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IN THE COMPETITION

Case No. : 1282/7/7/18; 1289/7/7/18

APPEAL
TRIBUNAL

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

19 April 2021

Before:
The Honourable Mr Justice Roth
(President)
Dr William Bishop
Professor Stephen Wilks
(Sitting as a Tribunal in England and Wales)

BETWEEN:

UK Trucks Claim Limited
v
Fiat Chrysler Automobiles N.V. and Others
and
Road Haulage Association Limited
v
Man SE and Others

Monday, 19 April 2021

(10.00 am)

HOUSEKEEPING

THE PRESIDENT: Morning everyone. This case, as you all know, is being heard remotely, but it is, of course, just as much a full Tribunal hearing as if it was taking place physically in the courtroom of the Tribunal where I and one of the other members of the Tribunal are now sitting, the third member is, himself, joining us remotely.

There are a large number of you on the Teams platform, and still more watching on the live stream. I must, therefore, start with a warning. An official transcript of these proceedings is being produced in the usual way, but it is strictly prohibited for anyone else to make any unauthorised recording, whether audio or video, of the proceedings, and to infringe that prohibition is a contempt of court. This is no mere idle threat. The BBC was recently fined a significant sum for almost inadvertently making a recording of a planning case in the High Court, so this prohibition is being strictly enforced.

The fact that we have so many participants on the Teams platform for this hearing, obviously, is a challenge in technological terms. If, at any time,

1 you lose connection please send a message through to the
2 Tribunal Registry and we will try and pause until you
3 can rejoin, and, also, I would ask you, please, to put
4 your microphone on mute when you are not speaking, or we
5 will get background interference.

6 There is, we've noticed, some confidential
7 information in the bundles. It may well be that it's
8 not necessary for anyone to refer to confidential
9 material. If you do need to refer to it, if you can do
10 it by just drawing our attention to the page, and I hope
11 arrangements have been made for the Opus document
12 retrieval to be constrained in a way that it doesn't
13 reach anyone outside the confidentiality ring, but it
14 may well be that we don't need to look at any of those
15 confidential matters at all. If absolutely necessary we
16 can, of course, go into camera, but I hope that can be
17 avoided.

18 We will take a short break mid-morning and
19 mid-afternoon in the usual way, perhaps a slightly
20 longer break because of the strain of doing everything
21 on the screen. When we take our break you may wish to
22 remember to mute your microphone as the recording
23 continues to operate so -- not that I can imagine anyone
24 would wish to make any rude remark about the Chairman of
25 the Tribunal -- but in case you might be so tempted, I

1 expect you don't want it to be recorded and go on to
2 potentially the transcript.

3 Thank you all for your helpful skeleton arguments
4 which, of course, we've read. I can't pretend that
5 we've read everything that's been produced in terms of
6 the voluminous experts' reports. We've tried to divide
7 up the reading a bit between us, but, as I say, this is
8 not a case where it's just been physically possible,
9 given the volume of material, but I hope we've read the
10 key aspects.

11 As I understand it, it's been agreed that UKTC will
12 begin and, second, the other applicant in the other
13 matter, RHA, will then go second.

14 So, with those words of introduction I think
15 Mr Thompson, it's over to you.

16 Submission by MR THOMPSON

17 MR THOMPSON: I'm grateful, Sir. Can I just ask, before I
18 commence, whether the members of the Tribunal will all
19 be looking at hard copy or whether some will be looking
20 at hard copy and electronic? What is going to be the
21 most convenient reference system?

22 THE PRESIDENT: We will probably be doing a mixture,
23 certainly on my part I will, so that for such documents
24 as the key documents -- skeletons, claim form, reply and
25 so on -- we will be looking at hard copy, but Opus

1 should bring up an electronic copy as well, so if you
2 could give both references. If you need to go into
3 exhibits at any point, I think they will be purely
4 electronic. So if you can give both references, and can
5 I just say it may be somebody isn't muted because we are
6 getting a bit of a resonance.

7 MR THOMPSON: I'm not muted, and can I just say on behalf of
8 Mr Pickford and myself that we inadvertently turned on,
9 I think it was the Ring Central function and we heard
10 some remarks from members of the Tribunal, but I don't
11 think they added to the source of wisdom or caused any
12 injustice, so it is just an apology on our behalf.
13 We've now made suitable arrangements so it won't happen
14 again. Just to inform the Tribunal.

15 THE PRESIDENT: Yes. Thank you.

16 MR THOMPSON: The structure I was going to follow broadly is
17 the same as our skeleton argument. I was going to make
18 some introductory remarks about the nature of the test,
19 the statutory regime and the nature of the UKTC
20 application, and then I was going to address six,
21 perhaps not very surprising topics, namely
22 identification of the claims in the class, the
23 authorisation condition in relation to the class
24 representative, the two eligibility conditions,
25 commonality and suitability, and the opt-in opt-out

1 question, and then, finally, as it were, by way of an
2 introduction to next Monday's events, some remarks about
3 the expert evidence, and clearly I will seek to move as
4 quickly as I can because Mr Flynn needs his time which
5 starts at some point this afternoon.

6 So, first of all, the correct approach, and I think
7 the obvious place to start is the judgment of the
8 Supreme Court in Merricks, and, in particular, the
9 introductory paragraphs, paragraphs 1-5 and 19-21. I
10 suspect the Tribunal is very familiar with them, but it
11 may be worth just bringing them up for a moment. So
12 that's {JA/68/4}.

13 THE PRESIDENT: Yes. Just a moment. This is joint
14 authorities bundle at tab 68.

15 MR THOMPSON: Yes, and page 4 in the bundling. There is
16 obviously a summary of the regime throughout paragraphs
17 1-5, but, in particular, the first sentence of the
18 entire judgment:

19 "This appeal concerns the procedure for collective
20 proceedings introduced by amendment to the Competition
21 Act 1998 for the purpose of enabling small businesses
22 and consumers more easily to bring claims for what may
23 loosely be described as anti-competitive conduct in
24 breach of the provisions of the Act".

25 Then at paragraph 3 the Supreme Court sets out

1 a number of characteristic features, and then at
2 paragraph 5 the principal criteria, first of all, the
3 just and reasonable authorisation criterion, and,
4 secondly, the two eligibility criterion which I think
5 have been called the, "Commonality", and, "Suitability",
6 criterion, and then, in the passage at 19-21 which is
7 {JA/68/8}, there is a comment on the nature of the
8 regime, and I was particularly going to draw the
9 Tribunal's attention to the indented passages at
10 {JA/68/9} at B, D and E, and the comment after that at
11 F, and, in particular, the first comment:

12 "The aim of these proposals is, therefore, two-fold;
13 1) to increase growth by empowering small businesses to
14 tackle anti-competitive behaviour that is stifling their
15 business, and, secondly, to promote fairness by enabling
16 consumers and businesses who have suffered loss due to
17 anti-competitive behaviour to obtain redress".

18 So that's by way of the shape of the regime and its
19 intended beneficiaries, and then at paragraph 11 of our
20 skeleton argument which is at {A/1/3} to 4, we pick up
21 three features from the judgment, first of all from
22 paragraph 64 of the judgment, where this is
23 a multifactorial issue. Secondly, at paragraph 59, that
24 the certification process is not a merits test, except
25 in limited regards, and, thirdly, and that's the core

1 part of the judgment at paragraphs 47-54, that once
2 a class has identified that it has, on the balance of
3 probabilities, suffered at least some loss, then it is
4 for the Tribunal to do its best on the familiar broad
5 axe principle which applies in a particularly extreme
6 form in a large scale collective claim, as, of course,
7 was the case for Mr Merricks and his multitudinous claim
8 against MasterCard.

9 Just adding to those points, the basic point which
10 was picked up both by the Court of Appeal and by the
11 Supreme Court, is that section 47C(2) provides for no
12 individualised assessment of common issues or of damages
13 is needed for an aggregate award, and that's picked up
14 at paragraph 58 of the Supreme Court judgment. I don't
15 think we need to go to it, but that's at page 23 of
16 JA/68, that this is a radical modification of the
17 compensatory principle in collective claims.

18 The Supreme Court also referred to Canadian
19 precedent by analogy, at least, with approval, while
20 making it clear that its ruling was based on UK statute
21 and UK principles of civil procedure and that's at
22 paragraphs 37-42. That's {JA/68/16} to 18.

23 So that's a bit of a whistlestop tour of the
24 judgment, and there are obviously a lot of details in
25 there, but I'm aware that the President, in particular,

1 is very well aware of the nature of this judgment and
2 very familiar with the issues in the Merricks case.

3 Our overarching submission in relation to Merricks
4 is that the Court of Appeal and the Supreme Court have,
5 in the first major claim brought under this new
6 legislation, indicated clearly at least three things.
7 First of all, this is an exceptional statutory regime
8 that is being deliberately adopted by Parliament to
9 facilitate properly formulated collective actions in the
10 field of competition law.

11 Secondly, it was always intended to benefit not only
12 consumers, but also small businesses. Indeed, some of
13 the objectives appear to have given primacy to the fair
14 treatment of small businesses, and, thirdly, and in
15 accordance with Canadian precedent in reflecting basic
16 principles of the common law as amended by the statute,
17 the certification process is to be conducted in
18 a realistic way that will contribute to rather than
19 impeding the achievement of that statutory objective,
20 and I think that runs through the entire Supreme Court
21 judgment.

22 There is obviously more to be said in terms of the
23 regime, and we've said some of it in our pleadings and
24 our skeleton arguments, but that is by way of
25 introduction.

1 Secondly, the three mandatory conditions identified
2 by the Supreme Court for certification under the 1998
3 Act. Again, I'm aware that particularly the President
4 is very familiar with these rules, indeed he may have
5 written some of them, and that Mr Hoskins and Mr Harris
6 are very familiar with this regime. Mr Harris, indeed,
7 from a variety of perspectives.

8 The three mandatory conditions for certification in
9 the Act, and under the 2015 Rules, are at tab 6 and 11
10 of the joint authorities bundle, and I think it's worth
11 looking at them just to set the parameters for the
12 debate.

13 If one takes the Act first at joint authorities --

14 THE PRESIDENT: Yes, just pause a moment while we ...

15 MR THOMPSON: Can I bring up on screen {JA/6/4}? That sets
16 out the core provisions relevant to today's, or this
17 week's proceedings. First of all, 47B(5) which says
18 that the Tribunal may make a collective proceedings
19 order only under two conditions. The first one, (a), is
20 if it considers that the person who brought the
21 proceedings is a person who, if the order were made, the
22 Tribunal could authorise to act as the representative in
23 those proceedings in accordance with subsection 8, and
24 so subsection 8 has a further condition at 8(b) that the
25 Tribunal may authorise a person to act as the

1 representative only if the Tribunal considers that it is
2 just and reasonable for that person to act as
3 a representative in those proceedings.

4 Then the second condition is at 5(b), so relating to
5 the claims:

6 "In respect of claims which are eligible for
7 inclusion in collective proceedings ..."

8 And then the issue of eligibility is dealt with at
9 subparagraph 6, and is subject to two conditions, first
10 of all that they raise the same, similar or related
11 issues of fact or law, and, secondly, that they are
12 suitable to be brought in collective proceedings, so the
13 commonality and suitability conditions.

14 Then this -- these requirements are given effect by
15 the rules which are at {JA/11/1}, and again, if one goes
16 to {JA/11/20}, Rule 78 sets out a series of conditions
17 in relation to authorisation of the class representative
18 for giving effect to section 47B(5) (a) and (8), and
19 Rule 79 on the next page, {JA/11/21}, sets out a series
20 of conditions in relation to eligibility, and that
21 relates to the claims.

22 THE PRESIDENT: Yes.

23 MR THOMPSON: So, it is all pretty elementary stuff, but the
24 authorisation condition, which was applied by the
25 Tribunal in Merricks, relates to the quality of the

1 class representative, and the only issue raised by
2 MasterCard in relation to Mr Merricks was whether he had
3 sufficient funding. In the other respects I think he
4 was accepted as a suitable representative, and the
5 Tribunal will obviously be aware that that issue was
6 also raised in this case, and it was addressed in the
7 funding judgment in terms that were only appealed on the
8 single issue of the DBAs which the Tribunal will recall
9 was then the subject matter of the judgment in the Court
10 of Appeal, or rather the Divisional Court and there is
11 an application for permission to take that forward in
12 the Supreme Court which is pending, and the reference
13 there is at K/5, I think.

14 So the authorisation condition relates to the
15 quality of the class representative, and the eligibility
16 conditions relate to the claims. Those three conditions
17 are the three statutory conditions limiting the ability
18 of the Tribunal to grant the certification. Obviously,
19 the eligibility conditions are now to be considered in
20 the light of the judgment in Merricks in the Court of
21 Appeal and Supreme Court.

22 In UKTC's case, UKTC is, of course, the proposed
23 class representative, and the relevant claims are, as we
24 have put it, the claims of direct purchasers or direct
25 long-term lessees of a new UK-registered truck during

1 the cartel period and shortly thereafter, so one claim
2 for a new UK-registered truck acquired during that
3 period, and one sees that from the draft order which one
4 finds at tab 15 of Bundle B, which is the first B1
5 bundle. {B/15/3} at pages 3-6.

6 THE PRESIDENT: It's Bundle B, tab 15?

7 MR THOMPSON: That's correct. B1, 15. Grateful, Sir. The
8 claims are defined at paragraph 11 on page 6 {B/15/6}.
9 The first sentence where you will see that:

10 "The claims, covered by the collective proceedings
11 set out in this order relate to follow-on damages claims
12 for loss and damage allegedly caused in the UK to
13 members of the class by various truck manufacturers
14 which are addressees of the decision of the European
15 Commission dated 19 July 2016".

16 That obviously incorporates the definition of,
17 "Class", which is set out at paragraphs 8-10 of the
18 draft order, but the core definition is, "Persons who,
19 between 17 January 1997 and 18 January 2011 acquired one
20 or more new medium or heavy trucks registered in the
21 United Kingdom". That's B/15/3.

22 THE PRESIDENT: Just looking at the exclusions, which are in
23 paragraph 10 --

24 MR THOMPSON: Yes, Sir?

25 THE PRESIDENT: You have excluded dealers. At 10(d):

1 "Finance providers, converters and lessors are ..."
2 lessors as defined at 9(h).

3 MR THOMPSON: That's right.

4 THE PRESIDENT: Now, as I understand it, it's lessors who --
5 there is a lot of background noise. It may be that
6 someone who is on Teams but not counsel is not muted, so
7 I would ask everyone on the Teams platform, other than
8 Mr Thompson, please, to mute themselves.

9 Lessor leases out an operating lease or long-term
10 financing agreement, so if -- have I understood this
11 correctly -- if someone buys new trucks for a truck
12 rental business, other than where it is an operating
13 lease or long-term financing, they will be in the class?

14 MR THOMPSON: Yes that's right. I think that's a notable
15 distinction from the RHA class.

16 THE PRESIDENT: Yes. So that's because of the way lessor is
17 the exclusion, and the way that's defined.

18 MR THOMPSON: Yes. I think it was an issue that was raised
19 originally in the original responses, and we responded
20 in our original reply, and then I think it's been the
21 subject of some correspondence, even since the amended
22 reply, but we have now clarified the position as best we
23 can to distinguish on the basis of leases of more or
24 less than a year, because our understanding is that it's
25 virtually unknown for, for example, a finance lease to

1 be less than a year.

2 THE PRESIDENT: So what is the exclusion? Is it who rents
3 out for more than a year or is it as defined here or has
4 it been refined, the definition?

5 MR THOMPSON: I think the definition -- obviously
6 purchasers, we've defined in 8, "Acquired", is a defined
7 term, and then 9(a) has two possibilities. One,
8 purchase the truck as owner, and, secondly, took
9 possession of and operated a truck pursuant to an
10 operating lease, or alternative long-term financing
11 arrangement, not conferring rights of ownership, and
12 acquisition shall be construed accordingly, and then we
13 define, "Operating lease", and, "Long-term finance" --

14 THE PRESIDENT: Oh I see. The 12 months is there in the
15 definitions of, "Long-term financing", and, "Operating
16 lease".

17 MR THOMPSON: So providing you have a lease which lasts more
18 than a year, and you are not a finance house, then you
19 are within the class. So it's intended to draw a clear
20 line --

21 THE PRESIDENT: Yes.

22 MR THOMPSON: I think we partly accepted in our original
23 reply, and we do accept that that is the one issue which
24 is -- where there needs to be a demarcation, and we have
25 drawn it as best we can at that point, and it appears to

1 us that that is a realistic distinction to draw, and
2 certainly a workable one, because it is perfectly clear.

3 THE PRESIDENT: Yes. Thank you.

4 MR THOMPSON: Then just in terms of the -- before we turn
5 away from that, my Lord -- Sir -- it may be worth just
6 looking very briefly, then, at paragraphs 15 and 19 of
7 the draft order which is at page 8 of B/15. So
8 {B/15/8}. It partly goes to the point that I think the
9 Tribunal will be familiar with from an earlier case
10 about defunct persons and companies, but there is
11 a provision in the draft order for a successor in title,
12 both in the opt-in and the opt-out class at paragraphs
13 15 and 19. That's just to draw that matter to the
14 Tribunal's attention.

15 THE PRESIDENT: Well, how is paragraph 15 supposed to work?
16 I mean, suppose they don't. Someone -- if it is an
17 individual who has died, I don't know who the successor
18 in title is, they have personal representatives.
19 I don't know who the successor in title would be, and
20 suppose they don't give notice.

21 MR THOMPSON: Well, I think if they don't give notice then
22 they are deemed to still be within the class, but,
23 obviously, there may be a question of practicality later
24 on. I accept that, Sir. It was intended to address
25 this issue, but in my basic submission on this, it is

1 something of a side show to the main questions before
2 the Tribunal. I simply brought it to the Tribunal's
3 attention as a feature of our draft order.

4 THE PRESIDENT: Yes. Well, it may not be a side -- when you
5 say, "A side show". It may -- I can see it is not the
6 central point, but it is not, necessarily,
7 insignificant, because the period is so long, of the
8 cartel, since the time since the end of the cartel is
9 also so long, for reasons we all know, that quite
10 a lot -- certainly not an insignificant number of
11 people -- will have died and, more particularly,
12 businesses will have closed down, and there does need to
13 be some mechanism of dealing with that. I'm not sure
14 paragraph 15 is really an answer.

15 MR THOMPSON: I don't want to belittle the issue in terms of
16 statistics or the facts. It is just as a matter of
17 principle, if it were a good point as a matter of
18 principle, it would rather render the entire regime null
19 and void unless it was only intended for short-term
20 cases where you could be confident that nobody could
21 possibly have died in the middle of the claim class.

22 THE PRESIDENT: Well, you may be able -- I'm not sure that's
23 quite right, Mr Thompson. I mean, you may be able to
24 estimate -- there is a lot of estimation that goes on in
25 these cases -- the numbers that have gone, and make an

1 adjustment, therefore, to the aggregate damages
2 accordingly where you are claiming aggregate damages,
3 and make an assumption that X per cent of trucks sold in
4 that period will be to businesses that no longer exist.

5 MR THOMPSON: Yes. That was very much the -- if we were
6 going to get into the substance, that was very much the
7 point I was going to make to the Tribunal, that
8 actuaries and other persons are quite familiar with
9 making estimates of that kind, but I was merely drawing
10 to the Tribunal's point --

11 THE PRESIDENT: Yes. Well, you may want to come back to it
12 at some point, but I don't think, for my part, paragraph
13 15 of the order is really going to help very much.

14 MR THOMPSON: Okay. I move on.

15 Can I just draw the Tribunal's attention to the
16 provisions that UKTC has made in relation to run-off?
17 That's most easily seen in the original claim form, or
18 the amended claim form, rather, which is at B/1?

19 THE PRESIDENT: That's the same bundle, tab 1?

20 MR THOMPSON: Yes, and it is page {B/1/64}. So the effect
21 of this is not to amend the UKTC class, but it is
22 intended to say that in relation to purchases, our
23 understanding is that the price lists are set at the
24 start of the year, and so it is reasonable to assume
25 that any cartel effects that were still going in 2011

1 would run for the year, and, likewise, that at least
2 some finance and operating leases would have been
3 entered into, certainly those that were lasting at least
4 a year, would have been entered into during the cartel
5 period, and would, therefore, be working their way out
6 during 2011.

7 So it's not intended to be any more than a modest
8 footnote, as it were, saying that the issue of run-off
9 is live, and that there is reason to think that it will
10 be material, and Dr Lilico has taken the relatively
11 conservative approach of treating it as a straight line
12 deduction during 2011. So I think he has averaged it at
13 half the effect during the cartel period, so that's the
14 modest extent to which we have made provision for
15 run-off in relation to our claims.

16 Just returning to the statutory regime --

17 THE PRESIDENT: But it is only run-off for people who have
18 bought --

19 MR THOMPSON: Indeed.

20 THE PRESIDENT: -- before 18 January 2011.

21 MR THOMPSON: Yes.

22 THE PRESIDENT: That's to say, during the cartel period.

23 No, sorry, it goes beyond the cartel period. Yes. To
24 the beginning of 2011. Is that right?

25 MR THOMPSON: I think that is the cartel period.

1 THE PRESIDENT: That is -- yes. It is the cartel period,
2 yes, so it's for people who purchased -- I was right
3 first time -- within the cartel period, therefore losses
4 continue, if they have losses continuing one more.

5 MR THOMPSON: The purpose of that is so that we've got
6 a clear class, because otherwise our concern is that the
7 class definition would be either circular or ambiguous.

8 The further point on the statutory regime arises out
9 of Rule 79(1) (a) which is at {JA/11/21} where the Rule
10 says that the Tribunal may certify claims and it
11 specifies not only the commonality and the suitability
12 conditions in 79(1) (b) and (c), but also it requires
13 that the claims are brought on behalf of an identifiable
14 class of persons, and that doesn't correspond to 47B(5)
15 or 47B(7) (b) of the Act, but it is nonetheless a further
16 condition imposed by the rules, and, in practice, it is
17 critical to the certification process, and it is so for
18 a number of reasons.

19 First of all, it reflects one of the mandatory terms
20 for an order in section 47B(7) and Rule 80. 47B(7) we
21 don't necessarily need to go to it, is at {JA/6/4} and
22 Rule 80 is at the bottom of this same page, {JA/11/21}
23 and the very last line is 80(1) (c) where it requires the
24 order to describe or otherwise identify the class and
25 any sub-classes, so it is a requirement of the order

1 process. It's one of the three conditions in 47B(7)
2 which is also authorisation for class representative and
3 classifications, opt-in or opt-out.

4 It's also a necessary feature of the application
5 which one finds at {JA/11/18} at the top of the page.
6 It is the first requirement of the collective
7 proceedings claim form to provide a description of the
8 proposed class.

9 In practice, if we go back to Rule 78 and 79 on
10 {JA/11/20} and 21, so starting on 20, the first
11 condition under 78(2) (a) is that the class
12 representative -- is whether the class representative
13 would act in the interests of class members. 78(2) (b)
14 relates to possible conflicts of interest of the class
15 representative with members of the class relative to the
16 common issues, and then in relation to eligibility on
17 the next page, {JA/11/21} there are three aspects where
18 the class definition is relevant. 78(2) (c), alternative
19 proceedings by members of the class, 79(2) (d), the size
20 and nature of the class, and 79(2) (e), the
21 identifiability of class members, and then for good
22 measure it is also relevant to 79(3) (b), the
23 practicability of opt-in proceedings for class members,
24 including the likely level of individual recovery.

25 So the identification of the claims is critical for

1 the commonality and suitability conditions, and the
2 identification of the class is critical for the terms of
3 the order and the application of those principles.

4 THE PRESIDENT: Mr Thompson, may I then ask you this; you
5 took us to paragraph 15 of the draft order which is
6 clearly prepared with the intention that those
7 businesses that no longer exist, or if a sole trader who
8 is no longer alive should opt out, that's the intention
9 of -- indeed, they seem to be ordered to opt out. I'm
10 not sure why we necessarily have power to order them to
11 opt out, but that's what has been intended in the draft.
12 Why isn't the class definition simply stating that such
13 persons are not within the class, that it excludes --
14 just as you have excluded converters and lessors, you
15 exclude persons who are no longer alive at the time of
16 the making of the order if a sole trader or businesses
17 that are no longer in existence, so that they are not
18 within the class to start with.

19 MR THOMPSON: With respect, I think in principle they are
20 within the class. I think it is a question of whether
21 they can or do bring claims, and as I understand it the
22 real point that is being got at is that, particularly in
23 the context of an aggregate award, the aggregate award
24 should be discounted by some degree to take account of
25 the fact that, in practice, some dead persons will not

1 have any representatives who will bring claims, and some
2 defunct companies may not be able to be revived, but
3 that's, in my submission, a contingent question that the
4 Tribunal will, in due course, have to grapple with, but,
5 in principle, there is no reason why a claim can't be
6 brought on behalf of a deceased person.

7 THE PRESIDENT: Well, there is quite a lot of law on the
8 inability of a deceased person to bring a claim,
9 unsurprisingly, that there are some problems if someone
10 is dead, starting an action, and, similarly, a defunct
11 company. It can be revived in certain circumstances, it
12 has to be restored to the register, but at the moment
13 the class is defined, as you say, to include them, but
14 isn't that a problem?

15 MR THOMPSON: In my submission no, for the reason I have
16 given, but the Tribunal may be against me on that
17 question, in which case we would have to address it, but
18 at the moment my basic submission is that there is no
19 reason why the claim can't be brought in principle on
20 behalf of the deceased person, and it is just a question
21 of whether or not there is a representative capable of
22 bringing it, but we can perhaps come back to that when
23 we've heard how Mr Harris puts it, and I know that the
24 President has heard arguments on both sides of this
25 question fairly recently.

1 THE PRESIDENT: Yes. Well, a deceased person, it is
2 well-established, can't start an action. Personal
3 representatives can, but they bring it not on behalf of
4 the deceased person, they bring it on behalf of the
5 estate, which is a different entity. Similarly,
6 a defunct company just can't start an action at all. No
7 one can do it.

8 MR THOMPSON: The position we have here is that we have
9 a class representative who brings it on behalf of a
10 class, and also -- or on behalf of the persons who opt
11 into the class, if I can put it in that way.

12 THE PRESIDENT: Yes.

13 PROFESSOR WILKS: If I may come in briefly for a moment --
14 can you hear me?

15 MR THOMPSON: Yes.

16 PROFESSOR WILKS: Yes. First is that although paragraph 15
17 does talk about the deceased persons, it doesn't appear
18 to be -- as I read it in the order, so that it isn't
19 publicly notifiable -- sorry, there is a lot of
20 interference, isn't there -- that's my first point.

21 My second point was, if these deceased persons are
22 going to be included at some point, will that be
23 reflected within Dr Lilico's methodology in terms of
24 volume of commerce?

25 MR THOMPSON: Yes. Well, I think the answer to that

1 question would be -- when you say, "Included", I don't
2 know whether you mean it would be taken into account and
3 therefore excluded.

4 PROFESSOR WILKS: Yes, I do.

5 MR THOMPSON: I think that, as with other respects,
6 Dr Lillico is a perfectly realistic person. If the
7 evidence is that 2 per cent or even 10 per cent of the
8 people who bought trucks in 1997 will have died, then it
9 would be appropriate to make an adjustment to any
10 aggregate assessment, but if there isn't any such
11 evidence, then it wouldn't be.

12 PROFESSOR WILKS: Thanks.

13 MR THOMPSON: I see Mr Harris wants to weigh in. I'm
14 reluctant to take any interventions, as it were,
15 because of the --

16 MR HARRIS: Can I just say, sorry Mr Thompson, from our
17 perspective, it's not satisfactory for you to wait to
18 hear how I put it orally because this is a constrained
19 hearing. We put it in writing in our amended response
20 and we put it in writing in our skeleton argument, and,
21 in fact, I have to hear how you respond so that I can
22 respond to you.

23 MR THOMPSON: Yes. Well (Inaudible).

24 THE PRESIDENT: It may be that it won't be necessary for you
25 to respond, Mr Harris. I mean, we've got the point, the

1 objection that's being taken, and I put it to
2 Mr Thompson, and I have got his answers, which, as I
3 understand it, that he wants to maintain them in the
4 class, there is this provision in the order which I have
5 said I find troubling because I don't see that we have
6 jurisdiction to order people to opt out. They are not
7 individuals before the Tribunal, but at the same time he
8 says that if there is statistical evidence that
9 a certain -- and there clearly will be statistical
10 evidence of how many people die per year and so on, it
11 won't be people who run trucks businesses, but there is
12 some evidence of a number of hauliers that go out of
13 business, then that will be adjusted in the methodology,
14 and Dr Lilico could he will make an appropriate
15 reduction, but if he is making an appropriate reduction
16 it seems to me one is excluding them from the class.

17 MR THOMPSON: I mean, I am reluctant to get drawn into this
18 in any detail, but, with respect, Sir, I wouldn't agree
19 with you, that the claims, as claims, are not
20 appropriately within the class because claims can be
21 brought on behalf of deceased persons, subject to
22 certain conditions, and so, in reality, the actuarial
23 advice would not be sufficient, because they would have
24 to be people who are not only dead, but in respect of
25 whom claims could not be brought, and that might be

1 a more difficult thing for Mr Harris to advance as
2 a proposition, because it wouldn't be enough to show
3 that they had died, you would have to show -- and,
4 likewise, in relation to defunct companies -- they would
5 have to be not only defunct but not in a position
6 whereby they could be revived to claim what might be
7 significant sums against his client.

8 THE PRESIDENT: Yes. No. I understand your point.

9 MR THOMPSON: It seems to me inappropriate to debar them
10 now.

11 THE PRESIDENT: Yes.

12 MR THOMPSON: Then the fourth topic, which is something
13 I can be brief on because we've set it out in some
14 detail in our amended reply at bundle {B/2/5} to 8,
15 paragraphs 10-15, is the character and nature of our
16 application as described in both the amended claim form
17 and the amended reply, and I will pick out five
18 features.

19 First of all, it is a damages action for harm caused
20 by an admitted and long-lasting international cartel
21 relating to the future list prices of a readily
22 identifiable industrial product, namely medium and heavy
23 trucks.

24 Secondly, and relating to section 47B(5) (a) and (8)
25 in particular --

1 THE PRESIDENT: Sorry to interrupt you, where are you in the
2 reply?

3 MR THOMPSON: It's paragraphs 10-15 of our amended reply.

4 THE PRESIDENT: 10-15.

5 MR THOMPSON: Starting at page 5.

6 THE PRESIDENT: Yes.

7 MR THOMPSON: I wasn't proposing to read it out, I was
8 proposing to --

9 THE PRESIDENT: No, no.

10 MR THOMPSON: -- to point out.

11 In relation to the class representative, so relevant
12 to section 47B(5) (a) and (8), we would say that we are
13 a Special Purpose Vehicle with no other objective than
14 to pursue these proceedings with an experienced legal
15 chair and an expert board of industry specialists with
16 no links to the admitted cartelists.

17 Thirdly, in relation to the claims, and section
18 47B(5) (b) and (6), these claims relate to the direct
19 acquisition, either by outright purchase or long-term
20 lease, of the specific products which are the subject
21 matter of the cartel, with a modest run-off period for
22 those making such purchases or entering into such leases
23 during the admitted cartel period.

24 The class members are predominantly small and
25 medium-sized businesses, the exact target group of this

1 legislation, for whom the prospect of litigation on this
2 scale and complexity will be completely out of the
3 question unless conducted on a collective basis, and
4 even this hearing illustrates that proposition, and,
5 fifthly, there are tens of thousands of actual or
6 potential claimants, and hundreds of thousands of actual
7 or potential claims in respect of claims on a scale and
8 complexity that the Tribunal has already found in its
9 disclosure judgment to be impossible to try effectively
10 on a conventional and individualised basis, even in the
11 individual cases. That's the Ryder disclosure ruling at
12 paragraphs 40-43 which I don't think we need to turn up.
13 The President clearly is clearly very familiar with it.
14 It is at {JA/64/15} to 17 in joint authorities bundle 4.

15 We say this important guidance as to the nature of
16 the litigation arising out of the settlement decision
17 now, of course, falls to be considered in the light of
18 the general guidance of the Court of Appeal and the
19 Supreme Court in Merricks as to the correct approach to
20 be adopted by the Tribunal in collective proceedings.

21 We think in the light of that that it's not unfair
22 to ask the rhetorical question of what possible
23 circumstances could be more favourable for the statutory
24 provisions to be applied than to the direct purchaser in
25 the UK of products that were for 14 years the subject of

1 an admitted massive international cartel, involving tens
2 of thousands of claimants, the great majority of
3 claimants are SMEs, and hundreds of thousands of
4 transactions over a period of 14 years. We say if this
5 isn't a case for a collective proceedings order under
6 this regime, what is.

7 So that is much by way of introduction, and I'm
8 then, as I indicated, going to address the following
9 points; what are the UKTC claims defined in the ACF, the
10 amended claim form, and the draft order, and to what
11 extent do they overlap with the RHA claims? We say, as
12 I have indicated, that this is a critical issue for the
13 three statutory conditions, and for the first
14 eligibility condition in Rule 79.

15 Secondly, is it just and reasonable for UKTC to be
16 appointed as the class representative for those UKTC
17 claims?

18 Thirdly, do those UKTC claims raise the same,
19 similar or related issues of fact or law? Fourthly, are
20 those claims suitable to be brought in collective
21 proceedings?

22 Five, if an order is to be made whether those UKTC
23 claims should be made on an opt-in or opt-out basis,
24 sixthly, and this will transition into the hearing
25 that's to be carried out on Monday, what is the

1 relevance of the evidence of Dr Lilico giving his expert
2 opinion on the way in which common issues, identified in
3 the claim form, may suitably be determined on
4 a collective basis, which is in the guidance at
5 paragraph 6.13 of the court guide, Tribunal guide, which
6 is at {JA/12/18}. I don't think we need to turn that
7 up.

8 So, first of all, the UKTC claims which we address
9 at paragraphs 42-45 and 66-78 of our skeleton argument
10 which is pages 14-15 and 24-28 of Bundle A1. We've
11 already looked at the draft UKTC order at B/15, but
12 we've tried to summarise our approach as against the RHA
13 approach in the one-page annex at the back of the
14 skeleton argument which is {A/1/41}.

15 THE PRESIDENT: Yes. That was very helpful.

16 MR THOMPSON: Having looked at the UKTC order, it's probably
17 worth looking at the RHA draft order which is at C/10 in
18 Bundle 1.

19 THE PRESIDENT: Well, are you now doing a comparison between
20 the two applications? Is that what you are embarking
21 on?

22 MR THOMPSON: Well, it is background to that but I think it
23 is necessary for the Tribunal to understand the
24 differences between our application and the RHA
25 application, particularly --

1 THE PRESIDENT: I think we've got a pretty good picture of
2 that, so I don't want to take up time with that.

3 MR THOMPSON: Can I just make a series of points then?

4 THE PRESIDENT: Yes. Make your points, I think, rather than
5 taking us to the document.

6 MR THOMPSON: Yes. I mean, our basic point is that ours is
7 a closely fitting definition which is directed to
8 a clear category of claims, and we've discussed that
9 already, and it's been specifically adapted to the facts
10 of this case to be clear, simple, and
11 non-discriminatory, and to avoid any possible conflicts
12 now or in the future.

13 We would say that the contrast between our approach
14 and the RHA one is a striking one. I hesitate to make
15 analogies, but one of the most celebrated metaphors of
16 our Prime Minister was to describe EU law as being
17 uncomfortably tight in certain respects, and dangerously
18 loose in others, and in my submission there is a similar
19 contrast between our definition and the RHA one, and,
20 first of all at paragraph 5 of the order that the RHA
21 are seeking, it is said to apply only to road haulage
22 operations, and one might ask why are other categories
23 of truck usage excluded and note that there is no such
24 exclusion from the UKTC claims, and the reason for that
25 appears to have been the close proximity between these

1 claims and the RHA as --

2 THE PRESIDENT: When you say, "road haulage", my
3 understanding, and Mr Flynn will correct me if I'm
4 wrong, of the RHA claim, it's not restricted to those
5 who purchase a truck for hire -- to use for hire and
6 reward. It also includes those who purchase a truck for
7 what's described as, I think, "own account", so if
8 a grocery store purchases a truck to use for deliveries,
9 something that there has been a lot of in the past
10 months, that would be included.

11 MR THOMPSON: Oh yes. I think -- but as I understand it,
12 there are words of limitation in paragraph 5 of the RHA
13 definition which refers to -- that they must be for road
14 haulage operations.

15 THE PRESIDENT: Yes.

16 MR THOMPSON: -- and has permission for road haulage, so
17 unless that's a meaningless addition, as I understand
18 it's the word of limitation.

19 THE PRESIDENT: But what's the limitation you say applies in
20 substance?

21 MR THOMPSON: Well, if something is not for road haulage
22 then I assume it is excluded.

23 THE PRESIDENT: Well yes, but what do you understand for use
24 in road haulage to mean?

25 MR THOMPSON: Well, I think that there are other uses of a

1 truck than road haulage. I'm not sure that refuse
2 collection, for example, is road haulage.

3 THE PRESIDENT: Yes. I thought that -- yes. You are saying
4 if it is used for refuse collection it wouldn't be
5 included. That's your reading of it, is it?

6 MR THOMPSON: I don't know what this wording is here for if
7 it is not to exclude something.

8 THE PRESIDENT: Well, can I just clarify with Mr Flynn,
9 then? Because we need to understand that.

10 Yes, Mr Flynn? Mr Flynn? I think you are on mute.

11 MR FLYNN: Let me try that. Can you hear me now?

12 THE PRESIDENT: We can.

13 MR FLYNN: Your understanding is correct, Sir and I will
14 take you, if necessary, to the relevant part of our
15 order, but it's not just for hire and reward use of
16 trucks, but also for people who use it for their own
17 purposes. You gave the example of a supermarket with
18 their own fleet, and the same would apply for local
19 authorities using refuse lorries as well. It is for own
20 use, I think, is the term.

21 THE PRESIDENT: Yes. So it's --

22 MR FLYNN: I was just going to say, just to finish, you will
23 find a definition at paragraph 7.2 of our order, and I
24 just am struggling to get it in front of me, but the key
25 issue is whether you have a licence, an O licence, an

1 operator licence, and that's one way of cutting the data
2 as you will have seen, is by reference to licences, so
3 our class is essentially licence holders.

4 Sir, I'm not hearing you. I don't know if that's my
5 fault or...

6 THE PRESIDENT: The only exclusion might be if it is
7 operated on -- only on private land or something and
8 never leaves private land, so you may not need
9 a licence, something like that.

10 MR FLYNN: I think there was, in the early days, some
11 reference to farm vehicles that never went on public
12 roads, but I think at the margins there might be cases
13 of that kind, but the essence of it is the O licence,
14 and I can explore the fringes of this at a later stage,
15 if that would be helpful.

16 THE PRESIDENT: No. Thank you very much. I think that's
17 enough. Thank you, Mr Flynn.

18 So I think, Mr Thompson, I do not see that myself --
19 there are many distinctions with the RHA claim, clearly,
20 but I do not see that as a particular distinction.

21 MR THOMPSON: Sir, if I could just clarify, I obviously
22 accept that if Sainsbury's Commissioned somebody else to
23 haul something or Sainsbury's hauls it on its own
24 account, that's clearly within the scope of the
25 definition, and I would also certainly accept that the

1 great predominant usage of trucks is for road haulage,
2 but insofar as something isn't for road haulage, it
3 appears to me that it is excluded by this definition.

4 THE PRESIDENT: Well no, my understanding is that that is
5 not right, because if you use a truck on a public road
6 you need an operator's licence, and it doesn't matter
7 whether you are collecting refuse or carrying goods, and
8 road haulage is defined in terms of the operator licence
9 that the driver needs. That's my understanding. We can
10 look at this later if necessary when Mr Flynn comes to
11 address this.

12 MR THOMPSON: Perhaps we can then move on to the second one,
13 which is the primary business exclusion where it is
14 quite clear that there is a difference, namely that
15 where the majority of the turnover relates to selling or
16 leasing trucks, then that person is excluded, and,
17 again, I think we see no reason why such persons should
18 be excluded if they are overcharged for a new truck, and
19 you will recall that this was the subject of some brief
20 discussion between the Tribunal and myself at the start
21 of the May 2019 hearing by reference to a letter that
22 had been written by Messrs Charthire complaining that
23 they couldn't bring their 500-truck claim because they
24 were excluded by the RHA definition. Does the Tribunal
25 recall that? The reference is {B/29/2} and also the

1 transcript was L/2, pages 3-5. We pointed out a number
2 of anomalies that arise from that which it appears to us
3 to make it undesirable to have that restriction.

4 The third one is the treatment of cost-plus
5 operators which is addressed in evidence by Mr Leonard
6 in his first statement, and I think Mr Jowell in
7 particular has been exercised about cost-plus operators,
8 and, as I understand it, I think it is necessary just to
9 look at this briefly, because it is not a particularly
10 easy -- or we haven't found it particularly easy to
11 understand. It's at {C/1/27}.

12 THE PRESIDENT: C1, what tab? You are in the claim form of
13 the RHA or what document?

14 MR THOMPSON: It is the amended claim form of the RHA,
15 and --

16 THE PRESIDENT: I see. {C/1/27}.

17 MR THOMPSON: There is a footnote that hasn't been deleted
18 which is sitting at the bottom of {C/1/27}.

19 THE PRESIDENT: Footnote 24?

20 MR THOMPSON: Yes. I don't know if the Tribunal has had
21 a chance to consider this issue, but we found it
22 somewhat difficult to understand. I'm not sure if I
23 need to read this out.

24 THE PRESIDENT: Well, I think it is something we will take
25 up with Mr Flynn. As far as your claim is concerned, or

1 your application, what's the position about a cost-plus
2 operator? As I understand it, they are just included?
3 Is that right?

4 MR THOMPSON: Yes. As we understand it they don't form an
5 identifiable class. Some people sometimes provide
6 services on the cost-plus basis, but we don't think that
7 it is easy to identify people who only do that, and even
8 where they do, they probably do it under pressure from
9 their customers rather than voluntarily, and they don't
10 necessarily have a carte blanche simply to pass through
11 their fixed cost anyway, and we say that at most this is
12 a contested issue of evidence, but not a basis to tinker
13 around with the class definition.

14 Then the final point is the treatment of
15 sub-lessees, as it were, and whether purchasers of new
16 trucks should be excluded insofar as they -- their
17 trucks are actually used by other people, or supplied to
18 other people, and there we have a concern that we don't
19 really understand -- or there appears certainly to be
20 a difference, and it is in the same tab, the amended
21 claim form, paragraph 77, where it is pleaded that to
22 the extent the proposed class members purchased or
23 leased relevant trucks, other than from the cartelists,
24 including from independent intermediaries, it is averred
25 that the inflated prices for relevant trucks caused by

1 the infringement were fully passed on to the proposed
2 class members, and the Tribunal will recall that the
3 definition of, "Lease", in the RHA form is very, very
4 broad, and includes spot hirers, and this appears to be
5 a general exclusion of upstream suppliers on the basis
6 of an assertion that their overcharge is fully passed on
7 to lessees and sublessees, and that seems to us to be
8 a very, very wide and uncertain pleading, and that as
9 far as we are concerned the issue of pass-on is not
10 a matter that we might plead positively, it is a matter
11 for the cartelists to plead and prove, we having
12 established an overcharge in relation to a new truck.

13 So those --

14 THE PRESIDENT: Yes, but if I may interrupt you for
15 a moment, you are quite right, it is not a matter for
16 which you have the burden of proof, but given that there
17 is, clearly, a potential for pass-on in this case, it is
18 something that the -- and we know it is going to be
19 raised -- and we know that new trucks are often sold on
20 after a certain period of life, quite aside from the
21 general potential for pass-on, it is something that any
22 method of quantification or form of proceedings is going
23 to have to deal with, and have to have a way of dealing
24 with fairly. We can't just postpone it until we get
25 a defence saying, "There is pass-on".

1 MR THOMPSON: I understand that. The point I'm making here
2 is that Mr Flynn's clients are positively pleading,
3 apparently as against purchasers of new trucks, that
4 their entitlement has been fully passed on to lessees,
5 and apparently spot hirers, which --

6 THE PRESIDENT: Well, I understand that point, yes.

7 MR THOMPSON: Then the other side of it, and we've looked at
8 it in terms of our definition, and we are concerned that
9 the breadth of the RHA claim is potentially inconsistent
10 and raises conflicts as against the UKTC claims that we
11 are concerned with, first of all, in terms of duration
12 where the claim is said to be for over 22 years and both
13 for new and used trucks, and so in terms of new trucks
14 it is even longer because, presumably, any used truck
15 that was purchased after 1997, or, indeed, hired after
16 1997, was once a new truck, and so it does make the
17 claim extremely wide, and it is particularly difficult
18 to understand, given that, as we understand Dr Davis'
19 detailed reports, he is intending to operate on a,
20 "During/After", basis, and so it's not clear to us at
21 the moment, and I think the estimate is that there could
22 be as many as 150,000 claims arising after the cartel
23 period, whether these claims were intended to be actual
24 claims or whether they are not really claims at all,
25 but, rather, comparators that are going to be used for

1 the purposes of Dr Davis' regression analysis, and so
2 there appears to be a radical uncertainty about
3 a category of approximately a third of the RHA's claims
4 as to whether they are actually claims at all, and, as I
5 sought to indicate, that was the reason why we have
6 identified our class by a very specific purchase or
7 lease, namely one that took place during the cartel
8 period, because otherwise there seems to be an
9 ambivalence, and we are not clear how that ambivalence
10 will be resolved because it appears to be that only once
11 Dr Davis has done his expert analysis that you will be
12 able to separate the sheep from the goats.

13 THE PRESIDENT: Yes. Well, we will take that point up with
14 Mr Flynn, and we see that.

15 MR THOMPSON: Yes. We are also concerned, and I think this
16 is an issue that has been raised by more than one of the
17 defendants, as to how the issue of used trucks and new
18 trucks interacts with one another, and whether there
19 are --

20 THE PRESIDENT: Yes?

21 MR THOMPSON: -- and likewise, the size of the foreign
22 trucks, and whether or not they are actually part of
23 that.

24 THE PRESIDENT: Mr Thompson, we've got all those points
25 about the RHA claims, and which have been made not only

1 by you but by several of the proposed defendants.

2 MR THOMPSON: I think the point that I'm concerned with is
3 in relation to our claims. There is a risk of
4 significant prejudice to members of the UKTC class if
5 either conflicts arise with indirect purchasers or
6 lessees of new and used trucks, if it is unclear whether
7 post-cartel claimants are, in reality, being used as
8 comparators --

9 THE PRESIDENT: You just made that point. Yes.

10 MR THOMPSON: -- and if there are additional costs and
11 uncertainty arising out of international claims, we are
12 concerned that the basis for that appears to be that the
13 RHA has one or two very large claimants with
14 international interests, and that it could be
15 prejudicial to the small UKTC claimants if a large
16 amount of time and money and complexity is involved in
17 pursuing these international claims, and then, finally,
18 if there is confusion on the claimant's side between
19 pass-on as a mitigation defence and some form of
20 positive claim by indirect purchasers within the RHA
21 class.

22 So we have a concern as to how this interacts with
23 a positive case in relation to UKTC claims.

24 I'm not in any way seeking to prevent the cartelists
25 in their case, but I am concerned that we should make

1 our case clearly, and if they have a defence to it, that
2 they should plead it and prove it.

3 If I now turn to the authorisation of --

4 THE PRESIDENT: Well, would that be a convenient moment,
5 then, to take a short break?

6 MR THOMPSON: Yes. I see the time. I can probably cover
7 that, and I will obviously do my best to make up any
8 time I have lost, because I think that would be a good
9 moment, Sir.

10 THE PRESIDENT: Yes, and it may be, if it is possible over
11 the break, for -- and we might ask for technical
12 assistance -- for the Tribunal -- the sound quality has
13 been somewhat disturbing in that there is a strong
14 resonance. I don't know if that's the case at your end
15 when hearing my observations, but it is certainly the
16 case for us listening to you, Mr Thompson, which
17 sometimes makes it -- it is no fault of yours, of
18 course, personally -- but there is something in the
19 connection that is causing a very strong resonance, and
20 if it is possible for any technical assistance at your
21 end to look at that over the break, that would certainly
22 assist everyone, I think. I don't know -- people can
23 just nod -- are others experiencing this as well, that
24 it is resonating, or is it just -- no? Well, in that
25 case it might be here.

1 MR THOMPSON: What I might try is to link my own computer
2 here and switch off the main one, but whether you would
3 hear me better I don't know.

4 THE PRESIDENT: The volume is fine, it is the clarity. We
5 have a running transcript, so that's a help. We will
6 investigate as well and we will resume in -- at 12.15.

7 MR THOMPSON: I'm grateful.

8 (12.07 pm)

9 (A short break)

10 (12.26 pm)

11 THE PRESIDENT: Mr Thompson, that's the cue to continue.

12 MR THOMPSON: I'm grateful, Sir. We've made various efforts
13 but I'm not sure how far we've been successful, but we
14 can make more efforts at lunchtime if the sound is still
15 unsatisfactory.

16 THE PRESIDENT: Thank you.

17 MR THOMPSON: I was now going to turn to the question of
18 authorisation, so the 47B(5)(a) condition, which we
19 addressed at paragraphs 37-39 of our skeleton, which is
20 at page 11 and 13 of A/1.

21 This was effectively not an issue in the Merricks
22 case. The only issue raised was one of funding, and
23 Mr Merricks was otherwise accepted as a suitable person
24 to act as class representative, and you find that, for
25 the Tribunal's note, at paragraphs 90-93 of the Tribunal

1 judgment, which is at JA/54/30 but I don't think there
2 is any need to turn it up.

3 THE PRESIDENT: If I can interrupt you, as I understand it,
4 the only issue on authorisation in this case is not
5 about the make-up or constitution or governance of UK
6 Trucks which is a highly responsible board of directors,
7 it is an issue about whether the litigation plan takes
8 account of what it is said that Dr Lilico may need to do
9 by way of getting information, data, to operate his
10 method, and whether that's been adequately reflected.
11 I think that was the extent of the issue on
12 authorisation.

13 MR THOMPSON: Yes. Well, I don't want to take up time on
14 matters that are not in dispute, although, clearly, your
15 multifactorial exercise has to take into account issues,
16 positive and negative, plus and minus factors, and the
17 first point I was going to make was that the role of Mr
18 Kaye as chair of the UKTC board in many ways corresponds
19 to the role of Mr Merricks in that where the public
20 guardian, as it were, from the perspective of UKTC, and
21 I was also going to say that while the issue of whether
22 or not UKTC is an appropriate body so that it is just
23 and reasonable for it to be appointed, is in contrast to
24 the suitability requirement in relation to the claims,
25 it is not a relative issue. It is not a relative issue

1 as against individual claims.

2 There is one respect in which the Tribunal isn't
3 required to look at relatively, which is Rule 78(2)(c),
4 where there is more than one applicant seeking approval
5 to act as the class representative in respect of the
6 same claims, and it was partly for that reason that I
7 spent a little bit of time comparing and contrasting the
8 approach to the UKTC claims of UKTC as against the RHA.

9 THE PRESIDENT: Yes.

10 MR THOMPSON: So to the extent that the RHA is seeking to
11 act for direct purchasers and long-term lessees during
12 the cartel period, and it appears that that is a subset
13 of their claims in paragraph 6.1 to 6.4 of annex 6, then
14 the Tribunal may need to consider the relative
15 suitability of the RHA and the UKTC in respect of those
16 overlapping claims because that issue is relative to the
17 claims that overlap, and just to clarify, that's
18 a different question from whether the Tribunal could, in
19 principle, make two CPOs in relation to claims arising
20 out of the trucks cartel, where we would submit that
21 there is, in reality, no basis for -- I think it is
22 largely MAN's argument -- that this is impossible,
23 except in the case of two opt-out applications as in the
24 FX case, but that doesn't arise in the present case.

25 It's perhaps rather obvious that just to state the

1 obvious, UKTC is not seeking to act as class
2 representative for the rather motley selection of RHA
3 claims that fall outside the scope of the UKTC class,
4 for example used trucks, foreign trucks, trucks
5 purchased in 2018 or 2019 or claims on behalf of persons
6 who received cost-plus services who happened to be
7 members of RHA's class on independent grounds. Those
8 other RHA claims are only relevant to UKTC insofar as
9 they appeared to undermine RHA's suitability as class
10 representative for the UKTC claims, or generally.

11 Sir, as the Tribunal has already said, the other
12 issues are not contested, and just knocking them down,
13 of course they are statutory factors that the Tribunal
14 needs to take into account as positive or negative, and
15 we would say that, for the purpose of 78(2)(a), the sole
16 purpose of UKTC is to act fairly and adequately in the
17 interests of its class members, for (2)(b) it has no
18 interest that is or could be in conflict with interests
19 of the class members that it has been created to
20 represent, for (2)(d) the Tribunal has already resolved
21 the funding issues in UKTC's favour, for 78(3)(a) UKTC
22 is not a member of the proposed class, and for 78(3)(b),
23 unlike the RHA, UKTC is not a pre-existing body and has
24 no other objective that could prejudice the interests of
25 class members.

1 So as the Tribunal says, that leaves the question of
2 the litigation plan which is essentially for
3 notification of actual and potential class members, for
4 governance and consultation of class members, and we
5 would say that the creation of an expert board with
6 a highly experienced senior lawyer as its independent
7 chair is the best possible way, and has been designed as
8 such, to perform the requirements of the legislation in
9 this respect.

10 In terms of the challenges which I think Mr Harris
11 in particular had raised on behalf of Daimler, I think
12 it is relevant to look at the approach of the Canadian
13 courts on this very question, and I think the most
14 convenient place to look is the judgment which appears
15 at tab 104 of the joint authorities bundle, joint
16 authorities bundle 8, Godfrey v Sony, which draws
17 together a previous judgment on this issue, and approves
18 it, and applies it. {JA/104/1}. If one turns to say
19 tab 104 --

20 THE PRESIDENT: Just one moment. This is joint authorities,
21 Bundle 8, and it is the first case in that bundle at tab
22 98.

23 MR THOMPSON: Tab 104 Sir.

24 THE PRESIDENT: Yes. Just pause a moment. Yes. Thank you.
25 This is Pro-Sys and Godfrey.

1 MR THOMPSON: Yes. As I understand it, it was an appeal --
2 it is Godfrey v Sony Corporation. You have Godfrey and
3 then there are a lot of appellants or defendants.

4 THE PRESIDENT: I'm sorry, 104. Yes. Godfrey.

5 MR THOMPSON: Mr Godfrey was in effect what we would call
6 a class representative and he had been approved at first
7 instance and the question was whether that was properly
8 done, and the reasoning on that issue is right at the
9 back of the judgment starting at page 75. {JA/104/75}.

10 You find at 248 a conclusion on an issue about
11 umbrella purchasers, and then at 249 there were two
12 questions; one, whether Mr Godfrey was an appropriate
13 representative of the umbrella purchasers, and then,
14 secondly, in relation to Mr Godfrey's litigation plan,
15 and then there is a description of the nature of the
16 decision at 250, saying it is a discretionary question,
17 both in terms of the suitability of the representative
18 and also the litigation plan, and then the dicta at
19 paragraphs 252-255 quoting an earlier judgment of
20 {JA/104/76}, quoting an earlier judgment of Goudge, J
21 about the nature of litigation plans, and in paragraph
22 95 of the Cloud v Canada judgment:

23 "The litigation plan produced by the appellants is,
24 like all litigation plans, something of a work in
25 progress. It will undoubtedly have to be amended

1 particularly in light of the issues found to warrant a
2 common trial. Any shortcomings can be addressed under
3 the supervision of the case management judge once the
4 pleadings are completed".

5 Then towards the bottom of the paragraph 77 quoted
6 from the Fakhri case, it says:

7 "It is anticipated that plans will require
8 amendments as the case proceeds, notably individual
9 issues as demonstrated by the class members".

10 Then at 255:

11 "As I have suggested above ..."

12 THE PRESIDENT: Well, perhaps 254 as well:

13 "It has been said that the detail of a litigation
14 plan should correspond to the complexity of the action".

15 MR THOMPSON: Yes, and then it goes on:

16 "Class proceedings are flexible and dynamic in
17 nature. At the certification stage, the standard that
18 a litigation plan must meet is not one of perfection; as
19 affirmed in Fakhri, the plan need only set out
20 a framework within which the case may proceed and
21 demonstrate the representative plaintiff and class
22 counsel has a clear grasp of the complexities involved
23 in the case", and then 256 applies that learning to the
24 particular facts.

25 THE PRESIDENT: But all that is being said in 256 is, this

1 has been considered by the judge, it is a matter of
2 discretion for the judge, or at least it involves an
3 exercise of discretion, and he was satisfied and that's
4 entitled to deference, so it doesn't actually tell us
5 the basis on which the judge was satisfied on that plan
6 and on what criteria he applied. This is an appellate
7 judgment saying, "We are not going to interfere with the
8 judge's view that it was adequate".

9 MR THOMPSON: With respect, I would say two things. One,
10 it is certainly saying that, that they should grant due
11 deference to the trial judge, but it is also saying that
12 the nature of the exercise in terms of certification of
13 litigation plans is inevitably a provisional one, and as
14 such case management has to take place, and it is really
15 that second point that we are going to here, and the
16 Tribunal will, of course, be aware that almost three
17 years has passed since the original litigation plan was
18 drafted and there are statements by Mr Kaye, I think,
19 three statements by him, there is the statement of
20 Mr Leonard, there are two statements of Mr Surguy and
21 there are the statements of Mr Perrin, and there is the
22 litigation plan itself, and if I give the Tribunal the
23 references, Kaye 1-3 are at B/4, B/6 and B/10, so
24 Leonard is at B/13, Mr Surguy is at B/11 and B/12, Mr
25 Perrin's fifth and sixth statements are at B/9 and B/14

1 and the litigation plan itself is at B/16, and given the
2 scale and scope of this hearing, it's not really
3 possible for me to go blow-by-blow through each of those
4 witness statements --

5 THE PRESIDENT: Well, we don't want you to, but what is
6 important is there are particular criticisms that have
7 been made, and to deal with those, and you know what
8 they are because they have been set out -- we've got so
9 many respondents here -- but we've set them out, in
10 particular, that the -- what Dr Lilico says he will need
11 or seek to have, is it covered in the litigation plan,
12 and is it covered in the budget. That's the point that
13 arises. Dr Lilico has obviously done a lot of work, he
14 has given a list of the things that he thinks he needs
15 to consider, and has it been taken into account, and is
16 it adequately budgeted for. I mean, that's the only
17 point we need to look at, but it is an important point.

18 MR THOMPSON: I understand that, Sir, but it is a point that
19 needs to be addressed in a realistic spirit, as I'm sure
20 the Tribunal will do, taking into account that we are
21 proceeding on the basis of a Commission decision, but
22 not the documents that are relied on in a settlement
23 decision, and without any disclosure at all of the
24 documents that the defendants have in their possession,
25 and so I accept the very limited evidence that they have

1 already adduced, that some, at least, of the
2 manufacturers, did have a pretty good grasp on the level
3 of discounting that took place in relation to their
4 trucks, and so this is obviously an issue that can be
5 explored with Dr Lilico, but in my submission he would
6 say, well, there is inevitably going to be a huge amount
7 of information within the possession of the defendants,
8 and the extent to which further information is required,
9 possibly on the claimants' side, to essentially address
10 two questions; what was the character of this cartel,
11 and what was the character of this market, because, as
12 you will appreciate, Dr Lilico's methodology,
13 essentially models the impact of the cartel on this
14 market, and so it needs to know enough for the Tribunal
15 to reach intelligible conclusions about the nature of
16 this market and the nature of this cartel, but he also,
17 of course, needs a certain amount of information about
18 the relationship between list prices and transaction
19 prices so that the Tribunal can reach a view as to the
20 likely level of actual transaction prices across the
21 market, and also other issues relevant to questions such
22 as the production costs and the elasticity of demand
23 which are factors which he builds into his model, but
24 I'm reluctant to go much further into that because that
25 seems quintessentially the sort of issue that the

1 Tribunal may wish to debate with Dr Lilico next Monday.
2 THE PRESIDENT: Well, I think this is the point, but I think
3 Dr Lilico has explained the sort of information that he
4 would like to -- and seek to have, and certainly that's
5 something that can be explored with him, but he's not
6 involved, of course, in the litigation plan or the
7 funding, and if he says, well, I think to operate my
8 method it will be necessary or desirable to do X and Y,
9 that is his evidence, he can't go beyond that, it is
10 then a question whether your litigation plan has
11 provided for doing X and Y and getting that information,
12 if it is needed by, for example, third party disclosure
13 or information from a sample of class members, and how
14 that will be done, and that's where -- that's not
15 a matter for Dr Lilico, that's a matter for you, and
16 that's what the criticism, as I understand it, that has
17 been advanced, goes to.

18 MR THOMPSON: Yes.

19 THE PRESIDENT: Just take an example. If you look at his
20 fourth expert report which is Bundle F, the first
21 Bundle F at tab 4, which starts at page 1. {F/4/1}.
22 That's the first page of his report, and then we go into
23 the report at {F/4/8}. Dr Lilico has very helpfully set
24 out the sort of steps and tasks that his approach
25 involves, and on page 9 {F/4/9} -- well, bottom of page

1 8, he says:

2 "My assessment of overcharge would draw on a range
3 of sources of data and other information and these
4 include the following", and then he has a list, and the
5 fifth one from the bottom is, "Data obtained from
6 claimants (eg perhaps sample data)". Now, has your
7 litigation plan taken that on board, and how is that
8 going to be done, given that it is an opt-out class that
9 you are at the moment asking for, and what's the
10 procedure, and that's a matter for the litigation plan,
11 not for Dr Lilico. He just says, "I want this
12 information".

13 MR THOMPSON: Yes, and -- well, we have addressed it in both
14 Mr Surguy's second and third statement and in the terms
15 of the litigation plan itself, but we've caveated it by
16 the fact that as that list helpfully indicates, there
17 are one, two, three, four, five, six, seven items above
18 that, a number of which are currently within the
19 exclusive knowledge and control of the cartelists.

20 THE PRESIDENT: Well, I appreciate that, of course, that's
21 not something -- you are going to get disclosure, and
22 that's covered in your litigation plan, but the one
23 above it includes third party, some data from third
24 parties, and have you budgeted for third party
25 disclosure. That's the sort of thing we need to take on

1 board.

2 MR THOMPSON: I think the answer is that we have done all
3 those things, but, of course, the Tribunal is by no
4 means a naive Tribunal, and so it is aware that third
5 party disclosure exercises come in a number of different
6 shapes and sizes, and if the test is whether our plan
7 and our budget includes the most extreme types of third
8 party disclosure exercise, or, indeed, the most
9 extensive sampling that Mr Harris could possibly demand
10 before he was prepared to entertain our claim, then the
11 case -- that's why the Canadian case is relevant,
12 because both the funder and the -- Weightmans is
13 a responsible litigation solicitor and indeed the board
14 as a responsible board, doesn't want to go haring off,
15 spending enormous sums of money on a task that is,
16 actually, a complete waste of time because Dr Lilico
17 says, "Well, I don't need any more data because when you
18 look at this the defendants are bang to rights." It is
19 perfectly obvious that they knew what the level of
20 discounting was, so (Inaudible) it is very much the same
21 sort of point as the Tribunal itself made in the funding
22 judgment, but there are two things. One, it is very
23 uncertain, and, two, this is an unusual situation
24 because the collective claims, for various reasons we
25 are all familiar with, have fallen behind the individual

1 claims, and so it is likely that a number of these
2 questions, indeed some of them, have already been
3 decided, and it is likely that a number -- more of them,
4 will be decided before this case comes to trial, so that
5 makes it particularly difficult to know what the
6 budgeting implications are going to be.

7 THE PRESIDENT: Well, let's think about pass-through which
8 is clearly going to be a significant issue raised by the
9 defendants. That's clear. Pass-through is something
10 where Dr Lilico is going to be faced with the arguments
11 about pass-through, it's only new trucks you are
12 claiming for, and he is going to have to consider how he
13 is going to -- what data is needed or what data you want
14 for him to argue against whatever level of pass-through
15 is being urged against him.

16 MR THOMPSON: I'm reluctant to intervene, Sir, but I don't
17 think that's necessarily a given, given the implications
18 of a plea of pass-on for the overall liability of this
19 group of defendants. I know they make protestations
20 about their enthusiasm for pass-on now, but MasterCard
21 is less enthusiastic about pass-on in the context of
22 Mr Harris' Merricks claim, and so it is possible that
23 counsel will say, "Well, wait a minute, if we say there
24 is so much pass-on from new trucks, we are going to be
25 faced with very difficult situations in other cases",

1 and, indeed, you may be faced with arguments from
2 Dr Lillico that a lot of the claimants went bust because
3 of pass-on effects and volume effects, and so --

4 THE PRESIDENT: Well, all I can say is that you have
5 referred to the individual claims, of which there are
6 quite a lot now, and in every one of them pass-through
7 is being run as a defence, quite vigorously with a lot
8 of disclosure resulting. So anything is conceivable,
9 but the expectation on the basis, now, of some
10 experience of the Tribunal with trucks claims against
11 these very defendants is that they do, indeed, as they
12 have said they will, run a pass-through defence, whether
13 you think they are wise to do it or not is not for me.
14 I think we would be rather naive if we approach this on
15 the basis that there is not going to be a pass through
16 defence, particularly in your claim, given that you are
17 not claiming for used trucks, so that makes the pass
18 through defence particularly -- less unattractive, if
19 you like, than where you have -- because the claim on
20 the resale of the truck isn't going to benefit your
21 class.

22 MR THOMPSON: I understand that. I was simply making the
23 point that the goose and the gander here may lead them
24 to have some reservations about saying what a very good
25 point it is on behalf of the used trucks purchased, but

1 I simply make that by way of qualification, Sir, but I
2 accept the general point, and I think our more
3 substantial point is that unless and until this case is
4 actually pleaded against us, it's very difficult for us
5 to predict what the likely scale and scope of it, or the
6 nature of the issues that the cartelists will actually
7 seek to raise.

8 THE PRESIDENT: But we've got to be realistic, Mr Thompson,
9 otherwise what we end up with, we ignore pass-through
10 for now, and we say, "Yes, this all works", and then we
11 get a defence, or defences alleging pass-through. We
12 then see it is a big issue. It is then said, "Now the
13 methodology doesn't work", so we have another big
14 hearing and then we set aside the CPO. Now, that can't
15 make sense. Where there is -- of course there may be
16 wholly unforeseen defences we can't take account of, but
17 where there is something so central and fundamental, one
18 has got to think about it at this stage, otherwise we
19 end up in a mess, and it's not fair to the individual
20 claimants whose interests we must bear in mind, that
21 this is actually a case that is actually going to work
22 in an effective way. It may be that there is a very
23 good way of dealing with pass through, I'm not saying
24 there isn't, but it is something that has got to be
25 considered.

1 MR THOMPSON: Certainly. I don't think Dr Lilico is
2 reluctant to debate the issues with the Tribunal, all
3 I'm saying is that, at the certification stage, the
4 primary focus is on the case that we have advanced and
5 the reservation that we had about the RHA is that it
6 seems to have -- although it says pass-on shouldn't be
7 thought about at all as a part-issue, in fact the
8 positive case is a positive case on pass-through, and
9 that's a distinct feature from our case which is the
10 straightforward case about the position of direct
11 purchasers where the issue of whether or not there has
12 been pass-on is a matter for the cartelists to plead and
13 prove.

14 THE PRESIDENT: Yes, but your litigation plan has got to
15 plan for the realistic developments of the litigation,
16 the realistic and foreseeable developments of the
17 litigation.

18 MR THOMPSON: Yes. We are certainly not naive that the
19 cartelists are not going to defend themselves, and I
20 certainly am not naive that one of the things they will
21 think about are pleas in mitigation. Indeed, Mr Harris
22 in particular has produced quite a long list.

23 THE PRESIDENT: Yes, so the way of dealing with that is
24 something that Dr Lilico will have thought about, and we
25 can ask him about that, and your litigation plan should

1 take on board, and maybe it has.

2 MR THOMPSON: Well, in my submission also, the Ryder
3 disclosure ruling is highly relevant to this, because
4 I think one of the issues that was indicated was that
5 that was going to be treated, in particular the issue of
6 pass-on wasn't really feasible to be dealt with on
7 a micro basis, and a similar indication was given by the
8 Supreme Court in Sainsbury's in relation to volume
9 effects, that they were going to have to be dealt with
10 at an economic level, because if Mr Harris and Mr Singla
11 say that the butcher, the baker and the candlestick
12 maker all had different pass-ons, then the issues would
13 obviously ramify and be completely unwieldy, but
14 I think --

15 THE PRESIDENT: Well, it is dealt with by the broad axe.
16 That has been established. It doesn't have to be done
17 at a granular level. It is an estimate using the broad
18 axe to employ the well-worn metaphor, in just the same
19 way as the estimate of the overcharge.

20 MR THOMPSON: Yes. We don't know whether, by way of
21 defence, it is in the cartelists' interests to do it in
22 terms of the broad axe, or whether they may say we will
23 be better making it all so very complicated and
24 expensive.

25 THE PRESIDENT: Well, with a class, I think it is inevitable

1 that it will be dealt with by the broad axe, and that's
2 the way that the Supreme Court has effectively said it
3 should be dealt with where you have a complex claim, and
4 that the only question I'm raising is whether that has
5 been taken into account in the litigation plan and how
6 it's going to be approached from your side in no doubt
7 seeking to argue there was very little pass-on, and what
8 sort of evidence which doesn't come, obviously, from the
9 defendants in this case, how it's going to be
10 approached, and what budgetary implications that has.
11 It's as simple as that.

12 MR THOMPSON: Yes, and I think in a sense, as the Tribunal
13 has very helpfully put to us, and as Dr Lilico has
14 very -- in his usual, very clear way, has set out at
15 F/4/9, he is relying on a wide range of data but the
16 Tribunal rightly brings the focus in to the extent to
17 which there may need to be, in due course, disclosure
18 from third parties, all of which the Tribunal may direct
19 some degree of sampling within the claimant class. The
20 point I'm pushing back on is that unless and until the
21 process of disclosure has gone some way down the track,
22 it's going to be very difficult for the Tribunal, or,
23 indeed, for UKTC, to reach any informed view about the
24 extent to which sampling from potential or actual
25 claimants is going to be a useful exercise, or on what

1 basis it is going to be conducted, and in relation to
2 pass-on, unless and until the -- and at the moment we
3 don't even know whether the claimants -- the
4 cartelists -- are going to say that they want to run
5 used trucks as a pass-on issue or some other issue,
6 whether they may say, "Used trucks moved up and down
7 because they are in competition with new trucks". We
8 just don't know what the argument is going to be in
9 relation to used trucks, and, likewise, whether they are
10 really going to say that sub-purchasers, or sub-sub
11 purchasers were passed on, and allow that to ramify, and
12 the extent to which that's going to be a complex issue
13 that we are going to have to deal with, or whether it is
14 actually going to be a high level economic argument, and
15 so it is only to that extent that we are saying it is
16 very difficult to estimate specifically what's going to
17 be needed, and we say that the guidance of the Canadian
18 courts is highly material to that sort of question, that
19 it's going to evolve, depending on the issues as they
20 emerge, and are pleaded, and the evidence, as it
21 emerges, and the guidance of the Tribunal.

22 THE PRESIDENT: Yes. Can you just take us, before we have
23 to break, to your cost budget, and what's in it for
24 contingencies on that basis?

25 MR THOMPSON: Yes. I should first -- I think it may be

1 worth --

2 THE PRESIDENT: I don't know if it has been revised, given
3 the passage of time.

4 MR THOMPSON: I was actually going to first take you to the
5 witness statement of Mr Perrin which is at tab 9, and
6 you will appreciate that Mr Perrin, or persons related
7 to Mr Perrin --

8 THE PRESIDENT: Yes. Tab 9 of Bundle B1?

9 MR THOMPSON: Yes.

10 THE PRESIDENT: {B/9/1}.

11 MR THOMPSON: Go to {B/9/3}, it is, as it were, the other
12 side of the balance sheet, paragraph 13. Mr Perrin
13 makes the general comment that if there is a budget
14 overrun on the case --

15 THE PRESIDENT: Yes.

16 MR THOMPSON: -- would be taken, as it has in many other
17 cases, but:

18 "Assuming the case continues to have merit, the
19 current investors will respond to the need to make
20 additional investment, because to fail to do so might
21 cause a collapse of the case from the loss of the very
22 substantial funds already invested".

23 So that's a point that I think the Tribunal picked
24 up in the funding judgment and I think it is obviously
25 part of the context that needs to be borne in mind in

1 this discussion.

2 THE PRESIDENT: Yes.

3 MR THOMPSON: In terms of the budget itself, that's
4 explained in the second and third witness statements of
5 Mr Surguy which are at tabs 11 and 12, and then the
6 budget itself, I will be assisted, is -- I think it is
7 an annex to the litigation plan which is at tab 16, and
8 that's at tab 17, which is the exhibit "JMAS 5".

9 THE PRESIDENT: Ah yes. Thank you.

10 MR THOMPSON: I see the time Sir. I don't know whether you
11 want to break now.

12 THE PRESIDENT: Well, I was saying if we just look at this
13 before we break.

14 MR THOMPSON: If you are asking me about disclosure then
15 I think that is something we looked at, and the figure
16 is currently just over £5 million.

17 THE PRESIDENT: I'm looking, really, at -- just at the
18 contingencies. There is a contingent cost A and B, but
19 what is A and what is B? I'm on page B/17/7. I fully
20 take your point that the funder has every incentive not
21 to leave you high and dry, but to put in more funds if
22 necessary {B/17/7}. Is that explained? Perhaps you can
23 take instructions over the lunch adjournment of what
24 contingent cost A and contingent cost -- well,
25 contingent cost A, it is at the bottom, it is

1 a mediation, I think, and contingent cost B, an
2 allowance made for two CMCs post approval and pre PTRs.
3 Yes. I see. So it's not about additional disclosure.

4 MR THOMPSON: Is the question that's being put to me whether
5 there is or should be a generalised contingency element,
6 given the uncertainties? Is that the point that's being
7 put to me?

8 THE PRESIDENT: Well, as I understood it, what you are
9 saying is, well, we can't really be more specific
10 because we don't know how things on pass-through will
11 develop, and so we can't be more specific about how we
12 might need to deal with it, and so I'm saying, well, if
13 that's right, given the -- it seems to me inevitably
14 that it will be an issue, is it covered somewhere in
15 terms of a contingent fund that you can use to deal with
16 it.

17 MR SINGLA: Sir, I hesitate to interrupt but it may assist
18 to look at page 4 where there is a note. It is
19 Mr Singla here for Iveco.

20 THE PRESIDENT: Yes.

21 MR SINGLA: On page 4 you will see that Mr Thompson referred
22 to the approximate 5 million figure for disclosure, but
23 there is a note underneath that says this does not
24 include any applications required in relation to
25 disclosure and any third party aspects which will need

1 to be considered on an ad hoc basis. Now we don't
2 actually understand what that means, but if, Sir, you
3 are looking for contingencies, I think that explains
4 that, in fact, there are no third party disclosure
5 elements to this budget.

6 MR THOMPSON: Can I come back to this after the --

7 THE PRESIDENT: Yes. Perhaps this is something you want to
8 talk to those instructing you. As I say, we don't
9 expect you to budget, obviously, at this stage, for
10 every detailed element, and sometimes it can be dealt
11 with for contingencies to deal with sort of issues
12 arising from the defence, or defences, but it is the one
13 issue on authorisation. I think there we should break.
14 We will return at 2 o'clock. I would like to just tell
15 you, given the time and the plan of your submissions, we
16 do want to ask you quite a number of questions on the
17 opt-out versus opt-in question issue, which we know you
18 are going to come to, but you will receive a number of
19 queries from the Tribunal on that point, so it is
20 something that you must allow time for. We will say
21 2 o'clock.

22 MR THOMPSON: I'm grateful, Sir.

23 (1.07 pm)

24 (Luncheon adjournment)

25 (2.00 pm)

1 THE PRESIDENT: Yes, Mr Thompson?

2 MR THOMPSON: I'm grateful, Sir. If I could just pick up
3 two issues from this morning's discussions, first of
4 all, just to tie together the threads on the deceased
5 persons/defunct companies issue, there was one point
6 that I don't think I made, and I don't think they are in
7 the papers currently before the Tribunal, which is
8 something which the Chair in particular will be very
9 well aware of, that this matter was debated at length
10 between MasterCard and the advocate for Mr Merricks in
11 a hearing on 25 and 26 March, and perhaps, ironically,
12 in that respect, we very largely adopt the submissions
13 made on behalf of Mr Merricks, so Mr Harris' client in
14 that case, in relation to this issue, and, in
15 particular, perhaps the rather elementary point that
16 these are class representative applications not claims
17 brought on behalf of individuals, and, as such, it would
18 only be a good point at the certification stage if it
19 could be suggested that there was a high percentage of
20 people or clients who were either dead or companies who
21 were either dead or defunct, so that the class action
22 was liable to totter over, and in my submission we are
23 a long way away from that as Mr Harris' clients were in
24 Merricks. Otherwise, it is an issue that's either
25 appropriate for some form of discounting process, if

1 any, in relation to an aggregate award which could be
2 taken into account either in the CPO order itself or
3 probably, and we wouldn't accept that claims in relation
4 to dead persons which would normally accrue to their
5 estates are a nullity, and in relation to defunct
6 companies, although there are complications about
7 whether a defunct company can be revived, in principle,
8 defunct companies, the liquidator or administrator, can
9 bring such a claim, so it's not a straightforward issue
10 about whether or not some of these people may have been
11 defunct, it's a more nuanced question about whether or
12 not these dead people or these defunct companies,
13 whether their rights can be protected, either by
14 representatives of their estate or representatives of
15 the company. I think that's the gist of it. I don't
16 know whether it would assist the Tribunal to have the
17 transcript from the recent Merricks hearing because it
18 is obviously highly relevant to a lot of these
19 questions, as I'm sure Mr Harris in particular is well
20 aware and indeed Mr Hoskins.

21 THE PRESIDENT: Yes. Just to be clear, in Merricks, of
22 course, it was only about deceased persons. It wasn't
23 about defunct companies.

24 MR THOMPSON: Yes indeed.

25 THE PRESIDENT: Because it was a consumer claim. I don't

1 think we need a transcript, but I take your point that
2 you adopt those submissions, yes.

3 PROFESSOR WILKS: Can I just weigh in and point out that it
4 is quite a substantial class, as far as we can see, and
5 if we were to believe Burnett, the witness statement
6 from the RHA witness, he is talking about 145,000
7 potential purchases, so I think it is really quite
8 a significant issue.

9 MR THOMPSON: Oh yes, I am not disputing that, and I think
10 it may be something that, in terms of methodologies for
11 dealing with it, it may be that Dr Lilico, or indeed
12 Dr Davis, may be better able to debate it with you than
13 myself, but I'm not under any illusion that nobody has
14 died since 1997, so I can see that it is a potentially
15 significant statistical issue.

16 THE PRESIDENT: What I don't quite understand is, in your
17 draft order, and I don't want to take up time with this,
18 we've enough else to do, but you have actually envisaged
19 that we would direct that those people have to opt out.
20 That's what we are being asked to order. Well, if we
21 order them to opt out, why not just exclude them from
22 the class.

23 MR THOMPSON: It may be that it is an infelicity of
24 drafting. I think it was intended to give effect to the
25 legislation which envisages the Tribunal giving an

1 opportunity for people who wish to opt out of the
2 opt-out claim to do so, whether they are Royal Mail or
3 the representatives of a dead person.

4 THE PRESIDENT: Well, anyone can opt out, but I thought that
5 was specifically -- well, we will look at it separately
6 and look at it later. Yes. Okay. That was the first
7 point.

8 I think let's -- you said two points from this
9 morning.

10 MR THOMPSON: The other one was the budget and the question
11 of how it is allocated, and, of course, a short answer,
12 but I do not think it is going to be a sufficient
13 answer, is that many of these questions were debated
14 before the Tribunal and were the subject matter of the
15 funding judgment, and, likewise, I have taken the
16 Tribunal to Mr Perrin's sixth statement in the general
17 assurance given at paragraph 13, the sort of pragmatic
18 assurance that, in reality, he's not going to suddenly
19 abandon ship if things get expensive if he regards the
20 voyage as still a worthwhile one.

21 There is also, of course, the point made in the
22 wider ruling about proportionality which I think is also
23 made in the funding judgment, and against that
24 background we would say that this is certainly only
25 a factor, and we would say not a significantly negative

1 factor that the application and the litigation plan and
2 the budget cannot, and has not attempted to anticipate
3 or finance everything that might go wrong with this
4 litigation, and how expensive it might be, if the
5 cartelists make a number of very expensive pleaded
6 cases, or cases that would be very expensive to
7 determine, and the Tribunal rules that disclosure must
8 be made to enable them to litigate those questions, and
9 in my submission that is a reasonable approach, and that
10 any other approach would threaten destroying the whole
11 regime, because it would give a very obvious incentive
12 which, to some extent, was manifested in some of the
13 submissions of Mr Bacon at the funding where I think he
14 was talking that at least £60 million or £70 million was
15 going to have to be put up to fund this, but it is, as
16 it were, a green light to the cartelists to say, "This
17 is all terribly, terribly complicated and going to be
18 very expensive and therefore you shouldn't certify it
19 unless more and more money is put into the pot", which,
20 as you will anticipate, this is a very, very expensive
21 thing for a funder to do, to tie up money to specific
22 claims, and where -- I don't think it is something
23 I have taken the Tribunal to yet, but Mr Perrin's sixth
24 statement evidences that the funder on the UKTC side
25 has, indeed, done what it was required to do under the

1 terms of the funding judgment, and it is a very
2 difficult thing, if that's a moving target, and after
3 the funding judgment comes along two years later, it is
4 said that the funder must put up yet more money, and so
5 I accept that the budget does not anticipate every
6 contingency, and I think Mr Surguy has been quite open
7 that the litigation plan is still a work in progress,
8 partly because the board and Weightmans don't wish to
9 incur the costs of potentially very expensive claims
10 management services, until it is clear 1) whether the
11 order is going to be granted, and 2) what's actually
12 required, and I think Dr Lilico would be very happy to
13 discuss, first of all, what's likely to be needed, for
14 example, on transaction prices where we strongly suspect
15 that the truck manufacturers like the car manufacturers
16 monitor like a hawk the transaction prices of the UK
17 market, and we suspect that there will be very
18 substantial evidence available on that issue, and then
19 in relation to pass-on, it's not directly relevant, but
20 it's the best authority we have which is the Sainsbury's
21 judgment of the Supreme Court where the issue of pass-on
22 and the application of the broad axe was debated, and
23 one finds that at joint authorities bundle 5, tab 66,
24 and the reason why I say it's not directly an issue is
25 because of the question of the aggregate award, and

1 whether or not the compensatory principle applies,
2 that's at paragraph 217 at {JA/66/61}. Page 61 of
3 JA/66.

4 THE PRESIDENT: That's it. Thank you.

5 MR THOMPSON: It is headed, "The degree of precision
6 required in establishing the extent of pass-on of
7 overcharge", and then there is general discussion of the
8 approach which has some similarities to the discussion
9 in the Merricks case, and then over the page at
10 {JA/66/62} there is this passage towards the end of that
11 paragraph:

12 "The task of valuing claims for purely monetary
13 losses may also lack precision if the compensatory
14 principle is to be honoured, particularly when one is
15 dealing with complex trading entities such as the
16 merchants in these appeals. We see this, for example,
17 in AAM's alternative case which seeks to assess the loss
18 of profit caused by the volume effect where the
19 overcharge was passed on to their customers in the form
20 of higher prices. Such a claim is likely to depend in
21 considerable measure on economic opinion evidence and
22 involve imprecise estimates".

23 In my submission, certainly under the UKTC
24 application for an aggregate award, any defence is also,
25 in reality, going to be an aggregated defence, and so

1 the issues of pass-on and volume effects are, in
2 reality, going to be conducted as battles between
3 economists at the global level about the UK trucks
4 industry, and we would say that reflects the approach in
5 the Ryder disclosure judgment, and it is also worth,
6 perhaps, noting that there is quite a lot of information
7 about the UK trucks industry, and no doubt there will be
8 more, but we provided the Tribunal with the overview
9 report, both for 2011 and I think also 2016 in the
10 papers, and it appears to us that it is realistic that
11 the pass-on issue will, in fact, be debated by
12 economists at an aggregated level, and that the
13 suggestion that there is going to have to be disclosure
14 from the butcher, the baker and the candlestick maker,
15 in my submission, is an unrealistic one which is
16 essentially self-serving by the cartelists.

17 THE PRESIDENT: Yes. Can I just -- on the budget which we
18 were looking at just before the break -- can I just make
19 sure I have understood one thing which was at B/17? So
20 {B/17/5}? We have an expert fee summary. You see that
21 on the right, right half of the page. Just to make sure
22 I have understood that correctly, what I think is said
23 there is that 114,000-odd has been incurred, for future,
24 what we've got there is -- it is a very precise figure
25 for some reason, but it is -- rounding it, it is about

1 840,000. That's what's been provided for future expert
2 fees for the future. Is that right?

3 MR THOMPSON: Yes. That appears to be the figure.

4 THE PRESIDENT: I just want to make sure I had understood it
5 properly.

6 MR THOMPSON: That may partly reflect the different
7 methodological assumptions that are being made which no
8 doubt the Tribunal will want to discuss with Dr Lilico
9 and Dr Davis next week.

10 THE PRESIDENT: Yes.

11 MR THOMPSON: But as I understand it, there are the
12 estimates that have been given --

13 THE PRESIDENT: Yes. I see.

14 MR THOMPSON: -- for the settlement.

15 DR BISHOP: Could I ask a question? Dr Lilico says at
16 several points that he hasn't ruled out doing the more
17 traditional, during the cartel/after the cartel,
18 econometric estimates if that should be needed. Now,
19 those will entail very substantial data gathering
20 exercises and quite a lot of work in the modelling in
21 addition to what's currently budgeted for Dr Lilico's,
22 in theoretical optimisation model, that is his main
23 model. If he does find that he needs to do more
24 econometrics, then where is the money going to come
25 from?

1 MR THOMPSON: Yes. I'm certainly not dodging that as
2 a question that's right for me to make, but I think the
3 nature of Dr Lilico's anticipated econometrics is
4 probably a matter for him, but my understanding is that,
5 sitting where he is now, he sees considerable problems
6 with the during/after model given, in particular, the
7 circumstances of this case, and how long the attribution
8 would have to go back to before the creation of the
9 Euro, et cetera, and I think he is anticipating
10 econometrics as a form of cross-correct rather than as
11 a freestanding basis for his evaluation, and, of course,
12 he will, by the time this comes on, have the benefit of
13 whatever the Tribunal has found in other cases, but I'm
14 reluctant to go much further, because that will only
15 display my ignorance and Dr Lilico will say things
16 better next week, but I don't think at the moment he is
17 anticipating a freestanding econometric exercise on the
18 scale that Dr Davis has in mind. I think I have been
19 handed a note, if I could just ... (Pause)

20 Apparently some allocation has been made by
21 Dr Lilico for some econometric work and clearly the
22 allocations will depend on methodological decisions
23 which are taken further down the track, but I wouldn't
24 want to go any further than that if the Tribunal, and in
25 particular Dr Bishop want to debate that, I think it

1 will probably be a matter to raise with Dr Lilico if
2 that's an acceptable answer.

3 DR BISHOP: It is acceptable to me. I think it is --
4 I think you are right that it is better pursued with
5 Andrew Lilico next week. Yes. I agree.

6 MR THOMPSON: (Inaudible) clear answer when he gives
7 evidence next week.

8 Given the indication from the Tribunal and the
9 passage of time, I'm aware that we are on a fairly
10 constrained timetable, and I see that it's now 2.20.
11 I have addressed the suitability, or the just and
12 reasonable criterion in relation to UKTC, and the
13 positive factors, plus factors that need to be taken
14 into account, I would invite the Tribunal to treat as
15 plus factors in the wording of the Supreme Court, Rule
16 79(2)(a), (b), (d), (e), (f) and (g). We would say
17 that -- I'm sorry, I'm in the wrong part. I have jumped
18 over myself. I'm sorry, Sir.

19 I'm sorry, I'm in my 79s when I should be in my 78s.

20 THE PRESIDENT: Yes. You took us through 78(2) and the
21 various sub-rules, and you say that we should -- and the
22 point you make is the fact that they are not contested
23 is one thing, but you say these are actually plus
24 factors that we should weigh in the evaluative exercise,
25 I understand.

1 MR THOMPSON: I got out of my sequence.

2 So that, then, leaves the 78(2)(c) issue which is
3 the relative question, and I think I have largely
4 addressed that already in discussion of the class
5 definition, both in terms of clarity and absence of
6 conflict, and then there is also a point which we make
7 in our skeleton argument, that certainly if the order is
8 made on an opt-out basis, there is a significant
9 financial advantage to claimants in that they receive
10 any payment out of an aggregate award on a gross rather
11 than a net basis, because in substance they are at the
12 top of the waterfall in relation to opt-out, and at the
13 bottom of the waterfall in relation to opt-in, and so
14 that, to some extent -- anticipates the opt-out/opt-in
15 debate but the Tribunal, and in particular the
16 President, will be well aware that under the particular
17 rules of section 47C(6), the recovery of the funder's
18 fee comes at the discretion of the Tribunal after
19 distribution to the individual claimants, and so as
20 against the RHA opt-in application, and as against the
21 UKTC opt-in application, the most financially
22 advantageous way of distributing the aggregate award
23 will be to the individual claimants under an opt-out,
24 and so that is a point which is relevant in our
25 submission to the overall discretion in relation to

1 suitability or just and reasonableness under Rule 78.

2 Turning to the eligibility criteria, the two
3 eligibility criteria, the common issues and the
4 suitability for collective proceedings, the first one is
5 at -- addressed in our skeleton at paragraphs 46-7,
6 A/1/15 to 17, and by way of general submission this
7 issue is now governed not only by the Court of Appeal
8 and Supreme Court in Merricks which in our submission
9 confirmed that an issue can be common, even if it is
10 likely in practice to raise different specific factual
11 issues for different members of a proposed class, as,
12 for example, the perhaps slightly frivolous example we
13 gave of the cash purchaser of a cup of coffee as against
14 the MasterCard purchaser of a flight or a summer
15 holiday, that there are going to be very different
16 issues, and that didn't seem to put off the Court of
17 Appeal or the Supreme Court in Merricks, but in this
18 case the issue of commonality has, to some extent, been
19 anticipated both in the Ryder disclosure ruling that
20 we've already discussed, but also in the guidance of the
21 Tribunal and the Court of Appeal in their respective
22 recitals judgments which I don't think we need to go to,
23 but which are at tabs 60 and 68 of bundles 4 and 5
24 where, clearly, the question of the legal effect of the
25 settlement decision has been the subject of extensive

1 submission and rulings, both by the Tribunal and the
2 Court of Appeal, and is quite obviously a common issue
3 of law which applies to all of the UKTC claims, so we
4 were surprised to see Mr Singla say that the only common
5 issues were issues of jurisdiction and simple interest
6 at paragraph 2.2 of his skeleton argument.

7 In reality, we've identified a series of issues
8 common to the proceedings at paragraph 55 of our amended
9 claim form, which is at B/1/26, the most basic and
10 obvious of which is whether the cartel led to an
11 overcharge for members of the UKTC class {B/1/26} all of
12 whom were the purchasers or lessees of new trucks. We
13 would say that, obviously, that is a common issue.

14 We would say that Iveco's own skeleton illustrates
15 the fact that there are, in fact, a series of common
16 issues which the cartelists themselves will raise, for
17 example the nature of the cartel as bound by
18 a settlement decision which all of the cartelists and
19 their experts raise, for example, at Iveco's skeleton
20 argument, paragraphs 19-24, the character of the actual
21 and potential competition on the UK trucks market nearer
22 the time which Iveco raises at paragraph 25-29, the
23 relationship between list prices and transaction prices
24 which all of the cartelists raise and which Iveco raises
25 at paragraphs 51 and 52, and the nature of the collusion

1 between the cartelists in respect of delay compliance
2 with emissions technology requirements, all of which the
3 cartelists raise, for example, it appears at paragraph
4 74.3 of the Iveco skeleton.

5 There are also a series of economic issues that have
6 been identified by Dr Lilico as relevant in his four
7 expert reports, for example, the degree of
8 differentiation of the UK trucks market, the elasticity
9 of demand, and the nature of the price competition
10 between the cartelists who would have existed on the UK
11 trucks market in the absence of a cartel. For example,
12 paragraph 4.5 and 5.1.8 of his first report, which is
13 F/1/23-25 and 33-36. Although the answers to those
14 questions are likely to be contested in various ways and
15 it appears that the cartelists may wish to challenge
16 Dr Lilico's methodology, even as a matter of principle,
17 we would submit that there are obviously common issues
18 across all the individual claims that cannot be resolved
19 either individually at the application stage, but that
20 are matters for the Tribunal to determine at trial. For
21 good measure we would say that the cartelists intend to
22 run a number of common issues by way of defence in order
23 to argue mitigation of loss, notably that of pass-on of
24 any overcharge or at least they indicate that that is
25 what they intend to do to customers and to purchasers of

1 used trucks, and we also anticipate that a number of
2 issues that the cartelists seek to propose and
3 individualise would, in practice, resolve themselves
4 into common issues, possibly at the stage of
5 distribution, notably the issues of the correct approach
6 of interest and tax, and whether or not compound
7 interest should be awarded, and we say it would be
8 premature to suggest that they are not capable of being
9 addressed on a common basis at this stage.

10 The other point that Iveco makes, and to some extent
11 is shared by Daimler, is whether the UK trucks market is
12 too heterogeneous for the commonality requirement to be
13 satisfied. This forms no less than an entire section of
14 the Iveco amended response and also paragraphs 30-36 of
15 its skeleton at A/3/15-17. We would say that that is
16 a completely hopeless argument and that there are two
17 straightforward answers. One, it is obviously
18 self-serving and would emasculate the regime if it were
19 to be accepted otherwise than on the clearest evidence.
20 Here both Mr Leonard and Mr Burnett clearly dispute that
21 evidence, and here, at least a common cause of Mr Flynn,
22 in that he has made helpful reference to Canadian and US
23 precedent on this issue at paragraphs 98-103 of his
24 amended reply, which is at C/3/50-51, and so we say this
25 is an exaggerated and self-serving argument that cannot

1 possibly succeed, and, indeed, if it had any merit,
2 which we seriously doubt, it is an issue that can be
3 perfectly well pleaded by the cartelists as an element
4 of their defence, if it proves to be a good argument
5 supported by evidence, it might reduce or conceivably
6 eliminate an award of damages if UKTC fails to establish
7 its case. However, we would submit it is obviously
8 premature to decide that issue now at certification. It
9 is a matter for evidence at trial, and we would say
10 essentially similar points are made in relation to the
11 lengthy dispositions, particularly from Daimler in
12 relation to interest and tax. If these are good points
13 they can be raised by the cartelists and determined by
14 the Tribunal as issues at trial, possibly on the basis
15 of sub-classes, so we would say that the commonality
16 requirement is plainly and obviously satisfied, and that
17 Iveco draw the short straw in trying to argue to the
18 contrary.

19 I say that subject to my next point, which is the
20 suitability point is equally hopeless, and there,
21 Daimler has taken the lead. The Tribunal will be aware
22 that paragraph 56 Merricks, which is at {JA/68/22}, the
23 eligibility requirement of suitability and the claims
24 for collective proceedings, and also for aggregate award
25 was to be decided on a relative rather than absolute

1 basis, on the basis that the question of this multitude
2 of parallel claims was more suitable to be litigated
3 collectively, rather than in a series of individual
4 claims, so that if the same or greater difficulties
5 beset individual claims, then that didn't undermine the
6 application on grounds of suitability, and that's
7 paragraphs 54-56. On the contrary, the difficulties
8 facing individual claimants were recognised as a key
9 reason for this innovative statutory scheme, including
10 the possibility of an aggregate award, and that's at
11 paragraphs 54 and 57.

12 We would say against that background there is only
13 one answer to the general question whether resolution of
14 the UKTC claims are more suitable for collective
15 proceedings than for individual claims. We would say
16 that is obviously the case. The number and scale of
17 these claims --

18 THE PRESIDENT: I don't think we need to hear you on that,
19 Mr Thompson, at this point.

20 MR THOMPSON: I'm grateful.

21 Equally, Daimler seek to take exception to our
22 pursuing a top-down, aggregate approach, notwithstanding
23 the fact that that appears to be the approach that was
24 envisaged by the Tribunal itself in its disclosure
25 document, and we would say the two stand and fall

1 together.

2 I think I have already jumped ahead and said that
3 the -- we get a spectacular tick on 79(2) (a), (b) and
4 (d) to (g) so I wouldn't propose to take any more time
5 on that.

6 It seemed to us that the only issue that was
7 arguable, I don't know whether the Tribunal is
8 interested in that question, is 79(2) (c) which is the
9 existence of a number of individual claims and the
10 stayed RHA High Court GLO, and the fact that the RHA
11 itself has devoted a lot of effort to signing up
12 potential claimants to support its opt-in application,
13 and there is quite a lot of effort, both in the pleading
14 and in the evidence of Mr Burnett which indicates that
15 quite a lot of the RHA's efforts have been directed in
16 that direction.

17 THE PRESIDENT: I don't think that goes to -- I mean, 79(2)
18 is collective as opposed to individual.

19 MR THOMPSON: I think I'm only going to it because -- it may
20 be worth just turning up for a second --

21 THE PRESIDENT: I mean, it doesn't say, "As compared to
22 individual", but the Supreme Court has said that's what
23 it means.

24 MR THOMPSON: Yes. I will not enter any --

25 THE PRESIDENT: So that's what one is dealing with there,

1 but so we take the point you make, you say, well, we've
2 read what you said about individual claims, on aggregate
3 damages, which is a separate suitability question
4 which -- and only one of them, which is at sub (f), you
5 say there is the Ryder disclosure judgment that says it
6 is not quite saying that a whole lot of claims from
7 different claimants can be treated together, it's
8 looking at all the Ryder trucks and saying you can't go
9 truck by truck.

10 MR THOMPSON: Yes, but I'm merely making the point that
11 I don't know if we need to turn it up. I suspect the
12 Tribunal has it well in mind that the indication is that
13 a bottom-up approach may not be feasible, and I
14 anticipate that that means that a top-down one is the
15 only realistic approach, and it's not a long way, indeed
16 it is implicit in the Court of Appeal's approach that an
17 aggregate award is characteristic in the top-down
18 approach, but the only point I was picking up was,
19 insofar as there are plus and minus factors, all of the
20 factors are plus, except, possibly, for (c), which is
21 that there have been some other claims bought, both by
22 the RHA and by individuals, so I don't know whether, in
23 my submission, that's, as it were, a pebble on one side
24 of the scales, as against various bricks on the other
25 side, but if the Tribunal would like me to address them

1 on that question, I'm very happy to do so.

2 THE PRESIDENT: No, I think that's all right. Perhaps you
3 will move to 79(3) which is the opt-in/opt-out.

4 MR THOMPSON: Yes, and as I read the legislation, strictly
5 speaking this issue legally only arises for
6 determination if the Tribunal is satisfied that an order
7 should be made. It is then deciding what sort of order
8 it should make, because it is required under Rule
9 80(1)(f) to state whether the collective proceedings are
10 opt-in or opt-out collective proceedings, but, in
11 reality, as the Merricks case illustrates, the two
12 issues of suitability for collective proceedings and for
13 an opt-out award are often closely linked, as one of the
14 cost factors of collective proceedings is their
15 suitability for an aggregate award, which is also one of
16 the principal justifications for an opt-out order.

17 THE PRESIDENT: You can have an aggregate award for an
18 opt-in proceeding.

19 MR THOMPSON: I'm aware of that. I'm simply making the
20 point that, as it were, where there is an opt-out
21 I think there is necessarily an aggregate award, and so
22 that seems to be implicit in Rule 93(3) where there is
23 reference to that aggregate award which I think is
24 (Inaudible) the one that's in opt-out proceedings.

25 The advantages of the aggregate award are identified

1 in Merricks, and in particular at paragraph 57, in that
2 it radically resolves the disadvantages of a multitude
3 of individually assessed claims for damages, both for
4 the court and for all the parties.

5 THE PRESIDENT: Yes. Well, we appreciate that, but what we
6 want to hear from you, as I have said, is about opt-out
7 versus opt-in, not about aggregate award.

8 MR THOMPSON: Indeed, Sir.

9 THE PRESIDENT: Because you say -- and I'm concerned about
10 the time -- you say in your skeleton argument at,
11 I think, paragraph 60, that the reality of the situation
12 is the Tribunal is faced with a choice of certifying
13 UKTC's opt-out class action for an aggregate award based
14 on all collective claims, or, (ii), leaving the majority
15 of members of the class without any realistic prospect
16 of obtaining compensation, but it isn't that binary
17 choice, is it. There is the third alternative of an
18 opt-in class, and, indeed, you have, in your
19 application, put that as an alternative, although not
20 your favourite alternative, and so -- and that is the
21 issue we have to address under 79(3), and you have seen
22 the reference in the guide that opt-in, where
23 practicable, has many benefits, and what we are not
24 clear about is what is the -- given the preference for
25 an opt-in for various reasons, what is the objection

1 here that you say to making the UKTC claim opt-in?

2 MR THOMPSON: Sir, if I may, the point I was seeking to make
3 by reference to the aggregate award is that many of the
4 advantages identified by the Supreme Court in relation
5 to an aggregate award are also advantages of an opt-out
6 order, in that they radically simplify the book building
7 stage and the distribution stage, and, indeed, the
8 issues between the parties in that they are conducted at
9 an aggregated level which --

10 THE PRESIDENT: I'm sorry, I just don't understand your
11 submission. That is the advantage of an aggregate
12 award. Why is that an advantage of an opt-out
13 proceedings with an aggregate award as opposed to an
14 opt-in proceedings with an aggregate award?

15 MR THOMPSON: Well, I think one only has to imagine or
16 conceive of the possibilities in relation to an opt-in
17 class. Sitting here now, we have no idea how many
18 people there will be in it, whether there will be
19 10,000, 100,000, 500,000, and we have no idea of the
20 character, and depending on the answers to those
21 questions, the character of the class may vary very
22 significantly, and the Tribunal may have to exercise its
23 discretion as to whether or not particular parts of the
24 opt-in class should be the focus of its discussion,
25 whereas just as in relation to an aggregate award, if

1 you have an opt-out class you know exactly who you are
2 dealing with, you are dealing with the whole lot, and --

3 THE PRESIDENT: Well, if you have an opt-in class you have
4 a date by which people have to opt in, and when that
5 date is passed you know exactly who you are dealing
6 with.

7 MR THOMPSON: Well, that is true, Sir, but you don't know,
8 even when you do know, you will have to make an
9 investigation of the character of the people who may or
10 may not have -- or the people who have opted in, and,
11 inevitably, that's going to be a quite different type of
12 exercise from the exercise involved in assessing the
13 opt-out class. That's -- I don't want to get bogged
14 down in this point, it was, as it were, an introductory
15 point that many of the advantages which the Supreme
16 Court has identified in relation to an aggregate award
17 also apply in relation to an opt-out class, which was
18 not necessarily to be distinguished in Merricks because
19 it was an opt-out application for an aggregate award,
20 but if I turn to the specific statutory criteria where,
21 again, we are looking at an overall assessment of the
22 same kind, a multifactorial assessment of the plus and
23 minus factors, the first one is the strength criterion
24 where we are dealing with a massive international
25 cartel, admitted, and we would say that we fulfil that

1 very considerably, so that the complications of a
2 questionable claim don't arise here, and in terms of the
3 feasibility of the opt-in proceedings, and to some
4 extent we debated this, I think, in relation to whether
5 there should be a stay in the first place, is
6 complicated, not only by the scale, duration and
7 complexity of the infringement at issue, but also by the
8 passage of time and the uncertain position of the
9 cartelists in respect of limitation which is an issue
10 that we debated before, but it remains a factor that was
11 of concern to UKTC when it started these proceedings and
12 knocked out (Inaudible) and given the history of what's
13 happened since in terms of procedural challenges brought
14 by the cartelists, notably DAF we have no reassurance at
15 all that that is not still a legitimate source of
16 concern.

17 THE PRESIDENT: Well, can I just try and understand the
18 limitation point? You say limitation is a point for
19 opt-in, is a potential problem for an opt-in claim, and
20 is this on the basis that you have set out in the --
21 I think in the appendix to your reply? Is that right?

22 MR THOMPSON: Yes. If I could take it in stages, Sir, the
23 first stage is in relation to the High Court where
24 I think Mr Flynn, his client, have started proceedings
25 on a precautionary basis for a GLO, presumably because

1 of concerns over limitation if his opt-in claim is not
2 granted, so that's one thing. There has been no
3 assurance in relation to that.

4 THE PRESIDENT: Yes.

5 MR THOMPSON: The second one is in relation to opt in. We
6 are not making any concessions that this is a good
7 argument.

8 THE PRESIDENT: Yes.

9 MR THOMPSON: But the fact is that there is a process for
10 opting in to opt in proceedings, and few, if any, of the
11 claimants, either in the RHA or UKTC opt in cases were
12 made by October 2018 which I believe is the original
13 cut-off for claims in the Tribunal.

14 THE PRESIDENT: Well they can't be made because we haven't
15 had a CPO. So nobody can opt in. There is nothing to
16 opt into.

17 MR THOMPSON: I understand that, but certain individual
18 claims have been made, and I believe that they were made
19 in the Tribunal within that timetable, so the question
20 is, what do you have to do to opt in to the claim, and
21 what happens if the limitation period expires before you
22 opt in?

23 THE PRESIDENT: Yes.

24 MR THOMPSON: Now, in relation to opt-out, that is
25 a completely hopeless case because bringing the

1 proceedings brings the proceedings on behalf of all the
2 members of the class, and so it is simply a matter of
3 defining the class, and since our class is extremely
4 clear, it is quite plain who we've brought the claims on
5 behalf of. The concern is whether or not somebody may
6 seek to argue, were there to be only an opt in case,
7 that the claims have not been brought, and so that the
8 people who wish to opt in are now out of time, and we
9 haven't heard any assurance --

10 THE PRESIDENT: Yes, although if that was a good argument it
11 would knock out the great majority, effectively, of the
12 RHA application.

13 MR THOMPSON: It would indeed.

14 THE PRESIDENT: That would just dispose of it, but it's not
15 an argument that any of the respondents have now raised,
16 because if they wanted to run it, they can run it now
17 and we would say, "Goodbye RHA", save, perhaps, for
18 those limited numbers who have perhaps started an
19 independent action.

20 MR THOMPSON: Those are obviously various tactical
21 considerations here, just as there may be in relation to
22 pass-on, as I think was indicated by the Supreme Court
23 in Merricks in relation to pass-on, but MasterCard is
24 sometimes enthusiastic about the pass-on argument and
25 sometimes not so much, and it's not impossible these

1 cartelists are thinking this limitation case doesn't
2 look very good against opt-out, but if only we can get
3 the opt-out kicked out because opt in is such
4 a brilliant opportunity, we can then bring a limitation
5 case and knock that out as well, and I don't know, given
6 the amount of money at stake, the cartelists have -- and
7 they have already indicated -- an almost infinite
8 ability to think of procedural points.

9 THE PRESIDENT: Well, I would have thought it is incumbent
10 upon them to raise the point now, not to sit silent,
11 allow the Tribunal to consider opt in and then to come
12 afterwards and say, well, actually, there is
13 a fundamental problem with opt in, we didn't tell you at
14 the CPO stage, but nobody can opt in, because the
15 limitation's expired.

16 MR THOMPSON: Yes, but from my client's point of view --

17 THE PRESIDENT: That's bordering on abuse.

18 MR THOMPSON: From my client's point of view that's scant
19 comfort if we haven't got our opt-out award, and still
20 a very good for them if it's being knocked out.

21 THE PRESIDENT: I understand the point you make, and so
22 that's one reason you say it should be opt-out. Are
23 there any others? Because certain other points have
24 been made.

25 MR THOMPSON: There are others.

1 THE PRESIDENT: Yes.

2 MR THOMPSON: A number of opt in -- a number of individual
3 claims have been brought, in particular by large
4 companies such as Royal Mail and Ryder, and the main
5 point we make is that there are tens of thousands, we
6 would say over 99 per cent of potential claimants who
7 are, in reality, SMEs who are very far from being able
8 to bring individual claims, and even in relation to an
9 opt in, given that the proceedings not only go back to
10 1997, but also have been delayed by -- through no fault
11 of anybody but because of the contingencies of the new
12 regime, have been delayed for three years, there is
13 obviously a risk that the energy of people to opt into
14 these collective proceedings will have waned,
15 particularly for people going back prior to 2010, and so
16 there is every risk that only a proportion of those who
17 have perfectly valid claims will claim, given the -- and
18 indeed, the -- it is the counterpoint of the point made
19 about deceased and defunct companies. There will be
20 people who are still alive and companies which are still
21 going, which were hammered by this cartel prior to 2005,
22 but who may well think, 20 years later, that it's all
23 water under the bridge, that they are not going to bring
24 a claim, and so --

25 THE PRESIDENT: Well, does the -- I mean, we've had evidence

1 from the RHA about the number of people, mostly very
2 small businesses, who have responded to their campaign
3 and signed up, you are dealing with not insignificant
4 amounts of money, this is not -- first of all, these are
5 not consumers, these are businesses, and, secondly, the
6 amount is not in the tens or hundreds of pounds, even
7 for one truck, on your case we don't know exactly what
8 it is, but this is the sort of money where you certainly
9 wouldn't bring an individual claim, I fully take your
10 point about that, but if all you have to do at no cost
11 to yourself is respond to the well-publicised
12 information and send back a form, if you are serious
13 about it, why wouldn't -- why should we assume people
14 wouldn't bother, given, particularly, the evidence of
15 what the RHA has been able to achieve by way of response
16 from small businesses?

17 MR THOMPSON: Well, I think I have made the submissions on
18 the facts, and in my submission they are powerful,
19 because the number of small claimants and the staleness
20 of these claims -- I mean, supposing you have got
21 someone who was driven out of business in 2005 by the
22 cost of their trucks, you might say that's a fanciful
23 possibility, but it is certainly within the scope of our
24 class, they are still alive, but they might be retired
25 by now, and the prospect of them bringing an opt in

1 claim must be questionable. It's not just a matter of
2 they are not going to litigate against Mr Jowell and
3 Mr Pickford and Mr Harris on their own, it's that,
4 basically, they have lost interest in this whole
5 question. That's not how this regime is meant to work,
6 and in my submission the guidance that is given in
7 relation to opt in and opt-out are much more in the
8 category of, for example, the BritNed case where you
9 have got a small number of large firms -- supposing the
10 only people who have been harmed by this were Royal
11 Mail, BT, Sainsbury's, Tesco's, and they said, "We want
12 a collective claim", and the claim is for
13 a million pounds each or more. You would obviously say,
14 "Ridiculous. If you want to do it collectively you
15 would do it on an opt in basis".

16 THE PRESIDENT: Well, I think we might say, "You can't do it
17 collectively, you can do it individually, as they are".

18 MR THOMPSON: Here, although this isn't a consumer claim, it
19 is right at the very end. It's very nearly a consumer
20 claim. You have got thousands and thousands of
21 individuals who are bringing claims for fleets of trucks
22 between 1 and 5, and where their claims, even at the
23 highest levels, are in the -- no more than £100,000
24 aggregated, and although that's a lot of money, it's not
25 a lot of money for the extreme aggravation of getting

1 involved in litigation against these people. As we've
2 seen, it is a serious matter to get involved in a fight
3 with these sort of defendants, and so in my submission
4 it is not a heavy factor against us if one at all, and
5 I don't want to remind something of which I'm sure the
6 Tribunal is very well aware of, that one of the key
7 points in the Merricks judgment was that these
8 individual statutory factors are not to be treated as
9 hurdles, but they are to be treated as factors, and we
10 would say that when you look at the factors, there are
11 things -- there are some factors weighing very heavily
12 on the other side. I have mentioned some of them,
13 I have mentioned the limitation issue, I have mentioned
14 the scale and age of this case, and I have, in fact, in
15 a different context, also mentioned the financial issue.
16 For these individuals it is financially much more
17 advantageous for them to get their fair share of an
18 aggregate award assessed by the Tribunal than for them
19 to wait their turn while the lawyers, the funders and
20 the insurers and everybody else gets paid, and then they
21 get a share of what's left at the end, and that's the
22 approach that Therium have, for perfectly good reasons,
23 adopted in the RHA case, and that Calunius, for
24 perfectly good reasons, or Yarcombe, have adopted on the
25 opt in basis because, you know, it's a different type of

1 claim. From the perspective of the little guy who is
2 actually what this is all about, the opt-out case both
3 has, in my submission, its radical advantages analogous
4 to those of an aggregate award, namely that the whole
5 thing is debated at the industrial level rather than at
6 the micro level of individual transactions, but also
7 that they get the financial benefit of their share of
8 the aggregate award, the distribution, and in my
9 submission those are powerful factors in favour of an
10 opt-out claim. It will be much easier for the Tribunal
11 to adjudicate on in the same way as it is envisaged
12 happened in the Ryder disclosure hearing, it will
13 deliver on the objective of the legislation which is to
14 effectively deter anti-competitive conduct at the
15 expense of small businesses which you will recall is one
16 of the primary objectives of this legislation, and it
17 will benefit the individuals, so in my submission, even
18 if the fact that, in principle, millions or --
19 not millions, but thousands of these claims could be
20 aggregated in an opt in case, the balance comes down
21 heavily in favour not only of an aggregate award, but
22 also of an opt-out aggregate award, so that's my general
23 position on that, but when you do the multifactorial
24 exercise, the scales, again, come crashing down in
25 favour not only of a collective claim and an aggregate

1 award, but also of an opt-out claim, that will, in fact,
2 be the reality of this case, and will, actually, make
3 this legislation which has been on the stocks for over
4 five years, actually bite in the way that Parliament
5 intended, and in my submission that's the right
6 approach.

7 THE PRESIDENT: Can I ask, if it is opt-out, what -- how do
8 we deal with all the individual claims that exist?

9 MR THOMPSON: There are two possibilities, and they are
10 dealt with in Rule 82 I think which is at joint
11 authorities tab 11 {JA/11/20}. Yes. It is {JA/11/23}.

12 THE PRESIDENT: Yes. So they are just not included.

13 MR THOMPSON: Well, they --

14 THE PRESIDENT: Unless they discontinue.

15 MR THOMPSON: Yes. Yes. So for some of the smaller
16 individual claims, they might think it was actually
17 a better option to discontinue their claim, or to stay
18 their claim and to throw in their lot with us. I don't
19 think Royal Mail or BT are very likely to do that,
20 but --

21 THE PRESIDENT: So the position is under Rule 82(4), if they
22 don't discontinue, then they are not in the class.

23 MR THOMPSON: Yes.

24 THE PRESIDENT: I see. That's the answer.

25 MR THOMPSON: We can go back to the point that the Tribunal

1 was making to me about deceased person. I think the,
2 "Must", was meant to be under 82(1), but there is
3 a specified date for these things to be done. You have
4 to make your election by the date --

5 THE PRESIDENT: Yes. I see. That answers the question.
6 Can we -- what we wanted to also ask you about, in your
7 skeleton on this point at paragraph 61 you refer to the
8 litigation funding arrangements that UKTC has got.
9 There is a further powerful plus factor, this is
10 {A/1/23}.

11 MR THOMPSON: Yes.

12 THE PRESIDENT: There is, in addition, UKTC submits there is
13 a further powerful plus factor in favour of opt-out, and
14 you say it is more favourable to the interests of the
15 individual members of the proposed class. You refer to
16 the priority of payment, but there is a footnote, at
17 footnote 16, and you say:

18 "The opt-out application also has the advantage that
19 the funding arrangements are not subject to an economic
20 viability threshold"

21 Can you just explain what the point is there?

22 MR THOMPSON: Yes, and it goes right back, I think, to Mr
23 Perrin's first witness statement that there is
24 a difference in the -- I'm not sure we've got it in
25 front of us but I think it is the third addendum to the

1 original funding arrangements -- that there is an
2 economic viability threshold for the opt in claim, ie
3 that there is an estimate per truck and a number of
4 trucks, and this has been treated as a very confidential
5 issue as against the cartelists for obvious reasons.

6 THE PRESIDENT: Yes. Yes. Well, I don't want you to turn
7 up something confidential, but it is about the way the
8 funding works.

9 MR THOMPSON: Yes.

10 THE PRESIDENT: I see. We will find that -- if you give us
11 the reference, we can then look at it in our own time.
12 What is the reference?

13 MR THOMPSON: It is Mr Perrin's first statement at paragraph
14 22 which is at B/3/7. He explains but doesn't specify
15 the viability issue, and in relation to the
16 difference -- I'm not sure whether the Tribunal was
17 asking about the sentence and the opt in priorities
18 agreement, I think that was a point I was trying to make
19 about five minutes ago about the net and gross, that
20 there is an advantage to the individual because, under
21 the priorities agreement, the opt in priorities
22 agreement, it applies to the entire proceeds, and the
23 claimants come last, whereas under the opt-out, that is
24 at the discretion of the Tribunal.

25 THE PRESIDENT: Yes. That's the other point, and the third

1 addendum, again, I don't want to turn it up, can you
2 just give us the reference?

3 MR THOMPSON: I'm not sure it is in the current papers,
4 but -- I had it in the original papers. Perhaps I could
5 let the Tribunal know at the end of the day rather than
6 take up time now.

7 THE PRESIDENT: Yes. Yes. Absolutely. Yes. Thank you.

8 MR THOMPSON: The last topic I was going to address was the
9 question of Dr Lilico's evidence and its relevance to
10 the commonality and appropriateness or suitability
11 criterion, but I see the time. I don't know whether the
12 Tribunal wants to rise and then hear five minutes on
13 that or --

14 THE PRESIDENT: Well, I think, why don't you continue and
15 complete your submissions and then we will take a break.

16 MR THOMPSON: Yes. Well, in terms of the general position,
17 I have referred already to paragraph 6.13 of the guide,
18 and I don't think it is necessary to turn it up, but the
19 reference is at {JA/12/18}. Joint authorities 1, and
20 the guidance is that such expert evidence and witness
21 evidence can be relied on in support of an application,
22 in particular in respect of the commonality and
23 suitability requirements but there is no statutory or
24 administrative requirement for such evidence, but,
25 nonetheless, and, again, being realistic, both in

1 Merricks and in this case the issue of expert evidence
2 has taken centre stage, or at least has been one of the
3 items on the stage.

4 THE PRESIDENT: And, indeed, in Pride as well, if I may say.
5 In every single -- and in Gutmann in every single
6 application.

7 MR THOMPSON: Yes, and I think in Merricks there was no
8 counter evidence, but in this case there seemed to be --
9 I counted them up -- there seemed to be ten expert
10 reports already and four expert reports from the
11 respective applicants in bundles F2 and F3 in the
12 respondent's --

13 THE PRESIDENT: Yes.

14 MR THOMPSON: So I just wanted to make a small number of
15 points which no doubt can be explored with Dr Lilico
16 next week. First of all, and perhaps the most basic
17 point, any implied suggestion that Dr Lilico's
18 simulation modelling approach is in some way eccentric
19 or out of the ordinary needs to be taken into account,
20 or needs to take into account the fact that it is
21 a methodology that was endorsed by the Commission in its
22 practical guide which is at joint authorities tab 20,
23 pages 7-9, by RHA's expert, Dr Davis, that's in joint
24 authorities 145, pages 17-20, and by Mr Noble, Daimler's
25 expert, both in the private capacity and in a report

1 done for the Commission, and you will find that at joint
2 authorities 146, pages 99-100, and joint authorities 147
3 page 2.

4 The second point is that [move up to page 104,
5 line 22, to read "page 2 {JA/147/2}."] Dr Lilico, in my
6 submission, has explained clearly the basis for these
7 reservations about the use of regression analysis on the
8 particular facts of this case, in particular in his
9 first and his fourth reports at F/1/17, paragraph 4.2,
10 and F/4/4-6, paragraph 2.3 to 8 in his fourth report,
11 and he can no doubt put it better than me, but in
12 summary his concern is that given the scope and scale of
13 the admitted infringement, and the absence of any likely
14 data before the start of the infringement in 1997, he is
15 concerned about the availability of satisfactory
16 counterfactual data that will enable a clear
17 attribution, particularly for the early years of the
18 cartel, and in passing this appears to be of particular
19 relevance to the RHA methodology, which is based on
20 a total period of 22 years, leaving only the period
21 since May 2019 to provide data for Dr Davis' regression
22 analysis, and that appears to us not only to make it
23 very practically difficult, but also to build in an
24 ambiguity into the class definition, for example for
25 a truck purchased in 2017 or 2018. At the moment it is

1 not clear to us whether Dr Davis sees that as a claim or
2 (Inaudible) basis for one.

3 We say that by contrast, or Dr Lilico says that by
4 contrast, truck manufacture is a very well-understood
5 and traditional type of industrial process that should
6 be susceptible to simulation modelling techniques, but
7 given the scale and scope of the cartel and the findings
8 in the settlement decision, there should be a lot of
9 information available about the pricing of trucks and
10 the character of competition on the UK trucks market,
11 but there will also be significant documentary evidence
12 which is based on admissions from the cartelists
13 explaining the character of the cartel over a period of
14 14 years, so perhaps unusually he sees this as a very
15 strong candidate for simulation modelling, and in
16 assessing his view, it is necessary to bear in mind the
17 guidance of the Supreme Court and the Canadian
18 precedent, that a certification exercise is certainly
19 not a time for assessment of the merits of expert
20 evidence, and that's paragraphs 37-42 of the Supreme
21 Court judgment. We would say that a recognised
22 methodology and a carefully reasoned opinion from
23 a reputable expert should be amply sufficient for this
24 purpose, particularly in the context of a follow-on
25 claim, and I think there are only really two criticisms,

1 apart from a general, "What is this simulation modelling
2 all about", sort of response, which Dr Lilico can
3 obviously explain much better than me, first of all
4 there is a complaint that he assumes what he should be
5 seeking to prove, and we say that that criticism is
6 misguided for the reasons that Dr Lilico gives in his
7 report, in particular section 3 at F/4/10 to 11, and
8 there are various points that I would just like to draw
9 to the attention of the Tribunal.

10 First of all, as the recitals judgment of the Court
11 of Appeal and the Tribunal indicate, the terms of the
12 settlement decision severely limit the ability of the
13 cartelists to deny the nature of their infringement, and
14 that's at joint authorities tab 65 and 67 in Bundle 4
15 and Bundle 5, and I know that the President in
16 particular is very familiar with that set of issues, but
17 I particularly draw his attention to paragraphs 45 and
18 50 and 69 in the judgment of Rose LJ, and paragraphs 131
19 and 132 in the judgment of Sir Geoffrey Vos.

20 Secondly, we would say that the character of the
21 cartel is clear, for example, recital 71 and 81 of a
22 settlement decision which is at K/2/17 and 19. I don't
23 think it is necessary to turn those up but if I could
24 ask the Tribunal to turn up Recital 121 which is at
25 {K/2/27}, and the Commission says this:

1 "The infringement committed by the Addressees
2 involves horizontal price collusion within the meaning
3 of point 25 of the guidelines on fines".

4 So it is relevant to look and see what those
5 guidelines say in terms of characterisation of this
6 infringement, and that's joint authorities tab 15.1. I
7 hope that's been added to the Tribunal's bundles.

8 THE PRESIDENT: Well, it's coming up on screen, I think.

9 MR THOMPSON: Joint authorities 15.1, page 2.

10 THE PRESIDENT: No. 15.1. {JA/15.1/2}.

11 MR THOMPSON: Yes. It's come up on screen. I think that's
12 probably sufficient.

13 THE PRESIDENT: Yes.

14 MR THOMPSON: And you will see paragraph 23:

15 "There is horizontal price-fixing, market-sharing
16 and output-limitation agreements, which are usually
17 secret, are, by their very nature, among the most
18 harmful restrictions of competition. As a matter of
19 policy they'll be heavily fined".

20 And then at 25:

21 "In addition, irrespective of the duration of the
22 undertaking's participation in the infringement, the
23 Commission will include in the basic amount a sum of
24 between 15 per cent and 25 per cent value of sales as
25 defined in Section A above in order to deter

1 undertakings from even entering into horizontal
2 price-fixing, market-sharing and output-limitation
3 agreements".

4 I don't think there is any question of these being
5 market-sharing and output-limitation agreements, so the
6 reason I take the Tribunal to this is that Dr Lilico's
7 in very good company in understanding that this
8 agreement is tantamount to a horizontal price fixing
9 agreement, and we would say that far from it being
10 a fatal or fundamental flaw for Dr Lilico to carry out
11 his preliminary assessment of that assumption, which is
12 ultimately a matter for the Tribunal to determine at
13 trial on the basis of the evidence and including the
14 evidence supporting the settlement decision, we submit
15 that it would be a strange assumption for him to proceed
16 on any other basis. The cartelists are in no way
17 precluded from arguing that, contrary to what they
18 admitted in the settlement decision, the character is,
19 in fact, innocent, as some of their experts suggest, but
20 when I say that they are not prevented from it, that's
21 subject, of course, to the recitals judgment that, in
22 terms of substance, they are very heavily restricted in
23 ability to resile from the admissions they made where
24 they got financial benefits for admitting certain types
25 of conduct which is characterised in this way, so in my

1 submission there is nothing in the suggestion that
2 Dr Lilico had done something unreasonable.

3 The other point which I can take very shortly is the
4 volume of commerce point. Although Daimler is
5 particularly enthusiastic about it and makes it in
6 various ways and shapes and forms in paragraphs 33-36,
7 37-40, 46-50 and 51-61, in my submission the point is
8 completely hopeless. Dr Lilico has always been clear
9 that his initial models were based on the available data
10 at the time when he made those reports, and it is
11 difficult to see how he could have proceeded on any
12 other basis, ie the industry-wide basis of list prices,
13 which is what he had. He has always been clear that if
14 and when the size of the class and the transaction data
15 is available to him, he will adjust his estimates
16 accordingly, and that's basically the end of the volume
17 of commerce point, and that takes us back, again, to the
18 deceased and defunct companies, if the cartelists can
19 show that there is actually some reason to believe that
20 the class is dwindled away for some reason then that
21 will need to be taken into account, but we would
22 submit --

23 THE PRESIDENT: Sorry, I think you were drowned by the
24 Siren. Could you just repeat that? If there was some
25 reason to believe that the class is what?

1 MR THOMPSON: I think I said, "Dwindled away", or had shrunk
2 for some reason, then there might be an argument that
3 the aggregate award should also be reduced to take
4 account of the best evidence of the actual size of the
5 class, and the actual size of the loss, but we would say
6 that was an absolutely hopeless basis on which to refuse
7 certification to a very substantial class in relation to
8 a very substantial cartel lasting for a very substantial
9 period. The mere fact that the figures may shrink
10 somewhat, unless they were shrunk to an extensionless
11 point or a point which makes it not worth litigating,
12 the point is a completely hopeless one.

13 THE PRESIDENT: The point about the defunct companies is
14 that if they are in the class then you calculate the
15 damages for them. It's just there is no one who is
16 going to get the damages.

17 MR THOMPSON: Yes.

18 THE PRESIDENT: The distribution. You can't not -- if they
19 are in the class then you have to calculate the loss --

20 MR THOMPSON: Yes.

21 THE PRESIDENT: -- include them. You can't exclude them
22 from the calculation if they are in the class.

23 MR THOMPSON: That's true, but the Tribunal has very wide
24 powers at the stage of distribution to decide what to do
25 about it, and, indeed, in making its award. It seems to

1 me these are arguments that can be had at trial if and
2 when it is shown that there has been an overcharge, and
3 how big it is. Mr Harris, or whoever may wish to
4 advance this point can say there should be a discount
5 because, in fact, lots of people would have died or lots
6 of companies may have gone out of business, and won't
7 realistically bring a claim so it would be stupid to
8 make an award, but then there could, of course, be an
9 argument that it would be better for it to go to charity
10 than for the cartelists to keep it, but that's not for
11 today.

12 THE PRESIDENT: Yes.

13 MR THOMPSON: I think I would finally just say that, in my
14 submission it is clear, both from section 8 of
15 Dr Lilico's first report at F/1/46 to 47, and from the
16 passage that we've already looked at from Dr Lilico's
17 fourth report, paragraph 2.18 to 2.19 at F/4/8-9, that
18 he is under no misapprehension as to the litigation
19 process, and the fact that his opinion evidence at trial
20 will be based on the evidence then available, including
21 the number of claims and the level of discounts, and he
22 also makes the point that some of these issues will
23 already have been the subject of rulings {F/1/46} from
24 the Tribunal, and possibly, heaven knows, from the
25 appeal courts before this comes to trial, and he will

1 obviously take those into account in reaching his final
2 expert opinion, but we would say that none of that comes
3 within a million miles of being a reason why these
4 basically straightforward and meritorious claims
5 shouldn't be certified to go forward on a collective
6 opt-out basis for an aggregate award. In our submission
7 there is really nothing in any of the respondents'
8 submissions that can weigh in the balance against the
9 points that I have put forward, so those are the points
10 that I wanted to make. I don't know whether there are
11 any further questions from the Tribunal.

12 THE PRESIDENT: Yes. Can I ask you, if you look at your
13 claim form in bundle {B/1/27}, it's come up on screen
14 very quickly, where you list in paragraph 55 common
15 issues, and issue number 6, what was the impact of the
16 cartel as to the timing for the introduction of emission
17 technologies in terms of operational cost or otherwise
18 on members of the class? Well, this is a financial
19 damages claim so we are only concerned with effect --
20 impact in terms of damages.

21 MR THOMPSON: Yes.

22 THE PRESIDENT: Where is the methodology, or the proposal of
23 how that is going to be assessed?

24 MR THOMPSON: Yes. I think there are two points, and,
25 again, I think this is something that Dr Lilico would be

1 very well placed, better placed than me to debate.

2 THE PRESIDENT: Yes.

3 MR THOMPSON: In terms of the basic overcharge question and
4 the collusion between the -- admitted collusion between
5 the cartelists, my understanding is that Dr Lilico sees
6 the emissions issue as similar to other largescale
7 issues. I mean, it could be, for example, something
8 like the introduction of the Euro where they effectively
9 became focused for discussions between the parties, and
10 one sees repeated meetings at which not only future
11 gross list prices but also delays in relation to
12 introduction of emissions technology compliant trucks
13 was debated.

14 THE PRESIDENT: Yes.

15 MR THOMPSON: So in that sense, the issue is, as it were,
16 a focal point for the price collusion, and I think
17 that's why it says, "Or otherwise".

18 THE PRESIDENT: But what is not clear is the impact in terms
19 of operational cost, that's not an overcharge in price,
20 it's some other financial impact.

21 MR THOMPSON: The second point is that -- and this is where,
22 prior to disclosure I think we are very uncertain about
23 the viability of this case and how that works in terms
24 of scale and scope, but -- and it is certainly an issue
25 that has been raised by Dr Davis in, I think, somewhat

1 more detail, is that one of the possible impacts of
2 delaying emissions technology improvements, if I can put
3 it that way, is that the cost of ownership of trucks
4 could have gone up, and all we are saying is that at
5 this stage it would be wrong to rule it out as an issue,
6 if, in fact, disclosure emerges, or if, in fact, it were
7 to emerge that complying with the rules actually
8 increased costs, and so it wasn't actually a good point,
9 then the case would fall away, but it's at least in
10 principle a claim, and I think Mr Flynn's skeleton has
11 gone into it in more detail than ours, that this could
12 well be the further head of claim.

13 THE PRESIDENT: I think we understand that, that it could
14 be, and we understand that if the evidence doesn't
15 support it, it will fall away, but the question I had is
16 how, on an aggregate basis for an opt-out class,
17 assuming it is a good claim, what is the method by which
18 the increased operational costs, it is proposed that
19 they will be estimated?

20 MR THOMPSON: Yes. I don't want to duck that issue -- well
21 I do actually want to duck that issue but I have two
22 reasons, one is the time, and the other is I think
23 Dr Lilico is a much better person to give the answer
24 than I am.

25 THE PRESIDENT: Fine. I don't want to deny you the

1 opportunity of -- we couldn't, I think, see it covered
2 in Dr Lilico's reports, and that's why I wanted to raise
3 it with you, but we are quite happy to raise it with him
4 and no doubt he's listening, or will be told about it,
5 and can deal with it, but as things stand we couldn't
6 see that he has explained where in his method he is
7 addressing this point.

8 MR THOMPSON: If I can say he has been put on notice, but
9 I'm not going to go any further until he has had his
10 chance to speak. Is that a fair way to deal with it?

11 THE PRESIDENT: Yes.

12 MR THOMPSON: In that case I think that's the end of our
13 submissions.

14 THE PRESIDENT: Yes. Well, we will just take a moment,
15 Mr Thompson, so if you will all stay there for just
16 a moment?

17 MR THOMPSON: Very well.

18 (3.25 pm)

19 (A short break)

20 (3.27 pm)

21 THE PRESIDENT: Yes. Thank you Mr Thompson. I can't see
22 you but I assume you are there. Yes. I can see you.
23 You are there. We've nothing further to ask you.

24 MR THOMPSON: Sir, the reference to the third addendum is in
25 bundle H, tab 12.

1 THE PRESIDENT: Sorry, bundle?

2 MR THOMPSON: H, tab 12.

3 THE PRESIDENT: H/12. Thank you very much. Thank you.

4 Yes. We will take 10 minutes and we will -- we were
5 asked to sit at 10 tomorrow, we said 10.15 as we've lost
6 some time, we will sit at 10 o'clock tomorrow morning,
7 Mr Flynn, and we will see how we get on from there, so
8 we will take 10 minutes now and then you can start your
9 submissions.

10 (3.28 pm)

11 (A short break)

12 (3.39 pm)

13 Submissions by MR FLYNN

14 THE PRESIDENT: Yes, Mr Flynn? Mr Flynn, you are muted.

15 MR FLYNN: Is that better? Yes. I have a double-mute
16 system here which I haven't mastered, one on screen and
17 one in front of me. Thank you. Thank you, Sir.

18 On the timing, Sir, you have indicated you would be
19 starting early tomorrow at 10. What I am proposing to
20 do this afternoon is cover the competing CPO's point, if
21 you like, to pick up on the discussion that you have had
22 with Mr Thompson, and then deal with the more
23 thorough-going, as it were, respondent's objections to
24 our application in my time tomorrow, and I think that
25 will make it more coherent and, as it were, in one go

1 and I should be able to do that in the time available
2 tomorrow. I mean, I haven't asked for extra time, it's
3 just I'm being squeezed at both ends, as it were.

4 THE PRESIDENT: We're due to rise at 4.30 today.

5 MR FLYNN: Yes. I'm working on that basis. Please do tell
6 me if I'm covering anything you don't need to hear
7 today, but I thought it might be helpful just to pick up
8 the intervention I made earlier about the scope of our
9 class and the operators who are covered by it, just so
10 that you have all the references.

11 I mean, as I think our discussion this morning
12 established, we cover all haulage operators with an
13 O licence, with an operating licence. That's just about
14 every truck on the road needs to be covered by one of
15 those, and -- but they are held by the company rather
16 than the driver, for example, so it's not every truck
17 driver needs one of these, but it is the operators of
18 the truck that needs them. There are also some vehicles
19 on the road which do not require the statutory O
20 licence. They are covered by exemptions, and Fire
21 Service, for example, is one of those, funeral vehicles
22 is apparently another, although how many of those are in
23 the form of heavy trucks one doesn't know, but those are
24 exceptions, but insofar as they are exceptions, we are
25 also seeking to cover them, if they otherwise fall in

1 the definition of, "Trucks", and that is what the
2 definition of, "Road haulage operations", in our claim
3 form is intended to cover, and we say achieves, so if I
4 could give you the bundle reference for that, and you
5 might want to just take it up quickly, so it's C/1,
6 which is our claim form, amended claim form, and it's
7 paragraph 35 which is page 13, so {C/1/13}.

8 THE PRESIDENT: Yes.

9 MR FLYNN: That's where what I have just said is compressed
10 into 35.1, and you will see there is also a definition
11 of, "Group", and, "Primary business", which we may need
12 to come back to tomorrow. These are expanded on in
13 Mr Burnett's evidence. Firstly, his first statement,
14 which is at tab 4, so {C/4/1}, and if we turn up
15 paragraph 17 of that statement, he describes the
16 operating licence regime {C/4/6} in a little more
17 detail, and standard operating licences which can be
18 national or international which allows carriage of goods
19 on a hire and reward basis, and the restricted operating
20 licence is the one that allows people to carry goods for
21 their own trade or business, so the supermarket fleet is
22 one example of that, and that's where the phrase, "Own
23 account", is known, and he gives figures or there are
24 references there to figures, the split being 55/45.

25 It's also worth looking at his second witness

1 statement which is behind tab 7, and, in other words,
2 C/7, paragraph 31 of that statement. {C/7/12}. He
3 again goes into -- I'm not going to read this out -- but
4 the Tribunal may wish to note this, because it goes to
5 the certainty of the class as well as the description of
6 it, and you will see, so if you read 31-33 you will see
7 at the end that part of this was to address questions or
8 queries from the respondents to various types of
9 vehicles, so cement mixers, cranes, refuse collection
10 vehicles which we discussed earlier, skip wagons, all
11 fall within the regime, and Iveco mentioned gritters, we
12 said that's a fair point, and we made the adjustment to
13 the class definition which you saw in the first document
14 which I took you to, which is why it was in green in
15 relation to those who would require an O licence unless
16 an exemption or exception applied, and just to make sure
17 that those are covered in the class, so all this
18 definition came in part to meet earlier objections to
19 what we had said.

20 I hope that's sufficient references for the
21 Tribunal's purposes for now.

22 Our overall position, of course, and that's what we
23 will be spending time -- you will be spending time with
24 me on tomorrow at any rate is that we are an eminently
25 suitable class representative and that we amply meet all

1 the tests that follow from the various rulings in the
2 Merricks case and others as regards the eligibility of
3 our claim, and it is pretty striking that we are not
4 facing any applications by any of these respondents
5 either for strike out or reverse summary judgment in
6 relation to any aspect of our claims which I suggest
7 should be comforting for the Tribunal. Obviously the
8 Tribunal needs to be satisfied for itself that no one is
9 doing that, but -- so we will come back to those aspects
10 of our pleadings and skeleton before you tomorrow.

11 There is just one point, and I might as well deal
12 with it now, that's made by UK Trucks and not by any of
13 the respondents about the RHA as a class representative,
14 and that's the suggestion which was only fleshed out in
15 the skeleton argument for no good reason that I can see,
16 that the RHA is not a suitable class representative. It
17 is conflicted, because it has, amongst its members,
18 associate members, it has the cartelists, as Mr Thompson
19 calls them, the respondents and objectors to this
20 application, so UKTC said in paragraphs 96 and following
21 their skeleton, "We get money from them, they are
22 associate members, they query when we say these amounts
23 are small, and we have vested interests in staying in
24 with them, and this gives rise to a material conflict",
25 and they seem to have picked up on this because of what

1 Mr Burnett said in his first statement about the fact
2 that some truck manufacturers were associate members of
3 the -- of the association, and the point he was making
4 was it doesn't give them any possibility of influencing
5 what the RHA does, and he can't see that there is any
6 scope for any conflict, and the revenues that are
7 derived from such membership are absolutely tiny.

8 Given the lateness of this attack, we obviously
9 haven't had a chance to put in any evidence on it, but
10 I have taken instructions which are to the effect that,
11 with two exceptions, none of the cartelists have
12 anything other than what is called, "Other", membership
13 with the RHA, so no status but just a kind of, "We know
14 about you", membership which doesn't involve any
15 subscription or any outlay on their behalf, and simply,
16 really, means that they are on our email list, and that
17 is, of course, absolutely separate from the website
18 arrangements for contacting potential class members, so
19 they don't get any of that, they just get our mailshots
20 and so forth.

21 The two exceptions are that DAF, apparently, has
22 something called, "Bronze associate membership", which
23 costs them £622 a year plus VAT. They make a charitable
24 donation of £10 for which we are very grateful and they
25 subscribe to the magazine called, "Roadway", at the

1 princely cost of £24. I think they might also get
2 something off a stand at our exhibition and there may be
3 other discounts they can get.

4 Top of the class is Volvo which has gone for silver
5 membership, and here we are into the serious money of
6 £1,949 plus VAT and has a few additional perks above
7 what DAF is prepared to pay for and they get some
8 member-only information and they can attend member
9 briefings. I haven't asked anyone to check the register
10 as to whether they actually turn up.

11 The principal point is that they have -- play
12 absolutely no part in the RHA as an institution. They
13 have no role, no vote, no possibility, for example, of
14 being on the board, and this is really just a way of
15 appearing in publications and helping us with a small
16 amount of cost. In our submission there is absolutely
17 nothing in this point, and I think if Mr Burnett were
18 here, I dare say he would be able to tell you that
19 relations with some of those represented in this hearing
20 has not been all that cosy, over the last few years.

21 So that -- we say there is nothing in that point,
22 and let me turn to the competing CPOs point which is, of
23 course, a matter that's not covered by authority in this
24 country, and is not, really, in some ways, covered by
25 authority elsewhere, notably Canada, because opt in

1 isn't a known beast in Canada, so a lot of what is said
2 is in relation to carriage motions and so forth, is
3 where there are competing opt-out proposals.

4 Our bottom line, as I think is clear from our reply
5 and skeleton, is that while, as a matter of legal
6 theory, or as a matter of reading the statute, the
7 Tribunal could certify two collective proceedings, sets
8 of proceedings if both pass the scrutiny which is to be
9 conducted over the next few days, we say it could do
10 that, but it should not do that. That's our bottom
11 line.

12 As I understand what Mr Thompson is saying today and
13 has written in the documents before the Tribunal, is
14 that they consider that the Tribunal should approve
15 their opt-out and could, if so minded, also approve our
16 opt in, and in his skeleton and in everything he has
17 said today, Mr Thompson is placing all the weight on
18 their opt-out proposition, and we understand that, not
19 least as the opt in side of their application is sketchy
20 to say the least, it is clearly the less-favoured last
21 alternative approach.

22 So, that's where, as it were, the battle lines seem
23 to be drawn. If we are right on the law and Mr Jowell
24 and others will be trying to persuade you otherwise that
25 the Tribunal could make an order approving two -- could

1 grant both CPOs, as it were, in this -- at the end of
2 this hearing, we say it is important, then, to look at
3 the rules and the guide, notably Rule 79(3)(a), I don't
4 know if we need to go to it now, you have looked at it
5 already today, but you have a wide discretion, a wide
6 discretion as to -- you can take into account all
7 matters that you think fit in deciding whether
8 proceedings should be opt in or opt-out, and you can,
9 when two applications are before you, consider their
10 respective merits, and, as you have already mentioned,
11 Sir, in your discussions with Mr Thompson, there is
12 a clear preference in the rules, and made explicit in
13 the guide, for opt in proceedings, for a collective --
14 shall we say a collective proceedings to be on an opt in
15 basis where that is practicable, and we say there are
16 two consequences of that. One is that it places
17 a burden on an applicant for an opt-out collective
18 proceedings order in those circumstances, a high burden
19 to explain why the opt-out is preferable, and we say
20 that's not met in this case for a number of reasons
21 which I will come to, and we obviously say that for
22 a number of reasons we have already demonstrated that an
23 opt in set of proceedings is eminently practicable in
24 this -- in the circumstances of this case.

25 Now, one particular point, and perhaps the high

1 point of what Mr Thompson had to say, on why opt-out is
2 preferable to opt in in the circumstances of this case,
3 is his point about priority and who gets paid first. We
4 will look at that in a touch of detail in a second, but
5 if that really were the killer argument it would apply
6 in every such case. If that were the winning argument
7 it would effectively knock out opt ins, but both the opt
8 ins in the present case are clearly on the basis that
9 the funders get paid first, as it were, if I can put it
10 in slightly crude terms, and that's fully
11 understandable. The rules more or less dictate that it
12 is the other way in opt-outs, and, of course, in
13 opt-outs, one particular thing to guard against is that
14 the funder is relatively relaxed about that as
15 a possibility because there will be, they hope, a large
16 pot of undistributable damages at the end from which the
17 fee can come, even after the viable claims have been
18 paid out, but that, I think, was the kind of high point
19 of the submission to you as to why opt-out was
20 preferable.

21 Two things to say about that, really. One is that,
22 actually, it's the -- you have the figures, you have our
23 waterfall and so forth. The incidence of the funder's
24 collection, if I can put it that way, in our case,
25 assuming a substantial recovery is not enormous, it's

1 not as if a whole lot of claimants will get a paltry sum
2 whereas under an opt-out they might be entitled to
3 a substantial sum, the waterfall you can see and I don't
4 suppose you will want to look at it now, it's just lots
5 of rows of figures, but you will see at {C/42/73} and at
6 page 73 of that you will see that the recovery is 5 per
7 cent at a 3 billion damages figure.

8 THE PRESIDENT: Just so we understand that, the 5 per cent
9 is what the funder gets in is that right?

10 MR FLYNN: That's the funder's fee to which one would add
11 the funder's initial -- I think it is called the
12 funder's, "Initial outlay", which is essentially
13 disbursements, and that covers, also, legal fees and so
14 forth and I think that the ATE premium would also be
15 added to that, but I can check the precise details if
16 that is necessary, but just as an order of magnitude --
17 sorry, Sir?

18 THE PRESIDENT: No, go on.

19 MR FLYNN: Just as an order of magnitude, if the suggestion
20 is, or sounds as if a very substantial proportion of
21 damages award at the end of an opt in action would
22 actually be going to those who fund it rather than those
23 who should be recovering, that's certainly not the case
24 if one envisages a fairly successful action, and so just
25 to take one level, you know, it is 5 per cent if you get

1 a 3 billion recovery, and that will obviously depend on
2 numbers of people who opt in, levels of overcharge and
3 so forth, but as you pointed out, these are not hundreds
4 of pounds claims, if there is anything in them they are
5 rather bigger than that, and so if you start adding up
6 numbers of trucks involved, potentially involved in the
7 case, and translate that into any figure you like for
8 recovery, it's clear that it has the potential, shall I
9 say, to be substantial, and where the fee for the funder
10 plus the other incidentals aren't taking a massive cut
11 out of the total award that the Tribunal might make,
12 that's --

13 THE PRESIDENT: Yes. So I understand the waterfall, it's
14 actually 6 per cent if it is just 3 billion, and it goes
15 down, and it is 8 per cent if it is 2 billion, as I
16 understand this, and then it -- and if it -- it's 13 per
17 cent if it is 1 billion. I think that's -- is that
18 right? That's the correct way to read it?

19 MR FLYNN: Yes. It starts on page 1 with a million of which
20 the funder would take 300,000. That wouldn't be a great
21 result, and it just works its way down in a kind of
22 inverse ratchet to the bottom of that waterfall, so you
23 take a figure that accords with your -- you know, any
24 instinct you might have, and you can see what the --
25 what the funder's return is. That's my simple point.

1 THE PRESIDENT: That's how it works, yes.

2 MR FLYNN: That's how it works. Yes. That's how it works.

3 The other point to mention, since it was raised in
4 relation to the UKTC opt in, is this issue of the
5 minimum viability threshold, and you were given a bundle
6 reference by Mr Thompson just before the break. I don't
7 know if you interrupted your cup of tea by having a look
8 at it, but --

9 THE PRESIDENT: Well, just be careful because there was some
10 suggestion it's confidential. I don't know if it is.

11 MR FLYNN: My point is, it's so confidential that it's
12 redacted, and if you look at it, it's {H/12/2} and 3.

13 THE PRESIDENT: Just a moment. Yes. I see.

14 MR FLYNN: So we don't know what it is, and as far as we
15 know, but we may be wrong, the Tribunal doesn't know
16 either, and it is an undisclosed but presumably material
17 threshold which the UKTC opt in would have to pass
18 before it would even get off the ground.

19 I mean, I can't help you further with it, except
20 that we say it is obviously a point, whatever that is,
21 their application will crater if it's not met, and we
22 say that that is a problem, and I will come back to that
23 briefly.

24 THE PRESIDENT: This is for -- there are, as I think,
25 speaking from recollection, so I might be wrong, there

1 was, I think, an opt in and an opt-out LFA for UKTC.

2 MR FLYNN: Yes. I'm not an expert on their funding as I
3 wasn't involved in the funding hearings as such, but
4 I think that is correct, and this is the separate
5 arrangements for their opt in.

6 THE PRESIDENT: This is dealing with the opt in.

7 MR FLYNN: That is dealing with the opt in, and so whereas
8 Mr Thompson is saying the opt-out has a clear advantage
9 for all the claimants, I have dealt with that point and
10 I'm now saying that their opt in has a viability, an
11 undisclosed but presumably material viability threshold
12 and for reasons which I may not need to develop at
13 length, the Tribunal should be concerned about that, but
14 returning to the issue of practicability, leaving aside
15 financial considerations, practicability of opt in
16 proceedings in this case, these are, as you have already
17 said, Sir, business claims, not consumer claims, and it
18 was a significant feature of the reforms to the
19 collective proceedings system under the Competition Act
20 that allows businesses to make opt in claims, and so
21 when people are talking about paradigm cases and so
22 forth, there is no particular reason why an opt in claim
23 for a business should not be a paradigm example of opt
24 in claims under the developed regime, and I think you
25 have already made the point that a very large number of

1 those signed up, a very large proportion of those signed
2 up to our collective proceedings effort, are, indeed,
3 you know, very small businesses, small and micro
4 businesses, and we have attracted a very considerable
5 number of such businesses, since launching the effort in
6 2016, leading up to the filing of the application before
7 the Tribunal, and that's effort that's been undertaken
8 by the RHA with its industry expertise and connections,
9 using dedicated personnel for the task and assisted
10 throughout by a committed funder, where -- so that
11 today, we are in the position of having, I think it's
12 now over 16,000 operators signed up to the potential
13 class, so we say it's absolutely untenable to suggest
14 that it is hard to reach the potential claimants in
15 these proceedings, or, indeed, that there will be
16 a substantial degree of inertia or ignorance, so that
17 a lot of potential claimants will be left behind, and
18 unless possibly they are dead, and I will come back to
19 that in a short while. The fact that we are now told
20 only 36 operators have contacted UKTC, we don't think is
21 particularly persuasive or relevant to your
22 considerations, so the binary choice in Mr Thompson's
23 skeleton in paragraph 60 that you raised with him just
24 seems to us incomprehensible. It's illusory. It is
25 simply not the case that the only option for a very

1 large number of small haulage businesses, for example,
2 is the opt-out option.

3 We have also spent some time and RHA expertise and
4 resource in drilling down into the numbers, the numbers
5 that are claimed, to see what might be left for the
6 opt-out, once you exclude the trucks that are already in
7 the numerous so-called, "Individual", actions, although
8 of course they tend to be large groups, but the
9 so-called, "Individual", actions before you, or signed
10 up or registered with us, or, indeed, catered for, as it
11 were, by proceedings in other jurisdictions, and you
12 have a lot of information on those figures, and I
13 probably haven't got time to go through them all now,
14 and they are not all absolutely reconcilable, but they
15 give you a sense of it, so, broadly speaking, you know,
16 we think that something like two-thirds, two-thirds of
17 the trucks which the UKTC says are available for its
18 opt-out are actually already involved in other actions
19 or in a waiting room, as it were, by being signed up to
20 ours.

21 THE PRESIDENT: Can I just interrupt you on one thing?

22 MR FLYNN: Yes.

23 THE PRESIDENT: I understand the point about other actions,
24 but signed up to the RHA, what does that actually mean?
25 If -- suppose we were against you, we didn't grant you

1 a CPO, but we granted the UKTC CPO, does it mean that
2 people who have signed up to the RHA are then out of --
3 can't be included in the UKTC class?

4 MR FLYNN: No it doesn't. It's -- I mean, they have signed
5 up and they have committed to allowing us to prosecute
6 their claims, as it were, and if, in fact, you refuse
7 our application and we may have some difficult
8 discussions with members of the class, and there may be
9 a bit of a power play, who knows, because we have got
10 the fallback option, and it is very much a fallback
11 option of the High Court proceedings which was taken in
12 pursuance of that obligation, we undertake, as it were,
13 when they sign up, which is to represent them and defend
14 their interests, so -- and we can go to the provisions
15 of the relevant agreement if we need to, perhaps
16 tomorrow, but they are -- they have committed themselves
17 to the RHA, but, ultimately, you know, as I say, there
18 may be a bit of a power play, if you refuse the RHA's
19 application it would hardly be for the RHA to say that
20 their claims were then sterilised, so I cannot say how
21 it would come out. They have committed to letting the
22 RHA defend their commercial interests in connection with
23 the infringement, but if there is no home for us at the
24 Tribunal, as it were, then who knows what would happen.

25 THE PRESIDENT: But you are not saying that you would -- the

1 RHA, as a responsible body, would say, well, tough,
2 there is another class action going ahead, these other
3 collective proceedings, very disappointing that ours
4 wasn't approved, and we think the Tribunal got it all
5 wrong, but there is this other CPO that it has approved,
6 and if you fall within the scope of that class, which of
7 course is narrower, we are not going to stop you joining
8 it.

9 MR FLYNN: Well, I'm not going to say what form of words the
10 RHA would use now, but the RHA is a responsible body
11 which seeks to represent the interests of the UK haulage
12 industry, and, you know, some form of reality would
13 assert itself. As I say, if there is no home for us,
14 not saying that -- and I'm not saying this in any
15 in terrorem way but, I mean, you know, there might be
16 other routes to explore, including the failsafe High
17 Court proceedings, so I'm not saying they would be
18 immediately released, there might be a difficult
19 discussion, but currently they are signed up, they are
20 committed to the RHA, but the point I'm obviously making
21 to you at the moment is that these are reachable,
22 committed people, and, furthermore, that they have
23 entrusted their claims to the RHA because of who the RHA
24 is.

25 THE PRESIDENT: Yes. Can you just -- don't turn it up, but

1 can you just give me the reference to the agreement
2 which they sign up?

3 MR FLYNN: The litigation management agreement, I will do
4 that in just a ... C/25, I'm hearing from ... normally
5 when one opens a case of this kind one says, "I appear
6 with". I appear by myself but there are -- Mr Went and
7 Ms Mockford are within reach and they are able to point
8 me to {C/25/1} which is the litigation management
9 agreement.

10 THE PRESIDENT: Yes. I see, and that's what they sign.

11 MR FLYNN: Yes.

12 THE PRESIDENT: Yes. I see.

13 MR FLYNN: It is being suggested you might turn to clause
14 2.5.

15 THE PRESIDENT: 2.5:

16 "If the RHA does not obtain ..."

17 Yes. I see.

18 MR FLYNN: So we have the authority to bring alternative
19 legal proceedings, and that's been done on a failsafe
20 basis for some members of the class, and if they are not
21 available then the RHA will use its best endeavours to
22 find alternative representation.

23 THE PRESIDENT: Yes.

24 MR FLYNN: So if we can't do it for them we will find them
25 a home.

1 THE PRESIDENT: Yes. Thank you.

2 MR FLYNN: So with an eye for time, broadly, then, those are
3 the numbers. We think that UKTC's estimates of numbers
4 available for its opt out are wildly out, even though
5 probably no one knows exactly what the numbers are.

6 Then one comes to the issue of defunct companies, as
7 I think we are calling them. Defunct companies and
8 probably also deceased owner operators, one man bands is
9 a relevant feature in this case, and it is not a side
10 show, as I -- and I think Professor Wilks was on this
11 point earlier, and they are within the UKTC claim and we
12 say this is actually a structural advantage in favour of
13 the opt in proceedings, because we -- obviously the RHA
14 will only take the call from someone who is capable of
15 making it, that if someone gets in touch and
16 says, "Actually, I retired three years ago, can I still
17 join", the answer may be, "Yes", because you can restore
18 your company, if it was a limited company you can
19 restore it I think within six years. I mean, you know,
20 there are rules on companies being returned to the
21 register for particular purposes, or they may be in
22 liquidation, or people may -- I don't know that there
23 has been any single example of this, but there is no
24 actual reason why a person or representative shouldn't
25 be in touch and have the possibility of their making

1 a claim be investigated, but the main point is, firstly,
2 it would be pro-active, there would have to be an
3 approach, and, secondly, it would be verifiable, so you
4 won't have a large mass to be dealt with by, possibly,
5 you know, some form of statistical evidence about the
6 likelihood of someone who was in business in '98, you
7 know, no longer being in business or whatever it might
8 be, the opt in will only deal with real cases by real
9 claimants.

10 THE PRESIDENT: Yes.

11 MR FLYNN: As I say, I have no sort of figures to give you
12 on that, but that is -- that seems to me clearly the
13 position, and the haulage community in some ways is
14 quite close knit, and who's to say that someone won't
15 say, "What about Alan's business", you know, and that
16 could happen.

17 An additional point on the -- sort of -- which is
18 preferable, opt in or opt-out, goes to the expert
19 methodology. We've had some discussion of that today,
20 and obviously the main show, as it were, is in a week's
21 time, but I think it's fairly clear that a main reason
22 for Dr Lilico's choice of approach is driven by the
23 features of the opt-out regime. He won't have, as
24 Dr Davis would have, the contact with real claimants
25 from which data can be taken, and who are, in fact,

1 obliged to co-operate with us to provide it. He won't
2 have that until very late, if at all, in the process,
3 whereas in the opt in model it will be available at
4 a very early stage and enable the statistical models to
5 be, you know, properly populated and the regressions
6 specified and so on, but in my submission that is an
7 important consideration for the Tribunal to bear in mind
8 which might avoid some kind of unfairness or skewing
9 which would be based -- which would result from
10 a model -- a methodology that's essentially based on
11 assumptions about categories of data which are available
12 in these proceedings, and the other point about
13 methodology is consistency with the individual actions.
14 The Tribunal has already said, and I think we've been
15 taken to the order, or it has been quoted to you, but
16 the Tribunal has already explained that it is important
17 that there should be consistency of approach between the
18 various individual actions, and they are all zeroing in
19 on the econometric sort of regression models, and we say
20 the same consideration applies in relation to collective
21 proceedings. You should also be reassured by
22 consistency of approach, and wary of inconsistency of
23 approach, and that would be so also if you were to,
24 contrary to our submission, approve two opt in models.
25 There should also be consistency of approach. If there

1 are different models that presents great difficulties of
2 co-ordination and reconciliation for everyone involved,
3 for the Tribunal, for the representatives, those they
4 represent, and, indeed, the defendants. One should
5 spare them a thought once in a while. My friends are
6 looking a bit tired, but I have their interests at
7 heart.

8 THE PRESIDENT: I expect not too much Mr Flynn.

9 MR FLYNN: Not too much actually, Sir, I would be quite
10 happy to keep them here for another couple of hours, but
11 the other -- if you were at all minded to approve two
12 opt ins, we also say that there is enormous risk for
13 confusion in the messaging, the way in which potential
14 members of the class are contacted and so forth, and so
15 this would require enormously careful managing, and
16 I have already referred to the minimum viability
17 threshold, which also would require some careful
18 managing, because if people signed up to an action with
19 that involved, something would have to be done for them
20 or they would be just left without a seat in the game of
21 musical chairs, so broadly, as we approach 4.30, let me
22 say simply that whatever your legal options are in
23 theory, this is a case where we would say, and obviously
24 we are going to spend a few days now talking about that,
25 but we would say that opt in, and our opt in, has been

1 shown to be workable. There is no showing that opt-out
2 would be preferable and in our submission you are being
3 guided by your version of the overriding objective, as
4 Lord Briggs put it in Merricks, that cases should be
5 decided not only justly, but at proportionate cost,
6 clearly points in favour of approving only one opt in in
7 this case, because otherwise you will be leading to
8 wasteful duplication of costs, no doubt increased court
9 time and all that sort of thing and ultimately could
10 lead to class members being left high and dry as well
11 for the reasons I have given.

12 THE PRESIDENT: Yes. We understand.

13 MR FLYNN: Well Sir, I will stop there, unless I can help
14 the Tribunal further this evening and we can pick it up
15 at 10 in the morning.

16 THE PRESIDENT: Yes. Can we leave you with two thoughts to
17 consider? Obviously one of the points being raised
18 against your application is the problem of the inclusion
19 of new and used trucks. You are well aware of that and
20 I'm sure you are going to address it. We would like you
21 to explain to us whether there is any particular reason
22 why you are not seeking an aggregate award of damages
23 which, as I mentioned to Mr Thompson is possible for opt
24 in just as for opt-out. It's not confined to opt-out,
25 and whether that could potentially overcome some of the

1 problems which are then left to be dealt with at the
2 distribution stage, or another potential route is
3 whether you have considered Rule 78, subrule 4, that's
4 to say, to have a sub-class with a different class
5 representative, as discussed in the guide at paragraph
6 6.35, precisely in the circumstances where there is
7 a potential conflict on certain issues between members
8 of the class, but, of course, not on all issues, and
9 perhaps you would like to reflect on those with your
10 team overnight.

11 MR FLYNN: Yes. Yes indeed Sir. Thank you.

12 THE PRESIDENT: We will resume at 10 o'clock tomorrow.

13 MR FLYNN: Thank you, Sir.

14 (4.32 pm)

15 (The hearing adjourned to 10 am on 20 April 2021)

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