

This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive record.

IN THE COMPETITION
APPEAL TRIBUNAL

Case No. : 1292/5/7/18
1293/5/7/18
1294/5/7/18

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP
(Remote Hearing)

Tuesday 5 October

Before:
THE HONOURABLE MR JUSTICE ROTH
(Chairman)
THE HONOURABLE MR JUSTICE FANCOURT
HODGE MALEK QC
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Suez Groupe SAS and Others v Stellantis N.V. (formerly Fiat Chrysler Automobiles N.V.) and Others

Veolia Environnement S.A. and Others v Stellantis N.V. (formerly Fiat Chrysler Automobiles N.V.) and Others

Wolseley UK Limited and Others v Stellantis N.V. (formerly Fiat Chrysler Automobiles N.V.) and Others

APPEARANCES

Suez/ Veolia/ Wolseley	Hausfeld	Tristan Jones (Blackstone Chambers) Tim Johnson (Brick Court Chambers) Tom Foxtton (Brick Court Chambers)
DAF	Travers Smith	Rob Williams QC (Monckton Chambers) Nikolaus Grubeck (Monckton Chambers)
MAN	Slaughter and May	Daniel Jowell QC (Brick Court Chambers) David Bailey (Brick Court Chambers)

Iveco	Herbert Smith Freehills	Tony Singla QC (Brick Court Chambers) Matthew Kennedy (Brick Court Chambers)
Volvo	Freshfields Bruckhaus Deringer	Mark Hoskins QC (Brick Court Chambers) Sarah Abram (Brick Court Chambers) Jacob Rabinowitz (Brick Court Chambers)
Daimler	Quinn Emanuel	Paul Harris QC (Monckton Chambers) Ben Rayment (Monckton Chambers) Michael Armitage (Monckton Chambers)
Scania	Allen and Overy LLP	Brian Kennelly QC (Blackstone Chambers) Jason Pobjoy (Blackstone Chambers) Andrew Trotter (Blackstone Chambers)

Digital Transcription by Opus 2

Address:

Tel No:

Fax No:

Email:

Tuesday, 5 October 2021

(10.04 am)

Hearing via MS Teams

Submissions by MR JONES (continued)

THE PRESIDENT: Good morning, Mr. Jones. I think you were going to check a couple of things.

MR. JONES: Sir, yes, the first was the German law issue.

My clients do wish to take the points in the German judgment which will obviously require an amendment. The question which you asked me and which I know the Tribunal is particularly interested in is might it be suitable for a preliminary issue.

We have given that careful thought. We think there are two sets of issues which need to be ironed out before one can reach an informed view on that, and I suggest that that can be done before February and it could, if it is convenient for the Tribunal, be back in February.

Can I just address you on what those two sets of issues are briefly. The first is pleadings.

Clearly my clients need to amend their pleadings to take the point, and we also though would ask that Iveco, who obviously have already taken French and German pass-on as a point, plead out what they say the laws are in France and Germany on pass-on and the ways in which

1 they differ from English law, because, sir, that is what
2 has been done by other defendants when they have raised
3 foreign law issues. It is obviously the normal way of
4 pleading foreign law. For instance, on German
5 limitation we all know what the issues are, we know what
6 the disputes are, it has all been pleaded in detail.

7 Iveco's pleading simply said French law applies and
8 German law applies to pass-on. What we have said in
9 response is, firstly we disagree, but also you have not
10 pleaded any substantive differences. So at the moment
11 we do not see an issue between us, which is why we had
12 said a few times, including in my skeleton, that we did
13 not think there was an issue.

14 Clearly things have moved on since then, as we now
15 have the German judgment and, as I said, we would like
16 to take those points. But we also think to look at
17 these issues in the round and see what the disputes are
18 between the parties, it would help to know, obviously,
19 what Mr. Singla's clients are actually saying also about
20 those laws.

21 So it seems to us that there is an opportunity for
22 us and Iveco in particular to plead on German and, if so
23 advised, French law of pass-on and that will then enable
24 us to see exactly what the issues are between us.

25 There might potentially be some cross cutting

1 issues, so you raised yesterday possibly lex causae and
2 lex fori issues which arises in France and Germany. So
3 one would want to look at those in the round. That is
4 the pleading point. My second point, where I said that
5 it seems to us it needs to give a bit more thought, is
6 just on the question of what would a PI trial look like,
7 what evidence in particular might it involve.

8 Clearly, to a certain extent that follows on from
9 the pleadings and the precise ways in which these points
10 are put, where one can see what are the issues of
11 principle and are they suitable for a PI. But I also
12 note looking at the judgment that even the, what one
13 might call potential, I put it that way, the potential
14 sort of knockout blow on German law principles, which is
15 in the judgment from 99 onwards, appears to require
16 a degree of factual investigation into downstream
17 markets.

18 THE PRESIDENT: Yes.

19 MR. JONES: We are certainly not saying that that means that
20 it is definitely not suitable for a preliminary issue.
21 In some respects one can see that here actually if there
22 are additional factual points then maybe it is actually
23 better to have it as a preliminary issue because we
24 already have a heavy six-month trial. But what we are
25 particularly keen to do is to look at the extent to

1 which it overlaps with points which we are going to be
2 looking at in the trial, especially if I were to lose
3 the preliminary issue to avoid duplication.

4 THE PRESIDENT: If I can cut in, sorry to interrupt you.
5 Clearly we cannot decide now. That is evident. But we
6 can, we should decide in February, and to do that these
7 points have to be pleaded out so we can see what the
8 points are and to what extent they are disputed and what
9 is the dispute.

10 MR. JONES: Yes.

11 THE PRESIDENT: So I think it would be helpful to set
12 a timetable for pleadings to make sure they are all in
13 in good time. When we say February, we have not of
14 course fixed this and we all know the problems of
15 getting listings with this number of parties and even
16 the Tribunal members, but I would hope that we can find
17 two days in February that will suit everyone. But we
18 had better start getting that arranged and the registry
19 will get in touch with everyone later this week.

20 MR. JONES: Yes.

21 THE PRESIDENT: So I do not think you need to wait for Iveco
22 at this point, do you? Or would you prefer to keep
23 that?

24 MR. JONES: No.

25 THE PRESIDENT: You have got to then take your points.

1 MR. JONES: That is right. So the applicable law pleadings
2 I think were done simultaneously last time and that
3 seemed to work. There is different ways of approaching
4 it. There are arguments for Mr. Singla to go first
5 because he has German law as his primary point and we
6 need to respond. But on the other hand, if I am now
7 putting in Supreme Court points there is obviously
8 arguments for me to go first. I do not have a strong
9 view but I would suggest that if we were to do it, both
10 of us, in, say, six weeks, the other defendants also are
11 obviously going to have an interest in this. I do not
12 suggest they should work to the same timetable, because
13 it may be that they do not want to add anything, but
14 that would allow them to look at what we have said and
15 what Iveco have said, and then if they wanted to amend,
16 say, four weeks after that.

17 THE PRESIDENT: Do you really need six weeks? Could it be
18 by 29 October? The last Friday in the month.

19 MR. JONES: We could perhaps do it quicker than six weeks.
20 The only reason I am hesitating is that it is obviously
21 a point where we have to liaise with the German team and
22 with German lawyers to unpick it. I do not yet have a
23 proper -- there is a bit of a translation in the bundle
24 but it is not a proper one.

25 Sir, we have until February. Could we say perhaps

1 four or five weeks, which may not be much different to
2 what you have just suggested to me, but we clearly need
3 a bit of time to process with our German team.

4 THE PRESIDENT: Well, let us say by 5 November.

5 MR. JONES: Thank you for that, sir. That works for us.

6 THE PRESIDENT: Technically, it would be an application to
7 amend, but we are pretty far from trial so I doubt it
8 would be opposed.

9 But clearly the defendants have a right to see it
10 before agreeing, and that would be for you. I will hear
11 from Mr. Singla if Iveco can do the same, and then any
12 response, pleadings in response by, let us say by --
13 could it be 6 December? That is what I would suggest.

14 Now, Mr. Singla, can you --

15 MR. MALEK: Can I raise one point?

16 Mr. Jones, Mr. Singla has pleaded German law, but
17 not spelt it out in his pleadings. In your reply what
18 have you said to that? Have you said that you deny
19 German law does apply to pass-on? I cannot remember.

20 MR. JONES: Let me show you, sir.

21 MR. MALEK: I thought you did.

22 MR. JONES: Yes. Can I show it to you?

23 MR. MALEK: Does that mean you need to amend your reply
24 as well?

25 MR. SINGLA: Mr. Malek, I can address that. I am looking at

1 Mr. Jones' pleading here. I am grateful for the
2 question. It is helpful, because he has pleaded, they
3 have put all of their eggs in the choice of law question
4 basket, if I may put it in that way. So he has not yet
5 pleaded any position as regards the substance of
6 German law, in contrast, as I indicated yesterday, to
7 their pleading on French law where they take the lex
8 fori versus lex causae point and in addition they say we
9 are wrong as to the substance of French law.

10 If I may say so, it is very unsatisfactory for
11 Mr. Jones not to have given us notice of this point
12 overnight, because we do not accept that our pleading is
13 inadequate. We pleaded two years ago and they never
14 asked for any further particulars. So we would oppose
15 the suggestion that we should somehow have to do our
16 amended pleading in parallel to the claimants.

17 What should happen, with respect, is that they
18 should amend if they want to include for the first time
19 a substantive point on German law. The defendants
20 should then have a chance to look at that and amend in
21 response, and if he has any further information that he
22 wants as regards our existing pleading he can ask those
23 questions as part of that process. But it is not really
24 for him now to be seeking further particulars for the
25 first time after two years, with respect.

1 MR. MALEK: Mr. Singla, I understand that, but the point
2 I was just raising with Mr. Jones is whether or not he
3 needs to amend his reply. I think he does.

4 MR. SINGLA: Plainly, sir, yes.

5 MR. JONES: Sir, could I show you the pleadings because
6 I think this may be going off on a -- we need to just
7 look at what has been said.

8 It is {VSW-A4-1/31/1} and my pleading on German law
9 is on page 5.

10 THE PRESIDENT: Just a moment.

11 MR. JONES: It is {VSW-A4-1/31/1}.

12 THE PRESIDENT: It has now come up.

13 MR. JONES: Page {VSW-A4-1/21/5} and it is paragraph 27, and
14 it says:

15 "Paragraph 9 of Iveco's statement of case asserts
16 that the VSW Claimants will not be able to recover
17 damages, to the extent that the Overcharges were passed
18 on, because pass on has been 'recognised' in German
19 law".

20 "The principle that an overcharge might be passed on
21 is also recognised in English law.

22 "The principle that an overcharge might be passed on
23 is also 'recognised' in English law.

24 "In the premises, paragraph 9 of Iveco's statement
25 of case is embarrassing and/or does not identify any

1 element of substantive German law that differs from
2 English law. The VSW Claimants cannot plead further
3 [to it]."

4 THE PRESIDENT: Can we have the next page, please? Thank
5 you. {VSW-A4-1/31/6}

6 MR. JONES: We said we could not plead because it was
7 embarrassing, and then we said:

8 "Furthermore, the passing on - or otherwise - of an
9 overcharge is a question of fact, to be determined when
10 quantifying damage. The quantification of damage is a
11 procedural matter governed by the lex fori."

12 MR. MALEK: So your pleading is that pass-on is really
13 a question of quantifying damage which is for the
14 lex fori.

15 MR. JONES: Yes, that is right, sir.

16 MR. MALEK: If you are going to change your case to say
17 actually it is actually a matter for lex causae and that
18 is Germany, then that is -- you are going to have to
19 amend this pleading, are you not?

20 MR. JONES: Sir, could I make two observations.

21 I completely agree with that and that is why I said
22 we may need to amend. But just on that, of course the
23 significance of the German judgment on the face of it is
24 that it is setting up a substantive defence rather than
25 a point of law about quantification of damages. So that

1 actually, if we take that point in that way, it is not
2 that I am reversing out of something that I said in this
3 document, it is that there is a new case from a month
4 ago which actually raises a substantive point of German
5 law rather than a quantification point.

6 I totally accept we need to plead it. Can I just go
7 to Mr. Singla's point, because he has criticised me a
8 few times for how we have characterised his case.
9 Clearly we had said from the outset that it was
10 embarrassing and we did not know what they were
11 pleading, and clearly if there is an argument over
12 German law we need to know what it is and we would be
13 making that point from these pleadings, yes, it would
14 only have ever been my fall back, obviously, because we
15 have said here that it would have been English law, but
16 he has known that. Moreover, we have made the point
17 repeatedly in correspondence we do not see what the
18 issue is, which is why I said it in my skeleton.

19 So I know Mr. Singla was giving me a bit of
20 a kicking on it, but the truth is we have tried to
21 bottom out the issues and that is why -- just to short
22 circuit it, we obviously both need to plead, that is
23 where it comes to. I did not particularly want a spat
24 with Mr. Singla over this, but we simply both need to
25 plead the points out so we can take it forward. That is

1 as far as it goes, sir.

2 THE PRESIDENT: Can we just see Mr. Singla's German law
3 pleading. Rather, I do not know if it is his pleading
4 but the Iveco pleading.

5 MR. JONES: It is at {VSW-A4-1/21/1} and his German pleading
6 is on page {VSW-A4-1/21/5} of that in 9.

7 THE PRESIDENT: I think that has not come up. You say
8 {VSW-A4-1/1 ...

9 MR. JONES: No, tab 29.

10 THE PRESIDENT: That is it.

11 MR. JONES: Page 5, paragraph 9 {VSW-A4-1/29/5}.

12 MR. MALEK: It may not be a straightforward question of what
13 the German law is.

14 MR. SINGLA: Sir, could I try and help the debate and really
15 just cut through it, because I think where we have got
16 to is Mr. Jones is saying that he, for the very first
17 time, wishes to advance a substantive case as to German
18 law. That is plainly not pleaded.

19 Now, we will have to respond if and when he pleads
20 to that, and I think the debate really just comes down
21 to the sequencing of events, and all I am really
22 suggesting is that what should happen from here on is
23 that he should go first and then we, like the other
24 defendants, should respond.

25 Now, separately from that if he has got some problem

1 with our existing pleading which he has not mentioned
2 for the last two years, then they can ask us questions
3 and we will sweep up any points in our amended response
4 in due course.

5 But in a sense what happened last time is that we
6 went first because we put German law in issue and they
7 came back in the way that we have seen. But what is
8 going to happen from now is that they in fact are now
9 going first because they want to introduce the
10 substantive German defence. So I think the debate
11 really just comes down to the procedural position going
12 forward as to who should go first.

13 MR. MALEK: Is there a reply to this document, Mr. Singla,
14 or not?

15 MR. SINGLA: Yes, the reply was the VSW document, sir,
16 because although Mr. Jones submitted --

17 MR. MALEK: They were not simultaneous.

18 MR. SINGLA: No, they were not simultaneous, no.

19 THE PRESIDENT: I think this is a slightly arid debate and
20 I do not think at the end of the day it hugely matters.
21 What is important is that everyone's case is clear both
22 to the Tribunal and, as it were, to all of you by the
23 time we gather again in February.

24 I think the sensible thing now is, Mr. Jones, you
25 amend, setting out your case, and everyone else,

1 including Iveco, who is concerned with the German
2 claims, and I do not think that is every defendant but
3 I may be wrong, then has to respond but also making
4 their own position clear. Because at the moment
5 obviously from reading this paragraph 9, it is not quite
6 clear whether Iveco says German law does govern or does
7 not. It is a sort of "insofar as it does". So no doubt
8 that will be clarified.

9 I think let us do it that way so we do not get
10 a round of amendments. Then I think you should have
11 a chance to reply and that can be in early January. We
12 give you extended time because obviously you are going
13 to have to liaise with German lawyers. But if you can
14 do that by, can we say 11 January?

15 MR. JONES: Yes, sir, that is fine. Thank you.

16 THE PRESIDENT: By 11 January, and that will give everyone
17 time before November.

18 Now, I have not checked with the defendants.
19 I suggested 6 December for defence on foreign law, or
20 amended responses on foreign law. Is anyone
21 inconvenienced greatly and wants to shout against
22 6 December?

23 Good, well, that will be it. So 5 November
24 claimants on German law; 6 December for defence; and
25 11 January for reply.

1 Mr. Jones, I do not know if we need a formal order,
2 but can we assume that the Hertz claimants will be
3 effectively claiming German law or pleading German law
4 in the same way?

5 MR. JONES: Yes, sir, we can. There is a related point
6 which is that it does therefore probably make sense for
7 the February CMC to also include the second waves in
8 case there is a preliminary issue ordered on these
9 points.

10 THE PRESIDENT: I think it is only Hertz, is it not, that is
11 in Germany? There is someone else in France, is there?

12 MR. JONES: There is someone else in France. There is
13 Zamenhof in France, so it could potentially affect them.

14 THE PRESIDENT: I think that probably makes sense. You
15 represent them all anyway.

16 MR. JONES: Yes.

17 THE PRESIDENT: Just on the foreign law point, and that is
18 on an undertaking that they are pleading it in the same
19 way and basis, but if there are factual issues and
20 I agree with you that, as we understand the
21 Supreme Court's judgment, there is a limited factual
22 enquiry involved. So we will have to consider whether
23 it is appropriate that they should be included in the
24 preliminary issue or not. But for the purpose of
25 examining the question it may be sensible that both

1 Zamenhof, and Hertz are represented in February.

2 Mr. Harris wants to say something.

3 MR. MALEK: Before he does, Mr. President, it would be
4 helpful for the February CMC to have agreed translations
5 of any German judgments that have been pleaded.

6 THE PRESIDENT: Yes, that is a very good point.

7 MR. HARRIS: Thank you. Just a brief point, if I may, sir.

8 I apprehend that it is intended that the pleadings
9 on foreign law in Zamenhof and Hertz will be separate
10 documents as they are in the other cases and that they
11 can be responded to as separate documents.

12 The reason I raise that, sir, is that Daimler is in
13 a unique position currently as regards the pleadings in
14 the VSW claims and the soon to be amended and formally
15 submitted and very lengthy pleadings in cases such as
16 Hertz and Zamenhof. The reason that Daimler is in
17 a unique position is that as a Part 20 only and only in
18 Wolseley, we have not had to respond in detail and in
19 substance to the lengthy pleadings and we would not be
20 in a position, therefore, to respond by 6 December to
21 a full pleading in Hertz and Zamenhof as well as
22 a foreign law pleading.

23 We certainly can respond on foreign law by
24 6 December if they are separate pleadings, but we would
25 not be able to do the full comprehensive job, and we are

1 different in that regard because the other defendants
2 have all responded at length to the lengthy pleadings in
3 VSW and therefore they have a less extensive task than
4 we do when they receive the amended pleadings in Hertz
5 and Zamenhof.

6 THE PRESIDENT: I think probably for good order, Mr. Jones,
7 it would be appropriate for both Hertz and Zamenhof to
8 put in a foreign law, just a foreign law, pleading.

9 MR. JONES: Yes.

10 THE PRESIDENT: Also by 5 November.

11 MR. JONES: Yes.

12 THE PRESIDENT: Then Mr. Harris' clients can respond
13 to that.

14 MR. JONES: Yes.

15 MR. SINGLA: Sir, on behalf of Iveco, may I make a point
16 which is connected to the point that Mr. Harris has just
17 made.

18 We also want the foreign law pleading process to be
19 separate from the main pleading process but for
20 a different reason, and this in fact is related to
21 a point that I think Mr. Jones wishes to put on the
22 agenda later this morning. But it raises a wider case
23 management point as regards the second wave claimants.

24 Now, we completely understand what you have said,
25 sir, about some potential involvement if there is going

1 to be a preliminary issue on foreign law, and therefore
2 they need to be involved in the pleading process between
3 now and February. But we would have grave concerns
4 about any wider case management decisions being made
5 today as regards the second wave.

6 THE PRESIDENT: We are not. Mr. Singla, we are not making
7 any wider -- it is not before us in any substantive way
8 once we have decided they are not going to be in the
9 main trial.

10 MR. SINGLA: I am very grateful.

11 THE PRESIDENT: It is purely foreign law. So I do not think
12 you need to worry.

13 MR. SINGLA: Mr. Jones was seeking to put that on the agenda
14 so I am grateful.

15 THE PRESIDENT: For the moment anyway. If he does, we will
16 hear him in due course.

17 Good. Does that take care -- if someone could mute
18 because there is an echo. Thank you. Does that take
19 care of the foreign law to put us in a position to
20 decide in February whether or not to have a preliminary
21 issue and, if so, whether it should be France and
22 Germany or only one and, indeed, what it should be?

23 MR. JONES: Absolutely, sir, I think that does it. I think
24 that does it.

25 Is now the moment for me to go on to the other few

1 points that we picked up from our directions?

2 THE PRESIDENT: Yes.

3 MR. JONES: Can I just show you the directions. They are in
4 {HS2-B/30/1}.

5 I just wanted to pick it up on page {HS2-B/30/4}.
6 There are three short points that I just want to raise,
7 sir, for your attention.

8 One is, if you have page {4} --

9 THE PRESIDENT: Yes, it has come up.

10 MR. JONES: The first one is a point which Mr. Singla and
11 also Mr. Harris, in a slightly different way, were just
12 advertizing to, which is paragraphs 6 and 7, which is our
13 application to move the pleadings on for the second
14 waves.

15 It is a really targeted point because we of course
16 entirely see that if they are not progressing to trial
17 they are not going to make an awful lot of progress.
18 But we think that some simple things can be done at low
19 cost to ensure that they are firstly in a position to
20 negotiate at all, and secondly in a position to take
21 advantage of trials 1 to 3 judgments when they arrive.

22 We have circulated amendment pleadings based on the
23 Commission file documents. That is the point. We have
24 had the Commission file since our initial ones, and we
25 simply want to be able to rely on them and for the

1 defendants to reply.

2 Sir, you will appreciate here, just to explain why
3 this is important, that although we on my team, as it
4 were, know what the defendants are going to say, if you
5 like, unless they come up with a new series of points in
6 their defences, but these particulars mirror the VSW
7 particulars and so one can anticipate the defences,
8 Mr. Harris, as he said, will have more work to do than
9 the rest, but we cannot discuss a lot of that with our
10 clients because they are different cases, there is
11 confidentiality concerns. So at the moment we are quite
12 hampered in taking forward even quite basic points.

13 For most of the defendants this is going to be
14 reasonably straightforward because, as I have said, they
15 mirror the VSW pleadings. It is more for Mr. Harris.
16 On the timings we do not have a strong view because of
17 course if they are not progressing to trial on any short
18 time horizon, there is no rush for the defences.

19 I think Mr. Harris said he wanted, I do not remember
20 precisely, but a few months, I think. That is fine; any
21 reasonable requests we are not going to object to, sir,
22 in terms of how long the defendants take. But we do
23 think it is an easy next step which will make a lot of
24 progress and enable those claims to be taken forwards.

25 THE PRESIDENT: You are looking at this draft, paragraphs 6

1 and 7?

2 MR. JONES: 6 and 7, although, as I said, the date --

3 THE PRESIDENT: You are not suggesting that they should file
4 proposals on expert evidence?

5 MR. JONES: No, no, just 6 and 7, and as I say the date on 7
6 obviously can be moved now.

7 So that is the first point. The second point though
8 is about expert evidence for VSW, which clearly needs to
9 be on the Tribunal's agenda for February to set
10 directions. We proposed, you will see in 8, just
11 a moment for the parties to exchange their proposals on
12 expert evidence, including how many they propose
13 to call.

14 Number 2 says which area of law. Clearly when
15 I drafted this I had the foreign law issues and our
16 slight lack of certainty on that in mind, but we did not
17 mean to confine it to that. It was meant to be which
18 areas of expertise broadly. So I apologise for that
19 error there, but which areas and the extent to which
20 they propose to share experts with other parties. We
21 think that is a simple step. It gets us on track
22 for February.

23 THE PRESIDENT: Sorry, this is paragraph 8?

24 MR. JONES: Paragraph 8.

25 THE PRESIDENT: As regards first wave only, or as regards

1 the potential test claims.

2 MR. JONES: That is right.

3 THE PRESIDENT: But we have not ... yes.

4 MR. JONES: That is right. So we had another stage in this,
5 which is actually paragraph 11, which was that then we
6 would inform the Tribunal of any disputes. But, sir,
7 that is perhaps a detail too far.

8 The important point is paragraph 8, which is that
9 the parties at least get this moving so that it comes
10 back in in February.

11 The third point, sir, was really a point which you,
12 sir, have already raised, which is I was asked to raise
13 with the Tribunal the best way of trying to get this
14 listing in February, having regard to the draws on the
15 Tribunal time. Sir, I know you have that well in mind.
16 My solicitors obviously have a concern that we need to
17 ensure that things are done at the right points, and
18 February seems the right moment for it. So they just
19 asked me to raise whether there is anything that can be
20 done now at this hearing to progress that. It may be
21 that the answer is no, but I raise that as a third
22 point, sir.

23 THE PRESIDENT: No, I think there are too many diaries
24 involved, I think at this point, by the registry writing
25 to everyone when we know the Tribunal's availability and

1 offering and then asking for responses.

2 MR. JONES: I understand.

3 THE PRESIDENT: So that is that one. So the question is
4 about your amended defences first of all. Those have
5 been circulated, and then -- I am not even sure I know
6 who the defendants are in all the second wave
7 proceedings, but does it involve basically everybody --
8 I think you are muted, Mr. Jones. You have slipped into
9 mute.

10 MR. JONES: Sir, in broad terms I understand that they are
11 all in at least one of them. So it affects all of them.
12 Are they all in each of them? I think the answer to
13 that is no, although I do not have the details to hand
14 right now. But I think perhaps Scania, for example, is
15 not in all of them. But it will be a process that they
16 will all need to engage in one way or another.

17 THE PRESIDENT: There are five separate claims; is that
18 right?

19 MR. JONES: Yes, that is right.

20 MR. SINGLA: Could I please address you on this point, sir?

21 THE PRESIDENT: I think you all have a right to address us
22 on it, but it is a question of who goes first. So,
23 Mr. Singla, do you want to kick off?

24 Submissions by MR. SINGLA

25 MR. SINGLA: I think I have been volunteered to, sir.

1 It really goes back to the point that I started to
2 develop earlier. We do oppose the making of an order in
3 the terms of paragraph 6, 7 and indeed 9 which Mr. Jones
4 has not, I think, showed you.

5 Essentially, whilst he says it is all very
6 straightforward and we have had their amended
7 particulars for a while and all of us apart from Daimler
8 have already served defences in respect of similar
9 particulars of claim, he portrays this as being
10 a straightforward issue, but we do oppose the making of
11 these orders. The reason for that is because this is
12 not a CMC in the second wave claims.

13 They were only here because they brought an
14 application to participate in trial 3. That was
15 dismissed yesterday and, with respect, that should be
16 the end of their involvement in this hearing. What
17 should happen, in my submission, is that their cases
18 should go off to their own CMC, and we intend to make an
19 application for a stay of those claims at that CMC.

20 Now, of course Mr. Jones in his skeleton says if any
21 application by a stay will be resisted, but that just
22 goes to show why it would be inappropriate to be making
23 any orders at this point in time, because there will be
24 a hotly contested issue as regards: (a) whether there
25 should be a stay, and (b) when that stay should kick in.

1 Our submission at that CMC will be that we should not be
2 put to the cost of pleading back to the second wave
3 amended pleadings.

4 We may win or we may lose that argument, but in my
5 submission it would be inappropriate to preempt it.

6 THE PRESIDENT: Can you pause a moment? I think we will
7 just confer because we do need to move on to disclosure
8 points and I am not even sure this was clearly on our
9 agenda. So we will take a moment. (Pause)

10 Mr. Singla, you were addressing this for everyone.
11 Can I just check, are you also opposing permission to
12 the claimants, second wave claimants, to file their
13 amended particulars of claims?

14 MR. SINGLA: Yes. We essentially say all of this should be
15 put off until a CMC where this Tribunal can properly
16 grapple with the second wave claims. We do not see --

17 THE PRESIDENT: You have seen the amended particular of
18 claim. It is right at the beginning of their action.
19 Is it actually opposed, those amendments?

20 MR. SINGLA: It is opposed in the sense that we intend to
21 cross apply for a stay.

22 THE PRESIDENT: Before they have even pleaded out their
23 case?

24 MR. SINGLA: They have already pleaded out their case. They
25 are seeking permission to amend, and we are essentially

1 saying this really now has brought matters to a head and
2 there will be little utility, with respect, in us
3 consenting or the Tribunal granting permission to amend
4 unless and until we have had the argument about a stay.
5 That is our position.

6 THE PRESIDENT: It is sometimes helpful that you see what
7 actually is the case they are seeking to bring.

8 MR. SINGLA: I do not mean to be difficult, but as I said
9 earlier, this is not a CMC in the second wave claim and
10 really this is an inappropriate use of the Tribunal's
11 time when we have so much to be getting on with in the
12 VSW claims. That is really the fundamental procedural
13 objection I have with Mr. Jones seeking to put things on
14 the agenda like this.

15 So I am not looking to be difficult or suggest that
16 we will oppose the substance of the amendments, it is
17 just really taking this procedurally in the right
18 course, with respect.

19 THE PRESIDENT: It is just that when we do come to look --
20 we are with you on everything else.

21 MR. SINGLA: Yes.

22 THE PRESIDENT: So we are not going to require the
23 defendants to do any work. But given that the amendment
24 presumably tracks the amendment that you have seen in
25 the other cases, we find it hard to think it will be

1 opposed. If the claimants want to do that work, or they
2 have done it already, it would be better that we have
3 the actual claims before us and then we can look at that
4 in that CMC in the second wave.

5 MR. SINGLA: I can take instructions on that point, but I am
6 grateful for the indication as to the wider position.

7 THE PRESIDENT: Yes. So that is the only issue that we
8 think it may be helpful --

9 MR. WILLIAMS: Sir, this is Mr. Williams. Can I make
10 a practical suggestion.

11 Being completely candid, sir, with so many else
12 going on we simply have not focused on this issue for
13 this CMC and we wondered whether, if the Tribunal is
14 minded to take the course that you have indicated, if
15 you could give us, say, seven days to register any
16 objection just so that we can at least focus on the
17 point, because this is not really a trial 2 CMC and
18 I think that would be a practical step.

19 THE PRESIDENT: Yes, I think that is very sensible. So we
20 will say within seven days the defendants should
21 indicate whether they oppose the amendment. If they do,
22 then we will have to include the application for
23 permission at a second wave CMC. If they agree to the
24 amendment then it can be done by consent. No other
25 directions on the second wave apart from those that we

1 have given regarding foreign law pleadings from Zamenhof
2 and Hertz. All other matters to be adjourned to a CMC
3 in the second wave, which might be listed immediately
4 following the February CMC in these cases, if there is
5 time. But that may require a three-day listing which
6 might be much more difficult. If not, it will have to
7 be listed separately.

8 Right, I think then we can move on, can we,
9 Mr. Jones? I think that deals with your points.

10 MR. JONES: Only the expert point. I do not know if that
11 was opposed by any of the defendants, there was just
12 that small order on the experts.

13 THE PRESIDENT: The experts in this case.

14 MR. JONES: In the VSW case, yes.

15 THE PRESIDENT: Should that not wait until we have finalised
16 which are going to be the claims going to trial?

17 MR. JONES: I see some nodding. We were, certainly for our
18 part, not aware that any of the parties might have
19 different experts, as it were, for different claimants.

20 It is going to be -- one can see an applicable
21 law -- sir, I am just thinking through it. I cannot see
22 at the moment why there would be any difference. All of
23 the issues would arise. You are looking at fine grain
24 questions of which claimants, but they are going to have
25 I think the same experts whichever way you jump on

1 those.

2 So for that reason it seems it could sensibly be
3 done at that CMC, and it feeds into -- one of the points
4 which you made earlier yesterday, sir, was that the
5 Tribunal is minded at the moment to say just one expert
6 on pass-on for the defendants. There has not been an
7 order on that and we have been asking them about that
8 for a while. I do not know if that will end up being
9 controversial, but that sort of point is quite an
10 important big picture point for deciding on the
11 structure of the trial and might then feed into the
12 decisions that you make in February on things like
13 Veolia business unit, for example, how much time will
14 there be in the trial.

15 THE PRESIDENT: The suggestion is that you just exchange the
16 proposals.

17 MR. JONES: That is all.

18 THE PRESIDENT: I am not -- as regards which areas of law,
19 well, that will depend on the foreign law pleadings,
20 presumably, and then how many, which areas and the
21 extent to which they are proposed. Yes. Is there any
22 difficulty in people doing that by 11 January?

23 MR. SINGLA: Sorry to take up more of the time, sir, but we,
24 Iveco, do object to this. I am not sure I do -- I do
25 not know what the position of the other defendants is,

1 so let me speak just on behalf of Iveco.

2 We say again Mr. Jones portrays this as being
3 something that should not be controversial and it is all
4 very straightforward. But with respect, until the
5 claimants, the claimant constituency has been finalised,
6 we say it is premature for the parties to be engaging in
7 this process. Obviously it is a process that will need
8 to be undertaken and Iveco will engage constructively
9 with it at the appropriate juncture. But we say we are
10 really looking at a trial in 2024, there will be ample
11 time to deal with this post February and it would
12 actually be inefficient, in our submission, for the
13 parties to spend time and energy and cost on this before
14 we know the final claimant body.

15 The Tribunal said yesterday that it would hold over
16 questions of directions to trial and so on as regards
17 trial 3 until February, so we say this is something that
18 should be postponed.

19 THE PRESIDENT: Does anyone else want to come in on that?

20 Mr. Harris?

21 MR. HARRIS: Yes. Thank you, sir.

22 We adopt the submissions of Mr. Singla for Iveco on
23 behalf of Daimler, and there is another reason, which is
24 that this process in what is called trial 2, so
25 Ryder/Dawsongroup, has proved to be difficult and

1 protracted. It has taken many, many months to reach the
2 point where it is then going to go to the Tribunal next
3 week, and I respectfully suggest two things.

4 First, that a timetable to get this ready in this
5 trial 3 case before February is too constrained, but
6 that secondly, we will all, perhaps including, with
7 great respect, the Tribunal, have a better idea of how
8 this sort of thing will be managed after the CMC next
9 week, including how long it could take, or should take.

10 So for those two additional reasons we support what
11 Mr. Singla has said.

12 THE PRESIDENT: Yes. Mr. Williams?

13 MR. WILLIAMS: Very briefly, sir, it may be that in a number
14 of the disciplines the evidence does not depend on the
15 identity of the claimants, but there will be some
16 disciplines where it may do; interest is one area, for
17 example, tax may be another. So I think there is that
18 additional point, sir.

19 THE PRESIDENT: Yes. We will just take a moment, thank you.

20 (Pause)

21 Mr. Jones, we can see it might be helpful, but we
22 will probably have enough to do in February, and if
23 a direction of this sort is made in February, as
24 I anticipate it might be, as people have said, there
25 will be time to then return at a further CMC, which will

1 obviously be needed, whether it is in June or July or
2 whenever, to firm up the experts' position. Trial is
3 a long time away so we are not going to make that
4 direction now.

5 MR. JONES: I need, I should say to hand over to
6 Mr. Johnston for the disclosure issues. So if that is
7 where we are going next there will be a slight moment
8 while we hope that our technology does not fail us as we
9 switch cameras. But that is all.

10 MR. WILLIAMS: So I think the next agenda item might be the
11 RFI, actually, and I do not know whether that affects
12 where VSW's camera ought to be.

13 THE PRESIDENT: We were told at the beginning that that has
14 been agreed. Is that right, Mr. Williams?

15 MR. WILLIAMS: Yes and no, in the sense that I explained
16 yesterday, sir. We have agreed that we are not pursuing
17 further information today, but we are seeking further
18 documentation and disclosure, which is very much bound
19 up with the issues canvassed in the RFI. So I was
20 proposing to explain the position on the RFI leading
21 into the related disclosure issues. It is obviously
22 a matter for the Tribunal in which order you take the
23 issues, but that was how we were proposing to proceed in
24 light of the agenda.

25 THE PRESIDENT: So it links to one of the disclosure

1 applications, does it?

2 MR. WILLIAMS: It links to disclosure in connection with the
3 situation where the right to bring the claim has been
4 transferred to a new entity and in relation to the
5 unattributed trucks issue, which were the two main areas
6 of focus in the RFI.

7 THE PRESIDENT: Let us deal with it with the disclosure,
8 when we come to that.

9 The next item is the composite masterdata
10 application, the Daimler's application, but we were told
11 there is a large amount of agreement. Is that right?
12 That is Mr. Harris' application.

13 Submissions by MR. HARRIS

14 MR. HARRIS: Yes. Thank you, sir. I can take this, sir,
15 fairly briefly in light of the provisional indications
16 given by Mr. Malek on behalf of the Tribunal yesterday.

17 So the composite data, masterdata issue is as
18 follows, that we, Daimler, sent a letter over a year
19 ago seeking a whole series of answers to a detailed set
20 of requests that were put in a solicitor's letter but
21 were essentially generated by our experts. So that was
22 September 2020. Those questions were very largely left
23 unanswered.

24 If it is of assistance I can give you some examples
25 with some document references. But for the moment,

1 suffice to say that there were many, many questions of
2 a detailed variety, and large, very large numbers of
3 those from the letter over a year ago were left
4 completely unanswered.

5 THE PRESIDENT: Yes.

6 MR. HARRIS: But the gist of the point that remains is that
7 those questions were asked over a year ago because the
8 experts for Daimler simply could not understand the
9 composite masterdata and, for that matter, something
10 called the master RFIs and the Excel spreadsheets that
11 lay beneath it. Could not understand it.

12 Those answers, Daimler then wrote another letter
13 through its solicitor [...] input in April 2021, so five
14 or six months ago, reiterating a large number of the
15 requests and repeating that the data in the composite
16 master dataset simply could not be understood and
17 therefore could not be worked with.

18 That letter remains 100% unanswered even today.

19 What we have had since there were a large number of
20 questions left unanswered in the September 2020 letter
21 and no answers at all to the April 2021 letter, is that
22 we were forced to make an application for this CMC, a
23 formal application with supporting evidence from the
24 experts and from the solicitor.

25 Then after that had been done what we received was

1 a letter on 28 September in which Hausfeld acknowledge
2 two things essentially in generic terms. The first
3 thing that they acknowledge is that their composite
4 master dataset is replete with inconsistencies and
5 wholesale absences of data and that they have not
6 answered some of the questions from the September 2020
7 letter, and that is all true. It is replete with
8 inconsistencies, lots of data missing, and there are
9 masses of answers still outstanding from the
10 September 2020 letter more than a year ago.

11 In a moment I would just like to call up that letter
12 and illustrate to the Tribunal where Hausfeld have
13 simply admitted that that composite masterdata is
14 unsatisfactory.

15 THE PRESIDENT: Can I interrupt you so I understand where we
16 are going? What are you actually asking for today now?

17 MR. HARRIS: What I am asking for is an order that Hausfeld
18 respond to the outstanding questions on the composite
19 masterdata from the September 2020 letter and the
20 April 2021 letter. The reason I have done it by
21 reference to the actual letters is because Mr. Malek was
22 quite right yesterday in his closing remarks to identify
23 that there has been a measure of agreement ... as to
24 what was the order that was sought and as to those two
25 letters ...

1 The second thing is the 8 September letter, so this
2 is after we have been forced to make the application.

3 THE PRESIDENT: You are cutting out a bit, Mr Harris.

4 MR. HARRIS: The best I can suggest is logging out and
5 logging back in.

6 THE PRESIDENT: Perhaps that is a good idea.

7 (Pause due to technical issues)

8 MR. HARRIS: I do not know if that is any better, sir?

9 THE PRESIDENT: Carry on and we will find out.

10 MR. HARRIS: Thank you. Sir, I was just saying that on the
11 28 September letter, so this is the one that we got
12 after we made our application, Hausfeld acknowledges --
13 and I am here reading from paragraph 19 -- that they
14 have not responded to our letter in April and that they
15 will respond. But there are issues about the timing of
16 the response and the manner of the response.

17 So that is the outline of the application, and what
18 I would like to just show you, before focusing again on
19 the terms of the order that we seek, is some --

20 THE PRESIDENT: The order will be in the HS2-B bundle, is
21 it, the draft order?

22 MR. HARRIS: On this point there is no draft order. It is
23 a simple order that we seek, which is answers to all
24 outstanding requests from the September letter and from
25 the April 2021 letter, and on the latter point it has

1 been acknowledged in substance that Hausfeld will do it.
2 The question mark there is when they say best endeavours
3 which we do not accept and on the date.

4 MR. MALEK: Mr. Harris, this is where we got to yesterday,
5 so we are 100% with you on the substantive points. What
6 was outstanding, so far as I am concerned, is the basis,
7 because we have had an offer to answer the remaining
8 questions on a best endeavours basis, and the question
9 is, is that enough? Also, I need to know now whether we
10 are leaving open the option for your opponents to say
11 not entitled in response to certain questions or are
12 they going to say yes, they accept you are entitled to
13 answers and they will provide answers insofar as they
14 can. There is a big difference between that, and unless
15 we get that clarified now we can have another argument
16 further down the line.

17 I have read Mr. Bolster's tenth witness statement
18 and he covers it in paragraphs 136-138, and he accepts
19 a lot of the criticisms and the gaps he accepts. He
20 probably does not accept the extent of it, but let us
21 move on and really focus on the form of the order
22 because I think we are in a position where we are
23 inclined to make an order as you are asking for, but let
24 us figure out what the terms are going to be and the
25 timings.

1 MR. HARRIS: Sir, thank you. I am very grateful for that
2 indication.

3 We say as regards date that the answers should be
4 provided by 29 October but that, unsurprisingly, our
5 submission is that these questions have to now be
6 answered properly. So best endeavours is not
7 satisfactory.

8 The claimants have put together this data and we
9 have gone to extreme lengths to set out detailed
10 questions about what the data shows and why, for
11 example, certain data points have been chosen and not
12 others and why there are inconsistencies and what they
13 mean. This is all knowledge that lies in the hands of
14 the claimants who put together that composite masterdata
15 spreadsheet. So what we say is they should answer every
16 one of the questions.

17 I do accept -- and that should not be on a best
18 endeavours basis, that should be that we answer the
19 questions. I do accept of course that if there is no
20 answer or there is some legitimate reason why there
21 simply cannot be an answer, then they can explain in
22 their answer that there is no answer or there is some
23 particular reason why it cannot be given. But what
24 would be deeply unsatisfactory given that the first
25 letter was over a year ago and the second letter was

1 five months ago is if we are now met with obfuscatory
2 answers of the type you are not entitled to this or this
3 is irrelevant, or something like that.

4 So that is my simple submission, and I would invite
5 you to make an order by that date for answers to all the
6 questions in the September letter and the outstanding
7 ones, which is every one, in the April letter.

8 MR. MALEK: I understand the point about you do not want an
9 answer saying not irrelevant or not entitled, okay, and
10 we need to grasp that nettle now. If they are going to
11 run that argument in their response we need know that
12 because it is quite unsatisfactory, because I have been
13 through your RFI and the two letters. The questions
14 seem to be fine to me.

15 I can see some of the questions there may not be an
16 answer. Where you have two different figures which are
17 inconsistent, they may say we have put two figures in
18 because we just do not know which one is right, it is
19 one or the other but we just do not know, if that is
20 what their answer is going to be, that is absolutely
21 fine.

22 MR. HARRIS: Understood, and we agree, with great respect,
23 exactly. But what we cannot have is "not entitled to
24 this answer" or "irrelevant" or some other obfuscatory
25 response.

1 Can I just add one final point, which is they accept
2 in the 28 September letter of a few days ago that they
3 have not inputted all of the data from the underlying
4 documents into their composite master dataset. So there
5 is an example, for instance, of some underlying German
6 documents in respect of 30 lease transactions,
7 i.e. referring to 30 trucks, and it is accepted by
8 Hausfeld that they have only inputted the data from one
9 of the 30 and there is no apparent explanation for why
10 they have not inputted the data from the other 29.

11 What we say is that in answering the queries they
12 should also update their composite masterdata.

13 MR. MALEK: If they are going to do that, Mr. Harris, on the
14 29 as opposed to the 30, it may take more than the
15 29 October if they are going to do the actual updating.
16 I would have thought as long as they come back and say
17 "we will update", I do not think it is practical to say
18 that they have got to actually update by 29 October on
19 that particular example.

20 MR. HARRIS: Understood, sir. But we could certainly
21 bifurcate and have answers to the long, long outstanding
22 questions by the 29th and there could be a commitment by
23 a certain date to update the dataset. But let us not
24 forget this is data that they have long had and it is
25 their exercise and their spreadsheet, so it would not be

1 fair to bump it off into the long grass albeit it can be
2 a bifurcated process.

3 MR. MALEK: Exactly, but they have put a huge amount of
4 resources and effort into this and we all appreciate how
5 much time it takes to do this, and the reason why
6 I think it has taken so long to answer all your
7 questions is that it is complicated, it takes time and
8 resources.

9 MR. HARRIS: Some of them are not, of course, complicated --

10 MR. MALEK: Yes, but some of them are.

11 MR. HARRIS: Some of them have a degree of complexity but
12 some are ever so straightforward and have simply been
13 ignored.

14 MR. MALEK: They are going to answer them, but it is
15 a question of on what basis.

16 Shall we hear from the other side.

17 Submissions by MR JOHNSTON

18 MR. JOHNSTON: I am very grateful. Three or four points by
19 way of context.

20 Without wishing to engage in a tit for tat exercise,
21 it is inevitably the case that all of the parties at
22 various points have taken some time to respond to
23 correspondence. So there is nothing extraordinary or
24 unprecedented in this particular context. We squarely
25 accept that there has been a considerable time delay.

1 I am not minimising that but I am just merely pointing
2 out that this is not wholly unprecedented.

3 The second contextual point is that Daimler does
4 already have a considerable number of answers to its
5 questions.

6 THE PRESIDENT: I am sorry to interrupt you, Mr. Johnston.

7 There has been some confusion in the transcript. You
8 are Mr. Johnston and you are now appearing for VSW.

9 MR. JOHNSTON: Sir, I am very grateful. My apologies.

10 I did not introduce myself.

11 THE PRESIDENT: No, I'm just noticing the live transcript.

12 Just to make that clear.

13 MR. JOHNSTON: I am very, very grateful, sir.

14 The second point, you already have this point, there
15 is a lot of complaint and/or questioning as to whether
16 there are errors within the dataset. This is a point we
17 are going to have to come back to and canvass much more
18 fully in relation to our application. But you already
19 have the answer and I'm conscious that you have already
20 made the point, so I am not going to take you to it.

21 But in many cases, for example, where there are two
22 or three different prices in respect of one transaction,
23 that is because there may be two or three different
24 prices within the defendants' data and a third within
25 our data. What the claimants have not done at this

1 point is go through, hive off one and say that is the
2 only data point we are going to use, here is the
3 dataset. That is really a key point as regards the
4 application I am going to make when I make my
5 application in relation to the composite dataset.

6 So you have the point already, I am not going to
7 take you to examples of it now but we are very clear
8 that whilst there is a lot of talk of errors or it is
9 impossible to understand, firstly we have provided some
10 of those explanations, and secondly, what are called
11 errors in a number of these letters are actually just
12 multiple data points.

13 Sir, I think there is very little actually between
14 us. In fact, rather peculiarly, Mr. Harris' clients
15 suggested that we would respond by the 29th. My client
16 responded and said they would use best endeavours to
17 respond by the 20th. So rather earlier than Mr. Harris
18 was suggesting. I think the only thing between us is
19 the word "best endeavours".

20 If I can cut through Mr. Harris' concern that what
21 he is going to get is what he has described as a wave of
22 obfuscation, there may be some questions that it is not
23 possible comprehensively to answer. So a good example
24 of that would be which is the right price, and the
25 answer to that is, well, we can tell you what we think

1 is the right price, but actually, as I am going to come
2 on to and address you on later, we actually think the
3 parties need to engage amongst themselves, both sides'
4 economists, in relation to this common dataset to
5 determine what is the appropriate price. That is really
6 the gravamen of my application I am going to come on
7 later.

8 So there may not be answers to all the questions in
9 that sense, but we are not going to be responding saying
10 you are not entitled to an answer to this, this is all
11 completely extraordinary, we are not responding. That
12 is absolutely not our position. So the words "best
13 endeavours" therefore reflect the fact that there may
14 not be comprehensive answers to all of these questions
15 in part because what we are suggesting is a dialogue
16 between the parties in order to identify the answer to
17 these questions. We do not think there is a ready
18 answer that we necessarily should or, indeed, could
19 provide in that sense.

20 So, sir, we are not going to obfuscate or skirt
21 around these issues. Where we say we cannot answer this
22 question, then we will say we cannot answer this
23 question.

24 Just to touch on the final point that I think I need
25 to address you on, which is there has been

1 correspondence between Quinn Emanuel and my solicitors,
2 there have been a relatively small number of data points
3 or datasets that were only partially entered or
4 inadvertently missed. Absolutely, that material can be
5 entered into the composite dataset. It is not realistic
6 to suggest that it can be done by the 20th or 29th.
7 I will take instructions as to what a realistic date is,
8 but there is no concern on our side as to inputting that
9 data. The only question is whether we can do it by the
10 20th or 29th. Of course, we could not, but really they
11 are not connected, sir. They are not connected to the
12 answers to Mr. Harris' clients' questions, if I can put
13 that it way, and therefore that process is really
14 something separate.

15 If I can park that point, as it were, for now,
16 because there is as much bigger discussion between the
17 parties as to what needs to happen with the composite
18 dataset and who needs to do it, and that is my fourth
19 application that I am going to come on to.

20 So if I may, respectfully, sir, park that point and
21 Mr. Harris can have another bite at it, but I think that
22 is separate from this question about answers to letters.

23 MR. MALEK: What I am inclined to do, Mr. Johnston, subject
24 to the other members of the Tribunal is -- Mr. Jowell
25 wants to say something.

1 MR. JOWELL: If I may, I just wanted to make one thing
2 clear, which is that of course Mr. Harris for Daimler is
3 leading this application at the moment, but it is
4 important to bear in mind that Daimler is only
5 a defendant to the Wolseley proceedings and we have
6 written in addition on 21 April of this year and
7 followed up on 23 September of this year with similar
8 questions about the composite dataset which relate also
9 to the Veolia and Suez proceedings, for which we are
10 defendants and others as well. Those letters have gone
11 wholly unanswered. So we are hoping and assuming that
12 the responses that will be given by whatever date is
13 ordered will also respond to our queries as well, which
14 are somewhat wider in their scope than Daimler's.

15 MR. MALEK: I think that is a bit too far for this CMC.
16 I think what we should do is get the answers to
17 Daimler's request, not on a best endeavours basis but
18 answers by 29 October, with a date to be given by the
19 end of today for the updating of the composite dataset.
20 It may be that as long as we have it within a month
21 after that, I am sure Mr. Harris will be content with
22 that, but I appreciate it takes time to update.

23 We understand Mr. Johnston's points about some
24 things may not have an answer, but you can put that in
25 your answer. You are perfectly entitled to do that.

1 MR. JOHNSTON: Sir, can I make one more point, and apologies
2 for interrupting.

3 There is a further question of principle, which is
4 whether or not the Tribunal should be ordering the
5 parties to engage in inter partes correspondence and
6 ordering the parties to respond to correspondence by
7 a particular date. In circumstances where it has been
8 agreed between us that we will correspond with one
9 another, and it may be worth the Tribunal knowing for
10 context, I am sure you are aware of this, that all of
11 the parties have been writing to each other in advance
12 of this. Matters have fallen away from the CMC when
13 parties have said, look, we will answer that point by
14 this date, we will answer that letter by this date or
15 respond to that by this point, or we will go away, we
16 will come back to you.

17 So we do have a concern -- I think, sir, Mr. Singla
18 was temporarily unmuted by mistake. We do have
19 a concern about the Tribunal making orders for parties
20 to answer letters in circumstances where the ordinary
21 course of this litigation and, indeed, all litigation,
22 candidly, between the parties is we have said in writing
23 we will respond by the 29th, we hear what you say, sir,
24 which is that you think best endeavours is not the right
25 formulation for it. We are content and we hear that.

1 But we do not think it is appropriate for this to go
2 into an order.

3 That is something that you will see across all of
4 the disclosure applications. Where the parties have
5 said we seek this particular category of documents and
6 a party has responded and said we are content to provide
7 it, then it has been agreed between the parties that we
8 are not going to enter that into an order. Where the
9 parties have agreed the position, it is not a matter
10 that needs to go into an order.

11 There are some elements that have been put in
12 consent orders, sir, but the overall position is that
13 things have not been put into an order. Particularly,
14 sir, when it comes to correspondence, there is something
15 slightly peculiar, with the greatest possible respect,
16 about an order to correspond on an inter partes basis.

17 So you hear what my client says about what they are
18 going to do, and in the circumstances we say that is not
19 necessary, nor indeed actually appropriate in this
20 context.

21 MR. MALEK: I have made a very large number of orders in
22 this case already and I am making orders about once
23 a week. So a lot of these issues do actually end up in
24 an order. But what is unusual about this one is (a) its
25 importance, and (b) how long it has been taking to get

1 to where we are.

2 So I am inclined on this one occasion to say this
3 should be an order, but it should not, as you say, be
4 used as a precedent that every time there is an issue on
5 correspondence an order is made.

6 Yes, Mr. Singla.

7 MR. SINGLA: Sir, I am grateful for that. We certainly
8 support Mr. Harris' application, but I just wanted to
9 say something on behalf of Iveco, which really builds on
10 what Mr. Jowell was saying, which is in my submission
11 a rather important point. I want to deal with it now
12 because it will feed into Mr. Johnston's application
13 later, which concerns his reconciliation exercise.

14 So the position is that Daimler have asked questions
15 and, as you know, Mr. Harris wants further answers, but
16 Mr. Jowell's clients are in the Veolia and Suez
17 proceedings, and Iveco's position has been that we have
18 not ourselves asked any questions because we have been
19 happy for our experts to, as it were, adopt the
20 questions that have been asked.

21 But our experts are firmly of the view that it is
22 impossible to understand the VoC data across all three
23 sets of proceedings, and when we come to hear the VSW
24 application our position will be that it is in fact
25 premature for the Tribunal to be making any orders as

1 regards what the defendants should be doing in terms of
2 reconciliation until we have had our answers to all of
3 the questions that have been put across all three sets
4 of proceedings.

5 Mr. Malek, I just wanted to say something now,
6 because you I think tentatively suggested that it was
7 maybe going too far at this CMC to make an order in
8 respect of MAN's questions, but I just wanted to head
9 this off at this stage because I do not want that to be
10 a final decision taken now and for it then to be
11 a decision we cannot revisit later in the context of the
12 Hausfeld application.

13 I will be showing you if necessary what Compass
14 Lexecon are saying in the context of the VoC disclosure
15 application about the difficulties they are having. So
16 if we only have an order now in respect of the Wolseley
17 proceedings, that, with respect, will not progress
18 things very far at all.

19 MR. MALEK: I understand that, but the difference is that
20 Mr. Harris took out an application, it has been
21 outstanding for such a long period of time, there is
22 a lot of evidence on it that we are in a position
23 ourselves to take a view on the requests that he has
24 made, and we have made our decision on that.

25 As regards other parties' letters, I am not sure

1 whether we are in a position today to make orders, and
2 it may be sensible that if we move on the next part of
3 the application we deal first with Mr. Johnston's
4 application in relation to the composite dataset,
5 because that is one of the big issues that we need to
6 get resolved. I understand that it is the defendants'
7 position that, yes, there may come a time when it should
8 be required to give some input and come up with our own
9 version or to complement the VSW version, but it is not
10 until VSW has got its act together in the way that you
11 have suggested in your submissions in evidence that we
12 should get to that stage. So I think let us go that
13 point now, Mr. Johnston.

14 MR. SINGLA: Sir, can I briefly just give you the date of
15 the MAN letter. In a sense this is Mr. Jowell's fight
16 to have --

17 THE PRESIDENT: Mr. Singla, no. I think we have an agreed
18 agenda, agreed by you all. As Mr. Malek said, we are
19 dealing with Daimler's application, item 8 or A8 on the
20 agenda, on which we have had evidence. I think that has
21 been effectively resolved. We have got agreement on the
22 date and the form of the order Mr. Malek has indicated,
23 and I think that resolves that application and that
24 item.

25 When we come to hear VSW's application about the

1 form of disclosure then you can take us to any documents
2 that you want within reason. But let us just deal with
3 this one now.

4 MR. MALEK: I think we have finished this one. I think we
5 should now go back to the applications by VSW, and it is
6 up to them as to which one they want to start off with.
7 You have got four applications: dependent dealer channel
8 sales data, leasing data, the German market-wide
9 disclosure and the composite dataset. What we will do
10 is we will go through each one one by one and make
11 a ruling before we move on to the next one.

12 So, Mr. Johnston, it is up to you which way you want
13 to take it.

14 Disclosure Applications

15 MR. JOHNSTON: Sir, I am mindful of two things, firstly your
16 indication that the consolidated masterdata application
17 is particularly important. I was intending to deal with
18 that fourth. I am very happy to take it first. I am
19 conscious that it may be one of the most detailed and
20 possibly contentious of our applications.

21 Can I, just by way of introduction to our
22 submissions and our applications, make a small number of
23 points mostly to update the Tribunal on how matters have
24 moved on, even in the last 24 hours?

25 You are absolutely right, we have four applications

1 that we advance, and can I just check, I am conscious
2 that one of the members of Tribunal said they were
3 working from a hard copy bundle, that you have a copy of
4 {HS2-B/31/1} in your hard copy bundle. I only ask
5 because it was added relatively late.

6 MR. MALEK: We have got that now, it was put in this
7 morning. Thank you very much.

8 MR. JOHNSTON: If I can, there is one point that, if you
9 could turn it up, so it would be {HS2-B/31/4}, there is
10 one small point that has arisen overnight in
11 correspondence that I think that it is best if I address
12 you on now, and that is the definition of "Own Second
13 Transaction Data".

14 It has been very helpfully pointed out by, I think,
15 Herbert Smith, that the definition on page 4, the second
16 from the bottom of the bullet points, of owned "Second
17 Transaction Data", omits the final words "extracted from
18 the defendants' own databases".

19 Now, that is certainly implicit in own second
20 transaction data, but it is absolutely right,
21 Herbert Smith have pointed it out, that that was the
22 definition taken across from the Redferns into the
23 skeletons, it's been omitted from here. But I just
24 wanted to clarify and tidy off that point before we go
25 any further.

1 Sir, maybe by way of update --

2 THE PRESIDENT: Sorry, you have lost me. If you look on the
3 screen.

4 MR. JOHNSTON: Sir, I was not looking on the screen. It has
5 already been added in, sir, you are absolutely -- it is
6 pointed out to me that the version that I have in my
7 bundle does not have those words in.

8 THE PRESIDENT: We have got it, so that is correct.

9 MR. JOHNSTON: That is correct as is. I am very grateful,
10 sir. I was working from my hard copy bundle by
11 reference to the correspondence last night.

12 A few points to just update the Tribunal on how
13 matters have moved on. We are mindful of what was said
14 last night in terms of the Tribunal's provisional
15 indications in relation to various different
16 applications, and particularly mindful of the indication
17 that where the claimants have not carried out reasonable
18 and proportionate searches in respect of VoC2/01 and PO1
19 to 2, then the Tribunal's starting point is that further
20 searches should be carried out such that that standard
21 of search has been completed.

22 That application in the light of the Tribunal's
23 indication is no longer being resisted, and part of the
24 reason that I make this point now orally is that I know
25 there was a letter going out to that effect as the

1 hearing began. So I wanted to make sure the other
2 members of the counsel teams were aware of it in very
3 simple terms because it may well not have filtered
4 through to them.

5 Now, sir, you will be aware our position is that
6 there may very well not be additional documents pursuant
7 to those searches, but the searches will be done on that
8 basis and we hear what you say about it.

9 MR. HARRIS: Sir, I am so sorry to interrupt, but just so
10 you know, there does remain an issue on that topic,
11 which is the nature of the disclosure statements. So
12 I do not need to address that now --

13 MR. MALEK: Let me deal with that now, because on that what
14 I envisaged was that in relation to those entities which
15 have already done, let us say, the higher standard
16 review, I still think it would be sensible to have
17 a disclosure statement from them just confirming what
18 they have done, what searches have been done and how you
19 get to that stage of saying what we have done is
20 reasonable, proportionate. There may be some other
21 database we have not looked at, but explain why that has
22 not been done. I think that would be very helpful if we
23 have that.

24 MR. JOHNSTON: My intention was to address you on this point
25 at that stage, sir.

1 My position, just to sketch it out, is that VSW's
2 position is going to be, and is, that in the light of
3 what is already in the case, and what I mean by that is
4 the procurement statements which explain what has been
5 done, the POM statements which explain in certain other
6 respects what has been done, and the disclosure
7 statements, combined with what Mr. Bolster has said,
8 effectively what is being sought is a document to bring
9 together what is already there. We say that is
10 duplicative, but I think the best thing to do is to
11 address you on that. I am conscious that Mr. Harris is
12 shaking his head. Best to address you on that when we
13 get there. I was really trying to sketch that out --

14 MR. MALEK: The reason why one normally has that in the
15 disclosure statement is that the disclosure statement
16 pulls everything together and it has a statement of
17 truth by the relevant person. So I do not think it is
18 particularly satisfactory to have it in across three or
19 four different documents. I think it really does make
20 sense to have it in one place. If you say you have
21 already given that information, it is not going to be
22 a big deal to incorporate it in a disclosure statement
23 in the normal way. So I would be inclined to say that
24 is what you should do, as I said last night.

25 MR. JOHNSTON: Sir, I am happy to either address you on this

1 in full now or to revert to it when we get to the
2 defendants' applications. I am in your hands as to how
3 to deal with it.

4 I am at least briefly going to seek to persuade you
5 that by showing you the existing disclosure statements
6 and the existing pricing statements, which are of course
7 attested by statements of truth, and also of course
8 Mr. Bolster's statement has a statement of truth, that
9 this really is duplicative. But I am conscious -- I am
10 very happy I am in your hands whether you want to
11 address that point now.

12 My intention was to just outline areas where matters
13 have moved and then come back to them. So I am in your
14 hands.

15 MR. MALEK: I am a very simple person, you know, I like to
16 have it all in the right place, all in one place, a
17 disclosure statement says in the normal way what it has
18 done, and it is not great to have to look at other
19 documents to have to pull all the threads together.
20 I do not think it is going to be a huge job to do it, to
21 be honest, and I am having difficulty understanding why
22 you are reluctant to do that.

23 MR. JOHNSTON: Sir, can I suggest this, then, which is that
24 given that we need to make the VSW applications first in
25 any event, I can take instructions on that over lunch

1 and I will revert. I hear what you say, sir.

2 MR. MALEK: That is fine.

3 MR. JOHNSTON: Perhaps it is easiest if that point is
4 parked, as it were, until we get to that application.

5 MR. MALEK: It is just that disclosure in this case is
6 complicated enough as it is and if we do not have the
7 disclosure statements in the right place, for me it is
8 just an added complication. There are so many
9 disclosure applications in this case, you know, it is
10 like once a week I am dealing with it, and if we start
11 making exceptions it is going to be difficult to manage.

12 MR. JOHNSTON: Sir, I hear what you say. I will revert if I
13 can after the short adjournment.

14 The third point I was going to address you on was
15 Daimler's application for 31.14 or Rule 61 disclosure.
16 I am not going to address you on this now. I was going
17 to update you on it to let you know that that matter had
18 gone away. In correspondence between the parties, it
19 had been agreed that five of the seven categories would
20 be provided where they can be obtained by way of
21 reasonable and proportionate searches, two of them would
22 not. That had been agreed in correspondence between the
23 parties. There had been a phone call between the
24 solicitors because there was an outstanding question
25 about whether or not costs were being sought. Daimler

1 had confirmed they were not seeking costs.

2 As I sat down this morning I was told that actually
3 Mr. Harris' client has changed its mind. So apparently
4 it may be that I am wrong and that matter has not been
5 agreed; I understood it was agreed when I sat down this
6 morning. Mr. Harris may be able to assist us.

7 So it is for later in the day, but it might be
8 useful at least for my purposes to know whether
9 Mr. Harris' client has changed its mind.

10 MR. MALEK: It is a very simple point. What we have been
11 doing on all these applications I have had, is by and
12 large I have not been making any adverse costs orders
13 against anyone because I realise what a big and
14 complicated job this whole thing is and there is a lot
15 of give and take. The view I take is unless someone is
16 acting wholly unreasonably, then I have not been making
17 any orders, and I think it would be unfair to make an
18 order just in relation to this one very minor
19 application when we have not been doing it across the
20 board.

21 It works both ways, because Mr. Harris may have an
22 application which I resolve and he might not want to
23 have an adverse cost order against him.

24 So, Mr. Harris, where are we on this?

25 MR. HARRIS: The issue is not about costs. The issue is

1 that my learned friend's team conceded at the eleventh
2 hour on items -- of seven categories on items 1 to 5 but
3 not 6 and on 7. Then we were told that actually they
4 had not conceded on item 5, that was a typographical
5 error. So as of yesterday the suggestion was made that
6 my learned friend would give us items 1 to 4 inclusive,
7 not 5 and not 6, but 7.

8 Against that background, we decided that that was
9 largely a done deal and that we would not have to pursue
10 costs. But the difference is that the Tribunal,
11 sensibly, if I may respectfully put it this way,
12 yesterday made the suggestion that as regards the
13 documents that had been mentioned or arguably mentioned,
14 which includes categories 5 and 6, that the sensible and
15 proportionate way, doing this sensibly in the round and
16 trying to make substantive progress, would be to give
17 samples.

18 MR. MALEK: That is what I said yesterday, a sample one,
19 yes.

20 MR. HARRIS: That is now resisted by my learned friend, and
21 what we say the outstanding issue therefore is on
22 items 5 and 6, should you give nothing at all, which is
23 what Mr. Johnston is saying should be the position, or
24 should you in fact give samples on items 5 and 6, which
25 is what we say you should give.

1 Just to remind you, they are, both item 5 and 6
2 reads "contracts with key account customers", quote,
3 unquote. So what we respectfully contend is that you
4 should make an order that they give sample disclosure on
5 items 5 and 6. There is no question of costs arising
6 at all.

7 MR. MALEK: The view I take on 5 and 6 is that that does fit
8 within expandable against Rubin, and it is mentioned.
9 But there is this question of proportionality at the
10 second stage, and the court has a discretion despite
11 that to make some other order. The order I was
12 mentioning yesterday on those was that you just give
13 a sample, give one example of each, so we can just see
14 how the process worked. Because the statements say this
15 is the process, and it is unfair saying this is the
16 process referring to types of documents without at least
17 producing one so you can actually follow the statement
18 clearly.

19 MR. HARRIS: Precisely so, sir. If I may just add, you will
20 have noted that throughout Bolster 9 and Bolster 10
21 repeated reference is made back to the POM statements,
22 which of course includes the documents to which they
23 refer as being this is why we have given you what you
24 need.

25 MR. MALEK: Yes. Let us see what Mr. Johnston says. It is

1 not a big job to give samples on 5 and 6.

2 MR. JOHNSTON: Sir, let me put it this way. I am very
3 grateful that Mr. Harris has clarified what I was told
4 at 10.00 am this morning, which was that his client has
5 now changed its position.

6 Having agreed that 1 to 4 and 7 were sufficient to
7 dispose of the application in the light of what was said
8 last night, Mr. Harris' client has now reverted and said
9 no, we have changed our minds, we would like 5 and 6 as
10 well.

11 Sir, I am grateful for that indication. I had not
12 prepared on that basis. I think the sensible thing is
13 either for me to address you as I can now or for
14 Mr. Harris to make the application on the amendments.

15 MR. MALEK: Maybe you two should speak about it, because I
16 really do not think -- you know, we have so many people
17 around listening to this and it is a very minor point,
18 it is not a huge job for you to do it on a sample basis,
19 as I indicated yesterday. We are going to have a break
20 now anyway, so I suggest that you and Mr. Harris speak
21 during this break and we will see where we are.

22 MR. JOHNSTON: Sir, I will take instructions on the basis
23 that the application is renewed in that manner.

24 MR. MALEK: Okay.

25 THE PRESIDENT: Yes, so we will come back at 20 to 12.

1 I just mention, Mr. Jowell, your hand has been up, but
2 it might be an old hand, so you might over the break
3 want to lower it.

4 Thank you. So we are back at 20 to.

5 (11.28 am)

6 (Short break)

7 (11.47 am)

8 MR. HARRIS: I am so sorry, but that is ...

9 MR. MALEK: Mr. Johnston, have you had the opportunity to
10 speak to Mr. Harris?

11 MR. JOHNSTON: I have exchanged emails with Mr. Harris, sir.

12 THE PRESIDENT: Sorry, can you just pause. We are waiting
13 for the live feed.

14 MR. MALEK: Yes, Mr. Johnston.

15 MR. JOHNSTON: I have had the opportunity to exchange emails
16 with Mr. Harris over the break. My client is content
17 and we have agreed between us that we should provide one
18 contract in respect of category 5 and one contract in
19 respect of category 6, and I think that matters goes
20 away, sir.

21 MR. MALEK: That is now resolved, okay. Have you got
22 instructions on the timing for the update for your
23 composite dataset in relation to the RFI application?

24 MR. JOHNSTON: Sir, this is a more nuanced and complicated
25 point because to the extent that what is being sought by

1 way of an update is the matters that have been canvassed
2 in correspondence between my client and Mr. Harris'
3 client and the inputting of that data --

4 MR. MALEK: That is all I am asking about.

5 MR. JOHNSTON: -- that can be done in a short period of
6 time. Of course there is a bigger process at the
7 moment, the defendants have agreed to provide us with
8 a large volume of additional data, some of which we have
9 not even got yet.

10 MR. MALEK: Of course, yes.

11 MR. JOHNSTON: But in respect of the specific materials that
12 have been canvassed in correspondence between my client
13 and Mr. Harris, I am just checking behind me that a date
14 in January at the latest, I think, would be fine, sir.
15 So ...

16 MR. MALEK: So, shall we say 13 January?

17 MR. JOHNSTON: 13 January, sir. I am grateful.

18 Sir, I can also revert in relation to the matter
19 that we discussed. I said I would take instructions
20 over the short adjournment. I was actually able to take
21 instructions over the shorter break in relation to
22 disclosure statements.

23 Sir, we have heard what you have said. We have
24 taken your indication. We are content to provide
25 disclosure statements. Where claimants have already

1 provided reasonable and proportionate disclosure, they
2 will provide a statement setting that out and
3 effectively amalgamating what is already in other
4 places --

5 MR. MALEK: That is fine.

6 MR. JOHNSTON: -- into that context, sir.

7 MR. MALEK: That is very helpful. That is very constructive
8 of you to do that. So that resolves, hopefully, any
9 issues on PO1 and PO2 and VoC2/01.

10 MR. JOHNSTON: Exactly so, sir.

11 MR. SINGLA: Sir, that is not correct. I am sorry to
12 interrupt. That is not correct, because I can explain
13 now, in a nutshell, why that is not correct.

14 MR. MALEK: Just give us a nutshell quickly, yes.

15 MR. SINGLA: The offer, if I can call it that given that it
16 was made in response to your multiple indications, the
17 offer we have had for disclosure statements only is in
18 respect of those claimants where Mr. Bolster claims that
19 they have already conducted reasonable and proportionate
20 searches. But there are other claimants where he does
21 not even make that claim, and in respect of those
22 claimants there is therefore a live issue because we say
23 the same order should be made, i.e. reasonable and
24 proportionate searches. But for those claimants we are
25 expecting further documents, it is not merely a case of

1 further disclosure statements, because even on the
2 claimants' own case it has not done those searches.

3 MR. MALEK: Can Mr. Johnston reply to that because I think
4 there is going to be a short answer to that.

5 MR. JOHNSTON: I think I can cut through that.

6 I have already said this morning to the extent that
7 Mr. Bolster has not identified that they have done
8 reasonable and proportionate searches, they will carry
9 out -- To the extent that those claimants have not done
10 reasonable and proportionate searches, they will do so
11 and they will provide additional disclosure which is
12 responsive to those searches and a statement
13 accompanying it saying that they have carried out
14 reasonable and proportionate searches. So I do not
15 think there is any issue between us.

16 MR. MALEK: I think it is a misunderstanding because you
17 were quite clear.

18 Mr. Singla, you do not on need to worry about that
19 point. There are two categories. There is the category
20 that already, they say, has done a reasonable and
21 proportionate search, will get disclosure statements.
22 The ones who have not done that at all, they are being
23 required to do it for the first time.

24 MR. SINGLA: I am grateful. The confusion arose because the
25 letter from Hausfeld overnight was different to what

1 Mr. Johnston said.

2 But in relation to PO1 and PO2 I am not sure that
3 the position is exactly the same, because in broad terms
4 we are seeking the same order. So you are right in that
5 respect. But as I understand it at least, there is
6 actually an issue as regards the scope of those
7 categories.

8 Now, if that has fallen away then great, we have
9 made a lot of progress. But there is that issue that
10 does not arise on the VoC side of things. So there is
11 the reasonable and proportionate issue plus a scope
12 issue.

13 MR. MALEK: We will not get to that straightaway. I suggest
14 that you speak to Mr. Johnston during the luncheon
15 adjournment to iron that out. If there is any remaining
16 issue we will deal with it this afternoon, or if we run
17 out of time we will deal with it on a Friday afternoon
18 in the next month or so. So we will resolve it, do not
19 worry. We will get to the end of that one.

20 Yes, Mr. Johnston. We are now --

21 MR. SINGLA: Sir, I am very grateful.

22 MR. MALEK: We are now back to where we were before and we
23 have got the four categories. I have said it is really
24 up to you as to which one you want to start with.

25 MR. JOHNSTON: Sir, I am mindful of your indication that it

1 might be helpful to start with the consolidated dataset
2 application, and I am going to start there.

3 My suggestion is that after that, I deal with
4 market-wide disclosure in Germany because to some extent
5 some of the applications in relation to, for example,
6 dependent dealer data will go with the market-wide
7 disclosure application. To the extent that there is no
8 market-wide disclosure ordered, for example, in relation
9 to some of the defendants, then there would not be
10 dependent dealer disclosure further with it. So I think
11 that is the appropriate order.

12 MR. MALEK: We will deal with composite dataset now and then
13 we will deal with the German market-wide disclosure,
14 okay.

15 MR. JOHNSTON: Precisely.

16 MR. MALEK: That is only in relation to DAF Scania and
17 VT/RT, and I have seen Bolster tenth, paragraph 70 to
18 76. So some of those issues may have been resolved,
19 some are outstanding.

20 MR. JOHNSTON: Some have been resolved, some are
21 outstanding, some may or may not be resolved depending
22 on the position you take in respect of market-wide
23 German disclosure as well, sir.

24 I am grateful for that indication, I will speak more
25 slowly and more clearly to the extent that I can.

1 MR. MALEK: Okay.

2 MR. JOHNSTON: If I can address you on the composite
3 masterdata application, sir, it is worth stepping back
4 and explaining or remembering what is in issue here.

5 Following the last CMC, VSW engaged in a very
6 substantial process whereby they went back to the master
7 RFIs and they consolidated those and enhanced them by
8 way of adding in, cross-referring, drawing on all of the
9 different sources of data, seeking to create this single
10 set of material, cross-checking between the sources and
11 so on and so forth.

12 The purpose of doing that is to create the best,
13 most reliable, most comprehensive dataset that all of
14 the experts in this matter can rely on. That is
15 something that I stress right at the beginning of this
16 application, that what we are talking about here is a
17 dataset that goes to two important questions: firstly,
18 to VoC, of course; but secondly, this is the dataset
19 that all of the experts will be relying on for the
20 purposes of overcharge.

21 So in that respect, the composite dataset is
22 a shared or a common dataset, and the process that we
23 are effectively asking the defendants to engage in is
24 a common or a shared enterprise. So that is my starting
25 point.

1 MR. MALEK: On that, what you do not want to happen is that
2 you do your composite dataset and then you find that
3 people sort of start disagreeing with it and then saying
4 that it is all up for grabs and then it is just
5 a complete mess.

6 What the Tribunal will clearly want at the end of
7 the day is one dataset that is agreed between the
8 parties, albeit there may be some aspects of it which
9 you cannot agree and there are questions up in the air,
10 that everyone can work from, and the question is how do
11 we get there.

12 Now, when you look at what, for example, Daimler and
13 Iveco have been saying, is that, you know, is it really
14 the right time now to require them to come in with their
15 input. The way I was looking at this, as I indicated
16 yesterday, is maybe what we need is a bit more work on
17 your side to get to the next version of that and then
18 require the defendants to actually respond to it.

19 Now, I do not think it is sensible to require the
20 defendants to produce, to reinvent the wheel and produce
21 their own versions. What is far better for you is for
22 them to come back on your dataset and help you fill in
23 the gaps.

24 Now, there is an argument that some people have
25 raised which is we should not be required by way of, in

1 effect, an RFI to make your case. We have had that
2 argument before on one of the Friday hearings. There is
3 nothing wrong with an RFI which in effect requires you
4 to help to prove the claimants' case. That is the whole
5 purpose, or can be one of the purposes of an RFI which
6 is to get evidence. If you look in an action for an
7 account, for example, you are requiring the defendant to
8 produce basically the evidence to prove the claimants'
9 case. So I am not attracted by that.

10 But the question is of timing. Is this an issue
11 that we should resolve today, or should we be saying you
12 get the further disclosure that you have been asking
13 for, you update your composite dataset and then, either
14 on a subsequent Friday hearing or at the next CMC, we
15 come back to it and then say, okay, now we have got as
16 far as you can go, let us see what we can require the
17 defendants to do.

18 So I am happy to hear the full argument, but as
19 I indicated yesterday I am very much on your side when
20 it comes to having a document that we can all agree and
21 we can all work from, but it is a question of when and
22 what form that input should be.

23 MR. JOHNSTON: Sir, I am very grateful for that indication.
24 You have anticipated many or most of the points that
25 I was going to make.

1 The critical concern from VSW's perspective is that
2 we do not go to trial with ships passing in the night in
3 relation to this composite dataset. That is not
4 a purely selfish aspiration, if I can put it that way,
5 it is a concern from the Tribunal's perspective. If we
6 have experts calculating overcharge by reference to
7 different prices of trucks at different weights and
8 different respects, the Tribunal simply is not going to
9 be able to find a way through that thicket. There will
10 be ships passing in the night.

11 So our concern is to ensure that where possible, and
12 it may not be possible and it may be that what has to
13 happen is that the parties set out their positions on,
14 for example, which is the most appropriate price of the
15 three or four prices we have by reference to this truck,
16 and maybe that is a point that has to go to trial. But
17 at the very least our primary concern with this
18 application is to establish that it is for the
19 defendants to engage with this process at some point.

20 So, sir, my submission was going to be, there are
21 two questions here: firstly, there is the question of
22 principle. The defendants say we should never have to
23 do this, we will not be able to help, and in any event
24 this is your data so we are not going to engage.

25 Sir, I hear your answer to that question. It is

1 extremely helpful to have that indication now. The
2 second question, as you identify rightly, is time, sir.
3 I obviously need to take some brief instructions in the
4 light of what you have said, which has cut through
5 a portion of this. But, sir, the starting point from my
6 client's perspective is that it is most important that
7 the defendants will do this at some point.

8 The question of whether they do it now or they do
9 it -- if the next process is for us to circulate an
10 updated version and then there is an order for the
11 defendants to do that in three months or six months
12 afterwards, then we are not primarily concerned with the
13 chronology, if I can put it that way. We are concerned
14 with the principle, and we hear your very clear
15 indication that the defendants will have to go to this
16 dataset and supplement it.

17 Sir, I was planning to explain to you in some detail
18 why we say the defendants can improve this dataset by
19 reference to the data. I am currently minded not to,
20 because I think you are already persuaded that this is
21 something that they are going to have to do and it would
22 be a useful and a valuable exercise.

23 So, sir, I am currently minded not to open that for
24 you unless you say it would be helpful at this stage --

25 MR. MALEK: There are two points, okay.

1 The first is people have the opportunity to say what
2 they wanted to say, and I have obviously read the
3 evidence and the skeletons. So they have had that. The
4 idea when you are dealing with disclosure issues like
5 this, the hearing is just to really to iron out various
6 issues. But by and large everyone has done their
7 advocacy in these detailed skeleton arguments and all
8 this evidence, so I can understand where we are and
9 I have already said we are very sympathetic with you
10 that we do want a composite dataset that everyone can
11 work from. So you have got to that stage.

12 Secondly, do we have jurisdiction. I have no doubt
13 that we do have jurisdiction. It is Rule 4(5) of the
14 Rules: Case Management and the general principles I have
15 already indicated. So it is really a question of do we
16 need to make an order at this CMC or do we go back to
17 what I indicated yesterday, which is that you do the
18 further work, you get the further disclosure and then we
19 deal with this either on a Friday hearing or we deal
20 with it at the next CMC, which is now in February.

21 Because we do still have quite a lot of stuff to go
22 through, and I am conscious that, you know, it is
23 already 12 o'clock and we have had two hours already of
24 this CMC. But I think probably it is better to briefly
25 hear what the defendants have to say about this aspect

1 and then, if necessary, we will give a ruling before
2 lunchtime, or we may decide to say no, we will deal with
3 this at the next CMC.

4 MR. JOHNSTON: I am grateful to pause there then, because I
5 think it might be worthwhile knowing whether the
6 defendants are seriously going to contest two points,
7 firstly, whether they could do anything useful and
8 whether as a question of principle they should do this.
9 If they are not going to contest either of those matters
10 then I do not propose to address you on it and take up
11 the Tribunal's time.

12 So I am going to make way for my learned friends to
13 do that, and if I need to I will respond. Is that
14 perhaps the most sensible way to deal with it?

15 MR. MALEK: I think that is very sensible. I think
16 Mr. Singla is the person who is taking the lead on this
17 at least for now.

18 Mr. Singla.

19 Submissions by MR. SINGLA

20 MR. SINGLA: Mr. Malek, thank you.

21 Our position is that what you said yesterday and
22 what you have just outlined is precisely the way
23 forward. We do not actually understand Mr. Johnston's
24 concern or statement that the defendants have said they
25 are never going to engage. Mr. Farrell's evidence is

1 absolutely clear. We just say this is premature. They
2 should do their work and then we should revisit this.
3 So I actually do not have anything to add to your
4 indicative suggestion.

5 MR. MALEK: That is fine. Mr. Singla, I think where we are
6 is where we were last night, which is that I have
7 indicated that the defendants should co-operate in this
8 process, and I think they all will, and I do not think
9 we need to make an order today to that effect because we
10 all understand what needs to be done. What we do is we
11 get VSW to review the further disclosure that is going
12 to come through and at an appropriate time come back
13 before the Tribunal, whether it is at the next CMC or on
14 a Friday application, and we will then go in detail as
15 to exactly what needs to be done and by whom.

16 We are all working in the same direction and
17 everyone is going to be co-operative, and we understand
18 where we are on that.

19 MR. SINGLA: Yes, absolutely.

20 I am surprised actually this has taken so much time.
21 But to just add a footnote, which is to refer back to my
22 point earlier that whilst you have made an order in
23 respect of Daimler's questions, it is going to be
24 important for the VSW claimants to engage with MAN's
25 questions which relate to the Veolia and Suez as well.

1 MR. MALEK: I fully understand that. I think on that aspect
2 what we should do is let us get the answers in to
3 Mr. Harris' application and then you will see what is
4 really outstanding between you. Then perhaps you could
5 write to VSW and say, look, we understand you have given
6 the information already to Mr. Harris' clients. These
7 are the particular questions which are still
8 outstanding, and then one would hope that they will
9 agree that they are going to answer those and, if not,
10 come back and we will deal with it on a Friday or I can
11 deal with it on paper.

12 But clearly, I have not been through all your
13 questions, I have not satisfied myself in the same way
14 as Mr. Harris' questions, so I am really not in
15 a position to make an order to that effect today. But
16 if we can just wait until we have got the answers to
17 Mr. Harris' questions, then you will see what is really
18 outstanding. Then you write to VSW and say these are
19 the particular questions that we want answered, and then
20 we can go from there.

21 Is that all right, Mr. Johnston? Is that a fair way
22 of dealing with both of those issues?

23 MR. JOHNSTON: Sir, I am very content to proceed on that
24 basis. I am very grateful for Mr. Singla's indication
25 that the defendants will at a certain point to be agreed

1 in the future engage in filling in the blanks and
2 duplicating the data and so on and so forth. That is
3 extremely helpful. So I do not propose to address you
4 on this any further. The only question I need to
5 address you on, I think, and I propose to do this
6 immediately after the short adjournment, is when is the
7 best date to provide the next iteration.

8 Sir, that is because this is a dataset that, if
9 I can put it this way, is always moving and there is
10 disclosure that we are shortly to receive. So it is
11 difficult -- we can input the relatively limited matters
12 that have been canvassed in correspondence with
13 Mr. Harris' client. I think I need to talk to my
14 instructing solicitors to agree when is going to be the
15 best point in light of what we just have received or are
16 about to receive. I anticipate it will be next year.
17 Then that will enable us then to have a discussion about
18 what happens next, sir.

19 But I think it is probably best if I give my
20 instructing solicitor some time to mull that point and
21 revert immediately after lunch, if I can.

22 THE PRESIDENT: That is absolutely fine.

23 Mr. Jowell?

24 Submissions by MR. JOWELL

25 MR. JOWELL: Thank you, sir.

1 May I just put down a marker, which is that we did
2 write the letter in which we sought this information
3 back in April and we have not had any response,
4 literally no response, despite chasing again in
5 September.

6 The answers to Mr. Harris' questions will relate to
7 the W in VSW, they will not relate to the V or the S,
8 and if I may put in a plea, which is just that, or
9 a marker if you like, that it would be very helpful if
10 VSW were able to seek to respond to our questions
11 perhaps even before or at least at the same time as
12 responding to Daimler's questions, because otherwise we
13 are going to be waiting effectively almost a year before
14 our questions are then even begun to be answered.

15 Just a plea, if you like.

16 MR. MALEK: I understand that, Mr. Jowell. But as regards
17 Mr. Harris' questions, that has got to be the priority
18 because they are under an order and they have got to get
19 it right.

20 MR. JOWELL: Okay.

21 MR. MALEK: I think that as regards your questions, I agree
22 that you should have answers to your questions. I agree
23 those answers should be this year rather than next year,
24 all right. I am not going to put a guillotine now, but
25 I do think that we should get it this year and that

1 Mr. Johnston should try and do that.

2 But you can resolve that amongst yourselves about
3 timing, and if there is an issue you write to the
4 Tribunal, send a copy of the letter that you say has not
5 been answered and I can give a date and we can deal with
6 that that way. But hopefully by speaking to
7 Mr. Johnston you will agree a timetable for at least the
8 first initial response to your letter. It has been
9 outstanding for, as you say, since I think since about
10 April.

11 MR. JOWELL: I am very grateful for that indication. Thank
12 you, sir.

13 MR. MALEK: Yes, Mr. Johnston, are you happy with that? Can
14 you give an initial response to the April letter by the
15 end of this year?

16 MR. JOHNSTON: Sir, I do not think I need to look behind me
17 to answer that question. I am sure that my client can.
18 If there is likely to be any difficulty with that at
19 all, of course I will contact Mr. Jowell, but I do not
20 anticipate that at this point.

21 MR. MALEK: We have dealt with Mr. Singla's points which is
22 that Mr. Singla will write to you once we have got your
23 response to Mr. Harris indicating the precise questions
24 that he wants answered, and the same again for him.
25 I would expect once you have gone through that we will

1 get the answers by the end of this year.

2 MR. JOHNSTON: That may turn a little bit on when Mr. Singla
3 writes to my clients, but yes, sir, absolutely we hear
4 the Tribunal's clear steer that they want prompt timely
5 responses to correspondence. Some of the matters are
6 complicated, they will take some time, but we hear your
7 indication and we are grateful for that.

8 MR. MALEK: So we have dealt with the composite dataset.
9 Now, we go to the German market-wide disclosure from
10 DAF/Scania and VT/RT.

11 MR. JOHNSTON: Yes, sir.

12 MR. MALEK: From what I could see at least in relation to
13 VT/RT we are going in the right direction, but shall we
14 deal with them by reference to each manufacturer. Shall
15 we just go through VT and RT first.

16 MR. JOHNSTON: It might be easiest to tick off DAF first.
17 The only reason I suggest that is because DAF has agreed
18 now to provide market-wide disclosure.

19 MR. MALEK: Yes, if they are in trial 3 they said they will
20 provide it, and they are in trial 3 that is done.
21 I have ticked that off.

22 MR. JOHNSTON: That is off the agenda rather readily.

23 Dealing with Volvo first, the position is that VT/RT
24 originally did provide market-wide disclosure --

25 MR. MALEK: We have seen that, yes.

1 MR. JOHNSTON: -- and then said they did not want to go any
2 further in relation to market-wide disclosure because it
3 would be disproportionate to do so. The two critical
4 data points in relation to VT/RT are that they have 118
5 trucks in Germany and that Mr. Frey has said, and I do
6 not propose to turn it up but we can if it would be
7 helpful, that it would cost between 1.5 and 2 million.

8 MR. MALEK: That is his seventh statement at paragraph 74
9 to 82. He is saying it is 1.5 to 2 million.

10 MR. JOHNSTON: Precisely so.

11 MR. MALEK: We are back where we were in the Iveco hearing
12 as to whether or not that is the right thing to do.

13 MR. JOHNSTON: Indeed, sir, and two sort of points of
14 principle to begin with.

15 VSW is acutely conscious of the need to find
16 realistic and proportionate solutions to this kind of
17 issue. So you will have seen we have been corresponding
18 with Scania who have considerably fewer trucks.

19 MR. MALEK: Only 40.

20 MR. JOHNSTON: I think it is 39, but somewhere I had written
21 down -- Mr. Kennelly can correct me if I am wrong.

22 MR. MALEK: I had 40 on my sheet but maybe it is 39.

23 MR. JOHNSTON: I am willing to be corrected between 39 or
24 40, sir. But we have been corresponding for a year
25 seeking a practical solution, and in effect what we have

1 been saying is rather than provide market-wide
2 disclosure if you are not willing to do so, the proper
3 and the proportionate approach is to agree a proxy. So
4 where VSW has been very open handed actually, sir, in
5 that respect and said, look, you effectively elect, at
6 least in the first instance is what we said, either some
7 kind of average taken from the other defendants'
8 overcharge in Germany or your overcharges in France and
9 the UK. We were not pushing a particular position
10 because we are sympathetic, particularly have been
11 sympathetic to Scania's position given the small number
12 of trucks.

13 Given what Mr. Frey says about 1.5 to 2 million for
14 this further exercise, I have to put a bit of a marker
15 down, which is that that does seem an awful lot. But we
16 are also conscious that that is a large sum of money on
17 any view. Even if it were only half of what Mr. Frey
18 said, it would be a considerable sum.

19 VSW's position really is, if I can put it this way,
20 to put the defendants to their election in this point.
21 Given what Mr. Frey says, the position is the same in
22 respect of Volvo Renault and that is reflected in the
23 draft order. Either they provide market-wide disclosure
24 in Germany, and DAF, as we have just said, has made that
25 election and they have said they will provide

1 market-wide disclosure in Germany or they agree a proxy.

2 But, sir, really all that is outstanding, I think,
3 between VSW and Scania is the process for finding that
4 proxy.

5 Sir, we do say this is an important point. You will
6 see in the draft order, if you have it before you, it is
7 at {HS2-B/31/1} and it might be helpful to turn that up,
8 actually. We have suggested a process in paragraph 8 on
9 page 7, so it is {HS2-B/31/7}.

10 You will see it starts at the bottom of that page in
11 paragraph 8.1, it starts at 8.1 and goes forward to 8.2.
12 We are suggesting a mechanism by which the parties can
13 resolve now this question of the proxy. The reason for
14 that, sir, is that the rationale for not providing
15 market-wide disclosure is that it would be
16 disproportionate to do so because there are so few
17 trucks in the claim and VSW's concern -- sorry, sir.

18 MR. MALEK: I can see that. There are a number of
19 permutations on this, and one permutation is that we
20 take the view that it is just not proportionate to order
21 those parties to produce German market-wide disclosure
22 given the small number of trucks, full stop.

23 MR. JOHNSTON: Yes.

24 MR. MALEK: That means, you say, you would be left holding
25 the baby because it means how am I going to prove it one

1 way or another.

2 The other way of doing it is to say we are not going
3 to order such disclosure today but the parties should
4 try and engage with each other to agree a way forward on
5 some sort of proxy, and that may require the experts to
6 meet, et cetera, as they have been meeting on other
7 issues.

8 I think what we should probably do is hear from
9 Scania first and see how they see it, because it is
10 unlikely that we are going to want to order Scania to
11 pay the amount of money that it will cost to do this
12 exercise for just 40 trucks.

13 On the other hand, Scania -- and everyone will want
14 to know what are we going to do in place of that. We
15 all recognise that sometimes going for perfection leads
16 to something that is wholly unmanageable and not
17 cost-effective.

18 So as long as the Tribunal and the parties have
19 agreed what the proxy is going to be, no one is going to
20 be prejudiced.

21 MR. JOHNSTON: Precisely so, sir, and I had one final
22 sub-point, as it were. The only discrepancy I think
23 between VSW and Scania is that Scania's position was
24 which proxy should be the appropriate proxy should be
25 a live issue at trial.

1 MR. MALEK: I understand that.

2 MR. JOHNSTON: We say that would be disproportionate in
3 a different way.

4 MR. MALEK: Because that will increase costs.

5 MR. JOHNSTON: It is going to increase costs. We are going
6 to have to have expert evidence on which of these
7 markets was more or less comparable and why that was and
8 whether that is relevant to trucks, and we --

9 MR. MALEK: I understand that. But the thing is it is hard
10 to require them now to -- I think the parties need to
11 have this discussion and then we see where we come out
12 of it. But one would hope that the parties will be able
13 to agree a proxy rather than have a scenario of having
14 different proxies argued out at trial, because there is
15 real costs implications of that, and time implications.

16 So shall we just hear from Mr. Kennelly and see
17 where we get to here. Everyone is trying to work in the
18 same direction. Let us try and be pragmatic.

19 Mr. Kennelly.

20 Submissions by MR. KENNELLY

21 MR. KENNELLY: Brian Kennelly for Scania.

22 Mr. Malek, just in terms of the proper approach and
23 taking the point you have just made to me, the reason
24 why you have heard so little from me so far is because,
25 at least in relation to disclosure, we have tried to

1 give the claimants everything they want.

2 MR. MALEK: I can see that, and you have been very helpful.

3 MR. KENNELLY: In a pragmatic and constructive way. When it
4 comes to this question of the proxy, we are grateful for
5 the fact that the claimants effectively recognise the
6 market-wide disclosure for Germany is not the way to go.
7 The real question is when should you decide the suitable
8 proxy and what should that proxy be.

9 The claimants' position is that you should decide
10 now that the proxy should be based on the overcharge for
11 the other defendants' German trucks. But what we say is
12 it is not at all clear that that is the right proxy,
13 because the key information that informs your decision
14 on proxy is not yet available. So it is premature to
15 decide that now.

16 The Tribunal will be in a much better position to
17 decide what is the correct proxy after you see the
18 expert evidence.

19 I will take you, if I may, very briefly to what RBB
20 say in the letter attached to our skeleton.
21 Mr. Johnston shakes his head, but even he says that you
22 should wait. To know what the proper proxy is you
23 should wait until the expert evidence is in because not
24 until then will we see what the other OEMs' German
25 trucks overcharge is. So actually we will not know the

1 correct proxy, the level of proxy on Mr. Johnston's
2 case, until the expert evidence anyway.

3 The costs that will be incurred on this if it is
4 left over for the expert reports will be minimal,
5 because there are only 39 trucks in play. It is in
6 neither party's interests to devote time and effort to
7 this out of proportion to the value of the trucks.

8 But may I just show you first RBB's letter, and
9 I appreciate that you do not need to look at lots of
10 documents, you have read everything already, but to go
11 back to the RBB letter which is annexed to our skeleton,
12 that really addresses why you do not have the
13 information available at this stage to decide what the
14 correct proxy should be.

15 MR. MALEK: The way that I look at it, Mr. Kennelly, is the
16 idea for everyone is the parties to agree the proxy,
17 okay. It is only if you cannot agree that it is going
18 to have to be resolved by the Tribunal.

19 The question is, is there a realistic hope that the
20 parties, by having a discourse about this and the
21 experts discussing it, is there a realistic hope that
22 they are going to come up with a solution of saying:
23 "whatever proxy we have agreed, we may do better this
24 way, we may not do better". But for 39 or 40 trucks it
25 is not really worth the candle of getting to the stage

1 of having expert reports.

2 So I would hope that the parties and the experts, by
3 meeting, could resolve this issue without going down the
4 line of doing expert reports. That is what I would
5 hope. So my inclination would be to park this
6 application, let the parties correspond and engage with
7 each other, and if you do not get anywhere then we can
8 resolve this at the next CMC in February or on a Friday
9 hearing. Because it is something that is fairly
10 discrete, it is not going to be too difficult to come to
11 a decision as to whether or not there should be further
12 disclosure. But I think my current view is that we
13 should try and have a process whereby the parties try
14 and resolve this themselves. For 40 trucks it is not
15 really worth going through an elaborate process of
16 requiring each party to do expert reports and then
17 deciding later.

18 MR. KENNELLY: Sorry, did I interrupt somebody?

19 THE PRESIDENT: I was just going to say, as I understand
20 what Mr. Rosati, your economic expert, is saying, it is
21 that once you have got expert reports on the position in
22 France and the UK, not that there should be expert
23 evidence on Germany, but that having looked at that, it
24 should be, he hopes, possible for the experts to agree
25 on the right proxy for Germany.

1 Have I understood that correctly? So he says he
2 thinks that -- he does not suggest we should have expert
3 evidence on Germany, which, as Mr. Malek is saying,
4 would be quite disproportionate for what is involved.
5 But it will be easier to work out the right proxy or for
6 him to advise your clients on what he thinks is the
7 right proxy once the French and UK position is clearer.
8 Is that right?

9 MR. KENNELLY: Mr. President, that is part of the answer,
10 but Mr. Rosati goes on to say that even within the
11 German market, when we see the expert evidence from the
12 experts for the other OEMs on Germany that would help us
13 determine if the other OEMs' German proxy is
14 appropriate. It is not the average, as the claimants
15 suggest, because when we see that evidence,
16 a distinction might be made between medium trucks and
17 heavy trucks, for example, and because all the Scania
18 trucks are heavy trucks, the best proxy might be the
19 other OEMs' German overcharge for heavy trucks.

20 But Mr. Malek's point, if I may respectfully say, is
21 actually right. This is just not worth the time and the
22 effort. So we agree that we should engage further and
23 see if we can resolve it between ourselves.

24 In relation to that, though, timing is obviously
25 important. We cannot resolve it according to a very

1 short timetable. I have some information for the
2 Tribunal that may be relevant. We have heard from the
3 General Court that judgment will be handed down in the
4 Scania case on 2 February 2022. That may also have
5 implications for the setting of the CMC in February.

6 That judgment of the General Court obviously may
7 have implications for the question of proxy also,
8 because it may inform which bits of our case survive,
9 whether we succeed in whole or in part. So that will
10 also inform the discussions that the experts have on
11 a suitable proxy.

12 That is by way of information to the Tribunal, but
13 we are content with Mr. Malek's suggestion, subject to
14 instructions. If someone disagrees on my side, they
15 will tell me, if WhatsApp is back up, that we park the
16 claimants' application and we have that discussion
17 without a fixed timetable from the Tribunal. But
18 bearing in mind Mr. Malek's steer, which is that we
19 should get on with it and seek to resolve it in
20 a proportionate way.

21 MR. JOHNSTON: My only concern arising out of what
22 Mr. Kennelly is saying is not only should we be waiting
23 for February, but we should also be waiting for expert
24 reports in respect of overcharge in other jurisdictions.

25 VSW's position is that they are concerned that this

1 matter should not be, as it were, punted down the road,
2 because the rationale for what VSW, if I can put it this
3 way, is giving up. It is giving up something very
4 substantial, it is giving up market-wide disclosure in
5 Germany. Germany, as we know, is the hub of the cartel.
6 The rationale for that is proportionality.

7 So we are always, sir, keen to talk to you and to
8 engage with Mr. Kennelly's client, and the same applies
9 to Volvo/Renault. But if when we seek to engage the
10 response is we cannot talk to you now, we have to wait
11 until after February, and indeed February is no good
12 either, because we are going to have to wait until we
13 get expert reports about overcharge, which might not be
14 for a year, 18 months, further way down the line, sir,
15 then I am concerned.

16 This is a matter -- and the timetable set out in our
17 draft order is very much indicative. But you see the
18 spirit of that timetable which is this is a point that
19 needs to be carved away in a proportionate manner so
20 that we are not discussing this in great detail in
21 18 months' time. VSW, in exchange for giving up
22 market-wide disclosure, wants to cut down the scope of
23 the issues between the parties, and we have, with
24 respect, been writing for a year saying, in effect,
25 choose your proxy.

1 MR. MALEK: Where we are on this is that Mr. Kennelly will
2 seek to start the ball rolling with your clients
3 before February and that we will come and revisit it at
4 the next CMC, and we understand where everyone is coming
5 from but it may be that at the end of the day
6 Mr. Kennelly's clients just take a pragmatic view that
7 for 40 trucks it is better to agree something even if it
8 is not necessarily ideal, at the end of the day it might
9 work to their advantage, it may work to your advantage,
10 we just do not know.

11 MR. JOHNSTON: Precisely.

12 MR. MALEK: That is what I am encouraging him to think as
13 a way forward, and that he may benefit, he may not
14 benefit. But we will come back to this in February.
15 But I do expect some engagement between the parties
16 before February, and I am not going to put down any sort
17 of timetable. Everyone has heard what we have got to
18 say and we will see where we are in February.

19 MR. JOHNSTON: I am very grateful for that. That precisely
20 goes my concern that we do not want this punted off
21 past February and that is a very helpful indication.

22 MR. MALEK: I do not think Mr. Kennelly was suggesting that.

23 MR. JOHNSTON: Maybe I misheard him, sir. If I did,
24 I apologise.

25 MR. KENNELLY: To be clear, there is an issue between myself

1 and Mr. Johnston that needs to be resolved between
2 ourselves.

3 We disagree with his insistence on getting something
4 resolved straight away. I think we can give him some
5 reassurance on how costs can be capped and how this can
6 be kept in a proportionate way. That is a discussion
7 between ourselves. We do not need to entertain
8 everybody else with it today.

9 MR. JOHNSTON: I am grateful for that indication. I am
10 conscious that the same applies, as it were,
11 mutatis mutandis in respect of Volvo Renault and the
12 position is that they had considerably more trucks. So
13 we were rather less willing to give us, as it were,
14 market-wide disclosure in Germany.

15 In the light of what Mr. Frey says and even in the
16 light of my, candidly, sir, some doubts about the scale
17 of the numbers, sir, we recognise there is
18 a proportionality issue here and so the same position
19 applies. To the extent that Volvo/Renault is willing to
20 engage now in seeking to identify a proxy in order to
21 narrow the scope of issues between the parties, then,
22 sir, our position is as in respect of Scania.

23 MR. MALEK: Because there is only 114 Volvo and four Renault
24 trucks in Germany.

25 MR. JOHNSTON: Exactly so, sir.

1 MR. MALEK: What about the proposals that Mr. Frey is
2 making?

3 MR. JOHNSTON: I am keen to hear from Mr. Hoskins what his
4 client's position is in response to this.

5 MR. MALEK: Let us hear from Mr. Hoskins and see what he has
6 to say.

7 Yes, Mr. Hoskins.

8 Submissions by MR. HOSKINS

9 MR. HOSKINS: It is fairly useful to hear from Mr. Johnston
10 the recognition of the proportionality issue, because
11 I'm afraid that is the first time that that has been
12 accepted. We came into this hearing with them seeking
13 full German market-wide disclosure in relation to VT/RT,
14 so very happy that they can move on.

15 We are not in the same position as Scania because
16 the claimants have been insisting on market-wide
17 disclosure from us until two minutes ago. We have not
18 actually engaged with them. They have not offered us a
19 proxy and have not reached out to us. Obviously we are
20 very happy to do so, to try and come up with a solution.

21 It may be a proxy but it may not be a proxy. There
22 is a number of options, as we have heard this morning.
23 Maybe the parties do agree a proxy. It may be we elect
24 to do market-wide disclosure because we are so appalled
25 by the proxy option. It may be that there is some more

1 focused disclosure way through this, but we are more
2 than happy to engage with them and delighted that they
3 have seen the sense of recognising the proportionality
4 position.

5 I have to say their draft order does not work
6 because -- I think it is still on the screen -- 8.2 and
7 9 assumes that the only possible solution will be
8 a proxy, and of course --

9 MR. MALEK: Mr. Hoskins, we are not making the order in 8
10 and 9, we have made that clear. I have indicated the
11 way forward. I think Mr. Kennelly and Mr. Johnston
12 agree, and all we need to know from you, Mr. Hoskins, is
13 do you agree to go along the same route as Mr. Kennelly,
14 in which case we can move on to the next item on the
15 agenda.

16 MR. HOSKINS: Yes.

17 MR. MALEK: Okay, thank you very much.

18 Let us move on to the next one. Which is the next
19 one you would like to go through?

20 MR. WILLIAMS: It is Mr. Williams for DAF. We are not party
21 to any substantive debate on this, but --

22 MR. MALEK: No, you are not.

23 MR. WILLIAMS: -- there is a question of dates. I do not
24 know if you were proposing to come back to dates. But
25 although we do not oppose the principle, we are

1 concerned about the date that is proposed for this and
2 perhaps, I do not know whether you propose to deal with
3 that now or later?

4 MR. MALEK: What I am proposing is that I am not going to
5 make any dates, but the parties should be having their
6 discussion and exchange their views prior to the next
7 CMC in February. That is as far as we are going.

8 MR. WILLIAMS: I am very content with that, sir, thank you.

9 MR. MALEK: Okay, thank you very much.

10 So we have the leasing data issue and the dependent
11 dealer issue.

12 MR. JOHNSTON: Shall I address you first on dependent
13 dealers, because that narrows somewhat arising out of
14 what has been said just now?

15 MR. MALEK: Yes.

16 MR. JOHNSTON: That is the reason why I wanted to deal with
17 market-wide disclosure first.

18 To the extent that the Tribunal is at least not now,
19 pending the parties agreeing or failing to agree,
20 ordering market-wide disclosure in relation to Germany
21 for Scania and Volvo/Renault, then the application for
22 dependent dealer data for Scania and Volvo/Renault falls
23 away.

24 MR. MALEK: Yes. So far as it relates to Germany, you mean.

25 MR. JOHNSTON: Yes, so far as it relates to Germany.

1 So far as it relates to France there has been late
2 movement on the part of Scania and it is now agreed that
3 what is sought in relation to France, which is just one
4 sub-category, VoC2/01(ee)(ix), sub-request 9, that is
5 now agreed. So again, that falls away.

6 So, sir, in respect of DAF, DAF has just agreed to
7 provide market-wide data. We recognise in those
8 circumstances the most sensible thing is for us to look
9 at that data and then decide whether we want to come
10 back and seek dependent dealer data in respect of DAF.

11 MR. MALEK: So far as I understand it, there is only one
12 German dealer, dependent dealer, and in relation to that
13 it was not one of the trucks -- they were not involved
14 in the sale of any of the trucks in these proceedings.

15 MR. JOHNSTON: It may well be in those circumstances that we
16 do not revert, but we are conscious that the appropriate
17 thing at this point is to look at what we have just been
18 offered in relation to the German --

19 MR. MALEK: Exactly.

20 MR. JOHNSTON: So I am not going to oppose that application,
21 sir. There is a wider dispute about the utility of the
22 dependent dealer data that does not just relate to sales
23 to VSW, but rather relates to sales to other entities
24 which might then enable to us model both (a), dependent
25 dealer overcharges, and (b) independent dealer

1 overcharges. You will recall this point from the Iveco
2 application.

3 MR. MALEK: I do.

4 MR. JOHNSTON: There is a wider point there, but we accept
5 in the light of the fact that we have just been offered
6 DAF's market-wide German disclosure that we do not need
7 to press that point.

8 MR. MALEK: Okay, that is fine.

9 MR. JOHNSTON: As to France, we are asking the DAF
10 defendants to provide a witness statement saying in
11 effect that they did not hold an interest in the
12 relevant dealers, or if they did what the nature of that
13 interest was and why that precludes them from obtaining
14 access to any documents. That may well resolve
15 definitively the position in France. We may, in the
16 light of that witness statement, have to come back and
17 say we do not think this is satisfactory. So I do not
18 prejudge --

19 MR. MALEK: You have the issue of control, have you not,
20 which we looked at in the Iveco case.

21 MR. JOHNSTON: Precisely, sir. Then in respect of
22 Volvo/Renault, as I say, the application in the light of
23 the indication that you have just given in relation to
24 market-wide German disclosure, this may be something
25 that we revert to at a point in the future. But for now

1 the proper approach is for the parties to go away and
2 discuss how they are dealing with Germany as a whole.

3 So on my reading, that deals with all of the points
4 to the extent that Mr. Williams' client is not resisting
5 our application for a witness statement in relation to
6 France.

7 MR. MALEK: I would have thought he is not resisting it from
8 what I can see from the material.

9 MR. WILLIAMS: Sir, we were not resisting it because we were
10 not aware that that application was being made. But now
11 that it is being made, we do resist it but only because
12 Mr. Jenkin has already covered this in the witness
13 statement for these proceedings. What he did not say in
14 his witness statement was the extent of the
15 shareholding. Had we known that quite so much was going
16 to be made of that, we would have made sure that the
17 percentage shareholding was covered in the witness
18 statement. But I am instructed to say that the
19 percentage shareholding is 35%.

20 On that basis and given the evidence that the
21 Tribunal has already got, which I can take you to if
22 needs be, we really do not think it is proportionate for
23 us to be directed to provide another witness statement.
24 But the Tribunal has on evidence that DAF has
25 a non-controlling interest in SIDAN, does not hold any

1 data relating to SIDAN and does not have any control of
2 any data relating to SIDAN, and this is really just
3 flying a kite, sir.

4 MR. MALEK: I am not sure that it is flying a kite, but
5 I think they need to be satisfied themselves that these
6 documents are not within the control of your clients.

7 So, Mr. Williams, for now I think if your client can
8 put in what you have just said in a letter referring to
9 the shareholding and confirming that, I think that will
10 be enough.

11 MR. WILLIAMS: I am sure we can do that, sir.

12 MR. MALEK: Okay, thank you very much.

13 MR. JOHNSTON: I am grateful, sir.

14 MR. MALEK: That deals with the dependent dealer
15 application, and now we have the leasing data.

16 MR. JOHNSTON: In relation to leasing your provisional
17 indication yesterday was that you wanted to reserve that
18 for a Friday hearing.

19 MR. MALEK: In relation to leasing data and France,
20 provisionally I have indicated 14 January 2022 for
21 a hearing to resolve that one issue, and on that each
22 party should have no doubt an expert report and
23 a factual witness statement to go in support.

24 Probably the sensible way forward is for the --
25 I think it is -- is it just Scania who is running this

1 point or is it a number of defendants?

2 MR. JOHNSTON: The position as between the defendants is
3 different. So DAF's position is that they do not think
4 there is any issue arising out of French banking secrecy
5 law at all, as I understand it.

6 The position vis-a-vis Scania is that there is an
7 ongoing dialogue between the solicitors to agree
8 a mechanism whereby data can be provided in anonymised
9 form in that respect.

10 MR. MALEK: I thought you did not want it anonymised.

11 MR. JOHNSTON: We do not want it anonymised. We are seeking
12 to try and make helpful steps forward in circumstances
13 where Scania is willing to provide the data at least in
14 the first instance. That is our proposed approach.

15 As to the resolution of the question of French
16 banking secrecy law, I will need to take instructions.
17 I had not anticipated, perhaps I misunderstood what you
18 said yesterday, sir, that it was that particular point
19 that you were planning to carve out for the 14th.
20 I think I had misunderstood and thought you were saying
21 that the entire leasing question would be carved out for
22 that point.

23 MR. MALEK: I think it is a particular point in relation to
24 France and it is a discrete point that needs to be
25 resolved if it is being run.

1 MR. JOHNSTON: Yes.

2 MR. MALEK: I am not saying the whole of leasing data should
3 be carved out. We can deal with leasing data today
4 apart from that one issue to do with France.

5 MR. JOHNSTON: I am very grateful, sir. So --

6 MR. MALEK: Unless everyone is saying they are content for
7 leasing data to be dealt with at the same hearing on
8 14 January. Certainly we have enough time to deal with
9 it on the 14th.

10 Yes, Mr. Singla.

11 MR. SINGLA: Just a clarification, if I may. Iveco's
12 position is that it should not have to give any
13 disclosure as regards leasing in relation to France or
14 Germany, which is the substance of the application.

15 MR. MALEK: Exactly.

16 MR. SINGLA: On that basis, if we prevail we will not need
17 to participate in your January hearing. But I just
18 wanted to add that if, for some reason, you are against
19 us in relation to France and Germany today, then there
20 may well be a German law issue of a similar kind to the
21 French law issue.

22 MR. MALEK: So there might be, yes.

23 MR. SINGLA: As I say, we very much hope not to see you on
24 that occasion.

25 MR. MALEK: Who would be parties to the hearing in January

1 at the moment, then?

2 Yes, Mr. Harris.

3 MR. HARRIS: I was just putting my hand up. We will be
4 parties to that hearing.

5 MR. MALEK: You will be parties, yes. So the French law
6 point.

7 Who else?

8 MR. KENNELLY: Sir, for Scania we will be there unless we
9 have resolved the point with the claimants.

10 MR. MALEK: Yes, Scania. Okay.

11 The idea is, I presume, that DAF and Scania will
12 have to serve their evidence first, because you would
13 have to serve an expert report in French law. Then it
14 will be for the VSW claimants to serve their evidence,
15 and I think we should probably have one further round,
16 certainly on the expert evidence, in reply, not
17 necessarily on the factual evidence. So if you serve
18 your factual evidence and expert evidence first, then
19 a response by VSW and then an expert report in reply, if
20 you need one, after that.

21 But we do not need to deal with the dates now, but
22 we know we are aiming for 14 January and the parties
23 should propose a timetable, and we will deal with the
24 timetable in correspondence.

25 MR. KENNELLY: We are content with that, sir.

1 MR. MALEK: Thank you.

2 MR. WILLIAMS: I think you said DAF a moment ago. I am sure
3 you meant Daimler.

4 MR. MALEK: I do mean Daimler, sorry. Yes.

5 Do you want to deal with the other aspects of
6 leasing data, Mr. Johnston?

7 MR. JOHNSTON: Yes, sir, and I am mindful of what Mr. Singla
8 says, which is that if he persuades you that there
9 should be no disclosure then that will relieve his
10 clients of participation in any hearing in relation to
11 France.

12 Sir, the background to this application bears some
13 similarity to the dependent dealers matter. The
14 mechanics of it are probably best found in
15 Mr. von Hinten-Reed's witness statement. That is at
16 {HS2-B/IC2/8}. It is in paragraphs 36 to 37. It may be
17 easier, sir, if you just read those. That is
18 {HS2B/IC2/8} and paragraphs 36 to 37.

19 The simple facts are this, that 20% of the trucks in
20 this claim were sold via leases --

21 MR. MALEK: I understand that, yes.

22 MR. JOHNSTON: -- and a proportion leased directly from an
23 entity within the defendant groups, another proportion
24 leased via a third party. All of the defendants have
25 already disclosed their relevant first sales data, so

1 that is the price that they sold the truck to the
2 relevant leasing company. Some have also disclosed
3 their own second transaction data, so that is data that
4 they hold themselves in relation to subsequent leases.
5 But only Scania has disclosed data from its affiliated
6 leasing or financing companies.

7 MR. MALEK: That is the additional leasing data.

8 MR. JOHNSTON: Yes.

9 MR. MALEK: On the relevant first sales data, are you
10 seeking any further order?

11 MR. JOHNSTON: No, sir.

12 MR. MALEK: Because it looks as if you have got that
13 already.

14 MR. JOHNSTON: We have got that, sir, already. That is the
15 market-wide disclosure, precisely.

16 So all that arises between us, sir, is in respect of
17 different defendants where we are seeking either own
18 second transaction data if they have it and additional
19 leasing data.

20 Just pausing for a moment, sir, as with the
21 dependent dealer application, the additional leasing
22 data, it may well be the case that it only covers
23 a limited universe of the leased trucks. But
24 Mr. von Hinten-Reed's position on this is much the same
25 as it is in respect of dependent dealers, which is if he

1 is going to reliably calculate a distinct overcharge in
2 relation to leased trucks or if he is going to allow for
3 leasing as a variable within his analysis, then the only
4 data, as it were, available to him is going to be that
5 additional leasing data. He will then have to rely on
6 that to extrapolate in relation to those leasing
7 companies that are not part of the defendants' groups.

8 So whilst this data and in some respects the
9 universe of trucks that it might relate to, or the
10 volume of data may itself be comparatively limited, it
11 serves two functions. It serves a function in relation
12 to the trucks themselves, but it also serves as the only
13 and most reliable data in relation to third party
14 lessors.

15 So it is the same point as in relation to the
16 dependent dealers, sir. With the independent dealers
17 there is no data available from them and therefore, you
18 have had this point canvassed before you before, the
19 dependent data is extremely useful because it is the
20 closest we can get to ...

21 MR. MALEK: The problem we have on this is that I think we
22 are all agreed that in an ideal world you should be
23 working from the additional leasing data. If it is not
24 practicable because it is just going to be so expensive,
25 we should get whatever is readily available to be

1 supplied because at least you will have something to
2 work from. But if you want to go further to get
3 perfection and that is going to cost 1 million or
4 2 million, it's just not worth it, and you are going to
5 have to extrapolate in the way that we discussed at the
6 Iveco hearing earlier on in the year.

7 MR. JOHNSTON: Sir, two on three points in relation to that.
8 Firstly, different defendants take different positions.
9 Some of them do not say it is going to cost them 1 or
10 2 million. In fact, they do not place any price on this
11 at all, they just say I am going to need to deal with
12 each of the defendants differently.

13 MR. MALEK: We are going to go through them one by one, yes.

14 MR. JOHNSTON: I hear what you say as to proportionality.
15 The question then arises, and we find ourselves in
16 a similar position as regards dependent dealers, and
17 Mr. von Hinten-Reed's position is that if he does not
18 have any data of this kind at all either because (a)
19 it is not available, or (b) it would be disproportionate
20 to disclose it, then he is saying it is not going to be
21 possible to allow for this as a separate variable
22 because I am simply not going to know how leasing works.

23 What he is saying in his expert report and what he
24 is looking for, a steer, as it were, from the Tribunal
25 on, is that the parties are not going to be calculating

1 a separate overcharge by reference to leasing. That is
2 the position he is setting out. He is trying to explain
3 the methodological consequences of this and where it
4 goes, as it were.

5 Sir, that is the backdrop to it, and in that respect
6 it bears some similarity to dependent dealers.

7 MR. MALEK: Are you saying as of today he does not know
8 whether he can do it?

9 MR. JOHNSTON: What he is saying, sir, is if he does not get
10 any data --

11 MR. MALEK: As of the data you have got so far, he cannot
12 do it.

13 MR. JOHNSTON: It depends, sir, on the different defendants.
14 So in respect of Scania where we have had leasing data,
15 yes, he will, and in certain jurisdictions there has
16 already been some data provided.

17 But what he is saying is where the defendants say
18 either (a) we do not have this data at all, or (b) it
19 would be disproportionate to give it, his position is
20 then (c), this is not going to be something that I can
21 allow for as a separate variable, and the proper
22 approach is to say if you do not have it, then we are
23 going to have to agree to rely on the overcharge in
24 relation to sold trucks for leased trucks. That is his
25 point.

1 MR. MALEK: I understand that point, but what I am trying to
2 figure out in relation to what you have already got from
3 Scania, are you able to use that as a proxy to get
4 a figure for leasing data, or are you saying no, even
5 that is not enough and in fact we would actually have to
6 go back to sold trucks as the reference point?

7 MR. JOHNSTON: Mr. von Hinten-Reed does not address that
8 question in his evidence. His evidence is that in the
9 absence of leasing data in any particular context, he is
10 not going to be able to do it.

11 MR. MALEK: Yes.

12 THE PRESIDENT: Sorry to interrupt you, but I thought he
13 does in paragraph 40.

14 MR. JOHNSTON: Sorry if I have missed it.

15 THE PRESIDENT: At paragraph 40 of his statement, this is
16 the fifth statement at {HS2-B/IC2/9}, I thought he does
17 answer the question that Mr. Malek has just asked.

18 MR. JOHNSTON: I think what he is saying here, sir, is, just
19 to go through it in stages, therefore for Scania I would
20 be able to take into account leasing-specific factors in
21 my analysis, and that is what I was saying. Where he
22 has this data ...

23 MR. MALEK: My question was a different one. My question
24 starts off with what he said at paragraph 40. From
25 that, I am saying with the Scania data are you able to

1 extrapolate from that the leasing figures for the other
2 companies, or are you saying that is not going to be
3 enough and you are going to have to rely on the sold
4 truck data and extrapolate from that?

5 MR. JOHNSTON: Certainly Mr. von Hinten-Reed's evidence does
6 not say, "I have considered whether or not I could use
7 a proxy from the Scania data and I consider that will
8 not be possible". It is fair to say the clear
9 implication of his evidence is, in the absence of this
10 data, that the answer is not going to be as it is in
11 relation to -- and it may be worth saying or taking
12 a step back and looking at why it is that proxies are
13 being suggested in relation to dependent dealers.
14 Proxies are not, as it were, not being identified there
15 as the best way to find the most reliable data. They
16 are a pragmatic solution based on grounds of
17 proportionality. Simply what is being said is that if
18 it is right that this data is not going to exist, then
19 a proper approach is to use a proxy because there are so
20 few trucks here.

21 We are talking about 20% of the trucks in relation
22 to leasing.

23 MR. MALEK: I understand that.

24 MR. JOHNSTON: I think that may be why Mr. von Hinten-Reed
25 has not looked at it through that lens because he is

1 rather assuming that that, as it were, very rough and
2 ready metric does not apply so readily in this respect.

3 I can ask him, sir, at lunch time, if you want me to
4 take further instructions, if I can get hold of him,
5 I know he is in Poland, but the starting point is that
6 he is not countenancing that possibility.

7 MR. MALEK: He has not addressed it.

8 MR. JOHNSTON: Exactly so.

9 MR. MALEK: That is the answer.

10 If someone can speak to him and we can deal with
11 that at 2.00 pm.

12 But you do not want to be in a situation whereby you
13 are not able to calculate something specific because you
14 do not have the leasing data, and at the same time
15 people say: "Ah, but you cannot extrapolate across from
16 the sold data, the sold trucks data", in which case you
17 are left just hanging there.

18 The task of a Tribunal is to come to a decision
19 as best it can on the material that is provided to it,
20 even if it is not ideal. You know, this is not going to
21 be, hopefully, a case where someone says, "Actually we
22 are not going to come up with any figure because what we
23 have got is not ideal", and I can see that you want to
24 avoid that scenario.

25 MR. JOHNSTON: Precisely so. What we want to avoid is the

1 scenario in which now in 2021 disclosure is resisted,
2 but then when we get to a trial in 2024 the answer at
3 trial is either A, well, you know, we have come up with
4 a metric that is in Mr. von Hinten-Reed's view wholly
5 unsatisfactory in order to deal with this point, when he
6 said, "I need this data to be able to deal with this
7 point" and it has been resisted.

8 That is why Mr. von Hinten-Reed's position is that,
9 look -- I can tell you his position would be to shrug
10 his shoulders and say look, if they have not got it or
11 are not prepared to disclose it then the sensible thing
12 is that everybody agrees that we are just going to use
13 the sold trucks data. I will revert to him with your
14 question.

15 MR. MALEK: Exactly. I think we need to get the answer to
16 my question before we come to a landing on this because
17 if the answer is that he can actually -- he thinks he
18 can work from the Scania data and apply that across, or
19 have a combination of doing that and looking at the sold
20 trucks data to apply to the other companies, and that we
21 take the view -- and we have not come to a view yet --
22 that it really is disproportionate to require the other
23 truck companies to come up with -- go through a very
24 expensive exercise, then that may be one way forward.
25 But I think we have got this gap.

1 MR. JOHNSTON: Sir, I am very happy to -- I am conscious of
2 the time. Might I address you very briefly specifically
3 in relation to DAF because --

4 MR. MALEK: Yes, let us look at DAF, yes.

5 MR. JOHNSTON: In very broad steps terms DAF's position is
6 this, which is that they are not resisting wholesale and
7 across the piece disclosure in relation to leasing.
8 What they are saying is, "We will give you VSW only
9 disclosure." So the position is --

10 MR. MALEK: I have seen that. Their dispute is not
11 market-wide.

12 MR. JOHNSTON: Precisely. They are saying, "We will go to
13 the databases that we can access and we will extract
14 from them your specific data and create a new
15 spreadsheet containing the data only relevant to your
16 client, and we will disclose that to you, because we are
17 not prepared to disclose to you the underlying data in
18 the underlying data source."

19 It is notable that DAF does not raise any questions
20 as to proportionality.

21 MR. MALEK: The question I have for DAF on that is what is
22 the difference in the cost in doing the specific data
23 for the trucks in question in this action compared with
24 doing the wider exercise.

25 MR. JOHNSTON: Exactly so.

1 MR. MALEK: If we have an indication as to where we are on
2 that it is going to be much easier to go from there.

3 Mr. Williams, can you help us on this point?

4 MR. WILLIAMS: Yes, sir. The point we make is not a point
5 about the cost of the giving of disclosure. It is the
6 concern that this is opening up a whole new frontier of
7 analysis. It is a whole new economic piece of work.
8 It is about the cost implications of that in the wider
9 context of the litigation.

10 MR. MALEK: Yes.

11 MR. WILLIAMS: I am very happy to develop that point after
12 the short adjournment if that would help.

13 MR. MALEK: I think it would help. If you could develop
14 that after the short adjournment and Mr. Johnston could
15 get the answer to the other question, because we may get
16 to a situation where we feel that if we get the data
17 from Scania that is enough to work with; and there is
18 another permutation: if we get the information from
19 Scania and DAF is that enough to work with. So that is
20 another question for Mr. Johnston to ask his expert and
21 see if that makes a material difference.

22 Mr. Williams, if you can try and find out in cost
23 terms what is the difference in providing the specific
24 data for the trucks in question compared with everything
25 else on a market-wide basis, we will come back to this

1 at 2 o'clock.

2 MR. WILLIAMS: Sir, on that point I can try and take
3 instructions, but I think my instructions are clearly
4 that that is not the point we take, sir.

5 MR. MALEK: You are not taking a cost point on that.

6 MR. WILLIAMS: We are not complaining about the cost of
7 giving of the disclosure.

8 MR. MALEK: That is fine.

9 MR. WILLIAMS: In terms of the consideration of the
10 alternatives, that is one of the points that I will come
11 back to after the short adjournment. But I just want to
12 say now the various options that have been canvassed
13 this morning, they are not the only options. DAF has
14 made clear in its evidence that it sees another way
15 forwards, and that is part of the reason why we oppose
16 opening up this whole new exercise. As I say, I will
17 develop that after the short adjournment.

18 MR. MALEK: Thank you very much, Mr. Williams.

19 THE PRESIDENT: Just before we adjourn can I clarify, MAN as
20 I understand it from the skeleton, you are writing to
21 your affiliated companies, leasing companies, seeking
22 those documents, Mr. Jowell. Is that right?

23 MR. JOWELL: Yes, that is absolutely correct. We are
24 writing to the affiliates and we will have to see what
25 answers they give.

1 MR. JOHNSTON: Sir, just to round up that point that is why
2 in the disclosure order nothing is sought from MAN
3 because the parties had agreed that.

4 MR. MALEK: You have agreed that, yes.

5 MR. JOHNSTON: I am conscious of the time. We have already
6 canvassed indirectly many of the submissions made by
7 Iveco which are in effect this is disproportionate, but
8 Iveco's position is that they will do this assessment,
9 they will calculate a separate leasing overcharge, so
10 it is different to DAF, who are saying this would be
11 disproportionate to do this exercise, but they say they
12 will do it without providing any disclosure, they will
13 do it from the disclosure already in the case, and you
14 know Mr. von Hinten-Reed's position on that.

15 We can address that more fully afterwards. As
16 I say, there are different textures to the answers the
17 different defendants provide to this.

18 You have the very clear indication from
19 Mr. von Hinten-Reed that he would like to do this; he
20 thinks there may be some variation here; but what is not
21 going to be possible is to do this in the absence of any
22 data subject to the question you have asked.

23 MR. MALEK: We will get the answer to the questions that we
24 have asked, and then we will deal with it as between you
25 and DAF. Then we go down and look at the other

1 him having multiple different sets of data from
2 different defendants.

3 The way he explained to it me is this, which is that
4 in order to know whether leasing itself is a separate
5 variable, he needs at least two, really three, quality
6 datasets that he can work with together in order to see
7 whether it really is tracking as a separate variable or
8 if it is something to do with this individual
9 defendant's data.

10 So taking that in practical terms, sir, what we have
11 is pretty good but not complete data in relation to
12 Scania. In relation to Daimler at the moment, subject
13 to whatever discussion we might have in a moment, some
14 from the UK and from Germany. DAF are seeking it but do
15 not have any in Germany, and MAN we are going to have
16 a further discussion about it.

17 The point that he stressed is that he is going to
18 need more than one good dataset. If he were to have
19 those four, DAF, MAN, Scania and Daimler, and the data
20 is good enough, then his position is that it may well be
21 possible to then say I can see that actually leasing
22 really is not, looking through these datasets, showing
23 up as a variable that consistently affects the
24 defendants or not. But for example, were he only to
25 have Scania's, he said he would be concerned about

1 whether he could do that or not.

2 So that was his position, sir. I hope that is
3 helpful in terms of explaining --

4 MR. MALEK: Can I just summarise where we are, then. On MAN
5 they have agreed to write a letter to the affiliated
6 financing leasing companies.

7 MR. JOHNSTON: Right, sir.

8 MR. MALEK: But there is no guarantee either way, because
9 they may say why should we help you, it is going to be
10 burdensome et cetera, and then you get a nil return. So
11 we really do not know whether that is going to bear any
12 fruit.

13 MR. JOHNSTON: No.

14 MR. MALEK: Scania we have covered. Daimler are going to
15 provide it, are they not, for UK and Germany; is that
16 right or not?

17 MR. JOHNSTON: Yes, that is the position, sir. There is
18 a dispute about whether they might be able to provide it
19 suitably anonymised in relation to France. That is the
20 order that we are seeking in relation to the French
21 banking secrecy point.

22 MR. MALEK: Exactly, we have the French banking secrecy, but
23 we are putting France to one side.

24 Then with DAF you are seeking it from DAF, and DAF
25 have got the point that we are willing to give you

1 specific data in relation to the trucks in question, but
2 not market-wide. They are saying at the same time they
3 are not running the proportionality or the cost point in
4 relation to not extending it to market-wide.

5 MR. JOHNSTON: Sir, that is right. Their position is not
6 that it would be disproportionate to give it, but rather
7 it would be disproportionate for separate analysis to
8 take place in relation to --

9 MR. MALEK: Exactly, and you are prepared to do that
10 analysis and you just want to have the data.

11 MR. JOHNSTON: Precisely so, sir.

12 MR. MALEK: Let us hear from Mr. Williams and we will
13 resolve the DAF position before we hear from anyone
14 else.

15 MR. WILLIAMS: Sir, as discussed with Mr. Johnston before
16 the short adjournment, DAF has given and will give
17 claim-specific leasing data. That data is being
18 provided because it is relevant to the quantification of
19 the individual claims. It is not provided for the
20 purpose of doing a market-wide analysis. It is
21 essentially value of commerce or calculation of the
22 overcharge for the purposes of the specific claim.

23 DAF does oppose providing market-wide leasing data.
24 The purpose of providing such data would be to
25 facilitate a whole market-wide analysis of lease prices

1 either through a regression relating specifically to
2 that leasing data, or by incorporating features into the
3 main regression that Mr. von Hinten-Reed is going to do.

4 That would have to be done for all three
5 jurisdictions, as we understand it.

6 So that is a very substantial undertaking over and
7 above the primary regression on the prices of purchased
8 trucks outright. Obviously it is a big piece of work,
9 and doing it is going to generate substantial cost.

10 It is important to make the point that all of the
11 proceedings before the Tribunal raise claims in relation
12 to trucks which were leased, and it is only VSW and only
13 Mr. von Hinten-Reed that are seeking this dataset so
14 they can do this market-wide leasing analysis.

15 I explained before the short adjournment that our
16 concern about this is not the cost of giving the
17 disclosure in itself, it is a concern about the broader
18 impact on the litigation and whether the analysis is
19 necessary. The concern we have is that effectively an
20 application like this sets in train a whole domino
21 effect, because the costs do not stop with the giving of
22 disclosure. They are followed by the cost of analysing
23 the data, no doubt questions back and forth, trying to
24 understand the data, work by experts using the data to
25 work out if an analysis can be done at all. If an

1 analysis is going to be done, the production of the
2 analysis for trial, then in DAF's case, for example, the
3 production of a responsive analysis purely to deal with
4 the case that in this case VSW wants to advance when
5 that is not the way that DAF would itself analyse the
6 data.

7 So when you talk about whether the cost of the
8 exercise is a million pounds, the million pounds or the
9 millions of pounds we are worried about are not the
10 front end costs of giving the disclosure but everything
11 that comes after that.

12 So it is in that context we think it is important to
13 ask what is said in support of the application, and it
14 really boils down to paragraph 39 of
15 Mr. von Hinten-Reed's fifth witness statement, which is
16 in the inner confidential bundle but I do not believe
17 this is actually confidential. VSW have not produced
18 a non-con version. It is {HS2-B/IC2/9}, at
19 paragraph 39.

20 Mr. von Hinten-Reed says:

21 "It is my duty ... to investigate whether VSW
22 suffered a loss and, if so, to estimate the loss for the
23 trucks they purchased outright but also for the trucks
24 that they leased. Prior to conducting my full analysis,
25 it cannot be ruled out that the condition for leases

1 (including the price) led to some systematic variations
2 ..."

3 I emphasise the words "it cannot be ruled out"
4 because that is as high as Mr. von Hinten-Reed puts it,
5 and that is the basis for setting in train this whole
6 domino effect.

7 I mean, it is an obvious point, but in litigation
8 like this there are a thousand things that cannot be
9 ruled out at the outset, and the way that the Tribunal
10 has carefully managed this litigation is to make sure
11 that the costs and benefits of an analysis are carefully
12 considered before that process is set in train. In my
13 respectful submission, that is not remotely a good
14 enough basis to set in train all of the steps that
15 I referred to a few moments ago. It would be a whole
16 new frontier in this litigation, and just to reiterate
17 the point a frontier which only VSW considers it
18 necessary to explore, even though all of these claims
19 raise issues in relation to leased trucks.

20 We emphasise that Mr. von Hinten-Reed has given no
21 theoretical reason to expect a variation. He has given
22 no factual or market-specific reason to expect
23 a variation, and he has not given any reason to think
24 that any differences that one might see might be
25 material.

1 So it is a huge exercise all on the back of "it
2 cannot be ruled out", and in our submission that is not
3 good enough.

4 The question is, as you said before lunch, sir, what
5 are the alternatives? You have started to explore some
6 potential proxies with Mr. Johnston. I think it is
7 important to see how DAF is going to approach this
8 itself, which is set out in Mr. Jenkin's evidence. The
9 non-con version is {VSW-B1/3/13}.

10 MR. MALEK: Is this the right one on the screen,
11 paragraph 45?

12 MR. WILLIAMS: No, it should be 83. I am extremely sorry,
13 sir.

14 MR. MALEK: Let us just get it up on the screen.
15 {VSW-B1/3/21}

16 MR. WILLIAMS: I am very grateful. If you could just blow
17 up paragraph 83.

18 What Mr. Jenkin explains there, and I will say at
19 the outset this is not an answer to
20 Mr. von Hinten-Reed's specific concern about systematic
21 variations, but it is a practical method of calculating
22 the alleged overcharge on leased trucks.

23 Essentially, what is said is that DAF's experts, and
24 this is starting at (a):

25 "Run a market-wide analysis for all DAF Trucks

1 (regardless of whether they were purchased or leased),
2 using the price at which the ... truck was sold ... as
3 the dependent variable."

4 Then (b) is where we get to the calculation of the
5 overcharge, if any, on the leased transaction, which is
6 that essentially the experts are going to calculate
7 a leasing model that calculates, or uses the price of
8 the truck as an input and then calculates the damages,
9 as point (ii) explains:

10 "... as the difference between the actual and the
11 counterfactual lease payments, taking into consideration
12 the time value of money."

13 If I can put that in my own words, essentially the
14 overcharge on the leased transaction will be calculated
15 as a function of the overcharge on the truck, and the
16 terms of the lease and interest payments pursuant to the
17 lease.

18 So although that is not a proxy for any distinct
19 overcharge on a leased transaction, distinct from the
20 overcharge on a new truck itself, on a truck purchased
21 out right, it is a practical method for arriving at an
22 overcharge calculation on the leased transaction which
23 takes into account the specific terms of the lease
24 which, as I have explained, will be disclosed.

25 So I fully accept that that methodology is not an

1 answer to Mr. von Hinten-Reed, paragraph 39, and the
2 possibility of a systematic variation because that
3 methodology is built up using the putative overcharge on
4 the sale of the naked truck outright.

5 But this really just takes you back to the point
6 that Mr. von Hinten-Reed has not given any reason to
7 expect that there would be such a systematic variation.

8 So there is a lot of work being generated off the
9 back of what starts out as something that is really not
10 much more than informed speculation. I do not say that
11 as a criticism, it is a theoretical issue but it is
12 really not any more than that.

13 So as I said earlier on, we strongly support the
14 approach that the Tribunal has taken to the management
15 of the proceedings as a whole, whereby expert work
16 streams are closely monitored and disclosure is tailored
17 according to the sorts of analyses that the Tribunal
18 thinks it is proportionate to conduct, and we have -- in
19 our submission, VSW have not demonstrated that this is
20 a process that ought reasonably to be set in train in
21 this case. Mr. von Hinten-Reed is an outlier and he has
22 not made out a case that he should be able to follow his
23 own path.

24 There is a second aspect to this, sir, which I do
25 not think Mr. Johnston has touched on yet but it relates

1 to the order that VSW seek if this disclosure is not
2 granted. I think it is important to look at that.

3 It is {HS2-B/31/7} and it is paragraph 6 of that
4 order. We have other points on the form of the order,
5 sir, but I will not bother you with those now. I just
6 want to deal with this point of principle.

7 Here, VSW seeks an order that insofar as the
8 defendants do not disclose any leasing data
9 {HS2-B/31/7}, it says:

10 "... there shall be no separate calculation of the
11 overcharge referable to that defendant's leased trucks
12 in that market."

13 MR. MALEK: We do not need to hear from you on that at the
14 moment, because I am not inclined to order that. So let
15 us not waste any time on that.

16 MR. WILLIAMS: I am grateful, thank you. I think I have
17 made my submissions on the issue of principle, sir,
18 unless I can help you any further.

19 MR. MALEK: No, that is very helpful.

20 Mr. Johnston, the question is are you really an
21 outlier, because if you look at your client's statement,
22 it is not just paragraph 38, it goes up to paragraph 41,
23 you have to read the whole section.

24 MR. JOHNSTON: Indeed.

25 MR. MALEK: What you are posing is in a way an ideal because

1 if you can do it, it is going to be more accurate to
2 actually work from the leasing data than to extrapolate
3 from the sold trucks data. Clearly that must be the
4 case, but are you an outlier on that or not?

5 MR. JOHNSTON: Sir, I am not instructed in all of the other
6 matters. I do not doubt what Mr. Williams says, which
7 is that in respect of trial 1 and trial 2 this is not
8 something that has been sought.

9 If I can respond briefly, we are in a slightly
10 peculiar position that an expert economist is being
11 criticised for intellectual humility in the sense that
12 what he said is that he does not know, he does not yet
13 have this data. But what he goes on to say and what
14 Mr. Williams did not read is that it would be
15 considerably more robust if he has that data, and that
16 is Mr. von Hinten-Reed's position, sir.

17 He says, if you read on into the remainder of
18 paragraph 39:

19 "As a result, my analysis would be considerably more
20 robust if it has the benefit of market-wide disclosure
21 with respect to leased new trucks data."

22 Mr. von Hinten-Reed thinks it is, bearing in mind
23 there is 20% of the trucks in the claim are leased, he
24 thinks this is a significant factor that he as an
25 economist should explore. What he is not saying,

1 because he cannot say it, is: I know that this will
2 become a variable that is hugely significant, because he
3 has not seen the data, he has not got the data. He
4 cannot say that, and he has not had the Scania data in
5 sufficient time to analyse it to give you even his
6 provisional views on that.

7 But his position is that this is in his view
8 a factor that will make his analysis considerably more
9 robust.

10 If I can take a step back to where we were, sir,
11 with VoC disclosure, there was a considerable dispute
12 between the parties in 2019: should VSW only be given
13 VSW, volume of commerce data. There was a substantial
14 dispute between the parties on that, and VSW's position
15 was no, we are going to need market-wide data.

16 So we are in an analogous situation here. The
17 defendants have seen the force of the fact that
18 market-wide data is necessary in order to do the kind of
19 systemic analysis that is necessary.

20 I hear what you say that you worry that this is
21 a counsel of perfection, and I suppose my answer to it
22 is in two or three points. Firstly, and I have already
23 made this point, it is a significant number of trucks,
24 and secondly, Mr. von Hinten-Reed is of the view that
25 this is likely to make his analysis considerably more

1 robust. So it is not a question of gold plating, he
2 regards this as one of the most important factors that
3 he might be able to get access to. If he cannot, he
4 thinks he is not going to be able to do it at all, and
5 possibly ...

6 MR. MALEK: Let us look at the different permutations.
7 Permutation 1 is what Mr. Williams wants us to do, which
8 is to say you do not get it at all, okay.

9 Permutation 2 is we take the view actually, having
10 regard to paragraphs 39 to 41 of the witness statement,
11 we think this is a useful exercise, it is going to be
12 more accurate and it should be done and it is not going
13 to cost that much more money.

14 MR. JOHNSTON: Indeed.

15 MR. MALEK: The third possibility is to say you get the
16 disclosure from the other parties and then see whether
17 or not your expert is able to be more concrete as to the
18 likelihood of this being a productive route.

19 So those are the three permutations. Where we are
20 at the moment, or certainly where I am at the moment is
21 that I am not attracted by the first one, okay.

22 So we are really talking about two or three.

23 MR. JOHNSTON: I am grateful, second or third.

24 MR. MALEK: What do you have to say about that really?

25 MR. JOHNSTON: As to the reason why it should be the third

1 as opposed to the second, sir, the critical factor not
2 to lose sight of is that Mr. Williams is not saying this
3 is going to be an expensive exercise. The cost at this
4 point is with Mr. von Hinten-Reed and with Hausfeld and
5 with their clients. What Mr. von Hinten-Reed is saying,
6 if you want to test now whether or not this is going to
7 be useful data, the position is that Mr. Williams'
8 client has said we have got the data, we will go into
9 the data, we will extract certain relevant data points
10 that relate to you, we will put them in a separate
11 spreadsheet and send them to you because we do not want
12 you to have the whole universe of data, because if you
13 were to have that, then, and this is Mr. Williams'
14 concern, that will start a whole chain of enquiry and
15 chain of analysis, and we think that is a chain of
16 analysis that should not be carried out.

17 But if what you are saying to me, sir, is you want
18 to know in more detail from Mr. von Hinten-Reed having
19 had access to some more of this data, whether or not
20 it is going to be useful, then my plea to you is in
21 those circumstances where Mr. Williams' case is
22 expressly not that it would be onerous or costly or
23 disproportionate to give it to us, that that data should
24 be provided to Mr. von Hinten-Reed now.

25 That comes back to the point that I addressed you on

1 immediately after lunch, which is the reliability of
2 what he can or cannot do is going to turn on having
3 multiple defendants' data if it is going to be right
4 that he is going to extrapolate to others.

5 Sir, I think you have my point.

6 MR. MALEK: Okay. Let us just stop for one moment. (Pause)

7 We consider that there may well be a difference,
8 particularly on pass-on, between sold outright trucks
9 and leased trucks, and that the exercise that
10 Mr. von Hinten-Reed wishes to carry out as set out at
11 paragraphs 39 to 40 or 41 of his fifth witness statement
12 is something that he should be entitled to explore.

13 We understand the more truck companies that supply
14 this data and in a reliable form, the more robust any
15 analysis can be and the more confident he can be that
16 this is a viable option.

17 Given that DAF has agreed already to provide data in
18 relation to the specific trucks in question and has not
19 said that it would be costly or disproportionate to
20 provide market-wide leasing data, we are going to order
21 that as against DAF.

22 That does not mean that we necessarily will order it
23 as against any other defendant because we need to deal
24 with those on a one by one basis.

25 So shall we now deal with Iveco.

1 MR. JOHNSTON: I am very grateful, sir.

2 I am conscious that when it comes to drafting up the
3 orders one of the things that bedevils counsel is
4 wanting to know the date on which it might be done. Is
5 it sensible to canvass that now, or do you want us to
6 address that between ourselves separately? I am content
7 either way. It might be sensible to hear from
8 Mr. Williams when his client thinks that they can
9 provide that disclosure.

10 MR. MALEK: Let us hear from Mr. Williams and see if we can
11 quickly deal with it.

12 MR. WILLIAMS: I think I would like to take instructions, if
13 I may. I think we have concerns about the dates which
14 have been proposed which, as I indicated earlier on,
15 are January dates. We also have concerns about the form
16 of the order which has been proposed, and again, I do
17 not know if the sensible thing is for me to discuss that
18 with Mr. Johnston offline rather than to take up time at
19 the hearing.

20 MR. MALEK: That is fine. What I suggest you do is that you
21 and Mr. Johnston discuss both timing and the form of the
22 order. If there is any difficulty we will deal with it
23 in the normal way in correspondence. But ideally we
24 should try and get this disclosure done early 2022.
25 I am not expecting you to do it this year, but I would

1 have thought if it is done by the first quarter of 2022
2 then that would certainly help.

3 MR. WILLIAMS: I understand, sir. Thank you.

4 MR. MALEK: Shall we deal with Iveco?

5 MR. JOHNSTON: I am just taking instructions in relation to
6 Iveco from those behind me. Might it be possible to
7 deal with Daimler first and then revert to Iveco?

8 The issue in relation to Daimler, I think Mr. Harris
9 can help me by adding some clarity here. The defendants
10 have taken three positions in relation to French banking
11 secrecy, the first of which is, and this is the position
12 broadly taken by Scania, that they may not disclose the
13 identity of the individual who bought the truck.

14 Others have said we have taken legal advice on this,
15 that is completely wrong, there is no problem here, you
16 can disclose. What I am not sure about Daimler's
17 position is whether Daimler's position and Mr. Harris'
18 position is that no disclosure of any kind pursuant to
19 any of these categories may be given at all in France,
20 or whether his position is that he may not, for reasons
21 of French banking secrecy law, give disclosure of the
22 identity of the party who purchased. Because of course,
23 sir, you will see where the submission and the question
24 goes. If his position is the former and he says the
25 French banking secrecy law has that extraordinary wide

1 ambit, then I am placed in a very difficult position.
2 If it is the latter, then my client seeks disclosure in
3 relation to France, and it is worth saying that Daimler
4 has provided disclosure in the UK and Germany so it
5 recognises in basic terms the proportionality in force.

6 MR. MALEK: As against Daimler, are we only arguing about
7 France at the moment?

8 MR. JOHNSTON: Absolutely. So it has already been provided
9 in the UK and Germany. The position is that it has been
10 stalled in France over the French banking secrecy
11 question.

12 The question that is still unclear to me from what
13 I have seen from Mr. Harris is whether or not it is said
14 that French banking secrecy precludes any kind of
15 disclosure at all in relation to this material or only
16 that it precludes disclosure of the identity, which is
17 the animating issue, as I have always understood it, the
18 identity of the purchaser. Because if it is the latter
19 then my client does seek from Daimler disclosure with
20 that category anonymised, and then at a later date we
21 can decide whether that redaction can be removed or not,
22 sir, so ...

23 MR. MALEK: Sometimes redaction is quite a complicated task.
24 It all varies, I do not know how their systems are set
25 up. Sometimes it is very straightforward, other times

1 it is a lot more complicated.

2 MR. JOHNSTON: Sir, maybe it would assist to hear from
3 Mr. Harris on that specific point. I do not understand
4 him to say it would be disproportionate to do the
5 redactions, but I am not 100% clear what his
6 position is.

7 MR. MALEK: I am sure that Mr. Harris knows what his
8 position is.

9 Mr. Harris, can you help us?

10 MR. HARRIS: Sir, yes. It is not a straightforward
11 dichotomy, as Mr. Johnston suggests, not a question of
12 whether you give an identity as in the name of
13 a particular lessee, or you give nothing at all. It is
14 not as simple as that, because it may be that as
15 a matter of the substance of French law you are not
16 allowed to reveal by one means or another the identity.
17 What that means in practice is that whilst you might,
18 for instance, redact the name of the lessee,
19 nevertheless by providing 25 other columns of data
20 regarding that particular lessee, the person to whom
21 those 25 columns are disclosed can work out the name of
22 the lessee.

23 So the dichotomy is a false one, and I cannot answer
24 the question fully today because the whole point is it
25 was agreed that the argument about the substance of

1 French law could not be dealt with today. So I cannot
2 address you today as a matter of the substance of French
3 law as to quite how many of those columns one would be
4 allowed to reveal without going too far and revealing
5 the identity of the lessee or quite how they interrelate
6 with each other.

7 So that is the position. We had clearly understood
8 that any debate about the substance of French law was
9 not for today, but it was to be dealt with by expert
10 evidence in due course. So I am not in a position to
11 say anything else.

12 The only other thing to throw into the mix is that
13 there will be questions about the proportionality of
14 disclosure probably when we have got to the bottom of
15 the substance of French law.

16 For instance, if it turns out that it is permissible
17 as matter of French law to reveal, say, columns 1, 2, 3,
18 4 and 5, if, then there might be a question mark about
19 how much it costs in order to do that and how long it
20 will take. I simply do not know, because I do not know
21 whether we are talking columns 1 to 5 or columns 1 to
22 5,000.

23 MR. JOHNSTON: For the avoidance of doubt I wasn't seeking
24 to canvass the substantive issues of French banking
25 secrecy law -- I was just seeking to understand Mr

1 Harris' position.

2 My understanding is that what he is saying is that
3 he cannot currently provide anything, because he does
4 not know he what the content of French banking secrecy
5 law is sufficient to know what he could or could not
6 provide. Sir, in that position, I am placed in the
7 invidious scenario where I have to say that this is
8 a point to be held over.

9 I do put down a marker that Mr. Harris' client is
10 a notable outlier in that respect.

11 MR. MALEK: Do not worry about that. Where we are on
12 Mr. Harris' clients is that we have got this hearing on
13 14 January. He knows what the Tribunal has already said
14 in relation to DAF, so he should expect in the ordinary
15 course that if the French law issue is resolved in one
16 particular way his client may be required to give
17 disclosure of this material. So his clients can at
18 least prepare themselves to having an order that
19 requires them to provide that data within a certain
20 period of that hearing.

21 I would like to put down one marker about this
22 French law point, which is that often you will find that
23 disclosure of information -- you have this with Russian
24 law, Swiss law, French law -- is a criminal offence
25 under certain laws, but that in practice if a party has

1 been required by an English court to provide disclosure
2 the likelihood of any prosecution is minimal, and that
3 one of the things we are going to have to assess is not
4 only the question is does it infringe French law to
5 supply the information, but whether under French law
6 either it is a defence if they have been required to
7 produce it by an English court, or even if it is not
8 a defence as a matter of reality it will not lead to
9 a criminal prosecution.

10 I am just flagging that. I think we have gone as
11 far as we can in relation to Daimler and France for
12 today.

13 MR. JOHNSTON: Sir, as to Iveco, I am conscious that there
14 is further disclosure arriving from certain of the
15 defendants. There is also disclosure recently arrived
16 that we have not had the opportunity to review in full,
17 and there is the possibility of a third category of
18 defendant who is writing and there may be therefore
19 additional material from them.

20 So what I propose to say in relation to Iveco, sir,
21 is in the light of the Tribunal's indication that what
22 you would like is for Mr. von Hinten-Reed to in effect
23 look at the first tranche of material that he has,
24 assess its usefulness and revert in the light of that,
25 that the sensible thing to do in relation to Iveco is to

1 hold that over.

2 So once we know what Mr. von Hinten-Reed says, we
3 would either at that point be able to say it will be
4 critically important to have additional material from
5 Iveco and without it we are flying in the dark, or it
6 may be at that point he says in the light of what I have
7 already got and what is already likely to come as well
8 I do not need it.

9 So that is my practical suggestion in relation to
10 Iveco, that we hold that aspect of the application over
11 for another day, as it were, when we know slightly more.

12 MR. MALEK: I am sure Mr. Singla will not oppose that.

13 Mr. Singla?

14 MR. JOHNSTON: I do not doubt that.

15 MR. SINGLA: Sir, no, we are content with that.

16 Could I just put down just a couple of markers
17 though?

18 MR. MALEK: Of course.

19 MR. SINGLA: The first is, like Mr. Williams, our position
20 is that in fact this disclosure is not necessary and our
21 expert has made it clear that this exercise on the
22 leasing side of the case can be done without any further
23 disclosure. So Mr. Williams and his clients are not an
24 outlier in that respect; that is our position that this
25 is not necessary. We take a slightly different view as

1 to how it can be done, but we say it is not necessary.

2 The second marker is that if this application
3 against us is resurrected it would need to be seriously
4 narrowed, because as the Tribunal will have seen, our
5 evidence at the moment is that this would cost between 1
6 and 2 million euros, and that is excluding the
7 qualitative disclosure. So that is just on the data
8 side.

9 So we are very content for this to go off, it should
10 never have been brought in the broad way in which it has
11 been brought, but if they are going to come back it
12 needs to be seriously refined, I would suggest.

13 MR. MALEK: You have laid your markers and I think we all
14 know where we are coming from on that.

15 So we have dealt with leasing data.

16 MR. JOHNSTON: Yes, sir.

17 MR. MALEK: We have dealt with the German market. So we
18 come back to the composite dataset.

19 MR. JOHNSTON: Yes, sir, and where we have got to having
20 addressed you on the composite dataset, if I can capture
21 the gravamen of the discussion, is that my clients are
22 going to input the additional material that has been
23 identified in correspondence with Quinn, they are going
24 to input some of the additional data that they have
25 received or are shortly to receive. What then remains

1 is the question of when that will next be provided.

2 As I explained to you earlier, there is no perfect
3 date for that because there is always ongoing material.
4 Then the question will arise when following that and in
5 what time period the defendants will then carry out the
6 reconciliation exercise that the Tribunal has indicated
7 that they should carry out.

8 MR. MALEK: Yes, so we will revisit that in February.

9 MR. JOHNSTON: I am grateful, sir.

10 MR. MALEK: Yes.

11 MR. JOHNSTON: I am looking slightly to those behind me, but
12 is the Tribunal's indication then that the next
13 iteration of the consolidated data should be provided
14 before February?

15 MR. MALEK: Ideally, yes, that is right. But it may not be
16 practicable, so --

17 MR. JOHNSTON: I think it is practicable in the sense that
18 there may be more or less within it, if that makes
19 sense, depending on when --

20 MR. MALEK: Exactly.

21 MR. JOHNSTON: -- and what it gets provided, but we can
22 certainly recirculate what is a sort of iterative
23 document in advance of that hearing in February.

24 MR. MALEK: What we are looking for is answers to all the
25 questions that the parties have raised --

1 MR. JOHNSTON: Yes.

2 MR. MALEK: -- and a new version of the composite dataset by
3 the time we come back in February, and it is for you now
4 to sort that all out yourself. But we have already
5 indicated we want answers to all the questions by the
6 end of this year, and that will then give you some time
7 to update the composite dataset and hopefully you will
8 be able to do that by the very beginning of February.

9 MR. JOHNSTON: Sir, I am very grateful. I am very grateful
10 for that indication in terms of timing.

11 I have only one more point. I think that deals with
12 all four of the applications that I have made. This is
13 a point really that is perhaps a pertinent point to
14 start with in relation to the defendants' applications,
15 and it is as to the consequences that follow from the
16 test claimants' decisions that were taken yesterday.
17 Because if I can put it in very simple terms, the basic
18 position is that there are certain test claimants that
19 are now inked in, as it were, or very nearly inked in.
20 So they are Suez UK, C28, Metro France, C112, and Suez
21 France, C97. Then there are others within the sort of
22 penumbra, as it were.

23 So, for example, there has not been a final decision
24 as to whether or not Brakes or NWF would either, well,
25 whether either one or none or both of those might be

1 included, and there is also certain questions in
2 relation to some of the companies within the Suez and
3 Veolia context.

4 So just to sort of clarify this point before we go
5 on to applications for disclosure against the claimants,
6 it is immediately obvious the rationale for the test
7 claimants' proposal was at least in part to ensure that
8 there is a manageable process to trial, including
9 manageable disclosure.

10 So, therefore, the position, and this was something
11 that I wanted to canvass at this point rather than at
12 the end, and you can see why I am doing it now, sir, the
13 position from VSW's perspective is that the sensible
14 approach to any order for disclosure is that it should
15 be given by all of the companies that are, I have
16 described them slightly colloquially, inked in. In
17 respect of those that I have referred as in the
18 penumbra, any further disclosure from them should wait
19 until February because that is the point at which we
20 will know that they are in or out, in four months' time.
21 In respect of those who we know are not going to trial,
22 then they should not be providing further disclosure at
23 this point, and that is because that is precisely part
24 of the rationale, logic and benefit of the test
25 claimants' approach.

1 It is a manageable trial and a manageable lead-up to
2 trial, and of course there is no point then providing
3 disclosure when it is effectively going to be ignored
4 because it is not going to be cross-examined on or
5 whatever it might be going forwards, sir.

6 So that is just to raise that point --

7 MR. MALEK: It is a difficult point because I think that the
8 defendants will say they need that data in any event
9 even if those particular claimants are not the test
10 claimants. But I think that at the moment I am probably
11 against you on that, but we can come back to that later
12 when we have heard from the defendants.

13 On the tax and interest, we indicated yesterday that
14 we were minded to make an order on the question of
15 timing. Have you got timing now? Have you discussed
16 that with your opposite numbers?

17 MR. JOHNSTON: I have not had an opportunity to discuss
18 that. That is -- I think by way of consent order, I had
19 that parked for after the hearing to deal with my
20 opposite number, or opposite numbers as it were, in that
21 respect. So we have not canvassed a date for it, no.

22 MR. MALEK: Okay. We will want to have that -- when we
23 draft the order, we will want to have the timing in
24 there.

25 MR. JOHNSTON: Yes, sir.

1 MR. MALEK: If you cannot agree, send us a consent order,
2 put the date in brackets and put the alternative dates
3 in and we can cross off one set of dates.

4 MR. JOHNSTON: Precisely, sir. I would hope that we can.
5 If we cannot, we will deal with it by way of square
6 brackets.

7 MR. MALEK: Is there anything else that we need to do on
8 VoC2/01? Is that all resolved now?

9 MR. JOHNSTON: I think it is, sir. There is a question that
10 Mr. Singla canvassed before lunch about the scope by way
11 of chronology of what has been ordered for PO1 to 2.

12 There has been some back and forth between myself
13 and Mr. Singla, but maybe we will come on to that. I am
14 conscious that you may want to leave that for a moment,
15 but yes, the simple answer to your question is yes, in
16 respect of VoC2/01. There may be a small issue of
17 timing as to PO1 to 2, but I will address you on that in
18 a moment.

19 MR. MALEK: Let us hear from Mr. Singla on the timing of
20 VoC2/01.

21 MR. SINGLA: There is no issue. I think Mr. Johnston is
22 confusing VoC and PO categories here. On timing, do you
23 mean temporal scope of VoC?

24 MR. JOHNSTON: The point I was making was in respect of PO1
25 to 2, there is a temporal scope question, but --

1 MR. MALEK: We are not talking about that at the moment. We
2 are just talking about on VoC2/01, are there any issues
3 on that claim?

4 MR. SINGLA: No, there are no issues. Mr. Johnston has
5 confirmed all of the VSW claimants are going to provide
6 disclosure statements to the reasonable and
7 proportionate standard. That is agreed now.

8 MR. MALEK: That is fine. Let us deal with PO1 and 2.
9 There is an issue on that, Mr. Singla?

10 MR. SINGLA: I believe there is, yes. There are, I think,
11 probably three issues. If I can just tell you what they
12 are.

13 One is rather curious, but Hausfeld do not accept
14 that PO1 and 2 are relevant to pass-on. We simply do
15 not understand that issue because they are all to do
16 with the disposal of trucks.

17 MR. MALEK: Do not worry about that. I am sure we do not
18 need to resolve that issue.

19 MR. SINGLA: I am grateful. They say that relevance is in
20 issue.

21 They also take a second point, which is the only
22 trucks that are relevant for these categories are those
23 that had a balance sheet value at the time of disposal.
24 We say through our expert and by way of submission that
25 that is hopeless because it is the realised disposal

1 value of the truck and not balance sheet value which is
2 relevant to pass-on. So hopefully that will not detain
3 the Tribunal for too long.

4 Then the third point is a temporal scope point, as
5 to which I think the gap between us is quite narrow. We
6 seek a temporal scope for PO1 and 2. If I can just tell
7 you what we are seeking and then perhaps Mr. Johnston
8 can clarify his position.

9 We say that this disclosure should be provided in
10 respect of trucks that were purchased by the claimants
11 between 1 January 1997 and 31 December 2016 and trucks
12 disposed of by the claimants between 1 January 1997 and
13 31 December 2018, and the reason why there is
14 a difference between the 2016 and 2018, which will be
15 self-evident because we are talking on the one hand
16 between trucks purchased and trucks disposed of, and the
17 2018 date I think reflects an order made in the Ryder
18 proceedings.

19 Those are the issues, I believe. Then subject to
20 those detailed points, we take the same issue as with
21 the VoC categories, which is they tell us they have done
22 a whole lot of work and we would like that confirmed
23 across the board in disclosure statements to the
24 reasonable and proportionate standard.

25 MR. MALEK: That is agreed. We have already covered that

1 last point, okay.

2 MR. SINGLA: Yes.

3 MR. MALEK: The first point, relevance and issue. At the
4 moment we are minded to take the view that it is
5 relevant for both, but we do not need determine that
6 because they are going to be giving the disclosure in
7 any event.

8 On the second point, they are saying it is only
9 relevant if it has a balance sheet value but you make
10 the common sense approach, well, what matters is the
11 realised value, because you can have something in your
12 balance sheet as zero because you have written it down
13 and then you sell it down and it comes back into your
14 balance sheet, and lots of companies like to write down
15 items significantly to zero and then show a profit the
16 next year when they have sold the item.

17 On that point, Mr. Johnston, I think it is a pretty
18 difficult argument if you want to run that.

19 MR. JOHNSTON: Sir, let me be clear, this is a point that is
20 being canvassed in the Redfern schedules but it is not
21 a point that has affected what disclosure has been
22 given.

23 So my clients' position, if I can put this way, just
24 as there is a dispute that has been canvassed in the
25 Redfern schedules effectively between the economists as

1 to whether or not PO1 or PO2 formally is a volume of
2 commerce category or not. In the same way there are
3 certain points canvassed there which relate to how these
4 trucks should be treated, as it were, but it does not go
5 to what has been disclosed. Just to be clear, VSW has
6 not said we are not disclosing that because that
7 specific truck had been written down to zero value.

8 MR. MALEK: I am sure Mr. Singla is happy with that. As
9 long as you are saying we will be giving disclosure in
10 respect of a truck which has a nil value in the balance
11 sheet that has been sold subsequently, then we do not
12 need to resolve that and that is fine.

13 What about the temporal scope, because they are
14 saying that it is fine to go up to 2016, the end of 2016
15 in respect of trucks purchased, and we can see that, but
16 there may be trucks that have been sold in the
17 subsequent two years. Surely they should be caught as
18 well, just in respect of those disposals.

19 MR. JOHNSTON: My understanding of this is that the original
20 order required PO1 and PO2 disclosure to the end of
21 2018. That is what my clients have done. Those are my
22 instructions.

23 I have had correspondence back and forth with
24 Mr. Singla, unfortunately we were not able to speak but
25 we had email exchange, and there was some confusion

1 within that email exchange, sir. But the basic position
2 of my instructions are that in relation to trucks sold
3 we have provided data and disclosure up to the end of
4 2018.

5 So I do not think there is anything between us on
6 this point.

7 MR. MALEK: That is okay. There is no issue between you,
8 that is fine.

9 So we go to PO3.

10 MR. JOHNSTON: Yes.

11 MR. MALEK: That is the factors relevant to prices obtained
12 by each claimant --

13 MR. SINGLA: Sir, I am sorry. Just to finish off on PO2 and
14 PO1, the temporal scope, I just want to make clear that
15 I think there is an issue as regards the temporal scope
16 of those categories under the 2019 order, and it was
17 slightly complicated because, as you will recall, the
18 ordered tranche 1 and tranche 2, and I believe in fact,
19 I think inadvertently, slightly different temporal
20 scopes were put into that order for the tranche 1 and
21 tranche 2.

22 So I am not in a position now to confirm or
23 otherwise as to what has actually come from the VSW
24 claimants to date, but we are sort of concerned to
25 ensure that going forward the position is clarified and

1 confirmed.

2 So I would not want this just to be skated over. If
3 there is any resetting of the temporal scope to be done
4 then we need it to be sorted out now and not referred
5 back to ... (Inaudible) ...

6 MR. MALEK: The order you make will have the temporal scope
7 in it, and Mr. Johnston has agreed that you will get
8 disclosure up until 31 December 2018.

9 MR. SINGLA: Yes, that is how I understood it, but I just
10 wanted to be absolutely clear. I am grateful.

11 MR. MALEK: Okay.

12 PO3. Mr. Singla, I think that it is probably for
13 you to tell us where the differences lie and we see
14 where we go on that.

15 MR. SINGLA: Yes. This is a relatively short point because
16 the -- so category PO3 was not the subject of the
17 December 2019 disclosure order, and therefore the VSW
18 claimants have not given any disclosure under this
19 category. They may or may not have given disclosure
20 responsive to certain elements of this category under
21 other categories, but we are not able to analyse that
22 data. So we do not know.

23 But the position here is straightforward because
24 they accept that this category may in principle be
25 relevant, and therefore the only two points I think they

1 take are, they go both go to proportionality. The first
2 point they take is the VSW claimants did not sell or
3 lease trucks to third parties as a core part of their
4 business, and therefore it is highly unlikely they will
5 have documents responsive to this category.

6 We say it is actually not particularly helpful or
7 constructive to make that sort of point. If they have
8 sold trucks then it does not matter whether or not they
9 did so as a core part of their business. So that, we
10 say, does not take matters very far forward.

11 The second point they make is the information we
12 seek under P03 is regularly recorded in fixed asset
13 registers which many of the VSW claimants have already
14 disclosed. We say that in fact it is unlikely that
15 fixed asset registers record information responsive to
16 the elements of P03. For example, they are unlikely to
17 record information on things like exchange rates and
18 resell prices and the relationship between the two.

19 We say that the POM statements have not been
20 specific enough to assist. So insofar as the only real
21 point here is proportionality, we say that in fact their
22 evidence on why this would be disproportionate is far
23 too generic and high level, and therefore the Tribunal
24 should make an order that they should conduct reasonable
25 and proportionate searches.

1 We have had no disclosure to date under these
2 categories and we say it is fundamental to the pass-on
3 analysis, and Compass Lexecon have served evidence which
4 I will not take you to now but I can show you if
5 I need to.

6 MR. MALEK: I understand the point that some of the
7 information in P03 will be caught by other disclosure
8 categories, and so you have got some disclosure out. So
9 it is not right to say that you have not had any
10 disclosure.

11 The fixed asset register point, some of it will be
12 in the fixed asset register point part, but others might
13 not be and you are saying that will not give a complete
14 picture. It puts the Tribunal in a difficult position
15 because obviously we have not looked at the fixed asset
16 registers. We have seen what you say in your evidence
17 saying, well, really it is not there or it is not always
18 there.

19 I think we had better hear what Mr. Johnston has to
20 say on this category because I have no doubt that the
21 category is relevant.

22 Yes, Mr. Harris, do you want to say something? Let
23 us hear from Mr. Harris, yes. Thank you.

24 MR. HARRIS: Sir, thank you.

25 Just very briefly, Mr. Singla has rightly identified

1 that we have not received anything by reference
2 responsive to this category. I take your point about
3 there may be the odd reference here and there, but on
4 the question of proportionality in particular I draw
5 your attention to the remark that Mr. Jones made
6 yesterday in the transcript at page 37, lines 7 to 8
7 {Day1/37:7}, and he said:

8 "Pricing policy has to be the start of the analysis
9 really for pass-on" and we agree.

10 These documents here in P03 are essentially the
11 pricing policy documents that relate to the on sale of
12 the trucks. So when addressing the question of
13 proportionality, each side is ad idem that these are key
14 documents, in Mr. Jones' words the start of the
15 analysis.

16 MR. MALEK: I have no doubt about that. That is why it is
17 quite clear that it is an important category and there
18 should be disclosure of it. But the points that we have
19 got is: is it practicable to give the information? And
20 in some cases the information just will not be there.
21 I can understand if you are talking about a small
22 business there may not be anything there, but then the
23 answer can be we have looked, we do not have it, and you
24 will accept that and then we move on.

25 Mr. Johnston?

1 MR. JOHNSTON: Sir, if I can respond to this in four or five
2 relatively brief submissions, but I am going to need to
3 take you to a few documents.

4 Can we first turn up category PO3 itself. So it is
5 in {VSW-A4-4/IC1/66}.

6 Sir, what you have here is the nature of the request
7 in PO3.

8 MR. MALEK: Let us look at it on the screen, yes. Let us
9 look at it in the screen.

10 MR. JOHNSTON: That is:

11 "Documents or information regarding factors relevant
12 to the prices obtained ... original purchase price;
13 truck condition ... exchange rate changes; demand
14 changes or forecasts in the used truck market; policy
15 and regulations changes ... seasonal or other
16 country-specific effects."

17 If we could go over to the next page as well
18 {VSW-A4-4/IC1/67}, there we have:

19 "Information about the categories of such methods;
20 and ... information about the disposal method applicable
21 to each [of these trucks] ..."

22 Sir, there are two or three extremely important
23 contextual points to make.

24 Now, the first of them has been deprecated by
25 Mr. Singla as somehow improper or inappropriate. The

1 starting point is that the VSW claimants are not like
2 the claimants in the wave 1 and 2 trials or, sorry, the
3 trial 1 and 2 trials, they are not companies who are
4 primarily in the business of acquiring and selling
5 trucks. These are assets, yes, that are acquired by the
6 business for a purpose. So they are transporting
7 fridged food or they are moving waste water.

8 So they are not, and this is the starting point,
9 they are not primarily focused as a business operation
10 on trucks. That is a really important contextual point
11 that goes to whether or not it is going to be (a)
12 possible and (b) proportionate to find material in these
13 categories.

14 The second point, sir, if I can take you briefly
15 to --

16 MR. MALEK: Does that really go to the question of whether
17 or not that material exists? You may not have that
18 material that will cover this, in which case you can say
19 we do not have that material, because you say we are
20 a small company, we are not in the business of selling
21 trucks or anything, and it is an incidental part of our
22 business and we do not have stuff that falls within all
23 of these categories.

24 But I am not sure whether it is a good enough reason
25 not to make the order in the first place.

1 MR. JOHNSTON: Sir, if I can come on then to show you
2 a couple of the POM statements, and it is worth taking
3 a step back and recalling that VSW created the POM
4 statements without any order from the Tribunal conscious
5 that what has happened frequently in respect of
6 different disclosure categories is that it has been
7 necessary to provide a witness statement setting out
8 what kind of things are there in order to assist
9 everybody to know what kind of documents exist.

10 MR. MALEK: Yes, they are very helpful.

11 MR. JOHNSTON: If I can take you to {VSW-A3/135/9}. So this
12 is the witness statement of Mr. Boughey. It is actually
13 a disclosure statement rather than a POM statement, this
14 particular statement.

15 If you look at paragraph 35, so this is in relation
16 to NWF. So:

17 "Mr. Brimelow and Mr. Sherratt explained that there
18 has been no formal or informal written policy in
19 relation to disposal of Trucks at Boughey, so there are
20 no documents responsive to this category."

21 This is in relation to PO2 and I take that point.

22 MR. MALEK: Yes.

23 MR. JOHNSTON: "In practical terms, the fleet needs are
24 reviewed from time to time by the Transport Operations
25 Director, and factors such as mileage are taken into

1 account. Mr. Brimelow then contacts potential suppliers
2 to request quotes based on the Truck Specifications for
3 the fleet and negotiates the prices with those
4 suppliers."

5 Sir, I could, because I have got them written down,
6 but I think in the interests of time I will not, take
7 you to two or three other places. It is worth saying
8 I thought there was an impression from what Mr. Harris
9 said that PO3 is primarily about policies. PO2 is
10 primarily about policies, and PO3 is much more granular.
11 PO3 says --

12 MR. MALEK: It is relevant.

13 MR. JOHNSTON: Now you have given us the policies, now do
14 the very deep dive to go into all the factors that were
15 relevant when you were selling all of these different
16 trucks and how you took them into account and how you
17 monitored prices on the second-hand truck market and
18 looked at exchange rates.

19 The simple point, sir, is that -- and I hear what
20 you have already said on this which is that the answer
21 may be simply that we have nothing, but it is important
22 to recognise that the answer that we have nothing can be
23 arrived at by more than one route. It might be -- and
24 I suppose this is the question that arises here.
25 Mr. Boughey has said we do not even have any policies

1 let alone being in a position to disclose to you the
2 detailed analysis that underlies this category all of
3 the factors that you took into account, how you fed them
4 into your complicated matrix in order to decide when to
5 sell a truck and so on and so forth.

6 If Mr. Boughey can write back and say we do not have
7 anything further to this, that is one thing. But
8 Hausfeld's concern is that the consequence of this order
9 is that this company is going to have to now go and do
10 some kind of key word search, harvest, presumably by
11 reference to trucks sales, or to trucks sold, tens of
12 thousands of documents in order to gather these all in,
13 they are then going to have to be assessed and filtered
14 through and looked at, and the outcome of this is going
15 to be that there is not anything responsive to this
16 category because they do not have it, because they do
17 not deal with truck sales in the way that is anticipated
18 by this category, that this category of disclosure
19 request anticipates documents that we say are not there.

20 I have already given you my answer as to why we say
21 that.

22 MR. MALEK: But the obligation is to do a reasonable search
23 for the documents or information.

24 So if you have a scenario, looking at Boughey, for
25 example, given the answer that has been given in PO2,

1 unless Mr. Brimelow and Sherratt come back and say
2 actually we did have some factors that we took into
3 account and these are those, then the answer will be as
4 paragraph 35 here. I am not sure whether what you are
5 saying is a complete answer to the point.

6 But no one is going to require your clients, let us
7 say in respect of Boughey, to spend hundreds of
8 thousands of pounds to look through documents which are
9 extremely unlikely to come up with any of the answers.
10 But on the other hand, if there is stuff that is
11 reasonably available or there are individuals that you
12 can speak to who can come back with the answers, then
13 I think we should do, and it may well be that
14 Mr. Brimelow and Mr. Sherratt will be able to perhaps
15 give a bit more detail than they have given in relation
16 to PO2 in relation to PO3.

17 But it is a requirement of doing something that is
18 reasonable and proportionate. So when it comes back to
19 you answering this category, you are fully entitled to
20 say we have got this data, we have not searched it
21 because having had an initial view it does not look as
22 though there are any relevant documents there and it
23 will cost us a fortune to do it.

24 MR. JOHNSTON: Sir, just to underline perhaps my final
25 point. This was the precise purpose of the POM

1 statements. They have gone through a whole series of
2 different aspects about pricing, but they also contain
3 sections in which they say this is how we have dealt
4 with leased trucks. You have Boughey here.

5 VSW's concern, as I say, is a precise reason why
6 this was not ordered at the start. What was asked for
7 was policies. Now you have got the policies go for
8 anything further. VSW's concern is that in many of
9 these cases we have come back and said, look, we do not
10 even have policies. Now what is being said in response
11 to that is, we have read your POM statements, we have
12 read your disclosure statements, we hear you do not have
13 anything, and now we want you to go and find these other
14 categories of document which are the level down granular
15 data.

16 Our position is, and we really do want to underline
17 this, we think a wholesale search is disproportionate.

18 MR. MALEK: You have a lot of different claimants.

19 MR. JOHNSTON: Yes.

20 MR. MALEK: You are going to have the whole range. You have
21 some claimants who clearly do have policies and they
22 will be able to come up with sensible answers on PO3,
23 and you will have others who had no formal written
24 policy, maybe no policy at all, who may come back and
25 say there is nothing further in a documentary form, or

1 it is going to be disproportionate to go and look
2 through records which is like a needle in a haystack.
3 That is perfectly fine and understood.

4 But I think what you are worried about is that you
5 are going to be required to spend an absolute fortune
6 for claimants like Boughey to look for documents which
7 are unlikely to shed any light on it. I am saying even
8 under the order that is being proposed, that is not what
9 you have to do.

10 MR. JOHNSTON: I am very grateful for that indication, sir.
11 As I say, my instructions are very clearly that we do
12 regard the application itself as disproportionate, but
13 I hear what you say, sir, and ultimately that is for the
14 Tribunal.

15 MR. MALEK: Let us just adjourn for one second. (Pause)

16 Mr. Harris, I just want to clarify what is being
17 expected of the claimants here. Are they being asked to
18 give this data in relation to every truck sold on an
19 individual truck basis, or are they being asked to say
20 what were the factors generally? Which one is it,
21 Mr. Harris?

22 MR. HARRIS: It is the latter, sir. It is what were the
23 factors that --

24 MR. MALEK: That is what I thought. You do not need to look
25 at every one.

1 MR. HARRIS: No.

2 MR. MALEK: Let me go back to the other members of the
3 Tribunal. We will be back in one second. (Pause)

4 Yes, the Tribunal has considered the application in
5 relation to PO3. So long as it is not expected of the
6 VSW claimants to deal with every truck individually but
7 on a general basis, then we think that the order should
8 be made on the understanding that it really is what is
9 necessary and proportionate, and that we are not
10 expecting each of the individual claimants to spend a
11 fortune to look through records going back many years if
12 they feel that there is nothing either readily available
13 and easy to search or that the prospect of finding
14 anything that will at all assist is low.

15 So I think that is a practical answer to that. We
16 will take a break now and then after the break we will
17 deal with PO4 to PO6 which raise slightly different
18 considerations.

19 MR. JOHNSTON: If I may, just before the break, sir, there
20 was something that was canvassed briefly after the short
21 adjournment, I think, and you said that we would come
22 back to it, and that is the extent to which orders and
23 in particular orders in relation to pass-on apply to all
24 of the claimants or apply to the claimants that are
25 within the test claim.

1 MR. MALEK: Yes.

2 MR. JOHNSTON: Mr. Jones is going to address the Tribunal on
3 that point, but if we could revert to that after the
4 break we have now, I think that is quite an important
5 point of principle in part because it goes to
6 proportionality as well, sir.

7 MR. MALEK: I can understand that that is a point that you
8 want to argue. The difficulty with that is the
9 defendants will say they need the information even if it
10 does not relate to the test claimants.

11 So far as I am concerned, the orders we have made up
12 until now relate to all the claimants. If Mr. Jones
13 wants to argue the point to the contrary, we can deal
14 with that, and I think it is probably sensible to deal
15 with that after the break before we get to P04 to P06.
16 But on P04 to 6, how much common ground is there? Are
17 you far apart on this?

18 MR. JOHNSTON: Without wishing to preempt anything that
19 anybody else might like to say, the defendants' basic
20 position is that they want everything responsive to all
21 categories blanket across the piece. The claimants have
22 put forward a proposal for staged disclosure that I can
23 address you on after the break.

24 MR. MALEK: Yes.

25 MR. JOHNSTON: We say that that is much the most sensible

1 way to proceed from here, but I will address you on that
2 fully. But it is fair to say that there is a sort of in
3 principle difference of approach as to what is the right
4 starting point for starting to make orders in this
5 category, if I can put it that way.

6 MR. MALEK: These are the hardest categories, we all can see
7 that. There is some attraction to a staged approach,
8 which is provide what you are willing to provide for now
9 and then we come back to it later to deal with them,
10 insofar as there are points outstanding. But to go
11 through these schedules for PO4 to PO6 will take a long
12 time. We will not have the time to finish it today.

13 MR. JOHNSTON: No.

14 MR. MALEK: On the other hand, I do not want to have
15 a position where the defendants say it is unfair because
16 we spent so much time, or one party saying we spent so
17 much time on the other side's application we have got
18 squeezed at the end of the day. So I do think what we
19 want to do today at least is to go away with some order
20 that covers PO4 to PO6 even if it is along the lines
21 that you have indicated.

22 So it may be that if we have our break now that if
23 you can you speak to your opposite numbers and see if
24 you can agree a staged approach. I think they may well
25 be happy with a staged approach knowing that the

1 Tribunal is willing to sit on a Friday to hear
2 outstanding points as and when they arise, but this is
3 quite a big chunk to deal with towards the end of
4 the day.

5 MR. JOHNSTON: I am very grateful for that.

6 MR. HOSKINS: Can I just say something about the staged
7 approach because I think you may be imagining something
8 different to what Mr. Johnston is actually proposing.

9 I will not try and tilt at windmills, but what they
10 have suggested is at tenth Bolster, paragraphs 112 to
11 122, which is not a staged approach where they give what
12 they can and then we look at it and see if we want more.
13 It is a very different exercise.

14 I do not want to do it now. I was going to suggest
15 that you perhaps have a look at that in the break that
16 we are about to have, because we are all at least
17 talking about what Mr. Johnston's staged process is and
18 what the staged process that the Tribunal has adopted to
19 date is, because they are different.

20 MR. MALEK: We may end up having the normal staged approach
21 if there is a difference. But what I am saying is that
22 we do want today to leave with some order on PO4 to PO6
23 and not shove it all down the road.

24 MR. HOSKINS: That is music to my ears, sir.

25 MR. MALEK: That some form of staged approach may be the

1 right way forward but we need to discuss how that takes
2 shape.

3 MR. JOHNSTON: Sir, can I just ask of the six defendants who
4 I might speak to over the short break we are having now,
5 which of them is the most appropriate one to speak to,
6 and I ask that probably by reference to who was going to
7 address this point on their behalf.

8 MR. HOSKINS: In our skeleton argument we have argued why
9 Mr. Johnston's staged approach is not appropriate and
10 I am leading on PO4, so that probably puts me in the
11 frame.

12 MR. MALEK: Can you then speak to Mr. Johnston whilst we
13 have our break?

14 THE PRESIDENT: I think you mean Mr. Bolster's staged
15 approach.

16 MR. HOSKINS: Yes.

17 MR. JOHNSTON: I am grateful.

18 MR. MALEK: What paragraph of Mr. Bolster do we need to
19 look at?

20 MR. HOSKINS: Sir, it is 112 to 122, and the reference is
21 {HS2-B/IC11/46}.

22 MR. MALEK: Thank you very much.

23 MR. HOSKINS: We are not keen on that. We will not be
24 agreeing that.

25 THE PRESIDENT: We will be back just after 3.30.

1 (3.22 pm)

2 (Short break)

3 (3.38 pm)

4 MR. MALEK: Mr. Johnston, I cannot see you but you are there
5 somewhere, hopefully.

6 MR. JONES: You have got me again. We are ping-ponging
7 slightly. I apologise for that.

8 THE PRESIDENT: Just a moment, I think our live feed is not
9 on. Just a moment. (Pause)

10 MR. MALEK: Where we are, we have made orders in relation to
11 VoC1/02, PO1, PO2, PO3, and that is across the board of
12 all the claimants.

13 We are now looking at PO4 to PO6, and we have two
14 issues to discuss really. One is if we can have
15 disclosure should it just be of the test claimants? The
16 problem with that is we have not determined who the test
17 claimants are, so in effect that would mean we are
18 kicking it into the long grass. And two is, if we are
19 going to have a staged approach, I think we are
20 attracted by the idea of a staged approach, what are the
21 stages?

22 MR. JONES: Sir, Mr. Johnston has passed the baton to me to
23 address you on that first point about test claimants if
24 now is a convenient moment --

25 MR. MALEK: Yes.

1 MR. JONES: -- which I think applies to the pass-on tax and
2 I suppose interest categories, albeit that that only
3 applies to one of our groups anyway.

4 Sir, it is a really important point and what I am
5 going to come back to at the end of what I am about to
6 say is that actually there are fairness issues wrapped
7 up in this, because our application for test claimants
8 was always presented on the basis that only the test
9 claimants would need to give disclosure, and that was
10 one of the major benefits of it from the very outset.
11 Can I just show you that in our very first letter12
{HS2-E/1/10}?

13 MR. MALEK: Can we have it up on the screen?

14 MR. JONES: This is the bundle with the wrong reference,
15 I apologise. It is {VSW-D1/486/10} and then page 10.

16 If one scrolls down on page 10, at 37(ii) you will
17 see there that we are describing the purchasing entity's
18 spreadsheet and the purchasing claimant's spreadsheet,
19 and we have said:

20 "It is clear that the test claims proposal would
21 result in narrowing the scope of issues, disclosure and
22 witness evidence ... from 265 claimant and 517
23 purchasing entities to 35 claimant and 159 purchasing
24 entities."

25 And then we give an illustration in the next

1 paragraph that that would have been a reduction,
2 particularly the disclosure exercise given in December,
3 an enormous reduction in the number of billable hours.

4 I start with --

5 MR. MALEK: Do we have POM statements in respect of all the
6 claimants?

7 MR. JONES: Yes, we do, yes.

8 So I start with that, sir, because there is then
9 a long, long, long chain of correspondence on case
10 management issues where the parties are trying to work
11 out the best approach, and I am sure one of my learned
12 friends will correct me if I am wrong, but we do not
13 think it was ever suggested by any of them that this big
14 benefit of our proposal was not going to materialise.
15 Indeed, we have repeated it over -- let me just give you
16 the reference to Mr. Bolster's statement. It is in his
17 ninth, paragraph 40(b) where he makes this point, he is
18 addressing the benefits of test claimants. Actually,
19 Volvo, when they described their different proposals,
20 also made references to cutting back on disclosure.
21 Where they are talking about the differences between
22 their proposals one of the differences is the amount of
23 disclosure.

24 So it has always been common ground between anyone
25 who said anything about it, and no one, as far as we

1 know, has ever disagreed with that.

2 So of course we were not surprised by that, as it
3 were, because of course the point of the test claimants'
4 proposal is that these issues, pass-on, tax, are
5 claimant-specific, that is what you have been addressed
6 on already. They are claimant-specific. Tax
7 self-evidently, but pass-on also, because, as Mr. Harris
8 and I have emphasised, both of us, the starting point is
9 the individual claimant's pricing policies, and then one
10 might look at that claimant's downstream prices.

11 Just to be clear, I should make clear, we are not
12 saying that if one company in a group has documents
13 which are relevant to the test claimant, maybe another
14 company in the group, then those documents should not be
15 disclosed. Of course I am not saying that. Very happy
16 for all of the claimants, as it were, to be under an
17 obligation to give disclosure relevant to the test
18 claimants. But we just cannot see why it would be at
19 all interesting or relevant to look at disclosure not on
20 the test claimant.

21 Sir, it has also been pointed out to me that
22 disclosure often would not be enough, because you
23 could not just take some of this disclosure and feed it
24 into a model, for example, because you would need to
25 understand it. So you would need input from people in

1 the groups.

2 MR. MALEK: Mr. Jones, let us just look at tax, for example.

3 We all know that in life most cases settle and there
4 has been some settlement already in this case. If you
5 wanted to settle, surely the defendants would want to
6 know the tax position of any claimant who is going to
7 settle with them because that could make some impact on
8 the figures to offer. So it is not --

9 MR. JONES: Can I answer this in this way, sir. If that
10 were true across the board then we would need to be
11 progressing all of the claimants, including the wave 2s,
12 and I very much hope it is not true because we very much
13 hope that the test claimants' proposal, and this was our
14 idea, was going to give guidance to settle the others
15 without going through all of these steps.

16 It is very likely that on tax the position is going
17 to be the same within each group, so choosing a spread
18 of claimants but ticking off the main groups is going to
19 be very helpful on that. But the whole premise of the
20 proposal was that we would draw a line under these
21 points and people would be able to say look at these
22 issues in the round, we have got helpful guidance and
23 that is going to help, as I have said a few times,
24 promote settlement, in these claims and in other claims
25 which also will not have this disclosure.

1 So I started by making a fairness point and I just
2 want to, if I may, just make that point because it is
3 important. The costs of this, we think, and I say we
4 think because there are some costs in Mr. Bolster's
5 statement but they are looking at the savings of my
6 original test claimants' proposal, which was obviously
7 a little bit bigger and they do not break out the
8 disclosure issue as a separate issue. But I have spoken
9 to him in the last ten minutes and in broad terms he
10 thinks that this disclosure, if it were across the
11 board, would add another 5 to £10 million.

12 The fairness point is this: I see, sir, that
13 although no one had ever suggested this before, when you
14 floated the point earlier on some of my learned friends
15 nodded and I assumed from that that they are now going
16 to say it is a very good idea and although they had
17 never mentioned it they now entirely agree with you.

18 Sir, on other much less important issues, much less
19 important issues with much lower costs, you have
20 estimates of costs, you have statements from economists,
21 statements from solicitors and one can go through it.
22 But we really are in the position now, we do not
23 understand why it would be helpful, and more than that,
24 and this also goes to the fairness, more than that these
25 clients we are talking about, clients of mine who we are

1 talking about, were the ones who promoted the test
2 claimant idea. They promoted the idea of their claims
3 being paused so that others could go ahead, and they did
4 it on the basis that they would save money and they
5 would not have to go through this whole process.

6 If it is now being said by any of my learned friends
7 that they should do that, it really would not be fair to
8 decide it now. That is the fairness point. We would
9 have to look at why they want this information that they
10 have not said previously.

11 MR. MALEK: One of the main reasons why the test claimants'
12 route is being taken is to have a manageable trial that
13 we can get everything, at least some of the issues,
14 resolved across the board. It is not simply the point
15 that you are making.

16 But I am concerned about the impact of all of this,
17 that we have been making an order in relation to the
18 defendants that they provide quite extensive disclosure
19 pursuant to your questions, and now you are saying as
20 regards their requests that now, us having made the
21 orders in respect of the other categories, we have not
22 come to P04 to P06, you are saying actually we should
23 row back on that and just give them certain claimants.
24 But we do not know who they are, so it is going to be
25 postponed until February at the very earliest.

1 The other thing to bear in mind is I have been doing
2 this job for enough years, I have had so many of these
3 similar cases where you have the test claimants and they
4 are the very ones that settle, and then you have
5 a position that everyone has waited two years for
6 a trial that has never taken place. So having the test
7 claimant route has delayed things very significantly for
8 all the other parties whose actions, let us say, have
9 been stayed and they get resurrected two years down the
10 line and they have not done all the basic work so you
11 have another two-year delay even before those are going
12 to be resolved.

13 MR. JONES: Can I take those points in order?

14 The risk of settlement is much lower, and that
15 particular problem, is much lower here given that the
16 test claimants are chosen most of them from bigger
17 corporate groups. So Metro is not going to be settling
18 one or two test claimants' claims and not its other
19 claimants'. So there is a much lower risk of that
20 happening here.

21 But, sir, more generally I do push back at the
22 suggestion that this is something which we have just
23 come up with. It is the opposite, if I may say so. We
24 have proceeded always, always, on the basis that
25 disclosure would be limited to test claimants and it is

1 rather we who are taken by surprise at the suggestion
2 that it may be different.

3 So, sir, in terms of the disclosure over the next
4 few months, I think where Mr. Johnston was starting off
5 was putting to you a sort of a narrow proposal and then
6 possibly a slightly wider one, and I can entirely see
7 that the narrow proposal is not, if I can put it this
8 way, going to go down well. But let me just recap.

9 He was suggesting that the narrow proposal would be
10 just to give, order disclosure against the ones who he
11 called locked in, so the three claimants who, going back
12 over the discussion yesterday, seemed to be definite
13 test claimants. He identified who those three were.

14 There is then a slightly wider group of claimants
15 where no decision has been made, and of course that is
16 the decision between Brakes and CM Downton. I think
17 Mr. Johnston said NWF, but I think it is Brakes versus
18 CM Downton. Within the specified Veolia groups there is
19 a question about whether it is going to be the business
20 unit or whether it is going to be a particular test
21 claimant. Then of course on Metro and Suez in Germany
22 there is the question about whether we should narrow it
23 down beyond the downstream entities who we have
24 identified within those companies.

25 So the wider proposal, and I think Mr. Johnston's

1 starting point was it was going to be one of those two.
2 He did not anticipate there might be a third much bigger
3 one, but that wider idea is obviously something which we
4 could do. We were going to try and persuade the
5 Tribunal to go with the narrower rather than the wider,
6 but the wider one would at least address the concern
7 that you just expressed, that we do not want to kick
8 this off until February given that you will not make the
9 final selection of test claimants until February.

10 So we could at least avoid that problem and focus on
11 the outstanding candidates for test claimants. But what
12 we really do resist on fairness grounds for today's
13 purposes, as well as more generally, is the idea that it
14 should be across the board.

15 Sir, those are my submissions on that subject.

16 Unless I can assist further.

17 MR. MALEK: Okay, let us hear the other parties.

18 MR. HOSKINS: I think it is probably for me to kick off.

19 I think the notion of surprise is itself
20 a surprising one, because you do not find the claimants
21 trying to make these narrowing points in their skeleton
22 argument for the Tribunal for today, or indeed in the
23 Redferns. The first time this point has been made, so
24 far as I am aware, and I apologise if I have got it
25 wrong, is now. So there is no surprise element here.

1 The second point is that, sir, as you have said in
2 introducing this session, if it is to be just test
3 claimants we are just going to kick all of this into the
4 long grass because we will not know who the test
5 claimants are until February.

6 We need to keep moving forward. April 2024 might
7 seem like a long way away but we are all absolutely
8 aware of the complexity of what is required to prepare
9 for April 2024, and we cannot just keep kicking
10 fundamental disclosure issues like pass-on down the
11 track. It is just going to make the problems of making
12 this trial as effective as possible even more difficult.

13 The third point is that disclosure given in relation
14 to pass-on, interest and tax, will not be wasted for two
15 reasons. One, after any judgment, but potentially
16 before, it will aid settlement with non-test claimants.
17 Sir, I absolutely adopt your point you made that nobody
18 will settle without knowing the tax position of
19 a particular claimant. But that is also true of
20 pass-on, tax, interest is only in relation to one of the
21 claimants, that is less important. But of course the
22 prospects of settlement are increased the more one knows
23 about the pass-on and tax position of a claimant.

24 The fourth point is the sort of fairness complaint
25 that appears to be the main argument that is put is of

1 course palliated by the staged approach that we are
2 going to come to. We have not discussed exactly what
3 the staged approach will be, but the rough way you
4 describe it is that they do what they can now and we
5 will flesh out what that actually means, and then there
6 might be further requests.

7 What we are certainly not talking about, the figure
8 of 5-10 million, only 5 million in the estimate, does
9 not actually vouch for its accuracy very well, but we
10 are not talking about spending that now, we are talking
11 about a staged approach. So the idea that 5-10 million
12 across the board is an estimate that is relevant to what
13 we are about to discuss, which is a staged approach, it
14 simply does not fly.

15 I have had a discussion with Mr. Johnston but
16 obviously WP for the moment. You might want to hear
17 what his suggestion for the staged approach is before
18 you decide what the scope of the claimant disclosure
19 should be.

20 But for all those reasons we submit that what we
21 apprehend is that the Tribunal's instinct is actually
22 the right one. We need to keep this moving forward and
23 these are crucial areas of the case.

24 MR. MALEK: My concern on the interest point is that if we
25 are not going to have disclosure across the board on

1 interest it is not going to be possible, really, to get
2 those claims settled on at least a knowledgeable basis
3 without that information.

4 So let us say you get a judgment at the end of 2024,
5 does that mean you then start the process of getting
6 disclosure on these issues which is quite important to
7 figure out what the damage figure is? It is a pretty
8 invidious thing to park some of these things back
9 so far.

10 As regards what we have already ordered so far, at
11 least from my point of view, including the tax and the
12 interest, I am at the moment inclined to say that we
13 should have the disclosure across the board. I am still
14 in open mind at the moment, and we will have to discuss
15 that with my colleagues, about P04 to P06 and where that
16 fits in.

17 Let us hear from some of the other defendants.

18 MR. HOSKINS: You might want to speak to Mr. Johnston,
19 because given the WP conversation we had, that might
20 move this forward, because ...

21 MR. MALEK: Let us hear from Mr. Johnston. Let us hear what
22 he has to say.

23 MR. JONES: Sir, just to jump in because this may be the
24 last you need to hear from me, I do not know, and I just
25 wondered before it goes back if I should simply respond

1 extremely briefly on Mr. Hoskins to remind you not only
2 did his skeleton argument talk about making savings on
3 disclosure, and one sees that, for example, in
4 paragraph 22, but he also was saying that the non-test
5 claimants should be stayed. In fact, I think that is
6 still his position. So a stay, but with disclosure
7 simply does not make sense.

8 So it really has been clearly his position, both
9 because his proposals emphasised the benefits of not
10 disclosing and because he has always wanted a stay, that
11 we would just be disclosing on the test claimants.

12 But, sir, can I do the ping-pong to Mr. Johnston now
13 if that is convenient.

14 MR. SINGLA: Sir, might I just say a word about -- before we
15 get to PO4 to PO6, I would just like to be clear as to
16 the position, because Mr. Johnston earlier today
17 confirmed that all of the claimants are now consenting
18 to the reasonable and proportionate order in relation to
19 the VoC categories and PO1 and 2, and you have made an
20 order on PO3. So I just want to ensure that that, as it
21 were, is off the table, and insofar as Mr. Jones is
22 seeking to persuade you that there should be some carve
23 out going forward, his submission is confined to PO4 to
24 PO6.

25 If that is the position I will put myself on mute

1 and we will hear from Mr. Johnston, but if there is some
2 rowing back going on I would like to address you on why
3 that would be completely inappropriate for there to be
4 any resiling from the position, because Mr. Bolster's
5 evidence both in his ninth and tenth statement in
6 relation to the VoC categories and the PO1 and PO2 and,
7 to some extent, PO3 was in respect of all claimants. So
8 we cannot have a situation where that aspect of the
9 debate is now --

10 MR. MALEK: Before Mr. Jones replies to that, on the
11 agreement that we discussed yesterday about tax and
12 interest was there an agreement that that was going to
13 be limited to the test claimants, or was it an agreement
14 that covers all the claimants?

15 Mr. Singla?

16 MR. SINGLA: I did not deal with that aspect myself, but as
17 far as I am aware --

18 MR. MALEK: Who did?

19 MR. SINGLA: I think it was Mr. Williams on behalf of DAF.
20 But all of these agreements, they were all on behalf of
21 all claimants, and this is the first time that Mr. Jones
22 has raised a narrowing, as Mr. Hoskins says. So I would
23 be very surprised if any agreement was reached on
24 a narrowed basis, but Mr. Williams will confirm that.

25 MR. MALEK: Let us get this right, because on tax and

1 interest when I looked at it before I thought that was
2 covering everything and there was no qualification to
3 what had been agreed and the only point was actually
4 timing and basically the form of the order. Am I right
5 on that?

6 MR. WILLIAMS: Yes, sir. The position is a bit different
7 between tax and interest because the interest issue
8 relates only to Brakes, as I understand it.

9 MR. MALEK: Exactly, yes.

10 MR. WILLIAMS: So that is a claimant-specific, or at least
11 that group-specific issue in any event. As far as tax
12 is concerned, as far as I am aware the request for
13 disclosure was general, and when it was agreed that it
14 would be adjourned it was on the basis that the general
15 issue remained open. Certainly, as far as I am aware,
16 DAF did not agree that the scope of it would be
17 narrowed.

18 MR. MALEK: Yes, okay.

19 Let us hear from Mr. Johnston, shall we.

20 MR. JOHNSTON: Sir, if I can just respond to Mr. Singla's
21 question first.

22 He is right to say that in relation to VoC2/01 and
23 PO1 and PO2, where there has already been very extensive
24 disclosure, there has been already disclosure statements
25 provided, there has already been what Mr. Bolster has

1 said in his statement, that the agreement or the
2 undertaking to provide a witness statement and/or to go
3 away and do further searches as appropriate depending on
4 which claimant we are talking about, that absolutely
5 applies, as it were, across the piece.

6 That is why I raised this point earlier, because
7 when it comes to what you might think of as the novel
8 categories of disclosure, that is PO3, and PO4 to 6,
9 then this is the point at which it becomes different
10 from the perspective of the claimants, because this is
11 the point at which the savings are anticipated to be
12 substantial, to be considerable. So that is the
13 distinction I would draw.

14 So that is why absolutely in relation to those
15 categories VSW has been clear that that is across the
16 piece.

17 It is, as Mr. Jones has said, always been VSW's
18 understanding that part of the purpose of the test
19 claimants process was to narrow disclosure further. So
20 that is why, in respect of the PO3 and 4 to 6, the
21 position is different, sir.

22 So that is to answer Mr. Singla's question.

23 MR. MALEK: But on tax and interest, surely that should be
24 across the board, should it not, because it is fairly
25 fundamental in assessing any losses?

1 MR. JOHNSTON: As to interest, I think the point really does
2 not arise because the relevant parties, Brakes
3 Brothers --

4 MR. MALEK: It is in both, yes.

5 MR. JOHNSTON: It is in both. So as to tax, sir, I will
6 need to take instructions as to precisely what was
7 agreed going back and forth in correspondence. I was
8 not party to that correspondence, so I will be passed
9 a Post-it note no doubt in a moment.

10 But certainly the overarching position consistent
11 with what has been said, it must be said repeatedly, in
12 correspondence by the defendants, that the non-test
13 claimants would be stayed, by way of example, has always
14 been that this is going to be the outcome. As I say,
15 sir, this is precisely why I wanted to make sure
16 I flagged this point this morning, because this is --

17 MR. MALEK: Are you telling me, then, that you made it clear
18 that when you agreed the tax point that that was only in
19 relation to the test claimants, and hence that was going
20 to have to go on ice until we have determined at least
21 who the test claimants are? That certainly was not
22 clear to me.

23 MR. JOHNSTON: I am not saying that to you, sir, very
24 explicitly not saying that to you, in part because I was
25 not party to the correspondence that went back and forth

1 on that.

2 I think it is fair to say that to the extent it
3 was not expressly reserved in that way that was because
4 the working presumption on the VSW side has always been
5 that in respect of new categories of disclosure there is
6 going to be a saving and that this is part of the
7 rationale for the test claimants' approach.

8 So we genuinely do not regard it as a novel
9 proposition, sir.

10 You have already heard Mr. Jones as to why, you
11 know, companies within the Veolia group who are not
12 going to be test claimants could spend an inordinate
13 amount of money both now, pursuant to staged disclosure
14 and then further, providing further disclosure, and,
15 sir --

16 MR. MALEK: It is not going to cost a fortune to deal with
17 tax, is it.

18 MR. JOHNSTON: No, indeed. I would not anticipate it would
19 cost a fortune to deal with tax, sir.

20 I am in a difficult position on tax. I am not able
21 to address you on the detail of what has or has not been
22 said. As to the broader principle, I can address you.
23 That is -- I have had a note, sir, that tells me that
24 tax is a groups' question, and so the relevance may be
25 slightly less because there will not be individualised

1 tax disclosure from each individualised claimant. So it
2 may be that this is precisely why the parties, precisely
3 why VSW were not specifically applying their mind to
4 this question in the context of tax.

5 But I am being candid. I have not, in the time
6 available, reviewed all of the underlying correspondence
7 in relation to that. But certainly leaving tax aside,
8 as it were, sir, and that is not to belittle the point
9 at all, but leaving tax aside, VSW's presumption has
10 always been that this is a part of the rationale for the
11 test claimant approach.

12 MR. MALEK: But the tax had been done on a group basis, so
13 I think, unless anyone else has got to say anything,
14 I would have thought that it is quite clear that the
15 order in relation to tax should go across the board and
16 not be specific claimant.

17 What we are really arguing about now is what do we
18 do about PO3 and the order that we have already made in
19 relation to that. Should that be confined in some way?
20 And what order should we make in relation to PO4 to 6?
21 And Mr. Hoskins was inviting you to respond and say what
22 your proposal is for a staged approach.

23 MR. JOHNSTON: I am conscious that Mr. Singla has had his
24 hand up, sir, so I do not want --

25 MR. SINGLA: Sir, very briefly, with respect, it is

1 completely wrong of Mr. Johnston to say that everything
2 which the VSW claimants have proposed to date has been
3 on the basis that only the front runner claimants should
4 give disclosure. Indeed, one can see that from two
5 ways.

6 One, Mr. Jones took you to a May 2020 letter from
7 Hausfeld, not Mr. Bolster's very lengthy recent witness
8 statements and not his own skeleton argument. But even
9 more revealingly, sir, Mr. Bolster's entire proposal in
10 respect of P04 to P06, the staged process that we are
11 about to hear about, that can only have been premised on
12 the idea that all of the claimants would otherwise be
13 giving disclosure. It simply would not have made sense
14 for Mr. Bolster to put forward this sampling idea if, in
15 fact, their proposal all along was that only the front
16 runner claimants should give disclosure.

17 So it is completely wrong for Mr. Johnston to make
18 submissions on that basis. We can obviously consider
19 afresh the merits or otherwise of the staged process,
20 but it would be wrong in my submission for the Tribunal
21 to proceed on the basis that this has always been the
22 VSW claimants' position.

23 MR. MALEK: Whether it is consistent or not, I think we now
24 are going to have to make a decision as to, in relation
25 to P03 and P04 to 6, whether it is going to be confined

1 to the putative test claimants or not. We are not going
2 to do that now, yes.

3 We should do before we do that, but I think we
4 should hear from Mr. Johnston about what his staged
5 approach is for PO4 to PO6 before we do that.

6 MR. JOHNSTON: Just to make clear, sir, from my clients'
7 perspective that obviously tax falls within this
8 category too.

9 I have just been passed a part of the Redfern, sir.
10 If I could just respond to Mr. Singla's point. There is
11 a certain circularity to it. VSW obviously did not know
12 what the test claimant order was going to be, and so
13 that is precisely --

14 THE PRESIDENT: Mr. Johnston, I will cut in because I am
15 concerned about time. I do not think it helps to us
16 have a debate about whether this was said before and
17 when. We are where we are. We know what your position
18 is now. Equally, you know what the Tribunal's position
19 is on the test claimants, which was not quite where you
20 were hoping it would be.

21 If you could just outline the staged approach that
22 you are putting forward and then we will take a break
23 for us to discuss this between the three Tribunal
24 members.

25 MR. JOHNSTON: Sir, I am very grateful.

1 So the starting point is as set out in my skeleton
2 argument, sir. VSW resists the application for across
3 the piece blanket disclosure from all of the very
4 considerable number of categories within PO4 to 6.

5 Now, VSW has a positive and a constructive
6 alternative that it has proposed, which is staged or
7 phased disclosure.

8 Sir, that is the approach the Tribunal has taken in
9 respect of disclosure prior to this point. Happily,
10 sir, and I was proposing to take you to it, but I know
11 that you were asked to look at Mr. Bolster's statement,
12 and the relevant paragraphs of it during the recent
13 ten-minute break, so I do not propose to take you
14 through it again. I think that would be duplicative or
15 wasteful. But the essence of what Mr. Bolster is saying
16 is both (a) a staged approach is appropriate, given that
17 these are novel disclosure categories in the sense that
18 the Redfern exercise came to an end in September, and
19 (b) happily in this context that is entirely consistent
20 with what the Supreme Court has said in Sainsbury's,
21 because what the Supreme Court said in Sainsbury's, and
22 I will not take you back to Mr. Bolster or, indeed,
23 Mr. von Hinten-Reed's statement, is that first it is
24 necessary to identify the mechanism for pass-on, and
25 then once you have identified that mechanism or possible

1 mechanism that is then tested by reference to the data.
2 That there is a process here, there is an appropriate,
3 as it were, link between what the law requires and the
4 appropriate staged approach.

5 So that is the basic nub of what Mr. Bolster says
6 there, and I do not propose to take you to it.

7 I also do not propose to take you to the POM
8 statements. I hope you have had an opportunity to read
9 at least one of them.

10 THE PRESIDENT: Yes.

11 MR. JOHNSTON: They are substantial documents and they do
12 contain a good volume of detail.

13 So what VSW is suggesting is a staged approach
14 whereby certain categories of documents are disclosed
15 first, and those are in particular the categories of
16 documents that will enable the defendants' and the
17 claimants' expert to assess what kinds of mechanism for
18 pass-on might at least in principle arise here, and
19 indeed maybe go considerably further depending on what
20 they see, because pass-on ultimately is a question of
21 decision-making. Pass-on is a question of what did this
22 company do when constructing its budget, what did this
23 company do when setting its prices. The answer to that
24 question is to look first at the level of policies and
25 the level of documents that might provide that

1 information, rather than a very granular deep dive into
2 the underlying data.

3 So that is the sort of rationale for the proposal.
4 So to put a bit of flesh on to that particular proposal,
5 there is suggestions in -- Mr. von Hinten-Reed outlines
6 the kinds of documents that would be useful, if I can
7 put it that way, for this process: statements of
8 strategy, budgetary and pricing documents, witness
9 statements, and so on and so forth, and he refers to the
10 POM statements.

11 If I could ask you to open up PO4, sir, it is at
12 {VSW-A4-4/IC1/71} for these purposes. If you look at
13 category C here, what is sought is management accounts
14 and management reporting packs, and VSW's suggestion is
15 that the best place to find those is going to be within
16 the board packs.

17 So VSW's suggestion for staged disclosure is that
18 the starting point for these kinds of documents are
19 going to be -- and I have no doubt for a moment many of
20 you sit on boards, there is an agenda and then there as
21 whole collection of annexes appended to that agenda for
22 discussion. That will include, of course, the
23 management accounts.

24 If we turn over to PO4(d), which may require to us
25 turn a couple of pages. If we keep going through, it is

1 the next page, and the next page, and the next page.
2 This is all discussion between the parties in relation
3 to -- and the next page again, {VSW-A4-4/IC1/76}.

4 So once we get to PO4(d), we are talking about
5 analyses and commentaries in relation to the management
6 accounts. Again, VSW's position is if you want to know
7 where these analyses and these commentaries are likely
8 to be, they are going to be most likely to be found in
9 those board packs. That is where the relevant decision
10 makers make decisions about matters that are legally and
11 factually relevant to pass-on.

12 How are we going to recover our costs? Are we short
13 in terms of capital, and therefore we are going to make
14 cutbacks in relation to branding, spending whatever it
15 might be? These are the questions that go to the heart
16 of how pass-on works. I will not keep clicking through,
17 but (f) is briefing papers for the boards, PO5(a) is
18 pricing guidelines and pricing models.

19 So, sir, the essence of what is suggested is
20 consistent with what Mr. von Hinten-Reed has suggested
21 is a staged approach. There has been a discussion
22 within VSW. Our position is that in order to, as it
23 were, put some flesh on precisely what that staged
24 approach might be conscious that the Tribunal is going
25 to want to make an order for specific kinds of

1 documents, that if you want to know where the management
2 accounts, the pricing policies and so on and so forth
3 are, much the best place to start is within the board
4 pack, and those boards will either meet monthly or
5 quarterly depending on the precise nature of how that
6 business operated.

7 That is VSW's staged approach. Now, sir,
8 I recognise, before anybody objects, that this is a more
9 crystallised version of what is set out in Mr. Bolster's
10 statement saying: we think actually the best place to
11 get this stuff is in the board packs. But it is
12 entirely consistent with the spirit of what Mr. Bolster
13 suggested and Mr. von Hinten-Reed suggested, which is
14 that you need to first look at how are prices set, how
15 are costs recovered. Then to the extent necessary, if
16 at all, it may be that the defendants' economists decide
17 we do not think this works by way of pricing, we do not
18 think that pricing is the critical avenue. There are
19 other avenues to pursue.

20 But, sir, what we are suggesting is that the board
21 packs provide the heart of many of these categories and
22 also the right starting point in many of these
23 categories. Once the defendants have had that material,
24 then it may be appropriate to come back having digested
25 it and have a discussion. They may say we do not know

1 about category P04(e) (e), or whatever it might be. Sir,
2 you will know there are 75 pages or so of P04, P05 and
3 P06. There are an inordinate number of categories here,
4 and there are different positions taken on them by the
5 claimants in respect of different ones of them.

6 But, sir, this is our suggestion as to how the
7 parties can most readily access the critical documents
8 evidencing how decision makers made decisions about
9 price and cost, which is the nub of pass-on.

10 Now, sir, the only other things to say are that (a)
11 we have always taken a position, and if you have had the
12 opportunity or perhaps misfortune to delve into the
13 Redferns in this respect, we have always taken the
14 position that disclosure in these categories should be
15 by way of representative sample, and that has very much
16 been VSW's position right from the start, that it is not
17 necessary to have the entire period. Because if one
18 wants to know how this worked, what Mr. von Hinten-Reed
19 has been saying is get a five-year period that straddles
20 the end of the cartel, some time afterwards, some time
21 before, so you can see after the cartel is there
22 a change in approach, is there a change in pricing
23 approach or cost approach, whatever it might be. The
24 other element to this, which intersects with the test
25 claimant question, is whether it should be done on

1 a consolidated level.

2 If you are with Mr. Jones and I that this disclosure
3 should only be ordered against the VSW test claimants,
4 then the question about consolidated, it being done on
5 a consolidated level falls away, and the very simple
6 point in relation to the consolidation is that there are
7 certain companies within the claim who are the parent
8 companies or the Op-Cos within the business, there are
9 others who are not. But I will not address you on that
10 because that is only, as it were, a secondary position
11 that arises if the Tribunal's determination is that this
12 has to be all the claimants across the piece.

13 Just to put that into context for a moment, sir,
14 what is being offered here is in some cases monthly and
15 some cases quarterly over a 5-year period for hundreds
16 of claimants. If it is to be ordered against
17 everyone -- and that is precisely why I will have to
18 come back and address you on consolidation -- if it is
19 to be ordered against all of the claimants this is an
20 extremely large process. That is why, I know there was
21 some sort of blanching at what Mr. Jones was saying
22 about cost, but this is just the first stage over
23 a limited period of time. If it is to be everyone it is
24 an inordinate process, or exorbitant process, whichever
25 way one likes to put it.

1 Sir, that is our suggestion. I have not had an
2 opportunity, inevitably given the limitations of time,
3 to finish whatever WP conversations I was having with
4 Mr. Hoskins, sir. But that is our suggestion, that as
5 you go through PO4 and PO5 and you pick these up you
6 will see a good proportion of these documents will
7 either be in the board packs or, to put it another way,
8 the board packs provide much the best place to start.

9 As I say, that derives from common sense. I sit on
10 a board of governors at a school. If we did not get the
11 management accounts and we did not get the budgets every
12 time we would be complaining about the inadequacy.

13 THE PRESIDENT: I think we have the points you are making.

14 I think we will take ten minutes.

15 MR. HOSKINS: Could I see if I can help? I think I can move
16 this forward. I hope I live up to that promise.

17 THE PRESIDENT: Yes.

18 MR. HOSKINS: In terms of this being a first stage we can
19 live with board packs and all the annexes. Board packs
20 should be readily available. We are not talking about
21 the specific financial information that one sees in the
22 Redfern. It should be readily available. It should be
23 over the whole period, and the reason for that one finds
24 in Mr. Grantham's first statement at paragraph 35. Can
25 we please have up {HS2-B/IC8/12}.

1 P04 to P06.

2 As far as interest is concerned, as we understand it
3 that concerns only one claimant or claimant group, and
4 we think that order should be made for disclosure.

5 As far as tax is concerned we think that should be
6 across the board for all claimants.

7 As far as the various pass-through pricing
8 categories, we do not think it is helpful to engage in
9 an almost archaeological analysis of who has been
10 consistent throughout and whether people have changed
11 their position.

12 We can see even on a cursory look at the arguments
13 put forward in favour of a wider or narrower group of
14 test claimants that different positions have been taken
15 about the implications for disclosure.

16 We have made our view clear of how test claimants
17 should be selected and the question is what is the
18 sensible thing to do in everyone's interests in the
19 light of that ruling as regards disclosure?

20 We think that disclosure of the other P04/P06
21 categories should be done on a staged basis as outlined
22 by Mr. Johnston starting with board papers and any
23 annexes or attached papers thereto; that it should cover
24 the entire period of the claim, but that it should be
25 limited to those claimants who will be in the trial to

1 be held in 2024. So it should not go across the board.

2 We have not finally of course ruled on which
3 claimants should be included but some, to adopt the
4 colloquial expression Mr. Johnston used, have been
5 locked in. So for today the order will be restricted to
6 the locked in claimants.

7 When we decide in February which will be the other
8 claimants to be included in the trial, then the staged
9 process will start for them. But we will not make that
10 order for the very many claimants who will not be
11 subject of the trial. That is how we will deal with PO4
12 to PO6.

13 Are we clear, Mr. Johnston, when you said there are
14 certain claimants that are locked in what you had in
15 mind, so there is no subsequent dispute about that?

16 Further discussion

17 MR. JOHNSTON: Sir, the ones that I identified this morning
18 are Suez UK, C28, Metro France, C112, and Suez France
19 C97.

20 There is then another question about which Veolia
21 business units, sir, and as you know there is the
22 further dispute between different smaller companies.
23 But those were those that were put to me by my team this
24 morning as those which are inked or locked in.

25 THE PRESIDENT: Yes. I think that it might be that as

1 regards the smaller UK company there was a question of
2 whether it should be CM Downton or I think you said the
3 alternative --

4 MR. JOHNSTON: Brakes, sir.

5 THE PRESIDENT: -- was Brakes, and that is one of three.

6 I think we will say that it should also be Brakes,
7 and that is Brakes UK, and CM Downton, and CM Downton is
8 just one entity.

9 I will hear from other defendants in a moment and
10 there will be then sort of consequential orders
11 extending those categories once we have settled
12 in February who is to be included as other claimants.

13 But it has to cover the whole period because if they
14 are going to be in the trial we think that is going to
15 be necessary in due course for analysis.

16 There are several hands up. I will take Mr. Jowell
17 first and then Mr. Singla.

18 MR. JOWELL: Thank you, sir. Really just again to put down
19 a marker which is that we are concerned that the
20 disclosure purely of these board papers will not provide
21 even those kind of critical documents, obviously
22 critical, but documents such as management accounts,
23 because notwithstanding Mr. Johnston's confidence that
24 management accounts would always be provided as annexes
25 to board level meetings, our own understanding is that

1 very often those would be documents that would come say
2 to the audit committee, but you would not necessarily
3 expect board level papers to contain management
4 accounts.

5 Of course, once one goes down the line to the other
6 sorts of critical documents such as cost allocation
7 methodologies, and so on, you are certainly not going to
8 see those, or very rarely see those attached to board
9 papers.

10 So I suppose really what we would invite the
11 Tribunal to make clear is how you would like us to take
12 forward our requests then for those later categories of
13 documents.

14 It seems to us there are various ways that could be
15 done. Either we could make an application shortly for
16 those at Friday disclosure hearings or we could wait for
17 receipt of these board papers and then analyse what we
18 have got and come back at some later point, perhaps
19 in February. But we would be grateful for guidance
20 because we do not share the great confidence of
21 Mr. Johnston that these are going to contain very much
22 of what is critical for an analysis of pass-on for these
23 key test claimants.

24 THE PRESIDENT: Yes, understood, thank you. Mr. Singla.

25 MR. SINGLA: Sir, we are slightly concerned at this end in

1 terms of the way that the argument has developed this
2 afternoon because the debate was around PO4 to PO6.
3 I think Mr. Johnston started mentioning board packs in
4 relation to or by reference to PO4 as an example.
5 Mr. Hoskins then made a counter-offer which was not on
6 behalf of at least Iveco, and we were actually not heard
7 on this issue as to how PO4 --

8 THE PRESIDENT: Mr. Singla, could you pause.

9 MR. SINGLA: Of course.

10 THE PRESIDENT: Maybe, Mr. Johnston, are you on mute? Can
11 everyone be on mute. Mr. Singla, your voice was
12 distorting. Would you like to try again.

13 MR. SINGLA: I am so sorry. Let me start again just in
14 case.

15 We are concerned about the way in which the argument
16 has unfolded this afternoon because we understand that
17 the Tribunal was dealing with a threshold issue as to
18 whether the PO4 to PO6 category should be across the
19 board or limited to the putative front runner claimants.
20 We understood that was the framework of the debate. But
21 what then unfolded was Mr. Johnston started making
22 submissions in relation to PO4 specifically I think.
23 When he started talking about board packs that was by
24 reference to PO4.

25 Now Mr. Hoskins then made a counter-offer, as it

1 were, which was certainly not authorised by the Iveco
2 defendants. That was a suggestion made by Volvo.

3 Where we have ended up is that the Tribunal has not
4 heard us in relation to PO5 and PO6, yet the order that
5 we are left with is board packs only from only the
6 putative front runner claimants, and that is as it were
7 to satisfy us in relation to PO4, PO5 and PO6.

8 I appreciate in one sense the Tribunal will say the
9 horse has bolted, you have made your ruling, but what we
10 do say is that this has been a slightly unsatisfactory
11 course this afternoon, and we would therefore want at
12 least PO5 and PO6 to be revisited afresh in February so
13 that we have a proper chance to argue about those,
14 because we do not see that the board pack solution is
15 a good solution so far as PO4 is concerned, but
16 a fortiori PO5 and PO6, which are actually unrelated,
17 although certainly they are distinct categories.

18 So we are slightly troubled by the blanket board
19 pack order that has now been made to cover 4, 5 and 6.

20 MR. JOHNSTON: Sir, if I might chip in just briefly.

21 Mr. Singla obviously missed the point at which
22 I referred to PO5(a) which related to pricing
23 guidelines, sir.

24 If it assists just very briefly by reference to
25 Mr. Jowell's question: certainly VSW's position is that

1 much the most sensible thing is for the defendants to
2 read the material they receive and then to return in the
3 light of the material they have had seeking something
4 more specific. Otherwise the purpose of the staged
5 process is undermined. The point of it is that they
6 read what they have and they identify what is lacking or
7 what is necessary, sir. But I will not trouble the
8 Tribunal any further, I am conscious of the time.

9 THE PRESIDENT: We been asked very fairly by Mr. Jowell to
10 indicate how this can be taken forward.

11 The first question is to set a date by which you can
12 provide that material from what is now a limited number
13 of claimants. I want to know how soon practically you
14 think you can do that.

15 MR. JOHNSTON: Sir, would it assist now? I did not mean to
16 speak over you.

17 THE PRESIDENT: Yes, please.

18 MR. JOHNSTON: 10 January is what is being suggested behind
19 me, sir.

20 MR. HOSKINS: Sir, there is a problem with that because it
21 does not --

22 THE PRESIDENT: Just a moment. Just a moment.

23 I would like you to do it before the end of the
24 year. Why is that not possible?

25 MR. JOHNSTON: Sir, if you will give me a moment I will turn

1 around. (Pause)

2 Sir, 20 December is being suggested behind me as
3 a date in this year.

4 THE PRESIDENT: Yes, I think Friday 17 December.

5 MR. JOHNSTON: Sir, that is absolutely fine.

6 MR. HOSKINS: Can I make a submission, I am sorry, I know
7 it is late. But we have taken a practical approach to
8 get something done today. We need to digest what is
9 given. We need to work out what we want to ask for. We
10 need to do this before February. This is very limited.
11 My suggestion for the date is 26 November. We have to
12 keep this moving.

13 MR. JOHNSTON: Sir, it is --

14 THE PRESIDENT: It is a very -- it is a substantial period
15 and I suspect a substantial --

16 I am sorry, I am told we have lost the live stream.
17 Just a moment. (Pause) We are trying to just restore
18 the live stream so just bear with us a moment. (Pause)
19 We are told it is about to come back.

20 It will be -- I understand that, Mr. Hoskins --
21 17 December. We will not be having the CMC in the first
22 week of February because we will wish to digest the
23 General Court's judgment in Scania. We think the month
24 of January will give you time to at least get the sense
25 of what is in those documents, even though no doubt you

1 will not necessarily have read each one, and to frame
2 further requests. They can be pursued first in writing
3 and if necessary at the February hearing. It will be
4 taken forward that way. We fully appreciate that we
5 need to keep the case moving, but at the same time this
6 is not a trial next year or indeed the year after, so
7 there is time for more documents to be provided and for
8 the analysis to be conducted. We do not think it is
9 going to jeopardise preparation of experts' reports.

10 Is there anything else that cannot be pursued by way
11 of Friday applications that we need to address as a full
12 Tribunal today?

13 Thank you all again for the work that has gone in,
14 not just by those we can see but by the teams of counsel
15 and solicitors behind you.

16 I would only say that while we have given some
17 specific rulings today I think there has also been quite
18 a lot of indication as to how this is going to be taken
19 forward. So, for example, this ruling we have just
20 given you know is going to be rolled out to the other
21 claimants once it is determined who will be in the
22 claim. If you can seek to agree an order and submit
23 that to the Tribunal so that it can be made, and you
24 will be contacted through your clerks and solicitors
25 about two days in February for a further CMC from the

INDEX

PAGE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Submissions by MR JONES (continued)..... 1

Submissions by MR. SINGLA..... 22

Submissions by MR. HARRIS..... 32

Submissions by MR JOHNSTON..... 40

Disclosure Applications..... 51

Submissions by MR. SINGLA..... 74

Submissions by MR. JOWELL..... 77

Submissions by MR. KENNELLY..... 85

Submissions by MR. HOSKINS..... 94

Decision on disclosure applications..... 199

Further discussion..... 201