

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

5 **IN THE COMPETITION**  
6 **APPEAL TRIBUNAL**

Case No: 1296/5/7/18

7  
8  
9 Salisbury Square House  
10 8 Salisbury Square  
11 London EC4Y 8AP

12 Wednesday 8<sup>th</sup> January 2025

13  
14  
15 Before:

16  
17 **Hodge Malek KC**

18  
19  
20 **Second Wave Trucks Proceedings**

21  
22  
23 **A P P E A R A N C E S**

24  
25  
26  
27 Alan Bates (Instructed by Edwin Coe LLP) On behalf of the Edwin Coe Claimants

28  
29 Ben Rayment (Instructed by Macfarlanes LLP) on behalf of Daimler

30  
31  
32 Digital Transcription by Epiq Europe Ltd  
33 Lower Ground 46 Chancery Lane WC2A 1JE  
34 Tel No: 020 7404 1400  
35 Email: [ukclient@epiqglobal.co.uk](mailto:ukclient@epiqglobal.co.uk)

1 **Wednesday, 8 January 2025**

2 **(2.00 pm)**

3 **THE CHAIRMAN:** Some of you are joining us live stream on our website, so I must  
4 start with the customary warning. An official recording is being made and  
5 an authorised transcript will be produced, but it is strictly prohibited for anyone else to  
6 make an unauthorised recording, whether audio or visual, of the proceedings, and any  
7 breach of that provision is punishable as contempt of court.

8 Mr Bates.

9  
10 **Application by MR BATES**

11 **MR BATES:** Yes, I appear for Alltruck, the claimant instructing Mr Thompson in the  
12 Second Wave Trucks proceedings. My learned friend, Mr Rayment, appears for the  
13 Daimler Defendants.

14 The Tribunal will have seen there are two issues to be dealt with today. First of all,  
15 whether the terms of the settlement agreement preclude the Tribunal from being asked  
16 to make an order in support of Mr Thompson's requests of the Daimler Defendants.

17 Secondly, whether the cost principles of the third party disclosure orders apply.

18 Before I deal with those issues, there's a preliminary point which needs to be dealt  
19 with about the confidentiality of this hearing and -- or at least the settlement  
20 agreement. Mr Rayment and I have discussed that. The position we've come to is  
21 that it would be sufficient protection if it's made clear that the fact that the settlement  
22 agreement's going to be referred to in the course of this hearing won't entitle anyone  
23 to request a copy of it. But we're not asking that this hearing take place in camera.

24 **THE CHAIRMAN:** No. Indeed, the main sensitive provision is the money side --

25 **MR BATES:** Indeed.

26 **THE CHAIRMAN:** -- and, in the bundle I have, that's already been blanked out and

1 I don't need to see it. The relevant provisions that both of you are citing I don't think  
2 are particularly sensitive at all. So I can see that we don't need any specific order.  
3 But, certainly, if anyone seeks a copy of the settlement agreement pursuant to this  
4 hearing, it's going to have to be on notice. I'll direct that you should be given notice of  
5 any application for a copy of the settlement agreement and you can make  
6 representations at the time. So, when it comes to drawing up the order, if you can put  
7 some appropriate wording to cover that.

8 I've read the bundle. There's not a huge amount of material to read. You can assume  
9 that I'm aware of any of the relevant authorities, certainly in relation to disclosure.

10 If I could just make a few initial points that I would like an answer on in the course of  
11 today. The first is that I fully accept that an application for non-party disclosure and  
12 a pre-action disclosure -- both of those -- are claims. That's clear from the wording of  
13 the relevant provision in rule 6 and also from the relevant authorities.

14 I'm not aware of any authority that says that inter partes disclosure, in the context of  
15 ongoing proceedings between those defendants, is a claim.

16 So that's the first point. If anyone knows of any authority that makes good that  
17 proposition, then they should say that in the course of today. But I don't regard that  
18 as conclusive, because the other argument is going to be that "there's a claim against  
19 me", that's what our friend here is saying, but in the context of that claim you're seeking  
20 disclosure. So, if you settled that claim, you shouldn't be entitled to be seeking  
21 disclosure from me because you've already agreed to settle that claim. So although  
22 I don't think there's currently, to the best of my knowledge, inter partes disclosure as  
23 a claim, I do think you have an issue, which is that it's an application within a claim,  
24 and once you settle that claim; are you entitled to seek disclosure on the wording of  
25 the agreement?

26 That's the first point.

1 The second point is: where are we on the timetable for this consent order?  
2 I've looked at the settlement and the correspondence, et cetera, but it's still not clear  
3 to me (a) when that consent order should have been made, and (b) when is it going to  
4 be made? So cover that, both of you, during today.

5 The third question is: are all the other truck manufacturers -- you know, the other four  
6 groups; were they also in the business of leasing, hiring out trucks?

7 I can see that you've given evidence of at least one. We know the position in relation  
8 to Daimler. I don't know what the position is in relation to the other three.

9 The next question is: can your expert carry out the exercise he wants to carry out -- and  
10 I fully understand what the exercise is -- without having this disclosure from Daimler?  
11 Because you have the disclosure that you can get from the claimants themselves, the  
12 other hiring companies, et cetera, you're going to get the disclosure from these four  
13 defendants, four groups of defendants; can your expert do what he wants to do without  
14 this disclosure that you're seeking?

15 The next question -- I'm sorry to give you so many questions. But you know me,  
16 Mr Bates, I always start off with questions and it always gives you the opportunity to  
17 educate me during the day.

18 **MR BATES:** It helps to know what's in your mind, sir, yes.

19 **THE CHAIRMAN:** The next question is: are there any other experts, in the Wave 2  
20 proceedings, considering the analysis of pass on in the context of business leasing  
21 and hiring out of trucks?

22 If there are: what material are they working from? What material are they going to be  
23 working from?

24 Finally, to what extent are the Edwin Coe claimants expecting in response to these  
25 requests for information documents?

26 Because, if you look at the request, it's pretty clear to me that a significant amount of

1 documentation will need to be reviewed in order to give an accurate answer to those  
2 questions. But are you expecting not just, let's say, the answers to those questions,  
3 but the documents that relevant to those answers, that support those answers? It's  
4 not clear to me what you're actually expecting.

5 The final question -- which isn't really for you, Mr Bates -- I don't have even a ballpark  
6 figure for how much it's going to cost to provide the information that you seek and,  
7 somewhat unhelpfully, the original skeleton argument, which was used for this hearing  
8 in December, says, "Well, we haven't done that assessment because we don't want  
9 to go through the expense of doing that assessment". But, in the context of a party  
10 that says it's spent 150,000 or whatever on this application, I would have thought that  
11 the very minimum is I should be provided with a ballpark figure. Because if I have to  
12 assess whether it's necessary or proportionate to require the Daimler Defendants to  
13 answer this, I need to know what the cost is. I thought if you look at the previous  
14 rulings I've given in the Wave 1 trial, I always said I expect to know, if someone's  
15 objecting to something, what the cost is going to be. But, no, they've chosen not to do  
16 that. But it's not constructive.

17 So it's a bit a telling off, I think, but you know that's what I normally expect on  
18 disclosure. If you're going to oppose it, just give a ballpark figure.

19 I know you're saying it's going to be material. I fully accept it's going to be material.  
20 But, if you're able to, even if it's a rough ballpark figure, that would help. It doesn't  
21 have to be to the precise 10,000 or anything like that. But, if you say, "Look, it's in the  
22 region of 100,000", or you say, "Well, it's in the region of 50,000 or 150,000 or 200,000,  
23 whatever it is, I can work from that and that would be very constructive.

24 **MR RAYMENT:** Sir, I will take instructions on that.

25 **THE CHAIRMAN:** It doesn't have to be precise.

26 **MR RAYMENT:** I'm sorry if you feel you need to tick us off. It is a pretty unusual

1 situation in terms of the nature of the objection to this application.

2 **THE CHAIRMAN:** I agree.

3 **MR RAYMENT:** They are quite specific and quite technical.

4 **THE CHAIRMAN:** Yes, but I think it's really important --

5 **MR RAYMENT:** Sorry, what I was going to say -- I will take instructions on this, but  
6 would you be -- are you talking about the sort of estimate of an experienced litigation  
7 solicitor at this stage, rather than something that is more granular in terms of a ballpark  
8 figure?

9 **THE CHAIRMAN:** Granular will do. I just have to have a feel. Are we talking about  
10 one of those exercises, which we've dealt with in the past together, where you're  
11 talking about potentially half a million or are we talking about one of those exercises  
12 which is a tenth of that, or somewhere in between? As I said, I don't need to have the  
13 figure to the nearest 10,000. But, if you're going to say to me, "Look, I think, having  
14 spoken to the team, we think actually -- we fear it's going to be within this range", that's  
15 enough for me. I don't need anything more than that. I do accept that it's going to be  
16 material. I'm with you on that.

17 **MR RAYMENT:** We've deliberately avoided using the words "low cost" because that  
18 seems to beg quite a big question about what the level of cost will be. Obviously,  
19 Daimler is a very large and complex organisation. The investigations required even  
20 to come up with an estimate would require a certain amount of work, so --

21 **THE CHAIRMAN:** When I looked at this, I thought this was going to cost you probably  
22 about 200,000 to do it, if you were going to do it properly, given how long ago it is, the  
23 number of systems you probably have to look to, the number of people you're going  
24 to have to speak to and the complexity of the questions, the sort of information that  
25 you're actually looking for. So, to me, I'm seeing a range of maybe 150,000 to  
26 250,000, just using my own experience. But I'm not the guy who's looked at this case

1 in that much detail, but I'd certainly be surprised if it was going to be less than 100,000.  
2 But I may be surprised.  
3 Just have a quick chat with your team at an appropriate moment and give me -- I don't  
4 need to tell you off in any big sense. It's just that it just helps me and sometimes it's  
5 a bit difficult to predict what I want to hear and what I don't. But as long as I get it by  
6 the end of the hearing, I'm perfectly happy. Thank you very much.

7 **MR BATES:** If I may, I'll take the seven exam questions first, just to make sure that  
8 I've covered them.

9 **THE CHAIRMAN:** Yes, you'll cover them now. That's really helpful.

10 **MR BATES:** On the first one, the phrasing of the question in terms of whether we're  
11 seeking disclosure in the context of that claim we would slightly take issue with,  
12 because we're not seeking disclosure within the context of our claim against Daimler.  
13 But Mr Thompson is seeking data that he needs in order to carry out his role within the  
14 Second Wave proceedings.

15 **THE CHAIRMAN:** I understand that. What you're saying is: look, although we've  
16 settled with these guys, you need this information for the purposes of your expert  
17 report as against all the other defendants.

18 I certainly have that point. But you have to realise that this is an application by your  
19 client against them, so I will be taking into account the settlement agreement. That is  
20 a relevant factor in the whole scheme of things. The other relevant factors are: how  
21 necessary is it to get this? And: where are the costs going to lie? Because it's highly  
22 significant for the following reason: if you are both parties in the same litigation and  
23 you have claims against each other, if Daimler win, at the end of the day, they will say,  
24 "Here's our bill. We want the costs, and it includes 150,000 for this disclosure that you  
25 asked us to give". If, on the other hand, you've compromised all your claims against  
26 you -- and let's say Mr Rayment has a great victory at trial and he's held not to be liable

1 to anyone, and he says, "I have this bill for 150,000; who's going to pay it?"

2 The other claimants may say, "I don't know what you mean, Mr Rayment. We didn't  
3 ask you to do this. That wasn't in relation to us. We didn't want you to do it. It's up to  
4 you if you want to do it, but you should be asking the EC claimants". And he says,  
5 "I can't ask the EC claimants because I've settled with them and I have an agreement  
6 not to make any claims".

7 That's one of the things that worries me about the whole thing. I don't necessarily  
8 agree with them that I should treat this as a non-party disclosure application, because  
9 if I did you wouldn't get it, because that's a separate claim and it's a claim you've  
10 compromised all your claims. But I have a lot of sympathy for them when it comes to  
11 saying, "What about the cost of all this exercise?" I don't think they're being Luddites.  
12 I'll find that out later. But their primary point seems to be that you're not going to  
13 be -- the way you're doing it, you're not going to be effectively responsible for our costs  
14 and we're going to have to bear those costs ourselves. And it's going to be very difficult  
15 for Mr Rayment later on, even if he wins the whole case, to recover those costs against  
16 other people. And that's why, when you have non-party disclosure orders where  
17 there's not going to be a trial between those two people that the court has to bite the  
18 bullet and say, "We're going to decide at the moment we grant this order where those  
19 costs are going to lie." That's what we normally do.

20 So that's one of the things that concerns me about the whole thing.

21 **MR BATES:** It's perhaps slightly unfortunate that we're having to deal with this  
22 application at their insistence in front of a separate chairman, rather than a chairman  
23 who's been involved in managing the Second Wave proceedings, because we say that  
24 the way that the Second Wave proceedings have been set up is going to avoid  
25 precisely the problem that has been set out, because the design of the proceedings  
26 doesn't depend on -- or doesn't work on the basis that the lead claimants are



1 themselves instructing the experts with the consequence that those particular lead  
2 claimants are going to bear the costs of what the expert may generate from other  
3 parties. These lead claimants are there to represent particular points in the supply  
4 chain, but there are lots of other claimants with stayed claims behind those experts  
5 and, of course, whatever pass on did or didn't occur to and by the truck lessors is also  
6 going to be relevant to everybody else further down the chain.

7 So insofar as there are any claims that are not settled and there's a trial, and costs are  
8 being dealt with at the end of the trial, it's simply not the case that there won't be  
9 anybody there against whom the Tribunal can award Daimler the costs of looking for  
10 this material.

11 **THE CHAIRMAN:** I don't know, you could be right, but it's a bit of a risk, because  
12 I think we don't know what other people are going to argue, at the end of the day.  
13 Whilst you say you have people behind your wave, the fact is that this application is  
14 being made by the EC claimants, who have settled with these guys here. I fully  
15 understand what you're trying to say. It's not as straightforward as it sounds, but that's  
16 why we're arguing it.

17 **MR BATES:** It's certainly not straightforward. We don't see it ourselves as  
18 an application by the EC claimants. In fact, it can't be by the EC claimants because  
19 many of them are not truck lessors, they are not therefore instructing Mr Thompson  
20 for that purpose.

21 Alltruck is the lead claimant for the lessors, which happens to be an Edwin Coe  
22 claimant. It's not the only lessor claimant, as I said. There are people further down  
23 the chain who in the pass on at the lessor stage, would also be relevant.

24 Our understanding is that the proper characterisation of this request is it's a request  
25 by Mr Thompson pursuant to the Tribunal's mechanics judgment and the mechanics  
26 that were established by the Tribunal in January last year --

1 **THE CHAIRMAN:** Are you saying that Thompson is instructed, in fact, by persons  
2 other than people who are the clients of the EC claimants?

3 I haven't seen anything like that. If there is, I'd need to see something, because it's  
4 easy enough for you to say this. But the problem is that when bills start coming up,  
5 everyone protects their own interests and you may find that other people will say,  
6 "Well, look, we never specifically instructed Edwin Coe to make this application. You  
7 had no actual authority to act on our behalf in that regard. You were instructed by  
8 Edwin Coe and so we're not going to pick up this bill", whatever the bill is. That's why  
9 I think it's important that we resolve this application, what would happen if you do get  
10 the disclosure, on a costs basis, because it may be that Mr Rayment's line is that, look,  
11 he doesn't want to end up holding the baby and using all this money up for this cost  
12 for one party that he's actually settled with. He may also say, "Look, you never  
13 reserved the right to bring this application when you settled." You had a settlement  
14 agreement on 1 October. Then, on the 4th, you take out this application. You would  
15 have thought that you would have at least reserved the right in the settlement  
16 agreement, if this is something that you were going to do against this particular  
17 defendant.

18 But there's a number of matters in here. Let's go through the list and then we'll see  
19 where we are.

20 **MR BATES:** If I can just pick up on a couple of my points --

21 **MR RAYMENT:** Can I just make clear that in relation to settlement, I mean, we have  
22 now settled with the Edwin Coe Claimants, who comprise businesses with leasing,  
23 rental businesses. But we have also settled with every other leasing rental business  
24 in the Second Wave. I think that's highly pertinent to the question of what happens to  
25 the costs, because: who is going to be around to pay the costs, at the end of the day?

26 **THE CHAIRMAN:** That's my problem. I'm not going to determine it finally, but I don't

1 like to leave a mess. Not determining the costs and what the costs position should be  
2 today is not the right way forward. What you're telling me is that you've actually settled  
3 with all the other people in a similar position to these claimants, and so ... yes.

4 **MR BATES:** I'm conscious of the time --

5 **THE CHAIRMAN:** What I'm saying is -- but -- okay, let's go through the list.

6 **MR BATES:** I am conscious of the time. I do just want to pick up on a few points that  
7 you've just made to me.

8 First of all, it's correct that Alltruck at the moment is instructing Mr Thompson, but the  
9 design of this process, as set down in the mechanics judgment, was expressly on the  
10 basis that if Alltruck were to settle with all defendants, which might well happen, that  
11 another party could come in and take over, and that's part of the design.

12 Now, if all the lessors have settled, which I have no information -- as the Tribunal's  
13 already picked up on, the consent order even for this settlement hasn't yet been  
14 processed -- then another way would have to be found for the people lower down the  
15 chain to instruct Mr Thompson to deal with the pass on or for another expert to deal  
16 with the pass on at that stage in the supply chain because it's necessary for seeing  
17 how pass on operated across the entire supply chain. So that's baked into the design  
18 of this unique process, which the Tribunal has designed.

19 The second question was about the timetable for the consent order. My understanding  
20 is that the hold up is -- as the Tribunal may have seen from the bundle -- that other  
21 defendants have been commenting on the terms of the amendments to be made to  
22 the particulars of claim. My understanding is that's where things currently are, so the  
23 consent order --

24 **THE CHAIRMAN:** We have no date where we think the consent order's going to be  
25 filed?

26 **MR BATES:** That's right.

1 **THE CHAIRMAN:** Because you're saying you're waiting on other people?

2 **MR BATES:** And doing our best to push it along.

3 **THE CHAIRMAN:** Yes, I can see that.

4 **MR BATES:** Yes, but there's no question of the fact that the settlement agreement

5 has been agreed and it's there --

6 **THE CHAIRMAN:** You're bound by it.

7 **MR BATES:** -- so it's a matter of the mechanics to agree the specific amendments to

8 the particulars of claim.

9 **THE CHAIRMAN:** Yes, you're not walking away from the settlement agreement.

10 **MR BATES:** In relation to the other questions, can I say as a preliminary point that it

11 wasn't my understanding that matters to do with the proportionality or appropriateness

12 of the disclosure were within the scope of the two matters that were referred to

13 a separate chairman by the Tribunal. I understand that the order from the December

14 CMC may not yet have been approved. But, at page 199 of the hearing bundle, you

15 have a copy of the transcript.

16 **THE CHAIRMAN:** 199; you mean the authorities bundle?

17 **MR BATES:** No, it's in the hearing bundle, at page 199. There's a transcript there

18 and it's an excerpt from a transcript.

19 **THE CHAIRMAN:** 199 is not a transcript in mine.

20 **MR RAYMENT:** I think it might be the other bundle.

21 **MR BATES:** In the hearing bundle?

22 **THE CHAIRMAN:** It's not. It's probably in the authorities bundle, is it?

23 No, it's not there either. Just read it out for now. Then you have a rival bundle.

24 **MR BATES:** It's from page 147 of the transcript. This is the chairman of the Tribunal

25 saying:

26 "Within seven days, the parties are to lodge a succinct bundle of all the relevant

1 documents and written submissions no longer than six pages to cover the cost issue  
2 as well as the settlement issue."

3 So those are the two issues I outlined earlier. First of all, whether or not the meaning  
4 of the second agreement is that it precludes the Tribunal making an order in support  
5 of Mr Thompson's requests and, secondly, whether the third party disclosure orders  
6 apply. That was our understanding of what the issues were.

7 **THE CHAIRMAN:** Mr Rayment, are you saying in determining this application today,  
8 I should not look into whether or not I consider it's necessary and fair and proportionate  
9 to order disclosure? Or am I just going to look at the two simple questions and come  
10 to a view in isolation, and whether or not I feel it's necessary or not?

11 **MR RAYMENT:** By the way, the reference that Mr Bates was looking for, I think, is at  
12 tab 6.2 of the hearing bundle, at page 210.

13 **MR BATES:** The number at the bottom of the page I have is 196.

14 **MR RAYMENT:** It's not a transcript, but it's the order. It's the scope of the issues  
15 referred to this Tribunal.

16 **THE CHAIRMAN:** What does it start off with at the top? Does it say "Claimant's  
17 information request"? What page are we talking about?

18 **MR RAYMENT:** 210 of the hearing bundle.

19 **THE CHAIRMAN:** My 210 has -- it's not a transcript -- has this.

20 **(Indicated)**

21 Is that the same? Yes, okay. What do you want me to read?

22 **MR RAYMENT:** It's paragraph 5.

23 **THE CHAIRMAN:** Yes, it's just saying -- they put a bundle relevant to determination.  
24 Where does it say I'm limited to those two issues?

25 **MR RAYMENT:** It's true, it doesn't.

26 **MR BATES:** Sir, can I just ask if you have page 196 of the bundle and whether that's

1 a transcript. Because that's what I have in front of me. It's a page of the hearing  
2 bundle. It says 196. And the electronic page number is 199. I'm sorry, that's what I  
3 was using. I didn't realise they were not matching up.

4 Because what Mr Rayment is showing you is the draft order that hasn't been finalised.

5 **THE CHAIRMAN:** Let's go through it. Where in 196 do you want me to read?

6 **MR BATES:** The part that I was reading from was the top of transcript page 147.

7 So our understanding is that what was being referred to there was the settlement issue  
8 was the interpretation of the settlement agreement. The costs issue being referred to  
9 was about whether the third party costs order principle should apply, such that Alltruck  
10 was ordered to pay the costs of the work that Daimler would have to do.

11 So that was our understanding of it.

12 I note that the two sets of written submissions that were lodged with the Tribunal by  
13 both parties took that approach. Neither of them have dealt with the proportionality of  
14 it or how much the exercise would cost, or whether there are other ways that  
15 Mr Thompson could obtain the material. So those matters would be reserved to the --

16 **THE CHAIRMAN:** So you're saying I shouldn't come to a conclusive view on  
17 necessity, because someone else may want to take that view further down the line?

18 **MR BATES:** Exactly. With respect to you, sir, the panel dealing with the trial is going  
19 to be very well placed to make an assessment of what material -- because, of course,  
20 the Tribunal's already considered this issue -- although it didn't in the end have to  
21 resolve it -- between Mr Thompson and the other defendants.

22 **THE CHAIRMAN:** I think so. Okay, I'll put that down.

23 Okay, thank you.

24 **MR RAYMENT:** Sir, can I also respond on this point? Because presumably our  
25 understanding is potentially helpful to you as well.

26 **THE CHAIRMAN:** Yes.

1 **MR RAYMENT:** Our understanding was: no, questions of proportionality and so on  
2 were not going to be dealt with today. The issues were narrower. But, obviously, we  
3 accept that's based on the framing of the issues by these two parties. Perhaps if you,  
4 sir, are framing the issues in a different way, it may be that questions of proportionality  
5 and so on are relevant, we see that.

6 But, to be clear, we don't accept that these requests are proportionate. It's just that  
7 the other defendants have voluntarily agreed to go away and --

8 **THE CHAIRMAN:** Can I just go back? What may be proportionate can be determined  
9 in part by figuring out who's going to pay for it. So one may say that it's  
10 disproportionate to order this disclosure in circumstances where they're not going to  
11 pick up the bill. On the other hand --

12 **MR RAYMENT:** Yes, I agree.

13 **THE CHAIRMAN:** -- if they are going to pick up the bill, it may be more proportionate,  
14 but what would be disproportionate, on one view, is to require your clients to do this  
15 exercise without the benefit of a costs protection.

16 So I can see why Mr Bates is saying what he says, but I do think, in the whole context  
17 of determining these issues, I'm not likely to ignore the fact that disclosure should only  
18 be ordered when it's necessary and proportionate and it's fair, and as part of that  
19 question you need to look at a number of things. One is the settlement agreement  
20 itself may be a factor as to whether it's proportionate, let alone fair, to order disclosure.  
21 But the other bit is the costs bit. So I'm not sure if there's a sort of --

22 **MR RAYMENT:** That's very helpful, when you put it that way.

23 **THE CHAIRMAN:** I don't think it's as clean as Mr Bates is saying, necessarily as clean  
24 as I want to say it. But, at the end of the day, I'm pretty familiar with the Trucks cases;  
25 I'm familiar with all the disclosure; I know all this about expert led disclosure; I can form  
26 my own view on whether or not this is proportionate in the context of the fact that

1 they're not offering to pay your costs.

2 So I'm not necessarily, when I give a ruling in maybe an hour's time, I'm not committing  
3 myself to saying I'm not going to say anything about proportionality, because  
4 I probably will say something, even if Mr Bates isn't happy with it, because I do think  
5 that this costs point comes into it. Fairness always comes into it, and that's where the  
6 settlement agreement comes into it. So I'm not committing myself to say: I am  
7 promising now I'm not going to say anything about necessity, fairness and  
8 proportionality.

9 I hear what you say.

10 **MR BATES:** We --

11 **THE CHAIRMAN:** I have to be careful what I say, but I hear what you say. It's not  
12 an unfettered discretion for me to say: I don't think it's necessary and that's the end of  
13 it.

14 **MR BATES:** No. I just want to make absolutely clear that we are not coming here  
15 today expecting to come out, necessarily, with an order for Mr Thompson's request to  
16 be answered. We are anticipating a ruling on the two questions that were referred to  
17 be dealt with by you, sir, as chairman. If there are further arguments about  
18 proportionality, they can still be dealt with by the panel that's dealing with the trial.  
19 They already know that there is a settlement agreement. They are very well placed to  
20 take a view about proportionality because of their understanding of the answers to the  
21 questions, 3, 4, 5 and 6, and they will be assisted by your ruling, sir, as to the  
22 interpretation of the settlement agreement, because, of course, the only reason why  
23 it's had to be referred is because the settlement agreement terms themselves can't be  
24 shown to the trial panel.

25 **THE CHAIRMAN:** No, you don't want to do that, that's for sure.

26 Okay, yes.



1 **MR BATES:** I'll be as quick as I can on my submissions in relation to the other points  
2 then, because I'm not sure to what extent I am still required to answer them.

3 The third question was about other defendants who are in the position of leasing  
4 trucks.

5 Mr Thompson understands that there was at least one other, but part of the difficulty  
6 here is because we haven't yet received the data from those people, we don't know  
7 what data they have. So Mr Thompson is trying to seek, in a proportionate way, the  
8 data that he needs, without necessarily knowing what he's going to get back.

9 The fourth question was whether or not the expert can carry out the exercise without  
10 receiving this data. Well, it's the same answer, really; it may partly depend on what  
11 he receives back from the other defendants.

12 **THE CHAIRMAN:** The discussion with the other defendants, surely if they say, "Well,  
13 we weren't in this business. We don't have these documents, information"; wouldn't  
14 they have said that already?

15 **MR BATES:** As I say, my understanding of Mr Rayment's position is there is at least  
16 one other defendant that was involved in this business.

17 Part of the difficulty here is there was very belated engagement by the defendants'  
18 experts. The experts are instructed by the defendants, including Daimler, who had  
19 been having discussions directly between the experts about disclosure.  
20 Unsurprisingly, the defendants' experts have been keen to prioritise their own data  
21 requests.

22 But the whole point of the process the Tribunal has set up with discussions directly  
23 between the experts was to try to get as much information as possible shared openly  
24 about what data all the different parties to the Second Wave proceedings have.  
25 Unfortunately, that engagement from the defendants, collectively, has not been what  
26 it should have been. That has greatly increased the difficulties for Mr Thompson in

1 getting an understanding of what data it is that they have to provide.

2 **THE CHAIRMAN:** The MAN defendants seem to have some data. They must have  
3 some because of the evidence statement that you produce as an exhibit.

4 **MR BATES:** Yes, and, of course, we're looking at data going back many, many years  
5 because of the length of the trucks cartel. So what data they still have, going back  
6 decades, remains to be seen.

7 **THE CHAIRMAN:** I know. That's the problem with this case.

8 **MR BATES:** It also may be that some of this data was gathered -- although perhaps  
9 in a slightly different form -- for the First Wave proceedings. As I say, it's a pity there  
10 wasn't more engagement between the experts at an earlier stage in response to  
11 Mr Thompson's request.

12 **THE CHAIRMAN:** Yes.

13 **MR BATES:** The fifth question was about whether any other experts in the Wave 2  
14 proceedings who are considering pass on in leasing. Well, of course, all the experts  
15 who are instructed by people in the supply chain to whom lessors allegedly passed  
16 on, they will also be looking at pass on by lessors and to lessors, because it will be  
17 relevant input to their analysis. So that will be manufacturers, supermarkets, pretty  
18 much any business that had a need to use trucks.

19 The sixth question was about whether a request for documents and  
20 narratives -- I come back to the point I made earlier about engagement between the  
21 experts. There should have been more engagement. There has been some limited  
22 engagement. But, obviously, the defendants' experts are limited by what information  
23 they're told by their client as to what data is already available.

24 The seventh, about the ballpark figure, I think is not for me to answer.

25 **THE CHAIRMAN:** No, I'll wait for Mr Rayment to come back on that.

26 **MR BATES:** I'll be as quick as I can in my submissions on the interpretation of the

1 settlement agreement. Obviously, it's a contract.

2 **THE CHAIRMAN:** Yes.

3 **MR BATES:** So the Tribunal won't need any reminding of what Lord Hoffmann said  
4 in *Investors' Compensation Scheme* and what was said in *Rainy Sky*. You will be very  
5 familiar with that.

6 **THE CHAIRMAN:** Everyone cites it, yes.

7 **MR BATES:** But what I draw from it is that court's task involves ascertaining what  
8 a reasonable person would have understood the parties to have meant. The  
9 reasonable person is one who has all the background knowledge which would  
10 reasonably have been available to the parties in the situation in which they were in at  
11 the time when they made the contract. The court has to have regard to all the  
12 surrounding circumstances. So we say that that is the key, actually, to answering the  
13 question about the interpretation of the settlement agreement.

14 So the points that I'm going to address you on -- as quickly as I can -- is, first of all, the  
15 context in which the agreement was reached. That context includes particularly the  
16 Tribunal's mechanics judgment. It was also a context -- and this is a really important  
17 point -- it's the context in which the pass on experts -- who were instructed by the  
18 Daimler Defendants, amongst others -- were actively pursuing, and indeed they  
19 continue to pursue, requests for data from the EC claimants, which will inform those  
20 experts' work, including in relation to claims by other claimants against the Daimler  
21 claimants. So that's claimants with whom Daimler has not settled.

22 So that's the context.

23 Secondly, the meaning of the word "claim", it says -- well, as I said, it should be  
24 interpreted in the context I've set out and in light of its purpose. We say it covers action  
25 for damages or an injunction, or some other remedy. So, in other words, what a lawyer  
26 or an informed layman would normally use the word "claim" to refer to. But we say it

1 doesn't include applications for disclosure of documents relevant to claims that are not  
2 between the Edwin Coe claimants and the Daimler Defendants.

3 **THE CHAIRMAN:** Can we just wind back on that?

4 **MR BATES:** Yes.

5 **THE CHAIRMAN:** I presume you accept, in view of *Gorbachev v Guriev* and all these  
6 other cases, that an application for non-party disclosure and an application for  
7 pre-action disclosure are claims particularly for the purposes of applying to serve out  
8 of the jurisdiction.

9 The difficulty I have with Mr Rayment's submissions on this is he gives the example of  
10 pre-action, non-party, *Norwich Pharmacal*, and I fully accept they are examples of  
11 claims. It's established and it's pretty clear. You could bring, as you know,  
12 a *Norwich Pharmacal* by way of writ under the old rules and it's part 8 under the CPR.  
13 But what I'm not aware of is any authority saying that when you're seeking inter partes  
14 disclosure in the context of an ongoing claim that in itself is a claim. It's an application  
15 within a claim. But, unless I've missed something, I don't currently think it's a claim.

16 **MR BATES:** We respectfully agree. We haven't ourselves been able to identify any  
17 authorities saying that it would be a claim. Indeed, I made the point earlier that this is  
18 not even, in this case, a request simply within a claim; it's a request within the Second  
19 Wave proceedings and the particular framework that the Tribunal set up in the  
20 mechanics judgment, where Mr Thompson has a job he needs to do within this overall  
21 process where the independent experts are assisting the Tribunal to allocate pass on  
22 throughout the supply chain. So that's what it is. And we agree it's not a claim, even  
23 for the purposes of CPR Part 6.

24 But we would also take issue in principle with the notion that the meaning of the word  
25 "claim" in CPR Part 6 is somehow to be read across into the interpretation of the  
26 settlement agreement, which was for a completely different purpose and for

1 a completely different context. So we say it's contrary to *Investors' Compensation*  
2 *Scheme* to just read across the definition of "claim" from Part 6.

3 You, sir, have already recognised that Part 6 is specifically about service of  
4 documents. It's not even the whole CPR's definition of claim, just for Part 6. If the  
5 word "claim" as used in the Practice Direction B to CPR Part 6 didn't include  
6 applications for third party disclosure, that would have had the draconian consequence  
7 that you could never serve out an application for third party disclosure. It's within that  
8 context of the interests of the English courts trying to do justice in proceedings before  
9 the English courts that need disclosure from outside the jurisdiction that that  
10 interpretation was reached.

11 **THE CHAIRMAN:** For a while it was quite a controversial point, wasn't it, whether or  
12 not you could get permission to serve out for either non-party disclosure or for  
13 pre-action disclosure? You can see how gateway 20 has been used to provide a hook  
14 on something that, let's say, academics had legitimately different views as to whether  
15 or not you could do it.

16 **MR BATES:** Yes. Well, there were a number of different tools or reference points  
17 that the Court of Appeal used to reach the conclusion that it did. If I can show you the  
18 Court of Appeal judgment, which is authorities, tab 6.

19 **THE CHAIRMAN:** Yes.

20 **MR BATES:** If one first looks at paragraph 22, which is at bundle page 45.

21 **THE CHAIRMAN:** We're talking about statutory interpretation there, yes?

22 **MR BATES:** Yes. And this was statutory interpretation, so interpreting Part 6.

23 **THE CHAIRMAN:** Exactly.

24 **MR BATES:** And they set out there, at paragraphs 22 and 23:

25 "The modern approach to statutory interpretation is in effect of the purpose of the  
26 legislation which must be derived from its language and context. It is to give effect to

1 Parliament's purpose."

2 So the controversial provision should be read in the context of the statute as a whole  
3 and the statute should be read in the historical context of the situation which led to its  
4 enactment.

5 Then 23:

6 "It is a duty of the court in accordance with ordinary principles of statutory construction  
7 to favour an interpretation of legislation which gives effect to its purpose rather than  
8 defeating it."

9 So that was the starting point, not the *Investors' Compensation Scheme* principles.

10 Then, when one comes to paragraphs 31 to 34, one can see the reasoning.

11 **THE CHAIRMAN:** I'm very familiar with that.

12 **MR BATES:** Yes. The point I make about paragraph 31 is that at that time -- 31 and  
13 32. At that time, CPR Part 6 actually contained a definition of the term "claim". That  
14 definition of the term "claim" included specific reference to petitions and applications  
15 made before actions, et cetera. Then, of course, when you look at the gateways  
16 themselves, in 6B, they used the word "claim" in all those different contexts for each  
17 of those gateways. So you had those indicators within Part 6 and the Practice  
18 Direction as to what the word "claim" means in that context.

19 **THE CHAIRMAN:** But people would turn it on its head and say: it's not really a claim.  
20 Hence you can't get non-party or pre-action disclosure. You can't get leave to serve  
21 out. But these decisions that are referred to in here, they come to a particular view  
22 which enables it to be done.

23 **MR BATES:** Yes. They come to a particular view in light of the purpose of Part 6 and  
24 in light of the definition of the word "claim" in Part 6, and also in light of the way the  
25 word "claim" is used in all the different gateways in 6B. Now, none of those three  
26 factors have any relevance to the interpretation of the settlement agreement.

1 So we say that the *Gorbachev* case is just simply irrelevant for the purposes of this  
2 hearing.

3 With regard to the design of the Second Wave proceedings, I don't know if you, sir,  
4 have had an opportunity to read at least the whole of paragraph 14 of the mechanics  
5 judgment?

6 **THE CHAIRMAN:** I'm very familiar with the mechanics judgment.

7 **MR BATES:** Yes.

8 **THE CHAIRMAN:** I'm fully aware of the strengths and limitations of expert-led  
9 disclosure, and this hearing itself is a reflection of the consequences of that.

10 **MR BATES:** Yes. It's not just expert-led disclosure, the whole model is unique.  
11 Because one has other CAT proceedings where you have expert-led disclosure  
12 between -- proceedings between two parties, for example, which is rather simpler.  
13 But, in this case, where what you're trying to do is look at pass on throughout a whole  
14 supply chain, require the claimants to select lead claimants for the different places in  
15 the supply chain and then have everybody else standing behind them bound by the  
16 outcomes that are reached from that process.

17 One can understand the reasons of practicality why the Tribunal favoured that  
18 approach, given the hundreds of claims in the Second Wave proceedings, but it does  
19 give rise to particular issues that even expert-led disclosure doesn't normally give rise  
20 to.

21 **THE CHAIRMAN:** For my part, I would much rather have the additional method where  
22 you have solicitors filtering it all, dealing with it, because, at the end of the day, the  
23 solicitors have a huge amount of experience in disclosure, the practicalities, the ability  
24 to work with other firms of solicitors to get the right result. I must say for my part, the  
25 way it was done by the solicitors in the First Wave was a very good example as to how  
26 it should be done. The lawyers all worked really well together.

1 **MR BATES:** Yes.

2 **THE CHAIRMAN:** But Wave 2 was a different kettle of fish, in the sense that it's just  
3 so many parties that the Tribunal clearly was trying to find a mechanism that would  
4 work, fearing that the traditional mechanism may not be right. Time will tell which was  
5 the right one or wrong one for this case.

6 **MR BATES:** The particular difficulty in the Second Wave is that you have single firms  
7 of solicitors representing people at multiple different levels of the supply chain, who  
8 might have differing interests, which obviously makes it more difficult if you're going to  
9 select simply one particular firm, for example. One could have had test cases,  
10 perhaps. That was the alternative that was on the table. But the Tribunal's reason for  
11 not wanting to use the test case approach was that they were concerned that the  
12 defendants would then settle with the test claimants.

13 **THE CHAIRMAN:** Yes.

14 **MR BATES:** They explained that in the judgment. They also explain, in paragraph 14,  
15 that's why they set up a system where you have these experts instructed by lead  
16 claimants. But, if the lead claimant settles, another claimant comes in to be the lead  
17 claimant, so you don't have to delay the trial listing.

18 **THE CHAIRMAN:** Yes, I'm fully aware of that.

19 **MR BATES:** I won't labour the points then. But, for all those reasons, we say this is  
20 really a sui generis process that the Tribunal laid down and that is the factual context  
21 against which the parties made the settlement agreement.

22 As I've already mentioned, it was also a context in which the defendants' experts were  
23 already pursuing data requests from the Edwin Coe claimants. Those requests have  
24 not been dropped; they're being actively pursued by experts instructed by Daimler.  
25 Daimler have not suggested that they will somehow be barred from using the expert  
26 report or the parts of their expert report that draw upon the data that those experts



1 have requested and will be receiving from the Edwin Coe claimants.  
2 So those are all part of the practical context against which the settlement agreement  
3 was agreed.  
4 In terms of the meaning of the word "claim" in the settlement agreement against that  
5 context, the Tribunal may well have read the whole of the settlement agreement, so  
6 I won't go through the individual provisions, save to say, in relation to 10.8 -- which is  
7 deployed against me -- all that 10.8 is doing is making clear that the disclosure that  
8 had been provided by the defendants could still be used by the claimant. It does not  
9 say that no further data can be sought or that no further data provided by the Daimler  
10 Defendants to the experts going forward could be relied on by the Edwin Coe  
11 claimants, or any expert they're instructing.  
12 As I've said, given the context within which the settlement agreement was reached,  
13 with these outstanding data requests on the table, one would have expected that to  
14 be addressed head on if the parties really expected that the settlement agreement  
15 would have the effect that it's now contended to have.  
16 A term like "claim", it takes its precise meaning from the context. To be clear, I have  
17 two alternative cases on this. I only have to succeed on one of them.  
18 The first is that the term "claim" as used in the settlement agreement doesn't cover  
19 applications for disclosure, whether they are characterised as third party disclosure or  
20 not where this does not relate to any actual or proposed claim for any damages or  
21 other remedy against the party to the agreement. Of course, the agreement fully  
22 protects the Daimler Defendants against any further liability to the Edwin Coe  
23 claimants. So, to that extent, it's clearly fully achieving the purpose of the settlement  
24 agreement.  
25 But my alternative is: even if you were not with me on that, sir, we would say, in any  
26 event, the term "claim" in the settlement agreement doesn't cover data requests made

1 by experts within the special process that the Tribunal designed for experts to request  
2 data from, to use the words in the mechanics judgment, parties to the Second Wave  
3 proceedings. Of course, Daimler undoubtedly continues to be a party to the Second  
4 Wave proceedings, notwithstanding the settlement agreement, and it understood that  
5 when it signed the settlement agreement.

6 We would say that when the Tribunal looks at requests by experts following the tables  
7 that the experts prepare to try to agree the scope of each other's requests, the Tribunal  
8 is furthering its own procedure to enable it to decide what it needs to decide at the  
9 Second Wave trial, that it's not upholding any sort of claim, any sort of assertion of  
10 right by the party or parties who happen to be instructing that expert at this point in  
11 time, bearing in mind, as I have said, the party instructing the expert may change.

12 Finally on this, that Daimler's argument that our interpretation would discourage  
13 settlement agreements is unrealistic. The Daimler Defendants, they always knew  
14 when they were signing the settlement agreement that they would need to continue,  
15 as parties to the Second Wave proceedings, to provide data requested by the experts  
16 to inform the work. And the outcome of the Second Wave trial would remain relevant  
17 to Daimler because of all these other people further down the supply chain who were  
18 bringing claims against Daimler. But there's no reason why it wouldn't still be in their  
19 interests to settle the claim with particular claimants to draw a line under the liability,  
20 and that's what we say has been done. It's achieved the purpose of the settlement  
21 agreement.

22 Finally, sir, I'm conscious that I've used up my hour.

23 Just on the third party disclosure costs issue, of course the general rule is that costs  
24 relating to disclosure are dealt with as part of the proceedings.

25 So that's the starting point.

26 But where the request for data is from a party who's not before the court, then it's

1 understandable why a different approach is taken and it's taken for two reasons.

2 The first reason is that the person who's being asked to provide the material has no  
3 interest, perhaps, in the proceedings in which the documents are going to be used, so  
4 it would be unfair if they were not indemnified against those costs.

5 The second reason is that -- and you, sir, have already effectively noted this -- if they're  
6 not going to be there at the end of the proceedings to make submissions about costs,  
7 they would be prejudiced in that way.

8 Those are the two reasons.

9 Neither of them is applicable to Daimler. They do have an interest in the Second Wave  
10 proceedings because they're still parties to the Second Wave proceedings for the  
11 reasons I've outlined. And, secondly, they will be there at the end of the proceedings  
12 to make their submissions to the Tribunal about how their costs can be dealt with.

13 Now, of course, if they have any concerns about whether these data requests from  
14 Mr Thompson are necessary or proportionate, they can raise those concerns before  
15 the Tribunal panel that's dealing with the trial. Indeed, they already have done, and  
16 the other defendants did as well. It's just the other defendants have then resolved that  
17 position between the defendants' joint expert and Mr Thompson. So that's why the  
18 Tribunal in the end, at the hearing in December, didn't need to make a ruling on it. But  
19 if the Tribunal has looked at objections that the Daimler Defendants could raise, well,  
20 they can still raise further objections now relating to proportionality and the Tribunal  
21 says: no, we've looked at these tables pursuant to the proceed we've laid down, we're  
22 satisfied that Mr Thompson's request is proportionate. And this data needs to be  
23 provided for the purposes of issues that we, the Tribunal, still need to resolve at the  
24 trial in 2026 because Daimler, and indeed other defendants, haven't yet settled with  
25 all the claimants in the supply chain. If the Tribunal decides that; why should those  
26 costs not be part of the overall pool of costs that the Tribunal can make awards about

1 between people who haven't settled at the end of trial? Because it's all data that's  
2 required for the trial because the people going to the trial haven't settled.

3 So, for all those reasons, we say that this is not a third party disclosure order situation.  
4 We also make the point: in understanding the way that the Second Wave works and  
5 the mechanics judgment works, it is relevant that different claimants' experts can use  
6 and even request data from other claimants, even though there's no claim between,  
7 obviously, one lot of claimants and other claimants. It's because they're all parties to  
8 the Second Wave proceedings that those requests to be made. I've put a footnote in  
9 my written submissions noting that the Tribunal has already made provision for data  
10 to be shared with the different experts for the different claimants, precisely because  
11 you have different experts who are represented at different levels of the supply chain  
12 who are going to be looking at the same aspects of pass on. Nobody's saying the  
13 claimants' experts can't request data because they're not suing the other claimants.

14 Not all claimants have sued all the defendants. That's another feature. When the  
15 claimants issued their claims, they made different decisions amongst the different  
16 claimants' groups about which defendant undertakings they would choose to sue and,  
17 also, which companies within the defendants they would sue. Of course, it's open to  
18 those defendants who have sued to then interplead some other defendants and, to  
19 some extent, that happened with the claims. But the fact is the Tribunal just cut  
20 through all that, put all these things into the Second Wave, and established this sui  
21 generis process for all parties to the Second Wave proceedings to provide data  
22 requested by the experts in order that the experts can give the Tribunal the assistance  
23 it needs at the trial to determine pass on across the supply chain, and we say that is  
24 not a third party disclosure situation so far as any party to the Second Wave  
25 proceedings is concerned.

26 Sir, those are my submissions.

1 **THE CHAIRMAN:** Thank you very much. Mr Rayment, we'll have a break now. So  
2 you can get instructions on the costs point while we have a break.

3 **MR RAYMENT:** Very good, sir.

4 **(3.00 pm)**

5 **(A short break)**

6 **(3.18 pm)**

7 **THE CHAIRMAN:** Yes, Mr Rayment.

8

9 **Submissions by MR RAYMENT**

10 **MR RAYMENT:** I'm just going to go through the questions; is that okay?

11 Is there any authority on the question of whether a claim within inter partes  
12 proceedings -- is there any authority as to whether an application for disclosure within  
13 inter partes proceedings is a claim?

14 We're not aware of any authority on that point.

15 **THE CHAIRMAN:** What about the costs point?

16 **MR RAYMENT:** But we do maintain, however, if you're looking at a word on a  
17 dictionary meaning, an ordinary use meaning, is so broad it would include a claim for  
18 disclosure in relation to an inter partes disclosure application.

19 So I just wanted to make that point clear.

20 On the delay to the dismissal order, the delay, as far as we're concerned, is with the  
21 Edwin Coe claimants relating to the pleading amendments that are required under the  
22 settlement agreement. The non-Daimler Defendants reverted to the Edwin Coe  
23 claimants on 27 November. We confirmed, on 28 November, that we were content  
24 with the amendments proposed by the non-Daimler Defendants. They were minor  
25 comments, it has to be said. Therefore, we can't understand why there is a delay to  
26 the dismissal order being submitted and made. I think it's important to be clear

1 that -- because it wasn't clear to us how significant this point was.

2 But, as far as we are concerned, the settlement agreement creates a binding  
3 obligation to submit the dismissal order to the Tribunal, whereupon the proceedings  
4 are dismissed. On that basis, it's not correct to treat this as an inter -- if it is being  
5 suggested that is the basis on which this can be treated as an inter partes claim, we  
6 respectfully disagree.

7 **THE CHAIRMAN:** The thing is the date on which the claim is to be dismissed falls  
8 well after the date after the application was taken out. So the application was taken  
9 out on 4 October. At that stage, you're still parties to the same proceedings, albeit  
10 you're going down a path where it's going to be dismissed.

11 **MR RAYMENT:** I respectfully don't accept that.

12 The claimants can't in good faith say that this application be treated on the basis that  
13 it is an inter partes application. You have to treat it as that which should be  
14 done -- ought to be done as treated as done.

15 **THE CHAIRMAN:** But what they say --

16 **MR RAYMENT:** I know what --

17 **THE CHAIRMAN:** Is that they rely on this mechanics judgment which says: we're not  
18 going to have discovery --

19 **MR RAYMENT:** I'm going to come to that.

20 **THE CHAIRMAN:** -- we have this expert-led stuff. And as a result of that it's all very  
21 cosy, everyone can ask requests of each other and all that sort of stuff.

22 **MR RAYMENT:** Yes. The world as we know it is completely --

23 **THE CHAIRMAN:** Yes, yes, okay. What about the costs point?

24 **MR RAYMENT:** I'm coming to that. I have an answer for you.

25 Just before I do, let me run through the questions you asked.

26 On the leasing question, yes, all the other OEMs do some leasing. So of the non-

1 settling OEMs you have six possibilities who may have information about their leasing  
2 activities.

3 The fourth question, which is obviously --

4 **THE CHAIRMAN:** How many OEMs are there?

5 **MR RAYMENT:** Seven. I'm treating Volvo and Renault as separate. Obviously,  
6 they've since merged. It's MAN, DAF, Iveco, Scania, Volvo and Renault. So that's  
7 six. Seven, if you include us.

8 **THE CHAIRMAN:** Are they saying the other six have agreed to provide this  
9 disclosure? Or five?

10 **MR RAYMENT:** They have taken -- I don't propose to speak for them. But my  
11 understanding is they have agreed to go away to look to see whether they have  
12 information or documents that fall within the off-the-shelf or low-cost amendment to  
13 Mr Thompson's request. So, originally, Mr Thompson's request was much more  
14 extensive and it's gradually been pared back. Currently, as you will have seen from  
15 the request, what he is asking for is off-the-shelf material, ie pre-packed, or material  
16 that can be provided at low cost.

17 **THE CHAIRMAN:** But what he's asking for is both information and documents, ie  
18 answers to specific questions. But, in the context of that, he expects to get documents.

19 **MR RAYMENT:** He does. He makes express request for documents. That's request  
20 (e), I think.

21 **THE CHAIRMAN:** Shall we look at that?

22 **MR RAYMENT:** Yes. I think it's at 2.6 of the hearing bundle.

23 **THE CHAIRMAN:** Yes, read it out to me.

24 **MR RAYMENT:** Sorry, it's a bit on the small side. In respect of request (e), what's  
25 asking for in respect of this request is:

26 "Please provide a high level narrative response and/or off-the-shelf documents from

1 the period in question."

2 **THE CHAIRMAN:** How does that link with the --

3 **MR RAYMENT:** And that relates to independent truck rental and leasing companies.

4 **THE CHAIRMAN:** When I look at this report or request that's been served of

5 30 August, at paragraph 5, it has up to category (e), doesn't it? It's (a) to (e). This is

6 page 65. Look at page 65.

7 **MR RAYMENT:** Sorry, you're not on the updated version. The updated version is at

8 tab 2.6, page 113 and following.

9 **THE CHAIRMAN:** Okay.

10 **MR RAYMENT:** You see, that's very important because obviously that includes the --

11 **THE CHAIRMAN:** It includes the documents.

12 **MR RAYMENT:** You see, as I said, the previous request was more extensive and

13 he --

14 **THE CHAIRMAN:** Where do I see the list of requests on this one?

15 **MR RAYMENT:** There is some introductory text in landscape.

16 **THE CHAIRMAN:** I have that.

17 **MR RAYMENT:** Then, on page 117, you see the start of the requests. They are listed

18 by letters in the left hand column; you see (a)? It's quite small, I'm sorry.

19 And there are requests (a) through to (e). (e) is what I was just referring to you, on

20 page 127.

21 But you're right, with respect, that all -- even though this is the updated schedule, all

22 these requests include documents within them. All involve the need to identify and

23 refer to documents, for the main part.

24 So I think that's the answer to your question six. They must be expecting documents,

25 given the nature of the request. You are right on that, even though we're actually

26 looking at this version of the schedule now.



1 **THE CHAIRMAN:** Yes.

2 **MR RAYMENT:** So the point I was on when we took that diversion was about whether  
3 they need the disclosure. Of course, we say no, absolutely not. They have a panoply  
4 of defendants still available to them who are actually within the proceedings, as  
5 opposed to having settled out of them, so they can get the information from the  
6 ongoing defendants.

7 Again, the need for this disclosure is, again, somewhat questionable because, as you'll  
8 recall from your experience of Wave 1, in the *Ryder* and *Dawsongroup* proceedings,  
9 this information wasn't requested and sought by experts in that case. So, being quite  
10 clear about it, if it's relevant, we say they certainly don't need that information.

11 Question 5, no other experts in the Second Wave are seeking this disclosure. As we  
12 understand it, that's why, in paragraph 1 of the Thompson schedule, he says he's  
13 instructed by the Edwin Coe lessors, claimants, because he isn't representing  
14 anybody else or instructed by anybody else, because they've all settled.

15 **THE CHAIRMAN:** Are you saying they're not seeking disclosure from anyone or is it  
16 just from you?

17 **MR RAYMENT:** I don't think they're seeking it from anyone.

18 Then, finally, I think we do come to the number in relation to disclosure.

19 **THE CHAIRMAN:** Yes. I only want a rough number.

20 **MR RAYMENT:** I'm sorry, sir?

21 **THE CHAIRMAN:** I only want a rough number, ballpark range.

22 **MR RAYMENT:** Absolutely. Having experienced heads behind me knowing the case,  
23 they suggest the number is probably somewhere between 150,000 and 250,000, but  
24 with very much a view that it's likely to be at the upper end of that range, not the lower  
25 range. You've seen the costs schedule in relation to this matter already.

26 **THE CHAIRMAN:** That's mine. It's what my instincts told me would be the right range.

1 Maybe you're just parroting it back, I don't know.

2 **MR RAYMENT:** No, definitely not.

3 **THE CHAIRMAN:** I'm pretty good at knowing how much these costs exercises have  
4 been taking because that's certainly one of the things I followed through in the First  
5 Wave; finding out what were the consequences of the orders we were making.

6 **MR RAYMENT:** Yes, I appreciate you saw a lot of those.

7 **THE CHAIRMAN:** Yes, I wanted to have those figures, and people would write in with  
8 figures and your stuff like that, so I have a pretty good idea.

9 **MR RAYMENT:** Just to be clear about proportionality: obviously, that ballpark figure  
10 that I've given is relevant to proportionality more generally. But there's also an aspect  
11 of proportionality -- well, the point is -- and I think you have this -- that Mr Thompson  
12 has tried to reduce the burden of his request by asking for disclosure or information to  
13 be provided that is either off-the-shelf, so pre-prepared, or low cost.

14 The point we make is that we don't have any off-the-shelf material, because this is not  
15 a matter that we've ever had to investigate before because, as I've just mentioned,  
16 during the Wave 1 proceedings we didn't have to do it. So we would literally be starting  
17 from scratch on this. As I've already made the point, Daimler is a large, complex  
18 organisation. We're talking about historical information, that is going to take a lot of  
19 time, and that's why that estimate that I've just given you is as it is. In our respectful  
20 submission, that is not low cost.

21 OTS, obviously, is no cost at all. There's no problem in providing OTS material. But  
22 we don't have any OTS material and anything beyond that is not low cost.

23 Those are the pertinent points.

24 **THE CHAIRMAN:** Yes, I have your submissions in the skeleton, so you don't need to  
25 repeat those. I don't necessarily agree with them all. But, at the end of the day, it's  
26 3.40, and if I can give you until 3.45, then we'll finish in the range.

1 **MR RAYMENT:** Yes.

2 **THE CHAIRMAN:** On the second issue, I think it's pretty clear where I am on that,  
3 which is that I'm not going to treat this as a non-party disclosure application. But, on  
4 the other hand, there are parallels. The parallel is that in this type of scenario, given  
5 the context of the settlement agreement, one would expect, if someone wants to get  
6 this disclosure, they're going to have to come up with the money and cover that cost.  
7 That's why although it's not technically all 63 or CPR 31.17 by way of an application,  
8 when you look at the rationale behind the normal order one makes for costs on those  
9 applications, it applies equally to the scenario that you're facing, in circumstances  
10 where you have settled with someone and that it has to be resolved now what those  
11 costs are going to be, because I don't accept – Mr Bates says that you can proceed  
12 on the basis that, even if you win at trial, other people are going to rush around and  
13 say: here's the cheque for the 150,000 to 250,000.

14 I just don't see that happening.

15 **MR RAYMENT:** No, I don't see that happening either. It's simply not correct and  
16 actually contrary to what he said. In my respectful submission, if the Tribunal was to  
17 adopt his proposal, it would seriously discourage settlements because what you would  
18 find is people would have to hang on to the end in order to be there to debate the  
19 costs, which would potentially be very significant over the life of the proceedings.

20 Mr Bates has made a number of points about the nature of the Second Wave  
21 proceedings and the picture that he presents is not correct, in my respectful  
22 submission.

23 The basic framework that's set out in the mechanics judgment is really – it's not  
24 a question that there's no disclosure; it's that the Tribunal has simply provided for  
25 a scheme to apply to the Second Wave proceedings which dispenses with some of  
26 the normal procedural aspects of the provision of disclosure and information. And in

1 fact, in a sense, I'm addressing the godfather of this process, because, you, sir, were,  
2 I believe, on the original Tribunal which came up with the suggestion that a Redfern  
3 schedule procedure was a sound way of proceeding in these types of cases, and those  
4 enable informal engagement. We've also had case management meetings which are  
5 not formal applications. So the Tribunal was not able to make binding orders, but it  
6 was able to help the parties come to agreements about disclosure.

7 But, ultimately -- and this is the fundamental point -- at the end of the day, where  
8 requests are disagreed, that then triggers the need to invoke the formal powers of the  
9 Tribunal. At that stage, we are dealing with applications in the normal way in specific  
10 proceedings.

11 The Second Wave proceedings are not some amorphous blob. Specific applications  
12 have to be made, at the end of the day, where there are disagreements. In our  
13 respectful submission, it's simply not correct the way that Mr Bates has characterised  
14 the scheme of the Second Wave proceedings as established by the Tribunal in the  
15 judgment.

16 Another fundamental error that Mr Bates made in his submissions to you this afternoon  
17 is the comparison between active and stayed claimants and defendants who have  
18 settled.

19 On a number of occasions, Mr Bates made the point that as part of the Second Wave  
20 scheme of arrangement, if you like, the Tribunal said: fine, some claimants can have  
21 their claims stayed, if they want to. But that does not mean they're not liable to receive  
22 disclosure requests where the lead claimant, who is effectively representing them as  
23 a test claimant, settles their claim, or for some other reason doesn't have relevant  
24 disclosure.

25 But that is not the same case as a defendant that has settled. It's fundamentally  
26 different.

1 A defendant who has settled is not in the same position as a stayed claimant. They  
2 are simple not a party to the proceedings anymore. Therefore, applications for  
3 disclosure, and information and so on, are third party applications, in my respectful  
4 submission.

5 Yes, it's true that the Tribunal has introduced an innovative and flexible procedure for  
6 dealing with information and disclosure requests, but that simply doesn't mean that  
7 when push comes to shove on a disagreed request the Tribunal's normal powers and  
8 framework is dispensed with.

9 So the suggestion that the settlement agreement doesn't bind on Mr Bates' second  
10 point, which is somehow that the settlement agreement doesn't bind on an application  
11 in the Second Wave, because it's some new and unknown to man type of application,  
12 is not correct, in my respectful submission.

13 You have kindly indicated that you have read my skeleton and you have my points on  
14 the settlement agreement.

15 We obviously say that the word "claim", both in an ordinary and in a legal sense, is  
16 a broad one; that the definition of a claim in the settlement agreement is deliberately  
17 expansionary, not restrictive.

18 I'm just summarising my points.

19 We've also referred to you the *Gorbachev* case. Mr Bates says that *Gorbachev* is  
20 irrelevant. It's not irrelevant, but we don't even rely on it in the way that he says. What  
21 *Gorbachev* shows you is how, when you're looking at the word "claim" in  
22 a non-restrictive way -- which in my submission is the way "claim" is defined in the  
23 settlement agreement -- it is apt to include an application for third party disclosure. It  
24 includes procedural claims and substantive claims, if you want to draw that distinction.

25 It's very important, in our submission, to be clear about that.

26 Mr Bates also prayed in aid the context and purpose of the settlement agreement.

1 Well, in our respectful submission, it was to bring proceedings between these parties  
2 to an end and to achieve a clean break. His interpretation certainly is not consistent  
3 with either the wording or that important, overriding purpose.

4 That's all I want to say on the settlement agreement.

5 The final point in relation to the costs objection is that obviously you have well in mind  
6 our point, which is: why should we have to incur significant costs in relation to claims  
7 we have settled and which we have no prospect of recovering the costs from?

8 That's the critical issue in relation to the costs objection.

9 Nothing Mr Bates has submitted to you this afternoon has established there is any  
10 practical or viable way that Daimler would be able to recover those substantial costs if  
11 there was no order or agreement to indemnify Daimler. That's the really fundamental  
12 point.

13 **THE CHAIRMAN:** Okay. Mr Bates, is there anything you would like to say, very  
14 briefly?

15

16 **Submissions in reply by MR BATES**

17 **MR BATES:** Yes, two things. First of all, in relation to what the request actually is,  
18 my understanding is that document, the table that you were looking at, is from -- the  
19 date, according to the index, seems to be 14 November. My recollection is that there  
20 were further discussions between Mr Thompson and the defendants' joint experts right  
21 up until the morning of the case management conference, on 9 December.

22 **THE CHAIRMAN:** Yes.

23 **MR BATES:** So I don't think we actually have within this table the final formulation of  
24 the requests. As I've said, our understanding of this hearing was it was not to result  
25 in an order for disclosure one way or another, but rather to result in a ruling on the two  
26 points that have been referred. So I wouldn't take this table as necessarily being

1 an encapsulation of what the other defendants have agreed to do. But, to be clear, all  
2 that we're asking is for the Daimler Defendants to do what the other defendants have  
3 said they will do. That's the extent of what we're asking for.

4 With regard to how costs can be apportioned at the end of the proceedings, I've  
5 already made the point that pass on at the stage of the lessors will be relevant to the  
6 determination of issues at trial for other people in the chain, further down the chain,  
7 and that the material that's -- the data that's obtained as a result of these requests will  
8 be available to all the parties' experts with an interest in that issue to use for the  
9 purposes of the analysis. So, in my submission, there's no reason to take the view  
10 that those costs -- which are clearly costs of determining issues to be determined at  
11 trial -- would not be costs that could be adjudicated upon between the trial parties at  
12 the conclusion of that trial.

13 Those are my only two points. Thank you.

14 **MR RAYMENT:** Sir, I'm sorry to rise again, but it's just on a point of factual clarification  
15 in relation to what Mr Bates said about ongoing discussions with the joint experts right  
16 up until the application or the request being submitted. It's not correct that Daimler  
17 participated in those discussions. The joint experts were not instructed on behalf of  
18 Daimler to participate in those discussions and didn't do so on the part of Daimler.  
19 Just so that there's absolutely no doubt about the matter, Daimler hasn't pursued  
20 requests against the Edwin Coe claimants since the settlement.

21 I hope that clarifies the position.

22 **THE CHAIRMAN:** I think a lot's been clarified this afternoon.

23 This is only a short hearing and everything has to be done on a rough and ready basis.  
24 It's important that I give a ruling today. In my normal way, I'll give a ruling now. I may  
25 tidy it up a bit overnight, but you'll get something tomorrow.

26

1 (Ruling given)

2 **THE CHAIRMAN:** Shall we just deal with costs? Mr Rayment?

3

4 **Application for costs by MR RAYMENT**

5 **MR RAYMENT:** I apply for my costs of the application, my Lord, and the costs  
6 incurred in --

7 **THE CHAIRMAN:** I think it's difficult to resist that, isn't it, Mr Bates?

8 **MR BATES:** Yes, there is no resistance to costs in principle. I do have some  
9 submissions in relation to the quantum of the costs.

10 **THE CHAIRMAN:** Definitely. I've looked at your schedule, which is £50,000. I've  
11 looked at Mr Rayment's costs schedule, which is £150,000. I don't consider on a two  
12 hour application like this, even with the history of the previous arguments over it, that  
13 even £50,000 is a sum that I would order. So, subject to anything that Mr Rayment  
14 says, I'm inclined to make an order for £40,000.

15 Mr Rayment?

16 **MR RAYMENT:** Well, sir, there is quite a complicated history, as you've referred to.

17 **THE CHAIRMAN:** I'm sure there is.

18 **MR RAYMENT:** And although you say that still doesn't justify the amounts claimed in  
19 the costs schedule --

20 **THE CHAIRMAN:** You're telling me it's going to take £150,000 to £250,000 to carry  
21 out this exercise, which I agree with. I think, as you probably know, it could easily be  
22 at the top end of that. But to spend £150,000 on that is your client's prerogative.

23 I'm not saying they were wrong to spend that amount, because you've done  
24 a Rolls-Royce job and life has been made very easy for me by the way it's been  
25 presented, but I do think that what may be reasonable for your clients to do is not  
26 necessarily the test as to what I think should be paid by these claimants on this



1 application. I try and look at these things in the round.

2 I welcome, to be honest, hearings like this where parties have issues and they're  
3 thrashed out, and if we start making orders for £150,000 for coming for hearings like  
4 this, people are not going to be able to either afford or be willing to test things that  
5 need to be tested. This is a perfectly reasonable approach that was taken by  
6 Mr Bates, but he has lost, he's conceded he should pay the costs, and at the moment  
7 I feel that you've done pretty well today, and that £40,000 is the right figure.

8 You can try and move me, of course you can, but it's 4.10.

9 **MR RAYMENT:** Sir, there are a couple of points to be made. First of all, as I've said,  
10 the history is somewhat complicated, and I appreciate it's difficult in your position to  
11 form a clear view about whether those costs that were previously incurred, because  
12 this application has been floating around for a while, and the fact that we've had to  
13 prepare more than once for it has led to additional and unusual cost, and I appreciate  
14 it's difficult for to you form a view about the history of this.

15 So in those circumstances, it might be one way to deal with it would be to order  
16 a detailed assessment and to make a payment on account.

17 My second submission is that there is some without prejudice correspondence that  
18 has gone on in relation to this request, and in my respectful submission it shows that  
19 Daimler was extremely cooperative, within reasonable bounds. I think that the  
20 Tribunal should take account of that correspondence in forming its view as to what the  
21 appropriate level of costs --

22 **THE CHAIRMAN:** Is that without prejudice save as to costs?

23 **MR RAYMENT:** Save as to costs, yes.

24 **THE CHAIRMAN:** Where is it?

25 **MR RAYMENT:** I can produce that now.

26 **THE CHAIRMAN:** Yes, just produce it.

1 **(Handed)**

2 **MR BATES:** We do have a bundle, sir, with the without prejudice save as for costs  
3 correspondence. I don't know if ...

4 **THE CHAIRMAN:** It's okay.

5 **MR BATES:** If you have it all, that's fine, but I do have a bundle.

6 **THE CHAIRMAN:** I'm not going to spend much time on this, Mr Bates, it's 4.12 and  
7 we made it clear that this is only going to be a half a day hearing.

8 What do you want me to read?

9 **MR RAYMENT:** If you look at the first letter from Macfarlanes dated  
10 18 December 2024, which in the introduction refers to the information request  
11 application made by Mr Thompson. Then if you look over the page you see Daimler's  
12 position.

13 **THE CHAIRMAN:** You made an offer.

14 **MR RAYMENT:** We made an offer, which was basically to try and be as helpful as  
15 possible, but not involving us with any --

16 **THE CHAIRMAN:** Well that would have reduced the costs, wouldn't it. Okay, the next  
17 one, the other letter?

18 **MR RAYMENT:** There you have Edwin Coe's response, which didn't correctly reflect  
19 the offer that we'd made.

20 **THE CHAIRMAN:** Okay. The next one? It makes no attempt to engage.

21 **MR RAYMENT:** Yes.

22 **THE CHAIRMAN:** You've made an offer.

23 **MR RAYMENT:** The final letter in this quartet --

24 **THE CHAIRMAN:** I've read it.

25 **MR RAYMENT:** They've done worse than --

26 **THE CHAIRMAN:** I'll reflect on that.

1 **MR RAYMENT:** And they should have been more cooperative.

2 **THE CHAIRMAN:** Anything else you'd like to say, Mr Bates?

3 **MR BATES:** No, sir.

4

5 **(Costs ruling given)**

6 **MR RAYMENT:** I'm grateful, sir.

7 **THE CHAIRMAN:** Mr Bates, can I leave it up to you to draft the order for today,  
8 because I know we had that particular wording that we dealt with at the beginning in  
9 relation to the access to the settlement agreement. I'd rather I didn't do that, I think  
10 it's better that you do it, but I think you have the idea, that any application by anyone  
11 to see a copy of the settlement agreement has to be in writing, it's to be on seven days'  
12 notice to your client as well as Mr Rayment's client, and that you will have a right to  
13 file submissions in response, and then that can be dealt with, probably on paper.  
14 I have made it clear also that the settlement sum is not to be made publicly available.

15 **MR BATES:** Yes.

16 **THE CHAIRMAN:** Thank you very much to everyone. I know it's all fairly rough and  
17 ready, but it worked out quite well. I spent the morning looking at this, getting my head  
18 round it. The submissions were very, very good.

19 I was fascinated by the issue of whether or not inter partes disclosure is a claim or not,  
20 and you can see I have come to the view that I don't think it is, but I do take the clear  
21 view that non-party pre-action are claims. Both of you are right on different points.

22 So thank you very much for all your help, and I didn't mean to be that critical of your  
23 side in not providing me a costs estimate, I think there's a slight misunderstanding.  
24 I just want a ballpark figure.

25 I appreciate that costs in these cases are frighteningly high, and we have to do  
26 everything we can to try and make sure that costs don't escalate, if we can. I know

1 sometimes it's inevitable, and the Trucks cases are probably an exception where costs  
2 are really high of disclosure, for all the reasons we've debated in the past.

3 So thank you very much, gentlemen. I will rise.

4 **(4.20 pm)**

5 **(The hearing concluded)**

6

7

8

9

10

11

12

13

14

15

16

17

18