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5 **IN THE COMPETITION**

Case No. : 1294/5/7/18(T)

6 **APPEAL TRIBUNAL**

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8
9 Salisbury Square House
10 8 Salisbury Square
11 London EC4Y 8AP
12 (Remote Hearing)

13 Friday 19 June 2020

14
15 Before:
16 Hodge Malek QC
17 (Sitting as a Tribunal in England and Wales)

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19
20 **BETWEEN:**

21
22 Wolseley UK Limited and Others

Applicant

23
24 v

25
26 Daimler AG

Respondent

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28
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30
31 **A P P E A R A N C E S**

32
33 Mr Tristan Jones (On behalf of Wolseley UK Limited and Others)
34 Mr Ben Rayment and Ms Alexandra Littlewood (On behalf of Daimler AG)

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Friday, 19 June 2020

(2.00 pm)

APPLICATION HEARING

(Hearing held via video/telephone link)

MR MALEK: This is Wolseley's application for an order that Daimler provide to the claimants explanatory guidance on Daimler's database disclosure, as required by paragraph 5(b) of the Daimler order, which is an order I made in November.

By letter dated 18 June of this year Daimler applied for this hearing to be held in camera, as before the tribunal there are documents that contain inner confidentiality ring information and reference to it will be made to it during the hearing.

In considering this application I take into account rule 99 of the CAT rules, which has a presumption that all hearings should be in public unless the tribunal is satisfied that it will be considering information which is in the opinion of the tribunal information of the kind referred to in paragraph 1/2 of schedule 4 of the 2002 Act.

Having seen the material already I do accept that there is some material which is inner confidentiality ring information, but I do not think it is necessary in order to preserve that confidentiality to make an absolute order that this whole hearing be held in camera. If there is any particular passage that anyone wants to refer me to which is sensitive, they can point that passage to me and I can read it for myself but if it is absolutely necessary to refer to something in open court and it is felt that that should not be in the public domain, tell me at the relevant time and if necessary I will decide to make that part of the hearing in camera, but let's try and keep examples of that to the absolute minimum.

I have read all the material put before me, I have read the two skeleton arguments, I have read the various witness statements and the applications, so you don't necessarily have to

1 take me through everything from the beginning to the end. But the end result of today
2 is I will expect to have a practical way forward whereby everyone knows what they
3 are expected to do going forward from today, because it is evident to me that the
4 parties have different views or expectations of what the previous order actually
5 requires Daimler to do.

6 So, Mr Jones.

7 MR JONES: Sir, I am grateful and I see Mr Rayment wishes to speak but if I could make a
8 comment on confidentiality it may set his mind at rest, because I think I can anticipate
9 what he might want to say. Which, sir, is this, the manner in which information
10 comes to be categorised as inner ring confidential is in the first instance the decision
11 of the disclosing party. The situation in this case, sir, as you have seen, is that
12 Daimler has said in correspondence that not only the data contained in its disclosure is
13 confidential but also that things like the existence of databases, the names of data
14 fields, the names of the tables and so on are confidential.

15 Sir, in light of that, in light of the undertaking which I have signed, as well as others to the
16 CAT, given that it is not in camera, we all have to proceed on the basis that those
17 things, sir, unless and until an order is made otherwise, are confidential and I have to
18 accept that because otherwise we will spend a big chunk of time at the start arguing
19 about whether things should be categorised as confidential or not. We don't for the
20 record accept that they should be confidential and that is an issue we will have to pick
21 up another time and separately.

22 MR MALEK: Yes.

23 MR JONES: I anticipate that may be the point Mr Rayment wanted to pick up on, because
24 there was some correspondence on that. I see he has dropped his hand, so perhaps I
25 should continue.

26 Sir, it does mean I am going to tread very carefully and it does mean there are going to be

1 more passages than there ordinarily would and I will do my best taking into account
2 what has been said in correspondence, of course I don't have any desire to breach the
3 undertaking and we entirely accept it is there for them in the first instance, so I will do
4 my best but it does mean there will be more occasions than there ordinarily would be
5 when I am asking you to read stuff.

6 MR MALEK: Bear in mind I have read everything and I have read the skeleton arguments
7 and by and large on a disclosure application, the approach I take is that a significant
8 part of it will be dealing with whatever queries I have so I can formulate the
9 appropriate way forward.

10 MR JONES: Yes.

11 MR MALEK: So you don't need to go through everything as if I haven't read it.

12 MR JONES: No.

13 MR RAYMENT: Sir, that is very helpful guidance but I hope you don't mind me just making
14 a couple of observations.

15 MR MALEK: Of course.

16 MR RAYMENT: Mr Jones very fairly has identified one of the issues, which is that the
17 databases, their names, their content, their structure, is all, as he says, confidential
18 within the inner confidentiality ring and is subject to those processes. Whilst I hear
19 you loud and clear in terms of trying to stay off confidential material, nevertheless,
20 rather as Mr Jones has foreshadowed, it is going to be practically quite difficult at
21 times because although I appreciate very much that the tribunal has done its
22 homework, nevertheless I think that there will be times when I do need to take you to
23 the contents of databases to make some of the points that we need to make. I can
24 certainly flag that at the relevant time.

25 MR MALEK: You can.

26 If, for example, Mr Jones wants to refer to the name of one of the databases, you are not

1 suggesting that merely referring to the name of a database is something that should be
2 heard in camera?

3 MR RAYMENT: My instructions are that that is confidential.

4 MR MALEK: It may be confidential, and I can understand one thing, you will say, "Look, I
5 don't want the contents and how this database operates to be in the public domain" but
6 if Mr Jones says, "I want to refer to my submissions on database X" I think he should
7 be allowed to do that.

8 MR RAYMENT: I see that but, first of all, it is in the ring and he should have activated the
9 relevant processes in order to allow him to do that rather than taking up our time this
10 afternoon.

11 The second point is that the name and the content of what is in the database can be quite
12 closely linked. What is in a particular database is quite important when you come to
13 issues like costs material and so on and how costs are organised and maintained
14 within the business and that is an issue of real sensitivity.

15 MR MALEK: Okay.

16 Mr Jones?

17 MR JONES: Sir, I will tread as carefully as I can.

18 MR MALEK: Of course, yes. Yes.

19

20 Submissions by MR JONES

21 MR JONES: I intend to start addressing you on the problem and I appreciate, sir, that you
22 have seen the skeletons, so I will take this as quickly as I can. There are a couple of
23 important examples that I would like to go through.

24 Then, in light of what Mr Rayment has focused on in his skeleton argument, the
25 correspondence, and it is going to be necessary to look at that in some detail, partly in
26 order to show that what we are asking for now is what we have been asking for since

1 January, but also partly because the correspondence actually demonstrates the
2 difficulties which we have been having. So I will spend a bit of time going through
3 that.

4 The nature of the problem, sir, you have seen, and of course you made the November order,
5 which ordered disclosure in two tranches.

6 The first tranche related to the United Kingdom.

7 The second to France and Germany.

8 There is no need I think to look back at the detail of it, but in broad terms we are talking
9 about data relating to the price of sales by Daimler and the cost of production. The
10 particular paragraph, paragraph 5, appears in the bundle at page 121, and 5(b) of
11 course said:

12 "If contained in the form of an electronic database or extract, it should be provided in the
13 native electronic format together with ...

14 "(ii) if appropriate guidance on how the data is to be examined or any other explanatory notes
15 or material which would assist the disclosing party's expert economist in analysing the
16 disclosed information ..."

17 MR MALEK: On that, what do you say about the point that the other side appear to be
18 making, is that the use of "or" means that they have a choice of providing one or the
19 other, because, if they are right, it does seem that it is not really what we want. What
20 we want at the end of the day is you to have sufficient information that you can
21 understand these databases and how they work and what things mean, so you can
22 carry out the exercise that your expert wants to carry out.

23 MR JONES: That is entirely right, and there is plainly more than one way to skin a cat, and
24 so there are different ways in which this guidance could be given, the assistance could
25 be given.

26 What is recognised in 5(b), and this is the essential starting point, is, firstly, help will be

1 needed to understand the data.

2 MR MALEK: Of course, yes.

3 MR JONES: Secondly, the person who knows what help should be given and what help will
4 be most useful is the person whose data it is, because we are all going through the
5 same process of trying to understand our own client's data and then other parties' data,
6 so that first step of working out what data you have and how it should best be
7 described is something which the disclosing party is best positioned to do. So it
8 leaves a degree of discretion, but the ultimate aim is clear, it is whatever is
9 appropriate for us to understand it.

10 Sir, there is plenty of spectrum here, and one of the points I have made in my skeleton
11 argument is even the other defendants, which we say complied with this, didn't
12 provide every piece of information which we will need. We have entered into
13 correspondence with others as well. But what they did provide was enough for us to
14 understand at least the starting point.

15 One of the reasons I need to go through the correspondence is to show just how little has been
16 provided by Daimler and why it is we have simply not been able to make any progress
17 without more details at this stage.

18 That was the starting point. Of course the disclosure was then given in these two tranches.

19 The first tranche was the UK tranche and the explanations of the databases that were given
20 can be seen in the bundle. If one turns, sir, to page 89, this is the first document
21 which Daimler refers to as having been its guidance and its help in understanding
22 what was provided.

23 This is tranche 1, I am going to focus on tranche 1 and it is essentially the same when one
24 gets to tranche 2, that's in the bundle as well, it is same or similar but for other
25 countries.

26 These first few pages are describing in broad terms what they have done to find the data and

1 actually where the descriptions really start is on page 93.

2 They have disclosed several databases. The one which I have focused on, partly because it is

3 the one with most fields in it, it is also the first, is the one that starts from page 93, and

4 the system which is there described from paragraph 20.1.

5 Sir, can could I just pause for a moment, I don't know whether you

6 MR RAYMENT: Call that the UK sales support database, if that would be helpful.

7 MR MALEK: Instead of the description there?

8 MR RAYMENT: Yes.

9 MR MALEK: Instead of that name?

10 MR RAYMENT: UK sales support database.

11 MR MALEK: Yes.

12 MR JONES: Sir, can I invite to you read that paragraph, sir, so that you have an overview of

13 what their description actually was.

14 Sir, whilst you are reading it, could I make this particular point, which is that in my

15 submission it gives the impression, the strong impression, this paragraph, that what

16 that database contains is sufficient details of discounts which have been given for the

17 user of the database to work out, after discounts, the way in which the discounts feed

18 through into the actual price paid by the dealer.

19 Among other things that appears to be what is in the database. If I can invite you to read that,

20 and I will come back to that point. (Pause)

21 MR MALEK: I have read that, yes.

22 MR JONES: That is the description of the database.

23 The database itself has several hundred data fields in it. Of course we don't have the database

24 in the bundle, but we then have the description of the data fields. That starts from

25 page 96.

26 If you look at page 96 you will see firstly at the top of that page there is a light blue row

1 which says "Table" on it.

2 MR MALEK: Yes.

3 MR JONES: The different data fields which appear under that particular row all appear in
4 one table in the database.

5 MR MALEK: Yes.

6 MR JONES: If you look through the next few pages, sir, you will see that there are a number
7 of tables which make up this particular database, and the information that they have
8 given to make sense of these tables and the data is as follows, on the left hand side,
9 under the heading "Table" you will see "code", these are codes which are actually
10 used in the database for each of the data fields.

11 The next column along tells you the nature of the information which appears under that code,
12 so it may be an integer value, it may be a number, it may be a date, it may be text.

13 The next column gives an example.

14 The next column gives a description of this particular data field.

15 Pausing there, that is pretty much all that has been given to assist in understanding the data
16 that has then been disclosed, so whilst the witness statements in the skeleton
17 arguments make various points about whether enough has been given, the essential
18 question for you, sir, is whether or not this is sufficient. Of course the people trying
19 to make sense of this are lawyers, as well as economists, and one can simply look at
20 this and ask: is this enough to understand what has been given?

21 We keep giving examples but one could go anywhere in this table. If one takes the very first
22 row, and you will see the description of it, suggests it is something to do with
23 identification, if I can put it that way, but of what? Of a particular order? Of the
24 dealer perhaps? Of a particular truck? One just doesn't know.

25 Then the next row down gives a sort of a similar description, and that is one which I have
26 actually picked up on in my skeleton argument. One could say, again what is that?

1 Does that relate to the first row or is that relating to an order? Is it relating to one
2 truck or several trucks which might be in one order?

3 The next row down seems to be self explanatory, because it seems to be recording a
4 particular type of option, which has been sold with this truck. But then if one comes
5 to the next one, there are two words which, again, are ambiguous. Is this recording
6 the price which has been paid by the dealer or is it recording the price which has been
7 paid by the end customer? Or is it recording the cost which has been incurred by the
8 dealer or perhaps it is the cost incurred by Daimler? It probably is not the cost
9 incurred by Daimler, because it looks as if the option was not added by Daimler but
10 one simply doesn't know and when we say we don't have guidance, into this level one
11 can go through each of these rows and ask similar questions.

12 Sir, I have started on the first four. I can't go through all of them but I have started there
13 partly because we have been accused of cherry picking, but we are really not ...

14 MR MALEK: The issue for today is really whether what we have is so inadequate that you
15 cannot really work with it at all and they need to do it again

16 MR JONES: Yes.

17 MR MALEK: or as they say there may be gaps here and there, but you give us precise
18 questions and we will deal with it as and when it comes.

19 MR JONES: Yes.

20 MR MALEK: The way I look at it, at the moment, there is another option, which is I may
21 require at the end of this a schedule to be prepared in the way that you know I
22 normally like, which is that you will have one column whereby you put your question
23 or what your query is, the next column is what their response is, either providing the
24 information, or if they are not, explaining why not and on what basis they are not
25 providing it. You then fill out the third column if you contest what they have
26 provided and we will need further clarification, then we will have a fourth column.

1 That is one way of getting past where we are at the moment, but I have to have a feeling as to
2 this is why we have the hearing whether or not that is even workable, because your
3 case is ... what I am coming up with as a possibility is not what you are asking for and
4 not really what they are offering but somewhere in between, that I know I can work
5 with, because I know if there is a problem further down the line we can have a hearing
6 and go through the schedule and I can give you a quick ruling on every item in the
7 schedule that you say has not been answered properly. That is one way of doing it but
8 I have to get a feel from today as to how bad things really are.

9 I do accept, from what I have seen, there are gaps and ambiguities and to a large extent gaps
10 and ambiguities are inevitable when you are dealing with so many different entries,
11 different systems, things that operated years and years ago. So we are bound to have
12 that, but let's see how bad this case is in the spectrum of cases.

13 But I will want at the end of today to make an order wait a second ... I will make an order
14 which has something which is practical and has a way forward for all of us.

15 Yes, Mr Rayment?

16 MR RAYMENT: I am grateful, sir, and if it assists the tribunal, and indeed my learned
17 friend, we think that the tribunal's approach of a schedule is a sensible idea, with
18 respect.

19 MR MALEK: Yes, carry on.

20 MR RAYMENT: We do hear what you say. On the other hand, you know, if I have to
21 develop my submissions, I will be showing you that there is an awful lot of work that
22 we have done on this case, and that we have taken a lot of time and expense over it
23 and therefore simply to say go away and try and redo it all is not the best way forward
24 in our submission, not the most efficient. That a schedule would be like a middle
25 ground that would be quite sensible.

26 MR MALEK: I have read the evidence and it is quite clear that Daimler put in a lot of

1 resources into this exercise, I have no doubt about that, and that that is appreciated. If
2 I thought you were playing games, obviously, I would take a completely different
3 approach but at the moment I don't take that view. I think Daimler's doing its best in
4 very difficult circumstances, but I do want to make sure that Wolseley's expert at the
5 end of the day has all the information it actually needs to carry out the expert analysis
6 that it wants to carry out.

7 That is the end game for me, I just want to make sure at the end of this process, however we
8 slice this process up, that there is something that is workable.

9 MR RAYMENT: That is clearly what we want as well because we want our expert to be in
10 the same position the other way round.

11 MR MALEK: Of course, of course. Yes.

12 MR JONES: Sir I am very grateful for that.

13 Where I was hoping to go was to try and persuade you, sir, that what has been done, what has
14 been given, on a scale of how bad it is, is very bad. That is why I am going to give
15 some examples.

16 MR MALEK: Yes.

17 MR JONES: Also, sir, we would want to make this point, which is in terms of the table, of
18 course in relation to these particular rows, what the claimants are asking for is: what
19 does this mean? If we were to produce a table, we would essentially produce a table
20 which would say what does that first entry actually mean, what does the second mean,
21 and so forth. That is what we have been asking and that is what they have refused to
22 answer.

23 MR MALEK: When I look at this table and the other tables that have been produced by both
24 sides, there is a lot on it which I find comprehensible and I would have thought an
25 expert would find comprehensible as well. There are things when I look at it and I
26 say I am not sure what that means, I accept there are examples of that but you can

1 pick those out, you can highlight those and say to Daimler:

2 "As regards the following entries highlighted on the table, we require X, Y and Z."

3 You will get what you need at the end of the day, it is a question of how we do it.

4 MR JONES: Sir, can I again pick up where we were in the correspondence because I want to

5 show you that we have been asking questions like that, so before I go on to that, can I

6 make this point

7 MR MALEK: Sure.

8 MR JONES: which is the obvious entry problem because of course one of the points, sir,

9 that you have just made, and which has been made in correspondence, is that some of

10 the entries are obvious.

11 MR MALEK: Yes.

12 MR JONES: It is true that some of them appear completely obvious, customer address, for

13 example, one can see there are entries which one does not need a clarification of. Sir,

14 can I just explain very briefly why we have not carved those out, it is because some of

15 them which appear obvious, and I will have to show you this in the correspondence,

16 when we have asked about them, maybe not as obvious as the example I have just

17 given, but some of the ones we thought we understood when we asked about them it

18 turns out we didn't understand.

19 Thinking through the process which is envisaged, if Daimler is required to explain each of

20 those, then those which are "obvious" will take a minute to explain. It will really not

21 take any time to simply repeat what is on you obvious.

22 The exercise we are more interested in is making sure that we have understood all of them

23 and not miscategorising things as obvious. This will make more sense when I show

24 you what happened in the correspondence.

25 It is, with respect, a bit of a red herring to focus on the obvious ones because if they really are

26 obvious they will not take any of Daimler's time and what we are concerned to ensure

1 is that we do understand what they all are, and okay if Daimler spends an hour or two
2 explaining obvious things to us then there it is, but we would rather that happened
3 than that we missed things on the assumption that they are obvious when they turn out
4 not to be so.

5 Sir, can I go to two examples to just demonstrate how bad we say the position is.

6 MR MALEK: Could I ask Mr Rayment a question.

7 Do you have a database guru, who is someone who knows all these tables backwards, who
8 can just sit down in a room and say what the answer is to any queries or you don't
9 have someone like that because it is so many different sources and different people
10 coming together?

11 MR RAYMENT: That is the problem. That is the very particular problem that Daimler has.

12 You will have noted that obviously the database disclosure that has been given to these
13 claimants is actually dwarfed by the database disclosure that has been given to the
14 other claimants, in which the disclosure is much broader. Even with this sample of
15 databases, it is a pretty big undertaking and I think that is reflected in our disclosure
16 statement and also in Mr Bronfentrinker's witness statement, which is that it did take
17 a lot of different parties liaising in order to provide this information.

18 MR MALEK: Yes, okay. I understand, thank you.

19 Yes, Mr Jones.

20 MR JONES: Sir, the particular example is one which was canvassed in correspondence and I
21 showed you when we went to page 93 the description which had been given of this,
22 and I emphasised that it gives the impression that one can use this particular database
23 to look at various discounts which have been given and work out how they flow
24 through into the price which has been paid.

25 Clearly that gives rise to the question how does one do that, and where on this there are
26 various discounts and where does one look to see what the end price is paid by the

1 dealer. That appears at least to be on page 99, but I can't read this out but it is the
2 seventh row down.

3 What happened in correspondence was my solicitors wrote saying:

4 "We have looked at the discounts and we have looked at what is called the gross price and we
5 have tried to take the discounts off the gross price to come up with net price [when we
6 talk about net price here we are talking about the price paid by the dealer] but we
7 cannot do it, because they don't add up and we had got the impression from your
8 description that they should add up."

9 The response that came back is in page 60 of the bundle. Sir, if I could just ask you to read
10 where it says, "At paragraph 7 of your letter ..." That particular paragraph on page 60.

11 MR MALEK: Yes.

12 MR JONES: In my submission, contrary to what is very clearly indicated in the description
13 of this table, one cannot actually use the table in the way that it appears that one can,
14 and this is the sort of example of something which any sensible description of the data
15 which has been disclosed would explain.

16 MR MALEK: I am not sure whether it would explain it in that detail, but yes, I can see what
17 you mean.

18 But I don't want to go into what the information says, but it is opening up to the possibility of
19 further invoices or credit notes, so this may not be the final thing.

20 MR JONES: Yes, that is right but they have described the table, and one saw the description
21 of the table

22 MR MALEK: I have, yes. Yes.

23 MR JONES: And one can imagine the exercise which we have gone down, which is that you
24 sit down with that brief, a single paragraph description, one looks at the database, you
25 spend an awfully long time trying to marry these up and think, well, how is this
26 actually done, how do these different fields relate to each other, you write a letter, and

1 when I come to go through the correspondence, this is actually not the first time we
2 wrote this letter, we had to ask a couple of times before we obtained an answer, so I
3 will go through the correspondence.

4 When we eventually get an answer it tells us actually, no you cannot do that with the table
5 and it is not simply that this is a clarification, this is actually very difficult to reconcile
6 with the description which they themselves gave of the table.

7 MR MALEK: Let's say a truck has been sold, do you have the amount actually invoiced to
8 the dealer? Maybe not on this system but somewhere? Have you been given that?
9 So for every truck, will you know the amount that has been actually invoiced to the
10 dealer?

11 MR JONES: Sir, I am not sure I can answer that without breaching confidentiality. I
12 certainly know the answer. I am looking to Mr Rayment to see whether I can explain
13 the answer to that.

14 MR MALEK: Yes or no could be the answer.

15 MR RAYMENT: Mr Rayment is nodding.

16 MR JONES: Sir, we do have that, yes.

17 MR MALEK: I would have thought you did. Yes.

18 MR JONES: Sir, can I put it this way, my attempt to skirt around the confidentiality issues
19 may be backfiring here. That is the information in the table. The point is that the
20 other information in the table doesn't enable you to get to it, that is the point. When
21 you try to put together the information in the table to see how it fits together, you
22 cannot. That is the point.

23 That is what is being said in this letter, is that there is other information that you would need
24 to add into the picture to be able to marry all of this up. That is the point which is
25 being made.

26 The information in the table that one would have thought, given the description that they have

1 provided of the table, would marry up, doesn't marry up, you cannot make it on its
2 own arrive at the net price.

3 MR MALEK: But there may be inherent limitations in the database, but you know the
4 databases go back a long time ago, they were for a different purpose. It may be these
5 databases are not perfect, so you cannot criticise someone now for having a database
6 that is not perfect and may have errors or may be incomplete. Because they can give
7 you what they have

8 MR JONES: Yes.

9 MR MALEK: and I expect them to give you what they have.

10 MR JONES: Sir, I am not complaining about what they have given us, I am complaining
11 about the explanation they have provided. Of course they can only give us what they
12 have. The point is they then need to explain what they have given us and the
13 explanation which they have given us not only didn't cover this but actually was
14 misleading because it gave the impression that you could fit these pieces of
15 information together and it is only when one asks a few times, and I will have to go
16 back to show you how many times we had to ask this point but they then said to us,
17 "Ah, you actually cannot do that, the information doesn't come together in that way".

18 That is why we say, if they had provided a clear description of every entry, and, as others
19 have done, explained how they relate to each other, how the data in the database
20 relating to others in the database, we wouldn't have got into this situation because they
21 would have been telling us how it fits together.

22 Can I give the second example which I was going to give?

23 MR MALEK: Sure.

24 MR JONES: And maybe bring the (Inaudible) a bit more, because here we can see by
25 comparison what MAN has done. This is the one which was in my skeleton
26 argument, so it relates to the information which appears in the bundle at page 97.

1 MR RAYMENT: Can I ask what the confidential status of this document is?

2 MR JONES: Mr Rayment, this is your document.

3 MR RAYMENT: A MAN document?

4 MR JONES: No, page 97 is your document and then afterwards we will go to the MAN
5 document.

6 MR RAYMENT: I thought you were about to refer to the MAN document.

7 MR JONES: Sir, this is the one which one sees there, on page 97, there a table which starts
8 just over halfway down that page.

9 MR MALEK: Yes.

10 MR JONES: Sir, again I need to slightly skirt around this, so you have seen my skeleton
11 argument, so you have seen how we have understood this.

12 MR MALEK: I have.

13 MR JONES: And the uncertainties which we have raised about it.
14 For example, that first row, we have said, "Does that relate to one truck? Does it relate to one
15 order with several trucks? If so are they trucks with the same options on them ..."
16 The bottom row in that table, there are type codes which are incomprehensible ...

17 MR MALEK: Yes.

18 MR JONES: There are various other criticisms.
19 The contrast that I want to draw with what MAN has provided can be seen from page 143 of
20 the bundle. So this is describing data covering the same territory, but in the MAN
21 disclosure.

22 Keep in mind that Daimler has provided simply that little snapshot that we have seen MAN
23 does this sir, can I ask you to read 2.2 to 2.4 firstly. (Pause)

24 Then over the page, 2.10 and 2.11 explains what to do when there are multiple entries.
25 (Pause)

26 MR MALEK: All I got from here is, when you read that, you can feel that you can work

1 your way through the particular example.

2 MR JONES: Absolutely.

3 MR MALEK: That one of the things I have been thinking about to ask Daimler to do is to
4 actually work through with their witness when he provides a further disclosure
5 statement, which I may or may not order at the end of today, work through a number
6 of examples. We may have to discuss how many examples he does, so at least
7 everyone knows what we are working through and you just work through it and then
8 everyone knows we are working on the same level playing field. I do sympathise
9 with your view, which is that people can make mistakes and that, for me, and I look at
10 things very simply, you know, if someone can just take me through a worked
11 example, that would be ideal.

12 That is why I asked is there a database guru that can do that for us, but it may be that you can
13 get a team effort whereby the team puts together a few worked examples of how you
14 see the process from beginning to end in respect of the sale of an individual truck.
15 We will all get a much better feel for how things are.

16 MR JONES: Sir, that sounds very sensible. Worked examples is one of the things we have
17 promoted to Daimler in correspondence.

18 MR MALEK: Yes.

19 MR JONES: We have pointed them to what the other defendants have done and we have
20 tried to explain how they can make things clearer for us and worked examples of an
21 important part of that.

22 Sir, before I leave MAN, could I just show you how much further they have gone.

23 2.10 to 2.11 on 146, they explain why it is that you might have multiple entries and what to
24 do. Then

25 MR MALEK: The impression I obtained from MAN is that they have been trying to work
26 their own data out themselves, not sure what it means, and they are sharing the

1 product of their own working out what a lot of this historic information is and how
2 you do it. It is not easy. I am sure MAN took a long time to even get these examples
3 down, just as I believe that Daimler spent a lot of time in preparing those two
4 disclosure statements that I have read. Particularly going through those annexes,
5 these are the things that don't take five minutes.

6 MR JONES: Sir, I am not suggesting this would take five minutes.

7 MR MALEK: I am saying these are not simple things to do.

8 MR JONES: No, I fully accept that.

9 MR MALEK: Yes.

10 MR JONES: Sir, the important point there is all parties have been doing this and of course
11 that is why it is sensible for them to share the product of their work, because, of
12 course, Daimler's experts have access to Daimler, MAN's experts have access to
13 MAN and really if they are able to pull together guides like MAN has done, it is
14 extremely helpful and cuts down the work that the other parties need to do.

15 The other thing that MAN has done, this goes back to the example I gave a moment ago,
16 where Daimler didn't do this, is at 3.4 to 3.6, they have explained how the data in this
17 particular file relates to other data that they have disclosed in other files.

18 MR MALEK: Yes.

19 MR JONES: They have thought about, "We have gone through this process to understand
20 the data, other people are going to have to do the same, they are going to have to work
21 the data out the same way that we have. What could we do ..."

22 MR MALEK: But they will be calling experts as well. Everyone's experts needs to be
23 working with the same degree of knowledge as is how these systems work.

24 MR JONES: Absolutely.

25 MR MALEK: I am keen that, you know, at the end of this whole process, that when we do
26 get a further disclosure statement, all the threads are put together in a further

1 disclosure statement. We have the two disclosure statements already, but what I
2 expect at the end of this process is going to be a further disclosure statement which
3 basically verifies all the additional information we have, the stuff that I have read in
4 the very helpful letter of 15 May.

5 I want that all incorporated into a further disclosure statement together with everything else.

6 Because when this gets to trial, it is a recipe for confusion if the explanations are in
7 buried away in correspondence, not verified. I would want it all in one place so, when
8 we go to have the hearing and the experts are in the box, they are all working from the
9 same material and data and assumptions.

10 I am trying to look forward to trial. I know at the moment you are just trying to get very
11 basics, which is to understand what you have, but at the end of the day it is going to
12 be my job and other people's job to try these cases and I am thinking, I want stuff in a
13 form that is convenient to me to understand everything. It is not really convenient to
14 me to have answers, as important as the answers have been in the letter of 15 May,
15 hidden away in a letter. I would want it annexed to or part of a disclosure statement.

16 MR JONES: We entirely agree with that, sir.

17 MR MALEK: I am also conscious that Daimler had been giving explanations to
18 Dawsongroup and to Ryder in respect of common disclosure. Unless there is any
19 objection to that, I think that information should be incorporated, should be supplied
20 to you, they don't need to give you the actual letters but the answers, the information
21 contained in those I think 12 in one case and 13 requests in others, I think that should
22 be made available to you. I don't want to have a situation where one expert for one
23 party has one piece of information or one understanding, and others don't have the
24 same understanding.

25 MR JONES: Yes.

26 Sir, we respectfully agree with that entirely and it feeds also into this point which is back to

1 the "isn't some of this obvious" question. If all that happens is that my instructing
2 solicitors carve out however many they think appear to be obvious, one then doesn't
3 end up with a comprehensive description such as, sir, you have just described, in the
4 event that others come along and don't find them to be quite so obvious and find other
5 problems with the data and wish that other variables had been described.

6 That, I think we said in the skeleton argument, is one of reasons why we think doing this in a
7 comprehensive way now makes sense, because what Daimler provides now can then
8 be provided to other claimants, and used these cases are being case managed together,
9 they might be tried together, that is for consideration at the next CMC.

10 We entirely agree that having this done in a sensible and comprehensive way is the right way
11 to go about it.

12 Sir, could I turn to the correspondence.

13 MR MALEK: Sure, yes.

14 MR JONES: I am afraid one does need to go through it slightly carefully. Partly because it
15 is said this application is premature and maybe more importantly, partly because I do
16 want to show that our attempts to ask targeted questions and extract information have
17 not been dealt with appropriately in my submission. I will show you that, sir, one
18 needs to look at the correspondence.

19 If we start at page 14, please, sir, you will see on page 14 a letter dated 27 January 2020,
20 paragraph 3, from my solicitors:

21 "We note the Daimler defendants failed to provide meaningful explanatory notes to
22 accompany the information. The relevant variables cannot be easily identified."

23 Then they say:

24 "... by way of example ..."

25 There are four examples and I am going to come back to those four examples in a moment to
26 trace through how they have been answered.

1 Before I go through those, sir, could I ask to look at paragraph 4 on page 15, which is where
2 after setting out the examples, we say what we want Daimler to provide.

3 MR MALEK: I have read that, yes.

4 MR JONES: It is exactly what we are asking for now. You may disagree with the
5 suggestion that we should be given that, but the argument that we have somehow
6 changed position just doesn't stack up. That is what we were asking for back in
7 January.

8 On the four examples, if one picks up the first one, you will see 3(a):

9 "Often there is more than one variable named in a similar way or with a limited description
10 provided suggests a similar content of the variables, which makes it impossible to
11 understand which variable is responding to a certain category of disclosure ..."

12 MR MALEK: I have read these letters.

13 MR JONES: Sir, I wanted to trace it through.

14 MR MALEK: Sure.

15 MR JONES: The basic point being made in (a), there are a few points, but the basic point is
16 that some of your variables have similar names and we basically don't know the
17 difference between them.

18 MR MALEK: You say it is a recipe for confusion, I understand that.

19 MR JONES: Go forwards, if I can ask you to turn forwards, to page 17 to look at the answer
20 to this. This is how Daimler deals with this, at (i) they are quoting our question, but
21 they are not entirely quoting it because there are a few dots in the middle. What is
22 actually left out is the bit where we said it is impossible to understand what the
23 difference between similar variables is.

24 They have missed out that bit and they have addressed instead the sort of padding around it,
25 which on any view is less important. Then the way they respond to it is instead of
26 saying we can see this might cause problems, they attack the surrounding comments,

1 we weren't asked to provide this, we don't need to link it to the order and so on and so
2 forth, but the essential point which we are making is just not addressed.

3 Flicking back, and sir I appreciate you have read it but I do want to just show how Daimler
4 has actually engaged with this. (b), in our letter on page 15, is saying:

5 "The lack of description prevents the economists from basing their calculation analysis on the
6 database."

7 Then the example is set out and it is actually, this is in fact the example which we have
8 discussed, which I have shown you already, sir, and which is eventually addressed by
9 Daimler but here it is raised for the first time.

10 In their first response to it, back on page 18, they dodge it, and the way they dodge it is they
11 say, "We don't understand what you mean in your (b)", and then they just ignore the
12 example. So they purport not to understand and they say nothing about the example
13 which we have given.

14 MR MALEK: Yes.

15 MR JONES: (c) is a point about decoding variables and in all fairness they did answer that.
16 They answered that in the letter on page 18.

17 Then (d) is where, again, my solicitors say, "You have disclosed more than one data source,
18 but you haven't explained how they relate to each other".

19 The answer to that is, "We were not obliged to" and they also pick up on my solicitor's use of
20 the word hierarchy, and they say there is not a strict hierarchy as such, but we were
21 not obliged to tell you how these things relate to each other.

22 MR MALEK: It may be either they don't know, because of the passage of time, or it may be
23 that the answer is different depending on each individual case, in which case it is
24 extremely difficult to come back.

25 There are a number of possibilities as to why they may or may not have given a clear answer
26 to that question.

1 MR JONES: Sir, different possibilities, but we want to know how the data relates.

2 MR MALEK: Yes.

3 MR JONES: We don't want partial, if we were required to set out a full list of questions, it
4 would simply ask repeatedly: how does this relate to the other data? If there are
5 relationships, because sir, one way of answering it is, sir, your suggestion of earlier,
6 give some worked examples.

7 MR MALEK: I will, subject to what Mr Rayment says, I will make an order that they have
8 to give us some worked examples. Things become a lot clearer when we have a few
9 worked examples.

10 MR JONES: Sir, one then turns to the letter of 17 March, this is page 19.

11 MR MALEK: Yes.

12 MR JONES: Paragraph 3 is, again, saying, "What you have given is insufficient and we have
13 a right to make an application".

14 MR MALEK: Yes.

15 MR JONES: They then go on, my solicitors, to give more information on this particular
16 example. It is framed very much as an example and it is one that was already
17 mentioned but which had been ignored. They give a lot of information about the
18 example. They make clear it is an example, because paragraph 9 makes clear that we
19 want appropriate additional information but what has been set out here is an example.
20 But it is that letter with that example and detail in it which then flushes out an answer from
21 Daimler's solicitors.

22 Firstly, on 4 May, on page 24, essentially saying we disagree with your general criticism.

23 MR MALEK: I have read that.

24 MR JONES: Then on 15 May, this is the letter we have already looked at.

25 MR MALEK: 15 May is quite clear, isn't it, it is quite helpful?

26 MR JONES: It is helpful, it is helpful.

1 MR MALEK: It does show you that they have the ability, if need be, to give you answers to
2 questions as and when you raise them. That is one of the points Mr Rayment is
3 making, which is that we are not saying we are not going to give you answers, we will
4 give you answers where the requests are reasonable and justified and the specific ones
5 you have asked are justified and they have come back with answers.

6 What I don't want to happen is that it is going to be as long as a piece of string. I really do
7 want a situation whereby we have all the questions in one place and we have the
8 answers, ultimately, in one place in the form of a further disclosure statement. It is all
9 a question of how you skin a cat.

10 MR JONES: I appreciate this, but what I am trying to demonstrate is the process of pulling
11 teeth that has been gone through to get this answer. Because, sir, we are talking here
12 about a smaller number of variables which we have been asking about. We actually
13 gave this example in the very first letter and it was only ever an example and they
14 dodged it. We then had to write a very lengthy letter, explaining in minute detail the
15 difficulties which had been encountered in these particular variables. If that is as
16 appeared to be being suggested by Daimler, that is the level of detail and then we
17 Daimler will decide whether it is reasonable, it simply is not a practical process
18 because all of this would be short circuited if they were able to do what the other
19 defendants have done and themselves just provide a sensible explanation of each
20 variable and the databases.

21 That is the point, because if we have to do this for all of them, it is a far far more involved
22 and more time consuming process, because we are then engaged in speculating what
23 all of these variables mean, in explaining to them what we understand them to mean
24 and then waiting for them if they think it is reasonable and only perhaps after a couple
25 of requests to come back and tell us, "Actually you have misunderstood that particular
26 variable and now that we can see that you are confused we will explain what these

1 other variables mean". That, in my submission, is simply not an efficient process.

2 We then, if I can pick up the correspondence, I just need, I see the time but I will go through
3 the rest of the correspondence as quickly as I can to address the criticisms that Mr
4 Rayment's skeleton argument starts with.

5 That was the 15 May letter. There is then on page 30 a further letter from Hausfeld again
6 saying, this is the start of June, we don't think what was done is adequate and we will
7 make an application.

8 The 5 June is Quinn Emanuel over the page saying this is premature and that haven't engaged
9 enough in correspondence. If one goes forwards to page 112.

10 MR MALEK: Yes.

11 MR JONES: It is another letter, essentially making the same points from Hausfeld, we are
12 making the application.

13 MR MALEK: I have read that, yes.

14 MR JONES: Quinn Emanuel come back on 11 June, again, essentially making their same
15 point. One sees at 115, they say at the bottom of 115:

16 "We repeat our invitation that you set out precisely the information that you are seeking."

17 It was that which led then to the letter on page 159 of 12 June. This I think is where Mr
18 Rayment's skeleton argument makes some points at the start, and paragraph 5, over
19 the page, 160, what it says is:

20 "Our plan is to set out what guidance has been sought."

21 They have given examples, they have pointed to MAN's disclosure, they have said what the
22 problems are:

23 "In the hope of dispensing with the hearing [that's important] our clients have sought to
24 explain in the clearest possible terms what they require."

25 In other words to dispense with the hearing.

26 Sir, you will see at (i), they are talking about paragraph 1 of the draft order and they simply

1 say we just need a sentence or two, sometimes maybe three, explaining the variables.
2 (ii), in relation to paragraph 1(b), they ask for information relating to each of the tables and so
3 it may be, picking up on your suggestion from earlier, sir, if you were looking for a
4 more targeted list for 1(b), this would be the list for 1(b).

5 Then it makes a series of comments which will be familiar from what we have looked at
6 already.

7 Clearly had the response to that been, "We are happy with those, we will give you what you
8 have asked for", then that would have obviated the need for today's hearing, but that
9 was not the response. The response at page 167 was to say that because Hausfeld has
10 given that detail, they have changed their position and Daimler now, since about a
11 week ago, needs more time to think about things.

12 To which Hausfeld respond on 169:

13 "We have not changed our position. We want the guidance that we have always said that we
14 wanted and we gave you further examples of what guidance would look like."

15 There is no inconsistency there, 12 June, they were explaining in an attempt to avoid this
16 hearing, "This is what we would require". But the order has always been and still is
17 and has been since January, a request generally for guidance. We have explained in
18 various different ways what others have done to provide helpful guidance and what
19 we consider would be adequate.

20 MR MALEK: Could we just look at the draft order?

21 MR JONES: Yes, it is on page 3.

22 MR MALEK: As I understand it, the examples we gave should show the invoice price to the
23 dealer. Yes?

24 MR JONES: Sorry to interject, yes and no, it depends on the country and the table. Some of
25 them have that and some of them have "end customer".

26 MR MALEK: Okay.

1 On your (b) how the different discounts apply and how you arrive at the net price paid by the
2 end customers, has that been at least partly covered by the pricing statement process
3 or not? Because I have not read the pricing statement recently. I know I read it at the
4 time when it was given to me but ...

5 MR JONES: Not really. There is information undoubtedly in the pricing statement which
6 would be relevant to this, but does it help them to actually work out the answer to
7 this? I think the answer to that, sir, is not much.

8 The worked examples we have been asking for would be the way to do that.

9 MR MALEK: All right.

10 Anything else you want to say?

11 MR JONES: Sir, could I just see whether I am being sent any instructions, because I do not
12 have anyone to advise me as my computer is shut off.

13 MR MALEK: Yes. (Pause)

14 MR JONES: Sir, I apologise, if I could just have one minute. I see that someone is typing to
15 me, it may be that there is nothing else to say.

16 If I could just have a moment to take instructions.

17 MR MALEK: Yes.

18 MR JONES: No, sir, I am grateful, that is everything.

19 MR MALEK: Mr Rayment, I am not going to require you to do the whole exercise again, as
20 you can imagine.

21 What I am inclined to do is to order the schedule process that I have indicated, worked
22 examples, that you are to provide the answers on the common issues that you have
23 given to the other two parties to Wolseley.

24 You can try and persuade me not to do that, but that is what I am inclined to do. I don't
25 regard what you have done as wholly inadequate or shambolic or anything like that,
26 you have done your best in the circumstances but what the result has been, is clearly

1 there are gaps, there are ambiguities that need to be filled in. Your approach is to say
2 just tell us what your concerns are and we will review it, is one approach but I would
3 much rather have it all in a schedule so it is all properly audited and we all can see a
4 process and we can see an end point.

5 If you want to persuade me against that route then tell me, but otherwise I don't need to hear
6 from you.

7 MR RAYMENT: Sir, I am very grateful for that indication. I wonder if I might just take five
8 minutes.

9 MR MALEK: We will take a break now so I will be back in about five minutes. Thank you
10 very much.

11 MR RAYMENT: Thank you.

12 MR JONES: Thank you.

13 (3.04 pm)

14 (A short adjournment)

15 (3.13 pm)

16

17 Submissions by MR RAYMENT

18 MR RAYMENT: Thank you, sir.

19 Hopefully I am now audible, although potentially not visible.

20 MR MALEK: Yes.

21 MR RAYMENT: Sir, our principal position is that we don't seek to persuade you from the
22 course that you have outlined but we do think that there are a number of points that
23 need to be understood.

24 MR MALEK: Sure.

25 MR RAYMENT: By the other side in particular, because it appears to us that the tribunal
26 may in fact have a better appreciation of some of these difficulties.

1 If I could begin by mentioning the point that you, sir, mentioned, which is about the inherent
2 limitations in these databases.

3 Daimler has a number of different databases. They don't all relate together in a sort of simple
4 way. What that means is that, in order to answer the questions of the claimants'
5 witnesses, we need to have a clear idea of what it is they are trying to do. If they
6 explain to us what it is they are trying to do and they are not able to do, then we can
7 do our best to assist them.

8 It is not guaranteed that we will necessarily be able to assist them in doing what they want to
9 do, but at least if they provide us with clear explanations, then that gives us the best
10 chance. What we see is precision is really the key to this process being successful.

11 The more precision that can be provided, then the better the quality of the answers that we
12 will be able to give and, also, hopefully the quicker we will be able to give them
13 because, you know, we will be clear about what the claimants are trying to achieve.

14 Given the nature of these databases, there will be gaps, and sometimes we will be able to
15 provide what they want and sometimes we won't be able to provide what they want,
16 but as long as they are precise in their questions, then we should be able to provide
17 them with useful responses. In particular, we totally agree that worked examples can
18 be useful.

19 MR MALEK: Mr Rayment, how many worked examples do you think are needed?

20 MR RAYMENT: That is a difficult question to answer in a sense, because that slightly
21 brings me back to the point I made just now, which is it slightly depends on what the
22 claimants are trying to do.

23 Take the example provided in the 15 May letter, it was possible to provide that, which by
24 common agreement was a helpful response, because in that case we did get a clear
25 articulation of what it was that they were after.

26 I think, certainly here on my feet, it would be difficult for me to yes, we would suggest two

1 per database would be a good starting point.

2 MR MALEK: I think that is fair.

3 Carry on.

4 MR RAYMENT: The other point about how the data relates, I mean, you know, in some
5 databases, it is possible to provide that in a simple way but where you are talking
6 about the way the data relates across different databases, then we can help to clarify
7 things but there is a point at which ultimately that is exactly what the claimant has to
8 prove, as to how all of this works. You will have seen that point in our skeleton
9 argument.

10 MR MALEK: That is a point which I don't accept, and I will explain why.

11 Because, with disclosure and information requests, generally one of the major purposes of
12 that is to obtain information and evidence which can assist the requesting party to
13 prove its case. It is never a defence to that to say, actually it is not my job to assist
14 you to prove your case. It may well be the court will order you to do that. I accept
15 there are limitations on that, but I don't accept the broad proposition that you are
16 making, that merely because it helps someone prove their case on a contentious issue
17 is a good reason for not answering a request.

18 MR RAYMENT: Sorry, sir, I think I may have been unclear, I was not putting the
19 proposition quite as broadly as that, I was just saying that there is a point at which
20 there is a line that is crossed.

21 MR MALEK: There is a line, I accept that.

22 MR RAYMENT: I am not sure there is a lot that I can usefully say at this stage, other than
23 emphasise again the point about precision.

24 MR MALEK: I agree.

25 MR RAYMENT: The key thing is about precision.

26 Then the second thing is about the practicalities.

1 MR MALEK: Yes.

2 MR RAYMENT: Sorry, the other point about the difficulty of interacting with these
3 particular claimants is that you will recall from Mr Bronfentrinker's witness
4 statement, I hope, that he sets out at the beginning of the witness statement, he takes
5 us back to the case management conference back in September, and he outlines how
6 the position came to be such that these claimants only have partial database
7 disclosure.

8 MR MALEK: I remember.

9 MR RAYMENT: Whereas Ryder and Dawsongroup have, you know, much fuller database
10 disclosure.

11 Again, some of the difficulties that have been created in terms of these claimants'
12 understanding is partly because they didn't want to take this extra disclosure and you
13 will have read what Mr Bronfentrinker says, that Daimler didn't agree with that
14 approach and thought it was a recipe for trouble and would be storing up trouble for
15 the future, and that is now starting to show itself in our view.

16 It is an issue that may affect the process that you are proposing.

17 MR MALEK: Yes, okay.

18 MR RAYMENT: So, you know, there are questions of disclosure in the background as well.
19 Then two more points.

20 One is we are certainly happy to share the substance of the responses that we have given to
21 Ryder and Dawsongroup. Indeed it seems to us to make a lot of sense that the
22 claimants avail themselves of the opportunity, or their experts take the opportunity to
23 liaise in relation to what it is that they want to do with this data.

24 Then, finally, on timing, obviously

25 MR MALEK: We will deal with timing at the end, won't we?

26 MR RAYMENT: I accept that, but I just want to, sorry, I know it is an irritating phrase put

1 down a marker, because obviously what the appropriate position on timing is going to
2 be depends on what comes back to us in the schedule. Obviously if the schedule is 25
3 pages, it is going to take a lot longer to respond to than if it is 5 pages.

4 MR MALEK: But in the ordinary way, there would be liberty to apply and that if there is an
5 issue about timings you come back to me in correspondence and I will make a ruling
6 as to when it should be, but ordinarily, this is something that, if there is a problem,
7 you should resolve it amongst yourselves but if you cannot resolve it, I will deal with
8 it on paper.

9 I am here, I am available to deal with these disclosure issues. I do go through the documents
10 as and when they are filed and I can deal with these things quickly.

11 MR RAYMENT: I am grateful for that indication, sir, and I think it is also reassuring
12 because you have also indicated that you appreciate that there is quite a lot of
13 difficulty in actually sort of reconstructing in many cases how this data works and it
14 would be a time consuming business, especially at the current time when we all know
15 the challenges that, you know, all businesses are facing and the automotive sector is
16 certainly particularly affected, so that is all going on in parallel.

17 Finally, the tribunal I think has the point, but we do want to very strongly make clear that
18 there has been no heel dragging by Daimler in relation to the process. I don't want to
19 go into the wheres, whys and wherefores of all the correspondence but going back to
20 the whole question of disclosure, you know, it was us who were saying this needs to
21 be done thoroughly and fully at an earlier opportunity. That opportunity was not
22 taken and we think that is going to create some problems, but the key thing is it is not
23 us dragging our feet.

24 Whilst we are not in any way suggesting that other defendants are dragging their feet,
25 everybody has a different view in a different situation, Daimler has completed its
26 disclosure, whereas other defendants are still completing theirs as we speak.

1 That is not in any way suggesting there is anything wrong or improper about them, but it is
2 just that we do very much resist the sort of suggestion that we have been difficult
3 about this or dragging our heels. It is difficult stuff to provide, especially if it is not
4 clearly directed. And, you know, we really did resist, very strongly, the draft order in
5 the terms that it was being sought and the tribunal's solution is a very different kettle
6 of fish, as far as we are concerned.

7 I see Mr Jones has his hand up and I do not have anything to add at this point.

8 MR MALEK: He has a right of reply, so he doesn't need to put his hand up.

9 Is there anything you would like to say more, Mr Rayment?

10 MR RAYMENT: No thanks.

11 MR MALEK: Yes, Mr Jones.

12

13 Submissions in reply by MR JONES

14 MR JONES: The examples seem very sensible and go really to most of what we are looking
15 for in 1(b), because if that is ...

16 MR MALEK: Your sound is very fuzzy, I am afraid.

17 MR JONES: Sir, I am not sure I can do anything about that.

18 Sir, if I have a moment, I could call in my IT people who could assist, I do apologise.

19 MR MALEK: It depends how much more you have to say?

20 MR JONES: Or maybe how interesting it is. Let me try and say it very briefly.

21 Sir, the solution seems very sensible to us on 1(b) because that will go a long way to what we
22 were looking for.

23 Sir, I see Mr Rayment is having more difficulty than you are. Could I call in my IT people?

24 MR MALEK: Yes, call in your IT people. This is not nice to listen to. (Pause)

25 I will adjourn for a few minutes, and when he is back, contact us.

26 MR RAYMENT: Thank you, sir.

1 (3.28 pm)

2 (A short adjournment)

3 (3.31 pm)

4 MR MALEK: Mr Jones, I hope you have sorted this one out.

5 MR JONES: I hope so as well, sir, I can't hear myself, so I am relying on you to tell me if it
6 has gone fuzzy again.

7 MR MALEK: Yes, start from the beginning.

8 MR JONES: Start from the beginning.

9 I also took instructions of course during that short break. Sir, your suggestion as regards (b)
10 seems to us to be very sensible because having the worked examples directed as I
11 understand it at the net price, will of course get to what was the essence, really, of
12 what we were driving at with (b).

13 Coming back then to the schedule on (a), we can see the benefits of that and I am not going to
14 try to persuade you, sir, to take a different course on that given where we have
15 reached, but I just have a question, that we were slightly unsure about the degree of
16 precision or explanation, maybe, rather than precision, but explanation, sir, that you
17 had in mind on the questions. Because I have sought to suggest that, if I can put it
18 this way, we might have questions along the lines of, "Please tell us the meaning of
19 variable (a), please tell us the meaning of variable (b)."

20 Sir, I apprehend from what you have said, that if possible we should give a little bit more by
21 way of explanation but that we are not being required to go into the level of detail for
22 every single question, as we did in that correspondence, for example

23 MR MALEK: You are not.

24 MR JONES: which really would be too onerous and we want to avoid that.

25 MR MALEK: I am not expecting that.

26 MR JONES: In that case that also sounds a good compromise and very close to what we

1 were hoping for in the sense that it will flush out answers to each of the variables,
2 which is what we were after under (a).

3 It may be on that basis compromise has broken out.

4 MR MALEK: I will give my ruling then.

5

6 Ruling Given see separate transcript

7

8 Discussion on timings

9 MR MALEK: Can we now go through the timings.

10 I think, Wolseley, you start first, as regards your list, the first column in the schedule.

11 MR JONES: Yes, 14 days, sir.

12 MR MALEK: Give me the date.

13 MR JONES: Which would be 4.00 pm on 3 July.

14 MR MALEK: Yes.

15 Mr Rayment, the next one is you. When can you give your response? I know your point
16 about a lot may depend on the number of questions and all of that, but I would have
17 thought that you will need some time to do this, because I do want you to do it
18 properly.

19 What is your proposal, Mr Rayment?

20 MR RAYMENT: Sorry, sir, I am taking some instructions.

21 MR MALEK: Take instructions, yes.

22 MR RAYMENT: 18 September, sir.

23 MR MALEK: Yes. That is acceptable to me.

24 Unless Mr Jones has any question on that?

25 MR JONES: Sir, we are concerned by that. The reason being we have not been able to make
26 progress yet.

1 MR MALEK: I understand that.

2 MR RAYMENT: We are very impressed that Mr Jones can produce his schedule in a couple
3 of weeks, because we have consistently said this takes a long time.

4 MR MALEK: It does take a long time. The fact is the process you were going through
5 would have taken a very, very long time. This process is going to be a lot shorter. I
6 think that 19 September is fine.

7 Next one, Wolseley shall respond to (2) by way of the third column, so if

8 MR JONES: Sir, just thinking that through, that will just looking at the diary, as I look at
9 it, 19 September looks like a Saturday.

10 MR RAYMENT: I said 18th.

11 MR JONES: 18 September.

12 Sir, I think the next step is going to take us longer because we will need to look at the
13 answers which have been given. Can I ask for four weeks, which would be 16
14 October?

15 MR MALEK: I am sure Mr Rayment will not complain about that.

16 Any further response, Mr Rayment?

17 Because the further response may be either further information or saying we still think you
18 are not entitled to it or it is not practicable. I can't imagine that last column is going to
19 take too long, but the idea of that is it will crystallise the issues, so if you do come
20 back to me, I will be concentrating on those that you have filled something out in that
21 way.

22 MR RAYMENT: We think 13 November would be a reasonable date.

23 MR MALEK: Yes.

24 MR JONES: Sir, I am being asked again, that strikes us again as rather a long time, given,
25 sir, as you have said, by this stage they will have engaged with the questions.

26 MR MALEK: I am sure they can do it earlier than 13 November, but I am not sure how

1 much I would have thought they would need at least two weeks to respond to the
2 third column.

3 MR JONES: Yes.

4 MR MALEK: What does that take you to?

5 MR JONES: That is 30 October, sir.

6 MR MALEK: 30 October, yes.

7 MR RAYMENT: Sir, I was going to suggest the 6th as a compromise.

8 MR MALEK: All right, 6 November.

9 The further information and explanations provided to Ryder and the Dawson claimants in
10 relation to the disclosure common to these proceedings, that should not take long.

11 MR RAYMENT: No, one week, please.

12 MR MALEK: That takes you to?

13 MR RAYMENT: The 26th.

14 MR MALEK: Yes.

15 MR RAYMENT: Sorry, sir, we have provided the material to Ryder.

16 The material to Dawsongroup, we hope to provide at the end of July.

17 MR MALEK: Let's move that back then, so you will provide the Ryder by 26 June and the
18 other one by?

19 MR RAYMENT: 7 August.

20 MR MALEK: Yes. Then the idea is all that information that you are providing will then be
21 incorporated into Mr Scherer, or whoever is going to give that further statement.

22 So the date of that final statement, it probably should be

23 MR RAYMENT: We think 27 November, perhaps.

24 MR MALEK: I want the whole process to have sort of worked itself out yes, 27
25 November, okay.

26 MR JONES: I apologise, sir, was that for the two examples per database?

1 MR MALEK: No.

2 MR JONES: The final statement? I do apologise, I missed the date for the two examples.

3 MR MALEK: We have not come to that yet but all right, we will do that now.

4 The date for the two examples, Mr Rayment?

5 Mr Rayment is just taking instructions. (Pause)

6 MR RAYMENT: Sir, we would be able to provide examples for the French and German

7 databases, so one for each of those, by 8 July.

8 MR MALEK: That is fine, thank you. Yes.

9 MR RAYMENT: Then the second worked examples, we think that would be not possible to

10 provide until 25 September.

11 MR MALEK: For the UK, you mean?

12 MR RAYMENT: That would be one more for each of the databases. 18 September, sorry.

13 The proposal is that by 8 July, the claimants would have a worked example on each database,

14 because it has already given one.

15 MR MALEK: The second worked example yes, that is sensible to me, because that means

16 you get at least one worked example early on, and the second worked example well

17 before the end of this whole process.

18 Mr Jones, any points on that?

19 MR JONES: No thank you, sir.

20 MR MALEK: Gentlemen, on the question of costs, I think that this hearing was necessary

21 for both parties. You clearly had different views of the interpretation of the order. I

22 haven't accepted either of yours. You both had different way of approaching this

23 exercise, and I have come up with a different proposal.

24 I am inclined to say costs in the case, unless one of you tries to persuade me otherwise.

25 Considering in my view it was necessary and I am not going to criticise either party in

26 respect of why and how we are here. This is a useful exercise for everyone. It may

1 be a useful exercise for the parties in other cases, because they will understand the
2 approach that I take on disclosure.

3
4 Submissions on costs by MR RAYMENT

5 MR RAYMENT: Sir, I do have an application with regard to costs because we have been
6 substantially successful as a result of this hearing because of the stance that we have
7 taken about the draft order and the terms of the draft order effectively elevated us
8 redoing the entirety of our guidance to the level of principle. It is an extremely broad
9 order and it wasn't resiled from before you this afternoon.

10 Whereas we on the other hand, you know, the second that you said, oh, well, actually if you
11 are able to provide Daimler with some detail, then they will be able to respond. That
12 is exactly the approach that we have been taking throughout to this. If I may, I am not
13 sure where it is located in the tribunal's filing cabinet but there is some WP
14 correspondence which I would invite to you to read, please, which sets out our
15 position going into this hearing and you will

16 MR MALEK: Let me look at it now.

17 The registrar is giving it to me now, I have not seen this.

18 MR RAYMENT: The key point is we have always been open to answering questions, we
19 just wanted a bit more discipline, rather than desultory correspondence raising issues
20 by way of the odd example here and there. Indeed, as you will see in the without
21 prejudice correspondence we offered worked examples. This is all having to be done
22 under the shadow of an application that was issued on 24 hours' notice. (Pause)

23 I am afraid the fact that the tribunal helpfully indicated that it was available this afternoon has
24 been treated as making it necessary to shoehorn applications in much quicker than
25 was really necessary. I think once we reached the point we reached on 5 June, which
26 is when the application was issued, if somebody had enquired of the tribunal to say

1 could we put this back for a few weeks, it seems to me that would have been the
2 correct approach, given the stance that we were taking, which was not to resist
3 answering specific queries but just an understandable and deep objection to being told
4 that we had to do it all again on the basis that what we had done was so totally
5 inadequate. The tribunal has found that that just wasn't the case.

6 You can see the way that they were making such an issue of principle out of making us redo
7 the whole thing because they rejected our without prejudice offer out of hand.

8 If the tribunal is serious about the, in my respectful submission, guidance and the statements
9 in the disclosure ruling about the parties cooperating, you know, this ought to resound
10 in costs, in my respectful submission.

11 MR MALEK: Yes, Mr Jones.

12
13 Submissions on costs by MR JONES

14 MR JONES: Sir, we submit that costs in the case is the appropriate order. A couple of
15 reasons for that.

16 One is that the outcome in my submission is largely a draw. The reason I say that is that the
17 examples which will be provided, two worked examples, clearly for each of the
18 databases, will as I said go a long way towards addressing what we were asking on
19 (b).

20 On (a) the process, sir, which you have put in place, which is a sensible process, is a
21 structured process. It also, correctly in my submission, is described as a compromise,
22 because it puts in place a structured way for the parties to advance on the one hand the
23 claimants' requests, which will not be put forward with the amount of detailed
24 explanation that we had to put in the correspondence, but instead to set them out in a
25 table. There will then be a process for that to be answered.

26 Sir, it is correct in my submission, to characterise this as the sort of application which the

1 tribunal has to deal with regularly, could have been brought to a CMC, wasn't brought
2 to a CMC, because at this stage it only involves Daimler. So we didn't think it
3 appropriate to bring it to the CMC, but it is in the nature of a case management order
4 and of course what has been happening at the CMCs is these issues are being worked
5 through and ordinarily the result there is costs in the case. This is not out of the
6 ordinary in that sense, the parties had different views of what should happen, the
7 result is a compromise and in my submission costs in the case is the appropriate order.

8 MR MALEK: Okay.

9 MR RAYMENT: I am very sorry but Mr Jones is just not addressing the pertinent issues on
10 the without prejudice correspondence.

11 The fact is we made a constructive offer and they rejected it out of hand. Our offer included
12 worked examples. It included, paragraph 4 on the last page, a continuing willingness
13 to consider further specific questions with the Wolseley claimants and they rejected it
14 out of hand. They could have come back and said, "If you provide us with a second
15 worked example on each of the databases, then that would be terrific", or, "Could you
16 commit to something else ..." But they didn't, they just rejected it completely out of
17 hand.

18 Mr Jones has spent most of his submissions trying to persuade you that everything we did
19 was totally defective and it had to be absolutely done from scratch again.

20
21 Ruling on costs

22 MR MALEK: I have an application for costs on the part of Daimler. They say that the result
23 of the order I have made today is substantially in accordance with what they were
24 always willing to provide, which is we will provide further explanations when you
25 provide us with explanations, and that they will give one further example, an example
26 of worked examples, in respect of the databases.

1 Whilst that is true, it does seem to me that the disclosure has been defective in respects that I
2 have already pointed out and that in correspondence, certainly the initial
3 correspondence, Daimler did take an approach which is very far removed from the
4 order that I have made today. I do regard today's order as one I am not saying it is a
5 compromise, it is a different way of dealing with things and it is different from the
6 way proposed by both parties. It has elements of what both parties' position is, so I
7 am not going to make any order for costs against either party. The costs should be in
8 the case.

9 I can say I should thank the parties for the very well prepared bundle that has been provided,
10 the detailed skeleton arguments and that I do find that the hearing has been
11 approached on a constructive basis by both parties and we now have a way forward.

12 Thank you very much.

13 MR RAYMENT: Thank you, sir.

14 MR JONES: Thank you.

15 (4.11 pm)

16 | (The hearing concluded)
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