would be
11 helpful to clarify now.

12 THE PRESIDENT: Mr. Palmer can you assist on that?

13 Submissions by MR. PALMER

14 MR. PALMER: I certainly can assist.

15 We do not object in principle to there being
16 a process; we object to the terms which DAF have put
17 forward to us.

18 Just to be clear, so the Tribunal understands the
19 position, we wholly see the value and are happy to agree
20 a process identifying which trucks were purchased by
21 Dawsongroup, and the invoices paid by Dawsongroup for
22 those trucks. We think that would be relevant, we think
23 that would be helpful. So we are happy to agree to
24 a process where we set out in a consolidated dataset
25 which trucks are properly included in Dawsongroup's

1 claim and the invoice prices paid for those trucks.

2 But DAF have asked us to go further, in
3 correspondence, and to include what they describe
4 as deductions to be made to the invoice price to arrive
5 at the value of commerce for that truck on an individual
6 basis. The difficulty with that proposal is that the
7 question of whether or not any deduction should be made
8 to the invoiced prices raises issues of principle which
9 are not easily dealt with in this process and will just
10 elongate it, as happened in the Royal Mail and BT
11 claims.

12 So, for example, DAF ascribes certain values to what
13 they consider as extras, such as training days, and
14 ascribe values to elements of the truck price, such as
15 standard warranties, and say that should be deducted
16 from the invoice prices. This raises serious disputes
17 of principle between us, and we do not think this is the
18 process to resolve those disputes.

19 If the process is kept to identifying the trucks and
20 the invoice prices paid for those trucks, we see that as
21 valuable and helpful, and we can certainly do that.

22 Otherwise, we will be locked in a process for months
23 arguing over individual price deductions for individual
24 trucks.

25 THE PRESIDENT: Can the schedule specify, without reaching

1 a view as to whether there should be deduction or not,
2 where an invoice says what is included in the price, or
3 if the price is broken down on the invoice, so that
4 it is truck including two year warranty and whatever
5 extra there might be, so that one can see from the
6 dataset what is included and what is not included in the
7 price, just so it is comprehensive? Then the arguments
8 of principle, as you say, are not for the dataset.

9 It is just important the information should all be
10 there so everyone can see what is available.

11 MR. PALMER: We can provide that information, Sir, if it is
12 dealt with on that contingent basis, yes.

13 THE PRESIDENT: Yes, and if they have been separately
14 itemised in the invoice that can be set out in the data.

15 MR. PALMER: Yes, I think they are not all separately
16 itemised; that is where the problem arises.

17 THE PRESIDENT: That is why the problem arises, is it not?

18 MR. PALMER: Yes, it is.

19 THE PRESIDENT: So that you are not required to necessarily
20 in the first instance ascribe a value to them, but at
21 least say what is there; then you can have a discussion
22 and either agree or disagree what value should be
23 ascribed to these.

24 MR. PALMER: We are certainly content to proceed on that
25 basis, Sir, yes.

1 THE PRESIDENT: Mr. Williams, would that meet the point for
2 the first stage?

3 MR. WILLIAMS: Yes, well I think the first thing to say is
4 that obviously we will be able to revert to Dawsongroup
5 with the form of order that has been agreed in Ryder, so
6 we now have a more developed template for discussion.
7 But it is certainly right to say that the purpose of
8 this process is to gather the information. It is not to
9 prejudge substantive issues; it is simply to gather the
10 best available information to enable those issues to be
11 resolved in due course. So we do not really understand
12 Mr. Palmer's objection from that point of view; we see
13 it in the way that you see it, Sir.

14 THE PRESIDENT: I think he is not objecting to doing that.
15 So if the invoice says this truck, £10,500 including
16 VAT, and a two year warranty, that is set out and then
17 you can have a discussion or debate or disagreement of
18 what value you ascribe to the two year warranty and
19 whether it should be included or not in the value of
20 commerce. But you will get the information, I think
21 that is agreed.

22 MR. WILLIAMS: I am grateful.

23 THE PRESIDENT: Very well, it looks as though we can leave
24 it there.

25 Is there then anything else, apart from disclosure

1 issues, that we now should deal with?

2 Mr. Harris.

3 Submissions by MR. HARRIS

4 MR. HARRIS: A short matter, Sir. The date of the CMC in
5 this Trial 2.

6 Yesterday I made a note that there had been
7 a suggestion for possibly the week of 11 October. The
8 parties' draft timetable suggested it all a bit later,
9 everybody was talking early November or into December.
10 The only point is, if possible, could we get some
11 clarity?

12 I just point out that the week of 11 October,
13 although it is a week after the CMC for Trial 3, in
14 which of course many of us will be intimately involved,
15 it also has the slight disadvantage that a skeleton and,
16 if you like, the update to be most beneficial for the
17 next CMC in this case would be having to be produced
18 during the currency of the Trial 3 CMC, if it is the
19 week of 11 October.

20 So my respectful submission would be not just can we
21 please get some clarity on the date, but can it be a bit
22 later than the week of 11 October, if possible?

23 THE PRESIDENT: There are problems for the members of the
24 Tribunal doing it later. We can happily fix the date
25 for skeletons earlier, but this was to deal with the

1 issues of expert methodology, I think, that were being
2 canvassed, and I think that needs to be done as soon as
3 possible.

4 I think it has to be that week. I am sorry.

5 MR. HARRIS: Understood. Is it the current intention then
6 that it be a CMC on those expert methodology issues, and
7 that there might be provision for other hearings or
8 other, whether they be called a CMC or not, on another
9 date? Or is it that it is intended to be a CMC for, if
10 you like, all and every outstanding issue that there may
11 be, including for instance disclosure issues?

12 Disclosure will not have been closed by then, and there
13 may be outstanding issues.

14 THE PRESIDENT: It is certainly to deal with the expert
15 questions, which you will recall both Claimants had
16 wanted to be dealt with today. Whether there will be
17 time for other issues I do not know.

18 I strongly suspect that in a trial of this
19 complexity, with this many parties, and this magnitude
20 there will have to be another CMC as well as Friday
21 hearings on disclosure, so it is not intended to be the
22 last throw of the dice before the PTR. So I think you
23 can rest assured that there will be scope for later
24 CMCs, and probably at that point held by the trial
25 tribunal. At some stage we will, as it were, hand over

1 to the trial tribunal. At the moment we are seeking to
2 achieve a consistent approach as between the three
3 trials.

4 MR. HARRIS: I am very grateful for that indication.

5 My only other matter is, with great respect, may
6 I hand over to Mr. Rayment for the purposes of arguments
7 about disclosure, whether priority or detail? To that
8 end, if there are no other issues, can I respectfully
9 ask for a five minute break so we can arrange the
10 technology in the most convenient manner?

11 THE PRESIDENT: If there are no other issues apart from
12 disclosure, Mr. O'Donoghue wants to raise something, but
13 before disclosure we are going to take not a five minute
14 break but a ten minute break, and we also want to see
15 which parties have active and urgent disclosure issues
16 to be heard, because everybody else can then be
17 released.

18 But before we do that, Mr. O'Donoghue.

19 Submissions by MR. O'DONOGHUE

20 MR. O'DONOGHUE: It was the latter point that I wanted to
21 pick up on. Given my exhortations on non-duplication,
22 we were hoping to be spared the pleasure of the
23 disclosure application.

24 THE PRESIDENT: Well, everyone who is not -- can we just
25 clarify. We know there are Daimler and Dawsongroup

1 issues on disclosure that we are aware of. A lot of
2 compromise and agreement has been reached on all the
3 other disclosure requests that are said to be urgent,
4 for which we are very appreciative.

5 Apart from Daimler and Dawsongroup, are there other
6 disclosure issues that we are being asked to deal with
7 today?

8 Mr. Holmes.

9 MR. HOLMES: Speaking for the Ryder parties, I hope,
10 collectively, I can say that all of the disclosure
11 matters for today have been resolved. We followed the
12 approach that Mr. Malek helpfully suggested yesterday
13 and it produced an outbreak of very effective
14 collaboration on all sides, and there are no matters now
15 pending in the Ryder proceedings.

16 THE PRESIDENT: Well, we are very grateful to everyone, not
17 only counsel but we are sure the solicitor teams, for
18 achieving that.

19 MR. MALEK: Could I make a short statement before everyone
20 goes, because there are some matters that relate to all
21 the parties.

22 Given the complexity of disclosure in this case and
23 the number of parties involved and the issues involved,
24 and the paucity of data going back so far in many cases,
25 we consider that close case management is necessary by

1 the Tribunal, as set out in our ruling 2020 CAT 3. In
2 practice, that means that the Tribunal gets involved in
3 one of three ways.

4 The first is if there is a very short point of
5 principle, that can be dealt with easily, that is being
6 dealt with on paper, and we have been dealing with a lot
7 of applications in that way.

8 The practice varies. Sometimes the parties ask the
9 Tribunal for an informal view as to what the Tribunal
10 thinks; that informal view is given. If the parties are
11 happy with that informal view, the Tribunal does not get
12 involved any further, apart from approving a consent
13 order. If the parties are not happy with that, the
14 practice has been to have more elaborate argument, and
15 it is still dealt with on paper with a short ruling.

16 The second way is if there is a more substantial
17 point that will take up to half a day, that is going to
18 be dealt with and has been dealt with by way of Friday
19 applications.

20 The third route is where there is a general point
21 which cuts across all the cases and involves multiple
22 parties or one that needs extensive argument, then that
23 can either be heard by the full Tribunal at a CMC or it
24 can be held on a separate hearing with the full
25 Tribunal, or sometimes with one member of the Tribunal.

1 Those are the three types of hearings that we have.

2 As regards today's exercise, we directed Redfern
3 Schedules to be given, and they were served on
4 26 March 2021 and they have been very helpful. But
5 looking at those schedules, it was evident that there
6 was more room for discussion between the parties, and
7 there has been a gap between the 26 March and today, and
8 that is why we directed that further updated Redfern
9 Schedules be served today. But it is most important
10 that it is only once a dispute or an issue has
11 crystallised between the parties as one not being
12 capable of resolution that it comes before the Tribunal
13 for a resolution.

14 One aspect that is continually coming up in these
15 cases is should we have a statement in lieu of
16 disclosure.

17 The approach of the Tribunal is that if there is
18 a particular reason for a statement, then that is the
19 right way to go, because the documents are very
20 expensive to retrieve, often there are massive gaps, and
21 sometimes when you do get the documents, as shown by the
22 Wolseley ruling that I gave last year, it is very
23 difficult to follow what they mean and to understand
24 what they are.

25 So the statements we have had to date have all been

1 very helpful, and the pricing statements have been
2 extremely helpful in this case.

3 We will be dealing with the question of whether
4 statements in lieu of physical documents are going to be
5 appropriate when we deal with Daimler's application
6 later on today, but we must recognise that the
7 statements we are directing now are a form of disclosure
8 or further information; they cover that ground. They
9 are not to be a substitute for the witness statements at
10 trial. It is not necessarily an answer, where there is
11 a request for disclosure now, to say: well, you will get
12 the answer later, when you have the witness statements.

13 In the olden days when we had interrogatories,
14 sometimes that was the answer to interrogatories,
15 "I will cover that in witness statements at trial"; but
16 the problem with interrogatories was that quite often
17 the witness statements either would not cover the matter
18 at all or would cover it inadequately.

19 For a case this large and this complicated, it is
20 important for all the parties to have this type of
21 statement, which is a form of further information,
22 upfront now, rather than leaving it further down the
23 line. It is more important in this particular case
24 because of the way it has been dealt with as a form of
25 a compromise or in lieu of physical documents, because

1 sometimes you need to look at the pricing statement or
2 whatever the statement is, and then decide, "Oh yes, we
3 do need the documents after all" or "We do need some
4 documents after all", and if we are going to defer that
5 type of statement to exchange of witness statements
6 later, we may be finding that we will be having
7 disclosure applications for further documents too far
8 down in this process. That is why we are going down
9 that route.

10 Looking at the schedules we have now got, I am very
11 glad that the parties have been able to agree either the
12 issues or put them to one side for now and just continue
13 the process of discussion between the parties.

14 That leaves us with the request from Daimler, which
15 we will cover after we have had the short break.

16 THE PRESIDENT: We will now adjourn until 5 to 12, and all
17 parties not involved in Daimler's application are
18 released.

19 MR. O'DONOGHUE: Sir, could I raise a couple of loose ends
20 on dates?

21 DS Smith will obviously get the pass-on and
22 overcharge disclosure. We set a date for two weeks on
23 the pass-on disclosure. We did not set a date for
24 overcharge. I assume that would be the same.

25 MR. MALEK: Yes, it will be the same, Mr. O'Donoghue.

1 The other point is that as regards your point about
2 what about further disclosure further down the line,
3 I think we made the position clear yesterday that we are
4 not going to make an order today that you automatically
5 get the further disclosure given by Ryder and
6 Dawsongroup, but in principle it does make sense that if
7 further disclosure has been ordered and provided in
8 favour of the Defendants, you get the same material,
9 absent any particular reason to the contrary. If you
10 have any difficulty on that regard, we will deal with
11 that in writing.

12 MR. O'DONOGHUE: I am grateful, Sir.

13 Just to clarify, the disclosure in the case of
14 Dawsongroup and Ryder will be made into the
15 Confidentiality Ring. We did set out at paragraph 67 of
16 our skeleton a small tweak to the ring to deal with the
17 question of where common documentation is disclosed in
18 two or more sets of proceedings. Nobody has come back
19 on that, so I assume this is not controversial. I would
20 suggest if it is controversial we can pick this up at
21 the stage of the draft order.

22 For the Tribunal's reference, the amendments are at
23 DSD, tab 8, and in particular it is paragraphs 6(a) and
24 6(b) and 9.1.

25 MR. MALEK: Yes, I think that is sensible. If there is

1 a disagreement, we will deal with that on paper.

2 MR. O'DONOGHUE: Nobody has reacted, so I assume it is
3 noncontroversial.

4 MR. HOSKINS: Sir, can I raise one issue on that?

5 We agree with the proposed Confidentiality Ring, but
6 if there are disputes, that is going to have a knock-on
7 effect on the ability to give the disclosure, because,
8 as Mr O'Donoghue has said, the disclosure has to be
9 given into the ring.

10 One way of dealing with that, which we would
11 suggest, is that we give the overcharge disclosure two
12 weeks after the Confidentiality Ring has been settled,
13 and hopefully that will be tomorrow or today.

14 MR. O'DONOGHUE: Between me and Mr. Hoskins the ring is
15 settled. The provision we put forward concerns really
16 Dawsongroup and Ryder. So it would be disclosed in the
17 existing ring, and if there is an outstanding issue on
18 the two amendments we propose, we can deal with that
19 a bit later.

20 Sir, we can take this offline, I think, and deal
21 with it in the context of the draft order.

22 MR. MALEK: That makes sense. Thank you very much.

23 THE PRESIDENT: There will be liberty to apply in the order
24 in the normal way, and if it turns out because there is
25 some problem regarding this amendment, which I have not

1 focused on, and that therefore leads any party to say
2 they want the disclosure date put back while that is
3 resolved, we can deal with that. But I think first you
4 need an opportunity to actually consider this and
5 exchange your positions and see if it can be resolved.
6 There is no need for us to take up time dealing with
7 that now.

8 MR. HOLLANDER: I thought there was a point actually on the
9 ring. I do not want to take up the Tribunal's time now,
10 but I think I had thought that there was an issue about
11 the drafting. Maybe we should take it up separately
12 with DS Smith and deal with it.

13 THE PRESIDENT: What we will do is rise until noon. That
14 will give you a chance to just consider this. If you
15 want to address us when we return at 12.00 noon on this
16 point, we can hear you then, if it is something you
17 think we can sensibly deal with now. Obviously we are
18 all here now, so it is an opportunity. But if you think
19 actually it should be dealt with offline, and that you
20 might be able to resolve it, then you need not take up
21 time with it. Why don't we give you those ten minutes
22 to confer with those instructing you?

23 Mr. Palmer.

24 MR. PALMER: Sir, I am grateful.

25 Can I just indicate the disclosure applications

1 concern Inner Confidentiality Ring material, so there is
2 a question as to whether the live stream should be
3 turned off when we get to that point.

4 THE PRESIDENT: This is the Daimler application?

5 MR. PALMER: The Daimler applications for disclosure, yes.

6 THE PRESIDENT: Yes. It is a question of whether we need to
7 look at documents, rather than just the descriptions
8 presumably, is that right? The actual categories
9 themselves. The Redfern Schedule, it says it refers to
10 Inner Confidentiality Ring information; it is a question
11 to what extent we have to look at documents identified,
12 as opposed to general categories.

13 MR. PALMER: I do not think you will be taken to individual
14 documents, but there are categories of disclosure and
15 reference to types of document which have been
16 disclosed, which are already provided, which are
17 confidential. It may be, Sir, you prefer to deal with
18 it on an item-by-item basis.

19 THE PRESIDENT: I think we will deal with it on that basis,
20 because we like to sit in public whenever possible.

21 MR. WILLIAMS: Sir, sorry to jump around.

22 On the 14 days for the overcharge disclosure there
23 is one small point, which is that the Tribunal directed
24 a distinction between documents and data, and we think
25 that will be a workable distinction in practice. It is

1 possible that the exercise will be a little more
2 complicated than we had anticipated at the moment, and
3 we just wanted to say if that distinction turns out to
4 be a bit difficult in practice, we might need a little
5 more time. But we can take that up with DS Smith
6 separately.

7 THE PRESIDENT: Yes. We assume that DS Smith's lawyers will
8 be reasonable if certain parts of the disclosure are
9 delayed a little for practical reasons. But if you
10 cannot agree, you can always apply in writing.

11 MR. WILLIAMS: Thank you, Sir.

12 THE PRESIDENT: Right, so we will be back at noon. If any
13 parties want to pursue the point about the
14 Confidentiality Ring amendment we will hear you then.
15 If not, we will then proceed to the Dawsongroup/Daimler
16 disclosure application and, as I said before, everyone
17 else is released. Thank you all for your assistance,
18 and particular thanks to those who worked hard to
19 produce the amended Redfern Schedules for this morning.

20 (11.53 am)

21 (Short break)

22 (12.05 pm)

23 THE PRESIDENT: Good afternoon, Mr. Rayment, it is
24 a pleasure to see you.

25 Mr. Hollander.

1 Submissions by MR HOLLANDER

2 MR. HOLLANDER: Thank you, Sir. There are two points that
3 we have on the DS Smith Confidentiality Ring drafting.

4 In my learned friend Mr. O'Donoghue's skeleton, at
5 paragraph 67, he says the purpose of this is to enable
6 DS Smith to discuss evidence relevant to issues arising
7 in Trial 2 with the other parties to the Dawson and
8 Ryder claims.

9 The problem I think is that the wording goes further
10 than necessary to achieve that. If we can look up the
11 draft order, it is at {DS-D/6/4}.

12 MR. O'DONOGHUE: There is another version in {DS-D/8/1}.

13 MR. HOLLANDER: Yes, you are quite right, I should have
14 referred to that. Perhaps let us start with page 5 at
15 paragraph 6(a).

16 Now, at paragraph 6A that is:

17 "Any Inner Confidentiality Ring Member or Outer ...
18 may discuss any Confidential Commission Document with
19 individuals having the same confidentiality status in
20 the Trucks Proceedings ..." and so forth. (As read)

21 The problem with that is if you then go back to the
22 previous page, 3.13, page {DS-D/8/4}, if you look at the
23 definition at 3.13, which has historical relevance, the
24 Trucks Proceedings covers everything. It does not just
25 cover the Trial 2 parties, namely Dawson and Ryder, but

1 covers a whole bunch of people who are not in Trial 2.
2 So I think the problem on that one is that "Trucks
3 Proceedings" should be defined with reference to the
4 Trial 2 parties, rather than the everybody else as well,
5 because it is too wide as it stands.

6 That is the first point we make. The second point
7 is if you go to page {DS-D/8/7} of the same document, at
8 clause 9.1, if you look at clause 9.1:

9 "Nothing in this Order shall prevent:

10 "(a) any Inner Confidentiality Ring Member from
11 discussing Confidential Information with other inner
12 confidentiality ring members, in claims which the
13 Tribunal has ordered are to be heard together with these
14 proceedings ... " And so forth.

15 Now, the problem I think with that, in the light of
16 the Tribunal's order yesterday, is it undermines it,
17 because it enables them to discuss anything labelled
18 "confidential" with somebody of equivalent status in the
19 ring. However, I think the effect of that is that it
20 undermines the Tribunal's order of yesterday, which drew
21 a distinction between the documents, which DS Smith were
22 going to get, and the data, which they were not going to
23 get, and therefore allows them to discuss beyond
24 effectively what the Tribunal has ordered.

25 That was the second. Those are the two concerns

1 that we had on the Confidentiality Ring drafting.

2 THE PRESIDENT: Yes.

3 Mr. O'Donoghue, on the first point you are not
4 involved in Trials 1 and 3.

5 MR. O'DONOGHUE: Sir, that is correct.

6 THE PRESIDENT: So is there any reason why the reference to
7 "Trucks Proceedings" in paragraph 6A cannot instead, the
8 definition, I do not know where else the phrase is used,
9 of course, in this document, but at least here relate to
10 the parties to Trial 2, as opposed to all the Trucks
11 Proceedings?

12 MR. O'DONOGHUE: Sir, we would be content with that.

13 THE PRESIDENT: That would I think deal with the first
14 point, as I understand it, raised by Mr. Hollander.

15 MR. O'DONOGHUE: Yes.

16 THE PRESIDENT: So that will be amended appropriately.

17 MR. O'DONOGHUE: Yes.

18 THE PRESIDENT: The second point, can you assist me on that?

19 MR. O'DONOGHUE: Well, Sir, first of all it would have been
20 useful if Mr. Hollander had engaged on these points
21 before today. This has been discussed for over a month
22 and we have heard nothing.

23 MR. HOLLANDER: This point arises as a result of the
24 Tribunal's ruling yesterday.

25 MR. O'DONOGHUE: The wording has been in place for a month.

1 Be that as it may, let me try and assist.

2 Mr. Hollander's point, in my submission, is misplaced.
3 What we are trying to do in the amendment in 9 is to
4 avoid a sort of guillotine whereby any discussion or
5 even potential discussion of something which is
6 confidential gets me and other members of the ring into
7 difficulties.

8 Now, we hear loud and clear what the Tribunal ruled
9 yesterday, which is there is a strong expectation, for
10 reasons of proportionality, that DS Smith will limit
11 itself in certain respects in stage 1 and, subject to
12 the Tribunal's ruling in due course, perhaps also in
13 stage 2. We hear that loud and clear, and we accept
14 that.

15 But for Mr. Hollander to use that as a sort of
16 Trojan horse to say, therefore, the discussion of
17 confidential information as set out in paragraph 9 has
18 to be similarly circumscribed, in my submission it goes
19 much too far.

20 THE PRESIDENT: Can I interrupt you. I am not sure that was
21 quite the point he was making. As I understood it, and
22 I may have misunderstood it, of course, the point he was
23 making was, consequent on our ruling yesterday, that for
24 stage 1 you will receive disclosure of the documents but
25 not the data.

1 MR. O'DONOGHUE: Well, Sir, that is right but we --

2 THE PRESIDENT: 9.1 as drafted covers both. I think that is
3 Mr. Hollander's point.

4 Is that right, Mr. Hollander, have I followed that?
5 You are muted.

6 MR. HOLLANDER: Sorry. Yes.

7 THE PRESIDENT: Yes. So I think that is the point. It is
8 not about what you may limit yourself to out of
9 self-restraint.

10 MR. O'DONOGHUE: Sir, it is a point of submission, because
11 we cannot discuss what we have not got, it is as simple
12 as that. There is no need for an amendment, it is
13 self-executing.

14 THE PRESIDENT: I think it may be a question of drafting
15 which we are not going to draft in the course of
16 a hearing. It might at the moment read that anyone can
17 discuss these matters with you, even though you do not
18 otherwise receive them. I think as long as it is
19 drafted to say that the DS Smith individuals who are in
20 the Inner Ring can take part in discussions of
21 Inner Ring or Outer Ring confidential documents which
22 they have received with anybody else, in other words,
23 which have been disclosed to them, but not matters which
24 have not been disclosed to them. I think that is the
25 distinction that has to be made, and that is a matter of

1 the way it is drafted.

2 MR. O'DONOGHUE: Sir, yes. It should be common disclosure,
3 in other words.

4 THE PRESIDENT: So that can be accommodated in alternative
5 drafting, and that is something that I hope we can leave
6 you to propose and have exchanges with the other
7 parties' representatives.

8 MR. O'DONOGHUE: That is very fair, yes.

9 THE PRESIDENT: Mr. Hollander, will that deal with it?

10 MR. HOLLANDER: No, I do not think so, because 6B already
11 does that, on page 5. So I think 9.1 is a new, "Nothing
12 in this Order shall prevent", and it just is not
13 necessary.

14 THE PRESIDENT: Can we see 6B, please? Yes, we have not
15 read that.

16 MR. HOLLANDER: Sorry. {DS-D/8/5}.

17 THE PRESIDENT: So you say that 6B deals with this and 9.1
18 is either duplicative or goes beyond it.

19 MR. HOLLANDER: Both.

20 THE PRESIDENT: Yes.

21 Mr. O'Donoghue, do you want to deal with that now or
22 would you rather consider it with those instructing you?
23 Because we are getting into -- if you accept the
24 principle, as I understood you did, that it can only be
25 matters which disclosure has been given to DS Smith,

1 then it is just a question of making sure that the
2 drafting accurately reflects that.

3 MR. O'DONOGHUE: Sir, we will take that offline.

4 THE PRESIDENT: Yes.

5 Mr. Hollander, anything else?

6 MR. HOLLANDER: Thank you very much, Sir.

7 MR. O'DONOGHUE: One final point on the date for our amended
8 particulars of claim. We left that with the Tribunal.
9 We made a submission for six weeks and I think, Sir, you
10 were not that happy with that. I just wanted to make
11 sure that has not fallen through the cracks.

12 THE PRESIDENT: Your ...

13 MR. O'DONOGHUE: Amended particulars of claim. The
14 truncated version which you ordered us to produce.

15 THE PRESIDENT: Yes. Did we not order a date for that?

16 MR. O'DONOGHUE: No, Sir. I made a submission to you,
17 I think you were not over the moon about it, but there
18 was no actual order yet. I submitted six weeks and
19 I think your Lordship had in mind a week earlier or
20 something like that.

21 THE PRESIDENT: Just a moment. (Pause)

22 We thought four should be sufficient, given that you
23 have already produced a pleading, and essentially what
24 you have to do is to put in a schedule of the trucks.

25 MR. O'DONOGHUE: Yes.

1 THE PRESIDENT: So it is four weeks.

2 MR. O'DONOGHUE: I am grateful. Thank you very much.

3 MR. HOSKINS: Sir, there is also then our defences, and we
4 would ask for the same time.

5 THE PRESIDENT: Your defences to ...

6 MR. HOSKINS: We would have to put amended defences to the
7 DS Smith amended claim, and that is one of the items you
8 asked us to think about yesterday.

9 THE PRESIDENT: Yes, we did, you are quite right.

10 MR. HOSKINS: I do not want that to fall through the cracks.

11 THE PRESIDENT: That is a further four weeks thereafter.

12 MR. HOSKINS: Yes.

13 THE PRESIDENT: Yes.
14 Anything else?

15 MR. O'DONOGHUE: Sir, no.

16 Daimler/Dawsongroup Disclosure Application

17 THE PRESIDENT: Very well, can we proceed without further
18 break, and we appreciate some of you will exit, to deal
19 with the outstanding disclosure which I think concerns
20 Mr. Rayment and Mr. Palmer, which is the
21 Daimler/Dawsongroup disclosure application. We are
22 content for everybody else just to exit. Although if
23 you want to stay ...

24 MR. HOSKINS: Before we disappear, we are pursuing these
25 categories as well, but we do not have them down to

1 pursue today, so I simply wish Mr Rayment all good
2 speed. We do support these categories, but I am not
3 going to sit and stare at the screen and put you off for
4 the rest of the afternoon.

5 THE PRESIDENT: I am sure Mr. Rayment appreciates your good
6 wishes.

7 Yes, Mr. Rayment. We have got the schedule and we
8 are grateful to those who produced, as I said before you
9 joined us, an amended schedule overnight, we have looked
10 at the categories.

11 We thought we should deal, out of fairness to
12 everybody else, with the priority requests that are
13 asterisked. As we have deferred the non-priority
14 requests for everyone else to be dealt with on Friday
15 applications or further discussion between the parties,
16 it would not be right to, as it were, enable Daimler to
17 steal a march on the others. So we are dealing with
18 those that are starred or asterisked.

19 MR. RAYMENT: Yes. Thank you very much, Sir.

20 MR. MALEK: Just a couple of points, Mr. President.

21 Mr. Rayment, it would be helpful in your submissions
22 at the beginning if you could outline where we are on
23 disclosure generally as between your clients and
24 Dawsongroup, going both ways, so we have an overview as
25 to where all of this fits in.

1 Secondly, as regards requests that solely relate to
2 mitigation and to nothing else, it may be more
3 convenient to stand those over until you have had the
4 opportunity to see our ruling on the mitigation issue,
5 on the amendment application in the BT/Royal Mail
6 proceedings.

7 That said, the Tribunal has met and we have been
8 through the Redfern Schedule together. So what
9 I suggest is you give the general introduction and then
10 we will go through your schedule category by category.

11 MR. RAYMENT: Sir, thank you very much for those
12 indications. I am grateful to your colleagues as well.

13 MR. RAYMENT: Can I just clarify that you do not have any
14 questions on the Redferns themselves, the way that they
15 are presented? We think it is pretty straightforward.
16 You do not need me to explain the way that --

17 MR. MALEK: We are very familiar with Redfern Schedules and
18 there are two approaches that the courts can take. One
19 is to hear the parties go through all their submissions
20 and then we give a ruling on everything. I do not like
21 that approach. The other approach is that we go through
22 each request one-by-one, and there are two ways of doing
23 that. One way is that we give an indication as to where
24 we are in principle on a particular issue and then we
25 hear argument on it in more detail if the parties are

1 not happy with it; the other way of doing it is to allow
2 the parties in their own way to develop their
3 submissions on each issue, and then we give a ruling on
4 each issue, issue-by-issue. But I really do not mind
5 which way we do it.

6 THE PRESIDENT: Can I just interpose to say that before you
7 joined us, Mr. Rayment, the point was made by Mr. Palmer
8 that there is confidential material in the
9 Redfern Schedule. We do not want to hear the whole
10 application in camera, but if at some point you need to
11 refer to matters that appear to be confidential, if you
12 can flag that up and the live stream can be turned off.

13 MR. RAYMENT: Yes, I will, Sir.

14 The way I was proposing to deal with the request was
15 primarily by reference to the schedule itself, and
16 I hope you have all got a hard copy of that.

17 THE PRESIDENT: Indeed.

18 MR. RAYMENT: I think that being the case and all the
19 interested parties having a copy of the
20 Redfern Schedule, we should be able to deal with the
21 request, as I say, primarily by reference to that
22 document and therefore there should not be a need to
23 display the Redfern Schedule on the RingCentral display,
24 I think we can just deal with it with the Redfern in
25 front of us. I think that is going to be the simplest

1 and the most efficient way of dealing with things.

2 Could I just say a word about attendances before
3 I get into the substance.

4 Mr. Harris has asked me just to let the Tribunal
5 know that he is still in attendance, of course, and at
6 your disposal should any issue that he is going to deal
7 with arise.

8 Also, as you have also heard from Mr. Hoskins
9 wishing us good speed with this application, the fact is
10 that I just want to be clear that although in one sense
11 this is a bilateral application between Daimler and
12 Dawsongroup, on the other hand it is of interest to more
13 than just Daimler on the Defendants' side, not least
14 because it is currently anticipated that Daimler's
15 expert, Mr. Grantham, is going to be instructed by the
16 other Defendants as their single joint expert. As
17 I say, that instruction has not taken place at this
18 stage, but that is the intention. As you have heard,
19 the wheels are in motion to set that up.

20 So I just wanted to be clear at the outset that this
21 is not simply a bilateral matter, this is something that
22 more than one Defendant has an interest in.

23 Just by way of background, given the Tribunal's
24 helpful indications yesterday we had helpful discussions
25 with Ryder and, as I think you have seen, all the

1 Daimler requests that were directed to Ryder have been
2 addressed at this stage between Daimler and Ryder, and
3 that agreement is reflected in the struck through
4 entries in the Ryder Redfern schedules that we have
5 lodged with the Tribunal.

6 As you will see, in that schedule all the requests
7 are struck through to reflect the current happy state of
8 agreement between us and Ryder, but I just wanted to
9 make it clear that that is the position with Ryder, and
10 that is how that is shown in the Ryder Redfern Schedule.

11 Similarly, in relation to Dawsongroup, where there
12 are significantly more outstanding issues, there are
13 nevertheless some areas where issues have been resolved,
14 and where that is the case the schedule shows those
15 areas of agreement by struck through text.

16 The position, as you will see if you have had
17 a chance to glance at the Ryder Redfern Schedule, is
18 that the issues that Daimler raised, the requests that
19 Daimler raised in relation to Ryder, which in a number
20 of cases overlapped with requests that were being
21 advanced to Dawsongroup as well, have been addressed,
22 and they have been addressed by a combination of
23 agreements by Ryder to search for pre-existing
24 documents, in some cases to go back over categories that
25 were originally ordered in 2019, sometimes with more

1 targeting or a slightly adjusted frame of reference, but
2 also the requests for disclosure have also been
3 addressed by the provision of statements, notably -- and
4 by "statement" I do not mean a witness statement, you
5 know, I mean an explanatory statement by way of further
6 information, effectively -- the sort of statement that
7 other parties have already given in these proceedings,
8 as you are aware, including the Defendants in relation
9 to the pricing statements, and Ryder has agreed to
10 provide us with some statements to address our request
11 for disclosure, and, notably in that regard, in relation
12 to the price setting that they carried out in relation
13 to both long-term and short-term hire. They have agreed
14 to provide those statements and disclosure by 16 July.

15 That is the context of why we are not pursuing any
16 disclosure requests against Ryder today.

17 Now I move on to the outstanding requests against
18 Dawsongroup, and we did make a bit of progress overnight
19 but much more limited, as you will have seen from the
20 schedule.

21 Obviously, with the Tribunal's indulgence, the way
22 I propose to deal with Daimler's requests against
23 Dawsongroup, as I have said, I am going to use the
24 Redfern Schedule principally and I am going to go
25 through the requests. I suspect it is going to be

1 helpful to do it one by one, giving the opportunity to
2 the Tribunal to decide what they want to do, hearing
3 both parties on each entry. That is what I anticipated
4 the Tribunal would want to do, but obviously I am in
5 your hands on that. I was going to do it in the order
6 of priority in our annex 2 because, as you have already
7 mentioned, you know, there was a specific ordering of
8 priority by Daimler to try and make the most progress in
9 relation to disclosure issues, so our expert was asked
10 to carefully consider, you know, if there is only
11 limited time, what are your top 10, essentially, and
12 that is what is reflected in annex 2 to our skeleton.

13 There is one exception though to my general proposal
14 to follow the order in annex 2, and the main exception
15 is that I want to deal with the areas in which we are
16 seeking, in the absence of pre-existing documents that
17 provide explanations, where we are seeking statements in
18 relation to the disclosure we have received. So I would
19 like to deal with the statement -- the categories that
20 we would like to be covered by a statement first. Those
21 categories are P05(a), P02, P02(a) and P06(g)/1. Those
22 are the areas that I am going to start with in a moment.

23 MR. MALEK: When you start, what I suggest we do is that if
24 we start off with P02 and then we will give a ruling on
25 P02, and then we will go on to the next one, because you

1 may find that it will be a lot quicker that way.

2 MR. RAYMENT: Sir, I will try and be flexible. I think that

3 is probably right, that may well be right in relation to

4 certain categories, but there may be others where I need

5 to deal with them in a slightly different order because

6 some categories are affected by what is decided in

7 relation to another category. Because the scope of one

8 category may then impact on what we say we need in

9 relation to another category. Indeed, you may have seen

10 that in relation to certain categories PO4(h) and (i),

11 to name two, there is an issue there where we have said

12 there could well be agreement on this category if

13 Dawsongroup is prepared to extend, I think it is one of

14 the categories, PO4(f), if they are prepared to extend

15 what they have offered so far on PO4(f) to a category

16 that we have called strategic business reviews. I do

17 not know if you recall looking at that.

18 MR. MALEK: But on PO4(f), when we have come to that, it is

19 not necessarily what Dawsongroup are prepared to offer,

20 we will give a ruling on PO4(f) and then you will have

21 the benefit or not of that, when you come to the next

22 category.

23 MR. RAYMENT: That is a perfectly fair point.

24 MR. MALEK: When you look at PO2, you have made a proposal.

25 We understand the issue, because Dawsongroup say they do

1 not have any policies or procedures relating to the
2 manufacturing group generally, and you have asked for
3 a statement explaining how the fleet was managed over
4 time to achieve -- there is an echo.

5 THE PRESIDENT: We are getting quite an echo. I do not know
6 if that is affecting others, but it is affecting all of
7 us. It is affecting Mr. Palmer. Normally that is
8 because someone who is not speaking has left their
9 microphone on.

10 MR. MALEK: It is sorted out now, because Mr. Rayment has
11 turned off his microphone.

12 THE PRESIDENT: Mr. Rayment is going to have to speak. I do
13 not know why when you speak we get an echo. I do not
14 know if you can do anything about that. We can sort of
15 muddle through until 1 o'clock, but if that continues
16 perhaps somebody could look at it over the lunch
17 adjournment.

18 MR. RAYMENT: Sir, we will do that.

19 MR. MALEK: On your PO2, we discussed this amongst
20 ourselves. We fully understand why you want a statement
21 in the form that you have requested it, and what
22 I suggest we do is that we ask Mr. Palmer to give his
23 objection to that, and then if necessary we will ask you
24 to come back. But at the moment we are presently of the
25 view that given that they do not have any written

1 policies or procedures, and hence no further documents
2 can be supplied that will be particularly useful, it is
3 probably much better, at least in the first instance,
4 that they do provide a statement by way of further
5 information.

6 Mr. Palmer.

7 MR. PALMER: Thank you, Sir.

8 May I just divide my submissions on this into two
9 halves, both brief I hope.

10 First, there is a question arising as to the general
11 use of statements and, Sir, we noted what you said
12 earlier just before the break about that.

13 MR. MALEK: Yes.

14 MR. PALMER: Secondly, obviously some PO2 specific points.

15 On the general use of statements, we obviously have
16 well in mind exactly what you have said about the
17 usefulness, for example, of the pricing statements which
18 have already been offered, which were offered in a sense
19 instead of further disclosure at that point. It was
20 a step taken, because it was clearly proportionate to
21 have an initial statement rather than having the
22 documents first, so that, as you put it, argument was
23 saved only for what was really, really needed later. So
24 it was clearly better to have a statement as an
25 alternative to a wide-ranging disclosure order for

1 masses of documents which, even when received, might not
2 make sense on their own.

3 That was the approach taken when the Defendants were
4 ordered at an early stage of proceedings to provide
5 pricing statements. It was a proportionate alternative
6 to a search across multiple custodians for documents.

7 Now, that is not the case in this case, where our
8 point is that we do not have what is being asked for.
9 That is a point which arises in a number of categories.
10 What Daimler are seeking to do is to ask for a statement
11 not as an alternative to a wide-ranging disclosure order
12 on proportionality grounds, but as an alternative where
13 there simply is no disclosure to be given.

14 Sir, I have heard what you said in your statement
15 just before the break, saying these statements also
16 provide a function of providing further information,
17 which we have understood as being as an alternative in
18 effect to a request for further information that one
19 might make of a pleading. But this request, as we
20 understand it, does not amount to a request for further
21 information of a pleading, so it raises the question:
22 what status would our answer have? Would it be in the
23 form of a pleading or would it be in the form of advance
24 factual witness statements?

25 Our position on that is these disclosure requests

1 are not an appropriate method of obtaining advance
2 factual witness statements. As you said, Sir, these are
3 not meant to be an alternative to those witness
4 statements. So we have a question in our mind, which we
5 are not fully understanding of what purpose a disclosure
6 statement would serve where it is not a request for
7 further information arising from a pleading and it is
8 not an alternative to disclosure on proportionality
9 grounds because there is simply no disclosure to be
10 given.

11 MR. MALEK: Mr. Palmer, as you probably know, the old rules
12 used to be that you could get interrogatories in
13 relation to matters which are not further information of
14 a pleading. You had two different principles: one was
15 a request for further and better particulars of
16 a pleading, so you were asking questions in relation to
17 a pleading; and the other was interrogatories, which is
18 not asking necessarily for further details of
19 a pleading, but things can which are outside that, and
20 that was a form of disclosure.

21 What we are dealing with here, and particularly the
22 ones that we were just looking at, PO2, we are really
23 looking at the equivalent of a request for further
24 information.

25 Now a further information, it can be said to have

1 the status of a pleading, but it is certainly not
2 a witness statement.

3 MR. PALMER: No.

4 MR. MALEK: I know we have had this issue tangentially in
5 another hearing but I cannot remember which one. But if
6 you say something in your pricing statement that is not
7 necessarily accurate, then you are quite free, when you
8 give your witness statements later, to clarify and say,
9 "Although we gave this pricing statement, there is one
10 or two things I need to clarify". Because you are bound
11 to go into, let us say, a lot more detail when you are
12 giving your witness statements and you are further down
13 the line.

14 I think we fully appreciate that this type of
15 statement to a certain extent is going to be rough and
16 ready and it is not going to be perfect. So I do not
17 want to have a situation whereby you get to trial and
18 someone says, well, they put it to your witness, you
19 know "You have got this wrong and that wrong" and try
20 and undermine that witness because of what has been said
21 in one of these statements, if there is an
22 understandable reason why the statement is not 100%
23 accurate.

24 I hope that gives you some assistance as to what we
25 are really trying to get here.

1 MR. PALMER: If I may say, Sir, it does provide that
2 assistance which we were seeking and I am very grateful
3 for what you have said, if I can put it that way.

4 MR. MALEK: Can I just check with my colleagues as to
5 whether or not they agree with that formulation.

6 Yes, that is fine. Thank you.

7 MR. PALMER: Sir, on the subject of PO2 specifically, you
8 will see from the Redfern Schedule, if I may refer to,
9 this is on page 1 obviously it begins, PO2 of the
10 Redfern Schedule, I will refer to what I will call the
11 Dawsongroup column, which is the sort of middle of the
12 page, with Dawsongroup's remarks on, where the first
13 point we make is that we have already provided extensive
14 disclosure relevant to this category. We have set it
15 out there. You can see it numbered at (i) to (v) but
16 that is all in addition to, as appears above, the
17 granular details of dates and prices of manufactured,
18 sold, repurchased or traded over a period of 20 years.

19 The second point is that in addition to that we have
20 already agreed to provide, as you will see in relation
21 to the following category, if you go on down the
22 Redfern Schedule to page 4, in relation to the related
23 PO2(a), in our column on page 4 you will see we have
24 offered disclosure of reporting processes and practices
25 in respect of the disposal of trucks.

1 That has not yet been provided to Daimler, but that
2 is agreed to be provided as a consequence of this round
3 of disclosure requests.

4 In addition to that, we have --

5 THE PRESIDENT: Sorry to interrupt you. The PO2(a), I just
6 was not quite following the last point. PO2(a) on
7 page 4 -- it is the bit in red on page 5, Dawsongroup
8 have ...

9 MR. PALMER: Yes.

10 THE PRESIDENT: I am sorry.

11 MR. MALEK: That relates to the disposal of trucks. We have
12 got that, thank you.

13 THE PRESIDENT: Thank you.

14 MR. PALMER: Those reporting processes and practices are all
15 to be provided already, specifically again in relation
16 to the disposal of trucks, which is what the PO2 request
17 is also concerned with.

18 What we have said is that beyond those reporting
19 processes and practices we do not have any other
20 policies and procedures relating to the management of
21 the fleet falling within PO2, discrete from what we have
22 offered to provide under PO2(a).

23 Now, it is in that context that Daimler have
24 requested a narrative statement, but we say given that
25 we have already agreed to provide that further

1 disclosure under PO2(a), then the appropriate course is
2 for Daimler to look at that, and if they still have
3 questions arising, well, perhaps it can be dealt with
4 at that stage. But it would be premature to order
5 further disclosure before Daimler have actually had
6 a chance to absorb those reporting processes and
7 practices.

8 MR. JUSTICE FANCOURT: What will that encompass? I am
9 a little unclear what that additional category of
10 documents is likely to include.

11 MR. PALMER: The particular position of Dawsongroup is,
12 unlike Ryder, it is a smaller operation and perhaps more
13 informally managed, less structured management
14 procedures we guess. Obviously we do not have sight of
15 the Ryder disclosure or documents, we do not know, so
16 that is speculation on our part. But we anticipate that
17 an operator of their greater size will have more
18 formalised policies and procedures to offer in response
19 to a request like this than Dawsongroup in fact does,
20 where many of the practices are informal and not
21 documented.

22 So what we have done in those circumstances is
23 agreed to conduct reasonable proportionate searches for
24 processes and practices, which will embrace minutes of
25 sales meetings, for example, and reports presented at

1 sales meetings, which might provide details of processes
2 and practices.

3 So there will not be written procedures or policies
4 of the sort which has been requested, but it may be that
5 other documents provide evidence of the processes and
6 practices which are in practice adopted.

7 So we are willing to provide that, and we anticipate
8 that will meet Daimler's concerns. Of course, if it
9 does not, once they have seen it they can make an
10 application at that point.

11 MR. MALEK: Mr. Palmer, the way I look at it is that PO2(a)
12 is not necessarily covering everything in PO2, it is
13 a sub-set. What I envisage, and we can debate this, but
14 what I envisage with PO2 is a more general statement.
15 I am not going to make an order that you have to
16 provide, you know, a lengthy statement going through
17 things on a micro level.

18 MR. PALMER: No.

19 MR. MALEK: But I do think it is sensible that you do
20 provide a more general statement in relation to PO2
21 saying, "This is our general policy on the topic", and
22 I think that would be helpful.

23 You are not necessarily going to have any
24 duplication, because that can be the same statement that
25 covers PO2(a) at the same time.

1 MR. PALMER: Sir, we can supplement what we provide with
2 PO2(a) with a short statement.

3 Our concern beyond that is the use to which this is
4 to be put, which, as we understand it, this is to be put
5 in support of the forensic accounting approach to supply
6 pass-on, if I can put it that way, to re-sale pass-on.
7 So again, we are not content to provide endless
8 disclosure premised on a forensic accounting approach
9 unless and until at the beginning of October the
10 Tribunal rule that that is the appropriate methodology
11 to be pursuing at all.

12 Just as, Sir, you indicated that the appropriate
13 time for mitigation requests to be dealt with would be
14 in July, when the Tribunal is expected to rule on that,
15 we say that the same approach should be taken in
16 relation to forensic accountancy evidence.

17 Now ...

18 MR. MALEK: I do not think this merely goes to that
19 evidence, but I do think that both the Defendants and
20 the Tribunal would be assisted by a statement covering
21 this, given that there are no formal policies or
22 procedures. It is really fairly basic stuff that
23 I would have thought that it would not be a huge burden
24 for you to produce, and it will be useful; and it will
25 be useful for the experts and for everyone to know the

1 broad structure of how the disposal of trucks was being
2 dealt with within the business.

3 MR. PALMER: Sir, in the light of that indication, that is
4 what we will do. I am grateful.

5 MR. MALEK: Mr. Rayment do you have any other points on PO2?

6 MR. RAYMENT: Sir, that is very helpful.

7 We would simply say that if Mr. Palmer needs a model
8 to follow for his statements, he could do worse than
9 look at the Daimler pricing statement, because that will
10 answer a number of the questions that he has asked of
11 you about the nature of these documents. I mean, these
12 are fairly well established now, their use is fairly
13 well established in these proceedings, and what he will
14 see if he looks at our statement, he will see that we
15 have given it on the basis of our best current
16 information, but nevertheless it is reasonably detailed
17 so as to be useful. It is accompanied by documents that
18 it explains, where that is appropriate, and it is
19 covered by a statement of truth. Those are the sort of
20 key points. But no way are we suggesting that he at the
21 moment is required, and it is a complete
22 mischaracterisation of our position to suggest that he
23 is required to bring forward his witness statements at
24 this stage. That just is not what this is about.

25 MR. MALEK: Mr. Rayment, I am sure Mr. Palmer will have seen

1 or will look at the pricing statements already
2 provided -- can you turn off your microphone -- and I do
3 envisage that this statement will have a statement of
4 truth at the end of it. But just like your pricing
5 statements it will have a caveat, which is that, you
6 know: this material is the best I can do on the present
7 state, there may be errors and we are talking about
8 a long period of time.

9 What I do not want, and I think this is what
10 Mr. Palmer is trying to avoid, is for these statements
11 to be used as a rope to hang his clients on, when we all
12 appreciate that it is very, very difficult to get to the
13 bottom of exactly what went on when we are dealing with
14 so long ago.

15 So Mr. Palmer, on PO2 then you will provide the
16 statement along the lines that I have indicated, and let
17 us look at PO2(a).

18 Mr. Rayment, you have seen the offer, that they have
19 offered reporting processes and practices in respect of
20 the disposal of trucks. I do feel that that may not be
21 enough, unless it includes the further information that
22 you are seeking at the bottom of page 5.

23 Where I am at the moment and where the Tribunal is
24 at the moment, because we did discuss this among
25 ourselves, is that we are minded to go for your

1 formulation rather than Mr. Palmer's formulation,
2 because we do think that you probably do need the
3 information that you have asked for at the bottom
4 right-hand side of page 5. So really it is down to
5 Mr. Palmer.

6 MR. RAYMENT: Thank you, Sir. Yes, that was our concern
7 about their offer, that it was too narrow. To be useful
8 it needs to be a bit wider. Our expert has given this
9 very careful attention and that is what with be helpful.

10 MR. MALEK: We have obviously read what your expert says
11 about this, and we have taken that into account.

12 Mr. Palmer, I do not think what they are asking for
13 is a massive extension of what you have already offered.

14 MR. PALMER: What is asked for, as we understand it, is
15 relating to the profits or losses which were taken into
16 account by Dawsongroup when managing the fleet, and that
17 is, we say, irrelevant to the matter at hand because
18 I mean that may be required if the forensic accounting
19 approach is ultimately adopted, but from our perspective
20 and from Mr. Harvey's perspective, we do not see this as
21 relevant.

22 What is relevant is what the trucks were actually
23 resold for when they were disposed of, or what actually
24 came out of that, not what the process was in taking
25 profits and losses into account.

1 So we say that this request is adequately dealt with
2 by the disclosure that we have offered, and if more were
3 required it could only be by virtue of the particular
4 forensic accounting approach which remains the subject
5 of dispute.

6 Of course we have been co-operative in offering
7 those reporting processes and practices in any event for
8 reason of proportionality. But the point of principle
9 that we make is the point of principle that the Tribunal
10 itself identified in the January 2020 ruling, which is
11 the cart should not come before the horse here, the
12 methodology needs to be approved. I understand why that
13 might be used in respect of the forensic accounting
14 approach, but we have not reached that point.

15 The other point I make is the way in which the
16 disposal of trucks is accounted for by Dawsongroup is
17 already evident from the disclosure which we have
18 already made; that being the audited consolidated
19 financial statements, and the monthly management
20 accounts.

21 Daimler already have that information, and that
22 provides more than just the reporting processes and
23 practices which we are in addition now offering.

24 MR. MALEK: Yes, Mr. Rayment, what would you like to say in
25 reply to that.

1 MR. RAYMENT: I am very grateful to Mr. Palmer for raising
2 the question of profit and loss on disposal because you
3 will have noted that one of the associated categories
4 upon which we are seeking a statement is PO6(g)1, which
5 is at paragraph 33 of your Redfern Schedule, which is
6 dealing precisely with this topic. We say that this
7 whole area should be dealt with together in a single
8 statement. That is the approach that Ryder have taken.
9 We think it should apply to Dawsongroup as well.

10 MR. JUSTICE FANCOURT: Mr. Rayment, my understanding is that
11 what is being sought by you is not disclosure of
12 accounts or accounting -- I am talking about PO2(a) now,
13 which is where we are -- not accounts or accounting
14 documents, not policies, because it has been explained
15 there are not any written policies, but an explanation
16 in a statement of the approach that was taken by
17 Dawsongroup to how they dealt with income received from
18 selling trucks, and how that was used going forwards in
19 fairly general terms.

20 Is that right, because if that is right then
21 Mr. Malek is absolutely right; it is a relatively minor
22 extension of category PO2. But if you are looking for
23 something more detailed than that, which I think you
24 might be, it may be a bit more than a minor extension.
25 The way you describe it is a statement of how the

1 recovery of cost of trucks feeds into future budgets or
2 target profit margins. In other words, how do
3 Dawsongroup see or envisage the income they get from
4 selling trucks being used in the business going
5 forwards.

6 MR. RAYMENT: Sir, the question of exactly how detailed it
7 is, is difficult to answer, but our objective is for our
8 expert to be able to understand from the documents that
9 have already been disclosed, which are referred to by
10 Dawsongroup in the Dawsongroup response column to this
11 request, what we want is a bit more specifics about how
12 they dealt with the profits and losses from the sale of
13 trucks which we do not get from those more general
14 higher level documents.

15 So it is an extension. It is slightly in the eye of
16 the beholder as to how much more detail that involves,
17 but it is easy for me to state it in terms of what we
18 are looking for, which is a greater explanation of how
19 those matters were dealt with.

20 We would like Mr. Palmer's clients to go as far as
21 they can in that direction in the proposed statement.
22 If after that the scales have still not dropped from our
23 expert's eyes then we will have to maybe follow-up with
24 a question.

25 I am not trying to be too prescriptive as to the

1 level of detail; it is just that we would like more
2 explanation in the terms set out.

3 MR. JUSTICE FANCOURT: But it is an explanation of the
4 processes and practices rather than the financial
5 details of what was actually done with the income on
6 a year by year basis, is it?

7 MR. RAYMENT: Yes, that is correct.

8 MR. MALEK: I think with that clarification it is not a huge
9 extension and the Tribunal will just confer for one
10 second on this.

11 MR. PALMER: Sir, can I just indicate before you do that we
12 have of course already disclosed accounting policies as
13 to how matters will be dealt with. So they have that as
14 well as the consolidated financial statements and
15 management accounts, which actually show how the
16 disposal of trucks has in fact been accounted for.

17 Anything beyond that is going down this particular
18 forensic accounting line well beyond anything which
19 could be proportionate until the Tribunal has ruled in
20 principle on whether that is appropriate.

21 (12.59 pm)

22 (Short break)

23 (1.00 pm)

24 MR. MALEK: As regards category PO2(a) we accept the offer
25 that Dawsongroup have made, which is to give disclosure

1 of reporting processes and practices in respect of the
2 disposal of the trucks by way of a statement to be
3 accompanied by a statement of truth.

4 The issue is whether at this stage we should make an
5 order that is more descriptive or with more detail to
6 make it clear that it should include how any such
7 profits or losses were taken into account by the
8 Dawsongroup when managing their fleet, and in particular
9 how the recoverable costs of trucks feeds into future
10 budgets or target profit margins.

11 We do not think at this stage it is necessary to
12 include that in an order. Dawsongroup is obviously
13 fully entitled to give such particulars if they wish to,
14 but we are not going to make an order now.

15 It may be that this whole issue can be revisited
16 once you have had our ruling on mitigation and perhaps
17 even later once we have got any ruling on the expert
18 methodology. But for now what has been offered by the
19 Dawsongroup is adequate and that is consistent with our
20 incremental approach in any event.

21 Mr. Rayment, what is the next category?

22 MR. RAYMENT: I am grateful.

23 Sir, I was going to suggest, but obviously again
24 I am in your hands given your indication of how you
25 wanted to go sequentially through the Redfern, what

1 I was proposing was to deal briefly with PO6(g)/1, which
2 raises a related issue about profit and loss on
3 disposal. So that is sort of a little bit allied to
4 what we have just been discussing.

5 Then I wanted to go to PO5(a), which is price
6 setting, and a statement on price setting, and that will
7 complete the areas on which we are asking for
8 a statement.

9 MR. MALEK: Let us deal with PO6(g)/1.

10 MR. RAYMENT: It is on page 33, Sir. I do not know when the
11 Tribunal is intending to rise, Sir.

12 MR. MALEK: Maybe we should rise now and we will come back
13 to this at 5 past 2.

14 MR. RAYMENT: I am grateful, Sir.

15 MR. MALEK: Thank you.

16 (1.03 pm)

17 (The short adjournment)

18 (2.08 pm)

19 MR. MALEK: We will now deal with PO6(g)/1.

20 MR. RAYMENT: Yes. Thank you very much, Sir.

21 This category is actually a slight extension of
22 PO2(a), and what the expert is trying to understand or
23 gain an understanding of is the profit and loss on
24 disposal, and in particular --

25 THE PRESIDENT: Mr. Rayment, could you pause, we are not yet

1 live. We are now, yes.

2 MR. RAYMENT: I am sorry, Sir.

3 THE PRESIDENT: There is a slight delay until the live
4 stream is connected, and we have to wait to get as it
5 were the all clear before we can start.

6 MR. RAYMENT: Understood.

7 THE PRESIDENT: Although the Teams platform is working, the
8 live stream has a delay of about a minute to connect.
9 Sorry about that.

10 If you would like to start again.

11 MR. RAYMENT: Of course, Sir, and I hope that my connection
12 is slightly better, we have tried to improve it over the
13 luncheon adjournment.

14 THE PRESIDENT: Yes, it is.

15 MR. RAYMENT: As I was saying PO6(g)/1 is effectively an
16 extension of PO2(a), which we were talking about before
17 lunch, and it really relates to the need by our expert
18 to be able to understand the financials, how the profit
19 or loss on disposal is accounted for by the business.

20 In the column of the Redfern Schedule that deals
21 with our reason for the request, you can see there that
22 he is dealing with depreciation being a key measure that
23 he needs to understand the financial consequences of
24 disposals. I wonder if I could, in that regard, take
25 you to some correspondence that we have had about

1 depreciation.

2 This is a letter dated 14 April of this year from
3 BCLP to Daimler's solicitors, Quinn Emanuel, and it is
4 marked as containing Inner Confidentiality Ring
5 information. I do not think the information that I want
6 to refer to is confidential, but is there a way that the
7 Tribunal can view that document without it being sort of
8 displayed more widely, if I give you the electronic
9 bundle reference?

10 THE PRESIDENT: My understanding, but I had better pause
11 while that is checked, is that the Opus retrieval system
12 is confined to those within the Confidentiality Ring,
13 and certainly does not appear on the video, the live
14 stream, and so it will not go to those who are viewing
15 on live stream. The question is whether those who are
16 able to join through the Microsoft Teams platform are
17 confined to those who are within the appropriate
18 Confidentiality Ring, and that I do not know.

19 Maybe you should just take instructions to check
20 that, and similarly Mr. Palmer, because I think it can
21 be viewed by those who are on Teams if they have the
22 Opus link. It is a question of who has access to the
23 Opus link. Do you know the answer to that? It has not
24 been set up by the Tribunal, but by the parties, the
25 Opus link.

1 MR. RAYMENT: I do not. But I think the concern is that if
2 it had parties who are not parties to the Dawsongroup
3 claim on it, and I think there is a possibility that
4 MAN, for example, I think they are on the Teams
5 platform.

6 THE PRESIDENT: Is it in hard copy? It is probably not in
7 the hard copy bundle, is it?

8 MR. RAYMENT: I am afraid I do not know the answer to that.
9 We have not got a hard copy for this hearing.

10 THE PRESIDENT: Yes, we have got some hard copies, but I do
11 not think it is -- I am just looking. Our Dawsongroup
12 hard copies are basically just witness statements and
13 pleadings, but not exhibits. Just give me a moment.

14 (Pause)

15 Yes, we have got witness statements, and I think
16 otherwise we have just got -- which is quite right, this
17 is not a criticism, we do not want masses of bundles.
18 Yes. We have got pleadings and orders and witness
19 statements and nothing else, so I think probably -- just
20 one moment, pause a moment. (Pause)

21 Yes, it is being suggested that we have the
22 E bundles ourselves, as you do, and we could pull it off
23 one of the E bundles and put it up for ourselves on the
24 screen, in which case none else would see it, so that
25 deals with one aspect.

1 The other aspect is the transcript, which is of
2 course a live transcript for everyone. Will you be
3 reading out sections of the letter or is it enough to
4 point us to paragraphs?

5 MR. RAYMENT: Yes, I would just identify the paragraphs for
6 you to read, so there would not be any need for it to
7 appear in the transcript, even if it is confidential.

8 THE PRESIDENT: Let us see if that works. Can you give us
9 the bundle reference?

10 MR. RAYMENT: Yes, Sir, it is {DG-D4/IC1328}.

11 THE PRESIDENT: Give us a moment as we try to find that.

12 MR. JUSTICE FANCOURT: It is a 14 April 2021 letter from
13 BCLP, is that right?

14 MR. RAYMENT: That is it, Sir, yes. Thank you.

15 I would invite the Tribunal --

16 THE PRESIDENT: Mr. Rayment, wait a moment, we have not all
17 got it. Mr. Justice Fancourt is ahead of us.

18 Yes, we have all got it.

19 MR. RAYMENT: I am very grateful, Sir. If the Tribunal
20 could read the second and third paragraphs on the first
21 page of the letter, starting:

22 "In your letter ..."

23 THE PRESIDENT: Yes. (Pause)

24 Yes.

25 MR. RAYMENT: Thank you, Sir.

1 So there you can see, in response to a letter from
2 Daimler's solicitors enquiring about how depreciation is
3 measured, you see the response there, which does leave
4 a lack of clarity on this subject. That is what we are,
5 you know, seeking to get greater clarity on by our
6 request in PO6(g)/1, for the reasons given there. And
7 we do not think that that should be particularly
8 difficult to provide an explanation.

9 THE PRESIDENT: It does appear, though, that as phrased this
10 category does go rather wider, does it not? Because
11 what you are seeking are statements addressing how the
12 accounting profit or loss on disposal is taken into
13 account by the business in any subsequent
14 decision-making. That does seem to go beyond just
15 understanding how they identify the cost of a truck to
16 the business.

17 MR. RAYMENT: Yes, I accept it is a bit of an extension, but
18 it is nevertheless important to be able to understand
19 how the business is dealing with those costs.

20 THE PRESIDENT: I am not sure for myself that it is, unless
21 you want to understand how the whole business is run,
22 which is way beyond any question of pass-through.

23 I mean, one possibility is that they are asked to
24 explain the statement to which you have taken us, namely
25 how the costs of a truck are considered and assessed for

1 the purpose of the business. In other words, the
2 passage in the letter, which, as you pointed out, begs
3 certain questions, just to explain that more fully and
4 give a clearer picture of how that particular issue,
5 namely the business cost of a truck, is assessed.

6 MR. RAYMENT: Well, I think at this stage that would be
7 helpful.

8 THE PRESIDENT: I think, speaking for myself, I would be
9 much more comfortable about that than the very
10 broad-ranging statement that, as presently drafted, the
11 Redfern Schedule is seeking.

12 MR. MALEK: Mr. Rayment, I think the problem we all have is
13 in relation to the words "in any subsequent
14 decision-making". If you are willing to limit your
15 request to the formulation indicated by the President,
16 then I would certainly, subject to whatever Mr. Palmer
17 says, go along with that, but not the wider formulation
18 in the current draft.

19 MR. RAYMENT: I am grateful for that indication, Sir. At
20 this stage I would be prepared to limit the request.

21 MR. MALEK: Let us see what Mr. Palmer says, because
22 Mr. Palmer is facing --

23 MR. RAYMENT: Sorry to interrupt you, Sir. Just to make
24 clear that obviously I cannot -- I do not think it is
25 going to help us to spend loads of time trawling through

1 the correspondence, but what I can tell you is that
2 there has not been an answer on this point.

3 MR. MALEK: Okay.

4 Mr. Palmer.

5 MR. PALMER: That is for good reason, that the expert is
6 still actively considering that and is not yet in
7 a position to give an answer. It is not
8 a straightforward question, there are different ways of
9 accounting for costs and it may not just be a top level
10 accounting line, which the Defendants already have in
11 the disclosure provided to them. So that is an ongoing
12 exercise being conducted by our expert in support of his
13 preparation of his expert evidence.

14 But the request which is the subject of this
15 application in PO6(g)/1, with respect to Mr. Rayment, it
16 nothing to do with that. It is nothing to do with,
17 "Please explain how you are calculating the costs" in
18 a similar way to the request to which this letter is
19 addressed, but it is asking, in the context of pass-on
20 and, it seems, mitigation, for a statement explaining
21 how the accounting profit or loss on disposal is taken
22 into account by the business in subsequent
23 decision-making. And even if one were to lose those
24 words, it would still be how it is taken into account by
25 the business, which is an entirely separate question

1 from the question being addressed by this
2 correspondence.

3 If there is an application to be made further to
4 that answered in the correspondence, it should be made
5 on that basis and we can prepare for it on that basis.
6 We would say that the Defendants already have all the
7 accounts which show how depreciation is handled, and our
8 expert is continuing to consider whether there are
9 better measures of truck costs than simply the line in
10 the accounts, by disaggregating and considering further.

11 But that is not this application, so we resist
12 giving that response.

13 MR. RAYMENT: I am slightly confused by that response
14 myself, because it seemed to me that what we were
15 limiting this to what was a pretty straightforward
16 factual question of the business as to how it actually
17 treats these matters. And that is not a sort of
18 abstract, there are different accounting theories and so
19 on, the question is: what did you do?

20 MR. PALMER: In response to that, you already have the
21 application under PO2 and PO2(a), which the Tribunal has
22 already addressed, and it is effectively seeking to
23 revisit that by saying that these further details as to
24 how profit and loss is dealt with in the business should
25 be provided now, rather than further on down the line.

1 everyone when it is answered.

2 You are muted, Mr. Palmer.

3 MR. PALMER: I was just going on to say thank you, Sir.

4 MR. MALEK: Mr. Palmer, depending on how you want to deal
5 with it, it can obviously be part of the same document
6 that you provide under PO2.

7 MR. PALMER: Yes, I anticipate it will be, Sir.

8 MR. MALEK: Thank you.

9 Mr. Rayment.

10 MR. RAYMENT: Thank you very much, Sir. I understand that
11 is the way Ryder is doing it too.

12 Could we move on to P05(a) now, and that is on
13 page 23 of the schedule.

14 This relates to price lists and how price lists are
15 used to set prices. You will notice that this, in our
16 hit parade, is at the top of the hit parade; this was
17 our first priority item in our annex 2. The wording
18 here is actually in the same terms as the original order
19 that was made in 2019. So our request has been
20 consistent since that period, which was for price lists
21 and a description of how prices are set, agreed, by
22 reference to those price lists.

23 The pre-existing documents did not produce such
24 a description so, you know, we want it as a matter of
25 further information. What we have tended to be offered

1 is more price lists which, whilst that is welcome, the
2 crux of this request is to understand how prices were
3 set by reference to these price lists.

4 MR. MALEK: Mr. Rayment, just to say that for my part, and
5 I think we discussed this amongst ourselves in the
6 Tribunal, in principle we think that is a sensible
7 approach, so it is probably better to hear from
8 Mr. Palmer and then you come back and reply, if
9 necessary.

10 MR. RAYMENT: Thank you, Sir. Perhaps it is just fair to
11 also make the point that the bullet points that we have
12 set out that we would like to see covered in any
13 explanation, those are effectively what we have also
14 agreed with Ryder.

15 MR. MALEK: Yes. I can see why they have agreed that.
16 Thank you.

17 MR. PALMER: Sir, thank you.

18 Yes, well we are mindful of what the Tribunal has
19 already said about the giving of statements. Our
20 concern that remains is the nine bullet point very
21 detailed forensic level list, which is said by Daimler
22 to be required to be addressed in any pricing statement
23 which is given.

24 It seems to us that the appropriate order, if the
25 Tribunal is to make an order for a price statement,

1 would be one which was more akin to the order which was
2 made in respect of the Defendants, which produced their
3 price statement. We do not have a copy of that order,
4 it is not something we have access to, but it is found
5 at the top of the relevant price statement. If I may
6 give this, it is a confidential document, so again if
7 I can invite the Tribunal to bring it up on their
8 internal systems, rather than published on Opus. The
9 reference is DG-A1. Sorry, it is within the inner
10 confidential circle documents, and within that it is
11 {DG-A1/IC30.4.2} and within that page 2.

12 That sets out the order that Mr. Malek made, which
13 gave rise to that pricing statement, and you will see
14 there that what was sought and ordered was a general
15 description of how truck models were priced, including
16 any increases in price, which body or employee within
17 the company took such decisions, at what level the
18 decisions were taken, and the information on which that
19 body or employee relied, in general terms, in taking
20 such decisions. If I may say so, Sir, that is
21 a proportionate order which can be addressed on that
22 basis.

23 What is sought by Daimler on this application is
24 something far more prescriptive, far more detailed, and
25 far more tipping in to the detail of matters which will

1 in due course be dealt with by appropriately detailed
2 witness statements.

3 But treating this as a request for further
4 information in the way that Mr. Malek has explained
5 earlier, our submission would be the appropriate order
6 to make would be one in the same or very similar terms
7 to the order made in respect of the Defendants.

8 THE PRESIDENT: You would be content, Mr. Palmer, if that
9 made clear that this was to cover both long-term hire
10 and short-term rental? Because the mechanism may be
11 different.

12 MR. PALMER: Yes. I have checked with those instructing me
13 and yes, that is the intention.

14 MR. MALEK: I think the point, Mr. Palmer, is that although
15 the order I made in that one was in relatively general
16 terms, it was understood what everyone was looking for,
17 and that although the request was general, you needed to
18 come back into some detail in responding to it.

19 So for my part, I accept the point that we should
20 not be prescriptive and be listing every single item
21 that needs to be covered, but we should have
22 a statement, and the statement should bear in mind the
23 bullet points being addressed there, and should deal
24 with short-term and long-term hire. As long as that is
25 understood, then we can make an order in a more general

1 sense.

2 MR. PALMER: Sir, that is understood.

3 MR. MALEK: Okay, thank you.

4 Mr. Rayment, I am sure you are happy with that.

5 MR. RAYMENT: Sir, I am absolutely happy, and that is
6 absolutely right what you said about the pricing
7 statement. One simply puts down the marker that those
8 matters that are mentioned in the bullet points are
9 accepted as relevant by Dawsongroup. If they are not
10 explained in the pricing statement, then we all know
11 what is going to happen, and it is going to be, you
12 know, more time-consuming and more inefficient if those
13 issues have to be gone into further down the line.
14 Things have certainly moved on a lot since we gave our
15 pricing statements, and we have responded to a lot of
16 further enquiries and so on after that.

17 MR. MALEK: What has been happening with the pricing
18 statements, Mr. Rayment, is that the pricing statements
19 have been delivered and then the Claimants have been
20 asking for, in effect, further particulars of those
21 pricing statements or clarifications. I am not saying
22 that this document is going to be immune from that
23 process. I think we all appreciate that whatever is
24 produced, you may have some further questions.

25 What is your next one?

1 MR. RAYMENT: It is PO4(e)/2, please. Page 11, Sir.

2 THE PRESIDENT: I think it is our page 10.

3 MR. RAYMENT: I am sorry. Because I was working off the
4 version that did not have page numbers originally,
5 I made sure you did, but I did not have time to update
6 mine.

7 Yes, this was our second priority document in
8 annex 2, and it is a request for supporting documents or
9 calculations in respect of revenue and costs. What we
10 are asking for is example supporting documents or
11 calculation in respect of revenue costs and overheads
12 which support forecasts or budgets or form part of any
13 forecasting or budgeting process.

14 The difficulty which seems to arise with requests
15 for this type of information is that often reporting
16 that is made to senior level committees and so on within
17 the business are often summaries of information rather
18 than full documents, and this request is particularly
19 focused on getting more detailed documents.

20 MR. MALEK: Mr. Rayment, just on this one, are you looking
21 for examples, or are you asking them to do a reasonable
22 and proportionate search for every one document in that
23 category? Because so far as I am concerned,
24 a reasonable proportionate search for examples is one
25 thing; it is another if you are asking them to dig out

1 every single example of it.

2 MR. RAYMENT: Well, I am very grateful to you for raising
3 this point, because you will have seen that in the
4 right-hand column over the page, highlighted in yellow,
5 we have indicated an attempt to try to define the
6 parameters of this request. But what you find quite
7 often is that you try to formulate a category in order
8 to capture what you think it is that you want to find,
9 but the problem is, is that you are obviously shooting
10 a bit in the dark, as the person that does not hold the
11 documents. Then you get met with a claim that what you
12 are asking for is disproportionate.

13 Of course, what we are really asking for, you know,
14 we are willing to discuss any sort of more targeted
15 approach but we are not in a position to say, you know,
16 what that search would necessarily return.

17 MR. MALEK: Exactly. But at the moment, if you are
18 expecting them to get everything in this, i.e. send out
19 a broad net and pull every single fish and minnow in,
20 that is not going to be acceptable.

21 MR. RAYMENT: No.

22 MR. MALEK: It has got to be examples, at least in the first
23 instance. It is a question of perhaps having a dialogue
24 with Mr. Palmer or the solicitors to try and reformulate
25 this request into something that is acceptable. Because

1 in principle we agree that a reasonable, proportionate
2 search for material within this category is relevant and
3 necessary, but we do not accept that it would require
4 Dawsongroup to pick up every single paper in this
5 category.

6 Mr. Palmer, do you have any practical solution to
7 this?

8 MR. RAYMENT: Could I just say -- sorry, Sir -- just to come
9 back to the passage that I was just highlighting, you
10 know, it could be in respect of budgets prepared as part
11 of the annual budgeting process, that is what we have
12 suggested. Mr. Palmer may say that is still too wide,
13 but we would be interested to understand that more, if
14 that is the case.

15 MR. MALEK: Mr. Palmer, what do you have to say about that?

16 THE PRESIDENT: Just before we turn to Mr. Palmer, when you
17 say "the annual budgeting process", you mean for each
18 year of what? The infringement period, the claim, what
19 period?

20 MR. RAYMENT: The claim period.

21 THE PRESIDENT: The claim period. For each year of the
22 claim period.

23 MR. RAYMENT: Yes, the annual budget, yes.

24 THE PRESIDENT: Yes.

25 MR. PALMER: We have two points.

1 MR. RAYMENT: Obviously if it is the same every year it is
2 possible that we would not need information for every
3 year. I just offer that.

4 THE PRESIDENT: The calculations will not be the same every
5 year, unless the budget is exactly the same
6 year-on-year, which would be extraordinary. The
7 calculations are bound to be different every year, are
8 they not?

9 MR. RAYMENT: Yes, I understand that. I was just trying to
10 be constructive.

11 MR. PALMER: We have two points, one about proportionality,
12 and one about relevance which we do not accept.

13 The point about proportionality is, as Mr. Malek
14 indicated, the category as drafted was hopelessly wide,
15 and we appreciate the concession to limit the request in
16 the first instance, it is said, to supporting
17 calculations for the annual budgeting process. But even
18 that is vast, are my instructions, a huge amount
19 underlying that. So we still have concerns on
20 proportionality.

21 Moreover we have concerns on relevance, even before
22 we get into issues of proportionality, because these are
23 all concerned with underlying documents for forecasts
24 and budgets, not for costs which were actually passed
25 on. Of course, there can be a great difference, in the

1 context of an unregulated business like Dawsongroup,
2 between ex post outcomes from ex-ante expectations, due
3 to the impact of market forces and the uncertainties of
4 the marketplace.

5 So bearing in mind that this is said to be in
6 support of pass-on, Mr. Harvey has explained he does not
7 understand how forecasts and budgets themselves are
8 relevant to that exercise, but what this is looking for
9 is a disproportionate cast of the net into supporting
10 documents underlying those forecasts and budgets. It
11 may be -- and we have asked; we have not had an
12 answer -- that in reality, rather than being linked to
13 pass-on, this is all part of the disclosure which the
14 Defendants are seeking to support their proposed
15 arguments on mitigation, to really understand what costs
16 were being saved, what cost cutting exercises there were
17 and so forth.

18 So the evidence which we have produced in response
19 to this request, that is Mr. Harvey's evidence, goes
20 unanswered in that respect. For those reasons, we have
21 resisted this request and continue to do so.

22 MR. MALEK: Mr. Rayment, can you deal with the relevance
23 issue first?

24 MR. RAYMENT: Apologies, the relevance is that whatever
25 Mr. Harvey wants to do, Mr. Grantham wants to compare

1 MR. PALMER: Thank you, Sir, that is noted.

2 MR. MALEK: The next category.

3 MR. RAYMENT: I am grateful. PO4(j), please, Sir, which
4 I think you will find on page 23 of your schedule.
5 It is 22, I am told. Sorry.

6 MR. MALEK: Yes. Is this not particularly concerned with
7 mitigation? In which case is this not one of the ones
8 that we should postpone until after you have had the
9 judgment on mitigation?

10 MR. PALMER: That is certainly our position, Sir.

11 MR. MALEK: Yes. I would have thought, Mr. Rayment ...

12 MR. RAYMENT: May I take instructions for one moment?

13 MR. MALEK: Yes. (Pause)

14 MR. RAYMENT: Sir, we are content to leave that one until we
15 have had a chance to consider your ruling.

16 MR. MALEK: Yes. Thank you.

17 MR. RAYMENT: With that could we move on to PO4(f), then.
18 That is on page 11, I think.

19 Now this category is partially agreed. If you look
20 in the right-hand column in the bottom corner you will
21 see some text in italics starting "Contribution analysis
22 reports".

23 MR. MALEK: As I understand it, the Dawsongroup are prepared
24 to conduct reasonable and proportionate searches for
25 contribution analysis reports and contract contribution

1 analysis reports, which are prepared on a monthly basis,
2 and an assets not rented list, which are prepared on
3 a quarterly basis, so that is helpful.

4 MR. RAYMENT: That is correct, Sir.

5 MR. MALEK: You say you maintain the request for strategic
6 business reviews, and should the Claimants continue to
7 assert that they do not prepare any documents for board
8 meetings, executive meetings, the Claimants should set
9 out the searches undertaken to confirm that no documents
10 are available in a disclosure statement.

11 Are you prepared to accept that? If we order that,
12 is that all you are seeking for now?

13 MR. RAYMENT: That is what we are seeking, if the answer
14 is -- if the assertion is as we have set out there in
15 that highlighted yellow passage that you have just
16 referred to.

17 The issue, though, and why we are seeking the extra
18 bit of this category in relation to strategic business
19 reviews, is that if you can see in the column relating
20 to our original request, so I am on page 12 now, and you
21 can see there what we have done -- and of course this is
22 all part of the natural process of disclosure; we
23 obviously got disclosure under your original order, and
24 this additional Redfern is obviously following up on
25 that, and one of the documents that we identified is the

1 document entitled "Report to main board", which was
2 a document that was disclosed by the third Claimant, and
3 you can read -- I am not going to refer to it, just in
4 case it is confidential.

5 MR. PALMER: It is confidential, so ...

6 MR. RAYMENT: Yes, thank you.

7 If you could just read the italicised quote from it.

8 (Pause).

9 MR. MALEK: Yes.

10 MR. RAYMENT: Sir, we have obviously not had the document
11 that that refers to, but it obviously exists or existed
12 at some point in time. That is why we want to
13 understand, we want a search that captures the full
14 suite of documents that are --

15 MR. MALEK: But they have said they will conduct
16 a reasonable, proportionate search for contribution
17 analysis reports. They have said that that is what they
18 will do.

19 MR. RAYMENT: I understand that, Sir, but it is not clear to
20 us that, for example, the document I have just been
21 referring to is captured by the agreed scope of this
22 category, and it should be extended to cover strategic
23 business reviews, because that is what that looks like.

24 MR. MALEK: I think, subject to any argument from
25 Mr. Palmer, there should be a reasonable and

1 proportionate search for strategic business reviews,
2 whatever that covers. Clearly it is relevant, and in
3 principle they are willing to conduct searches for
4 contribution analysis reports. But you are saying it is
5 possible that they have something else which maybe has
6 a different name, that has the function of a strategic
7 business review.

8 MR. RAYMENT: Yes. If they can help us refine the term then
9 that is great, but we think that would be a good
10 starting point.

11 MR. MALEK: Let us see what Mr. Palmer says.

12 Mr. Palmer.

13 MR. PALMER: Thank you, Sir.

14 The position in relation to this category is we have
15 largely agreed it.

16 MR. MALEK: Yes, so I can see.

17 MR. PALMER: What has been agreed is agreed because it is
18 relevant to pass-on. What has not been agreed is either
19 that which does not exist or that which, if it does
20 exist, is relevant to mitigation only. I would just
21 like to unpack that and explain that so that the
22 Tribunal can understand that position, if I may.

23 MR. MALEK: Yes.

24 MR. PALMER: First, just so you understand what we have
25 agreed to, and to put a little bit of flesh on the bone

1 as to what a contribution analysis report is, or
2 contract contribution analysis report, these are reports
3 which monitor the financial performance of the truck
4 fleet, including monitoring profits and costs. They are
5 monthly updates which are used by management to run the
6 business. So you will readily understand the reasons
7 why we accept that to be relevant.

8 MR. MALEK: Yes.

9 MR. PALMER: The contribution analysis reports relate to the
10 shorter term rentals; the contract contribution analysis
11 reports relate to the longer term lease contracts which
12 were entered into; and, of course, assets not rented
13 speaks for itself, that is, if you like, the stock which
14 remains available to be rented or leased. We have
15 agreed for any sort of commentary, memorandum or
16 analysis following an accountant's review, if that
17 exists, we will search for that.

18 What is left beyond that is this request for
19 strategic business reviews, and we have tried to pin
20 down, given that we had nothing by that name or
21 function, we have tried to pin down what the Defendants'
22 underlying object is here, to see if we do have
23 something which is relevant and can be proportionately
24 searched for. Because we have confirmed that besides
25 those documents which we have agreed to provide, there

1 are no other documents prepared for board or executive
2 management.

3 Daimler's response to that has been to request
4 a statement explaining how, if no other documents were
5 prepared, decisions as to whether to undertake
6 restructuring and cost cutting activities were made.

7 Indeed, that passage from the report which you have
8 read -- I will not read it, because it is
9 confidential -- you can see how that fits within the
10 structure of that request. But this element of the
11 request, we say, does not fall within the pass-on
12 category. It is a mitigation request about cost cutting
13 and restructuring; and restructuring we understand to
14 include things like redundancies and so forth. That is
15 part of the Defendants' mitigation argument, it forms no
16 part of the pass-on analysis.

17 That is why we have taken the stance that we have in
18 distinguishing between the different aspects of this
19 request, and I hope that assists.

20 MR. MALEK: I think let the Panel confer.

21 (3.07 pm)

22 (Short break)

23 (3.08 pm)

24 MR. MALEK: We have considered this question. What we think
25 should happen in the first instance is that Dawsongroup

1 should give the disclosure that it has offered, and then
2 liberty to apply on behalf of Mr. Rayment's clients once
3 they have got that. So we are not refusing it, but we
4 are not accepting it at this stage.

5 The next category.

6 MR. RAYMENT: Sir, the next category, or indeed categories,
7 are ones that I mentioned at the outset of the
8 application as depending on the outcome to some extent
9 of what happened in relation to the category that you
10 have just addressed, PO4(f). Because there are a number
11 of documents that are covered by PO4(g), PO4(h) and
12 PO4(i) that we considered might fall within the scope of
13 the strategic business review, i.e. slightly longer term
14 planning documents.

15 We were prepared, if the strategic business
16 review -- if PO4(f) was ordered as widely as we were
17 seeking, to include strategic business reviews, then we
18 thought that we could do without (g), (h) and (i) for
19 the time being, but as the Tribunal has restricted the
20 scope of PO4(f) then I think I do need to go to PO4(g),
21 (h) and (i). So if we could go to PO4(g).

22 MR. MALEK: You do not think these are ones that go to
23 mitigation and perhaps should wait until you get the
24 mitigation ruling?

25 MR. PALMER: Sir, if it helps, that is our position in

1 respect of all of them.

2 MR. MALEK: Yes, it seems to me that is the probably the
3 most sensible thing, that we park these ones for now and
4 we can come back to those, because you have the
5 mitigation ruling to come and you have also got the
6 other documents which Dawsongroup have agreed to
7 provide. So I do not think you will be prejudiced
8 either way if we do not deal with that today.

9 MR. RAYMENT: Sir, could I just take instructions for
10 a moment?

11 MR. MALEK: Yes.

12 MR. RAYMENT: Thank you very much. (Pause)

13 Sir, you are not on mute, just so you know.

14 MR. MALEK: Okay.

15 MR. RAYMENT: Sir, I would like to try and persuade you on
16 PO4(g), please.

17 MR. MALEK: PO4(g), yes.

18 MR. RAYMENT: Yes. This is profit margin and I wonder if
19 I could just take you to Mr. Grantham's second
20 statement, paragraph 81. I will give you the reference
21 for that. Paragraphs 80 and 81. The reference for that
22 is {DG-B1/IC59/24}. If I could ask you to read 80 and
23 81 to yourselves. (Pause)

24 Members of the Tribunal, while you are there
25 I wondered if I could ask you to keep reading to 87,

1 costs. You can then consider that along with the other
2 documents that you are receiving, and if, on the basis
3 of that explanation -- and it would be for each Claimant
4 and I think in fact some Claimants were dormant at one
5 point and then the business was transferred to another
6 Claimant, which is why we have got five Claimants; and
7 you will also have the ruling dealing with mitigation,
8 and then if so advised you can make a further
9 application. That will enable you to start analysing
10 the process of recovery of truck costs, which is
11 essentially all you are legitimately concerned about.

12 MR. RAYMENT: Well, I understand that point. I am very
13 grateful for that indication.

14 Of course, I was also talking about P04(g) and (h),
15 which were profit margins and KPIs, and what we are
16 trying to do is to understand how pricing decisions were
17 taken. I think what you are putting to me is in
18 relation to trucks, and that of course is correct, but
19 all of these categories have a bearing on why pricing
20 decisions were taken.

21 THE PRESIDENT: Yes, but there may be all sorts of other
22 things that influence pricing decisions. The question
23 is what is done about truck costs, and where they are
24 dealt with; they may go into pricing decisions, they may
25 be dealt with in other ways, there may be a mixture, and

1 it may not be direct or it may be direct, we do not
2 know. But once you get a clearer understanding, which
3 is often better by a statement from someone in the
4 business, as opposed to whole swathes of documents, you
5 can consider the significance and you can consider what
6 further enquiries and requests are appropriate.
7 Equally, we can then consider, in the light of that
8 explanation, whether they are justified under the
9 relevant legal principles.

10 MR. RAYMENT: May I take very brief instructions, Sir?

11 THE PRESIDENT: I have not put this to Mr. Palmer, of
12 course, I have just indicated how they are thinking. So
13 rather than going to (g) and (h), is it?

14 MR. RAYMENT: (h), yes.

15 THE PRESIDENT: It seemed to us that this is the appropriate
16 place to start, and then if necessary you can come back.

17 MR. RAYMENT: May I just say of course one appreciates that
18 one is concerned with trucks, but the other costs in the
19 business affect the price of trucks. So I do not want
20 to leave our expert without information to have, you
21 know, a rounded understanding of how pricing decisions
22 were taken.

23 THE PRESIDENT: Yes, but it is what the business did with
24 the price it had to pay for trucks. That is the
25 question. It spent X hundred thousand or X thousand on

1 trucks in any one year. Well, how was that cost dealt
2 with? That is what we are interested in, and that is
3 all you are legitimately interested in. There will be
4 many other aspects of the business, such as staff pay,
5 bonuses, expenditure on warehousing, garages, whatever,
6 servicing, and so on, to maintain their fleet.

7 MR. RAYMENT: Some of those may affect the price of the
8 trucks.

9 THE PRESIDENT: Yes.

10 MR. RAYMENT: I think that is the point. Some of those may
11 affect the price of trucks. I am not saying at this
12 stage whether they do or they do not, but they might.

13 THE PRESIDENT: Yes.

14 MR. RAYMENT: Anyway, I believe you want to put that to
15 Mr. Palmer, and in the meantime I will try and get some
16 instructions.

17 THE PRESIDENT: You might want to pause and listen if he
18 would resist an order restricted in those terms first.

19 Mr. Palmer.

20 MR. PALMER: Sorry, Sir, may I just take a moment to confirm
21 my instructions on that last point?

22 THE PRESIDENT: Yes, we will just withdraw for five minutes
23 to let you both take instructions, I think, because you
24 both want to.

25 MR. PALMER: That might be sensible. In essence, all of

1 might be surprising but if not, then it will not be
2 included, but there would be follow-up questions if
3 those matters in (g) and (h) are not covered. But we
4 would be content for it to be left to the Claimant to
5 provide the explanation in the statement that you
6 potentially had in mind.

7 THE PRESIDENT: Yes. I mean Mr. Grantham does say, "I am
8 prepared to review the information that has been agreed
9 and further information under PO4(f)", which we have
10 dealt with.

11 MR. RAYMENT: Our understanding was that was on the basis
12 that it was slightly wider, potentially.

13 THE PRESIDENT: I see. But he does not actually deal with
14 this on the basis of what he is now getting, or
15 Dawsongroup is now providing.

16 Mr. Palmer.

17 MR. PALMER: Yes, Sir, thank you for that opportunity.

18 It would be helpful to recap on what we are
19 providing already, because above PO4(i)/1 on cost
20 recovery is a category which is now crossed out on your
21 copies of the Redfern Schedule. That is, in my copy,
22 beginning on page 17; it is immediately above PO4(i),
23 costing models.

24 THE PRESIDENT: Yes.

25 MR. PALMER: That is crossed out obviously because it is now

1 agreed, it was agreed last week in fact, and you can see
2 that that includes, if you can read through the crossing
3 out, "documents or information concerning cost
4 allocation methodology showing ..." and if you go to
5 (ii) "how costs in respect of the procurement, lease or
6 use of trucks are allocated for the purpose of pricing
7 and/or understanding the profitability of contracts and
8 pitches".

9 So that is to be provided. That is the first
10 element of what I draw your attention to. There is
11 three.

12 The second is, as you have heard under PO4(f), the
13 contribution analysis reports, which then monitor that
14 and report on it.

15 THE PRESIDENT: Yes.

16 MR. PALMER: The third element, of course, is earlier today
17 the Tribunal ordered Dawsongroup to provide a price
18 setting statement, and of course the extent to which
19 truck costs are considered in truck rental prices are to
20 be set out in that statement. That is one of the
21 bullets which you have asked us to have regard to in
22 doing that.

23 Now, that is all coming to Daimler already. The
24 original drafted PO4(i)/1, cost recovery, as the
25 Tribunal has pointed out, did not limit itself to the

1 cost categories in relation to trucks, but went wider;
2 and of course the invitation from the Tribunal was to
3 limit it back down to trucks.

4 THE PRESIDENT: Yes.

5 MR. PALMER: But when you do that through the combination of
6 the other points which I have drawn to your attention,
7 we think we have got that covered. So this would be
8 duplicatory.

9 We note also that Mr. Grantham, as you pointed out,
10 in his report, explicitly accepts that it is appropriate
11 to review the disclosure which is coming before pursuing
12 this. The one, of course, qualification is that he was
13 proceeding on the basis that he might also get, under
14 P04(f), the strategy review documents. But as I have
15 explained, to the extent that those documents exist, or
16 some functional equivalent to them, it would be
17 concerned with other cost cutting measures or
18 restructuring measures which go beyond the price of
19 trucks. That is why we have resisted that; it goes to
20 mitigation. So that again brings into play the
21 mitigation point that all that is left is the costs of
22 other matters, which may be relevant to Daimler's
23 mitigation defence if in due course it is permitted to
24 advance that defence, or to the extent that it is
25 permitted to advance it, but it should not be ordered at

1 this stage.

2 So we say the appropriate course is for Daimler to
3 review what is coming when it is disclosed, and then
4 consider its position. I do note that so far as these
5 categories are concerned, that is what Volvo/Renault
6 have agreed to and are content with, to await what is
7 coming under (f), and now the additional points which
8 the Tribunal has ordered as to the price setting, and
9 then to consider its position. We say that would be the
10 appropriate case for Daimler as well, in the light of
11 all that I have said.

12 THE PRESIDENT: If you say the limited explanation, as we
13 have reformulated and reduced the scope of PO4(i)/1, is
14 already covered under other categories, then you are
15 doing it. If it is not covered, then it is something
16 additional, in which case it might be helpful. I do not
17 know if simply showing how costs are allocated shows how
18 you consider any increase in truck prices; and no doubt
19 there were increases in truck prices anyway over
20 a period of 14 years, forgetting about any collusion.
21 I am quite sure that prices were never static.

22 MR. PALMER: Yes.

23 THE PRESIDENT: Whether this is something that therefore one
24 ought to seek to deal with by, for example, is it
25 something that we should deal with through the rental

1 charges or is it something that we need to spread across
2 the business or should we do it by trying to renegotiate
3 the lease of our head office, and so on, that would be
4 covered by a more general explanation and that, I think,
5 would be helpful. I am not sure that comes out of just
6 a statement of cost allocation. It may do, but either
7 it adds little, in which case there is nothing more for
8 you to do, or it adds something, in which case it may be
9 worthwhile.

10 Do you understand the way I am thinking?

11 MR. PALMER: I do understand, Sir, and of course insofar as
12 an order is made which makes no difference to what we
13 are already doing, I do not object on that basis. But
14 what I am concerned with, of course, is duplicatory
15 orders and then it is said that, "Oh no, the Tribunal
16 must have meant something in addition to what you are
17 going to do otherwise", and that leads to further
18 argument.

19 What I would ask the Tribunal to do is to accept
20 that our understanding is that when you combine the
21 disclosure on costing models with the disclosure of
22 contribution analysis reports and contract contribution
23 analysis reports, covering both rentals and leasing
24 obviously, with the price setting statements, you have
25 pretty much got it covered about how costs of trucks are

1 recovered and how that feeds through into prices. If,
2 on review of all of that, Daimler say, on a targeted
3 approach, "No, there is something missing", no doubt the
4 Tribunal will entertain that application. But it seems
5 to me that that is a safe basis upon which the Tribunal
6 can proceed.

7 What I am concerned about is Mr. Rayment is still
8 pushing for other cost categories to be included in this
9 and saying, well, that will affect prices as well; but
10 we say that falls squarely in the mitigation bucket, and
11 ought to be dealt with in the light of the Tribunal's
12 ruling in due course.

13 THE PRESIDENT: Yes.

14 MR. RAYMENT: I have raised those matters, Sir, but you have
15 limited PO4(i)/1 in the way that you have suggested and
16 therefore, in my submission, that should be ordered, and
17 from what Mr. Palmer says that is not going to be
18 a problem for him to deal with.

19 THE PRESIDENT: Yes, we will just take another moment.

20 (Pause)

21 Mr. Palmer, we will order it. We think it may be
22 helpful. It may be duplicative, but I think to postpone
23 that and possibly order it later, and then have
24 a further application in the light of it for yet more
25 information, it is better to grapple with it now. We do

1 not think necessarily, in the light of the other
2 documents being provided, that it should be so onerous,
3 and we think it will be very useful to have a document
4 giving that, as it were, more general overview Claimant
5 by Claimant.

6 So it will read as I indicated, an explanation as to
7 how the Claimants considered -- I think it should be in
8 the past -- and recovered over the relevant period costs
9 at the Claimant's business segment contract or vehicle
10 level, limited to the cost categories in which trucks
11 forming part of the claim are included.

12 It may not need to say "the relevant period" because
13 it says "trucks forming part of the claim", and those
14 are trucks in the relevant period.

15 You are muted at the moment, Mr. Palmer.

16 MR. MALEK: He may not be talking to us.

17 THE PRESIDENT: I do not know if you are talking to us.

18 MR. PALMER: Sir, can I just advance one point about what
19 you have ordered, by way of clarity and to an extent
20 limitation. I have taken further instructions given
21 that is the Tribunal's decision. It is the words "at
22 the business segment contract or vehicle level". There
23 are hundreds of thousands of rentals and, of course, we
24 anticipate that the Tribunal do not expect us to produce
25 granular level vehicle-by-vehicle, contract-by-contract

1 or even vehicle type by vehicle type explanations, but
2 something at a higher level than that.

3 THE PRESIDENT: We certainly do not expect it at the
4 granular level of each vehicle, or necessarily indeed
5 each contract. We just do not know on what basis you do
6 consider it. If you consider it, surprisingly, at the
7 level of each vehicle, then you will explain how you do
8 it at the level of each vehicle. But if you do it on
9 a broader level, as most people would expect, then you
10 will explain the way that you do it.

11 I do not think we need to insert the words "in the
12 relevant period", because it is limited to trucks. No,
13 I think it should be -- I am sorry. It should be "the
14 cost categories in which trucks forming part of the
15 claim are included", and it will be as regards recovery
16 of the costs of those trucks. In other words, it is the
17 recovery; if you purchased a truck in 2011 and you
18 recovered the costs of that in 2012, that would be
19 included. But it is only with regards to purchases of
20 trucks made over the relevant period.

21 It is a little difficult to redraft it as it were on
22 the hoof, but do you understand the point that I am
23 making? It clearly has a time limitation, and the time
24 limitation is to cover the costs of purchasing the
25 trucks that form part of the claim.

1 MR. PALMER: Yes, that is understood and we will draft
2 something accordingly.

3 THE PRESIDENT: But it may be that, as I say, trucks
4 purchased towards the end of the period, the recovery
5 was planned for something to happen just after the end
6 of the period, inevitably. I am sure you can agree that
7 form of word.

8 Are there any other categories, Mr. Rayment?

9 MR. RAYMENT: There is one more priority category, Sir.

10 THE PRESIDENT: Yes.

11 MR. RAYMENT: That is PO4(c)1, and that is the issue about
12 the reconciliation of the management accounts to the
13 statutory accounts. That is quite helpfully addressed
14 in Mr. Grantham's second statement, if you still have
15 that to hand.

16 MR. MALEK: Mr. Rayment, we considered that amongst
17 ourselves, and if there was no actual reconciliation
18 exercise carried out at the time, we are not inclined to
19 require Mr. Palmer's clients to in effect do that now.
20 On the other hand, if there were reconciliation
21 exercises which were carried out at the time, then that
22 may be a different exercise, in which case you may be
23 entitled to at least seeking an order in respect of the
24 ones actually carried out. I think that is where we are
25 provisionally.

1 MR. RAYMENT: Our understanding is that there are
2 reconciliations available.

3 MR. MALEK: Shall we find out from Mr. Palmer?

4 Mr. Palmer, can you clarify on that? Are there
5 reconciliations which are available? Because you have
6 heard what I have said, that we are not inclined to
7 order you to carry out a reconciliation which has never
8 been done. But if there were reconciliations done, are
9 you saying they are not available or they were not done
10 or what?

11 MR. PALMER: There are some available.

12 MR. MALEK: Yes.

13 MR. PALMER: Resistance to this category is on the grounds
14 of its relevance.

15 MR. MALEK: Okay.

16 MR. PALMER: This is part of the Defendants' forensic
17 accountancy approach again. We do not accept the basis
18 upon which, therefore, this is being requested. We do
19 not accept that it is necessary to reconcile management
20 accounts with statutory accounts for the purpose of
21 pass-on analysis. So whether or not that exercise has
22 been done, it is not a necessary part of a pass-on
23 analysis.

24 The reason why reconciliations occur, of course,
25 affects the fact that documents are prepared for

1 different purposes and record information in a different
2 way. As Mr. Harvey has explained, there are many
3 reasons why a business' detailed financial records may
4 not reconcile precisely with its statutory accounts. So
5 where there are discrepancies of the kind alleged by the
6 Defendants that does not mean that Dawsongroup's
7 management accounts are unreliable in the absence of
8 reconciliation; our position, and Mr. Harvey's evidence
9 as well, is that they provide a sufficiently robust data
10 source to assess financial performance. So going beyond
11 those management accounts into reconciliation questions
12 seems to us to be in support of a proposed forensic
13 accounting analysis, which is going beyond simply the
14 identification of the costs and the extent to which
15 those costs were passed on.

16 So it is on the basis of necessity, rather than
17 proportionate, given that, you know, they are available
18 in principle, but not necessary, we say, that we resist
19 it. We certainly would resist an application to do any
20 exercise which has not been done, but the Tribunal has
21 that point.

22 If there are focused questions on the management
23 accounts, something is not understood, of course we
24 remain ready to respond to that and provide that
25 information. But reconciling accounts prepared for

1 different purposes takes this matter no further forward.
2 THE PRESIDENT: Is it not just about reliability,
3 Mr. Palmer, the way it is explained here, that the
4 statutory accounts of course are audited, management
5 accounts are not, and where there are differences they
6 just want to understand whether any adjustment should be
7 made to the management accounts for the purpose of
8 working off them or not. It may be the adjustment, as
9 you say, was because they were prepared for different
10 purposes, in which case it can be ignored. That is the
11 way it is put forward in the schedule. It is simply to
12 test the reliability, and sometimes on the auditing
13 process it is found that certain things should be done
14 slightly differently.

15 MR. MALEK: That is the explanation given by Mr. Grantham in
16 his second statement at paragraph 64. You see, he wants
17 to know to what extent he can rely on the management
18 accounts for his analysis, and that seems to me quite
19 reasonable.

20 THE PRESIDENT: This would be a standard process for any
21 larger company, and they will be readily available
22 because you will need to keep the supporting material
23 for your statutory accounts, and this is not an onerous
24 request.

25 MR. PALMER: If the use to which those reports is limited to

1 that purpose, that is one thing. What we do not want is
2 a re-analysis of the reconciliation, picking apart and
3 doing his own reconciliation. If that is what is
4 proposed, then we would certainly say that is
5 unnecessary and would resist it.

6 THE PRESIDENT: We are not controlling what Mr. Grantham
7 might decide he wants to do. Whether he can ever
8 recover the costs of doing that, even if the Defendants
9 should succeed at trial, is a quite different matter.
10 But at the moment the only issue is whether they are
11 relevant for any purpose so as to be disclosed. We
12 cannot limit the use that they are put to, but there is
13 a legitimate use, it seems to us, and that is sufficient
14 to justify disclosure.

15 MR. PALMER: Well, I note that, and I note that Mr. Rayment
16 is shaking his head at the idea that they will be used
17 for a further reconciliation, so on the basis of the
18 Tribunal's reasoning I will not --

19 MR. RAYMENT: Sorry, I do not think I was shaking my head
20 for any specific reason.

21 THE PRESIDENT: We will not read anything into Mr. Rayment's
22 head movements.

23 MR. RAYMENT: Thank you very much.

24 THE PRESIDENT: But we would be somewhat dismayed if any
25 Defendant starts putting in evidence seeking to perform

1 a new reconciliation of company accounts for the
2 purposes of this trial. There are quite enough other
3 difficult issues to deal with at the trial.

4 MR. RAYMENT: I think Mr. Grantham will be quite busy
5 enough, Sir, thank you.

6 THE PRESIDENT: Yes. I think that fear is somewhat
7 overplayed, so I think we will, Mr. Palmer, order that,
8 and that will be -- I mean, yes, it is 14 years, but
9 there is just 14 years' accounts, so there will be those
10 reconciliations.

11 Is that the last category, Mr. Rayment?

12 MR. RAYMENT: Yes, it is. Thank you very much, Sir, that is
13 the last priority category.

14 THE PRESIDENT: Do we need to set a time for any of this, or
15 has that been discussed between the parties?

16 MR. RAYMENT: I think that does need to be discussed. As
17 I mentioned at outset, I think the Ryder claimants are
18 going to be providing their statements by mid-July.

19 THE PRESIDENT: Yes.

20 Mid-July, that seems a reasonable time, Mr. Palmer.

21 MR. PALMER: The end of July, please, Sir. There is a lot,
22 not only what has been ordered but the disclosure which
23 has been agreed as well, to be provided, and my
24 instructions are the end of July, please.

25 THE PRESIDENT: If we say 23 July, that will be somewhere

1 between mid and end. 23 July.

2 Is there anything else?

3 MR. PALMER: Might we ask for just the end of July in
4 respect of the price setting statement? It is that
5 where it is going to take the time to do. Ryder, we
6 know, began their process much, much earlier. We have
7 some catching up to do, and my instructions are that
8 that is the time that we will need.

9 THE PRESIDENT: It is only 6 May. 23 July is quite far
10 away. I think that is --

11 MR. RAYMENT: Sir, I understand Mr. Palmer's admirable
12 attempt to get as much time as possible for his client,
13 but it is pushing up very close against August and one
14 thing and another, and it would be very helpful if we
15 could have the information by say 19 July. If there is
16 really some intractable problem that they encounter then
17 they would have liberty to apply in the normal way, but
18 it does not seem unreasonable, 19 July. Ryder is
19 providing an equivalent amount of information by, you
20 know, the same date.

21 THE PRESIDENT: We are talking about the difference between
22 Monday and Friday of the same week, Mr. Rayment. I
23 think if you are getting --

24 MR. RAYMENT: If it is coming that close that does make
25 a difference.

1 THE PRESIDENT: If you have the Ryder information on the
2 Monday, you will have enough to keep you busy on Tuesday
3 Wednesday and Thursday, and you can get the information
4 from Dawsongroup on the Friday. So it will be 23 July.

5 MR. RAYMENT: I hope Mr. Grantham does not have any team
6 members who are standing idle during that period.

7 THE PRESIDENT: Mr. Palmer, that is the end date. There are
8 a whole lot of different categories here. It is not
9 productive for the Tribunal, in a hearing like this, to
10 get down to the granular level of saying: you can
11 provide the analysis reports by 30 June, these documents
12 by 4 July, this category by 11 July and so on. But the
13 point in my making these observations is to say that
14 when you have got some of the material, some of which is
15 obviously much more accessible than the others, for
16 example the last matter we were dealing with, the
17 reconciliations of the management accounts and statutory
18 accounts, that is something that you could produce
19 within a few weeks, we would expect your clients, as we
20 would expect all parties in a litigation of this scale,
21 with very responsible and experienced legal advisers,
22 not to hold back in supplying the documentation which
23 they have got until the very end of an extended period
24 for disclosure, but to supply it in tranches.

25 So we have given you until 23 July because of some

1 of the aspects we understand will take significant time
2 to prepare, but others should be readily available and
3 we would expect Dawsongroup then to disclose them well
4 before 23 July. We will not put that in an order but we
5 hope that is not necessary.

6 MR. PALMER: It is certainly understood, but may I ask
7 permission that we produce, in respect of all this
8 disclosure, a single disclosure statement, an individual
9 disclosure statement?

10 THE PRESIDENT: Yes, we understand that.

11 MR. MALEK: I was about to say that.

12 MR. PALMER: Thank you.

13 THE PRESIDENT: Is there anything else, Mr. Rayment?

14 MR. RAYMENT: No thank you, Sir, very much.

15 THE PRESIDENT: Very well, I think that concludes this
16 hearing. Thank you both. We know that you are not
17 working alone; thanks also to the teams behind you and
18 assisting you.

19 The CMC is now concluded.

20 MR. PALMER: Thank you.

21 (4.11 pm)

22 (The hearing concluded)

23

24

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