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IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1296/5/7/18

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Friday 9th August 2024

Before:

The Honourable Lord Erich
The Honourable Mr Justice Ian Huddleston
Derek Ridyard

2nd Wave Trucks Proceedings

A P P E A R A N C E S

Alastair Richardson (Instructed by Walker Morris) on behalf of Arla

Alan Bates (Instructed by Edwin Coe) on behalf of the Edwin Coe Claimants

Andrew Macnab (Instructed by Mishcon de Reya) on behalf of the Asda Claimants

Stephen Critchley (of Fieldfisher) on behalf of the Boots Claimants

Bethanie Chambers (Instructed by Fieldfisher) on behalf of DS Smith

Natalie Nguyen (Instructed by Arnold & Porter Kaye Scholer) on behalf of Morrisons

Brendan McGurk (Instructed by Slaughter and May) on behalf of the Defendants

Friday, 9 August 2024

(9.30 am)

(Proceedings delayed)

(9.35 am)

Housekeeping

THE CHAIRMAN: I will start with the standard housekeeping and another housekeeping matter. Some of you are joining us livestream on the website. So I must start with the customary warning: an official recording is being made and an authorised transcript will be produced but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as a contempt of court.

Another preliminary matter is that I am aware that there are confidentiality rings in this case. We will be dealing with a large number of issues so I would ask the parties to let us know if at any point we need to go into a closed session. If we do, we will rise in order for that to be set up.

Also in terms of housekeeping, for the assistance of the transcript if any counsel are speaking can they make sure that they are near a microphone and if necessary adjust seating for that.

1 Chairman's introductory remarks

2 THE CHAIRMAN: Today's business is to decide two
3 applications, one in relation to truck-related services
4 and one in relation to SPO. Given the length of the
5 revised applications we will be under considerable time
6 pressure and I am grateful to all of you for coming for
7 such an early start today. We are aiming to finish at
8 around 3.30. We have read the written submissions in
9 advance of the hearing and it will not be necessary for
10 you to repeat these orally.

11 The focus today will be on the orders sought in the
12 draft orders. We are obliged to parties for their
13 thoughts on the order in which we should take the
14 applications and we have considered that, but we intend
15 to stick with our original intention as intimated.

16 So the Tribunal will deal firstly with the TRS
17 order. We shall go through the data requests set out in
18 the TRS order line by line and we shall ask questions of
19 parties' experts and/or their legal representatives as
20 appropriate. Therefore, the same process will be
21 followed with the SPO order.

22 As we work through them we will give a decision on
23 each data request. That will be a provisional decision
24 and I say it is provisional because there may be an
25 argument from another party in relation to a data

1 request which we come to later today which might cause
2 us to revise our provisional view on an earlier one, but
3 unless we revise our provisional view then that will be
4 our decision at the end of the day.

5 The context of this hearing is the Tribunal's
6 procedure ruling which was 2024 CAT 2. That ruling made
7 clear that there would be no disclosure. That is in
8 paragraph 3 of the ruling.

9 Instead there would be a procedure for data requests
10 and I am going to read out now what was said in that
11 ruling because that is very important for the matters
12 which the defendants are asking us to grant orders on in
13 this case.

14 I quote {HS1-B1/5/11}:

15 "We expect Data Requests to be justified by the Lead
16 Economic Expert making the request to the Lead Economic
17 Expert receiving it. We expect that process ... to run
18 informally, and there should be regular and frequently
19 used lines of communication between the various experts
20 involved. It is likely that some Data Requests are so
21 obvious, that little by way of justification will be
22 required. Equally, some Data Requests will be so
23 straightforward to fulfil that little justification will
24 be required. It is those Data Requests that are of
25 marginal utility but which entail significant cost that

1 we expect will trouble the Tribunal and -- unless such
2 issues can be resolved by agreement -- we expect the
3 parties to raise these issues with the Tribunal promptly
4 so that they can be resolved without delay ..."

5 So that is the territory that we are in today. The
6 Tribunal is being asked to rule on the data requests set
7 out in the two applications which are before us, one for
8 truck-related services and one for supplier pass-on.

9 I will make some general observations of general
10 principle which of course are subject to any submissions
11 that parties may make to us as we go to look at the
12 detail of the orders.

13 First, this is not a disclosure exercise. It is
14 a data request exercise in terms of the procedure
15 ruling.

16 Second, as the procedure ruling says, the data
17 request must be justified by the expert making it, which
18 in the context of the applications before us which have
19 been made by the defendants means the defendants'
20 experts. We will be looking to the defendants' experts
21 to justify to us the specific data requests which the
22 defendants' experts are seeking in the two applications.

23 Third, the Tribunal expects that parties endeavour
24 to resolve data requests by discussions between experts
25 without troubling the Tribunal. Where the experts

1 cannot reach agreement on a particular data request then
2 that can of course be brought before the Tribunal for
3 a ruling.

4 Fourth, the defendants have made applications asking
5 us to make specific orders in which they have drafted
6 data requests in precise wording which they have set out
7 in the appendices to the draft orders. It is the
8 defendants who have come to us today seeking specific
9 data requests using that precise wording, so it will be
10 up to the defendants' experts to justify the specific
11 data requests. It is not our role to enter into some
12 sort of iterative process whereby we negotiate with the
13 defendants the wording of the orders.

14 Unless the defendants seek to amend the wording of
15 their proposed data request orders, we will rule only on
16 the wording in the applications. The particular data
17 requests set out in the paragraphs of the draft orders
18 will either be granted or refused.

19 As we said in our threshold ruling of 27 June, and
20 I quote {HS1-B1/9/7}:

21 "We also remind the Defendants of the necessity of
22 drafting a suitably precise, targeted draft order
23 specifying the items sought and the particular Claimant
24 from whom that item is sought. If the wording of any
25 paragraph of the draft order is too general or too

1 widely expressed, then it may be that the Tribunal will
2 refuse that paragraph ... parties are encouraged to
3 discuss the precise terms of the draft order in advance
4 and reach agreement on the wording in so far as it is
5 possible to do so."

6 I would stress the importance of this. We are being
7 asked to make compulsory orders. If a party breaches
8 their compulsory order that can have very serious
9 consequences for the party. So it is important and only
10 fair to the claimants that they must know with precision
11 what they are obliged to do so that they can ensure they
12 are not in breach of it. So it is important that there
13 is no ambiguity or misunderstanding in the words of the
14 order.

15 Fifth, I think it is fair to say that when the data
16 request procedure was set out in the procedure ruling,
17 the Tribunal did not expect that it would be necessary
18 for us to get involved in the level of detail which the
19 defendants' experts are asking us to make rulings on
20 today in terms of the two applications before us. The
21 Tribunal expects that before data request applications
22 are brought before the Tribunal, all the outstanding
23 data requests which are the subject of the applications
24 will have been discussed in detail between the experts
25 either in meetings or in correspondence, so that the

1 Tribunal's time at hearings such as the one today is not
2 taken up with matters which could have been resolved or
3 clarified or narrowed down by a meeting between the
4 experts or correspondence between the experts or
5 discussion between the experts. It is not an
6 appropriate use of the Tribunal's time to chair
7 a discussion between experts or a discussion between
8 legal representatives which could more properly be dealt
9 with at a meeting of experts or a meeting of lawyers.
10 That said, we will of course make rulings on the
11 applications which the defendants have chosen to put
12 before us.

13 Sixthly, the Tribunal is being asked to make
14 compulsory orders to respond to data requests.
15 Compulsory orders should be made only when necessary and
16 only in respect of responses which a claimant is
17 refusing to give voluntarily. The Tribunal will not
18 make a compulsory order against someone to do something
19 that that person has done already. Nor will the
20 Tribunal make a compulsory order against someone to do
21 something which is impossible, for example produce
22 a document which does not exist.

23 Seventhly and finally, as a general rule of thumb
24 where one party's expert needs a particular piece of
25 data for their positive case it would be natural that

1 the other side's experts may well need that for theirs
2 also. So it is clear that if one expert needs
3 a particular piece of data, it is very likely that the
4 other side's expert needs it too.

5 That means that the experts would have exactly the
6 same information before them when drafting their
7 opinions with the -- for the positive case. That deals
8 to a certain extent with the asymmetry point and also is
9 in accordance with the general position in litigation
10 that each side is entitled to see the information made
11 available to the other side's experts.

12 Now, we appreciate that there are possibly issues in
13 relation to information which is not available to one
14 expert and therefore is not being made available to the
15 others and that these can be looked at in detail, but
16 our general rule of thumb when looking at this is if one
17 expert has a piece of data, the other expert should have
18 it too.

19 So that is the general introduction. I now propose
20 to go on to a preliminary matter, which is that in the
21 written submissions of DS Smith they say that the
22 applications should be refused because they were lodged
23 late. They should have been at 4 pm on 8 July but filed
24 the TRS at 8.59 and the SPO at 10.02 pm.

25 Mr McGurk, do you have anything to say about the

1 lateness?

2 MR MCGURK: Only that it has not prejudiced anybody at all.

3 We are all here, we have come prepared to argue the case
4 on both applications. Nobody else has taken this point
5 and I do not believe the Tribunal has been
6 inconvenienced by the slight delay in the service, for
7 which we apologise again, but for those reasons we say
8 that application should be dismissed.

9 THE CHAIRMAN: Thank you.

10 Ms Chambers, do you have anything to say on this?

11 MS CHAMBERS: The only additional point I would make, sir,
12 is that the lateness has continued. Skeleton arguments
13 were then filed late, joint experts' statements were
14 then filed again and we were left in the unsatisfactory
15 position of not being able to address those in our
16 skeleton argument, so it seems to have persisted.

17 THE CHAIRMAN: Thank you. Well, we shall allow these
18 applications to be made, although late, but we will just
19 remind parties the deadlines are set for a reason and
20 the Tribunal expects deadlines to be complied with.

21 Procedural discussion re statements of truth

22 THE CHAIRMAN: Now we will deal with the TRS application
23 first, then the SPO. Before we do that, I would like to
24 address some matters which are common to both.

25 The first is statements of truth. If we could have

1 on screen the TRS order, page 2 {HS1-A3/14/2}. We will
2 just look as an example at the Arla claimants, so it is
3 paragraph 1, the Arla claimants are asked to:

4 "... provide confirmation, supported by a statement
5 of truth ..."

6 Then in (b):

7 "... provide responses, supported by a statement of
8 truth ..."

9 Then there are also other provisions in relation to
10 some of the other parties asking for confirmation that
11 previous responses are true and accurate to the best of
12 their knowledge.

13 So bearing in mind that the data requests have to be
14 justified by the experts, I am going to ask either
15 Mr Bezant or Mr Noble, I do not mind who replies, is it
16 necessary for you as an expert to have a statement of
17 truth before you can produce your positive case?

18 MR MCGURK: My Lord, thank you. I should just say, as you
19 know, Mr Noble is joining online and Mr Bezant is here
20 sitting beside me, so maybe he is best placed to
21 respond.

22 THE CHAIRMAN: Yes, thank you. Mr Bezant.

23 MR BEZANT: I think the answer is no, providing we
24 understand how information has been identified in
25 response to our questions. The reason that we were

1 asking these is if we were not getting a kind of
2 document or a depth of document or a depth of reply, we
3 were not sure why that was the case, if it was
4 a function of the way things have been searched for, who
5 had been asked, what they had been asked, how far back
6 in time people looked, so the question was motivated by
7 trying to understand the process that had been followed
8 to provide the data we had asked for. I do not know if
9 Mr Noble, just to be fair to him, has a different take
10 on that.

11 THE CHAIRMAN: Mr Noble, do you have anything to add?

12 MR NOBLE: No, the only point I would add is that we do want
13 to make sure that the material we are relying on is as
14 concrete as it possibly can be and we have noticed in
15 some of the replies that various of the answers have
16 changed, so we have been told certain percentages and
17 then in later iterations a different percentage, and so
18 it is important when we do the expert work that we can
19 be sure absent, for example, on some of the requests
20 getting any documents, that 50% is the answer rather
21 than say 25.

22 THE CHAIRMAN: Thank you.

23 Mr McGurk, this is perhaps more -- there is a legal
24 aspect to this as well. Why are you asking for
25 statements of truth? This is not a disclosure exercise,

1 this is a data request exercise.

2 MR MCGURK: My Lord, subject to the movement in the last
3 couple of days, what we have seen over the previous few
4 months in terms of the responses from the claimants is
5 that we have been given effectively no documents, none
6 of the data schedules that the president anticipated
7 when we last discussed this, and a lot of the material
8 that we were getting in response to the requests were
9 narrative responses but not signed off by anybody, not
10 explaining, as Mr Bezant said, how enquiries had been
11 made, of whom and to what effect.

12 THE CHAIRMAN: We will go through all that when we come to
13 them individually but I know you have said you have had
14 no documents at all, is that --

15 MR MCGURK: No, we have had very few internal documents. We
16 will come back to this in due course. That has changed
17 in the last --

18 THE CHAIRMAN: Is there a technicality about why you need
19 a statement of truth?

20 MR MCGURK: Yes, in a sense given that we have largely been
21 given narrative responses to some of the requests and
22 where, as Mr Noble says, they are keen to be able to
23 rely on that material when they are doing their
24 modelling and do not want to find in another month or
25 two that it is said, as has been said, as Mr Noble has

1 alluded to, actually we got that wrong, or actually we
2 need to revise this, all of which can impact on the
3 modelling that is done in reliance upon this material,
4 so the legal aspect of the reliance point Mr Noble makes
5 is that we wanted to be able for them to feel confident
6 that they will not be countermanded down the line
7 undermining the modelling they have already done. So
8 that is the practical force of the point.

9 THE CHAIRMAN: You are asking for statements of truth. At
10 this stage, which is quite late and there are obviously
11 difficulties in looking retrospectively for statements
12 of truth, were statements of truth asked for when the
13 data requests were first made by the experts?

14 MR MCGURK: The initial requests, SPO were made on the 26th
15 and 28th, the TRS requests were made on 9 April. The
16 statements of truth were not originally asked for
17 because we understood that pursuant to the iterative
18 process and the required engagement that the Tribunal
19 expected from the experts, and not least the point that
20 the Tribunal made in the Mechanics Judgment as to the
21 audibility and capacity to verify what was provided,
22 that what they would get back from the claimants'
23 experts could indeed be relied upon and that there would
24 continue to be an iterative process as the Tribunal
25 expected there would be.

1 It was only in light of seeing the responses, or the
2 lack of responses by 16 May when we originally made the
3 applications, and then pursuant to the voluntary
4 deadlines of the 21st and the 28th, what we actually
5 got, that it became absolutely clear that the promised
6 responses, the promise of fulsome responses was not met,
7 and in terms of the narrative responses we got back
8 rather than the anticipated data schedules and documents
9 which come with those narrative responses, combined with
10 the changes of case we have seen, it was felt at that
11 stage that statements of truth would be needed in order
12 for the experts to be able to rely upon what they have
13 got because the position kept changing.

14 THE CHAIRMAN: I am also wondering if there were any data
15 requests which went the other way. Have there been any
16 data requests made of your experts?

17 MR MCGURK: No, not as far as I am aware. I know there have
18 been data requests made between the claimants and we are
19 slightly in the dark about that. It is only Mr Williams
20 alluding to that and that is something we may come back
21 to in relation to SPO, but no, we have not received data
22 requests. In fact, there has been very, very little by
23 way of proactive engagement from the claimants' experts
24 at all but that is all set out in the tables to the
25 updated 31 July statement of Mr Noble and Mr Bezant

1 filed.

2 THE CHAIRMAN: In relation to one of the claimants, which is
3 LafargeHolcim, they have said that they will provide --
4 they will provide confirmation supported by a statement
5 of truth, so why do you need us to have a compulsory
6 order to make them do something which they have said
7 they will do?

8 MR MCGURK: Insofar as they are quite happy to give that
9 undertaking, we are in the territory of providing an
10 order by way of consent effectively. If they are
11 content to do what we have suggested, even though they
12 were only giving that confirmation pursuant to the
13 application, (a) to that extent the application has
14 succeeded and we can record the subsequent consent in
15 the order, so it is akin to a consent order we say
16 essentially.

17 THE CHAIRMAN: Thank you. I now invite counsel for the
18 other parties to address us on whether we should order
19 statements of truth.

20 MR RICHARDSON: Alastair Richardson for Arla, sir.

21 We do not -- Mr Bezant suggested when he was
22 speaking to you a few moments ago that it was not
23 necessary for the experts to have statements of truth
24 when relying on the information to carry out their
25 analysis. We -- you also alluded to the practical

1 difficulties which statements of truth would entail.
2 Going retrospectively to try and attribute information
3 to people across the businesses is not going to be
4 straightforward and for those reasons we do not think
5 a statement of truth is necessary or that any order
6 should be made.

7 THE CHAIRMAN: Thank you. Yes, Ms Chambers.

8 MS CHAMBERS: I adopt entirely those submissions but, sir,
9 just to add that it does appear to us to be another
10 inappropriate attempt to try and accelerate what will
11 happen at the stage of positive cases when of course
12 there will be statements of truth, there will be witness
13 statements, so we would say for that additional reason
14 it does not also need to happen now.

15 THE CHAIRMAN: Yes.

16 MR BATES: I adopt the points that have been made by my
17 learned friends. The positive cases will of course be
18 verified by statements of truth and the data that will
19 inform the positive cases is of course the same data
20 that is being shared with all of the experts, so this is
21 an attempt by the defendants to essentially bring
22 forward something that will happen ultimately in any
23 event. That is a particularly forceful point in
24 relation to the value of commerce data given that the
25 burden of showing the value of commerce is of course on

1 the claimants. They will have to show the value of
2 commerce in their positive cases verified by a statement
3 of truth in the usual way.

4 Secondly, the fact that the statements of truth were
5 not asked for when the original information requests
6 were made gives rise to important practical impacts for
7 my clients in particular, bearing in mind that Edwin Coe
8 acts for so many of the claimants, some of whom are very
9 small companies who have been targeted by these
10 requests, because the work involved even of going back
11 to those claimants and asking them to individually give
12 authorisations to statements of truth and material that
13 has already been provided, that itself is significant
14 additional work against the background of the very tight
15 timetable that we are having to operate within for our
16 own positive cases.

17 THE CHAIRMAN: Thank you. Yes, I am afraid I am not quite
18 sure who all the people are. Can you just tell me.

19 MR BATES: I am sorry, sir. Alan Bates for the Edwin Coe
20 claimants.

21 THE CHAIRMAN: Thank you very much.

22 MR CRITCHLEY: Stephen Critchley of Fieldfisher for the
23 Boots claimants.

24 I would just like to add I have a slight advantage
25 amongst the claimant counsel insofar as I was actually

1 the solicitor that was taking these statements that were
2 provided on behalf of Boots.

3 THE CHAIRMAN: That is our routine 10 o'clock fire test I am
4 glad to say, so if we just give that a second. (Pause).

5 MR CRITCHLEY: So the way it works, well certainly in our
6 case, we would have conference calls and we would have
7 two or three participants from the client and they would
8 be -- we would go through the questionnaires and we
9 would take responses from them. We did not keep
10 a record of who said what. So we have the
11 questionnaires now and to retrospectively apply
12 a statement of truth, I mean if we were to have
13 everybody sign the statement of truth at the bottom I do
14 not think the individual interviewees would know what it
15 was that they were -- what it was that they were
16 attesting to, and I think it would be very difficult now
17 to go back and unpick it and try to attribute to each
18 person we spoke to who said this and who said that.

19 Insofar as there are further questions which Boots
20 and Moy Park have agreed to answer, knowing that the
21 statement of truth would be required would at least make
22 things somewhat easier although it would still interrupt
23 the flow of the conversation to be continually trying to
24 attribute, so if it is not a necessary thing I think it
25 might be an impediment.

1 THE CHAIRMAN: Thank you.

2 MR MACNAB: Andrew MacNab for the Asda claimants.

3 I essentially adopt everything that those on the
4 claimants' side have said. Statements of truth were not
5 asked for with the original request. Collecting data in
6 response to requests for data is a complicated business
7 and it is simply impractical now to go back and identify
8 everybody. Everyone has been identified but identifying
9 which particular piece of data has come from which
10 person is going to be extremely difficult.

11 MS NGUYEN: Natalie Nguyen for the Morrisons claimants.

12 I adopt entirely the submissions made by my learned
13 friends and have nothing to add to those submissions,
14 thank you.

15 THE CHAIRMAN: Thank you. Have we heard from all the
16 parties now?

17 Ruling

18 THE CHAIRMAN: We are going to refuse the applications for
19 supporting by a statement of truth. The defendants'
20 experts have said that it is not necessary, we do not
21 think it is necessary at this stage which is a data
22 request exercise. There will obviously be different
23 issues at a later stage once the positive case is
24 drafted. So we will refuse the statement of truth
25 elements in both the TRS and the SPO, so that means

1 that -- I am not going to go through and list them at
2 the moment.

3 So, for example, in the TRS, Arla claimants,
4 paragraph 1(a), the words "supported by a statement of
5 truth" would be deleted. In 1(b) the words "supported
6 by a statement of truth" would be deleted. In
7 paragraph 2, which is the Boots claimants,
8 paragraph 2(a) which is "provide confirmation, supported
9 by a statement of truth, that their previous responses
10 ... are true and accurate" would be deleted and these
11 deletions would be tracked through wherever they appear
12 in both orders.

13 So that deals with the preliminary matter. We are
14 now going to turn to the TRS application. So if we
15 could have that on screen, please.

16 MR MCGURK: Sir, I should just indicate that we sent an
17 updated TRS order reflecting the developments overnight
18 to the Tribunal at 8.29. We understand that it has not
19 been uploaded on to Opus yet.

20 THE CHAIRMAN: Do you have hard copies for us? Well,
21 clearly it is going to be important that we are dealing
22 with the up-to-date information. We are going to
23 adjourn very briefly for these to be provided to us one
24 way or the other, but I do have concern, as you
25 appreciate, the Members of the Tribunal have spent

1 a considerable amount of time working through this line
2 by line and for an amended version to be produced
3 immediately before the hearing and not even provided to
4 us is not really satisfactory. However, I appreciate
5 the parties have been discussing things and things have
6 been moved on.

7 We are going to adjourn now and we expect very
8 swiftly to have either a hard copy or an electronic copy
9 before us.

10 (10.05 am)

11 (A short break)

12 (10.29 am)

13 MR MCGURK: My Lord, I am grateful. We are producing hard
14 copies; as I said, we made these available to the
15 Tribunal at 8.30 this morning. We had assumed they
16 would make their way to you. I can only apologise for
17 this, but I want to --

18 THE CHAIRMAN: Can I just say it is a really unsatisfactory
19 amount of time we have lost here on a very tight
20 schedule just because these were not provided to us
21 yesterday, and even today things have not been provided
22 to us timeously. The Tribunal is trying to assist by
23 printing off, but of course parties should not depend on
24 the goodwill of the Tribunal to print off documents,
25 parties are expected to make sure that documents are

1 fully brought before the Tribunal.

2 Can I just say there is some sort of echo that we
3 might need to correct. So if those of you who are on
4 screen can mute, that might deal with it.

5 So I think what we are going to do is going to
6 proceed on the basis of the order which we already have
7 and you can advise us of the changes as we go through.

8 MR MCGURK: Yes. My Lord, there is a route through,
9 starting with Arla, but to my Lord's point I accept what
10 has been said this morning. All I can say is this has
11 come about (a) because the Tribunal has expected the
12 parties to narrow the issues before the hearing today
13 and there has been substantial movement particularly on
14 SPO, but also in relation to the TRS, in advance of the
15 hearing, including yesterday, pursuant to meetings which
16 took place yesterday to narrow.

17 THE CHAIRMAN: When did that meeting finish?

18 MR MCGURK: We were told only yesterday afternoon by Edwin
19 Coe that TRS-related documents will be sent across to
20 us. Edwin Coe provided no TRS material before even
21 skeletons were exchanged. So documents landing
22 yesterday, the day before the hearing, with the burden
23 on us to update the order and provide that to the
24 Tribunal, has meant people working overnight on both
25 sets of orders to reflect the most up-to-date position.

1 If Edwin Coe had engaged on 9 April when we
2 originally arranged this, rather than the night before
3 the Tribunal was sitting, we would not be in this
4 position. So while I take my Lord's point and I do
5 apologise, (a) we have tried to narrow it and (b) we
6 have been put in a very difficult position by those who
7 have just not engaged in particular on the question of
8 TRS.

9 In terms of a route through -- 17.32 yesterday. It
10 is unacceptable. Four or five months and we get it at
11 17.32.

12 THE CHAIRMAN: Can I just say to you that we are not really
13 interested today in the ins and outs of complaints about
14 who said what when. We are looking at the orders which
15 are before us today.

16 Application re TRS

17 MR MCGURK: Yes. My Lord, in relation to TRS then there has
18 been a difference in the approach of the Arla claimants
19 and the approach of all other claimants in relation to
20 TRS. Arla engaged -- and we will go through the Arla
21 order in the Excel in a moment, that has not changed,
22 which is why we can make progress on it -- Arla have
23 instructed an expert and they are the only claimant
24 party in relation to the TRS issue who have instructed
25 an expert. All of the other claimants, just so that you

1 are clear, have not engaged. They have provided some
2 information but (a) they have not instructed experts and
3 (b) they have said it is not even an expert issue.

4 Therefore Mr Bezant and Mr Noble have been effectively
5 hamstrung in terms of who they can engage with to make
6 progress on TRS VoC. So they are in a real difficulty.

7 We proposed, as an innovative alternative, that we
8 would speak -- they would speak, Mr Noble and Mr Bezant
9 would speak to personnel at the claimants who are
10 involved in the recording of the relevant information
11 for TRS purposes. Again, that was just refused by the
12 claimants.

13 So you will hear it from them but they have been put
14 in an extremely difficult position by all of the other
15 claimants. But with that can I just make one final
16 point of principle. The other claimants have
17 effectively said we are not going to give you any more,
18 you will get what you get in our positive cases.

19 Now I am going to make a point of principle about
20 why that is completely inconsistent with the one shot
21 positive/negative structure that was imposed in the
22 mechanics document. I do not need to repeat that for
23 my Lord. But the simple point is there is an implicit
24 acknowledgement that that material is relevant to
25 Mr Noble and Mr Bezant's positive case on TRS, but yet

1 they are not going to get the same data as their own
2 experts are working on and modelling up for the purposes
3 of their positive case. It is my Lord's point in
4 opening.

5 That leaves us in a very, very uneven situation.
6 They are not seeing the data others are now working up
7 and of course what will be said against us is one, when
8 you get that data you are confined by the Mechanics
9 Judgment to only put in negative case. So you can only
10 deal with this responsively. So we will be hamstrung by
11 virtue of getting that data at that stage.

12 Then we are at risk of it being said against us,
13 with the burden on us in relation to TRS, you have not
14 provided sufficient in your positive case to deal with
15 it.

16 THE CHAIRMAN: Yes, well, you will have heard in my
17 introductory remarks the rule of thumb that experts
18 should have what the other experts have, and shall we
19 then proceed with Arla and we can hear what the other
20 parties say about the points you have just raised about
21 them.

22 MR MCGURK: Let us do that. Can I hand over to Mr Bezant
23 who is going to take you through the position with Arla.

24 THE CHAIRMAN: Yes, thank you very much. Yes, Mr Bezant.

25 MR MCGURK: Could we bring the existing order and the

1 appendix covering Arla up on Opus, please.

2 EPE OPERATOR: Sorry, could we have a reference, please?

3 MR MCGURK: The reference is {HS1-A1/22/1} which should
4 bring up a link which I think we need to click on. Then
5 it is the Arla tab at the bottom, thank you. (Pause).

6 I think if Opus can, it will be more helpful for the
7 Tribunal to have the reference {HS1-A3/14/8} which
8 brings up appendix 2 which is the Arla TRS order.

9 THE CHAIRMAN: Thank you. So we have the draft order and
10 if -- we are going to go through it paragraph by
11 paragraph. So 1.1 is in green so I understand that is
12 agreed, so my question is: are the defendants still
13 insisting on us making this order or are they dropping
14 it because it is agreed?

15 MR MCGURK: There is a point of principle to the dispute on
16 the need for an order in relation to the green requests
17 as we should call them. It is being said by the
18 claimants that insofar as they have agreed to provide
19 these requests that an order is not necessary. I want
20 to deal with that as a matter of principle. We can
21 either deal with it now or we can deal with it at the
22 end, I think on through the order.

23 THE CHAIRMAN: Let us deal with it now because that might
24 assist us given that the green requests, it is clear
25 from the document, are agreed.

1 MR MCGURK: Yes. Certain of the claimants have of course
2 now agreed to provide responses and you will see this
3 with SPO as well, and in relation to SPO a lot of red
4 has turned green overnight. In relation to the
5 contention that this does not need to be recorded in an
6 order, our position is that obtaining orders is
7 necessary and appropriate for a number of reasons.

8 Without the benefit of this order we are concerned
9 about the potential for uncertainty and further delays
10 in the provision of responses which risks causing
11 further prejudice to Mr Bezant and Mr Noble being able
12 to construct their positive cases.

13 My Lord, as I said, the initial requests were made
14 between 26 March and 9 April. By 16 May, when we made
15 the TRS application, we had been provided with
16 essentially nothing, and as a result of the application
17 the Tribunal corrected the claimants on 16 May to
18 explain why the orders sought should not be made.

19 It was only when the Tribunal effectively rowed in
20 behind the applications that we got some activity and
21 some commitments from the claimant in relation to both
22 TRS and SPO and it was promised that responses would be
23 provided by 21 and 28 June, and we did not take the
24 application forward as you saw on the basis that we
25 would be getting fulsome responses by those voluntary

1 dates.

2 In fact, the responses received at that point were
3 substantially deficient and the experts have explained
4 in their statement of July how they could not move
5 beyond step one in their three-stage methodology for
6 TRS.

7 On 14 June the Tribunal issued directions for today,
8 and I make that point because we were required to
9 provide our revised applications by 8 July, but there
10 was a flurry of activity again before 8 July, a number
11 of responses were provided on 4, 5 and 8 July, and again
12 getting closer to the fire with this hearing coming up
13 there has been a flurry of activity this week.

14 So all of this indicates that the voluntary
15 commitments that have been made back in May to provide
16 fulsome responses by 21 and 28 June led to completely
17 dashed expectations and doing it in a voluntary way has
18 left the experts here in August still unable to pass go
19 and deal with stage 1 of the TRS methodology.

20 You see from Greene 3, which was filed a few days
21 ago, that much of the Edwin Coe information has been
22 provided after the 24th and as I said, in relation to
23 TRS we got documents at 5.30 yesterday. So it is only
24 with looming deadlines for skeletons and the looming
25 deadline for the hearing that we have actually got more

1 engagement from the claimants.

2 We now need certainty and we now need finality.
3 They have been promised by 23 August. We have not got
4 them yet. This is not stuff that we have. It is akin
5 to the promises made on 20 May after the initial
6 application. To give you another example beyond
7 Mr Greene, it was only the day before yesterday that the
8 Asda claimants released a substantial number of
9 documents as well.

10 So in light of the experiences we have had from
11 April through to date, we say an order is necessary and
12 will provide the discipline that is needed to bring this
13 to a close by 23 August, and indeed, given the belated
14 agreement by the likes of Boots and DS Smith to provide
15 remaining information, there should be absolutely no
16 issue with that being recorded in an order to provide
17 the certainty and discipline that we say is needed to
18 bring this to a close by 23 August.

19 So we say as a matter of principle the green
20 requests should be captured in an order, again almost by
21 way of a consent order, because this is a belated
22 concession of a right.

23 THE CHAIRMAN: It would not be a consent order, would it?

24 I mean, if the claimants say they consent to it then
25 that is absolutely no problem, we will grant the consent

1 order, but they are opposing it as I understand it.

2 MR BEZANT: They are in principle agreeing to provide
3 everything that is in the substance of the requests and
4 in circumstances where they are now prepared to do that
5 as reflected in the green requests we say there should
6 be no issue in them being subject to the discipline of
7 an order lest we get to the 23 August, there is more
8 slippage as we saw May, June and July, and we are back
9 before the Tribunal saying we are still in difficulty,
10 we still cannot pass go.

11 So it is for those reasons we do say now it is the
12 time to bring this to a close. October is looming, it
13 is incredibly tight already, and holding the claimants'
14 feet to the fire by way of an order might finally make
15 this happen. So we say the green requests should be
16 reflected in the order, my Lord.

17 THE CHAIRMAN: Thank you. We will hear from all the parties
18 on the question of principle about what we do with the
19 green requests.

20 MR RICHARDSON: Sir, as far as Arla is concerned, the
21 requests that are in green we are happy to be included
22 in an order. There are various other categories of
23 objection that we have, objections of substance,
24 objections to requests that were made on 19 July after
25 the deadline for making requests and so on, and requests

1 which we say are difficult to respond to save at a very
2 high level. To such an extent we do not think they
3 should go into an order but the ones that are in green,
4 we are happy for those to be in an order.

5 THE CHAIRMAN: In that case we will hear from the others
6 later. We will just concentrate on the Arla ones.

7 As I understand it then, if we are looking at
8 appendix 2, 1.1, Arla consent to us making that order.

9 MR RICHARDSON: 1.1, yes.

10 THE CHAIRMAN: So we shall make that order on 1.1.

11 2.1, that is also green. Arla consent to making
12 that order?

13 MR RICHARDSON: Yes.

14 THE CHAIRMAN: We shall make that order.

15 Then we come on to 2.2, which unless it is changed
16 is red, so I shall ask Mr Bezant, whoever wishes to
17 address us on whether -- why it is necessary for us to
18 grant that.

19 MR MCGURK: I am going to ask Mr Bezant to address the red
20 request.

21 MR BEZANT: Thank you. So the issue here is that overall in
22 the market structure one has inter-relationship between
23 different parties at different levels. Hauliers supply
24 other people and other people supply other people. They
25 supply trucks, they supply services, sometimes they

1 supply their own trucks to somebody else to supply
2 a service. It is a complicated interaction of who is
3 using trucks, buying trucks, renting trucks out and
4 so on. The issue with truck-related services is that
5 they may be the self-same trucks that a haulier has
6 purchased. What we are trying to eliminate, or at least
7 understand, is the extent to which truck is claimed once
8 at one level of the diagram and if it is being claimed
9 again at another level of the diagram, somebody is
10 buying a service using that truck, that one does not end
11 up double-counting.

12 So the issue of trying to understand to the extent
13 that we can who the services are procured from and
14 latterly what kinds of services are procured from people
15 is trying to avoid misalignment and overstating of the
16 amounts in dispute.

17 THE CHAIRMAN: Thank you. Yes.

18 MR RICHARDSON: So we have explained in correspondence that
19 in relation to request 2.2, the amount of information
20 that is required and the nature of it extending to each
21 of the suppliers in the Arla haulier list, which is
22 extremely long, over the course of the relevant period
23 is not something we think is realistically achievable,
24 something we are able to do. In response to this the
25 defendants' experts reformulated this request, as you

1 will see in the text of 2.2.1 {HS1-A3/14/9}:

2 "In the event that the Arla Claimants' records are
3 not identical and consistent, please provide a breakdown
4 [they say] of their expenditure ..." and so on.

5 This is responding to the accepted limitation on the
6 data available in our systems. In those circumstances
7 we say you should not order request 2.2 because there is
8 a limitation on the data and everyone seems to be agreed
9 about that, and 2.2.1, given those limitations again, it
10 is not going to be something we think we can
11 realistically do. It is not an order we think you
12 should make.

13 THE CHAIRMAN: So if I have understood you, 2.2.1 is
14 something which you would agree to provide.

15 MR RICHARDSON: It is something we are willing to do at
16 a high level of generality but we do not think we can
17 realistically provide a substantial level of information
18 in response to that request and we do not think it
19 should go into an order.

20 THE CHAIRMAN: Thank you. Now, do you have an expert
21 instructed in this?

22 MR RICHARDSON: We have an expert instructed. He is not
23 here today. There is a meeting scheduled.

24 THE CHAIRMAN: What is the expert's view on whether this is
25 necessary or not?

1 MR BEZANT: We do not know. We have had no engagement.

2 There is an expert meeting set for next week, my Lord.

3 THE CHAIRMAN: Why was this expert meeting not held before

4 today, before we had to deal with this?

5 MR RICHARDSON: I do not have an answer to that question,

6 my Lord -- sir, excuse me.

7 THE CHAIRMAN: Who is your expert?

8 MR RICHARDSON: Steven Law, forensic accountant.

9 THE CHAIRMAN: I do not know how much further we can take

10 this if the experts have not decided between themselves

11 whether it is necessary or not.

12 MR MCGURK: Forgive me for rising. Again, this is a product

13 of the fact that an expert was instructed so late,

14 Mr Bezant and Mr Noble have been trying to engage on

15 this for months, but the absence of an expert and the

16 absence of responses to requests for engagement have

17 been effectively stonewalled. So it is not our fault

18 that we are here today with this difficulty. They could

19 have lined Mr Law up to say 2.2, 2.2.1 is

20 disproportionate because either it is the documents and

21 here is why it would be difficult. This is an expert

22 process where the economists are asking for it and they

23 have been told by lawyers that you cannot have it.

24 THE CHAIRMAN: What we need in order to decide this is to

25 have the defendants' experts saying, this is our data

1 request, we think it is necessary because of X, and then
2 we have the claimants saying, well actually this data
3 request is not necessary because of Y, and then we can
4 take a view on whether X is right or Y is right. But we
5 are in a difficult situation if the experts have not
6 even met so we do not know what the position is.

7 MR RICHARDSON: The point I have made, which I do not think
8 requires an expert to make, is that the effort involved
9 in compiling this information is going to consume an
10 enormous amount of time and not something we think we
11 can comply with by 23 August.

12 THE CHAIRMAN: When could you comply with it?

13 MR RICHARDSON: I do not have an answer to that on my feet
14 although I can --

15 THE CHAIRMAN: You can find an answer to that. (Pause).

16 MR RICHARDSON: I mean, we do not presently feel we are
17 really in a position to answer that question although if
18 pushed I mean by the end of September might be a more
19 realistic deadline.

20 THE CHAIRMAN: This is really entirely unsatisfactory from
21 our point of view. We can only rule on things once the
22 experts engage and narrow them down for us. I do not
23 think we can rule on 2.2 and 2.2.1 at all now until you
24 have had your expert meeting. So we are going to -- and
25 I think 2.2.2 is connected with that as far as I can

1 see.

2 MR RICHARDSON: Yes.

3 THE CHAIRMAN: So we are going to refuse at the moment 2.1,
4 2.2.1 and 2.2.2. Mr McGurk, you can bring this back
5 before us if -- depending on the result of the meeting
6 next week, but we are not going to rule on things on
7 which the experts have not engaged.

8 MR MCGURK: The fundamental difficulty with this is that
9 Arla is the only claimant who have actually instructed.

10 THE CHAIRMAN: We are dealing with it one by one. The
11 answer may be different when we come to other people,
12 but as far as -- I am looking at a dispute between
13 Mr Bezant and Mr Law and until we have -- that has been
14 narrowed down between these two experts, we cannot rule
15 on it.

16 MR MCGURK: If I may, my Lord, I do want to try and push
17 back on that because Mr Bezant -- Mr Noble and Mr Bezant
18 have set out in the tables appended to the 31 July
19 updating statements the extent of the engagement or
20 rather lack of engagement across the board from the
21 experts on the other side. I do not particularly blame
22 them because they take their instructions from their
23 solicitors, but these applications have been
24 foreshadowed since May, the requests have been clear
25 since at the latest 9 April. We feel we should not be

1 punished when our experts have tried to engage, have
2 provided reasons for the requests that have been made,
3 and have effectively been stonewalled. So in a sense
4 the claimants are being rewarded with further delay if
5 their failure to engage results in our application being
6 refused and we see that as unfair.

7 THE CHAIRMAN: They are not being rewarded because you have
8 a meeting next week and after that you can bring back
9 the application on these with a detailed note of the
10 dispute between the experts, the reasons for and the
11 reasons against and we can rule on that. We could rule
12 on it possibly on the papers.

13 MR MCGURK: Yes, could Mr Bezant say something on that.

14 THE CHAIRMAN: Yes.

15 MR BEZANT: Thank you. In anticipation of that, we have no
16 information yet as regards Arla's TRS material. We
17 anticipate Arla's expert does. If we are to have
18 a productive meeting next week, it would be helpful to
19 have what he has before we have that meeting for obvious
20 reasons, so ...

21 THE CHAIRMAN: That goes without saying. I would be very
22 surprised to hear that Arla were not proposing to give
23 you everything their expert had.

24 MR BEZANT: That is the current status and that is what
25 request 2.2.2 was directed to, the extent to which

1 Arla's expert was privy to facts.

2 THE CHAIRMAN: I am quite prepared to make an order that --
3 when is this meeting next week?

4 MR BEZANT: It is Wednesday or Thursday next week, my Lord.

5 THE CHAIRMAN: I am prepared to make an order that by 5 pm
6 on Monday Arla provide to Mr Bezant all the data which
7 has been given to their expert.

8 MR BEZANT: Thank you.

9 THE CHAIRMAN: That should not be difficult to comply with
10 because you must have it all sitting somewhere in the
11 form it has been given to your experts.

12 MR RICHARDSON: Excuse me, sir, I did not quite catch that.

13 THE CHAIRMAN: I imagine that is not difficult to comply
14 with because you all already have that. It is only an
15 order in relation to what your expert already has.

16 MR RICHARDSON: We did object to a request for all of the
17 information that had been given to the forensic
18 accountant on the basis that we considered it premature
19 in advance of the deadline for filing a positive case.

20 THE CHAIRMAN: We do not consider it premature because we
21 are going by the principle that all experts must see the
22 information which the other sides' experts have.

23 MR RICHARDSON: I am grateful. I do not think anything
24 I say is going to change your mind on that.

25 THE CHAIRMAN: Thank you. So we shall make that order and

1 we shall order Arla and the defendants to lodge by 5 pm
2 on Friday a detailed report of the experts' meeting
3 which sets out what matters have been discussed, what
4 matters have been agreed, what matters are not agreed
5 and the reasons of each party for not agreeing these
6 matters. We will take things from there. In the
7 meantime we refuse these, but clearly depending on what
8 that document says further orders might be required.

9 5 pm on Monday for the data, then you will have your
10 expert meeting on Thursday, and 5 pm on Friday
11 a detailed report of the expert meeting to be lodged.

12 MR MCGURK: Thank you, my Lord. The next point is a very
13 similar point. That arises on 2.5.2 and 2.5.3.

14 THE CHAIRMAN: Sorry, so I am with you, we have dealt with
15 2.2.1 and 2.2.2 and then the next one I have is 2.3
16 which is green. Is that right? So that is consented
17 to.

18 MR RICHARDSON: Yes.

19 THE CHAIRMAN: Then 2.4 is green, consented to.

20 MR RICHARDSON: Yes.

21 THE CHAIRMAN: 2.5.1, green, consented to.

22 MR RICHARDSON: Yes.

23 THE CHAIRMAN: Then I think the next contentious one is
24 2.5.2.

25 MR RICHARDSON: I think although the order you have made

1 deals with 2.5.2.

2 THE CHAIRMAN: 2.5.2.

3 MR RICHARDSON: 2.5.3.

4 THE CHAIRMAN: I think we are in a different category here
5 because this is a report. I will hear from Mr McGurk as
6 to why the report should be produced at this stage.

7 MR MCGURK: My Lord, can I ask Mr Bezant to address that.

8 THE CHAIRMAN: Certainly.

9 MR BEZANT: So this comes under the general heading of
10 trying to understand what information is available and
11 what processes have been followed to understand how
12 information has been extracted, how it has been verified
13 and how gaps have been filled in. It was essentially to
14 get us some information, if he had had the documents and
15 produced a report that would be a synthesis of trying to
16 understand the amounts claimed. So that is really why
17 we were asking for that report if it existed.

18 MR MCGURK: The only legal overlay on that is that it was
19 referred to openly. There was no attempt to say we are
20 reserving all our rights, we are not waiving privilege.
21 It was relied upon as a matter of substance and it was
22 for that reason that we asked for it and then got
23 refused.

24 THE CHAIRMAN: Yes.

25 MR RICHARDSON: I think the reference which Mr McGurk is

1 referring to was a reference in correspondence to the
2 preparation of that report. It is a report we intend to
3 rely on when we file our positive case and it is
4 protected by litigation privilege. There has been no
5 response to the privilege point in the defendants'
6 skeleton.

7 THE CHAIRMAN: Okay. So this report does exist, is that
8 correct?

9 MR RICHARDSON: I mean, I do not want to on my feet waive
10 privilege, but --

11 THE CHAIRMAN: It just says please provide the forensic
12 accountant's reports. If there is no such report then
13 that is of interest to us to know because we are not
14 going to order a report if it does not exist.

15 MR RICHARDSON: There is a report in existence in draft
16 form, but --

17 THE CHAIRMAN: So there is a report in draft but there is
18 not a final report. I think it would be very difficult
19 to persuade us that we should be ordering people to
20 produce draft reports which are uncompleted work.

21 Mr McGurk, should we be ordering draft reports to be
22 exchanged, in which case which of your draft reports are
23 you intending to reciprocate by exchanging?

24 MR MCGURK: The key thing about the draft is that it is
25 going to contain information about methodology and data

1 which is going to help Mr Bezant understand the case we
2 have to meet and to build his own case. Again, given
3 that it was referred to openly and there was no
4 suggestion that privilege was not being waived, we were
5 not at that stage to any other mind that this was being
6 relied upon in substance, and that is why --

7 THE CHAIRMAN: Can methodology not be discussed at this
8 meeting next week without a draft report being
9 exchanged?

10 MR MCGURK: If the chair has made that clear that it will be
11 discussed, that would be satisfactory, my Lord.

12 THE CHAIRMAN: Yes. Thank you. We shall refuse 2.3 on the
13 basis that we are not requiring draft reports to be
14 exchanged. However, questions of methodology should be
15 discussed at the experts' meeting next week.

16 MR MCGURK: Thank you.

17 THE CHAIRMAN: Now we are on to 2.6 which is green, so again
18 that is ordered of consent. Then we are on to 2.7
19 {HS1-A3/14/11}.

20 MR MCGURK: Yes.

21 MR BEZANT: So this goes back to the root issue of
22 identifying how information has been selected for
23 extraction from accounting systems and other records and
24 how that has been done in order that one can identify
25 the extent to which they relate to truck-related

1 services, and to the extent again one is just trying to
2 understand the basic question of data extraction, how
3 much was spent on truck-related services, so one can
4 then go on to identify the subset of that which is
5 relevant here, the value of commerce of the trucks that
6 are the subject of the dispute. Again, we have -- they
7 flow out of requests I think that have been granted or
8 will be granted.

9 But the question is whether there is additional
10 information that would assist us in that process.

11 THE CHAIRMAN: Thank you, yes.

12 MR RICHARDSON: Sir, our objection to this was primarily
13 that it seemed to be requesting the same thing as was
14 requested in request 2.5.1, and to the extent that that
15 is the case, it need not trouble anybody. But to the
16 extent that is not the case, it was not entirely clear
17 what we were being asked to produce. "Extracts from the
18 Claimants' accounting systems" was not terribly clear to
19 us and we made that point in correspondence, to which
20 the response was, well this means financial data
21 extracted from the Arla claimant systems, which did not
22 enlighten us terribly as to the specific data that was
23 being requested of the accounting codes that were being
24 requested.

25 Nevertheless, insofar as you have already ordered

1 that everything that has been given to our expert should
2 be given to Mr Bezant, it may be that that will suffice
3 and you need not order 2.7 as well.

4 THE CHAIRMAN: Is this going to be discussed at the experts'
5 meeting next week?

6 MR RICHARDSON: I would imagine so, certainly. But I mean,
7 I think the gist of the request is probably --

8 THE CHAIRMAN: We will refuse this on the basis that it is
9 going to be discussed at the experts' meeting next week.

10 MR RICHARDSON: I am grateful.

11 THE CHAIRMAN: I am sure, Mr Bezant, you will note that
12 there is an issue about the wording here as to what is
13 meant by "extracts" and so on. At the outcome of that
14 experts' meeting there should be absolute clarity on
15 what is being required if it is not agreed.

16 MR BEZANT: Yes, and in some of their responses Arla have
17 referred to extracts from their accounting system and
18 the method they have gone about to do that, so if we can
19 understand what that extraction process was then we can
20 make progress.

21 THE CHAIRMAN: Hopefully you can make progress with Mr Law
22 on that next week.

23 2.8 {HS1-A3/14/17}.

24 MR BEZANT: 2.8, it is clear there are different forms of
25 contract that are used in the industry for different

1 types of services which have implications for the
2 pricing arrangements and therefore they in turn have
3 implications for the extent to which costs flow through
4 or do not flow through. Again, in trying to understand
5 the truck-related services expenditure that has been
6 claimed, that is a very high level of abstraction. But
7 one is trying to understand something about the nature
8 of those services by reference to the nature of the
9 contracts and the extent to which one can then
10 understand how costs and prices relate, interrelate,
11 include certain costs, exclude certain costs. Open book
12 pricing for example, the costs are transparent, are paid
13 for. Other contracts someone provides the truck, so it
14 is not even a question of the cost of the trucks. So
15 trying to understand the nature of the contracts.
16 Hence, the pricing arrangements that sit underneath the
17 headline number, truck-related services, is something we
18 are trying to understand.

19 It flows into the question again of the value of
20 commerce that you have to extract from a higher level
21 number.

22 THE CHAIRMAN: Thank you. Yes.

23 MR RICHARDSON: Our position is that we can provide certain
24 information in response to this request at a high level
25 of generality again, but going on an endless search for

1 documents we think is likely to be -- well, it is
2 disproportionate and it is going to consume an enormous
3 amount of time and cost.

4 We have explained in correspondence that Arla does
5 not have a systematic set of documents that it can
6 provide in short order to the defendants' experts that
7 will respond to this request. So insofar as it is
8 looking for documents, we think this falls into the
9 category which you alluded to in your opening remarks of
10 being one which is impossible or very difficult to
11 comply with and a request which you should not order on
12 that basis. Insofar as it is open to information that
13 we can provide at a high level we are happy to do that.

14 THE CHAIRMAN: Yes, Mr Bezant, you have heard what the
15 factual position is. Why is that factual position not
16 acceptable to you?

17 MR BEZANT: I suppose it depends upon what comes. So to
18 some extent we are asking for explanations and then --
19 which is 2.8(1), and just to understand the nature of
20 the contracts here, (2) onwards we are asking for
21 a small number of documents to help us see the kinds of
22 contracts. (3) open book contracts are important
23 because of the way that costs pass through, trying to
24 understand and be clear about if they have any of these
25 can we see some examples to make sure we understand how

1 costs [pass] through, and then 2.8(4) again is similar,
2 we are not asking for everything, we are asking for an
3 understanding by reference to some documents.

4 THE CHAIRMAN: Yes and is this going to be discussed on
5 Thursday.

6 MR BEZANT: I very much hope so. We are due to send Mr Law
7 an agenda for the meeting. He has asked for one and
8 naturally everything that is in our red list, to the
9 extent it is not granted today, I would anticipate
10 talking to him about it.

11 THE CHAIRMAN: Yes, thank you.

12 Can you just help us with this as to why you are not
13 able to explain the different kinds of contracts?

14 MR RICHARDSON: I think that is the kind of information we
15 are able to provide an explanation of that kind.

16 THE CHAIRMAN: So why are you not able to provide an
17 approximate percentage split?

18 MR RICHARDSON: It is the kind of information we are able to
19 provide at a high level of generality but we do not have
20 systematic records of contracts.

21 THE CHAIRMAN: You are being asked to say please provide an
22 approximate percentage split of how much of the
23 claimants' third party truck-related expenditure related
24 to each of the different types of contracts. Are you
25 able to provide that or are you not?

1 MR RICHARDSON: In answer to that specific question, I am
2 not sure. I know that we are able to do our best to
3 answer this question at a high level and provide
4 information to the extent we can.

5 THE CHAIRMAN: Again this is extremely unsatisfactory. We
6 have come here to rule on this and for a party to say
7 they do not know whether they can comply with it or not
8 is not very helpful to us.

9 We will move on to number (2). Why are you not able
10 to provide a copy if there is a small but representative
11 example of about five or ten executed contracts?

12 MR RICHARDSON: The difficulty is providing a representative
13 sample because of the way the documents have been filed
14 in our systems. It is not something we can commit to
15 undertaking to do, to find a representative sample over
16 the course of the relevant period.

17 THE CHAIRMAN: So if the words "but representative" were
18 deleted would you be able to comply with it?

19 MR RICHARDSON: I would imagine so, yes.

20 THE CHAIRMAN: In (3), "in respect of any open book
21 contracts included in the sample ... provide documents
22 related to the suppliers' costs". So this of course
23 assumes that you would provide under (2) an open book
24 contract. Why could you not provide this?

25 MR RICHARDSON: We have explained in our skeleton that we

1 did not generally enter into open book contracts.

2 MR BEZANT: But I do not know what the word "generally"
3 means.

4 THE CHAIRMAN: This is carefully worded so that it is only
5 if you produce an open book contract that you have to
6 give this information about it. So this is predicated
7 on you having produced an open book contract, so if you
8 do produce an open book contract why could you not
9 provide this information?

10 MR RICHARDSON: Insofar as we have open book contracts to
11 provide, I am sure we can provide information in
12 relation to them. But, as we have set out in our
13 skeleton --

14 THE CHAIRMAN: So there is no difficulty --

15 MR RICHARDSON: -- they do not typically exist.

16 THE CHAIRMAN: -- with (3) then?

17 MR RICHARDSON: No, again insofar as we have any to provide.
18 We may not have.

19 THE CHAIRMAN: That is what it says. (4), "in respect of
20 any remaining contracts ... provide other contracts
21 relating to the suppliers' costs". Do you have any
22 difficulty with that?

23 MR RICHARDSON: Again, the issue here is again with the kind
24 of systematic nature of the documents that are stored.

25 THE CHAIRMAN: Again, this is predicated on the 5 to 10 that

1 you produce?

2 MR RICHARDSON: Yes, we can produce information in relation
3 to documents we provide, yes.

4 THE CHAIRMAN: We are going to refuse this on the basis that
5 it is going to be discussed, but I think parties will be
6 aware from my comments so far that we expect information
7 to be provided if it can be, and if there are contracts
8 provided then the material in 3 and 4 has to be provided
9 also, and it seems to me the only issue is the question
10 of whether they are representative or not and the
11 question.

12 So what I am going to suggest is that Arla provide
13 by 5 o'clock on Monday the sample of executed contracts
14 which they are willing to provide and then there can be
15 a discussion between the experts on the issue of whether
16 or not that sample is representative and where the
17 discussion might go if it is not representative.

18 Moving on to 2.9.

19 MR BEZANT: So 2.9 is again trying to clarify the situation
20 because if a haulier or some provider of a truck service
21 uses their truck, then that has one implication for what
22 you are paying for and if there is an overcharge
23 embedded in that truck. If you are using your own
24 truck, which is what Arla are saying, then again it may
25 be that the claim therefore becomes something whether

1 Arla bought a truck.

2 So what one is trying to avoid here is again
3 double-counting or miscounting of the amount of
4 expenditure that is properly represented to one or more
5 claimants. It is clarification of who owns the truck
6 that is the subject of the truck-related service. So if
7 I have a truck and I hire a driver from somebody else
8 then the cost of hiring that driver, it is not
9 a truck-related service that relates to the truck, it is
10 a totally different question, because it is my truck to
11 start with. It is not a truck-related services question
12 in the same way as using a truck from somebody else to
13 provide a service.

14 So we are just trying to get clarity of what is
15 included in the pot and how to boil that down to the
16 truck-related services value of commerce.

17 THE CHAIRMAN: Thank you. Yes.

18 MR NOBLE: If I might just add, there is another rationale
19 as well which is actually for using this information to
20 help transform the expenditure on truck-related services
21 into truck-related value of commerce and we are seeking
22 to understand here the extent to which the Arla trucks
23 are interchangeable. The first question is about in
24 a sense the nature of the services that are being
25 provided, are they equivalent to the services that are

1 being provided by external parties, and then the second
2 part of the question is to understand what is the cost
3 structure Arla incurs.

4 Obviously if the services are interchangeable and
5 the services are very similar then we can use the cost
6 structure of Arla as a guide as to what the cost
7 structure of its suppliers may be, which it may not have
8 direct insight into, for example it does not have open
9 book contracts as you just heard a few moments ago. Of
10 course that is very important to go from the expenditure
11 part to the value of commerce part.

12 THE CHAIRMAN: Thank you, yes.

13 MR RICHARDSON: That was the explanation that Mr Noble has
14 given that I had understood to be the basis for the
15 request as provided in the Excel sheet. We have not
16 advanced a claim for the costs of insourcing
17 truck-related services. The suggestion is that the
18 costs of insourcing truck-related services can be
19 a benchmark for the costs of expenditure on
20 truck-related services from third parties, but given
21 that it is not within the scope of our claim that is the
22 first reason why we object to it. The second reason is
23 because again it is extensive and requires us to conduct
24 substantial searches for further documents which we do
25 not think is merited given it falls outside the scope of

1 our claim.

2 Thirdly, it is not clear to us --

3 THE CHAIRMAN: Just on that, the extensive work required, so
4 you are being asked to explain whether there were any
5 differences in the nature of truck-related services
6 provided in-house and those provided by third parties.
7 That is not labour intensive to provide that
8 explanation, is it?

9 MR RICHARDSON: It is labour intensive because it requires
10 us to look at documents over the course of a long period
11 of time relating to both insourced and outsourced and
12 give careful consideration to that question and come up
13 with an explanation.

14 We do think it is labour intensive and the intensity
15 of the labour is not justified by the value of the
16 request according to the experts because it is for
17 a calculation which is not part of -- does not fall
18 within the scope of our claim. The suggestion is it
19 will be used as a benchmark for the expenditure we made
20 on outsourcing truck-related services and it is not
21 clear to us why that would be a relevant benchmark in
22 any event.

23 THE CHAIRMAN: What does your expert say? Does your expert
24 say it is a relevant benchmark or does your expert say
25 it is not a relevant benchmark?

1 MR RICHARDSON: I do not have instructions on that. No
2 doubt it will be the subject of discussion --

3 THE CHAIRMAN: That is unsatisfactory again. I do not think
4 we can take this much further. We really cannot rule on
5 this until we know what your expert's view on this
6 benchmarking exercise is so we are going to refuse this
7 but we will make it absolutely clear that this must be
8 discussed by your expert at the meeting on Thursday.
9 Thank you.

10 Now, 3.1 is green. So is that consented to?

11 MR RICHARDSON: Yes.

12 THE CHAIRMAN: 3.4.1, green, is that consented to?

13 MR RICHARDSON: Yes.

14 THE CHAIRMAN: 3.4.2, green, is that consented to?

15 MR RICHARDSON: Yes.

16 THE CHAIRMAN: That brings us on to 3.4.3 {HS1-A3/14/12}.

17 Yes, Mr Bezant, do you want to address us on this?

18 MR BEZANT: Thank you. So again, 3.4.3 is us trying to
19 understand how information has been surfaced, including
20 via the assistance of an expert, in order that we can
21 understand the information we have been provided, in
22 order that we can understand whether there may be other
23 ways of getting at the information or we can form a view
24 on the robustness of the information that we are being
25 given and the answers we are being given.

1 So that was really the thrust of that enquiry.

2 THE CHAIRMAN: Yes.

3 MR RICHARDSON: Sir, our objection to this is that it is
4 straying into the realm of a costly and onerous
5 disclosure exercise. It is effectively looking for
6 a disclosure statement of the kind which we did not
7 consider to be -- the emphasis to be on in these
8 proceedings. I think you indicated as much at the
9 outset in your remarks today. But this is not
10 a disclosure exercise and this kind of request we think
11 is objectionable on that basis. It is a point of
12 principle which all of the other claimants have raised
13 as well.

14 THE CHAIRMAN: Yes. We are going to refuse 3.4.3 on the
15 basis that this is not a disclosure exercise, it is
16 a data request exercise. Having said that, it may be
17 useful as part of the discussions at the meeting for
18 parties to make such progress on these sorts of areas as
19 they can.

20 3.4.4.

21 MR BEZANT: 3.4.4 is again trying to clarify on what basis
22 documents were determined and what were assessed to be
23 relevant and useful. Again, it was just a contextual
24 question: how has somebody made a decision, this
25 contains truck-related expenditure, this is a means of

1 extracting that information, this is a means of
2 transforming that information to extract the underlying
3 value of commerce. We do not understand how the process
4 was followed.

5 THE CHAIRMAN: I dare say if I were to ask you why your
6 expert decided that certain things were relevant and
7 useful or why they did not is not something you are
8 going to be able to address me on.

9 MR RICHARDSON: No, that question is not something I can
10 address you on, no.

11 THE CHAIRMAN: I am going to refuse that on the basis that
12 it can be discussed by the experts on Thursday.

13 MR BEZANT: It was not clear whether this was a decision
14 involving or by their expert but I appreciate the
15 topic --

16 THE CHAIRMAN: I go back to the general principles that this
17 is a data request exercise, the expert asking for the
18 data yourself has to justify it and the expert refusing
19 the data has to explain why that justification is wrong.
20 That is the exercise which you will be engaged in on
21 Thursday.

22 3.4.5, 6 and 7, these are also matters which we
23 should follow the pattern of refusing but leaving it to
24 the experts to discuss.

25 MR RICHARDSON: If I might save Mr Bezant some time, our

1 objection to all three of these is simply that they were
2 raised on 19 July and we can deal with them in
3 correspondence. We do not think it is appropriate for
4 you to make an order in relation to them. Again,
5 perhaps it is something that can be discussed next week
6 in the experts' meeting.

7 THE CHAIRMAN: We are refusing. It can be discussed in the
8 experts' meeting. Again, it is completely
9 unsatisfactory if we are being asked to rule on things
10 which the parties have not even discussed.

11 I think that brings us to the end of the Arla
12 claims, certainly on the version that I have been
13 looking at, and I think now we move on to Boots unless
14 there is anything else arising out of the Arla claims.

15 Application re Boots

16 MR MCGURK: My Lord, thank you. Boots, we could go off the
17 31 July version of the draft order but I understand it
18 has been slightly revised overnight. I hope that has
19 made its way to the Tribunal. There are a couple of
20 preliminary points.

21 THE CHAIRMAN: Just let me check whether we have it here.

22 MR MCGURK: Yes. (Pause).

23 THE CHAIRMAN: So just to clarify, we now have this
24 morning's version of the Boots.

25 MR MCGURK: Great. I understand parts of this draft order

1 may contain confidential material. Potentially the
2 claimants could indicate whether they are prepared to
3 designate for these purposes or whether they need to go
4 into closed to deal with it.

5 THE CHAIRMAN: I think it would be more straightforward if
6 we just adjourned and went into closed.

7 MR CRITCHLEY: I am not sure it will be necessary. I am not
8 sure there is confidential material in the order. We
9 have disclosed 3,000 documents into the confidentiality
10 ring but I do not think the content of those documents
11 that we have disclosed into the ring appear in this
12 document. Obviously if they do then we would need to go
13 into the closed session.

14 THE CHAIRMAN: What I do not want to do is to start in open
15 session and keep going in and out of it, but if you
16 think we can deal with Boots in its entirety without
17 going into closed session we are prepared to do that.

18 MR MCGURK: I am grateful. As I understand Mr Critchley, he
19 is content to go ahead and if he is content we are
20 content.

21 THE CHAIRMAN: Good. We will proceed on that basis,
22 thank you.

23 MR MCGURK: The second preliminary point, this is the first
24 of the rest of the claimants where the point of
25 principle I discussed arose.

1 So they have not instructed an expert, they do not
2 consider this to be an expert meeting, so we do not have
3 the default of pushing it off to next week and seeing if
4 progress can be made with an opposing expert next week.
5 So we have asked for this information. It is there in
6 the order. We have been told no, it is not an expert
7 issue. We are not instructing an expert. You cannot
8 discuss with an expert and more to the point you cannot
9 discuss with anybody from our organisation to understand
10 what you are asking about in relation to these TRS
11 matters either.

12 So we hit a brick wall with this. That is the
13 preliminary point with Boots and everybody else.

14 THE CHAIRMAN: Thank you. Well, Mr Critchley, can you just
15 explain to us the thinking on why you do not need an
16 expert for this?

17 MR CRITCHLEY: Yes, my Lord. It is that we do not see there
18 is any point here that requires expert evidence, that
19 requires an expert opinion. If I can explain the
20 process whereby we put this case together. The volume
21 of commerce is essentially residing in our client's ERP
22 systems, their financial management systems. Those
23 systems get interrogated according to general ledger
24 codes and the relevant expenditure is pulled out of
25 them.

1 Now, it is not a simple question where you have got
2 one general ledger code for haulage, there are several
3 general ledger codes which seem to relate to haulage, so
4 you then extract the data in relation to those. You
5 take expert evidence from your clients -- sorry, not
6 expert evidence, you take evidence from your clients in
7 relation to what these codes entail. It could be that
8 a code could relate to haulage but the defendant would
9 say, well is this for trucks of under 6 tonnes? Could
10 it have gone on a train? In which case you will have to
11 take evidence about that. There will be data black
12 spots, in which case you will need to take evidence from
13 your clients generally from the start of the cartel
14 period as to what the business was like at that stage in
15 order to extrapolate backwards.

16 The main point I would like to make is these ERP
17 systems, these financial systems are numerous. I am in
18 a slightly different position to the other claimants'
19 counsel because I represent eight different groups of
20 whom seven have got TRS claims. The two largest ones,
21 Rockwool and Nomad, Findus Birds Eye, they are in
22 numerous different countries. Rockwool is in 20
23 different countries. At the start of the cartel period
24 it had different ERP systems for the different countries
25 which means it is a different extraction, the general

1 ledger codes will be different, the evidence that we
2 have to take from our clients is going to be different.

3 So the entire process that I have just described has
4 to be gone through multiple times and there just is not
5 time to do it by 23 August or, I mean, it is going to
6 take months and we were always going on the basis that
7 this is positive cases and it is going to take us that
8 long to do it.

9 But we cannot see any item that is requiring of an
10 expert opinion in it.

11 THE CHAIRMAN: Well, it is entirely your privilege at the
12 moment at any rate as to whether you want to instruct an
13 expert or not. If it turns out an expert was necessary
14 then that may have an impact on a decision at the end of
15 the day in a substantive hearing as to whether your case
16 has been proved or not.

17 Where we are at today is data requests. Data
18 requests have been made, we will hear what the
19 justification of that is. If you do not have an expert
20 fair enough, but we will need a justification from
21 someone in detail as to why the data request should be
22 refused and why Mr Bezant is wrong.

23 MR CRITCHLEY: One thing I would like to say on the issue of
24 experts actually, my Lord, is that I understand that
25 Steven Law has now been instructed but this was not an

1 issue in the claimants' protocol and my understanding
2 was that Mr Noble and Mr Bezant were instructed on the
3 issue of pass-on and it was not suggested until
4 I believe their statement on 8 July that they were
5 instructed on this issue of third party haulage volume
6 of commerce, I do not think the defendants' protocol has
7 been amended, and it was a surprise to us because we did
8 not think it was an expert issue so it was not
9 surprising to us that it was not in their protocol.

10 THE CHAIRMAN: Yes, Mr McGurk, can you clarify the position
11 of your experts on this?

12 MR MCGURK: There are a number of points, forgive me for
13 turning my back, sir. The defendant protocol is not
14 definitive. The claimants will tell you later in the
15 context of SPO in relation to a point we are going to
16 have to raise that the claimants' protocol is not
17 definitive.

18 Secondly, we wrote originally on TRS back in
19 February and we followed up in April, on April 9, with
20 the request and we made clear that they were being
21 sought on behalf of the defendants and their experts.

22 The application was made in May and Mr Critchley's
23 point in answer to my Lord, this is going to take
24 months, well, we are four and a half months later, six
25 and a half if you count the original requests that were

1 made to Arla and Boots in February in relation to TRS,
2 so they have had the opportunity to do this either
3 through experts or through factual personnel who could
4 have engaged with Mr Bezant and Mr Noble and explained
5 the position that way. They have chosen to do neither.

6 So it is that decision which constitutes the
7 impossible situation that Mr Noble and Mr Bezant having
8 made these requests clear on the April 9 at the very
9 latest, such that again they cannot pass stage 1. There
10 is no default position we have with Arla as we have just
11 been discussing.

12 So this is deeply unsatisfactory. It is a point of
13 principle. Mr Critchley's follow-up point was not only
14 will this take months once he has had to do it, but we
15 are going to give all of this in positive cases.

16 Back to my Lord's point in opening, if it is going
17 to be something that is going to go into a positive case
18 and relies upon data, it is data the defendants' experts
19 should also see because the one shop positive/negative
20 structure that has been adopted in the Mechanics
21 Judgment presupposes equality of arms and equal
22 treatment of the parties in relation to the data they
23 can each model their positive cases on.

24 So we cannot be hamstrung by virtue of unilateral
25 decisions being -- decisions of characterisation being

1 made by the claimants and the position is deeply
2 unsatisfactory.

3 MR CRITCHLEY: My Lord, I would just like to address first
4 the question that nothing has happened since these
5 requests were first made. When the requests were first
6 made in the first iteration of the application there
7 were four requests made against my client, of which we
8 have responded to three of them and partially responded
9 to the fourth. The first two requests were for
10 a breakdown of our clients' haulage by year and a
11 breakdown of our client's haulage by haulier, and it
12 took us several months to prepare a spreadsheet of many,
13 many thousands of lines and I cannot remember how many
14 columns which we provided to the defendants on 23 July
15 I think.

16 There was a request for documentation in which was
17 provided 3,000 documents, and the fourth request was in
18 relation to well how do we know that the data that has
19 been extracted from your machines is the correct data?
20 I mentioned this in my second witness statement. I went
21 into some detail as to what we had done with Rockwool's
22 UK system and Rockwool's international system because
23 they retired their national systems and moved to
24 a single one at some stage, and I went into detail about
25 that process.

1 But I do not know the details of all these other
2 systems that Rockwool had beforehand, that Findus Birds
3 Eye had, that all our other clients had. It is months
4 and months of work. But I gave as good an explanation
5 as I could at the time. As I said in my third
6 statement, if we are forced to provide information by
7 23 August we will do our damndest to do so but it is
8 very likely to get contradicted in positive cases where
9 we just risk sending the defendants off in the wrong
10 direction. It is something we say which is only
11 required for positive cases.

12 The first suggestion that this was required by the
13 defendants came in Dr Padilla's statement where he
14 talked about the fact that he could not get started on
15 his work until he had seen this volume of commerce
16 information. Now this has moved into Mr Noble's and
17 Mr Bezant's statement and I go into some detail on this
18 in my third statement where we condense their reasons
19 for it and we could not find anything in Mr Noble's and
20 Mr Bezant's statement which said why they needed this
21 information for their positive case. Rather it seemed
22 to be taken for granted that their case was going to be
23 going into the positive case and then they said they
24 needed it for that, whereas we say it is an
25 intrinsically responsive case. Mr McGurk says that it

1 is not fair for the claimants to choose the methodology
2 and then restrict the defendants in their replies, to
3 box them in in saying something which is only responsive
4 to that.

5 I mean, I think the point is that it is in a way an
6 inherently responsive critiquing of our case. The only
7 way that it would not be is if we said to the defendants
8 these are the ERP systems, you perform your own data
9 extractions. I do not think anyone is suggesting that.
10 We are going to be performing our extractions, we are
11 going to be explaining the decisions we have made, we
12 are going to be explaining the extrapolation decisions
13 we have made and it is then going to be up to the
14 defendants to respond to that.

15 THE CHAIRMAN: Yes, I am not quite sure on your point
16 about -- you say it is going to take a long time to
17 produce this on the one hand, but on the other hand you
18 say you are going to be relying on some of this in your
19 positive case. Have I understood you correctly?

20 MR CRITCHLEY: Correct. So we are acquiring the
21 information, we are going through the -- we are speaking
22 with the data extraction teams, we are understanding the
23 processes we have gone through, we are putting it into
24 documentation for our positive cases, and then we will
25 say well this is our positive case, this is how we

1 perform the extractions, these are the assumptions we
2 have made, these are the witness statements that says
3 that Findus did not put their frozen pizzas on trains,
4 it would have been trucks, and the expense would have
5 fallen to this particular claimant.

6 There is another issue which I have not mentioned
7 which is the fact that we have 135 claimants and the
8 defendants are saying to us, okay, so which of the
9 individual claimants does this expenditure fall to? It
10 is not always the case that the company codes on the ERP
11 systems map neatly on to the claimants, and we are well
12 aware of the need to perform this exercise and to say to
13 whom the -- to which claimant the claim falls, and that
14 is going to be another element of this.

15 But it is a very large task, it is going to take us
16 months and months to put it together, and really all of
17 these points in red, we can go through them line by line
18 but it is a point of principle really that we do not
19 think that any of it is required in the positive cases.

20 MR RIDYARD: Sorry, just to be practical about this, you
21 have got an amount that you will have spent on haulage
22 and somewhere or other that has to be converted into
23 truck equivalents, so this is what we are talking about
24 here, how does that transformation take place?

25 MR CRITCHLEY: At the moment we are just talking about the

1 value of commerce on haulage. There is a separate piece
2 to it which I do not think is part of the defendants'
3 application, as to how we then convert that into truck
4 equivalents.

5 MR RIDYARD: But you are going to have to do that sooner or
6 later.

7 MR CRITCHLEY: We will have to do that in positive cases as
8 well, yes. There are various parts we are pursuing for
9 that. Partly it is going to be a matter of expert
10 evidence, it is something that Dr Ramada is looking at,
11 we are looking to see if we can get information from any
12 friendly hauliers of our clients, but it is something
13 else that we are going to have to turn our attention to
14 but as I understand it it is not something that forms
15 part of the defendants' application for today.

16 MR MCGURK: The orders sought are in the draft order that is
17 before you, but as a point of principle this is really
18 unsatisfactory. You have heard repeatedly from
19 Mr Critchley that all of this work is being done for
20 purposes of preparation of their positive case. What
21 was determined on 9 January is that both sides should be
22 put in the position to be able to make positive cases on
23 the three issues that were subject to the issues-based
24 approach. We are effectively being told we will not be
25 able to do that. You can respond destructively only.

1 That is not fair. That is a breach of our rights to
2 the defence and it is flatly inconsistent with what has
3 been written down in the Mechanics Judgment.

4 We therefore offer two routes forward for this.
5 First of all, as a matter of principle and consistent
6 with the Mechanics Judgment, we say in circumstances
7 where we have brought forward reasoned requests to all
8 of these claimants and no expert has or will push back
9 to say from an expert perspective these are either
10 irrelevant or disproportionate, the Tribunal, if
11 satisfied that there is a rationale for them, should
12 order them.

13 Alternatively, there must be some other mechanism by
14 which all of this factual information can be provided to
15 the defendants' experts in very short order so that they
16 are put in a position of equality.

17 I would urge the former on the Tribunal. I will
18 happily take the latter if there is any concern of the
19 former. We think the former is consistent with the
20 Mechanics Judgment and the principles set out therein.

21 THE CHAIRMAN: The principles in the Mechanics Judgment are
22 that each party produces a positive case and responds to
23 the other side's requests in order for the other side to
24 be able to do that. So I am not sure I am really with
25 you, Mr Critchley when you say it is essentially

1 responsive. So on the basis that you need to provide to
2 the defendants the stuff that they need for their
3 positive case, are either of the options put forward by
4 Mr McGurk effective to you?

5 MR MCGURK: Really and primarily what I want is in
6 circumstances where Mr Bezant and Mr Noble have set out
7 reasoned requests which they were required to do and
8 where there has not been and will not be expert
9 opposition to those requests, my principal case is that
10 all of those requests should now be met pursuant to the
11 order. If the Tribunal is not happy with that in
12 principle, we can take it from there, but that we say is
13 the most consistent way of dealing with the claimants'
14 response to those requests.

15 THE CHAIRMAN: Yes, Mr Critchley.

16 MR CRITCHLEY: So, my Lord, I think only one option was put
17 there which was to answer the requests. There are two
18 points really. Number one is the art of the possible in
19 that it simply cannot be done in the time available.
20 But also in relation to the point that the Mechanics
21 Judgment said that both parties should be putting their
22 positive cases on 31 October, as I said, we looked
23 through the defendants' experts' joint statement and we
24 could not see why they needed our information before
25 positive cases. It is in my third witness statement.

1 I do not know if we could -- if it would assist.

2 THE CHAIRMAN: Just to summarise where we are then.

3 Mr Bezant has made a request for data. He says it is
4 justified. You say it is not justified. So then the
5 exercise is deciding whether these requests are
6 justified or not.

7 MR CRITCHLEY: It is not that we say they are not entitled
8 to the information. We are saying that their case is
9 a responsive case.

10 THE CHAIRMAN: I think we are not with you on that.

11 MR CRITCHLEY: I understand, but if I -- if we were to look
12 through the defendants' joint statement, I go through it
13 in my witness statement in paragraph 43.2, I mention the
14 fact that when they give their reasons, for each line
15 they give a reason why they want this information and
16 they are always saying it is because they basically want
17 to check our homework, they want to find out if this is
18 appropriate expenditure, if this is correct or if that
19 is correct. In other words, it is innately because they
20 want us to serve our positive case on 23 August so they
21 can respond to it on 31 October.

22 THE CHAIRMAN: So I think what we need to do is to go
23 through the orders sought and we will ask Mr Bezant his
24 reason. If we think that is a justified reason we will
25 order it; if you persuade us that it is not justified we

1 will not.

2 MR CRITCHLEY: My Lord, if he is merely going to talk about
3 whether he needs this information or not, I imagine
4 I will agree with him. It is more a point of principle
5 as to whether it is something that he is -- necessarily
6 has to come in positive cases as opposed to reply cases.

7 THE CHAIRMAN: It is a very subtle distinction which I do
8 not quite get because if he needs it for his positive
9 case, he needs it for his positive case. What we are
10 interested in today is whether he needs it for his
11 positive case.

12 MR CRITCHLEY: My client's position is that the defendants
13 do not need to make a positive case on this issue.

14 MR MCGURK: How many times do we need to make this clear to
15 Mr Critchley? That is not what is envisaged in the
16 Mechanics Judgment and the more he says you can only
17 have it and deal with it responsively the more absurd
18 this position seems to be.

19 THE CHAIRMAN: Good, we will go through this paragraph by
20 paragraph and I will ask Mr Bezant just to explain to us
21 why he needs this for his positive case and we will hear
22 any opposition on the precise point of why you say he
23 does not need it for this positive case.

24 Yes, Mr Bezant.

25 MR BEZANT: Thank you. So --

1 THE CHAIRMAN: Just where we are. We are at 1.1
2 {HS1-A3/14/14}.

3 MR BEZANT: 1.1. So claims are being brought in relation to
4 truck-related services expenditure and it is being said
5 that there may be an overcharge embedded in that and
6 there may be an implication or a supply pass-on, again
7 given the nature of the market structure in relation to
8 those expenditures. So in order to understand how much
9 has been spent on truck-related services to which an
10 overcharge and/or a supply pass-on question might arise,
11 we need to have a figure to start with. That figure
12 comes from truck-related services expenditure which is
13 at large, logistics haulage, waste management, involving
14 a variety of vehicles not all of which are the trucks
15 and are the subject of this claim and all of which are
16 services relating to trucks. There may be drivers,
17 there may be logistics and warehousing.

18 So we have to start from the way information is
19 captured in the accounting or other systems to extract
20 at the first instance, and this is what we are talking
21 about today, at the first instance the total
22 truck-related services expenditure in order to then be
23 able to pare it down into the value of commerce,
24 i.e. the subset of that expenditure relates to the
25 trucks and are the subject of the claim.

1 If we do not know how to get at the first level of
2 information, what is in the systems, how accounting
3 codes are used to capture the related categories of cost
4 at large what kinds of services they embody, not all of
5 which relate to the cost of trucks per se, we cannot
6 work out the expenditure to which other elements of the
7 matters in dispute clearly relate.

8 THE CHAIRMAN: Thank you. So why is that not necessary for
9 Mr Bezant's positive case?

10 MR CRITCHLEY: My Lord, I think the same answer is going to
11 pertain to each point. The point is that if the correct
12 time for Mr Bezant to be putting his case is in positive
13 cases then it would be necessary for it. The problem
14 I face is that as a point of practicality it is just not
15 going to be possible to provide what he wants in the
16 time available. We do have a volume of commerce figure
17 which was in the --

18 THE CHAIRMAN: Let us just stop there. So, as I understand
19 it, we now have an acceptance in principle by you that
20 this request and possibly others but I think it is
21 easier to take them one by one, are necessary for
22 Mr Bezant's positive case and the only question is how
23 long it is going to take you to provide it.

24 MR CRITCHLEY: It is an acceptance by me that the Tribunal
25 is not with me on the point, yes, yes, my Lord.

1 THE CHAIRMAN: Yes.

2 In that case I think the appropriate thing is, again
3 just taking it one by one, we would grant the order in
4 1.1 but we need to have a discussion about the deadline
5 for that.

6 MR CRITCHLEY: I think that there is a question as to the
7 level of accuracy that is required because if what
8 Mr Bezant is after is a volume of commerce figure --

9 THE CHAIRMAN: He is asking for a full explanation of
10 methodology for a start. Could you provide that by the
11 date requested?

12 MR CRITCHLEY: No, nothing like it because there are so many
13 ERP systems and we have to understand the extraction
14 processes for every one.

15 THE CHAIRMAN: So when can you provide that by?

16 MR CRITCHLEY: We were going on the basis of 31 October and
17 frankly we were worried that 31 October was going to be
18 difficult.

19 THE CHAIRMAN: When are you going to have that information?

20 MR CRITCHLEY: It will come in in dribs and drabs from the
21 different clients as we chase them down in respect of
22 their ERP system or the data extraction teams that were
23 performing those data extractions.

24 MR MCGURK: I just wonder, given the precise figures that
25 they put forward in support of their TRS claims, how on

1 earth they put together that figure without some of this
2 information.

3 MR CRITCHLEY: The original figure was put forward on the
4 basis of extrapolations of what they would need in order
5 to -- it was different for each client actually. So
6 with some clients they performed an estimate of what
7 they would have needed to ship around based upon recent
8 expenditure and the size of the business. In other
9 clients it was possible to take some extractions and
10 extrapolate from that.

11 So we are the first to admit that the figure that
12 was put into the Tribunal in November was an estimated
13 figure and the refining of it is something that just
14 takes time and it just gets more and more refined over
15 time and if the defendants would force us to provide
16 a figure by 23 August, we will do our best; if we have
17 longer it will be more refined than that. But really we
18 were always going on the basis that positive cases was
19 when we had to have this done by.

20 THE CHAIRMAN: We are just going to have a quick discussion
21 now. (Pause).

22 We are going to grant 1.1 on the timetable sought in
23 the application. However, we recognise that that might
24 be to some extent provisional information so we will
25 expect Boots to immediately forward the information

1 which they received to refine their position on receipt
2 it must be at the same time sent to the defendants.
3 Then that is the equivalent, given that you do not have
4 an expert, that is the equivalent of both parties having
5 the data at the same time and both parties being able to
6 deal with a positive case.

7 MR CRITCHLEY: My Lord, I would say the refinement process
8 is something that happens on a daily basis. We will be
9 gradually putting our case together. I mean is the
10 suggestion that we would be saying to the defendants
11 that this is what we did today or that we ...

12 THE CHAIRMAN: These are data requests. When you receive
13 data which is relevant to 1.1 after the deadline then
14 that data gets immediately forwarded.

15 MR CRITCHLEY: I am not sure how the defendants are defining
16 data. If data is transactional data, then this was in
17 the spreadsheet that was provided on 23 July. If it is
18 talking about a more sort of testamentary information
19 from the data extraction teams as to these are the
20 general ledger codes we have, these are the general
21 ledger codes we extracted --

22 THE CHAIRMAN: Just to be absolutely clear. You are being
23 asked to answer these questions by the deadline set out.
24 We appreciate that that might not be your final answer.
25 Whenever you receive any further information which is

1 pertinent to the question you must immediately send that
2 to the defendants.

3 MR CRITCHLEY: That is fine.

4 THE CHAIRMAN: Thank you. That just deals with 1.1. Is
5 that going to apply to everything or are there other
6 ones which we need to look at specifically?

7 MR MCGURK: I think they carry across, my Lord, and
8 I certainly think it does, unless Mr Critchley says
9 otherwise, and so you ought to make the same order in
10 respect of the remaining requests.

11 THE CHAIRMAN: Mr Critchley are there any differentials in
12 any of the other ones?

13 MR CRITCHLEY: My Lord, I do not believe so. In other
14 words, to summarise, that we put our positive case
15 together as we anticipated and we just give a running
16 commentary to the defendants as we do it, essentially.

17 THE CHAIRMAN: No, you answer the data request which has
18 been made here. You can do what you like with your
19 positive case. That is not what we are talking about
20 here, and you have to update the answers you have given
21 as you get more data.

22 MR CRITCHLEY: We can do that, my Lord.

23 THE CHAIRMAN: There are certain elements of Boots which are
24 in green. Do we take it that -- I think that is 3.1,
25 3.2, 3.3 -- these can be orders of consent?

1 MR CRITCHLEY: I think this has recently been put into
2 green. I do not know if Mr McGurk can help me. If this
3 is in green because we provided the 3,000 documents, so,
4 in other words, we are not being asked to do anything
5 else other than what we have already done.

6 THE CHAIRMAN: Can we look at 3.1. Do you consent to that?
7 I do not think this is recent because I am not looking
8 at that. I happened not to be looking at what was
9 lodged today. It may not matter as we are going to make
10 all these orders anyway.

11 MR CRITCHLEY: It may not matter.

12 THE CHAIRMAN: It may not matter if they are of consent or
13 not.

14 MR CRITCHLEY: I mean, what I will say is that the documents
15 have come to us in dribs and drabs over the two or three
16 years we have been working on the case. We have not
17 necessarily kept an audit of where they have come from,
18 so we will not necessarily know the answers to these
19 questions.

20 THE CHAIRMAN: I shall not draw a distinction between the
21 green ones and the red ones. I am just going to order
22 them all.

23 Thank you, we are now moving on to DS Smith and we
24 need a transcriber break so this would be a good time to
25 do it. DS Smith is redacted. Should we go into

1 confidential session for this? If so we can get that
2 set up during the break.

3 MS CHAMBERS: I am instructed it should not be redacted,
4 sir. There is no need.

5 THE CHAIRMAN: Thank you very much. In that case we shall
6 now adjourn for about 10/15 minutes.

7 (11.55 am)

8 (A short break)

9 (12.10 pm)

10 Application re DS Smith

11 THE CHAIRMAN: Thank you, so we now move on to the DS Smith
12 requests.

13 MR MCGURK: Yes, and, sir, in light of the very sensible
14 way, if I may say so, it has been dealt with and given
15 that the other claimants are essentially in the same
16 position, by whom I mean DS Smith, the Edwin Coe
17 claimants and Lafarge, we would submit that in substance
18 the Tribunal should take entirely the same approach with
19 those claimants as they have with -- as you have with
20 Boots. Again, there are no experts. There has been
21 nobody to engage with, so we would urge the same
22 approach on the Tribunal. I would just make three
23 further points on each of those three sets of claimants.

24 You will note from the joint experts' evidence that
25 in relation to the DS Smith claimants their estimate of

1 the value of their TRS claim increased from 319 million
2 to around 859 million because inter alia an alternative
3 method of estimation was used. The joint experts have
4 no idea how the previous estimation worked or the basis
5 on which the subsequent estimation worked.

6 Secondly, in relation to Edwin Coe, we found out
7 last night --

8 THE CHAIRMAN: It helps us immensely if we just deal with
9 these one at a time. But if you want to make a general
10 point about Edwin Coe, but I really just want to deal
11 with the detail about DS Smith shortly.

12 MR MCGURK: Absolutely, my Lord. Our position is DS Smith
13 are in no different position to Boots and that the
14 approach that the Tribunal has helpfully taken to Boots
15 should be carried over to DS Smith. Subject to anything
16 counsel for DS Smith wishes to say, we suggested that as
17 a sensible way forward given that they are in no
18 substantively different position.

19 THE CHAIRMAN: Thank you very much.

20 MS CHAMBERS: Sir, we would say we are in a very different
21 position and that is because DS Smith has been
22 substantially cooperating with the defendants since the
23 beginning of this process when the initial TRS requests
24 were sent. It has provided substantial responses with
25 underlying data on 13 May, 20 May, 21 June, 5 July and

1 8 July, and the 5 and 8 July response were not even
2 considered by the defendants before their revised TRS
3 application was sent.

4 So in respect of each of these requests, I am going
5 to be showing you what information has been provided
6 already by DS Smith. I am also not --

7 THE CHAIRMAN: Does that then go to the point I made at the
8 beginning, that we should not be ordering things which
9 have already been provided?

10 MS CHAMBERS: Absolutely, sir. There are also more
11 objections we take than just positive cases. If I can
12 summarise it like that. A lot of the information has
13 already been provided which goes back to the point you
14 made in your opening remarks. There is nothing more we
15 can essentially do. What has happened is that the
16 defendants seem to have reformulated requests late in
17 the day suggesting that perhaps documentation can be
18 looked for shortly after the cartel period, and I think
19 the position of my client is to the extent that that
20 information is available we will of course undertake to
21 provide it to the defendants if we have it, and we have
22 already provided an undertaking in our 15 July letter to
23 the Tribunal saying that we would do so but we certainly
24 should not be subject to a compulsory order in that
25 respect.

1 THE CHAIRMAN: Yes.

2 MR MCGURK: I think we should go through the order. We
3 resist a lot of what has been said as a matter of
4 principle. I think it would help the Tribunal to hear
5 from Mr Bezant as to why, contrary to what has been
6 said, information is still outstanding and needed.

7 MR BEZANT: Do you mind if I stand up, sir, because the
8 microphone was not picking me up.

9 THE CHAIRMAN: Please do. Just to be clear, this was
10 redacted but the copy I have starts "1.1 in respect of
11 each of the DS Smith claimants' estimates", is that what
12 we are looking at? Or has this been updated in the new
13 one, still the same?

14 MR MCGURK: There are no changes in the order.

15 THE CHAIRMAN: Mr Bezant, you can take it there are no
16 changes so we can just proceed if we can look at 1.1 of
17 what you are looking for.

18 MR BEZANT: Thank you. So what we have and what we have
19 received are some narrative explanations in many cases.
20 What we do not have is information that sits below and
21 that is the thing, and again, whether this is said to be
22 coming at some point in the future or said not to be
23 coming on a matter of principle is I think one of the
24 issues between us.

25 So we are trying to understand the methodologies.

1 We are trying to understand, as with the other claimants
2 we have discussed, the manner in which information has
3 been extracted from systems, the decisions that have
4 been taken, the types of costs and the explanations when
5 extrapolations have been made. As you heard, there has
6 been a change of approach which has led to a material
7 change of estimate. We do not have the information to
8 be able to examine that at the level at which we can
9 understand those numbers.

10 THE CHAIRMAN: Thank you.

11 Looking at 1.1 this is not an example of just the
12 original request being repeated. This seems to be quite
13 specific. So is this asking for things which you have
14 already provided?

15 MS CHAMBERS: The request itself, originally it is from
16 a request made in the defendants' initial request on
17 9 April which asked for a breakdown of the third party
18 services expenditure attributable to TRS.

19 On 13 May the DS Smith claimants responded
20 explaining how it isolated truck costs within net
21 external transport costs and providing reasons for the
22 differences between the value of commerce figure in
23 amended particulars of claim and then the wave 2
24 characteristics.

25 On 21 June DS Smith provided a full response to the

1 request as now formulated alongside an enclosure which
2 was a breakdown of DS Smith's annual value of commerce
3 for third party logistic services and the response
4 itself, and I am not sure if the Tribunal has it in
5 front of them, but perhaps the best place to see it is
6 in 31 July spreadsheet appendix 3 which is at
7 {HS1-A1/23/1}.

8 I think there is a link there that you may need to
9 open. But 21 June response is set out in the column
10 headed "claimants' response received prior to 15 July".
11 In my submission it was a very detailed response
12 outlining the calculation of net transport costs.

13 THE CHAIRMAN: Just while that is coming up just so

14 I understand where you are going, are you saying that
15 the whole of 1.1 has already been answered?

16 MS CHAMBERS: We are saying that we have provided
17 a substantial amount of information. We are now having
18 to move at an aiming target as such. We do not think it
19 would be proportionate to have to provide any further
20 information. To the extent that we find this
21 information we will provide it in accordance with the
22 Tribunal's direction before but we certainly should not
23 be compulsorily ordered to provide it as such. We have
24 been substantially complying throughout.

25 THE CHAIRMAN: 1.1 is asking to provide a full explanation

1 of the methodology. Have you provided a full
2 explanation of the methodology?

3 MS CHAMBERS: If you see the 21 June response, sir, it
4 outlines the calculation of net transport costs, the
5 ratio used and over what period, the data sources used
6 and why those data sources were chosen, the methodology
7 used to estimate the relevant deduction and the system
8 of data used to reliably calculate and it included an
9 Excel spreadsheet setting out the annual breakdown of
10 logistics spend.

11 THE CHAIRMAN: I will just ask Mr Bezant, why is that not
12 a full explanation of the methodology?

13 MR BEZANT: Because we do not understand everything in
14 relation to the way that calculation has been performed.
15 There is a response I think on 15 July that said more
16 would come with the positive cases, that would explain
17 the nature of the calculation. So that is why we feel
18 stymied if there is more to come and we do not have it
19 all now.

20 THE CHAIRMAN: Yes.

21 MS CHAMBERS: Sir, we have also taken the view that we do
22 not need to instruct an expert at this stage because
23 value of commerce is primarily a factual issue.

24 I am instructed that we can confirm we can have an
25 expert instructed by next Friday and we could

1 potentially have an experts meeting the following week
2 to determine if in fact this information really is
3 needed in accordance with the approach that the Arla
4 claimants have taken.

5 THE CHAIRMAN: I mean, we are here today to decide whether
6 Mr Bezant's request is justified or not, so what we are
7 really expecting to hear is from an expert, and if you
8 do not have an expert that is fine, if not from you or
9 from those instructing you why he is wrong. How else
10 can we order it unless you tell us why he is wrong?

11 MS CHAMBERS: I have no further instructions on that point,
12 sir.

13 THE CHAIRMAN: Yes. (Pause).

14 On 1.1 we are going to order this according to the
15 original deadline. If you instruct an expert, then the
16 expert can deal with this before the deadline and we
17 will see where we are at after that.

18 Now, will that deal with all the rest of them or
19 should we go through them individually? Is there
20 anything that is in a different category from that?

21 MR MCGURK: I think we are going to be in the same position.
22 I defer to my learned friend.

23 MS CHAMBERS: With a lot of the requests we say that there
24 is simply no further data available and we have
25 confirmed that in our 15 July response. As I said in my

1 opening, sir, to the extent that the request has been
2 slightly reformulated since that date to change the time
3 period within which we are looking for the
4 documentation, then to the extent that it is found and
5 it is available we of course are willing to provide it.
6 We do not think there should be a compulsory order in
7 that respect.

8 I should also say that in respect of the DS Smith
9 claimants seven of the requests were made for the very
10 first time in the revised TRS application and one on
11 19 July, and we do say in respect of the seven requests
12 that no compulsory order should be made in circumstances
13 where we were not given an opportunity to respond in
14 correspondence and in accordance with the 19 July
15 request it simply falls outside the scope of the order
16 but the same point would apply there as well.

17 THE CHAIRMAN: Yes, I have certain sympathy towards that
18 point but we are where we are at and where we are today
19 is what order we are going to make. So we are going to
20 make all the orders in respect of DS Smith. That will
21 leave your expert to advise you as necessary.

22 So that deals with DS Smith. Just bear with me
23 while I re-organise my papers. (Pause).

24 MR MCGURK: I think Lafarge should be next.

25 THE CHAIRMAN: Yes, thank you.

1 Application re Lafarge

2 MR MCGURK: Two very short points on this. You will note
3 that the order is fully in red and secondly, as I said
4 in opening, Lafarge have not even turned up today --

5 THE CHAIRMAN: Yes, well ...

6 MR MCGURK: -- which makes life doubly difficult. So we
7 would suggest the same approach to Boots being rolled
8 over to Lafarge.

9 THE CHAIRMAN: As I understand it, certain of your clients
10 have settled with Lafarge. That is what I understand
11 from Stewarts' letter. Why should we make an order on
12 behalf of your clients where your clients have settled?

13 MR MCGURK: Can I just take an instruction in terms of the
14 scope of the settlement. I think the point of principle
15 is going to remain for those who are still in the claim.

16 THE CHAIRMAN: Indeed. At the moment I am just interested
17 in those who have settled. I appreciate there are those
18 who are still in but why should we make an order in
19 respect of people who have settled?

20 MR MCGURK: There is a fair point on the scope of the order
21 to be made. I accept that. Can I take an instruction?

22 THE CHAIRMAN: Thank you.

23 MR MCGURK: Thank you. (Pause).

24 Thank you, my Lord. I understand that only some
25 subset of the defendants have formally settled. Others

1 have not. To my Lord's point, and we quite accept it,
2 you can only make an order against those against whom
3 proceedings are live and by whom an order is still
4 sought. So we would be content for the order to make
5 clear that this is only ordered against Lafarge by those
6 who are continuing to maintain those applications being
7 those parties who have not settled with them.

8 THE CHAIRMAN: Yes. Thank you. That is what we will do.

9 In a moment we are going to come to whether we are going
10 to make any orders at all but to the extent we are these
11 are only orders in respect of the defendants who have
12 not settled.

13 MR MCGURK: Exactly so.

14 THE CHAIRMAN: Now, the other thing is if I have understood
15 it correctly, the Lafarge case is stayed; is that right?

16 MR MCGURK: Lafarge has the status of a stayed claimant. It
17 is a very significant claimant and the reasons why it
18 became subject to those requests are set out in the
19 expert reports in May and July, but the value of the
20 Lafarge claim is very significant.

21 THE CHAIRMAN: Because what I was going to ask is, why do
22 you need information from a stayed claimant from your
23 positive case and will you be dealing with their claim
24 in your positive case? It maybe is for Mr Bezant to
25 answer that.

1 MR MCGURK: It may be for Mr Bezant. I may follow up if
2 I may.

3 THE CHAIRMAN: Certainly. (Pause)

4 At the moment, Mr Bezant, the question really for
5 you is, why did you need information from Lafarge when
6 they are stayed?

7 MR BEZANT: I am just trying to find something, sir.
8 (Pause).

9 MR MCGURK: It may well be a point for me for reasons, if
10 I may, might explain.

11 THE CHAIRMAN: Certainly.

12 MR MCGURK: First of all, you will note from the May
13 application already that in relation to the TRS claim
14 the total value of the claim brought by Lafarge is the
15 biggest of all the claimants.

16 Two principal reasons why we have included Lafarge.
17 First of all, VoC is an issue that is going to be
18 determined at the trial. Given Lafarge has brought the
19 biggest case across the piece first of all, we need to
20 understand their case in order to respond to it and
21 secondly, there is a pragmatic reason that we covered in
22 Edinburgh that we need to understand the case in order
23 potentially pragmatically to facilitate settlement. So
24 it is important we understand the basis for Lafarge's
25 case.

1 Secondly, if Lafarge, and indeed some of those
2 Edwin Coe claimants who are stayed as well are not dealt
3 with in positive cases, they will not be dealt with at
4 trial, notwithstanding the size of their TRS claims and
5 they will be held over. We say that would be deeply
6 unsatisfactory, given the size of those claims and given
7 the ambition of the Tribunal was to adopt a methodology
8 which would resolve these claims finally at trial.

9 So we say in those circumstances that Lafarge is an
10 appropriate target for these requests and they should
11 respond to them.

12 THE CHAIRMAN: Yes. Well, we do not have Lafarge here to
13 respond to that. I mean Stewarts' letter does refer to
14 the February transcript. I am just going to read what
15 is said there because I think it is useful to inform the
16 debate and that is a discussion on 16 February about the
17 effect of staying.

18 "Stayed claimants are not absolved from being
19 obliged to respond to data requests although to the
20 extent possible data requests ought to be dealt with by
21 active claimants ... We are not particularly keen to
22 trouble those who have voluntarily stayed their claims
23 because the whole point of that is a saving of costs.
24 There is an obligation to provide disclosure if it is
25 ordered. I do not see any reason to equate a stayed

1 claimant with an unstayed claimant. I see every reason
2 to distinguish between the two. Parties ought to be
3 identifying the low-hanging fruit. Claimants who have
4 and have ready to give quickly material information. It
5 is not a one-stage process. It means the bigger players
6 and then working out if there are limitations in the
7 data pool which means further fishing. A stay is
8 something which is a factor in terms of not wanting to
9 burden the state party unduly but 'unduly' is the key
10 word. If directions/orders need to be made against
11 a stayed party, then of course they will be but let us
12 just see how good or bad the claimant pool is."

13 So applying that is the claimant pool without the
14 stayed Lafarge big enough for Mr Bezant to do his work?

15 MR MCGURK: I think that observation was made in the context
16 of SPO.

17 THE CHAIRMAN: Right, yes.

18 MR MCGURK: Those requests are different to TRS requests in
19 that the TRS claims that have been brought on behalf of
20 the TRS claimants are very much specific to them. How
21 they compile the headline truck-related expenditure
22 figure and how they extrapolate them is unique to them.
23 We cannot use another claimant as a proxy given that
24 different claimants did different things differently and
25 have evidently used different methodologies in trying to

1 extract the truck-related costs figure for the purposes
2 of the claim.

3 To the point the president made in February, it
4 would seem wrong in principle and we had this of course
5 with Wincanton as well with SPO who sought to absolve
6 itself from taking an active part in the claim
7 notwithstanding its claim was the biggest in the haulier
8 sector and it became common ground that you could not
9 use the process of staying to absolve yourself from
10 answering those requests when (a) the size of your claim
11 is so significant and (b) you cannot be dealt with as
12 a proxy by reference to any of the other claimants in
13 the claim.

14 So given again the significance of the TRS claim
15 brought by Lafarge and given the utility in getting this
16 information both in terms of understanding the case,
17 potentially settling it and facilitating a trial of the
18 biggest case or a determination of what is the biggest
19 TRS case at trial for all those reasons it makes sense
20 for Lafarge to answer these requests.

21 THE CHAIRMAN: Yes.

22 In the absence of Lafarge I am just reminding myself
23 of what Stewarts have said in their letter. (Pause).

24 Can you just help me with this, how this is going to
25 work. You are going to make a positive case including

1 Lafarge but then Lafarge are not going to make
2 a positive case because they are stayed, is that how
3 this is going to work?

4 MR MCGURK: Yes. I mean, it is a matter for Lafarge what
5 they do. As I said, they brought the biggest claim. If
6 they want it to be determined without putting in
7 a positive case, that is a matter for them. But we need
8 to understand the claim and we need to be able, not least
9 again, I am repeating myself, given the size of it, we
10 need to be able to understand it and we need to be able
11 to put in a positive case. But whatever else Lafarge
12 want to do we do want to put in a positive case given
13 its value and its importance to the claim overall.

14 THE CHAIRMAN: Thank you. (Pause).

15 Thank you. It is really for Mr Bezant going back to
16 the principles of what we are doing here. This is
17 a data request made by you and it is up to you to
18 justify it. Now, what troubles us is that you are
19 looking for a data request for a positive case against
20 a stayed party who is not going to be making a positive
21 case, so what is your justification for an order against
22 Lafarge when they are not going to be party to this?

23 MR BEZANT: Sir, to the extent the case needs to be
24 determined at some point, the Lafarge case, by
25 settlement or otherwise, as was said, the information

1 about their claim is specifically unique to them.

2 THE CHAIRMAN: Yes.

3 MR BEZANT: If we do not have any information we cannot
4 anticipate the size of that case, we cannot deal with
5 the size of that case. If they reactivate at some point
6 down the line we cannot borrow from anybody else because
7 this is a Lafarge specific issue, unlike some of the SPO
8 claimants where we are trying to find surrogates and
9 proxies. So in anticipation of that, given its scale,
10 it seemed, it is unique and it is large, given that, it
11 seemed helpful to gather the information that was going
12 to be needed at some point.

13 THE CHAIRMAN: Thank you.

14 To the extent that this order is sought by
15 defendants who have settled it is refused. To the
16 extent that this order is sought by defendants who have
17 not settled it is refused on the basis that Lafarge are
18 stayed and we are not persuaded that it is necessary for
19 the defendants' positive case for them to make a case
20 against a stayed party. We hear what you say about it
21 is useful for settlement. I dare say if Stewarts wished
22 to settle they will provide you with whatever
23 information would persuade you to go down that route, so
24 we are not really interested in ordering things which
25 may or may not help settlement.

1 So that deals with Lafarge. Now, we are on to
2 Edwin Coe.

3 Application re Edwin Coe

4 THE CHAIRMAN: This has been divided up, first of all, the
5 Adnams claimants.

6 MR MCGURK: A preliminary point arises in I think some of
7 the Edwin Coe material made in the confidentiality ring.
8 Perhaps Mr Bates could indicate whether he needs to go
9 into closed.

10 MR BATES: There is no need to go into closed session, sir.

11 THE CHAIRMAN: Thank you. So we will hear from you,
12 Mr McGurk, we will deal with it sections so that the
13 first segment is Adnams claimants.

14 MR MCGURK: Yes. The headline point is I repeat the point
15 of principle that this should be in circumstances where
16 there is no expert and the defendants' experts have been
17 stymied to that effect there is no difference between
18 the Edwin Coe claimants and the way the Tribunal has
19 resolved Boots and other claimants this morning.

20 THE CHAIRMAN: Yes.

21 MR MCGURK: If my Lord is keen to go through the draft order
22 in relation to Edwin Coe I will hand over to Mr Bezant
23 to provide the rationale.

24 THE CHAIRMAN: Thank you. (Pause).

25 MR MCGURK: I am sorry for turning my back again, my Lord.

1 I understand, and Mr Bates might be able to confirm
2 this, that all of the Edwin Coe claimants', TRS claims
3 are themselves stayed, so my Lord's approach to Lafarge
4 may carry over in the same way.

5 MR BATES: Yes.

6 THE CHAIRMAN: So in that case would you be asking us to
7 apply the same approach as we have done to Lafarge?

8 MR BATES: Yes, unless Mr McGurk wants to try to persuade
9 you otherwise.

10 THE CHAIRMAN: Thank you.

11 Do you want wish to persuade us otherwise,
12 Mr McGurk?

13 MR MCGURK: I see where we may be going so I am not going to
14 try to persuade you to do something different in
15 relation to the Edwin Coe claimants. What is slightly
16 unsatisfactory and which we will need further
17 confirmation potentially from Mr Bates is that there was
18 a further claim, TRS claim made last night by
19 John Nixon Limited, that had originally sat within the
20 Rowleys claimants. We were told late last year that
21 they were not pursuing TRS claims. We were told just
22 last night that John Nixon Limited was. We understand
23 that John Nixon is stayed, so it would in principle be
24 treated in the same way so that neither party would be
25 putting in positive cases and we would deal with them in

1 the same way as you have dealt with Lafarge. But
2 I would be grateful if Mr Bates could confirm the
3 position.

4 THE CHAIRMAN: Yes, Mr Bates.

5 MR BATES: I had not understood that this was within the
6 scope of the application. I am aware of the
7 correspondence. I suggest that given that they are
8 stayed anyway the way to deal with this is for Edwin Coe
9 to confirm on behalf of John Nixon, perhaps within a few
10 days, whether or not they pursue a TRS expedited claim
11 or not. But, as I say, they are stayed in any event.

12 THE CHAIRMAN: Thank you. It is useful no doubt for case
13 management to have aired this but I do not think it
14 affects our order.

15 MR MCGURK: We need to be very clear that John Nixon is not
16 going to be seeking to put in a positive case and be
17 treated differently because if it is we would need to
18 maintain the information request.

19 THE CHAIRMAN: Yes. Are they going to be putting in
20 a positive case?

21 MR BATES: As I understand it, they are not seeking to put
22 in a positive case, they are stayed and they will remain
23 stayed. It is nevertheless important that the
24 defendants are provided with clarity as to whether
25 John Nixon are pursuing a TRS claim or not and I am

1 saying that my instructing solicitor ought to confirm
2 that to the defendants within the next few days.

3 MR MCGURK: It is helpful as far as it goes, but in terms of
4 subject to these applications today we do need to be
5 absolutely clear that none of the Edwin Coe stay
6 claimants are planning to put in a positive case because
7 that does impact on the approach I take before the
8 Tribunal. If Mr Bates can take instructions on that
9 that would be helpful.

10 THE CHAIRMAN: I will give him an opportunity in a moment
11 but I am just thinking what strikes me is that they are
12 stayed. If they wish to produce a positive case there
13 would have to be an application to us to remove the
14 stay, and at that point there could be a discussion as
15 to whether we -- what they are doing with the positive
16 case and at that point matters could be discussed and it
17 may even be that we might refuse the stay, I do not
18 know, but I am just wondering if that is the point at
19 which we need to address that when they seek to remove
20 the stay in order to boost a positive case, because at
21 the moment, as I understand it, as they state it they
22 cannot produce a positive case.

23 MR MCGURK: If they accept that position then fair enough.
24 The concern I have is just that for eight months we
25 understood they were not pursuing a TRS claim at all.

1 It would be slightly unsatisfactory to get another few
2 months down the road, with the October deadline looming,
3 and for them to turn round and say, actually we do want
4 to put in a positive case.

5 I take my Lord's point this may weigh heavily
6 against them in an application to remove the stay, but
7 it would be useful to have now an indication of the
8 present intention of all Edwin Coe claimants that they
9 do not intend to put in a positive case. We do not want
10 the rug to be pulled out from under our feet. If
11 Mr Bates can give that indication that that would be
12 helpful.

13 THE CHAIRMAN: Are you able to assist with that, Mr Bates?

14 MR BATES: For the sake of clarity, sir, I had not
15 understood it to be possible for a stayed claimant to
16 put in a positive case so I think we are clear on that.
17 That is not something that is possible. None of the
18 Edwin Coe claimants who are currently stayed currently
19 have any intention to seek to be unstayed. The only
20 reason why one of our claims that was stayed is now
21 unstayed is because it opened up a gap in the chain of
22 supply in terms of representing a particular stage in
23 the chain of supply, so we then persuaded one of our
24 claimants to be volunteered as a lead claimant to assist
25 the Tribunal in dealing with the full picture of claims.

1 THE CHAIRMAN: Sorry, is that John Nixon you are talking
2 about?

3 MR BATES: No, that is not John Nixon. That is Alltruck.
4 That is Alltruck, yes. That was because there was
5 nobody else representing the lessors. But subject to
6 that sort of difficulty arising, there is no intention
7 on the part of any of the Edwin Coe claimants to seek to
8 unstay the stayed claims.

9 THE CHAIRMAN: Thank you. That seems to clarify the
10 position.

11 MR MCGURK: That is very helpful, I am grateful.

12 THE CHAIRMAN: Thank you.

13 Does that bring us to the end of the TRS order?

14 MR MCGURK: I think that deals with everything on TRS. We
15 might propose a very short break before we move to SPO.

16 Procedural discussion re the SPO

17 THE CHAIRMAN: Yes, it is coming up for lunch anyway, so
18 what I am proposing to do is just to give you some
19 thoughts about how we might deal with the SPO and you
20 can consider these over lunchtime. We will break until
21 about 1.30 to allow you to have lunch and consider this.

22 It has taken us the morning to get through the TRS.
23 Now hopefully that has been helpful as there will be
24 some issues of principle which can then be transposed
25 into the SPO discussion. However, I would be very

1 surprised if we managed to deal with the SPO in the
2 available time this afternoon. So we are going to
3 suggest a process which may be able to deal with these.
4 It might not deal with all the matters.

5 It is the defendants' experts who are seeking the
6 orders so as I have said before it is the onus on the
7 defendants' experts to justify them, and so this is
8 a process we are thinking of. We offer it as
9 a suggestion and we can discuss it after lunch.

10 The suggestion is that the defendants' experts
11 produce a document along the following lines, and the
12 claimants' experts would also be involved in this. The
13 document is not the Redfern schedule because as
14 I understand the Redfern schedule, having read it, it is
15 by and large a chronological history of what has been
16 requested and what is responded. What we need is
17 a record of the substantive reasons given by the experts
18 for or against particular specific requests. So this
19 document would be written by the experts and the final
20 version would be signed off by them.

21 There would be various columns.

22 In the first column it would set out for each
23 claimant in numbered paragraphs the precise information
24 which the defendants' experts now seeks from that
25 claimant, so it would be similar to what we have been

1 looking at so far. It should be precisely what is being
2 sought and is being refused to be provided. So, for
3 example, where there has been a partial response, the
4 entry should not repeat the whole of the original data
5 request but should specify in detail exactly what data
6 is now being sought which is additional to that
7 provided.

8 We would stress that this exercise is only about
9 precise narrowed down requests which in the opinion of
10 the defendants' experts are necessary and proportionate
11 for them to produce their positive case. It is not
12 about information which the claimants are willing to
13 provide. It is not about general requests in wide and
14 loose language. It is not about requests which
15 claimants have complied with in part. It is only about
16 the part that they have not complied with.

17 So the first column would set out the request. Then
18 there would be a second column and that would be for the
19 defendants' experts to say in detail why it is necessary
20 and proportionate for them to have the precise
21 information to produce their positive case. These
22 reasons should not be of a general nature but should be
23 targeted to the specific request and the specific
24 claimant.

25 Where reasons have already been given by the

1 claimants for not answering that request, the
2 defendants' expert should engage with these reasons and
3 explain why notwithstanding them the Tribunal should
4 still order the claimants to respond to the request.

5 Just on what I have said there, I am identifying one of
6 the main themes of what I am going to say is there has
7 to be engagement between the experts.

8 The third column would be for the claimants' experts
9 to say whether they agree or disagree that the request
10 is necessary and proportionate. If they agree the
11 Tribunal will expect the information to be provided. If
12 they do not agree there will be a fourth column where
13 the claimants' experts set out the reasons why in their
14 opinion the request is not necessary or proportionate in
15 order for the defendants' experts to produce their
16 positive case.

17 Then there would be a meeting of experts at which
18 the document insofar as produced by them would be
19 discussed, and there would be a fifth column which would
20 set out the result of the experts' meeting, for example,
21 request dropped or request agreed to or request
22 outstanding.

23 Then in respect of any requests which are
24 outstanding there would be a final sixth column setting
25 out the precise disagreement between the experts

1 remaining after the expert meeting with reasons from
2 both experts.

3 At the end of the exercise the defendants could make
4 an application to the Tribunal asking for a ruling on
5 any requests outstanding. It may be that the Tribunal
6 might be able to do that on the papers as the experts'
7 views on each individual request will be fully set out
8 in the document.

9 So far as timing is concerned, we would hope that
10 the defendants' experts would be able to produce that
11 document quickly because it is merely setting out in
12 precise form the reasons for which the defendants'
13 experts have brought the application which we are
14 hearing today. So Mr Bezant and Mr Noble we would hope
15 that you would have your reasons at your fingertips.

16 In effect, it is merely recording the reasons which
17 we would be asking the defendants' experts to be giving
18 us orally today had we had time to go through this and
19 recording the discussions between experts which we would
20 be having orally this afternoon.

21 So we are open to suggestions about timescale but
22 I would suggest this should be sent to the claimants by
23 the defendants' experts and lodged with the Tribunal all
24 in seven days, that is Friday, 16 August, but we can
25 have a look at what day it is, but the point is the

1 exercise starts with the defendants' experts' position
2 being put in this document.

3 Then I would suggest that the claimants' experts
4 have say seven days to complete their response, that
5 would be Friday, 23 August, and then expert meeting or
6 meetings held in the week after that.

7 That would enable this whole process to be completed
8 in time for the case management meeting due on
9 3 September. At the case management meeting parties
10 could report on whether all the data requests had been
11 resolved or whether there were any requests outstanding,
12 and by outstanding, as I have said, I mean whether there
13 were any requests on which there was a difference of
14 expert opinion on whether the requests were necessary or
15 proportionate for the defendants to bring their positive
16 case.

17 If so, the Tribunal could allow the defendants to
18 lodge an application for an order for the relevant
19 claimant to respond to the particular request and
20 a procedure could be set out for ruling on that.

21 The idea behind all of this is that the process
22 would have narrowed down the orders which the Tribunal
23 were required to rule on to a much smaller number of
24 requests than those in the application at present, and
25 narrowed them down to requests on which there were real,

1 significant and fully reasoned differences between the
2 experts as to whether the requests were necessary and
3 proportionate in order for the defendants' experts to
4 produce their positive case.

5 It seems to us that that sort of exercise is best
6 done in meetings of experts and not in front of the
7 Tribunal.

8 It may be that it would not be possible to hold all
9 the expert meetings that particular week but that need
10 not hold up the joint expert document because it could
11 be completed in respect of some claimants, the ones
12 where you had a meeting, and then progress in respect of
13 the others could be reported at the CMM on 3 September,
14 and if that is the case then the defendants' experts
15 might want to prioritise the meetings with the experts
16 of the claimants in which they are making the most
17 significant requests in respect of the work which they
18 need to do.

19 We will leave that with you to consider over
20 lunchtime. If we were going to go down that route,
21 a possible ruling today on the SPO application would be
22 as indicated earlier we would refuse the requirements of
23 a statement of truth, we would make the order for
24 a joint expert document and timetable and order that
25 further procedure in the SPO application would be

1 discussed at the CMM hearing on 3 September once the
2 joint expert document is available.

3 So we will throw out that suggestion and allow you
4 to think about it over lunch and see if that might be
5 a sensible way to take matters forward.

6 So we will adjourn now. Will half an hour be enough
7 time to for you to eat and discuss that? We are quite
8 happy to make it 2 o'clock if it is going to take some
9 time.

10 MR MCGURK: Can we have a tiny bit longer?

11 THE CHAIRMAN: Let us make it 2 o'clock.

12 MR MCGURK: I was going to offer 1.45 but I am in your
13 hands, my Lord. 2 o'clock is fine, yes.

14 THE CHAIRMAN: 2 o'clock because I want to give you the
15 opportunity to do this properly.

16 MR MCGURK: Yes, thank you very much.

17 (1.00 pm)

18 (Luncheon Adjournment)

19 (2.02 pm)

20 THE CHAIRMAN: Mr McGurk.

21 MR MCGURK: My Lord, Members of the Tribunal, we are
22 grateful for the time to consider what has been proposed
23 and to have a discussion with the claimants. First and
24 foremost, we the defendants really like what the
25 Tribunal has proposed and we are fully behind it in

1 a sense it is what the defendants' experts have been
2 seeking to do for months, so to the extent that it
3 captures the process we have sought to engage in we
4 welcome it.

5 More particularly, it is a pragmatic way of the
6 defendants' experts getting what they need, the
7 information they need to do their positive cases so
8 again we would welcome it. We are content with the
9 format and timing of the process that my Lord proposed.

10 We just have three further points that we would want
11 to build into the process and indeed the order that will
12 reflect it.

13 First of all, in relation to claimants' experts, the
14 Tribunal has made clear repeatedly this morning that
15 there has to be a level playing field in relation to
16 data availability, so we would propose adding that all
17 existing data and information the claimants have
18 provided to their own experts be provided to the
19 defendants' experts and we propose 5 pm next Monday to
20 do that. The reason for that, my Lord, is this: if we
21 are going to have an expert meeting next Friday, it will
22 help the defendants narrow and reframe their targeted
23 requests if they understand the data that has been
24 provided to the claimants' own experts, so it will just
25 help the process on Friday we think. So we would ask

1 data information that has been provided to the
2 claimants' experts to be provided to the defendants'
3 experts on Monday and I understand that will be agreed.

4 Secondly, the claimants' experts have, some of the
5 claimants' experts have indicated that expert requests
6 have been made of other claimants. Now, to the point
7 that SPO is an issue all the way down the supply chain,
8 of course downstream claimants are claiming that they
9 bore the loss and that requires them to prove upstream
10 pass-on which constitutes their overcharge. We cannot
11 do this in silos and I think, as I have understood the
12 Tribunal this morning, the Tribunal wants all expert
13 requests to be folded into this process, whether it is
14 claimant to defendant, defendant to claimant or claimant
15 to claimant, because it gives rise to the very same
16 issue with SPO. All ultimately coming back to the
17 avoidance of overrun the compensation.

18 So we think it should not be a one-way street, so
19 I do not think this is opposed either, but all claimant
20 requests and all defendant requests, irrespective of who
21 they are made, to be folded into this process.

22 Again, such requests that are going to be made by
23 claimants to defendants in addition to those we are
24 going to make to the claimants or claimants to other
25 claimants, we think the timetable that you have proposed

1 should apply to that as well so that it is all done
2 fairly and in parallel.

3 The second additional point that we propose, in
4 particular with SPO progress was made overnight. Some
5 of the red requests have turned green. I understand the
6 updated SPO order is now on Opus, it is {HS1 A9/9}, and
7 you will see where we got to with each of the targeted
8 claimants in that regard.

9 We say the Tribunal should ensure that the progress
10 that has been made is captured in the way that the
11 Tribunal has ordered it to be captured with Arla for
12 example this morning. So the requests that are agreed
13 and reflected in green should be ordered to be provided
14 by 23 August, as was the case last night when all this
15 further progress was made.

16 If that is going to be objected to, the problem with
17 that is that that which is sought to be rowed back from,
18 the stuff which is in green will have to be folded into
19 the process and ideally the process is going to be used
20 to fine-tune the requests that are to be made and the
21 responses to be given in relation to that which is
22 unagreed.

23 If we have got to a position where there is
24 commitment to provide responses by the 23rd, ideally the
25 order would capture that such that everything falling

1 outside the green requests would then go into my Lord's
2 process.

3 So we would urge that addition to be made to the
4 order that is being proposed.

5 Finally, we would like the meetings between the
6 experts to take place on an open, not a without
7 prejudice basis, and we very much pick up on the point
8 that the Tribunal made this morning that these meetings
9 are effectively going to be in lieu of what would be
10 said in open court anyway. So we are keen to have
11 a transparent process and we would ask that those
12 meetings that do take place take place on an open basis,
13 feeding into the template that was described by the
14 Tribunal this morning.

15 So we are in favour of what has been proposed with
16 those additions and I will let my learned friend respond
17 to that now, but we very much hope with those additions
18 that this can be captured in an order.

19 THE CHAIRMAN: Thank you very much. Just one point of
20 clarification. I think that you mentioned experts'
21 meetings by next Friday. I think it was -- the document
22 was to be produced by next Friday.

23 MR MCGURK: I meant the request. I did mean the request.

24 THE CHAIRMAN: I thought that is what you meant but I wanted
25 just to be sure.

1 MR MCGURK: Thank you for picking me up. I misspoke.

2 I meant requests and of course the meetings would take
3 place the following Friday. Subject to that, yes.

4 THE CHAIRMAN: Yes.

5 MR RICHARDSON: Sir, we are happy in principle with the
6 proposal although we would ask if possible for slightly
7 more time for Arla and its expert to engage with this
8 process, essentially to extend each of the steps you
9 proposed by one week rather than our expert responding
10 on the 23rd as you had suggested. We would respond by
11 the 30th and then our expert would be available to meet
12 during the following week with one -- aside from one of
13 the days during that week but generally available to
14 meet during the following week, the first week of
15 September.

16 I appreciate you had hoped that the CMM on
17 3 September would be the date on which you could resolve
18 all these issues but we would ask that the following
19 week's CMM be when you resolve them for Arla.

20 THE CHAIRMAN: Thank you. We will hear what the others have
21 to say. I think whatever the timetable is it will apply
22 to everyone, so that when it comes to the CMM we are
23 dealing with everyone rather than trying to deal with
24 people individually, but we have three CMMs pencilled in
25 and I did that because I thought that we might have

1 quite a lot to discuss by September, so as long as it
2 appears -- as long as the information is there by at
3 least one of them, that may be a possibility but we will
4 just see what the rest have to say.

5 MR RICHARDSON: Yes. In relation to the requests in the
6 draft order that are in green, the SPO requests that are
7 in green, which we had agreed to provide by the 23rd, in
8 light of the proposals for addressing the various other
9 requests in red, we also would like to ask whether we
10 could respond by 30 August rather than the 23rd for
11 those ones that are in green as well.

12 THE CHAIRMAN: So you would consent to the order being
13 granted for the green ones but the date would be the
14 30th.

15 MR RICHARDSON: Yes, the approach that we had adopted, we
16 did communicate this previously in correspondence, was
17 in relation to the requests that are in green we are
18 happy for those to be ordered against us, but in light
19 of the proposal that is now being made for how to deal
20 with the other requests we just ask for all of them to
21 go into together at the same time.

22 THE CHAIRMAN: Thank you.

23 MR RICHARDSON: I do have one or two principal points to
24 make in relation to the SPO request generally that I do
25 not think require expert input. I can address you on

1 those in due course or now or later.

2 THE CHAIRMAN: Let us hear about timetabling first, hear
3 everyone on timetabling, and if there are other points
4 let us hear about that. Yes.

5 MS CHAMBERS: Sir, we are one of the claimants in which the
6 SPO requests have all turned green so we have undertaken
7 to provide those requests by the 23rd. If you were
8 minded to extend the time to provide the requests to the
9 30th in accordance with the submissions of my learned
10 friend then we would also ask if we could have that
11 extra time as well in which to provide the requests, not
12 least just because they are extensive in number and also
13 in scale.

14 THE CHAIRMAN: Thank you.

15 MR BATES: Sir, I understand I am being asked to address the
16 Tribunal just on timetable rather than, for example --

17 THE CHAIRMAN: Sorry, no, on the principle of whether you
18 are happy with our proposal as well.

19 MR BATES: With all three elements of it.

20 THE CHAIRMAN: Just address me and then we will see how we
21 deal with it.

22 MR BATES: Taking Mr McGurk's points in turn then. First of
23 all, on the level playing field for data availability,
24 we agree with that in principle. Of course it is not
25 only the case that existing data should be provided

1 to -- that has been provided to claimants' experts
2 should be provided to defendants' experts but it may
3 also be appropriate to provide that data to other
4 claimants' experts as well because they might be on
5 opposing sides, if I can put it that way, of a pass-on
6 and the objective here should be to build up the common
7 repository of data which the experts can all draw upon.

8 Subject to that we agree with that aspect of the
9 proposal.

10 Also I agree with Mr Richardson's suggestion that it
11 might be appropriate to extend the process by a week,
12 not least because if we are going to wrap in requests
13 made by claimants' experts that some additional time may
14 be warranted for that purpose, I understand at the
15 moment that Mr Williams is the only claimant expert who
16 so far has made a request of that kind but if there are
17 others that have been made then time needs to be allowed
18 for that to happen.

19 On his second point which is capturing the progress
20 that has already been made, there is certainly no wish
21 on the part of the Edwin Coe claimants to row back from
22 any commitments that have been given. We would however
23 question whether it is appropriate to simply take all of
24 the green text and put it into the form of an order
25 because of course the allocation of either red or green

1 text or colouring to particular text is something that
2 has been done by the defendants and done in some cases
3 a very short period of time before the start of this
4 hearing and the various claimants have expressed
5 themselves in different ways in terms of what it is that
6 they are committing to do.

7 My understanding of what the Tribunal was proposing
8 before lunch was that the table that is to be produced
9 will record things that have not been agreed rather than
10 having to interpose another stage in the process where
11 we record in order everything that has been agreed. Of
12 course some of the text that is in green is in green
13 because the material has already been provided by the
14 relevant claimants and I had understood the Tribunal's
15 position this morning to be that where material has
16 already been provided, it would not then be ordered by
17 the Tribunal to be provided, and I suggest that spending
18 time this afternoon going through all the different SPO
19 requests and working out the reasons why text is in
20 green, whether it should be in green etc is not
21 a helpful use of time.

22 But it should certainly be recorded that as far as
23 the commitments that were given by the claimants to
24 provide material that had been requested, that there is
25 to be no rowing back on that and people are to keep to

1 the commitments they have been given and that can
2 perhaps be simply in a recital to the order.

3 On the third point, which is whether or not the
4 meetings between the experts should be on an open basis,
5 I would strongly resist any notion that meetings between
6 experts should be on an open basis because what that
7 suggests is that experts would be going to the meeting
8 knowing what they have said to other experts could
9 somehow be quoted against them later and that is not
10 conducive to a free exchange of views between the
11 experts.

12 What should clearly be on an open basis and what
13 undoubtedly will be on an open basis is the table itself
14 which is going to record the views that the experts
15 ultimately come to and the matters on which after a free
16 discussion in the meeting they are still not agreed and
17 their respective reasons for that.

18 That is the usual approach for dealing with meetings
19 of experts whether on a without prejudice basis but the
20 document produced from it, the joint experts' statement
21 is the document that is on an open basis, and in my
22 submission that is clearly the sensible way to make sure
23 that independent experts are able to work
24 collaboratively in order to build up this repository of
25 data they all need for the work that they are going to

1 do.

2 THE CHAIRMAN: Thank you. Yes, Mr Critchley.

3 MR CRITCHLEY: I would just like to say a point on timing on
4 behalf of the Boots claimants. I said in a letter to
5 the Tribunal that our entire schedule seemed to be in
6 red, which I did not understand because I thought it
7 should be in green in order to answer these questions,
8 and I see that overnight it was taken at my word and
9 everything has suddenly come in green. But we did scope
10 out yesterday the availability of the people, the
11 witnesses within our clients that we would have to speak
12 with and we received -- I mean literally half that we
13 emailed we received out of offices for. They are on
14 holiday for one or two weeks. The main witness of Boots
15 is not going to be available for another four weeks. So
16 it will be hard for us in the timetable envisaged by the
17 23rd to interview these interviewees and to get their
18 answers. That is all I would say.

19 THE CHAIRMAN: Thank you. I am not inclined to put the
20 whole timetable off. I think you should do what you can
21 and we will just have to review the situation once we
22 get the document in.

23 MR CRITCHLEY: I would hope it would not put the timetable
24 off because of course this is the first wave and then
25 there are the red questions which will then supplement

1 it. I suppose if the change had not been made
2 overnight, then these exact interviews that are now
3 going to have to take place by the 23rd would just have
4 taken place further down the track.

5 THE CHAIRMAN: Yes, so just to be clear, your position on
6 what is green, are you consenting for that order to be
7 made?

8 MR CRITCHLEY: We are happy to provide the information but
9 I am sure that it will be impossible to provide it by
10 the 23rd.

11 THE CHAIRMAN: So when would you provide that by?

12 MR CRITCHLEY: I mean, if I could have -- on the basis that
13 I know that it is going to be impossible to interview
14 one of the main witnesses in the next four weeks,
15 I would ask for five weeks.

16 THE CHAIRMAN: If I have understood it correctly, if it is
17 all green you will not be participating in the expert
18 discussion process because there is no need to because
19 you have agreed to provide everything. Is that the
20 position?

21 MR CRITCHLEY: Blakemore is all red so that will be in the
22 expert discussion process. I have not seen if literally
23 every single paragraph is, there may be some red but
24 I see that it is pretty well green.

25 THE CHAIRMAN: Thank you.

1 MR MCGURK: The red is a point of principle not a point of
2 substance in relation to each individual request. They
3 are saying they should not have been targeted at all but
4 I understand that if that point of principle was
5 resolved against Blakemore, they would be providing
6 answers. So it is not Blakemore saying no no no, there
7 is no rationale for this.

8 THE CHAIRMAN: That I suppose is something for the experts
9 to discuss, is it necessary for Blakemore's information
10 or is it not necessary for Blakemore's information?

11 MR MCGURK: I mean you will hear from Mr Bezant and Mr Noble
12 about Blakemore and why they are appropriate. Perhaps
13 we can park that.

14 THE CHAIRMAN: We will park that just now, thank you. Yes.

15 MR MACNAB: Sir, yes, we are again in favour of the process
16 proposed by the Tribunal. There will need to be at some
17 point we suspect some input from the solicitors because
18 the economists and the experts may agree these things
19 are all wonderful but then questions of proportionality
20 and timing do kick in. But that is a little whistle and
21 bell on top of the Tribunal's proposal.

22 THE CHAIRMAN: I take your point, but the emphasis in this
23 exercise was really on the experts justifying their
24 views to each other and I appreciate there is a slight
25 overlay but this is not a solicitor-driven process.

1 This is an expert-led process.

2 MR MACNAB: I fully appreciate that, sir, but there may come
3 a point at which the experts say we have to have this
4 and the fact is you cannot get it done within a year and
5 that is a point we may be fighting about I suspect at
6 some point in the future.

7 Regarding Mr McGurk's whistles and bells, the first
8 point concerning making all data available, the Asda
9 claimants certainly do not agree to that. This is not
10 part of the application. Obviously we have heard what
11 the Tribunal has said this morning and fully understand
12 the concept of the central repository or the library or
13 whatever of data, but Mr White in this case has been
14 involved in the case for six years and has seen an awful
15 lot of stuff and much of it is going to be irrelevant.

16 It is certainly the case that, if data is going to
17 be relied upon in a positive case by either side or any
18 claimant or any defendant, that should be certainly made
19 available to everybody. That is a perfectly sane point.
20 Likewise, data that is requested by the defendants from
21 the claimants is going to be available to the claimants'
22 experts. But the way in which Mr McGurk is expressing
23 it, it is going to capture a massive amount of
24 irrelevant data which will be, as it were, dumped on
25 everybody willy-nilly, simply by virtue of having been

1 seen by an expert at some point over the past six years
2 so we would strongly push back against that proposition.
3 It is not part of this application and if an application
4 is to be made then we can address that in the proper
5 course.

6 THE CHAIRMAN: I suppose. How does what you are saying sit
7 with the principle which we are progressing on at the
8 moment, which is if experts have some data available to
9 them for their positive case that data should also be
10 available to the other experts?

11 MR MACNAB: I beg your pardon, sir.

12 THE CHAIRMAN: Sorry, the principle that we have been
13 seeking to apply today is that the data which is
14 available to one expert is also available to the other
15 experts, and as I understand, your proposition is that
16 data available to your expert will not be available to
17 other experts.

18 MR MACNAB: That is not -- the point I am making, sir, is
19 that our expert is -- the suggestion is that every piece
20 of data that has ever been provided to Mr White, of any
21 nature, relevant or not, that has been passed over
22 should be provided to the defendants and everybody else
23 as I understand it. But this data, I have simply no
24 idea how wide the data goes, whether it is in fact
25 relevant to anything, whether it is relevant to the

1 issues in this case. There should be -- and there has
2 to be some kind of limitation to the data that is to be
3 provided and my understanding of the process is that we
4 have the positive cases and the data that is going to be
5 included in a party's positive case obviously should be
6 provided to all the parties essentially as soon as it
7 comes into the parties' hands so that everybody has
8 access to the same material.

9 But this should not include data that simply is not
10 relevant or is not relevant to the issues in the case.

11 THE CHAIRMAN: I will just hear Mr McGurk on that because it
12 may just be a matter of definition and how you actually
13 draft it.

14 MR MCGURK: I think that is right, sir. Mr MacNab has
15 slightly mischaracterised what we are seeking. What we
16 are seeking is all data that their experts have seen
17 that are responsive to the requests that have been made.
18 So that is the constraint.

19 THE CHAIRMAN: Sorry, can you just give that at dictation
20 speed so we have it.

21 MR MCGURK: So the data we are seeking is all of the data
22 that is responsive to the requests that have been made.

23 THE CHAIRMAN: Yes.

24 MR MCGURK: Sorry, I have got my instructions slightly
25 wrong. The point is we want to see what their experts

1 have asked for and been provided with in the course of
2 their undertaking, their SPO analysis.

3 THE CHAIRMAN: Yes.

4 MR MCGURK: So that is the constraint.

5 THE CHAIRMAN: Mr MacNab, does that clarify matters for you?
6 Does that make it acceptable?

7 MR MACNAB: I hear what Mr McGurk says but it is still
8 unacceptable to my clients. That is because, as
9 I understand it, Mr White has asked my clients for data
10 and has been provided with material which is essentially
11 not responsive to his request or was not actually
12 relevant to what he was asking about, so therein lies
13 the problem.

14 THE CHAIRMAN: It is difficult to deal with this in the
15 abstract. I think as a matter of principle all existing
16 data provided to experts for their SPO analysis seems to
17 be fine, but you are saying there are problems in the
18 detail when you apply that.

19 MR MACNAB: As I understand it, yes. I am afraid I cannot
20 address you any further on the nitty-gritty but
21 I understand that -- which is why it is unsatisfactory
22 to deal with this matter on the hoof, but I understand
23 that there is material out there that is simply not
24 actually directed to what Mr White was asking about or
25 simply was just simply not on point, and I think that is

1 about as far as I can take it at the moment, sir.

2 THE CHAIRMAN: Thank you.

3 MR MCGURK: Just two points in reply. First of all,

4 Mr White is here and could possibly assist the Tribunal.

5 Secondly, when Mr MacNab says some of the data that has

6 then been provided responsive to his experts' request is

7 discarded, that may be true because he has determined

8 for the purpose of his particular methodology that it is

9 not relevant, but we have not been told by the Tribunal

10 that everyone has to adopt an identikit methodology, so

11 that which may be deemed not relevant to the methodology

12 as to why it adopts may not be true of our clients, our

13 experts and therefore a line in the sand can be drawn by

14 reference to what has been provided responsive to his

15 request for information that helps him undertake the SPO

16 analysis, but as I say, he is here and could potentially

17 assist the Tribunal.

18 THE CHAIRMAN: We will hear from Mr White on this what is

19 the issue here. Perhaps could you come forward to find

20 a microphone.

21 MR WHITE: So from my perspective there is a couple of

22 different issues here. So one is we have been spending

23 a huge amount of time, my team and I at Analysis Group,

24 responding to the defendants' RFI requests thus far. We

25 have been intaking a large amount of data, the

1 defendants' requests thus far have largely focused on
2 samples of documents, samples of data. We have not
3 processed and reviewed all of that data yet. A lot of
4 the data is, it has just simply come in, been archived
5 in the process of actually extracting, looking at it,
6 determining whether or not it is even relevant material
7 at all or simply, you know, somebody's out of office
8 request attached to a response to a request.

9 So I think first of all it is just a practical stand
10 of -- the request I believe was for by Monday at 5 pm to
11 turn over all of this information. There may be a lot.
12 It has not been reviewed, it has not been necessarily
13 considered whether or not it is even responsive to the
14 RFIs that I had initially sent to our clients and then
15 were ultimately superseded by the defendants' RFIs.

16 I think from my perspective, and I have discussed
17 this with both Mr Bezant and Mr Noble, I do agree that
18 there is a risk of ships passing in the night if we get
19 to the point where we are both preparing positive cases
20 on the basis of separate datasets, and I think therefore
21 as and when we are bringing data in and relying on that
22 data, I do think that there needs to be a process by
23 which I send across the transom to them, here is data
24 I have identified as potentially responsive to the
25 requests that have been made and I may or may not rely

1 on it yet. But here is the data.

2 I think asking for everything that I have seen
3 across six years some of which is VoC related, some of
4 which is not related --

5 THE CHAIRMAN: It would not be VoC related because they
6 would be restricted to SPO analysis.

7 MR WHITE: I agree but a lot of this has just been, you
8 know, basically data dumps, right. So we send out
9 a series of requests to the clients, the clients send
10 a variety of data back to us, some of it has been
11 reviewed, some of it has not. We have been providing
12 responses to the RFIs. That is the process that my team
13 and I have been undertaking for the last several months.
14 We have sent a lot of material across. We have agreed
15 that we are sending a variety of other material across
16 by the 23rd or whatever the date is agreed.

17 But the idea that we can over the next sort of three
18 days determine amongst all of our files, amongst all the
19 data we have received in the course of this case
20 everything that may be relevant to SPO or not is,
21 I mean, frankly unreasonable at this point from my
22 perspective. I think as I would see it, my duty here is
23 to assist you and there is a process by which Mr Noble,
24 Mr Bezant and myself will have ongoing conversations
25 about our analyses as we are developing them, joint

1 expert meetings etc, and there needs to be a process by
2 which we share information with them and they share
3 information with us to the extent that there is any
4 information we need from them.

5 But simply lobbing it all over in an unstructured
6 fashion etc I personally do not think is reasonable or
7 helpful.

8 THE CHAIRMAN: Mr Bezant, can you assist us on a solution
9 here?

10 MR BEZANT: I will say some words and maybe my colleague
11 Mr Noble will as well because I think this runs to some
12 of the things he is interested in in particular.

13 I suppose the issue is if Mr White has been issuing
14 his own information requests it would be helpful to
15 understand them. If he has been getting answers to
16 those requests it would be helpful to understand them.
17 I cannot say how they are attempting to answer our
18 requests and therefore whether they have got hold of
19 information which we and he would put to one side
20 because of the way it has been responded to, or whether
21 we would keep it and he would reject it. That is part
22 of the problem of not knowing what has been located and
23 is in the process of being analysed or filtered on one
24 level or another.

25 It sounds like there is information which is helpful

1 and then we are into questions of relevance and
2 proportionality which is hard to give you any guidance
3 on from the outside in.

4 THE CHAIRMAN: Yes.

5 Mr Noble, did you have something to say?

6 MR NOBLE: Yes, I mean, I would echo what Mr Bezant just
7 said. I think the only other point that I would add is
8 that Mr White just mentioned data dumps and I think
9 there has been some mention over the course of this
10 process that it is difficult to gather data and of
11 course understanding what is in those data dumps can
12 give us really helpful insights into essentially what is
13 the bit that is difficult? Is it to extract it, is it
14 to go through it, and so on.

15 I mean so the question of precisely when we get it,
16 I think a practical way forward is I do not know whether
17 we have to get it by Monday. It may be that there is
18 more time that is needed to go through and go through
19 a relevance check. I think the point that Mr Bezant and
20 I would make is we do want access to that material so we
21 understand the universe of data. It is not perfect but
22 we would get it a bit later on in this process but it
23 may be the lesser of the evils that a little bit more
24 time would be given for that to allow it to be passed
25 because I do appreciate I am not sure Mr White wants to

1 work all the weekend just so we can have it on Monday.

2 THE CHAIRMAN: We certainly are not intending to force you
3 to --

4 MR NOBLE: Having a week or two, maybe --

5 MR WHITE: I think just one point in response here. Well,
6 two points in response here. I think I am firmly of the
7 belief, and I think we agree in discussions that
8 Mr Bezant and Mr Noble and I have had, about the
9 importance of us working from a common set of
10 information. I think that is very well agreed.

11 I think there are two points here. One, the
12 defendants' requests up till now, the RFIs etc, have
13 been for samples of documents and question 6.3 for
14 instance of their RFI requested initially a sample of
15 documents that has been revised, a representative
16 sample, they have restricted certain time frames etc and
17 we have worked very long and hard in a very targeted way
18 in order to try and be responsive to those requests as
19 much as possible.

20 There did not appear, at least initially, to be
21 a request for every document, every -- that had been
22 produced but rather samples of documents and I think
23 I would note that the selection of the sample was
24 largely left up to the claimants in terms of responding
25 to that as long as we explained why we selected the

1 documents that we did. So I think that is one point.

2 The second point here is when I talk about document
3 and data dumps and I was just checking that this can be
4 public, like we are talking in some cases one of our
5 clients is Sainsbury's who participated in the
6 interchange litigation. There was a huge amount of
7 documents and data, over 600,000 documents that were
8 disclosed in the interchange litigation. Now some of
9 those may be responsive to the defendants' requests for
10 the RFI and so there is a process by which we are
11 undertaking to go through the interchange litigation
12 disclosure in order to try and identify what information
13 is potentially responsive.

14 So when I talk about document and data dumps I do
15 not mean that we are sitting on a trove of very granular
16 data that is potentially very useful to Mr Bezant and
17 Mr Noble's analyses, but rather in a lot of cases lots
18 of documents that have just been sent and need to be
19 looked at and need to undertake an analysis or at least
20 a classification exercise which has not yet been done to
21 say this is related, this is completely outside the
22 period, it is from 2023, this is in 2011, this is
23 related to stuff that occurred abroad or in the UK.

24 We just have not undertaken that -- we have been in
25 the process of undertaking that exercise. As and when

1 we have documents we will send them across.

2 THE CHAIRMAN: Can I suggest something then, that if we go
3 with Mr McGurk's first bell and whistle, the wording
4 would be:

5 "All existing data provided to experts in the course
6 of their SPO analysis to be provided by 5 pm on Monday
7 or as soon as reasonably practical thereafter after
8 discussion between experts."

9 MR MCGURK: I think that would be really helpful, my Lord,
10 thank you.

11 THE CHAIRMAN: I know we have points of principle for you to
12 come back and develop, Mr Richardson.

13 MR RICHARDSON: Just on the 5 pm Monday deadline, my
14 instructions are that even if we could have until the
15 following day, it would be make the process a lot easier
16 for us.

17 THE CHAIRMAN: We will come back to you on Monday, but look
18 at the rest of the wording here.

19 MR MACNAB: The Tribunal has laid down the process by which
20 data is to be asked for and that is why we are here
21 today. We are here to discuss and argue about the
22 matters that have been asked for and that the defendants
23 consider have not been answered properly. Essentially
24 what the defendants are now saying is we do not need to
25 bother with that, let us just have everything you have

1 got. Just pass over everything you have got. That is
2 completely at odds with the process that the Tribunal
3 has laid down.

4 There are two points. Obviously there is the data
5 request and that is what we are actually -- the expert
6 data request and that is what we are dealing with today.
7 That is what the application is. There is the potential
8 problem of ships passing in the night, obviously the
9 need for each side's experts to provide data on which
10 they are going to be relying, they may rely, as soon as
11 possible for their cases, their positive cases. But
12 beyond that the Tribunal should really not be going
13 beyond the scope of this -- the application that has
14 been made and that we are dealing with.

15 Essentially in a way this particular bit of the
16 order here would negate the exercise the Tribunal is now
17 proposing for resolving outstanding issues. It is
18 simply wholly inappropriate, at least in the form in
19 which it is being proposed as an on the hoof application
20 being made orally now by my learned friend. If
21 something to this effect is going to be put to the
22 Tribunal it should be done formally and then we can come
23 back and find about it on some later occasion. But as
24 it is put at the moment, it is wholly outwith the
25 process that this Tribunal has laid down for the

1 resolution of these cases.

2 THE CHAIRMAN: Thank you.

3 MR MACNAB: In my submission.

4 THE CHAIRMAN: Thank you, Mr MacNab. Did you have any other
5 points?

6 MR MACNAB: I have this. There is point number two which is
7 about the Tribunal being asked to order the green bits.
8 I align myself wholly with what Mr Bates has said. The
9 Tribunal should be making no order in relation to the
10 bits that are shown as green in a version of an order
11 that you have.

12 The point here is this: the Asda claimants have
13 provided a great deal of information since the RFIs were
14 made. They have been through the defence's iterative
15 process with solicitor and experts with which the
16 Tribunal is not concerned, and the latest iteration came
17 through I think at 8 am this morning.

18 What you see in green is not something that the Asda
19 claimants consent to. They are not consenting to what
20 was sought by the original order. We are not arguing
21 over the matters that are in green either because the
22 claimants have already provided the information that was
23 sought or because the defendants are content with what
24 the Asda claimants have agreed to do within the
25 timetable offered and subject to the caveats,

1 qualifications and limitations expressed.

2 So it would be simply inappropriate for the Tribunal
3 to subject the Asda claimants to a coercive order with
4 all attendant consequences to do something that they
5 have not agreed to do, at least in the terms expressed,
6 and where the defendants' experts are content to accept
7 what they have agreed to do.

8 So that process should simply run through as agreed
9 essentially, and my solicitors, my clients will do what
10 they have agreed to do by the date that they have agreed
11 to do it. You do not see in the order the nuance -- you
12 will see it referred to in my skeleton argument which of
13 course you have read and inwardly digested, concerning
14 we have agreed to make best efforts, use best efforts to
15 find things by a certain date, 23 August, subject to
16 caveats and qualifications, i.e. viz everyone's on
17 holiday. That sort of thing. That is simply not
18 captured in the order.

19 THE CHAIRMAN: Thank you.

20 MR MACNAB: Again, it is one of those -- another point where
21 we have specifically not been arguing about that matter
22 today because the defendants are happy with what the
23 claimants are proposing and essentially by making the
24 order you are then undoing all of that iterative
25 process. So that would be wholly inappropriate in my

1 submission.

2 The third point concerns the basis on which the
3 experts would meet and in that regard I align myself and
4 agree with everything that Mr Bates has said for the
5 reasons he gave and do not have anything I think further
6 to add on that point.

7 I think, sir, those are the only points I wish to
8 make.

9 THE CHAIRMAN: Thank you. Yes.

10 MS NGUYEN: Sir, the Morrisons claimants are content with
11 the Tribunal's proposals and also with the format and
12 the timing of that. We also do not object to providing
13 the data and information already provided to our expert
14 to the defendants by next Monday.

15 As to the requests in green, I adopt the submissions
16 of my learned friends Mr Bates and Mr MacNab, we do
17 disagree with the inclusion of green text in any order
18 mainly for the reason that Morrisons is still
19 investigating those requests to see if further
20 information can be made available, there is no
21 commitment at this stage to provide that further
22 information or documents, and it is worth noting in that
23 regard that these are requests which were new as of
24 8 July. So we are investigating them and we say that it
25 would be inappropriate for the Tribunal to make such an

1 order compelling production of that information where
2 those investigations are ongoing.

3 The final point is on the expert process. Again,
4 I agree with my learned friends Mr Bates and Mr MacNab.
5 We agree that the process should be without prejudice
6 but that the work product should be open.

7 THE CHAIRMAN: Thank you. Mr Richardson, I cut you off
8 before you were going to give us some points of
9 principle.

10 MR RICHARDSON: My points of principle are about specific
11 requests, one or two which I can keep short but I do not
12 think they require an expert to make them. I think
13 a lawyer can make them.

14 THE CHAIRMAN: Right. I think we should hear these now and
15 then what we are going to do is we are going to adjourn
16 just to consider all the points that have been made.

17 MR RICHARDSON: The first is about the request 2.1.2. I do
18 not know if you have the draft order against Arla in
19 front of you.

20 THE CHAIRMAN: Yes, this is the Arla SPO. We can have it up
21 on the screen in any case.

22 MR RICHARDSON: The Excel sheet is at {HS1-A1/10/1} and then
23 you can bring up the link. Do you have the green and
24 red, a copy of this?

25 THE CHAIRMAN: Is this the one that came today?

1 MR RICHARDSON: No.

2 THE CHAIRMAN: We do not have that. Let us just deal with
3 it on screen. I think that is the easiest way.

4 MR RICHARDSON: The trouble is on the screen it will be the
5 rather unwieldy Excel sheet, so if you do have this it
6 would be more convenient for you as well as me, I think.

7 THE CHAIRMAN: Do we not have the order? That is an
8 appendix from the order, is it, that you are looking at?
9 We should have that available. (Pause).

10 MR RICHARDSON: There is a version of the order in Opus but
11 it does not have the green and red colouring on it but
12 that should not be an issue.

13 THE CHAIRMAN: Right.

14 MR RICHARDSON: That is at {HS1-A1/6/1}.

15 THE CHAIRMAN: All right, have we got it in the bundles?
16 Yes. I will just ask the referendaire to tell us that.
17 Volume 1, tab 6.

18 MR RICHARDSON: Sorry, excuse me, I think {HS1-A3/10} in
19 fact is the more recent version. So that is volume 3,
20 tab 10.

21 THE CHAIRMAN: Thank you. Volume 3, tab 10. I have
22 a blank.

23 MR RICHARDSON: On Opus, forgive me, {HS1-A9} will bring us
24 the most recent version. I do not believe that is in
25 the paper bundles though. {HS1-A9/9/1}. It is

1 appendix 4 in the order. {HS1 A9/9/49}.

2 THE CHAIRMAN: Yes.

3 MR RICHARDSON: You will see the first two are in green. It

4 is the third I want to address you on, the one in red.

5 This seeks information about the Arla claimants'

6 position outside the UK or its operations outside of the

7 UK, and as far as we can tell that request must be aimed

8 at conducting a supply pass-on analysis specific to

9 markets other than the UK market. The straightforward

10 point that I wanted to make was that the Tribunal has

11 determined in relation to overcharge that the UK

12 overcharge determination will be a proxy for overcharge

13 determinations in other markets. We think the same

14 should be the case for supply pass-on and we do not

15 understand why this request is necessary on that basis.

16 THE CHAIRMAN: Thank you.

17 Mr Bezant, can you clarify that?

18 MR BEZANT: So our request was in the context of can it be

19 used in the UK as a guide to non-UK territories, yes or

20 no. If not, is there something you can tell us about

21 the non-UK territories, to the extent it is appropriate,

22 for the purpose of supply pass-on to adjust in some way

23 a result from the UK? I think there is a separate

24 question to whether the non-UK overcharge issue and --

25 the international overcharge issue has been resolved.

1 It is just a simple question: can we use the UK as
2 a guide outside of the UK? If not, are there some
3 differences it would be helpful to understand?

4 THE CHAIRMAN: Thank you. Yes, Mr Richardson.

5 MR RICHARDSON: You have the point that I have made. It may
6 be that our expert in due course can elaborate upon it
7 but the legal point is one I have just made.

8 THE CHAIRMAN: We will deal with this issue now because
9 I believe we can. (Pause).

10 We have heard what Mr Bezant has said to that and it
11 does seem to us that that is an appropriate question to
12 be asked and then that can work its way through the
13 system.

14 MR RICHARDSON: Understood. That may be the answer to my
15 next point but I will make it very briefly, if I may, in
16 relation to request 3.1 which should be over the page,
17 on page 50 {HS1-A9/9/50}. We have said in
18 correspondence that we are happy to respond to 3.1
19 subparts(1) and (2), but subparts (3) and (5)
20 essentially are asking the Arla claimants to explain how
21 they see themselves vis à vis their competitors and how
22 they see competition working in the market in which they
23 operate or the markets in which they operate.

24 The difficulty we had with that is that there would
25 be various different subjective views held by

1 individuals within Arla across the business within the
2 Arla group and those views will have evolved over time
3 and we consider it is going to be difficult to pin down
4 with any degree of reliability or accuracy an Arla view
5 that is going to provide a helpful answer to this
6 request.

7 THE CHAIRMAN: We will just hear from Mr Bezant on this one
8 as well.

9 MR BEZANT: Mr Noble might deal with this one.

10 THE CHAIRMAN: Or Mr Noble.

11 MR NOBLE: So the concepts of these section 3 requests is to
12 understand the market structure and the extent of
13 differentiation. Differentiation is an important factor
14 in evaluating the extent to which or rather how close
15 businesses compete with one another. It is of course
16 very hard to get your hands on and so we do not ask for
17 subjective views lightly. We ask for them because we
18 think that is in fact one of the best guides to the
19 extent to which a business is very similar to another
20 one or, if it is very different from another one, who
21 are your close competitors, for example. Indeed
22 questions of these type are often used in merger control
23 as measures of closeness of competition in
24 differentiated goods markets.

25 So it strikes me that these are questions that we

1 are very keen to understand and of course perhaps they
2 can be further refined in discussions with the other
3 experts so that they are even more on point, but
4 conceptually they are very important to us.

5 THE CHAIRMAN: Yes, we do seem to have a difference here and
6 I wonder if this is the kind of difference that will
7 just flow through in the wash in the process that we
8 have discussed through discussions between experts
9 rather than troubling us to make a ruling on today.

10 MR RICHARDSON: I hope so.

11 Two very small things to say finally. Some of the
12 other requests in this SPO order are the sorts of
13 disclosure statement requests that we objected to in the
14 context of the truck-related services order. We would
15 object to them in this order as well.

16 THE CHAIRMAN: I think you have heard our views on
17 truck-related services and our views are we expect them
18 to flow through to the similar issues in this.

19 MR RICHARDSON: The final thing I would say is just, and
20 I think it was just alluded to by one of my learned
21 friends as well, a degree of solicitor proportionality,
22 if I might call it that, will need to be kept in mind
23 because I do think some of the requests require quite
24 a lot of cost and time to be spent by solicitors to find
25 documents, and the client of course as well. Just that

1 is a consideration that will have to borne in mind in
2 the process. I tried to make those points to you this
3 morning but you have the point.

4 THE CHAIRMAN: Yes, we have your point on that.

5 So people have more to say. What I was going to
6 suggest is that we adjourn and decide on the various
7 points of disagreement on the process, but Mr Bates we
8 will allow you to have a final say and then --

9 MR BATES: Just one small point arising from the Tribunal's
10 exchange with Mr Critchley. As I understood it, there
11 was a suggestion by the Tribunal that experts instructed
12 by parties for which all the text was in green would not
13 attend the meeting of the experts. Given that it is
14 envisaged that requests made between claimants might
15 also be the subject of the same process and given that
16 all of the experts would have an interest in what should
17 go into the common repository of documents, I just
18 wanted to make sure that it was clear that all of the
19 experts were able to attend that meeting if they wished
20 to do so.

21 THE CHAIRMAN: We expect all experts to participate in this
22 process.

23 MR BATES: I am grateful, sir.

24 MS CHAMBERS: Sir, one final thing from me. Our green
25 turned to green overnight in the same way as it did for

1 many of the claimants and I just want it recorded that
2 we do not accept there should be a compulsory order in
3 that respect. It was agreed that we would provide the
4 undertaking and provide the agreements that we have set
5 out in our correspondence, and so the nuanced points
6 that Mr MacNab has made we would also adopt.

7 THE CHAIRMAN: Thank you.

8 MR MCGURK: May I have one final word?

9 THE CHAIRMAN: Certainly.

10 MR MCGURK: Just on that point that has been raised. The
11 nub is this: things turned green because we understand
12 the commitments being made by the claimants and the
13 commitments were to provide the information in those
14 requests by 23 August. If that is now being rowed back
15 on in light of the process that the Tribunal is
16 envisaging going forward, that which is -- you are being
17 told despite being green is not agreed will have to be
18 folded into the process that the Tribunal envisages, so
19 the efficiencies gained up to last night will be lost.
20 You have had that point.

21 THE CHAIRMAN: I suppose they would have to be folded in but
22 they might fall out of them quite quickly if the
23 information was provided by the 23rd.

24 MR MCGURK: Potentially. We do not want things falling
25 between two stools. We thought there would be no

1 objection to some of these requests but if there is any
2 doubt about it they would have to go into the Tribunal's
3 process.

4 Very lastly, I know you are rising to consider the
5 Blakemore issue of principle remains. That can be
6 addressed now or it can be addressed after the
7 Tribunal --

8 THE CHAIRMAN: Let us hear the Blakemore issue now as well.

9 MR MCGURK: I will hand over now to the experts as to why.

10 Application re Blakemore

11 MR BEZANT: Thank you. The question is essentially whether
12 Blakemore should provide information as a targeted
13 claimant or not and it is perhaps helpful to go back to
14 the beginning a little bit of how we selected the
15 companies we selected and for what purpose.

16 You will remember under our hybrid approach we are
17 trying to find a small subset of the 180 claimants who
18 are not part of the public authorities and we did that
19 by grouping the market into various areas, retailers,
20 hauliers and so on but we also grouped it into an area
21 called manufacturers which included about 20 people
22 engaged in wholesaling activity, clearly a core part of
23 the supply chain overall.

24 So we needed a candidate, a test claimant, to use
25 for the wholesaler community. We then use it as a proxy

1 as best we could for all of the wholesalers of which
2 I say there are about 20.

3 We had a process for identifying who those claimants
4 might be that were most useful to us. Question one.
5 Materiality. Did they individually constitute a large
6 number of the trucks in a particular subset of the
7 market or a particular group of the claimants? At that
8 time Blakemore had the second largest number of trucks
9 under the heading of wholesalers. It now has the
10 largest number of trucks still in dispute under the
11 heading of wholesalers.

12 Procedurally were they stayed or were they active?
13 They were not stayed so that was helpful. Had they told
14 us they did not have information? No, they had not, so
15 thus far thus good, having been told we cannot help you.

16 Lastly, and I think this is the real rub of it, is
17 this a representative business of the cohort, in this
18 case wholesalers? As we understand it, based on public
19 domain information and various things we have found, you
20 can understand Blakemore as having three types of
21 wholesaling activity.

22 The first type is it provides wholesaling services
23 to related franchise stores or own stores as part of the
24 SPAR retail chain. That is activity one.

25 Activity two, it provides wholesale activity to

1 independent retailers for courts and others, i.e. not
2 related retailers to its own activities but independent
3 retailers in that regard. That is activity two.

4 It has something called a food service wholesale
5 division, again serving third parties such as local
6 councils with pre-prepared food.

7 So it seemed to us that you were getting
8 information, if Blakemore was identified as a test
9 claimant, that would give you information on
10 wholesaling, at least to some and possibly to a large
11 extent recognising a piece of it was servicing its own
12 retail outlets.

13 Mr Critchley's witness statement deals, it seems to
14 us, solely with the question of what happens and what
15 are the arrangements as between the wholesale activities
16 of Blakemore and the connected SPAR activities of
17 Blakemore. But be that as it may, there are other parts
18 of this business, and this is a business with about
19 £900 million of turnover so its subdivisions are not
20 small, it seems to us that Blakemore can provide
21 information on wholesaling activity more generally that
22 we can then use, as I say, as a proxy for the 20 or so
23 wholesalers; it is not exclusively an integrated
24 retailer in the way that is being presented. That is
25 why I think we would still be interested, subject to the

1 other factors it is the largest remaining claimant in
2 that cohort, that is why we think it would be helpful to
3 have the questions answered.

4 THE CHAIRMAN: Thank you.

5 Does anyone else have anything to contribute before
6 we withdraw to consider ruling?

7 MR RICHARDSON: One very small thing, just I am instructed
8 that we adopt the submissions of my learned friends as
9 to the expert meetings being held without prejudice or
10 not on an open basis.

11 THE CHAIRMAN: Thank you. Mr MacNab.

12 MR MACNAB: I am not going to say exactly the same thing
13 about the green stuff in relation to Mr McGurk but
14 I would point out that there is nuance. What has been
15 agreed to is not what appears in the order in green that
16 is being sought and that is the very short point.

17 THE CHAIRMAN: Thank you.

18 MR MACNAB: As I said, we will do what we have agreed to do.
19 You have not seen the latest iteration of all this, you
20 will be very glad to hear it, but we agreed to do what
21 has been agreed in the latest iteration by the time it
22 has been agreed to be done.

23 MS NGUYEN: Apologies sir, just one final word. I do not
24 wish to repeat what Mr MacNab has said but we do agree
25 with the submission he has just made. We wish to point

1 out that we are not rowing back from commitments
2 previously made. What the Morrisons claimants agreed to
3 on 30 July was to conduct further proportionate searches
4 for documents and provide this information if it is
5 available, and that has been agreed by the defendants
6 and that is in the spreadsheet, the response tracker
7 which can be found at {HS1-A1/14/1}. We do not need to
8 go there now but just for your information those were
9 the responses we provided and which the defendants
10 agreed to.

11 THE CHAIRMAN: Thank you very much.

12 MR CRITCHLEY: Sir, I imagine you would like to hear from me
13 on the question of Blakemore because Blakemore is my
14 client.

15 THE CHAIRMAN: Yes.

16 MR CRITCHLEY: I will not be on my feet for long, it is
17 a relatively short and simple point, that Blakemore is
18 one of five SPAR claimants in the litigation and all
19 five is that they should be bracketed with retailers
20 because that is the way they price their products.
21 I mean, I am sure you have read my third statement so
22 I will not repeat it, but I will say that -- I mean,
23 frankly the first conversation that I had not with
24 Blakemore but one of the other SPAR clients where they
25 were talking about how they priced their products in

1 order to ensure that people came into the store, they
2 would buy things other than that which they came in for,
3 or driving footfall so having promotional offers to get
4 people off the streets, and the fact they cannot be
5 outpriced on bread and milk and bacon, I thought they
6 were talking about their resale pricings.

7 It was only in the second call with the second
8 Blakemore franchisee that the penny dropped that they
9 were actually talking about their wholesale pricing.
10 Mr Bezant was making the point that Blakemore has
11 various lines of business. My understanding, what
12 I understand from my clients is that they have the same
13 pricing mechanism regardless of whether they are having
14 a notional transaction with themselves at their own
15 retail level, a sale to one of their franchisees or
16 a sale to an independent retailer. They are still
17 adopting a retail logic at the wholesale level.

18 I mean there is a food service business. There
19 was -- the food service business is 11-12% of
20 Blakemore's overall business. I did say that the
21 defendants were seeking to bracket wholesalers with
22 manufacturers and they had not suggested they were going
23 to be bracketing food service with manufacturers, it was
24 only just now when I learnt from Mr Bezant I think he
25 used the term food service wholesaler, whereas he does

1 seem to be now seeking to make that bracketing.

2 I mean, it was put in Mr McGurk's skeleton argument,
3 he said it was very telling that the defendants'
4 application is for information that the experts are
5 saying they need but the claimants have not put any up
6 any expert evidence against it.

7 I must say it did not occur to me at the time that
8 I actually needed expert evidence in rebuttal for this
9 because the first point I was making is it was not
10 consistent with their own methodology that they were
11 seeking to adduce Blakemore as a targeted claimant
12 because they were saying in their expert methodology
13 that they were looking for representativeness.

14 The point I was making was that Blakemore -- it was
15 representative of the other four SPAR claimants but it
16 was not in any way representative of other wholesalers
17 because with the possible exception of the food service,
18 the 11%, it prices as a retailer.

19 When I made that point the defendants did not say,
20 oh no, no, that is not right, they are representative of
21 these other wholesalers; what they then said, they sort
22 of morphed the argument and then they said, no, we just
23 want to know the extent to which they are
24 representative, which obviously opens up the entire
25 spectrum because everyone is going to fall somewhere on

1 the spectrum of being entirely representative and
2 entirely unrepresentative, my clients falling at the
3 unrepresentative end of the spectrum. But if you just
4 say to the extent to which, it falls away the criteria
5 because everybody falls within it.

6 As to the point that instead I was saying that
7 Blakemore would fall within the retail category, I did
8 not adduce evidence and I did not ask my expert to opine
9 on that, partly I think really because my thinking was
10 you do not need to ask a weatherman if it is raining
11 because when you speak and they talk about this
12 methodology and their retail methodology, the defendants
13 have not said, well no, even if what Blakemore says is
14 true, even if it is true that they do adopt this pricing
15 logic, the analysis is different if that activity is
16 taking place at the wholesale level, not the retail
17 level.

18 So they have not actually suggested that -- if that
19 is the methodology they bring to it, they have not said
20 that it matters whether it is happening at wholesale or
21 retail level, so in our submission all five clients out
22 of -- as a cost saving and an indicative measure they
23 should be bracketed with the retailers and just taken on
24 that basis.

25 THE CHAIRMAN: Thank you. We will now adjourn to consider

1 the experts including experts amongst the claimants and
2 experts in data requests against the defendants.

3 In respect of the points raised by Mr McGurk, all
4 existing data provided to experts in respect of their
5 SPO analysis will be provided to the defendants by 5 pm
6 on Monday or as soon as reasonably practical, further to
7 discussion between the experts. The reason we do that
8 is at the end of the day this is a matter which the
9 experts will have to sort out amongst themselves.

10 In terms of Blakemore, we hear what you say,
11 Mr Critchley, but ultimately that is a matter for the
12 experts and that will work through the process as to
13 whether they think it is necessary or not for Blakemore
14 to be included.

15 We reserve all questions of expenses. In the
16 meantime we would ask parties to produce revised draft
17 orders both for the TRS and the SPO which would --
18 I think we need them in two versions: a complete version
19 and if necessary a confidential version so that each one
20 is in a consolidated document.

21 Now, I think that covers all matters which we have
22 discussed. If there is anything I have missed out can
23 people advise me of it and we can rule on that as well.
24 Mr Critchley.

25 MR CRITCHLEY: Can I just pick up one question of timing

1 which the defendants had to take instruction on from
2 this morning. You may recall that the Boots claimants
3 have been ordered to answer their annex, the red text as
4 well as they can by the 23rd and then add the further
5 information that comes in and they will pass that along
6 as well.

7 I mentioned this morning, just on a personal point,
8 I am in on Monday and then -- this job falls to me
9 frankly, and then I am on holiday until the 23rd so
10 I said to the defendants would it be all right to push
11 it out for two weeks because the information is going to
12 come in slowly thereafter anyway and I thought perhaps
13 there would be no prejudice if in instead of the 23rd we
14 added two weeks to that but unfortunately the
15 instruction came back that they were not prepared to do
16 that. So I was wondering if the Tribunal would be
17 minded to put in the order that the deadline rather than
18 23rd August would be two weeks later.

19 THE CHAIRMAN: Sorry is this the TRS?

20 MR CRITCHLEY: It is.

21 THE CHAIRMAN: What is the objection to that, given
22 Mr Critchley's holiday period?

23 MR MCGURK: It is the same answer. We are already behind on
24 the positive cases. We need this information as soon as
25 possible. I appreciate Mr Critchley's personal

1 difficulties but we are all here on our holidays when we
2 had to make other arrangements to accommodate the
3 Tribunal's very kind invitation to deal with this
4 in August.

5 THE CHAIRMAN: Yes. Thank you.

6 We are going to stick with the original date.
7 I think there is an advantage in it being dealt with all
8 according to the same timetable. Hopefully,
9 Mr Critchley, you will be able to make arrangements for
10 that to be dealt with.

11 Are there any other outstanding matters?

12 MR MCGURK: Just one consequential point that arises on your
13 ruling in relation to the green request, as we have been
14 describing them.

15 THE CHAIRMAN: Yes.

16 MR MCGURK: Given where we have got to it is now the case
17 that we are, notwithstanding commitments to provide what
18 was in green on the 23rd, in the dark about what will be
19 provided and Ms Nguyen says they are not going to row
20 back on what they have agreed to provide but the whole
21 thrust of the submission leaves us in a position of not
22 knowing what is going to be provided at all and that
23 matters for the Tribunal's process because if we know
24 what they are going to provide on the 23rd, on the
25 existing basis, we will know therefore what will feed

1 into the meetings on the 26th, and the more clarity the
2 experts have as to what is going to be provided the
3 better.

4 So what I was going to propose was, appreciating
5 what you have ruled in relation to the green requests,
6 potentially by some point next week the claimants
7 articulate to us what it is that they will be providing
8 on 23rd August so that we are clear about which falls
9 under which process.

10 THE CHAIRMAN: Yes, I think what we can say, and we will not
11 make this an order, but we will encourage the claimants
12 to make their position clear in correspondence to assist
13 the smooth running of this process.

14 Yes, Mr MacNab.

15 MR MACNAB: Can I clarify one point about the experts'
16 meetings if everyone is going to turn up. Our
17 understanding of the process is that there is a meeting
18 between the experts to resolve the issues between the
19 defendants and my clients, the Asda clients. There are
20 issues of confidentiality that arise as among the
21 various cliques. Any suggestion that everyone has a big
22 bean feast where everyone turns up and chats about these
23 things.

24 THE CHAIRMAN: We are not being prescriptive about how you
25 do it. The main point is that there is engagement with

1 the experts. How they engage, whether it is set
2 meetings, the same meeting, it is meetings where some
3 bits are confidential and not everyone is there we leave
4 entirely up to you.

5 MR MACNAB: I am obliged, sir.

6 THE CHAIRMAN: The key point is engagement between the
7 experts which results to narrowing down the issues to
8 simple matters which simple people like your Tribunal
9 can resolve.

10 MR MACNAB: Absolutely, sir.

11 THE CHAIRMAN: Thank you.

12 MR MCGURK: Just to be clear on that, meetings between
13 claimants' expert and other claimants' experts are not
14 meetings at which they could say, you the defendants are
15 not invited because this applies only to us. That is
16 clearly outside what you envisage in your previous
17 remarks.

18 THE CHAIRMAN: It is, yes.

19 MR MCGURK: Thank you.

20 THE CHAIRMAN: Thank you. That seems to be everything.

21 I am grateful to you all because I think this has been
22 a very productive day and I hope we have a constructive
23 way forward. We are now adjourned.

24 (3.23 pm)

25 (The hearing concluded)