IN THE COMPETITION APPEAL TRIBUNAL

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

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

21 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

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Wednesday, 21 April 2021

(10.15 am)

HOUSEKEEPING

THE PRESIDENT: Yes, Mr Harris, just before you resume, we have received from Mr Flynn, or his clients through, no doubt, the solicitors, a draft re-amended claim form where paragraph 77 has been changed. I have to say, as you explained it to us, what it is doing, Mr Flynn, I'm not quite sure what it adds to paragraphs 71-76 which sets out the position by each of the different categories.

MR FLYNN: Sir, I have to say we rather agree with you on that, and one option we considered yesterday was simply deleting it, but there we think it -- we wanted to make clear what the paragraph was saying, as it were, but I think we do accept that point. It doesn't actually add very much, if anything at all.

THE PRESIDENT: It might confuse slightly. That was my concern.

MR FLYNN: Well, I think -- sorry to cut across you Sir, but yes, indeed, and I think it has, as the discussion has shown, so we would be equally content simply to delete it.

THE PRESIDENT: I think, if I may say so, I think that's the better course because you then get into the question of

whether it's -- if it is purchased from another class member, are you saying that, then, that class member's purchase price was passed on to the other class member who purchased it as a pre-owned truck, and you are saying it will be to some extent but not completely, so -- and that's what you have got in paragraph 75, that it has an effect on the price of pre-owned trucks, but this one suggests a total pass-on, which I don't think is your case, is it.

MR FLYNN: I think that's correct, Sir.

So what I would propose, and, you know, obviously this is a touch bureaucratic, but we will note that, as it were. I don't know if other amendments may be necessary in due course. We will delete the paragraph and submit that for the Tribunal's approval, but leave, as it were, in place, a full stop so that we don't mess up the paragraph numbering, so we will have a blank paragraph at that point.

THE PRESIDENT: That's sensible. Yes. Thank you.

MR FLYNN: Thank you.

THE PRESIDENT: Yes, Mr Harris?

Submission by MR HARRIS (Continued)

MR HARRIS: Good morning Mr President, members of the Tribunal.

In the time available to me I have three principal

topics to cover. They are not lengthy -- individual actions and their relevance that I said I would go to yesterday, then one aspect of the unsuitability of Dr Lilico's methodology to supplement those addressed by Mr Singla, and in that topic I will be addressing the, we say, defective litigation plan, and then, finally, a few words on defunct companies and dead people.

If there is any time I will also address why UKTC shouldn't be opt-out as opposed to opt-in, but as you know, our principal case is it shouldn't be certified at all.

Before turning to those topics, however, I will just finish -- you have where I got to yesterday on VOC. I was addressing the Tribunal as to why there were big problems with VOC here, and, in particular, how there was no methodology for removing VOC that was irrelevant in very material respects, such as the bundled items or the fact that VOC differs between distribution methods, but just to finish that point off, you will, of course, appreciate that by virtue of its choice to go top-down, aggregate and opt-out, UKTC never descends to the transaction level, and that's why it can't remove the VOC. It just doesn't ever get to the transaction level.

In many cases it doesn't get data about the transactions that give rise to the VOC that need to be

removed from either party to the transaction, so in many cases it doesn't get it either from the purchaser, which is the PCMs, Mr Thompson doesn't -- he freely admits he didn't, and it is quite obvious, that he doesn't know who they are, and they are never going to get the transaction data from them, subject only to this point I'm about to make regarding the so-called claimant database, but on top of not getting it from the PCMs on one side of the transaction, it doesn't get it from the vendor either which, in the vast majority of cases which you were addressed on yesterday by Mr Singla, is the dealer, not the OEM, so you don't get it from either end, but what we do have, if you recall, I'm not going to turn this back up because you saw this with Mr Thompson on Monday, was that in the plan and the budget, these dealers who were, of course, third parties to this litigation, there is no budget and no proper plan for getting the necessary data for even that side of the transaction, even from the dealers, so you will recall, and the reference was Bundle B, tab 9, page 4 {B/9/4} in the cost budget, to no provision for third party disclosure, and, of course, we all know that it is highly expensive, because you have to pay the other side's costs and of the disclosure exercise. Instead, they were said to be, "Ad hoc", matters that may or may

not arise. Well, in our submission, of course they will arise, but now I'm just going to show you, if I may, a reference to the unsatisfactory so-called claimant database. That's the other side of the equation.

Now, having recognised the force of the OEMs' objections to this point at the end of the day Dr Lilico has come up with a new suggestion with his instructing team of a so-called claimant database, but let me show you, if I may, how unsatisfactory and poorly thought through there, with respect, that suggestion is.

Could you please turn up Bundle F1, the first of the F bundles, at tab 3, and page 12? {F/3/12}. I'm referring on page 12 of tab 3 to paragraph 1.40. This is in Dr Lilico's, I believe, fourth report. Third report. I'm so sorry.

So, having recognised the terrible problems with not having the data, this is what the proposal now is, and I quote:

"A claimant database created ..."

I will just pause there. It is elsewhere admitted that the claimant database does not exist. There is no claimant database. Then it goes on:

" ... by a Claims Administrator ..."

Well, we've heard there is no Claims Administrator appointed for the remainder of the case. There is just

some minor involvement from a Claims Administrator helping to shape the plan as it currently stands, so there is not a claimant database and there is not a Claims Administrator, but even if there were it only says, "May", it may do certain things, but critically there are the parentheses:

" ... it may, depending on the success in obtaining the relevant data ..."

But therein lies the rub. We completely agree. If this database ever gets created by an administrator who was ever appointed it entirely depends for its utility on what it gets and the plan simply doesn't deal with that. We don't know who the PCMs are, we don't know what data they have, we don't know whether they will be prepared to give any of it, or any of them, bearing in mind that this is an opt-out proposal principally, and even as regards the opt-in, there are no signed-up members, and then it goes on to say, well, it may allow us to do X, Y and Z and in the final partial of the first part of 1.40, using this non-existent database put together by a non-appointed Claims Administrator Dr Lilico, "Might attempt to answer the following questions".

In our respectful submission it is grossly unsatisfactory because it is not fit for purpose and

reveals a huge flaw in the UKTC approach, and I will just finish off on VOC, because there are other aspects -- I was addressing you principally yesterday about the bundled nature of the transactions and the distribution channels, but, Sir, there is a massive further problem with UKTC, far from being, "insubstantial", or, "Hopeless", this problem is irreconcilable for UKTC.

UKTC, as you know from Mr Thompson, excludes lessors. It excludes them, so that means that the VOC for those lessors cannot form part of the VOC for the purposes of Dr Lilico's methodology, but he has no method of ascertaining what it is or taking it out, that's a silence, total silence, but it gets worse because the lessor's VOC cannot be included there is a slight -- there is a couple that aren't included for short-term, but the lessee's VOC does have to be included, but Dr Lilico doesn't have any method for including the lessee's VOC that should be included and of course to get to the lessee's VOC that should be included, and, of course, to get to the lessee's methodology for upstream pass-through of the alleged overcharge that was first borne by the lessor before it gets to the lessee, but there is no methodology for that either, and Mr Thompson's answer, with respect to him,

is, "Don't worry, it will be all right on the night". When we get to trial this will all somehow magically resolve itself, but that, with respect, is totally unsatisfactory.

I seem to have lost Dr Bishop. Shall I pause for a moment? At least in -- oh, there we go.

You asked, Mr Thompson, Sir, on Monday, whether he could identify where Dr Lilico sets out in his expert's report, any one of the four of them, a methodology on emissions technology, and Mr Thompson said he didn't want to duck the question but then he did.

The answer is there is no methodology at all for emissions, and the exact same point relates to removal of VOC or upstream pass-through. You will search in vain for anywhere in those four reports for methodologies on those points. They don't exist and they are fatal flaws in my respectful submission for the UKTC case, and again, it doesn't end there, and I'm still just on VOC. You know there are fatal flaws elsewhere, but just on VOC, Dr Lilico also has to exclude all of the VOC, the actual VOC for everybody who opts out of his claim, and we know that there are substantial and increasing numbers of people who will, if they get certified, opt out from the claim, and that's because all of the existing individual actions

necessarily will opt out, and all of the future individual actions and there are those coming in every day. I will address you shortly on a claim that, I think, was served yesterday, highly germane to these actions, and they are coming in every day. All of them will opt out, and Dr Lilico must, simply must exclude the exact VOC from all of those opt-outs for him to have any hope of resembling a compensatory claim across the class, but he can't, he can't do it. He has no methodology, and let's not forget that when somebody opts out from UKTC they don't have to say to UKTC anything other than, "I opt out". They don't have to say, "I opt out and here is a bundle of detail and documents and evidence about my VOC, including that which was passed through to me at the upstream level using some regression". They have no idea what the VOC was going to be.

THE PRESIDENT: Mr Harris, if I can just interrupt you a moment, I don't think, in fact, the individual claims have to opt out. They are excluded from the class by -- under the rules, unless they discontinue their individual action. That doesn't affect the point you are making, but I think that's the procedural position.

MR HARRIS: Yes. You are quite right Sir and you are quite right. I accept that correction. I shouldn't have

used, "Opt-out", for those, I should have used, "Excluded", but the point remains.

Then of course there is McCulla and I'm going to be showing you McCulla under my next heading, "Individual actions", in a minute, but if the RHA class is certified then all of the RHA VOC will have to be removed but there is no methodology for that, but of course the RHA's position, or at least those of the underlying 16,000 signed-up members of the RHA proposed class is that if the RHA CPO is not certified, they will proceed with the individual action, so on any view, all of the RHA VOC has to be --

THE PRESIDENT: Well, I'm not sure that was quite Mr Flynn's position. He said --

MR HARRIS: Well, I will show you that.

THE PRESIDENT: Well, he said --

MR HARRIS: I will show you what the written documents say, notwithstanding the oral submissions, so what, in fact, you're faced with.

THE PRESIDENT: What he said was, irrespective of what the documents say, if there is another class action there would then be some discussion.

MR HARRIS: Well, exactly. That makes my point very well. So what you are told today is something in the documents and then you are told something wholly imprecise about

what may or may not happen in the --

THE PRESIDENT: Well, it is realistic, isn't it.

MR HARRIS: Well, with respect, I'm not sure that we do agree with that, given the signed-up contractual commitments that are being given by the proposed class members to provide exclusive rights to the RHA. I mean, my submission on that, just to foreshadow it, is; you have got the written contracts and that's what the position is, and then you are simply told today, oh well, that might not happen.

THE PRESIDENT: No, you are told by the trade association, on instructions through their counsel that we will take a realistic view of the situation in the interests of our members and others who have entrusted us with their claims, and we won't -- we are unlikely to completely preclude them if there is another separate class action and that's the only class action going forward, so it's not crystal clear, but one can take a sensible view about it.

But I don't know if you need that point. I mean, the point you make is that there are a whole lot of people who have to be excluded or are excluded and they have to be --

MR HARRIS: In that case I will move on. I will be coming back to defunct companies and dead people, but obviously

the same point applies to them.

So that just leaves the first of the remaining three topics, and I will take this quickly -- individual actions and their relevance, and the most germane point here is the point that was raised yesterday, and I said I would come back to today, which is; are they only large companies for lots of trucks, and the answer is no.

THE PRESIDENT: Just to be clear, the point is not are they for lots of trucks, that's not the point. It is are they -- do they include these micro -- small companies, because of course a large company may only need a few trucks.

MR HARRIS: Yes. Well, doing the best we can we think the answer is a definitive, "Yes", and I will show you what I mean by that.

I mean, plainly I don't have at my fingertips the precise audited accounts or revenue figures for all of them, but you will be able to see -- get a flavour from what I'm about to show you that there appeared to be some small entities with very small numbers of trucks.

Now, the first one I don't invite you actually to turn up in the interests of time, but I will give you the reference. It's Bundle D, tab 8.2, page 133 {D/8.2/133}.

THE PRESIDENT: Well, it will come up very quickly on screen because Opus are very efficient.

MR HARRIS: Yes. What you will see is that this is the 20th claimant, AA Skip Hire, in a case of Adnams and many other companies which are represented by Edwin Coe, and this particular 20th claimant has four trucks weighing six tonnes or more. That's the third paragraph. You can see that, and then if you were to go in the bundle to that claim you will see that there are other claimants that have small numbers of trucks. I'm going to show you another and a better claim in just a second, so I'm not going to go to that document, but what I do note, however, is that that claimant, and all of those in that -- what we call as defendants, "The Adnams claim", because Adnams is the number one claimant, is that they are represented by Messrs Edwin Coe, and if you were to turn it up, the Edwin Coe website simply says in terms that, "We are busy building books of claimants -- truck purchasers and we've got funding to do it". That's on the Edwin Coe website.

So there is funding and the incentive to bring claims of small and medium-sized companies, provided they are grouped together with others. The Edwin Coe website reads, and I quote:

"Edwin Coe has funding in place which means you can

pursue your claim without cost or risk".

But let me show you, if I may, another document. This is for the Opus assistants bundle M, page 24 {M/24/1}, and that's a claim called A-Z Catering Supplies Ltd, or at any rate that's the leading claimant but if I may, you will see that there is a whole raft of, on the face of it, small --

THE PRESIDENT: I think you have got --

MR HARRIS: It is the claim form at {M/24/1}, and then {M/24/3} there is a list of the actual claimants for A-Z Catering, and I don't know if that could please be brought up on the screen, M/24/1, but let me give you some figures. We've done it -- I will happily, if you want me to provide these in writing -- we've been through the claimants in this list that appears at the annex, 84 claimants, and claimant number 2 has seven trucks, it appears to be a small removal company, claimant number 4 has ten trucks, claimant number 6 has nine trucks. If you like, shall I send this in in a table, Mr President, so you -- for your note?

THE PRESIDENT: Yes.

MR HARRIS: Claimant 8 is perhaps the most surprising. Claimant 8 has one truck.

MR THOMPSON: Sorry, Sir, could Mr Harris give the references to what he is referring to?

MR HARRIS: Yes, I have done that twice. I will do it a third time. It's bundle M, page 24, page 1 -- tab 24, page 1, and I'm now looking at page 3. Page 3 of that document {M/24/3}.

THE PRESIDENT: The number of trucks doesn't appear there, does it?

MR HARRIS: No, and that's why I say I'm happy to send it in in a -- we've done this by reference to the particulars.

THE PRESIDENT: Are the particulars in the bundle?

MR HARRIS: I don't believe they currently are. We can supply them and I can supply a cover table as well.

THE PRESIDENT: I think that's what Mr Thompson means, when he says where do the figures come from.

MR HARRIS: Yes. We will supply the table and the particulars from which we get them, but claimant number eight has one truck, claimant number 19 has four trucks, claimant number 36 has three trucks and claimant number 44 has eight trucks, and overall {M/24/5} there are eleven claimants with ten or fewer trucks.

Claimant 36, it is worth noting, is a sole trader a point that I will come back to in the context of dead people, briefly, very briefly, but can I also, please, now draw your attention -- and here you do have the particulars including the numbers already, to the same bundle, M, this time to tab 26 {M/26/1}. At least in my

copy this appears to be only the schedules rather than the particulars. I don't know what's happened to the particulars, but this -- we can have them added. These are particulars of schedules that are annexed to -- these are part of the statement of case --

THE PRESIDENT: Mr Harris, if you go back to the previous tab {M/25/1} --

MR HARRIS: Yes. That's right. I'm very grateful. Thank you very much.

THE PRESIDENT: -- then you will find the pleading, and then it says the others for the claimants, it says, "See Schedule 2", not 1A, 2, but obviously there is a Schedule 1A and 1B.

MR HARRIS: There is.

THE PRESIDENT: But there is a Schedule 2 as well which starts at page 4, I'm told {M/25/4}.

MR HARRIS: You are quite right. Thank you very much. Tab 25, page 4 is the list of the claimants. There are 138 district or borough councils and that's all we need that schedule for. There are 138 of them, the first one being the District Council of Adur, if I have pronounced that correctly, but more relevantly for today's purposes is the next tab which are the schedules that were attached to those Particulars of Claim, and they identify the numbers of trucks for some of these

extremely small district councils.

THE PRESIDENT: Well, I mean I don't know if they are small. I mean, district councils are not like a small family business. They may not need many trucks --

MR HARRIS: Yes.

THE PRESIDENT: -- but they are, nonetheless, a substantial entity.

MR HARRIS: Well, some of them at least in my experience are extremely small and have extremely low funding, but I take your point, I take your point, these are district councils, some of them, not one man bands. However, the point remains that some of them have made claims for very small numbers of trucks, and there are lots with small numbers of trucks.

Now, I'm obviously not going to go through this, but I can provide a table, circulate it generally, but if you were to look at Schedule 1A you can see that the District Council of Adur, and you will see that the number of trucks directly bought by that council from the defendants was only three, and if you were to just scan down it, you will see that, again, there are some very small numbers in here. For example, the claimant 21 is five, and you can scroll through them, claimant 58 is eight.

THE PRESIDENT: Sorry, I'm -- oh, I'm looking -- not in

terms of umbrella purchases, but purchases from the -- and the total number of trucks they bought is rather --

MR HARRIS: You are quite right Sir, and I'm going to address you on that. I don't want to mislead anybody. I'm currently in 1A addressing only bought from the defendants, but you are quite right, in the Particulars of Claim there are allegations of umbrella purchasers as well.

THE PRESIDENT: And we've got a Schedule 1B on page 8.

MR HARRIS: What we will do to assist the Tribunal and everybody else is provide you with a table that conglomerates the figures, and --

THE PRESIDENT: Well, I don't think we need that. I mean, district councils are in a very different position. They have grouped together, they have brought a claim, some of them only buy a few trucks, and that's the only point, isn't it.

MR HARRIS: There we go, exactly.

THE PRESIDENT: It may be very convenient to have a combined claim of similarly-placed entities like that, whether it's procedurally effective and efficient I don't know, but that's what they have done.

MR HARRIS: The point that I make is that here are a series of claims by, on the face of it, some small and medium-sized enterprises, or, in my submission, in some

cases some small district councils, buying low numbers of trucks, but I don't overstate the case. You are quite right, Sir. Some are district councils, but they do include, in certain instances, sole traders, and what they show is that by grouping together there is enough money on offer, both to incentivise claimants to participate in these individual actions or groups of individuals, and there simply must be funding. I'm not privy to what the funding arrangements are, but Edwin Coe says it has got it, and plainly these claims are funded.

So my submission is really, then, under this topic, individual actions plainly are practicable.

Then I take you, if I may, to the McCulla claim, and I'm going to start, if I may, with just the final page of it, so that you can see what is said in writing about it in a formal document that's been filed with the court, and if you wanted to turn that up, that's in the second D bundle, and I think it's the very final page. It, in any event, is {D/10/1}, the very final page of the hard copy bundle is the Schedule 3 brief details of claim, and it is two pages.

THE PRESIDENT: Wait a minute. Wait a minute. No, I think it's in -- well, it is in bundle -- no. It's in Bundle 4 of 5, I think.

MR HARRIS: My reference electronically is {D/10/1457}. I want to show you the final page.

THE PRESIDENT: That's the electronic reference. It is the fourth D bundle at page 1457. {D/10/1457} and it has come up on the screen.

MR HARRIS: That's right. I obviously don't want to read it -- most of it is not relevant for today's purpose, I'm just going to go to the very end, so it is page {D/10/1458} and at the bottom of page {D/10/1457} the RHA individual claimants, all 16,000 of them say:

"This claim form is being issued out of an abundance of caution given the considerable delay to the CAT hearing the certification of the RHA's application for a collective proceedings order and in case the RHA is not ultimately awarded a collective proceedings order in respect of some or all of the claimants it represents".

So our understanding of that is that if they don't get their CPO order they will be proceeding with this claim. In any event, it has been issued as a formal court-issued claim, and, plainly, the RHA's lawyers must have had instructions from each of these 16,000 claimants in order to issue that claim and some of them, on the face of it, look to be very small indeed.

THE PRESIDENT: Well, they will be because they are the same group. That's clearly right.

MR HARRIS: Exactly my point.
THE PRESIDENT: And this is a claim for 14,500-odd claimants.
MR HARRIS: 16,000-odd. Indeed.
THE PRESIDENT: 16,000-odd. Ah. It seems to run out at 14,432.
MR HARRIS: I think it has been amended.
THE PRESIDENT: I see. Are you suggesting that's a procedurally efficient way of conducting litigation?
MR HARRIS: What we are saying is what it shows is that there is a practicable and, indeed, by these very claimants, it simply must be deemed to be a suitable action, otherwise they couldn't properly and responsibly have brought it.
THE PRESIDENT: Mr Harris, they may have brought it for their own reasons. From the court's perspective, do you think that's a procedurally efficient way of conducting such litigation?
MR HARRIS: We do, Sir, we do say that in just the same way that there are hundreds of claimants in some of the others, or tens of claimants in some of the others, in the UK litigation landscape that faces this Tribunal today, that is something that has to be regarded as a suitable way of proceeding.
Now, you can do it by way of test claimants, you can

do it by way of sampling, and you can do it by way of grouping, or they could apply for a group litigation order which has some of those other ramifications, but what you cannot do is say, in my respectful submission, that individual claims are not practicable and/or they are impossible to bring and/or that they simply won't be brought, and that is fundamentally --

THE PRESIDENT: Just so I'm clear, it is your submission that this is procedurally efficient.

MR HARRIS: It is my submission that on the relevant test of suitability relative to individual actions which we've been told by Merricks Supreme Court is the test, that yes, it must be the case that all manner of responsible firms have taken the view that they do not need to proceed in a collective action, including all -- however many -- 10,000 plus RHA individual claimants.

Now of course I don't make the submission that they regard their individual action as more suitable -- obviously I don't make that submission, they don't, but that's not the test. What you have to do, with respect, under Rule 79, and under the framework in the UK, is ask yourself, well, what is the relevance in the multifactorial balancing test of the fact that there are, actually, all manner of other individual claims that are actually being pursued and are actually being

proportionately pursued, and, on top of that, in my respectful submission you have to bear in mind the suitability of the fact pattern.

THE PRESIDENT: Isn't suitable relative? Isn't that what we've been told?

MR HARRIS: It is relative, but it is highly germane in that regard that there are all these responsible firms bringing grouped individual actions on a funded basis, and they are coming out every day.

THE PRESIDENT: Yes. Well, we've got the submission.

MR HARRIS: Yes, and they are being case-managed, in my respectful submission, in a responsible manner by none other than you, Sir, and other formations of this Tribunal, and it can't be said that they aren't being suitably, in my respectful submission, case managed, but most critically of all, it goes back to my foundational submission, is there must be, on the fact pattern of these cases, individualised issues to be dealt with, and they are far more suitable, these individual actions, to deal with the fact patterns of these cases because they do deal with individual fact patterns and disclosure, and that's the critical point. They may -- I'm not suggesting for a minute that they are an attractive proposition, or that they are easy to case manage, but they are there, they are responsible, they are suitable,

and indeed they are more suitable on this fact pattern, particularly bearing in mind things like test cases and GLOs and grouping together.

Finally, before moving on to the next topic, I invite you, with respect, to reflect upon what is said in the disclosure ruling, which is that there is a precedential effect of the other actions going on in the UK litigation landscape. This point distinguishes these actions from, with respect, any other with which you are faced in the Tribunal. Any other collective action. Nobody else has a mass UK litigation landscape of all manner of other individual claims that give rise to precedential effect which, and I'm not suggesting that it's res judicata or issue estoppel, but as was recognised in the disclosure ruling in the real world, will have an impact upon other actions that follow.

THE PRESIDENT: I thought that same submission was made by, in fact, none other than you, as I recall, in Merricks pointing to the various individual claims against MasterCard, and saying they will be a very useful precedential value for the Merricks claim, because Merricks is a group claim against -- it is a collective claim against MasterCard and we have a whole lot of individual claims against MasterCard.

MR HARRIS: Yes.

THE PRESIDENT: I seem to remember the expert saying, actually, they are going to rely on the --

MR HARRIS: Yes, and I make the same submission here.

THE PRESIDENT: I thought you said this is unique. I misunderstood you.

MR HARRIS: No, no. It is unique in the sense that these are the same underlying actions that are being dealt with in the individual cases. In MasterCard, of course, they are not the same underlying actions because the ones that provide a little bit of precedential assistance are at the merchant level not the end consumer level, whereas here you will be addressing your mind, with other colleagues --

THE PRESIDENT: The pass-through is the critical issue in both.

MR HARRIS: Well, to some extent, yes. To some extent.

THE PRESIDENT: So it is the same, because, I mean, the level of the MIF is established, so the --

MR HARRIS: Well, Sir, you have the point. That's what I say about these individual actions, and given the time I'm going to quickly address the other two topics which are unsuitable methodology, not repeating Mr Singla, and then dead people and defunct companies, and I'm going to take them very quickly, but just for the avoidance of any doubt, lest there be any confusion on the part of

any -- frankly anybody, we, Daimler, we do contend that the UKTC methodology is so flawed, and it has no reasonable prospect of being fit for purpose that it should be struck out or summarily dismissed.

So you will have seen -- this is page 1 of our skeleton and page 1 of our amended response -- that we do say that there is a summary dismissal application. Of course, I don't need to develop it because it's the same submissions that mean that the methodology is unsuitable. If it has no realistic prospect under Pro-Sys, and/or it is not grounded in fact.

THE PRESIDENT: You get to the same place.

MR HARRIS: But just for the sake of -- because somebody -- I think Mr Thompson was saying he wasn't facing one, but he is, but I don't need to develop it, and just very, very quickly --

MR THOMPSON: I'm sorry Sir, I can't let that go, and there are one or two rhetorical flourishes from Mr Flynn as well. There has been no application for summary judgment or reverse -- or strike out, and the Tribunal made the point yesterday without being challenged, and that's the position. There have been some rhetorical statements along those lines. There has been no application, and in my submission it would be completely procedurally inappropriate to try and make an

application of that nature in the middle of the hearing.

THE PRESIDENT: Yes. Well, Mr Thompson, you are quite right, and we are not treating this as a summary -- reverse summary judgment application. I think that would be pretty difficult anyway on methodology. It looks more to the merits of the infringement or any allegation that it caused loss rather than the particular methodology, but we will deal with this in terms of certification and, as Mr Harris has accepted, it actually doesn't make any difference. All he is saying, somewhat rhetorically, is that it is so flawed he says it could be the subject, shall we put it that way, could be the subject of a strike out, but he is saying, in any event, we just shouldn't certify on that basis.

MR THOMPSON: I understand Mr Harris' forensic style, and I took it in that spirit, but no application has been made.

THE PRESIDENT: No. That's quite right.

MR HARRIS: Sir, with respect, we don't agree, and I give you the reference.

THE PRESIDENT: Well, Mr Harris, it really doesn't matter. We are not going to deal with it as a summary judgment point.

MR HARRIS: It doesn't matter at this stage, it may matter

on appeal and it may matter, Sir, because I --

THE PRESIDENT: Well then you should have -- you haven't actually issued, as has happened in other cases, an application for summary judgment.

MR HARRIS: We haven't issued an application notice, but we've said in terms, and this is paragraph 1 of our amended response, and in our skeleton argument, and in the cover letter to the skeleton argument that we are pursuing a summary dismissal application, and it uses that exact phrase, and refers to the issue and the bundle reference is Bundle E/IC3/2, and it is also paragraph 1 of our skeleton argument.

So for the record, whilst I take your point, and indeed I have just made the submission that I don't need to develop it because it's substantively the same, it is formally on the record, and it may be relevant later on, not least of all because Lord Briggs says in Merricks Supreme Court that there is an unclear line -- I paraphrase -- between what might be a Merricks challenge and what might be a suitable methodology challenge, and to cover those bases we do make, and I formally submit that we have made, a summary dismissal application, though I accept there is no separate application notice, but that's not been necessary always in CAT case management terms.

If you wanted a document that says what it already says in writing on that page then that could be produced, but that's my submission. I'm not going to take it any further because I don't have time.

THE PRESIDENT: You needn't say any more about it.

MR HARRIS: Very good, but what I --

MR THOMPSON: I don't want to delay, but --

THE PRESIDENT: Well, I think Mr Thompson, you will get your response on it and we will consider it. I don't think you need deal with it now. I would like Mr Harris to continue.

MR HARRIS: What I draw attention to, therefore, Sir, I'm most grateful is very quickly, of course there is absolutely no merit in the point that some of these issues haven't been raised in a formal defence, such as tax, mitigation, pass-on and what have you, of course there are no defences at this stage of the claim, and in Merricks, MasterCard was never once told, "Oh, sorry, you can't run these points including about pass-on because there is no defence", but more important than that is what it says in paragraph 6.30 of the CAT guide. If anyone wants to turn that up, it's in bundle of authorities at tab 12, page 22, and what that says {JA/12/22} is that the plan should be sufficiently detailed and comprehensive to correspond to the nature

of the particular case. It should explain how the proposed class representative and its lawyers intend to ensure that the collective proceedings will effectively be efficiently pursued in the interest of the class referring to the issues likely to arise in the particular case, but, with respect, the UKTC simply hasn't done that. It is obvious that pass-on downstream will arise. We've already seen that pass-on -- pass-through upstream arises, but it is equally obvious that tax and mitigation, other forms of mitigation, and to the extent that compound interest is pursued, defences will be take then that regard, and it was incumbent, in our respectful submission, for the UKTC claimant to address these in its plan. It says so in terms in the Guide and it says so in terms at the end of Kett v Mitsubishi, though I accept that's a Canadian case.

One of the bullet points refers to, "Addressing the degree of disclosure likely to be required in the proceedings", but UKTC hasn't done that, and then it says, "Whether disclosure from individual class members is likely and if so the intended process for collection of relevant documents from class members". I have already addressed you on that. UKTC hasn't done that or hasn't done it in anything resembling a satisfactory

manner, and then it says, "How necessary witnesses will be identified and/or what steps will be taken to obtain their evidence", but, of course, individual claimants will be needed in this case, and UKTC simply doesn't address that.

So where is the plan on these matters? How does the plan explain how these other inherent parts of the claim, these downstream issues, are going to be dealt with? Is the plan suitable? Is it cost effective? Is it better than the way in which individual actions could or will proceed on these other points that arise? Is it realistically funded, this part of the plan? Is it funded at all? Will there be engagement by the PCMs on these points? How do we know? How long will the litigation take if all of these issues have to be addressed in the collective proceedings? Will the PCMs have anything approaching the relevant data? Will the opt-out claimants have any time or inclination or wherewithal to provide information on things like VOC? Where is the claimant database? When will it be produced? Who will be in it? All of these matters are not addressed, and in our submission that is a fatal flaw, and what's more, it's likely in our respectful submission to give rise to potentially irremediable prejudice, because what's likely to happen is, were it

to be certified, we would get to an overcharge stage, and as you rightly pointed out, Sir, yesterday, with respect, overcharge is not damage, the OEMs are not going to be providing payments in response to an overcharge finding, not least of all because as things stand the OEMs take the view that there is no overcharge, so that's what I submit as regards the defective plan, and it leaves me with one final topic, very brief, defunct companies and dead people.

THE PRESIDENT: Yes. Could you pause there a moment? We will just consult for a moment. (Pause)

Mr Harris, I think if you just concentrate on defunct companies, and you needn't address us on deceased persons.

MR HARRIS: I'm most grateful. I will keep this very quick.

So the defunct companies, to coin a phrase, that's a phrase from the Companies Act but we know what we are talking about, are classic examples of, "Uninjured claimants", by reference to the case law that I was addressing you on yesterday.

Their VOC is currently included in the UKTC claim because of the way it is purported to be constructed on a top-down basis, but they have no claim. Indeed, they are not claimants. So they need to be removed, and this is a material point. As Professor Wilks pointed out in

argument on Monday, and the reference to this evidence of Mr Burnett of the RHA is as follows: Bundle C -- I have got tab 9, tab 7, so if that can be checked as I'm speaking, and in any event, paragraph 17 of Mr Burnett's evidence. I will come back to that reference once it has been checked. He is the one who refers to there being 144,867 new relevant trucks to which the defunct companies relate {C/9/6}.

Now it doesn't matter whether that's precisely accurate. It is obvious that there are going to be substantial numbers of trucks because it's obvious that companies get dissolved and removed from the register on a regular basis, and, indeed, this period spans a global economic crisis that particularly hindered this type of haulage operation, and so we say that that is an intractable problem on the basis of the UKTC's current approach, and it can't be resolved by restoration, not that UKTC has even suggested that it's going to try to do that, but it can't be resolved for a number of reasons. First, there is a six-year time limit for restoration, and, plainly, many of these companies will be outside that time, so that's the first problem.

THE PRESIDENT: That's under the Companies Act is it?

MR HARRIS: That's under the Companies Act and the reference

is in our skeleton.

Secondly, again, as referred to in our skeleton, such restoration requires a court application and an applicant, of course, but any such applicant has to have the resources and the inclination to pursue the application. There is no suggestion anywhere in any of the company law materials to which I have had reference that the UKTC would be capable of being allowed to bring such an application. They don't have any relevant relationship to these now defunct companies. They appear to be people --

THE PRESIDENT: They would have to identify the company as well.

MR HARRIS: And they would have to identify the -- precisely so. They haven't got the faintest idea who those companies are and they never will have, on their methodology, but in any event we submit that it's unlikely to the point of being fanciful that any person on behalf of a now defunct dissolved, deregistered, opt-out corporate class member, who, on the face of it, hasn't got any idea about the UKTC claim because he is opt-out, would engage with the resources and time and effort to bring any such application, bearing in mind that these people are, by definition, people who haven't shown any interest in any individual action, ever, or

even in the RHA action.

THE PRESIDENT: Well, we just don't know.

MR HARRIS: We don't know, but it's -- and then third and finally, and I will give you the reference to this, it is Companies Act section 1012 to be found at bundle of authorities 1, tab 8.1, page 14 {JA/8.1/14}. Under that provision after dissolution, property and assets of dissolved companies vest in the Crown. It's called bona vacantia, or people like the Duchy of Lancaster or Duchy of Cornwall and on the face of it, a tortious cause of action is a property asset that would be so vested so, that would also have to be dealt with and there is no methodology -- I mean, UKTC hasn't addressed any of these points.

THE PRESIDENT: Well, I think the position is, isn't it, once a company is dissolved its assets, after -- depending on -- go to the Crown, but if the company is restored then the position changes, so if an application were made and was successful, and it was restored to the register, it can then recover its assets, so if someone was going to do that, they might be able to do it as people -- this happens, that you get applications precisely to take part in litigation, so it's possible that some would do it, but we don't know.

MR HARRIS: I accept that, Sir. That's my understanding, so

it is the combination of those three points, but principally the first two, and it's not as though the UKTC has even said that it would try even to do any of this, or have a methodology, and as you rightly pointed out, Sir, they haven't got any idea who these companies are. They haven't got any way of ascertaining who the companies are, and they never will have on their methodology.

THE PRESIDENT: They had advertised their proceedings, and it may be that a significant number of people who ran these companies would apply, and others wouldn't. We don't know.

MR HARRIS: Well, I'm happy with that, Sir.

Just before, the reference to Mr Burnett's fourth statement, paragraph 17 is Bundle C, tab 9, page 6 {C/9/6}.

THE PRESIDENT: Paragraph 17.

MR HARRIS: Yes. Yes, and so there is -- so let's be clear. There is no application to amend to remove these companies.

THE PRESIDENT: No, I think we've got the point.

MR HARRIS: Right. Good, and then that leaves me with the final point on companies, and two minutes on opt-in, opt-out and then you will be delighted to hear I'm finished.

Just so that you know, we have found reference in a multiple of the individual claims that have been issued to other sole traders. I already showed you one, and if you wanted to just note some others in the McCulla claim that we looked at before -- just as examples --

THE PRESIDENT: Well, McCulla will have lots because they are the same people who have signed up. We know there are lots of sole traders.

MR HARRIS: Exactly, and I only do that, Sir, because I said that although I'm not now going to address you at all on dead people, you have got our written submissions on that.

THE PRESIDENT: Yes.

MR HARRIS: Sole traders, obviously fall, potentially, into that legal entity category, and there are lots of them knocking around, if I can put it like that.

THE PRESIDENT: Yes.

MR HARRIS: So then that takes me to my final topic which will only take a few minutes, and it is why, with respect, the UKTC claim could never be suitable for opt-out as opposed to opt-in, and you have got the written submissions. I have only two points.

First is, as you have already discussed with Mr Thompson, quite obviously the UKTC claim itself, even

by UKTC is said to be practicable as an opt-in, because that's its alternative way of putting the case, and we say that not jurisprudentially that that is fatal, it doesn't say that under the rules, but in practice in this case that's fatal to the opt-out, as it self-evidently, even on UKTC's own case, can be brought as an opt-in. It says so itself, and, indeed, it recites some reasons why it would be suitable as an opt-in, so in practice that's fatal, though I accept not jurisprudentially, and that leaves only the last point, which is that Mr Thompson said, ah, but one of the reasons why opt-out is much more suitable, apparently, than opt-in, is because of the funding arrangements, and look, the funding arrangements are more suitable for opt-out, so the submission went, because the lawyers and the funders get paid after distribution in an opt-out, and suddenly that is supposed to transform the opt-out proposal into being vastly more suitable than the opt-in, but, of course, it's a fallacious argument, Sir, for this obvious reason, that the way in which funding structures are put together for opt-in and opt-out are fundamentally and structurally different. It's only fair that in an opt-out the lawyers and funders should get paid after, because, of course, the proposed class members have nothing to do with the claim at all. There

is no contact with them or litigation arrangements, let alone agreements with them, and, secondly, everybody knows that in the real world the funders and lawyers will get paid because any aggregate damages in an opt-out don't get distributed beyond a small percentage, so there is no particular problem, but in sharp contrast, in an opt-in, there are people who have assessed the value of the litigation, assessed their involvement and entered into actual agreements with the people who are conducting the litigation, namely the PCR and the PCR's lawyers, and quite possibly the PCR's funders, and so, on a bilateral basis for each proposed opter-in, or each actual opter-in, it is a purely contractual affair. They can say to them, oh well, I'm prepared to agree that you will be paid before me if this succeeds, and that's the nature of the bargain, so it is fundamentally different -- but that having been said, and my final word on that, is if, because Mr Thompson now says that getting paid afterwards is so much more suitable, he wishes to change his funding arrangements for his proposed fall-back opt-in so as to make funding after distribution, we, of course, would be delighted. We think that -- we agree. That is more suitable, and we invite you to take that into account if there is any prospect of you seriously considering UKTC

as an opt-in.

So, Sir, with an eye on the clock, unless there are any further questions that you have for me, those are the submissions that Daimler has to make on UKTC and to some extent RHA. Strictly speaking in the timetable there is an opportunity for me to make very short supplementary submissions if any on RHA later. We will plainly take that -- play that by ear. There may not be a need and I will therefore finish then.

THE PRESIDENT: It is not on the timetable that I have been sent, Mr Harris. It says RHA commonality is dealt with by Mr Singla for Iveco and RHA's suitability is dealt with by Mr Pickford. That's what I have been sent.

MR HARRIS: And then, by agreement amongst the OEMs there will be, if needed, an opportunity for Daimler to make further submissions on RHA. It may not arise, and then after that Mr Hoskins --

THE PRESIDENT: I see. It's not in the timetable that I have been sent.

MR HARRIS: Well, as I say I will not take up any more time now. It may not arise. So unless there are any further questions for me, those are the submissions that I make on behalf of Daimler.

THE PRESIDENT: Yes. Thank you.

MR HARRIS: Thank you.

THE PRESIDENT: So I think we then go to the issue of dual certification and Mr Jowell. Is that right?

MR PICKFORD: Sir I think actually next was me in relation to just some very short follow-up observations on UKTC.

THE PRESIDENT: Ah. It would be helpful to get a timetable which reflects what you have agreed. I have been sent a letter from Travers Smith dated 15 April saying the respondents confirm they intend to divide the issues in the following manner. They do say, "Other respondents may wish to make brief non-duplicative submissions in addition", but it would be -- I would hope we would basically follow that scheme otherwise we will run out of time.

MR PICKFORD: Sir, we are going to basically follow that scheme and my submissions are both brief and I hope non-duplicative.

THE PRESIDENT: Yes. Well how long do you want?

MR PICKFORD: About 15 minutes, I think.

THE PRESIDENT: Hmm.

MR PICKFORD: May I start with the Tribunal's permission?

THE PRESIDENT: Well, I'm a bit concerned about that because that was not my understanding. 15 minutes, quarter of an hour is not insignificant.

Yes. Well, see how we get on, but I don't want to have a situation where some of the other key issues

which were identified in the letter, counsel addressing them, are squeezed out. We've heard quite a lot about UKTC, both from Mr Singla and from Mr Harris. We are going to hear about the issue of dual certification which obviously affects UKTC, we are going to hear about other issues on UKTC, apparently supplementary from Mr Hoskins, so ...

MR PICKFORD: Sir, no one has yet developed a point in any detail on downstream pass-on and that is the focus of my submission. I will see if I can do it in even less than fifteen minutes, in ten, so that's my newly-revised down target.

THE PRESIDENT: Right. Well, we will take a break at 11.35 and you will finish by then.

Submission by MR PICKFORD

MR PICKFORD: I'm grateful Sir.

So I'm going to focus on just three examples of why the UKTC has identified no plausible methodology for aggregate damages to be determined, and those concern downstream pass-on, buybacks and overlapping claims.

So, first on downstream pass-on, there are four points here that I need to make. The first I can deal with very briefly, but I do need to cover it off.

It is said by the UKTC that because pass-on hasn't yet been pleaded it was appropriate for them not to

engage with this issue, and, indeed, in their written submissions, in their amended claim, they go so far as to say the existence of such facts has yet to be pleaded and established, and that that's what gives them the reason not to be able to address the issue of pass-on. That is wrong. Obviously, in relation to --

THE PRESIDENT: Well, we've raised that with Mr Thompson. I have indicated that we think it needs to be considered.

MR PICKFORD: Well I'm grateful, Sir.

I mean, it is obviously entirely unreal to suggest that, and just for your note, of course, it's not simply the other claims where this has been raised, we raised the issue of pass-on, and we said that we would be taking it in the Responses and Objections that were filed in this very case in 2019, so they had known literally for years that pass-on would be an issue and it is simply inadequate, therefore, to say that they didn't know that they needed to grapple with it.

So the second point, then, Sir, is that there is a contradiction in the UKTC's case which is fatal to it. Mr Thompson made the submission on Monday that an opt-out claim necessarily requires an aggregate award of damages, and the UKTC also say that pass-on is necessarily a common issue, and I think there is an

implicit acceptance by the UKTC that in order to establish its aggregate award of damages it needs pass-on to be a common issue. It has no alternative avenue by which it can establish its award if pass-on is not, and we agree with that. That must be right. If pass-on is an individualised issue, there is, indeed, no means by which it can be addressed for an opt-out class for the purposes of aggregate damages.

So, given that premise, we say it is incumbent on the UKTC to ask for certification of pass-on as a common issue now at the outset. Any possibility that pass-on is not a common issue in the context of its opt-out claim is fatal to it, because it means it could never succeed and therefore should not be certified.

THE PRESIDENT: I mean, does it matter if it is certified now or whether the Tribunal takes the view, well, it is inappropriate to certify an issue before defences have actually raised the issue, but given that the high likelihood, or inevitability that it will be raised, there has got to be a means, a method, for dealing with it in calculating aggregate damages. You don't need to actually certify it as a common issue to say it's got to be part of the -- there's got to be a methodology that's going to work.

MR PICKFORD: You certainly don't need to say, as a legal

proposition, that there needs to be a methodology for it to work. It is not necessary in order to say that in order to certify it, that's for sure, but you do, in my submission, Sir, need -- if you are not going to certify it -- to be totally sure that it is going to be certified, that it is definitely capable of certification.

What you can't do is park the matter, hoping that it might be capable of certification, certify the action and then discover, when you actually examine it properly, that it isn't.

THE PRESIDENT: Yes. Well I thought that's what, perhaps, not very clearly was the point I made to Mr Thompson, that it's not satisfactory, when he get the defences, and then it's clearly raised and it's got to be taken account of, we then find it can't be a common issue, and then one might have to decertify the whole action. So I think that was the point I was trying to make, that it has to be capable of certification, but not necessarily appropriate to do it at this stage.

MR PICKFORD: Well, my submission, Sir, is that they need to persuade you that it will be certified as a common issue, and, therefore, in effect, they need it to be certified now, whether as a matter of formality the order is made now, doesn't really matter. The point is

on substance they need to be capable, in effect, of making the application now, and for the very reason that, Sir, you identified.

The third point, then, is that perhaps in recognition of this difficulty, the UKTC says, well, pass-on must be common in these proceedings because it was common in Merricks.

Now, Mr Singla addressed you on this and I would just like to supplement what he said on this with just a couple of other points because there are a few other points in the Court of Appeal's judgment in Merricks that it's helpful to go to, so if the Tribunal could please turn up Merricks, which is in the Joint Authorities bundle, Volume 4, tab 60, and it's page 11 that I'm starting on, which is paragraph 21 and 22. {JA/60/11}.

Does the Tribunal have that?

THE PRESIDENT: Yes.

MR PICKFORD: I'm grateful. So here at paragraphs 21 and 22 what we see is the Court of Appeal is quoting extensively from the expert's report on pass-on and how they were proposing to approach in detail the question of pass-on, and then if we move forward to paragraph 43 {JA/60/13}, I can get there myself, this is after a discussion of the Pro-Sys case {JA/60/20} and we see

at 43 {JA/60/21} the court says:

"We've already quoted what the court said, at paragraph 118, about the quality of the expert evidence needed to establish loss on a class-wide basis as an issue common to the class. The court recognised that in indirect purchaser actions the ability to treat the loss caused to consumers as a class as a common issue was dependent on the availability of an economic model and methodology that was capable of making that global (and therefore common) assessment".

So one needs an expert methodology that's capable of doing the job, and that's reinforced when one comes to paragraph 51 which is another paragraph I don't think we saw before {JA/60/23} where the court says:

"The appellant's experts, in their report, and in their evidence at the hearing acknowledged that the evidence gathering process was still at an early stage but sought to identify the likely sources of the relevant material. Although the CAT was entitled to satisfy itself that the experts' proposed methodology was credible, it was not appropriate at the certification stage to require the proposed representative and his experts to specify in detail what data would be available for each of the relevant retail sectors in respect of the infringement period".

So we say what this shows, unsurprisingly, is as follows; in order to determine whether an issue is capable of being resolved on a common basis you need to know that the expert methodology by which it is claimed that the issue can be resolved on a common basis, does establish a credible methodology for doing so. Otherwise, any claim that it is a common issue is an entirely hollow one, and that doesn't entirely exclude the potential consideration of data issues.

What the Tribunal can't do is require detailed specification of the data that would be available in respect of each element of the case.

Now, in the UKTC's case we just don't have an expert report at all grappling with the question of how pass-on will actually be addressed, so the Tribunal is not in a position to conclude that the UKTC's approach is credible. There is no approach, and we say in the light of that, the Tribunal can't know today that pass-on is a common issue, and therefore, it cannot know today that the UKTC's claim is capable of doing what it claims to be able to do, and plainly needs to do, which is establish an aggregate award of damages.

Final point, my Lord, Sir, and it is very quick, the UKTC contends in response that it's for the OEMs to plead such forms of mitigation as pass-on on

a collective basis, so what they say is, it's up to us to solve the problem of pass-on being an individualised issue for them, but, with respect, we are manifestly under no such obligation to do so. It's the UKTC which seeks certification for an opt-out claim. It's for the UKTC to persuade the Tribunal that there is a fair, just and reasonable method for features such as pass-on to be addressed on an opt-out basis, and it has failed to do so.

THE PRESIDENT: Yes.

MR PICKFORD: Sir, I had two further extremely short points on buyback and double recovery. I'm in the Tribunal's hands. I can't quite remember how many minutes I have got left.

THE PRESIDENT: Two.

MR PICKFORD: Two. Okay. Well, I will see what I can do.

So the second problem concerns mitigation of losses arising from buyback arrangements. Now, buyback is an inherently individualised issue. It is an individually agreed sale price for the repurchase of a truck which may occur in some cases, and may not in others. Other than by asserting that it is simple, in his words, to take account of such effects, Dr Lilico advances no proposals for taking these effects into account, and we say that's inadequate. No more needs to be said.

Third and final problem is that the claim needs to have some mechanism to ensure the avoidance of double recovery. Now, neither Dr Lilico nor UKTC seem to have considered at all the difficulty of how their opt-out claim is going to deal with overlapping trucks. For example, consider a truck bought by Ryder, claimed for in the individual claim, and then leased out to a UKTC class member on a long-term operating lease. That truck will be subject to both an individual claim in the Ryder proceedings, and it will be part of the opt-out claim in the UKTC's collective proceedings, and we simply have no information from the UKTC about how it intends to deal with that issue.

So those were just three short examples that I wanted to add to those that have already been made.

THE PRESIDENT: Thank you, and we will return at 11.45.

(11.34 am)

(A short break)

(11.49 am)

THE PRESIDENT: Yes, Mr Jowell, is it?

Submission by MR JOWELL

MR JOWELL: May it please the Tribunal, I should just clarify at the outset that our submissions will come in two parts, or sessions, like some of the other counsel, and in the present session I will be addressing you on

competing CPOs. In the second session I will be dealing with a series of specific issues, including the conflict between new and used trucks, the run-off period, the non-UK trucks and emission standards.

What is intended is that that the second part of my submissions will come after submissions by Mr Singla and Mr Pickford who will be addressing commonality and suitability generally on the RHA's application. We hope very much that it will be possible to squeeze all of those submissions into today, but we have to warn the Tribunal that, given where we are, there is a danger that that won't be possible, and in that eventuality we will have to plead for your indulgence for a little more time next week.

THE PRESIDENT: Well, we are a bit concerned about that because the more that you make submissions the more it is appropriate that both Mr Flynn, Mr Thompson should be able to respond.

MR JOWELL: Well, we do see that. On the other hand, the current division, I think, is very much in favour of the claimants, I think if one includes the expert evidence it does give them the preponderance of the time.

THE PRESIDENT: Yes. Well I don't think that's part of their legal submissions. Anyway, on you go. So this is dealing with competing -- and how long are you

expecting -- have you allowed, or are being allowed by your colleagues to talk on that?

MR JOWELL: A good question, Sir. I'm hoping to get through this in one hour.

THE PRESIDENT: Well, this is -- and the question that you are addressing is -- what? Whether there can be two --

MR JOWELL: Well, we put our -- well, obviously we say, for the reasons that have been explained by the other respondents, we agree that neither set of collective proceedings should be certified.

THE PRESIDENT: Yes.

MR JOWELL: But if we are wrong about that and both sets otherwise meet the criteria for certificate, we say that the Tribunal must choose only one of them to proceed, and we put our case in two ways. First of all we say that the Tribunal is obliged to choose one of the competing representatives to proceed, and we say that because, on the proper interpretation of the statutory regime, the Tribunal only has the power to certify a single representative to represent the same class in relation to the same issues.

Now, just pausing there, I should just correct a position that was attributed to us by Mr Thompson on Monday which was the suggestion that it is our position, I think he said, that there can be only one

representative arising from the infringement. That is decidedly not our position. We restrict ourselves to saying that what you cannot have are more than one representative of the same class in relation to the same issues, so it is only to the extent that the two class actions overlap that they are, in our submission, absolutely prohibited.

THE PRESIDENT: Yes.

MR JOWELL: But of course the two applications before you do, in large part, overlap.

THE PRESIDENT: Yes.

MR JOWELL: Now, our second way we put our case, which is in the alternative, is that we say if we are wrong about that point of law, and the Tribunal does have the power to certify more than one representative, we, nevertheless, say that in light of the purpose of the regime in particular, it would only ever be in exceptional circumstances that more than one representative should be certified for the same class and the same issues, and that the Tribunal should certainly not do so in this particular case.

THE PRESIDENT: Well, can I stop you? Leaving aside the legal point, the first point, whatever might be the answer to that, this is something that we have discussed among ourselves as members of the Tribunal. I can tell

you that in this case, whether it has to be -- whether you are right to say it is exceptional or not, that one can do it, but for various reasons in this case we are not at all attracted by the prospect of certifying two collective proceedings, so on that aspect you are pushing at an open door. Whether we need to reach a view on whether it's legally prohibited or not, I somewhat doubt.

So I think if you want to say something about the legal position in about 20 minutes I think that would be sufficient.

MR JOWELL: Well I'm very grateful for that indication.

THE PRESIDENT: And I hope that may resolve some of the timing issues that you alluded to which concern me quite a lot.

MR JOWELL: Well, I'm grateful. I'm sure that will.

Let me then briefly -- I will try to make my submissions brief -- on the point of law, because it is, in general terms, it seems to us an important point of law, and one never knows these things can always go on appeal by the other side, so -- in which case this point could then arise, but, you know, obviously we will leave it to the Tribunal to decide whether to resolve this issue, but let me run through the main points.

I would like to consider, first, the statutory

wording, if I may, and then the purpose of the statutory scheme, and then the guidance that we say comes from overseas.

So turning to the statute and the rules, we make five points. First of all, we observe that when referring to the proposed class representative, both the statute and the rules repeatedly use the definite article. They refer to, "The representative", in the singular. "The representative for the class".

Now, I don't -- oh. I have lost connection.

THE PRESIDENT: No. We can hear you. Can you hear us? Mr Jowell, can you hear us? (Pause)

Mr Jowell? Can you hear us? No. I think you have been lost. (Pause)

MR JOWELL: Forgive me Sir, I lost connection. Am I back?

THE PRESIDENT: You are back. Yes.

MR JOWELL: I'm grateful.

So I was making the point that one sees frequent references to, "The representative", so without taking you through them all --

THE PRESIDENT: Yes. I mean, this is set out in your skeleton, paragraph 9, isn't it?

MR JOWELL: Indeed it is, so you have the references. One point that I would particularly note is Rule 80 which you will find in {JA/11/21} where one sees a collective

proceedings order shall authorise the class representative to act as such in continuing the collective proceedings and shall state the name and address for the service of the class representative or where there are sub-classes, representatives.

So that makes clear that there is to be only one class representative, singular, albeit that there are -- where there are sub-classes there may be multiple representatives.

Now, we accept that those references to the representatives aren't, in themselves, determinative because they are made with reference, generally, to the proceedings, and so it might be said against us that theoretically you could have multiple proceedings, each with but one representative for each set of proceedings running in parallel, and certified in parallel, but the point that tells decisively against that, in our submission, is 78(2)(c) of the rules --

THE PRESIDENT: Yes.

MR JOWELL: -- which you have seen which says that in -- it says that in determining whether it is just and reasonable for the applicant to act as the class representative, the Tribunal shall consider whether that person, if there is more than one applicant seeking approval to act as the class representative in respect

of the same claims, would be the most suitable.

And so what that is, in our submission, making clear, and the unmistakable implication of that is that where there are various applicants in respect of the same claims the Tribunal must choose one and only one class representative, the one and only one class representative that is the most suitable, and we note that Rule 78(2)(c) is not restricted to opt-out claims. It doesn't say that if there is more than one applicant seeking approval as the opt-out class representative, it is in general terms.

THE PRESIDENT: I mean, Mr Jowell, I don't want to cut you too short, but, I mean, all of this is set out in very clear terms in paragraphs 8, 9, 10 of your skeleton.

MR JOWELL: Yes.

THE PRESIDENT: And you are effectively paraphrasing it.

MR JOWELL: Well I'm seeking to do a little more than that. I'm seeking to somewhat elaborate on it, and if I may, but I need to set out, if you like, the basic provisions before I do that elaboration.

THE PRESIDENT: Yes.

MR JOWELL: So if I may, just to make certain observations, now, one accepts, of course, that it is limited, in 78(2)(c) to the reference to the same claims, and so the question is, then, what are the same claims and the

answer to that in one sense is easy, because one says, well, it means claims that fall within 47A and are sought to be brought together under 47B, but, more specifically, and this is a point that is not elaborated on in our skeleton argument, when one looks at Rule 78 in its context the reference to same claims must be read in the context of what is said in the previous rule which is Rule 77, and you will see that in Rule 77(1)(b) it speaks of the Tribunal making a collective proceeding order after hearing the parties only in respect of claims or specified parts of claims which are eligible for inclusion in collective proceedings in accordance with Rule 79.

So what it appears, is that in our submission, is that section 78(2)(c) must be referring to two applications in respect of the same claims that are eligible for inclusion in collective proceedings in accordance with Rule 79. That's the natural reading if you read Rule 77 and then Rule 78 after that, and if you then follow the cross-reference from Rule 77(1)(b) across to Rule 79, one sees that Rule 79 permits certification of claims if the claims are brought on behalf of an identifiable class, raise common issues, and are suitable to be brought in collective proceedings, and so we say in that whole context of 77,

78 and 79, what section -- what Rule 78(2)(c) means, when it speaks of the same claims, are claims that are eligible for inclusion in collective proceedings, and are the same claims -- and are for the same class and raise the same common issues, and if one pauses to think about it, that is also the most natural and common sense meaning of the, "The same claims", in the context of what is a class action regime, and where what is being considered is authorisation of the class representative.

So looked at in that context, what section 78(2)(c) provides is that if there is more than one applicant seeking approval to act as the class representative in respect of claims for the same class and in respect of the same common issues, then the Tribunal must consider which would be most suitable, and as I have said by implication, certify only that one which is most suitable.

Now, we say that there are other points that also show that it's wrong to suggest, as I think has been suggested, that this only applies to opt-out claims, so -- and we see in particular one sees that the -- if one takes, for example, the possibility of having an opt-out class representative and an opt-in class representative for the same class, the problem with that is, first of all, it runs into the problem that one sees

in the -- both in the Act and in the Rules that the Tribunal is enjoined to specify either that the proceedings should be opt-in, or that they should be opt-out, so one sees that in Rule 79(3) and Rule 80(1)(f), and if one turns to the definition of, "Opt-in and opt-out proceedings", this, also, leads to a real problem when it comes to the question of certifying both an opt-in class and an opt-out class for the same -- with different representatives, but for the same class, so if one -- if I could ask you to look back at the rules very briefly, if one goes to -- this is in Joint Authorities 6 at page 4 {JA/6/4}, and if one goes to paragraph 10, one sees that opt-in collective proceedings are those that are brought by -- on behalf of each class member who opts in by notifying the representative that the claim should be included in the collective proceedings, and 11, the definition of opt-out collective proceedings, are proceedings which are bought on behalf of each class member subject to two exceptions.

Now, the first exception consists of those members who notify the representative that a claim should not be included in the collective proceedings, and so those who opt out, and the second is a class member who is not domiciled in the UK, and who doesn't opt in, and what we

observe is that that definition is significant for what it does not contain, because what it does not contain is a third exception for class members who are domiciled in the UK, and who opt in to a collective proceeding brought by a parallel class representative of the same class.

Now, if it really were possible to have an opt-out class representative and a parallel opt-in class representative for the same class, then one would surely expect to see that as a further exception, because if you didn't, then you will have class members who opt in, and who then also fall into the opt-out class, and that would be unworkable because such class members would then be able, potentially, to claim twice, and they would also be actively represented by two persons at the same time.

Now, UKTC in their written submissions have proposed a work-around for that. I don't invite you to turn it up. It's in 292(c) of their reply, and what they propose is that class members within RHA's opt-in class should rely on the first exception in 11(a), so they should notify UKTC that they wish to opt out of the collective proceedings altogether, and then, having done so, they should then notify RHA that they wish to opt in to the collective proceedings of RHA, so in other words,

what the proposal is that they opt out of the collective proceedings in order to then opt in to collective proceedings.

Now, what that ignores is that the exception in 11(a) is plainly intended to be an exception for persons that do not wish to be involved in collective proceedings at all. In other words, it is for people who probably either wish to bring individual proceedings or no proceedings, and the exception in subsection 11(a) was never intended -- it wasn't designed -- for class members as a wish to be part of some kind of parallel opt-in class, and the fact that UKTC have to propose that the Tribunal and class members engage in these sorts of acrobatics to try and circumvent the natural operation of the statute in our submission only goes to show that the statute wasn't meant to operate in this way.

If the statute had been, it would have provided for that, and, indeed, more generally, if the draftsman had envisaged there to be a potential for two or more collective proceedings, and two or more collective representatives for the same class in relation to the same issues, then one would find that expressly recognised in other parts of the rules. There would be provision for that situation, and it would be regulated

because it would be an important scenario that it would be necessary to cater for and regulate, so we say the silence of the rules also speaks volumes.

So that's what we say about the statute itself.

If I can briefly say something also about the aim of the statute, because, I mean, if I may refer you to one recent statement by the Supreme Court in the Franked Investment Income case at paragraph 155, and I quote, the Supreme Court said, "It is the duty of the courts in accordance with ordinary principles of statutory construction to favour an interpretation of legislation which gives effect to its purpose rather than defeating it".

Now I regret that case is not in the bundle, but I'm sure that the principle will be very familiar to the Tribunal.

THE PRESIDENT: Yes. I think the Court of Appeal, didn't they say somewhat similar things in the appeal, indeed in this case, on the funding?

MR JOWELL: They did indeed. Very similar, indeed, and if one looks at what the purpose of the regime is, we've cited Lord Briggs in our skeleton argument, but could I show you also in the dissenting judgment of Lord Sales and Leggatt which you will find in Volume 5 of the authorities bundle, of the Joint Authorities bundle, so

JA, Volume 5, tab 68, page 4. Forgive me. Page 30. {JA/68/30}.

What they say in paragraph 84, second sentence is:

"The central rationale for any class action regime is that it enables claimants to benefit from the same economies of scale as are already naturally enjoyed by the defendant as a single litigant. It does so by allowing numerous individual claims to be combined into a single claim brought on behalf of a class of persons".

Now, in light of that, to require a single representative for a single class with the same issues promotes the aim of the statute, and by contrast, allowing the same class with the same issues to be represented by multiple representatives in parallel would be to undermine, if not defeat, a central purpose of this whole regime, and that, we say, is a consideration for the Tribunal to bear in mind not only in deciding whether it has this power to, as it were, double-certify the same class, but also if it were to have that power, how sparingly it should exercise it.

THE PRESIDENT: Yes.

MR JOWELL: Now, you have asked me to deal with this briefly and I will. You have our points on the overseas regimes. The key points are that the Canadian regime which has been identified as the closest to ours, and is

a persuasive authority, has a very clear rule, not a statutory rule, but one established by the courts that there can be only one representative for the class in the same jurisdiction, one class action certified in the same jurisdiction representing the same class in relation to the same claim.

Now, it is true that that is an opt-out regime only, but again one sees the Unidroit rules which are -- which we refer to again in our skeleton argument. I don't intend to take you to them but you will see them at -- it is in {JA/21/20}. They also provide for a single representative, and the --

THE PRESIDENT: Those are model rules, aren't they?

MR JOWELL: Those are model rules.

THE PRESIDENT: I'm not sure how far that, you know, helps us. We've got to construe, if we are talking about the legal point, I mean, if they are recommending that countries introducing a class regime should do it that way, fine, and you may say for all sorts of reason it makes more sense, but the question is what has the English legislator, or British, I shouldn't say English, British legislator sought to do?

MR JOWELL: I take that point.

THE PRESIDENT: I think, I mean, you have taken us to the statutory provisions, both primary and secondary and to

what the Supreme Court said, and I'm not sure how, on this point, the Canadian or, indeed, Australian regime really helps us.

MR JOWELL: Very well, but I would merely say that it was in light, I think, of my learned friend's submissions on the Australian regime that the Tribunal, at a very, very early stage of these proceedings, gave a provisional indication of its view in a different direction to the one I made on this point.

THE PRESIDENT: Yes. One sees on early -- you know, the sort of early, ad hoc (Inaudible).

MR JOWELL: Indeed, and it's quite, in my submission, rather inappropriate to do so when they are clearly made provisionally and on the basis of only limited submissions, and the point about the Australian position, of course, is that they don't have a certification regime.

THE PRESIDENT: Yes. Well I know. I'm aware of that.

MR JOWELL: And that's a point that they make, and in our submission it is, in a sense, part of a certification regime is this gatekeeper function, and part of that, indeed perhaps a quintessential element of that gatekeeper function is to decide which of the representatives is allowed to go through the gate, and I don't think that there are any class action regimes

that my learned friends have pointed to where more than one representative for the same class is allowed through the gate, and in our submission it would defeat the whole purpose of the regime which is to avoid a multiplicity of proceedings to do so.

So those are our submissions on the competing --

THE PRESIDENT: Yes. Thank you very much.

MR JOWELL: I'm grateful. Thank you.

THE PRESIDENT: So next, is it Mr Singla?

Submission by MR SINGLA

MR SINGLA: Yes, Sir. I will be opening in relation to the RHA application.

Before I do that could I very quickly correct a reference that I gave you in my submissions yesterday, please? It's yesterday's transcript, page 143 at line 7, and I gave you a reference to Dr Lilico's third report, and I said there was an important paragraph there where he accepts that claimants are in different bargaining power positions, and I should have said it's paragraph 1.56 which is {F/3/15} and we do say that's a very important paragraph and a big concession in relation to heterogeneity.

So far as the RHA application is concerned --

DR BISHOP: Mr Singla, I'm sorry, I wanted to get that reference accurately. Which of Dr Lilico's reports?

I have abstracted them here and have them on the desk.

MR SINGLA: It is Dr Lilico's third report, and it is paragraph 1.56, and I hope it can be found at Bundle F, Volume 1, tab 3, page 15.

DR BISHOP: Okay. Thank you very much.

MR SINGLA: No, not at all.

In relation to the RHA application, as the Tribunal will be aware, Iveco's position is that it should not be certified for a number of reasons, as set out in our response, but as I did yesterday with the UKTC application, I'm going to focus in my oral submissions on the commonality condition, and, in particular, this question of whether the issue of whether the infringement had an impact on transaction prices, whether that overcharge issue is a common issue or not, and I will -- the reason I have a shorter slot in relation to the RHA is because, obviously, I have already dealt with submissions on the law and I pointed you to our evidence on heterogeneity and I don't intend to repeat all of that, but I would like, in addition to the overcharge issue, to say something briefly at the end of my slot about commonality and resale pass-on in light of an exchange between the President and Mr Flynn yesterday.

Turning to overcharge, we submit that the starting

point for the commonality analysis here in contrast with the UKTC application is that the RHA is not seeking an award of aggregate damages, and it is not, therefore, seeking an award of damages on a class-wide basis, and it has not, therefore, put forward a methodology with that objective in mind, and this is clear from the claim form, but they are seeking to prove individual loss incurred by each proposed class member, and one can see that in many places but, for example, at paragraphs 49 and 53.7 of the re-amended claim form.

Although Mr Flynn said yesterday at page 19 of the transcript that aggregate damages and individual damages are not binary, to use his words, we say that that is misconceived. In fact, when one looks at the statutory regime it is a binary choice. One either has to plead a claim for aggregate damages, which the RHA has not, or one is left seeking individual damages, and, of course, there is a significant distinction. We know that from Lord Briggs, because Lord Briggs makes clear in his judgment that aggregate damages constitute, I think paragraph 58, he says that that is a radical modification to the compensatory principle.

We also know that if they were seeking aggregate damages, that would involve getting into distribution issues, et cetera, so we do submit there is a binary

distinction, and the RHA application stands or falls on the individual loss basis.

Now, notwithstanding that they are claiming in respect of individual losses, the RHA contends that the issue of whether any overcharge was incurred by individual proposed class members is a common issue because of what they describe in their amended claim form and other documents as, "Common economic methodologies", and in my submission it is significant to note that if one looks at the RHA claim form at paragraph 47 -- I don't ask you to turn it up now but the reference is {C/1/23} they say in their claim form that the claims raise common issues from the perspective of the law, facts and expert economic evidence, and they refer there to Rule 79(b) of the Tribunal rules but that's a bad reference, but we submit that, actually, the statute and the rules require common issues of law and fact, and what the RHA are doing here is they are seeking to use expert evidence to draw together what would otherwise be highly individualised claims, and, in a nutshell, I'm sure the Tribunal is aware of Dr Davis' methodology, but in a nutshell what he seeks to do, and what the RHA say, is that he can estimate for each of his six proposed sub-classes the average overcharge, and he says the average overcharge estimates for each of

those six sub-classes are a reliable estimate of the overcharge incurred by any individual proposed class member within those sub-classes, and the RHA building on that submit to the Tribunal that the commonality condition is satisfied because Dr Davis is going to arrive at a common overcharge figure for all the proposed class members in each of the sub-classes.

Now, we don't, in contrast to our position in relation to UKTC and Dr Lilico, we don't make a root and branch attack on Dr Davis' proposed methodology. We are not suggesting that what he is doing is not credible or plausible per se, or that there is any issue in terms of proving loss on a class-wide basis. We submit that there is a rather different, but nonetheless fundamental problem for the RHA insofar as they are relying on that methodology to support a claim for losses on an individual basis.

We submit that the starting point here, as I touched on yesterday, is that if one stands back and looks at the facts, the nature of infringement and the features of the trucks market, the starting point is that the question of whether a particular customer incurred an overcharge is a highly individualised enquiry.

Now, what I submitted yesterday in relation to the Court of Appeal's judgment in Merricks, was that one

could, in theory, try to deal with that difficult heterogeneity problem by coming to the Tribunal with a sound methodology. We submit, obviously, the UKTC has fallen well short of that, but in circumstances where that's not being put forward by the RHA, they need to persuade the Tribunal that their methodology constitutes a reliable way of showing loss at the individual claimant level, and, indeed, it is helpful, the RHA concede, or accept, that that is the correct test to be applied, and that's the amended reply at paragraph 40 which is {C/3/17}, so the test, it is common ground here, I think Mr Flynn describes it as the target that needs to be met here, they need to show the Tribunal that what they have put forward is a reliable methodology for reliably estimating individual loss.

Now we say -- we make two main criticisms of Dr Davis' methodology in this respect. We say the first is that his methodology doesn't adequately control for the heterogeneity that we've made clear exists in the trucks market, and in particular we say it doesn't adequately control for heterogeneity because of what has been described in the papers as the unobservable factors issue, and I will develop this in due course, but we say that, in fact, it doesn't actually matter whether one frames this particular criticism in terms of commonality

or suitability, and, indeed, this is also common ground, if one looks at footnote 22 of the RHA's amended reply, they accept that it doesn't matter much whether one puts this point -- puts criticisms of methodology in terms of commonality or suitability. That's at Bundle C/3/17, so that's our first criticism, and our second criticism, which is, in fact, a suitability point that we make rather than commonality, but the criticism is that in arriving at average overcharge estimates, that will involve a departure from the compensatory principle, and the way in which we put this point is that it would involve a greater departure from the compensatory principle than if the RHA's claims were to be tried on an individual basis.

Now, before I develop each of those points, and obviously I'm conscious of time, but I do have two preliminary points. The first is neither of the criticisms which I have just outlined involves a battle of the experts or anything of that sort. Rather, the points we take are narrow, legal points. They are important points but they are narrow, legal points. The question for the Tribunal, we submit, is whether the commonality and/or suitability conditions are satisfied, given the nature of the methodology which Dr Davis is proposing.

Secondly, and relatedly, we submit that it does not assist the RHA to point to what may be happening in the individual actions, and at one point Mr Flynn says in his skeleton at paragraph 42; oh well, look, the same species of analysis is being advanced in the individual actions, and, therefore, must be acceptable here, and we say that's an entirely false point, because the RHA has the burden of showing that the commonality and suitability conditions are satisfied, whereas, of course, those questions and hurdles don't arise in the individual actions.

So here the question for the Tribunal, we submit, is not whether Dr Davis' methodology or something akin to it could be used in an individual action, the question, we say, the key question, is whether, when one starts from the point of view of highly individualised claims, whether, on the basis of Dr Davis' averaging methodology across six sub-classes, whether they can satisfy the Tribunal that the commonality condition and suitability conditions are satisfied, and when one asks the right question we say the answer is plainly, "No".

THE PRESIDENT: I think the point Mr Flynn was making was not that there has to be any formal decision of commonality in the individual actions, clearly there doesn't, but I think the point he was making is that the

claimants there who are claiming for a very large number of trucks purchased over a long period are facing the same arguments in response about, well, every purchase is different, some were large, some were small, some are different complements, et cetera, et cetera, and yet you are seeking to estimate an overcharge across-the-board, and it breaks down, it doesn't work, so the claimants there are also -- who have to prove their case -- doing it with an element of commonality, which is being challenged, so some of the same issues arise in a very similar way. I think that's the point he was making.

MR SINGLA: Yes. Sir, we say there is, actually, a very important distinction between an individual action where a claimant turns up at the Tribunal and the Tribunal then has to assess that claimant's loss, and it will do so by reference to the expert evidence, and the experts will do so by reference to their methodologies, but one is necessarily looking to assess that particular claimant's loss, whereas here, what the RHA are saying, is that they are claiming individual damages in respect of anyone who opts in, so at least 15,000 class members, and they are saying those claims which would otherwise be individual, they have to accept that the starting point is that those are individual claims, they say that there is something in Dr Davis' methodology which

permits them to unify those claims, and that's the only basis, we submit, they can overcome the commonality condition, and, therefore, we say it simply doesn't assist to look at how things are being done in individual actions, because in the individual actions the Tribunal has to do its best. An individual claimant has brought an individual case and one has to quantify with a broad axe, whereas here they have to overcome a commonality condition, and for the two reasons that I --

THE PRESIDENT: Aren't you then saying it's then more difficult here than in the individual action?

MR SINGLA: Yes, exactly Sir, so that's why I said the first point is both a commonality and suitability submission, and the second one is a suitability point.

We say these cases would be better off in an individual action because the Tribunal can then adhere to the compensatory principle much better, and --

THE PRESIDENT: Well, it would have to do its best on the expert evidence, you say then it has no choice.

MR SINGLA: No, but crucially, we submit, Sir, in the individual actions there will be significant amounts of factual evidence, and that's -- if I can just develop the two points, this is really quite key to our submission, that what the Tribunal will be doing in an

individual action is assessing individual damages or loss by reference to economic evidence supplemented by the factual evidence, and we know from the BritNed case, for example, that factual evidence can play quite a key role in these cases.

THE PRESIDENT: Well that was a case of one huge contract. None of the individuals -- so of course you looked at the negotiation of the contract. The individual actions here are all about multiple purchasers over many years and it's not really -- the claimants are not suggesting and they are not seeking to recover on the basis that they are going to go through each purchase and show an overcharge on each occasion. You may be saying in your defence, therefore, the individual actions fail, fine, but that's not the approach the claimants are taking. There doesn't seem to be such a difference.

MR SINGLA: Sir, the reference to BritNed, the reason I refer to that is that that is simply an illustration of the importance of factual evidence in these cases, and as I will come on to, my two points are really that it's not good enough, we submit, for the RHA to say, "We've got thousands of individual claims but Dr Davis is going to put them into six buckets and work out the average overcharge in those six buckets". We say that is far too simplistic given the nature of the infringement and

the nature of the market, and that's why we say that --

THE PRESIDENT: So you say each claimant has to be looked at individually?

MR SINGLA: Yes. We say this is not a case where the commonality condition is satisfied. That is our submission.

THE PRESIDENT: So if the McCulla case goes to trial we will have to look at 16,000 claimants individually?

MR SINGLA: Well, Mr Harris has already addressed you on that --

THE PRESIDENT: Well I want to know what you say, given the submission you have just made.

MR SINGLA: Well, we do say that these cases would be tried more appropriately in the individual actions. We do say that the suitability condition is not satisfied.

THE PRESIDENT: Well how do you say, then, the factual aspect, if you say it has to be looked at by individual claimant? Is that what you are saying?

MR SINGLA: Well, we are certainly saying that factual evidence and disclosure are going to be very important, whether this case is brought in the -- in an individual context, or on a collective basis.

THE PRESIDENT: Factual evidence from whom?

MR SINGLA: From proposed class members, and --

THE PRESIDENT: So in McCulla we would have 16,000

disclosures from -- is that right?

MR SINGLA: That would certainly be the starting point.

THE PRESIDENT: I see. Fine. I understand.

MR SINGLA: Sir, that's not unorthodox. I mean one faces, or one deals with group litigation in the High Court on a regular basis and the court has to case manage that and it is difficult for me at the moment to make submissions on a hypothetical case management question that will arise in the McCulla claim, but certainly the starting point would be that those 16,000 claimants have an obligation to plead and prove their case, and they will need to do that by reference to factual evidence and disclosure.

THE PRESIDENT: Yes, I think that's right.

MR SINGLA: Well that is right, Sir, and jumping ahead -- well, let me take my points in order but if I can just develop the headline point, we submit it is not good enough for the RHA to enter into what are, essentially, voluntary obligations on the part of the proposed class members, where they say, "We will call upon documents, and we have a right to call upon documents, as and when we choose to", or, "To the extent we choose to", and we say that's absolutely misguided, whether they bring these proceedings on a collective basis or whether they go off to the High Court in the McCulla claim, there is

an obligation to provide disclosure.

Now the court may want to cut that up in any particular way to deal with the practicalities, but the starting point must be that they have to plead and prove their case, and we don't accept simply because there are lots of them that that in any way lowers the burden. In fact it would be entirely self-serving, and one could turn up and say, "Well, there are thousands of us and therefore there is a lower evidential burden". We say quite the opposite. They have an additional burden here because they need to persuade you that they overcome the commonality and suitability conditions.

Now, if I could just briefly take you through my two points, because I do want to say something about pass-on, the first is we say the methodology doesn't adequately control for the heterogeneity, and, in particular, we put this point by reference to the importance of individual negotiations, and as I explained yesterday by reference to the factual evidence of Mr van Leuven and the empirical analysis of Dr Durkin, clearly, we say, individual negotiations and bargaining power are highly significant in this market. It may well not be the case in other markets, but what is clearly the case here is that one sees negotiations as between the manufacturers and the dealers, and then

a second level of negotiations between the dealers and the end customers, and Dr Durkin -- the whole purpose of Dr Durkin's empirical analysis is to show how individual prices vary relative to the averages.

Now, the RHA for their part and Dr Davis, they accept, rightly, we submit, that individual negotiations and bargaining ability will have had a bearing on the extent to which prices paid by the proposed class members were affected by the infringement, and one sees that from Dr Davis, his first report at paragraph 149, his second report at paragraphs 127, 245 and 246.

Now, so that's common ground, that negotiations had an impact on prices in this market.

The next point which is common ground is that bargaining power is an unobservable factor. I think that's a term used by Dr Durkin and Dr Davis in their respective reports. In other words, bargaining power is not something that can be directly observed in data, and directly controlled for in a regression analysis.

So notwithstanding that, how is it that Dr Davis says he is able to arrive at reliable estimates of individual loss without considering the impact of negotiations and bargaining power. He comes up with a variety of suggestions, and we say none of which is good enough.

The first, and the most important point, is he says he can control for unobservable factors using proxies based on unobservable characteristics, and again, if it assists the Tribunal, some references to his second report, paragraphs 47, 127, 246 and his fourth report, paragraphs 98-115, and, in particular, 105 in respect of bargaining power.

So, for example, he says, well, I will look at observable factors such as the size of the proposed class member, and that will be a proxy for bargaining power, but we submit, with respect, that that is not a good answer, because, as Dr Durkin explains, proposed class members and transactions which otherwise may have the same observable characteristics may have had different unobservable characteristics, and again, in the interests of time I will have to just give you some references.

That's Dr Durkin 1 at paragraph 97, and Dr Durkin 2 at paragraph 66(b), and to give an example, we say, for example, you may have a proposed class member purchasing different volumes, but one can't just use the volumes being purchased as a proxy for the bargaining power, because it's possible that two proposed class members who are purchasing the same volumes of trucks may, in fact, have had different bargaining skills and ability,

but there are lots of examples but that's just one.

So we say there is a fundamental problem in trying to treat this case purely on the economics that one will not be able to control properly, adequately, for the heterogeneity that exists in this market.

Now, Dr Davis then says, well, there may be some other ways around this, not necessarily solutions, but other ways in which he might be able to arrive at more precise aggregate -- sorry -- individual loss calculations. So, for example, he mentions the use of customer-specific fixed effects, and he also talks about sub-samples, and he devotes only a paragraph to each of those in his first report, but they have received much greater prominence in his later reports.

Now, in short, we say that those aren't good answers either. The first problem is that fixed effects and sub-samples and so on still will not resolve the issue that I have just mentioned about unobservable factors which can only be dealt with, we submit, by reference to factual evidence, so that's the first point. These aren't actually answers to the problem we've identified, but the second problem is the one that I have touched on, which is -- and this is very important so far as suitability is concerned, because fixed effects and sub-samples and so on are all well and good in theory,

but as Dr Davis quite fairly accepts himself, those would require lots of data, and disclosure, and, indeed, he doesn't commit to adopting either of those approaches, he says it may or may not be feasible, it's all couched in very equivocal language, and that's entirely fair, but the point is, this is entirely dependent, we submit, on the adequacy of the RHA's disclosure proposals, and one sees, again, I will have to confine myself to some references, but we take this point at paragraph 265 of our Response, and the issue arises out of the RHA's litigation plan, which is at paragraph 53, and that's Bundle C, Volume 1, tab 15 at page 18, and that litigation plan refers to the proposed class members being obliged to co-operate with requests that may be made to them by the RHA, and the litigation plan then refers, paragraph 53 of the plan, refers to the litigation management agreement at clause 4 which is at {C/25/10}, but all of this is, as I have said, all of this is put in terms of what the RHA may choose to request of the members. It's all drafted in very careful terms. If one looks at, for example, the RHA's amended reply at paragraph 122(c), it's all framed in terms of a unilateral choice of the RHA as to how much factual evidence they choose to deploy. That's really what Mr Flynn was discussing with you, the President,

Sir, yesterday, at page 22 of the transcript. He said, well, we will go off and get enough data so as to satisfy Dr Davis. We will get whatever he needs to give him the full picture, and we say -- we do submit this is really rather concerning, because disclosure and factual evidence is not a question of unilateral choice, and the Tribunal needs to be satisfied, and we certainly insist upon there being as good a discipline on factual evidence in these proceedings, and they don't get a lower threshold simply by going down the CPO route than the ordinary High Court route.

So our first point is that the fundamental problem with Dr Davis is that he is doing his best but an average across six or however many sub-classes is too simplistic and will omit reference to important factual evidence, and what is important, we submit, is that he -- Dr Davis himself, this is paragraph 127 of his second report -- he says, quite candidly, that his methodology will not take account of highly individualised negotiations, and he says, but if I did do that, that would create too many sub-classes whereas I think, and I'm quoting, he says it is desirable to ensure that there are not too many sub-classes, and we submit that that is really coming about this from the wrong end of the telescope, because they are trying to

shoehorn what are highly individualised claims into the collective procedure, and we submit in our response, it is a square peg into a round hole.

So that's our first point, and, as I say, we put that both in terms of commonality and suitability.

The second point I will be briefer on. It's simply this, that again, because of the concerns about factual evidence, there is going to be a departure from the compensatory principle. Because Dr Davis is, at best, arriving at six or whatever number of sub-classes, it is likely to be a small number, because he is only coming up with an average figure, there will be a breach of the compensatory principle, and, indeed, again, Dr Davis quite fairly accepts this, he says in his fourth report, paragraph 116 and 126:

"I agree it is certainly possible, some or all PCMs were not harmed by the infringement".

Paragraph 126:

"I agree that it can be true that individual PCMs may have suffered zero losses".

Now, we say here that that really is the problem with this case, and it is just far too simplistic to put all of these thousands of PCMs, proposed class members, into six sub-classes and say, well, don't worry about it, if some of those proposed class members within

a sub-class in fact incurred less than the average, because Dr Davis says, well, the Defendants shouldn't be -- or the Tribunal shouldn't be concerned about that because the overall cost of the defendants doesn't go up. That's what he says at paragraph 129, and we say this is really unacceptable, given what Lord Briggs has said about the importance of the compensatory principle in these actions, and Mr Flynn yesterday tried to defend this concept of approximation, but we submit that that is a circular proposition, because he is saying, Mr Flynn is saying, well, if this case is certified, the Tribunal and the experts will have to do their best, and of course the broad axe always involves a degree of approximation, and we say that is circular, because we are saying the fact there is going to be a high degree of approximation is a reason why the Tribunal should not certify, because one -- the Tribunal will be in a better position, and it will be -- there will be less approximation if these cases are tried on an individual basis, because one can do it properly by reference to an individual claimant's characteristics and factual evidence.

So, Sir, those are my brief submissions on commonality and suitability as regards overcharge. Notwithstanding the brevity, we do say they raise quite

important points in relation to the law on commonality and suitability, and it is a rather different analysis to the aggregate damages class-wide UKTC problem. It is a different analysis that we say --

THE PRESIDENT: Mr Singla, we fully accept they are important points.

MR SINGLA: I'm grateful.

THE PRESIDENT: They are no less important because you have managed to be brief.

MR SINGLA: I'm grateful.

Sir, can I deal very briefly with the resale pass-on issue? There was an exchange between yourself and Mr Flynn yesterday, this is pages 79-80 of the transcript, where you, Sir, put to Mr Flynn that pass-on may be a common issue, at least insofar as one is talking about a new truck being resold as a used truck, that's, as I understood, the exchange.

Now, in relation to this, Mr Flynn rather opportunistically, having for years expressly disavowed certification of pass-on as a common issue, he rather grabbed at that, and I do want to deal with this and make a few points.

The first is, as I have just alluded to, the RHA's position, until Mr Flynn yesterday, their clear and entrenched position was that pass-on should not be

certified as a common issue. One can see that at paragraph 51 of the claim form, notwithstanding amendments to the claim form, that remains their position, and one sees that also in paragraph 126 of the amended reply.

So notwithstanding that we have raised this potential problem as regards pass-on, the OEMs collectively have been taking this point since 2019. They have taken a firm view that they are coming to the Tribunal and not asking for this to be certified as a common issue, and, Sir, what follows from that is that for the last two years we have been dealing with this application on the footing that they are not seeking to have pass-on certified as a common issue.

Now, all of our submissions and our evidence have been directed in that way. That's why, for example, speaking for Iveco, we've put in evidence from Dr Durkin which focuses on the overcharge question and the commonality and so on as regards overcharge, but we do not accept that it is open to the RHA now simply because Mr Flynn wants to grab an offer made to him by the President, we do not accept that it is open to the RHA procedurally to shift its approach now.

The second problem, we say, is that for the reasons set out by Mr Pickford earlier, albeit in a different

context, one has to come to the Tribunal with a proper methodology, and because the RHA has never sought to have pass-on certified as a common issue, their methodology has never been put forward on any proper basis. The best Dr Davis has done is to set out what he describes as some provisional indications, or rather what the RHA describe are provisional indications, that's the amended reply at paragraphs 144-145.

So we say, and this is related to my first point, they never asked for this to be certified, they never put forward a concrete proposal in relation to this, and so we say that it's not open to them to run it, but if they do want to run it they fail the methodology test that Mr Pickford outlined.

Now, the third problem, we say, is that, Sir, what you were putting to Mr Flynn, and what he was grabbing on to, was a limited pass-on issue. It was only in respect of resale, and we submit that that is not a proper basis for certifying pass-on on a limited basis, because we say if that were the issue that the Tribunal had in mind certifying as a common issue, all of our submissions as regards the suitability condition would remain good, because we would still submit that individual actions would allow the resolution of all issues, including the balance of the pass-on issues, but

also tax and interest and so on, and we know from Sainsbury's that these are all, ultimately, questions about quantification of loss.

So we submit that it wouldn't be appropriate to certify a narrow partial pass-on defence, and my fourth point, Sir, is, really, as to the substance, we say it doesn't actually arise for the first three reasons I have given, but we wouldn't actually accept that resale pass-on is a common issue. First of all, if I can adopt the common question, common answer formulation that I set out yesterday, we say, first of all, it's not a common question, because not every proposed class member will necessarily have sold a new truck and passed on in that way, so we would need to identify particular sub-classes. The problem gets worse because over the duration of the relevant period the same truck might have been resold more than once, so one would need, in fact, a multitude of sub-classes, perhaps some sub-subclasses. All of that would require some quite careful thought, and we can see that it would quite quickly run in --

THE PRESIDENT: Does that happen, that a truck is resold several times?

MR SINGLA: My understanding is that it has happened.

THE PRESIDENT: Well, it may have, "Has happened", I don't

say it has never happened in the history of the UK truck industry, but is that a serious issue? Is there any evidence about that?

MR SINGLA: Well there is no evidence, Sir, from us because --

THE PRESIDENT: Well, it seems a rather odd proposition.

MR SINGLA: Well no, Sir -- well, there is no reason, we submit -- well, on instructions I'm told this does happen.

THE PRESIDENT: I'm sure it happens sometimes but, you know, we are talking about hundreds of thousands of trucks, I'm sure there were some that had --

MR SINGLA: Yes, but we are talking about a long period. Anyway, Sir, the point is, this is actually the onus, we would submit, is on Mr Flynn to make good his plan as regards pass-on, but we submit it is good enough for us to say (a) this did happen, and (b) there is no plan to deal with it.

Now, that's as to common question. As to common answer, we say there is not a common answer, so all of the points I made about heterogeneity yesterday which applied -- which we say apply to Dr Davis' new truck regression, all of those points apply to the used truck regression.

Now, the resale of trucks, we submit, is a highly

individualised enquiry, and we've dealt with this in our response at paragraph 112, and it is also dealt with by Mr Flach at paragraphs 70-77 of his first witness statement. So, for example, there are various different sales channels through which trucks are resold, and there are negotiations which take place, Mr Flach tells us this, at the point of resale, plus, as Dr Durkin explains at paragraph 84 of his first report, there are other issues which arise as regards heterogeneity in respect of used trucks, such as the condition of the truck.

So there are all manner of problems in terms of the individualised nature of the resale enquiry.

Now, a further problem is that I think what, Sir, you had in mind when you put this to Mr Flynn, I think what was being suggested was that because Dr Davis has put forward a used truck regression, that could somehow be deployed in relation to the resale pass-on point.

Now, if that was the suggestion, we would say that it doesn't work, with respect, and the reason it doesn't work is because the used truck regression is not the same thing as the resale, because the person selling the truck doesn't receive the used truck purchase price, rather, as Mr Flach explains, resales take place through intermediaries.

Now, this is common ground, Sir. Dr Davis accepts that there is this lacuna, or a missing link in the chain, as it were, and at paragraph 279 of his second report he says, "I will have to think about this", and he refers to some completely unspecified adjustments that would be required to plug that gap.

Now, again, I don't mean to criticise Dr Davis in this respect, but the point is he has not been asked to give a concrete opinion on any of these issues, because the RHA has never sought to have pass-on certified as a common issue, but for all of those reasons, Sir, we say that in the RHA case overcharge shouldn't be certified as a common issue, an even if you are against me on that we certainly say it would be wrong procedurally and substantively to certify any aspect of pass-on, and even if that were certified as a common issue, as I said earlier, that would run into a number of problems in relation to the suitability condition, because what one would have would be a salami slicing of the quantification of loss issues.

Sir, unless I can assist further, I hope I have kept, broadly, to my time estimate.

THE PRESIDENT: Yes. Thank you. Can I ask how we are doing now on time? Obviously Mr Jowell, following the Tribunal's indication, was far shorter than he had,

I think, anticipated, and prepared for. We've got next, is this right, Mr Pickford follows now?

MR PICKFORD: That's correct Sir, yes. So we each have two hours allocated to us apart from Mr Hoskins, and so I think I have got about one hour and 47 minutes or something left, so that will take me well into --

THE PRESIDENT: 3.50.

MR PICKFORD: Well into this afternoon, and then Mr Jowell needs some significant time to develop his specific points, I understand at least an hour on that.

MR JOWELL: I think it will be an hour-and-a-half, if I may, which would still keep me within my two hours.

THE PRESIDENT: Well you wouldn't have been if we had let you continue. You are seeking to switch the saving that we've made to add on to the other time.

MR JOWELL: I thought that was, in a sense, the purpose of it.

THE PRESIDENT: No. It was so we could finish today. So we don't hear submissions on things we don't need to anyway. Yes. I would have thought, if you can -- if Mr Pickford has an hour-and-a-half and you have an hour and if Mr Hoskins has about 20 minutes then that should resolve the -- I think you said, Mr Hoskins, that you have some short points that you wish to add.

MR HOSKINS: Sir, I think that we will be addressing you on

sub-classes which nobody else has dealt with because you are aware, certainly, the RHA are suggesting that the CPO should identify six sub-classes, and that's an important issue that nobody else is going to touch on.

THE PRESIDENT: Yes. It is. Yes.

MR HOSKINS: So that's what I would like to use my time for. 20 minutes, I think 20 or 30, but I will deal with what you give me, Sir, but we do deserve a slot for that.

THE PRESIDENT: Well, if Mr Pickford has an hour-and-a-half, Mr Jowell has an hour on other issues, and Mr Hoskins has 30 minutes, that will -- sounds as though a truck was being driven rather fast through those -- when I was speaking -- then with -- it will take us slightly over 5 o'clock because of the 10-minute break we should then conclude by very shortly after 5 o'clock. Does that cover what we are expecting to hear?

MR SINGLA: Sir, before you rise, could I -- this is nothing to do with timing, it's just a reference.

THE PRESIDENT: Yes.

MR SINGLA: If I could just give you -- I mentioned the concept of trucks being resold on multiple occasions.

THE PRESIDENT: Yes.

MR SINGLA: I'm very grateful, I have been given a reference to Mr Flach's first witness statement at paragraphs 76 and 77 which can be found at Bundle D, tab 3, page 20

and 21, and Mr Flach there explains that trucks can be third or fourth hand, so there is a multiple chain of resale.

THE PRESIDENT: Yes. Thank you very much. Very good. We will return at -- well let's return at ten to two. 1.50.

(12.56 pm)

(Luncheon adjournment)

(1.51 pm)

Submissions by MR PICKFORD

THE PRESIDENT: Yes. Good afternoon. I think it's -- is it Mr Pickford?

MR PICKFORD: It is Sir, thank you.

Members of the Tribunal, Mr President, my main role is to focus on general points on suitability in connection with the RHA application, and I have four points. The first is that the RHA have failed adequately to address the heterogeneity arising in relation to trucks, and, in particular, their purchase.

Second, that the RHA have included claims by claimants which manifestly could and should be brought in individual proceedings with the result that collective proceedings are not suitable for the RHA's proposed class.

Third, that the RHA have not adequately considered the path to damages, and then there is a fourth point

which is the conflict between new and used trucks.

Now, that point is also taken by MAN, and so to maximise efficiency and avoid duplication, as Mr Jowell has explained, he will take the lead on that point and I will only make any short points that are necessary by saving back a little bit of my time to follow him. It may be that I don't have to say anything at all but I'm certainly going to make sure that I reserve some of my allocation so that I don't overrun my total 90 minutes.

So those are my points that I intend to address.

So turning, then, first, to heterogeneity, now, Mr Singla has addressed you on this in the context of commonality. He has to some extent also addressed you on it in the context of suitability. Now, I'm going to do my best to avoid duplication but the Tribunal will I hope understand that I have to develop my submissions in a coherent way, and so there is some degree of commonality, if I may put it that way, with the submissions that Mr Singla made just before lunch, but I have done my very best in the short adjournment to eliminate its extent, and so, you know, I have that well in mind.

The starting point is that the Tribunal needs to be satisfied that collective proceedings will provide a fair and efficient means of resolving the common

issues, and that's Rule 79(2)(a). That means, plainly, it needs to consider the interests of both the claimants and the defendants and the context in which it does this is that the Tribunal is being asked to exercise one of the most powerful weapons in its procedural armory -- the combining of potentially very, very large numbers of claims is very high risk and it certainly involves very high costs, and the corralling of different claims into a one size fits all framework, it doesn't work, then there is a very strong possibility that the proceedings will simply go off the rails.

Now, it's worth just pausing for a moment to see how that risk plays out for the different actors in these proceedings, because from the point of view of the class members these proceedings are actually relatively low risk. They are presented with a package which essentially just has financial upsides because the costs and the cost risks are borne by the various finance firms that sit behind the claimants, and, moreover, the class members who opt in are faced with significant lower investment of time than they would be if they were bringing their own claims.

Now, from the point of view of the finance firms, taking risk is obviously how they make their money, they hope to do very well from a share of damages, and so

these claims are, in aggregate, for them, an opportunity, and they welcome the route by which they can seek large returns, obviously.

From the point of view of the defendants, the situation is somewhat different, and there is considerable risk, and it arises in two forms. First, there is the risk that the shape of the proceedings, based on the applicant's litigation plan, will, from the outset, preclude them from being able, fairly and effectively, to make the sort of case that they would wish to make and the issues in play.

Now, if, as here, there are a multiplicity of claims litigated on the basis of a single centralised methodology, the adoption of that methodology as the core framework for assessment will inevitably tend to limit how far defendants will be able to litigate and contest important issues which arise in the claims, and that, we say, creates a real risk of injustice which has to be properly considered.

THE PRESIDENT: Would it be unjust if the same expert was used in all the individual claims, using the same methodology?

MR PICKFORD: No, but the difference, Sir, is that in those claims we are able to present cases by reference to the individualised facts, and the consent --

THE PRESIDENT: Yes, but that point -- I thought you said that the problem is that there would be a single methodology as the core framework, that that is somehow unjust.

MR PICKFORD: Sir, the point I meant is not a concern that there is potentially a --

THE PRESIDENT: You said a multiplicity of claims litigated on the basis of a single centralised methodology. That was the words you used. Well, I'm just saying it would be a single, centralised methodology. It is one thing to say the different facts, the heterogeneity of the facts, but I don't understand the point about that it is one expert as opposed to --

MR PICKFORD: No, Sir, to be clear, I'm not saying that the point is about one expert versus many, but the difference with the individual claims is that it is a function of trying to corral a huge number -- and I will come on to develop this more specifically on the facts, this is just dealing with this in general terms to open -- but it is a function of trying to corral lots of disparate claims into one single methodology, which is what the RHA want to do. That risks inherently shutting out our ability to, in fact, deal with points on the individual facts where those facts arise, and that's the point that I am going to develop. That

doesn't arise to the same degree in individual proceedings, because, plainly, if there are a large number of individual claims that some organisation needs to take place in relation to them, they don't all have to be done through the vehicle of a single CPO with the particular methodology that has been adopted by the expert in that case for doing so, so that's the first problem, but the second one is the risk that the proceedings break down because it turns out that during them the degree of individualisation required to do justice is, as we warn, far greater than bargained for by the applicants.

Now, the applicants say we don't need to worry because there are provisions toward costs but we say that's simply not facing up to the realities of litigation, as they know.

Firstly, there is always a very large amount of unrecovered costs, and, in litigation of the massive scale that we are currently considering, the unrecoverable costs will run into millions, and that in and of itself puts pressure on defendants to settle proceedings quite irrespective of whether the proceedings, in fact, have any underlying merit.

Now, there is also the vast management time that is absorbed by dealing with litigation rather than engaging

in the productive activity of selling trucks, and the Tribunal will know, unsurprisingly, there are no offers on the table to indemnify my clients in the event that these proceedings break down, so there will be very serious costs involved.

Now we, of course, recognise, on the other side of the scales, that there may be advantages for claimants in grouping their claims in a CPO. It may be an attractive way for them to organise themselves, and the Tribunal's job is obviously to balance those competing interests, and my job in my submissions on this point is to address you on the specifics of this case, and how the considerable heterogeneity in the trucks market causes particular problems for the RHA's claim.

Now, there are two issues, essentially, that arise here. The RHA say, first, that we are wrong about the extent of heterogeneity, and then, second, they say that such heterogeneity as there is accommodated in their litigation plan, and, in particular, their econometric modelling.

Now, on the first of those points, just as the Tribunal can't second-guess the ultimate merits of the claim, nor is it in a position to decide on this application that we are wrong about the heterogeneity in the trucks market. For our part, we have the evidence

of Mr Ashworth, and in my submission his evidence is compelling and not remotely undermined by the RHA, and if we could go, please, just very briefly, to an extract from it, it's found in {D/19/5}. If I could ask, please, the members of the Tribunal to read to themselves paragraph 24, which summarises aspects of the heterogeneity in relation to the purchase of trucks.

(Pause)

Thank you, Sir. So the heterogeneity begins with the almost endless variation in the specification of the trucks themselves, as Mr Singla has explained, but -- and this is the crucial point -- it then extends to the fact that the trucks are the subject of complex and involved commercial arrangements of numerous different kinds, for instance purchases on a number of different models as well as operational leases or finance leases. They include a significant degree of bundling of other products, as you have heard, and that includes both goods and services, so it is bodies, for instance, but also services such as repair and maintenance contracts, some of those are sold by DAF, some of those are sold by third parties. There may be an involvement of finance providers, the truck body providers, and then there may well be repeat transactions over long periods of time. All of these transactional dynamics are capable of

profoundly influencing whether any information exchange was first capable of actually influencing transaction prices, that's the causation issue, and, if so, to what degree.

Now, these factors obviously vary as between different OEMs, they have each got their own trucks, they have each got their own arrangements for selling trucks, and they have each got their own data systems that provide information about them.

Now, the RHA's basis for claiming that our point on heterogeneity is, as they say, exaggerated, is, essentially, just the point they say, well, relatively few different models of trucks are sold. That's effectively the key point that Mr Burnett makes, and there are four points to make in response to that. Most importantly, even if it were true, it fails to recognise all of the manifold factors that drive heterogeneity that are external to the truck itself, such as the transactional differences that I have just been alluding to.

Second, it does, in fact, ignore a huge degree of heterogeneity within a single model, as set out by Mr Ashworth in terms of alternative configurations and options.

Third, even on Mr Burnett's own figures in any year,

around a third of trucks were not drawn from DAF's top ten models, as he puts it, and unless the claims in respect of those are going to be abandoned, plainly they also need to be accommodated in any analysis, and then, fourth, it's unclear, seemingly even to Mr Burnett, what definition of model he is, in fact, using, because he says he has relied on SMMT data, but he is then unable to explain how models have, in fact, been defined within it.

So, in my submission, the RHA has no good basis for saying that we are exaggerating about the degree of heterogeneity in the trucks market. It is a manifestly complex and heterogeneous market, and the claims will need to grapple with that reality.

So the second point, then, is the question of how the RHA plans to do that, and the critical factor in the Tribunal's appraisal of the risks in certifying a class action is the need for a credible, robust and sufficiently detailed litigation plan, and there appear to be, in fact, four points of common ground between us and the RHA in this connection. The first is that since the RHA seeks to estimate the effects of the cartel at an individual claimant level, that is the target to which its overcharge methodology must be aimed.

Second point, it is in respect of that target that

the RHA must satisfy the Tribunal it has a plan which shows a clear grasp of the complexities of its case.

Third, that there is a realistic prospect of its expert methodology properly addressing the common issues given those complexities, and then, fourth, that it is likely that the data will be available -- sorry -- it is likely that that data will be available to operate that methodology.

Now, the references in the RHA's amended reply, I don't intend to go to them but for your note, for those points of common ground, are paragraphs 32, 38, 40 and 53.

Now, the reasons for a well-developed litigation plan, and the degree of specificity required are well-articulated, we say, in the judgment of Winkler J of the Ontario Superior Court in the case of Caputo v Imperial Tobacco, and if you could just pick that up very briefly please, it is in the Joint Authorities bundle Volume 7, and it is tab 89, and I'm going to start at page 1. {JA/89/1}

In fact I fibbed. I said I was going to start on page 1, I'm actually going to start on page 2. I'm going to start at paragraph 1. {JA/89/2}.

So the nature of the motion was that this intended class proceeding is the first piece of major tobacco

litigation seeking damages for personal injuries in Canada. The plaintiffs seek to certify a class pursuant to the relevant act, which is broadly defined to include all residents of Ontario, whether living or deceased, who have ever smoked cigarette products manufactured, marketed or sold by the defendants, so that's the context, and then the judge addresses the workable litigation plans and the need for them at paragraph 75-78, so if we could please skip on to that? That's on page 20 of the bundle {JA/89/20}. So paragraph 75:

"The Act mandates that the representative plaintiffs produce a plan that sets out a workable method of advancing the proceeding on the basis of the class. McLachlin C.J., held in Hollick that the preferability analysis must be conducted through a consideration of the common issues in the context of the claim as a whole. In this context, the litigation plan is obviously an integral part of the preferability analysis. Frequently, in more complex cases, it is only when the court has a proper litigation plan before it that it is in a position to fully appreciate the implications of preferability as it pertains to manageability, efficiency and fairness. Here, the plaintiffs have tailored the proposed class proceeding in such a way as to attempt to move the overburden of

individual issues. They have endeavoured to achieve this through the use of aggregate assessments, combined with an argument that the common issues trial judge should bear the burden of both determining whether individual issues exist, and fashioning a method for their resolution. This approach is unacceptable. It is apparent that the individual issues exist, and that they must be dealt with in order for the class members to obtain relief even if a common issues trial will be decided in their favour. Consequently, by neglecting to address the presence of individual issues, and an acceptable method for dealing with them, the plaintiffs have a proposed litigation plan, such as it is, that is unworkable".

78:

"In my view ...

THE PRESIDENT: He says the class is 2.4 to 15 million. {JA/89/21}.

MR PICKFORD: Yes. It is certainly a large class, but in my submission that doesn't affect in any way the points of principle that he sets out in relation to the need to develop a proper litigation plan, and, in particular, to grapple with the individual issues. So even if they are not -- the common issues which certification is required, to assure the court or the Tribunal that there

is a clear path through to determination of damages.

MR THOMPSON: I'm sorry to interrupt, but just to save time, could I just ask the Tribunal to read paragraph 79 please?

MR PICKFORD: Well, before we do that can we just read paragraph 78?

78 first, two sentences:

"In my view --"

THE PRESIDENT: Well, why don't we just read 78 and 79 to ourselves? It's much quicker.

MR PICKFORD: The first two sentences, but by all means.

(Pause)

Thank you, Sir. So, with those principles in mind, Dr Davis has clearly invested time and skill in the preparation of his reports. There is certainly a manifest difference, we would say, between his efforts and those of Dr Lilico, but he, and the RHA, only really have one answer in relation to the difficulties raised by the complexities arising from heterogeneity, and they assert that they can control for it in their economic or econometric modelling, but on proper scrutiny we say that that contention breaks down.

Now, the first point to address here is one that Mr Flynn made in his submissions, I think it was yesterday, when he argued before you that we had

misunderstood the nature and degree of individualisation in Dr Davis' approach, and it is also a point that they make in their skeleton, and perhaps it is easiest to pick up their skeleton, actually, to consider this point in more detail. That's to be found in the A bundle, tab 2, and I'm going to paragraph 40(b) which is on page 17. {A/2/17}.

So if I could just ask the Tribunal to read paragraph 40(b) to recap on the point that I'm addressing. (Pause)

The hooting, I'm afraid, came at this end -- it wasn't me -- but the window is being shut to try and avoid any continuing disturbance.

THE PRESIDENT: Yes.

MR PICKFORD: So they say that any degree of heterogeneity that's present in the trucks market can be accommodated by Dr Davis. That's a very bold submission, and then they go on to describe how he is going to estimate average individual effects.

Now, the concept of average individual effects is not a very clear one, but they seem to be saying that the average overcharge effect that Dr Davis will calculate will be specific to an individual claimant for a specific make and model of truck purchased in a specific year via a specific distribution channel.

Now, if it really were true that the overcharge percentage were, say, 3 per cent for a claimant buying a particular make and model of truck in a given year, and say 2.5 per cent for a different claimant buying a different model in a different year, then that wouldn't really be an average at all, but that isn't what Dr Davis says he is going to do, so he has never said he is going to be producing an individual overcharge percentage that varies by claimant, by make, and by model of truck and by year. Only one of the RHA's points, the distribution channel, is relevant to his sub-classes, and there he simply distinguishes between direct and dealer purchases, and I would just like to give an example to illustrate the point so that we are clear about the degree of individuality that's really envisaged here, so let's take a given sub-class. Assume someone in that sub-class bought 10 trucks at £50,000 each, and that implies a value of commerce of £500,000. Let's say that it was a 2 per cent overcharge, so that would be a £10,000 overcharge.

Now, suppose a different claimant in the same sub-class bought eight trucks, different makes, different models, different years, but its value of commerce was still £500,000. The fact that the overcharge is the same but arising from different makes

and models of trucks bought by different claimants in different times, nowhere has Dr Davis suggested that those differing factors will have any bearing on the overcharge percentage that he is going to arrive at, and nor do the different years, save for the question of interest.

So I think it is important to be clear about the degree of individuality that's actually in play here. All they really mean is that, obviously, if someone has got a very large number of trucks and they were of particular value because they are particular models, the overcharge will be applied to that, and that's obviously -- you couldn't conceivably have any claim that didn't address that, but it's no more individual than that.

Now, at paragraph 40(c) the RHA say that Dr Davis can control for product heterogeneity, or the transaction characteristics that I have particularly emphasised by use of proxies, and let's take another example here to consider how this is supposed to work.

We say that a key determinant in the price that someone pays is how effective they are at bargaining, and in respect of a purchase through a dealer, that includes a multifactorial assessment of the bargaining ability of DAF, of a dealer and of the customer.

Now, Dr Davis talks about using fleet size of a purchaser as a proxy for bargaining power, but he has no proxy to address the complex dynamics of the skill of DAF versus the dealer versus the customer. Now, Mr Ashworth, and we don't need to go to this, but for your reference it's paragraph 71, that's Volume D, tab 19 at page 18, he explains a particularly striking example of the way in which bargaining ability can play out if a buyer negotiates a particularly good framework agreement which essentially establishes prices for a considerable period of time, and what that means is that the price for trucks potentially purchased during the infringement period may have been set, may have been bargained for, in a framework agreement that was negotiated outside the infringement period.

Now, we say the RHA isn't entitled to claim in respect of those trucks, but Dr Davis doesn't explain how he is going to address that fact that some trucks purchased during the infringement may have had their prices determined prior to the infringement. What one necessarily, we say, needs for that is detailed transaction-specific evidence, and it is simply not amenable to being swept up in the econometrics.

Now, we well understand why Dr Davis wants to use proxies for bargaining power, because there obviously

are practical challenges for analysing actual bargains for claimants in the class but what we see from the RHA is a proposal for conducting litigation which risks foreclosing our opportunity to contest these issues on the basis of actual evidence. If we simply do it on the basis of Dr Davis' very rough and ready and we say far too high level attempts at proxies.

What the RHA say in response to this is, well, you are the defendants, you can run whatever arguments you want. This perhaps comes back to the point that I was discussing with the President earlier on. We say that's just not realistic. The reality is we can only run our arguments on a practical basis within the parameters of the class action as it is set up, and the RHA hasn't explained how we could actually deal with the sorts of serious transaction-specific issues that we are raising.

Now, we maintain, as we do in the individual actions, that evidence of transactions and bargains is highly relevant, and, therefore, if the RHA doesn't have any plan for how such evidence in some form could be accommodated, its litigation plan ultimately is deficient and it is not a credible one.

If I could just give one further example, and that's value of commerce. Now, this was developed by Mr Harris a bit in relation to the UKTC. The points are subtly

different in relation to the RHA, so Professor Neven, who is our expert, pointed out in his first report that Dr Davis hadn't taken account of the fact that he needed to disentangle the price of trucks from the price of complementary goods that might have been purchased at the same time.

Now, Dr Davis appears to understand this point solely in terms of it being an econometric challenge, namely to investigate the extent to which the price of complementary products may have been driven up -- may have been driven down, I beg your pardon -- as the price of trucks was driven up and he explains the results of data available from his sampling exercise and again just for your reference, that's paragraph 381 of his second report, but he appears to contemplate quite a lot of missing data and we say he offers no proper solution to how he is going to deal with a different point, which is not the point about the balancing effect about the price of the complement changing, but a rather more basic point about the issue of how he is actually going to work out what the value of commerce is where the relevant claimant can't provide the data because we don't know, on the face of it, what the split is between the truck and the complementary goods without going into some greater investigation.

Now, he addresses this in his second report at paragraph 358, and it probably would be helpful just to go to that briefly. So that's {F/7/146}. The key point, really, is in his final sentence where he says:

"Values for missing variables can be predicted based on a truck's other characteristics so that predicted values can be imputed to the model to generate a but for price and calculate damages".

So he is seeking to grapple with the issue about, well, how do you deal with problems that arise from the fact that there may be missing data that would require a more detailed investigation?

The problem is we say that what he is proposing there about predicting variables based on a truck's characteristics is simply implausible in the context of value of commerce. What, we say, about a truck's characteristics tells you whether it came with a repair and maintenance contract, and if so, what one? What is it about a truck's characteristics which tells you what sort of warranty it had?

Now, econometrics simply doesn't give us an answer to those questions. It needs individualised evidence, it needs individualised analysis, and the RHA has not explained how that's going to work.

Now, the RHA purports to answer these types of

objections by essentially arguing two points. First, it says, well, such matters are for trial where DAF can advance the defences it sees fit, and I have, to some degree, addressed you on that already and it also says that the RHA may, at its own election, if so advised, choose to gather the sorts of information that we, in fact, require for an individualised assessment using contractual arrangements with its class members. We say that that response is inadequate, because working out how we are going to deal with an issue which is at fundamental at value of commerce, isn't an issue for trial. If the RHA wants a CPO to be made in its favour it is a matter for now, and if these matters are left, what happens when we run into the inevitable problems that we will? The Tribunal will be faced with a choice between two very unpalatable options, in my submission -- either abandoning the proceedings, or, potentially, being forced to make findings which are subject to huge levels of error, which would never be acceptable in individual proceedings, so assuming it's not going to do the latter, it is going to have to do the former.

So those are serious risks, and we say that the RHA's plan hasn't sufficiently addressed those sorts of problems.

So that's one side of the coin.

Now, we accept there is obviously another, and the other side is, well, what are the advantages to claimants? What would be lost if there were no CPO? Or there weren't this CPO? Now, in its skeleton the RHA refers to effectively two key points. It refers to the greater flexibility inherent in the class definition, it says, and it also refers to the case management powers that are available to the Tribunal. We say neither of these points is sufficient, so if we take, first, the point on greater flexibility, we don't accept that the CPO process necessarily offers greater flexibility that's appropriate for this particular case. There are important respects in which an ordinary claim procedure offers greater flexibility with different groups of claims being afforded treatment that's proportionate and appropriate and also focused on those particular claims.

Now, that obviously doesn't preclude the grouping of some issues in those individual actions, and Mr Harris this morning showed you the Adnams claim, the A to Z claim as examples of small claims grouped together outside the context of a CPO.

Second point, case management powers. Again, we don't accept the points that these inherently favour a CPO. In an ordinary claim there is much greater

involvement of the court or the Tribunal and the defendants in shaping the litigation through case management, because things are dealt with incrementally as one develops and we get an opportunity to have a much greater role in determining how matters actually play out. The point about a CPO is that it is very, very heavily front-loaded on the basis of the litigation plan that's advanced by the applicants. What we say is in the context of --

THE PRESIDENT: Sorry, when you say, "Front-loaded", what do you mean?

MR PICKFORD: Well again, it comes back to the point that I'm making, that if the -- there is a risk for us, plainly we are still about to, and we will, even if this claim is certified, seek to make the points that we advance in our defences, but the difficulty we are potentially faced with is that by virtue of the action having been certified as suitable by reference to a particular litigation plan and approach, there is a potential fait accompli, and an inertia behind a particular way of doing things which is going to make it very difficult for us to say, well, actually, this isn't -- we weren't given -- you know, we hadn't pleaded our defences at that point. Now we've got to the stage where, actually, we say it shouldn't really be dealt

with like this, it has to be dealt with in another way, and we may very well be faced with a submission, well, that's too late because it has been certified and we are going to go down this particular route.

THE PRESIDENT: Mr Pickford, sorry to interrupt you, we are not certifying the litigation plan, we just need to see a litigation plan to satisfy ourselves, essentially, that the class representative has thought about these things properly, that they have a reasonable way in which they intend to approach it, but that, obviously, is prepared right at the outset of complex proceedings and not just before defences, and then there is disclosure and so on, and then it is going to change and vary and we have to prove it because in an ordinary action you wouldn't think about it because it's discussed between the lawyers and their client. It's because there is this large group of clients who we have got to, to some extent, look after, and who are less directly involved, clearly, that we look at the plan to see whether this is a -- and that's why it only goes to the authorisation of the class representative and doesn't go to the eligibility of the claims.

MR PICKFORD: No, of course Sir. That's right, but in my submission it doesn't detract from the practical consequences of launching off into litigation in

particular where key issues have not been sufficiently covered. Obviously it goes without saying that there may be developments, but going back to the test in Caputo -- you need to be able to see a sufficiently clear picture of the whole of where the litigation is going to have the confidence that we can actually get somewhere in a fair way, and what we are saying is that there are sufficient deficiencies in the RHA's litigation, as much as, you know, they had put in effort in relation to it, and Dr Davis has put in effort, there are still remaining sufficient deficiencies that the Tribunal cannot have the confidence that it needs that there is such a credible methodology that will fairly allow all of these complex issues to be addressed.

Sir, I think that effect resets --

THE PRESIDENT: I mean, there is this contrast with Canada, as I understand the Canadian legislation, it is actually a requirement that you produce a litigation plan, whereas in our rules it's not.

MR PICKFORD: That's true, but obviously, plainly, as one sees from, for instance, the Merricks judgment in the Court of Appeal, it is expected that in order to be able to demonstrate the suitability of your action, you will need to come up with a credible plan based on, in most cases, a credible economic basis for establishing your

claim, so although --

THE PRESIDENT: Well, you need to establish an economic basis, but the litigation plan really doesn't go to the suitability criterion of the action, it's purely in terms of looking at the class representative and saying are they people one can have confidence in that they can manage this litigation, they understand what's involved, taking it forward in a professionally sophisticated way, and so on.

MR PICKFORD: Well, Sir, in my submission actually it goes to both. I mean, I have maintained the point that, actually, if you don't have such a plan you can't have sufficient confidence that the application and the proposed order that's being sought from the Tribunal is one that it should make, that the claim is suitable, but I do agree with the point you made, Sir, there is a second point here which is that it's not only the suitability question, also applying Rule 78(1)(b), we say that if there isn't a suitable plan it is not just and reasonable within the terms of that for the RHA to act as class representative, because it hasn't devised an adequate, to quote Rule 78(3)(c)(i), method for bringing the proceedings on behalf of represented persons, so you emphasised the effective duty of care, as it were, that the Tribunal has in relation to the

proposed class members, we say that what is just and reasonable has to consider everyone's interests there, not just the proposed claimant's interests, but also ours as defendants.

Sir, if I may, unless there are further questions on that point, I intend to turn to my second topic, which concerns large claims.

So a further feature of the RHA's proposed class, which we say renders it unsuitable, is this; it contains a very large number of very large claims -- sorry, I take that back.

It contains a number. It doesn't contain a very large number but it contains a significant number of very large claims valued at several million pounds, and we say these can manifestly be addressed more fairly, justly and proportionately in individual actions with a higher degree of forensic attention than would ever be possible in a collective action.

Now, as an example of the detailed factual enquiry that's taking place in the larger individual claims, the Tribunal will be aware that in those cases there has, for instance, been detailed negotiations disclosure, and that isn't to allow a transaction by transaction assessment of overcharge, but it is to understand how prices were set, what factors were taken into account,

how the process of negotiation worked, and the relevance of all of these issues to questions of causation and quantum, and, similarly, there is a detailed factual enquiry into other issues, such as downstream pass-on, the claimant's attitude to new truck emissions models, for example, are they an early adopter, and these are all inherently individualised issues.

Now if the large claimants in the RHA's class are allowed to take advantage of the RHA's proposed simplifying assumptions, and there are very many of them, then, given the quantum of those claims, we say that that poses a risk of injustice and prejudice to defendants such as DAF, and that's because even if one is taking a broad axe to the approach to damages, what is required in any given case is, obviously, a function of what is reasonable in that given case, and that reflects the overriding objective of conducting cases justly and proportionately.

Now, the RHA has strikingly little to say in response to this point. In its reply it focused on suggesting that there are only a few large claims. Mr Burnett says, well, there are only 40 claimants, he says, that claim in respect of 900 or more trucks for the period between 1997 and 2014, but he seems to have chosen all of those dates and numbers somewhat

advisedly. We are puzzled by his choice of 2014 as the cut-off date, because we heard Mr Flynn clinging, still, to the idea that they are going to be inviting claimants to sign up who purchased trucks as late as 2019, but, in any event, our objection isn't limited to claims of at least 900 trucks. Just taking those ones, if you apply the RHA's proposed overcharge of £12,500 per truck, those claims are worth, at a minimum, 10 million, and potentially a lot more, and that's even without interest, and that's substantially above what is needed for a viable High Court claim, even for one claimant, and it is obviously unrealistic to suppose that there wouldn't be some significant grouping of claims if they were brought in the High Court, as I have already mentioned, and we see that from previous experience.

So even if there are relatively few large claims, it is plainly the case that they represent a vastly larger proportion of the trucks involved in this claim, and we say it is appropriate that they are dealt with in a way that is proportionate to the size of those claims.

Now, in response the RHA --

THE PRESIDENT: Can I just ask you, so I understand, how do you define a large claim?

MR PICKFORD: Well, we say that, to some extent, that's the RHA's problem.

THE PRESIDENT: No, I'm sorry, because you are saying it's not right that large claims should be in a collective proceedings. I need to understand what you mean by, "Large claims".

MR PICKFORD: Well, obviously my primary submission is that no claims should be in it, and --

THE PRESIDENT: Yes. You say no small claims should be in it, I understand that, that's your basic -- but this is an alternative submission or an additional submission.

MR PICKFORD: Yes, and I say that it is manifestly the case that there are significant numbers of claims here that don't need -- because the essence of the point that the RHA makes to you is they say the reason why this action is preferable is because they say, well, there are lots of small people here and they are not going to be able to do this unless you certify this CPO. Point 1, that isn't actually the case, they will be able to and almost certainly will bring their claims in the High Court, but in any event we say that that submission, even if you were to accept the first part of it, breaks down, because, in fact, there are large numbers of people for which that's simply not true, and it is the RHA that is developing its class, and we say, ultimately, therefore, if the RHA wants certification, and they want certification on the basis that it's preferable for the

claimants in their class, it's they that need to cut -- to be able to find the dividing line.

THE PRESIDENT: I'm just trying to understand your submission. You say a large number of claims for which that's manifestly not true. I mean, what -- can you just explain, what are the claims? It's no good just saying, "Large claims". I mean, "Large", is a completely vague concept. What's large to someone is small to someone else. You have given an example, but you say that's not -- well, you have taken Mr Burnett, but you say that's not the right example, so ...

MR PICKFORD: Yes, well --

THE PRESIDENT: You are just arguing negatives. I want to understand what you are actually saying.

MR PICKFORD: The difficulty that I have, Sir, is that they haven't grappled with this issue at all. They have given us very -- I'm not the claimant. I have very limited information about the make-up of the class. What I do know is what Mr Burnett has told us.

THE PRESIDENT: No, but you are saying that there is a certain size of claim. I'm not asking you to identify the claimant, or even necessarily to say how many there are, because you don't know about everyone, and there might be a whole lot of further people joining in if we certify, so that whatever Mr Burnett says about the

number, that may not be the final number because, as he also says elsewhere, once, as he hopes, the Tribunal certifies the action, many additional people might join in, so if he says there are only 40, I'm not sure how much that helps us. What I'm trying to understand is what you say is the large claims for which they can fairly and justly be considered in an individual action. I mean, is the claim £1 million, maybe put it in terms of amount. It is obviously a rough and ready figure, but I just want to get a sense of what you are referring to.

MR PICKFORD: Well, Sir, there are a couple of -- there are a number of responses to this.

The first one, and I hear what you say, Sir, so I'm not going to repeat myself, but my primary submission is that what the RHA wants is to achieve certification, and it justifies that on the basis that they say it is preferable for this class, and we say they have to be able to demonstrate it for the whole of the class, and they haven't done because, at the very least, there are plainly aspects of the class that simply don't need this kind of certification, and in fact it would be far preferable for those claims to be litigated individually, so that remains my first answer, but I do hear you, Sir. You would like me to go further.

One answer is, obviously, one can look across to the individual claims and see how many trucks are pursued in those, and Mr Harris showed you that there are groupings of relatively modest numbers of trucks that are plainly quite capable of being pursued in High Court proceedings. I'm not able to give you the precise cut-off in relation to the claim that's brought by the RHA, or the proposed claim that's brought by the RHA. It depends somewhat on how they are grouped, themselves.

THE PRESIDENT: I thought Mr Harris' point is that small claims can be brought individually. That was what he was emphasising, is look how small the claims are.

MR PICKFORD: Well, he was, although obviously those have been grouped together.

THE PRESIDENT: Yes.

MR PICKFORD: I don't think anyone is saying that very small claims are likely to be all litigated individually. That, I think, is unrealistic.

THE PRESIDENT: No, but your point, your submission was a different one --

MR PICKFORD: Yes.

THE PRESIDENT: -- that there are large claims which can, if I wrote it down correctly, can fairly and justly be considered in an individual action.

MR PICKFORD: Yes.

THE PRESIDENT: So I'm just trying to see what -- I mean, suppose we say, yes, Mr Pickford has made a very powerful point, it isn't right, we shall therefore -- as we are entitled to do, we don't have to accept the class definition, we can say that we are persuaded by Mr Thompson but not as regards, for example, deceased persons, so we will define the class to exclude deceased persons, equally we could say we are persuaded by Mr Flynn but Mr Pickford made a powerful point about large claims, he says -- he doesn't say the majority, he says, "Significant number", valued at, he said, millions of pounds, but that's what I'm trying to refine, so a claim in the amount of 10 million should not be within the class, for example, and then you turn around afterwards saying, "No, I didn't mean 10 million I meant half a million". That's what I'm trying to understand.

MR PICKFORD: Well, our point is that this brings down -- I mean, our submission is that this brings down the whole of the class, because they haven't sufficiently grappled with it, and that if what they want to do is have the class certified, they should come back -- so suppose I'm right on this point but I'm not right on any of my other points, the remedy is that the RHA goes away and thinks about, well, what claims really do need to be in this, they would say, in this particular grouping, and what

ones can we sensibly allow to be litigated separately? And then they would come back and they present that new class and we could then look at that, Mr Burnett would have to give us lots of information about it so we could look at it properly, we could then analyse the extent to which that was realistic, the way that they had refined their class, and we can consider it again, and it is very difficult for me at this stage without the RHA having done more work in this area, for me to give you a cut and dry answer, I'm afraid, is the bottom line in relation to my submission, but certainly -- obviously at the very least it is the claims that he analyses that are above 900 trucks. We would say that, actually, you know, probably 100 trucks or so, I imagine, would be sufficient, but I'm not -- you know, that's me somewhat speculating without the benefit of the RHA having done its homework.

Can I address the Tribunal, Sir, on the other points that the RHA makes in response to this?

THE PRESIDENT: Yes.

MR PICKFORD: So what they say is there is no point of principle to prevent the class action from being utilised by large -- you know, larger claimants, and they point to cost protection again in the Tribunal, it is a point that they make a number of times.

What we say is those points may very well be true in theory, but they entirely miss our point, which it is still preferable, in the interests of fairness and justice and proportionality, for those claimants who are able to, to be -- those claims to be addressed on an individual basis, and a more bespoke treatment of the issues in those claims would avoid the risk of prejudice to us and other defendants by them being simply bundled in and corralled into a one size fits all framework which doesn't actually probably fit them at all.

Final point on this is that the RHA say there could be a separate sub-class for relatively larger class members to estimate fuel costs as part of the RHA's proposal to quantify claims in relation to emissions technologies, and we say that's not an answer, and there are three points that I make in response to that.

First, we don't contend that larger claimants are all similar, and therefore simply should be a sub-class within the RHA claim, we say that they are suitable for an individualised analysis, and that's manifestly preferable to the proposals that the RHA makes, irrespective of whether the Tribunal accepts my primary and first submission on heterogeneity.

Second point is this only concerns emissions technologies in any event. This is not an issue that

goes across the claims, and, thirdly, we say the RHA hasn't really explained how this sub-class is going to work anyway, or on what basis it is assumed that the larger class members are sufficiently similar to form the sub-class.

So, Sir, unless there are further issues on that point, I plan to move on to my third point in relation to the absence of the plan to assess damages. I'm grateful.

So, on this, we say that there is no proper plan advanced by the RHA for the assessment of damages, and, in particular, I'm considering issues of pass-on and interest and taxation.

Now, we accept that it isn't incumbent on a class representative in an opt-in action necessarily to seek certification of all issues necessary to establish damages as common. It is obviously the case, the regime doesn't rule out some collective proceedings, which, in an appropriate case, are for the purpose of establishing some common issues on a common basis, even if others are individualised, but what we do say is that there needs to be a litigation plan which provides a clear route through to how the claims will, in fact, be capable of being resolved, otherwise the Tribunal simply can't be satisfied as to the preferability of the collective

proceedings. That's a point we were discussing before.

What they may well end up doing, if the order is made, is leading, in this case over 10,000 potential claimants, down a dead end road.

Now, I showed you what was said about litigation plans, for example, in Caputo, so I don't need to go back to that. Instead, I'm going to examine some of the issues that we say needed to be considered in more detail than they have been by the RHA.

So, take pass-on. I obviously focused some submissions on this in the context of the UKTC claim, and it remains the case, equally, here, merits of pass-on are plainly for trial, but we can't rule out the prospect that pass-on was very large, and, indeed, of course, we've had discussions about potential claimants to whom 100 per cent of an overcharge was passed on because they were following, for instance -- their suppliers were following the RHA's cost-plus pricing guidelines.

Now, one of the implications of a high degree of pass-on is that the question of quantum is clearly extremely sensitive to an accurate assessment of it, and I gave an illustration of this point in my skeleton, and just to recap and summarise what's said there, the example is, let's suppose that pass-on is around 90 per

cent, but there is a plus or minus 5 per cent error margin. So on its face, that seems not so bad, plus or minus 5 per cent, it seems like, you know, we've focused in pretty keenly, but of course when one takes account of the fact that the damages figure is the residual, that it is 100 per cent minus the 90 per cent, the plus or minus 90 per cent error means that the overcharge, the absorbed overcharge -- sorry --

THE PRESIDENT: Mr Pickford you set that out in paragraphs 27-28.

MR PICKFORD: I'm grateful, I just wanted to make sure that --

THE PRESIDENT: We have read it.

MR PICKFORD: -- as I'm sure you will have done, you have remember it had.

THE PRESIDENT: Well, we haven't read everything, as I said at the outset, by no means, but we have read the skeletons, and a bit more.

MR PICKFORD: I'm grateful, in which case I need say no more about that, but that was the example. It is purely illustrative but what it is intended to show is that one does need to be really careful about issues such as pass-on, and you need an adequate plan to explain how they are actually going to be assessed, so that we can see the way through to the end.

Now, we say, somewhat like the UKTC, not quite as extreme way, but essentially the RHA eschewed the burden that is placed on it in this respect. Like the UKTC it made a big play of the fact that we hadn't pleaded pass-on, and I have already discussed that point with the Tribunal, and that's plainly not a responsible or acceptable position for a proposed class representative to take, and the Tribunal has that point. You can't just ignore it and put your head in the sand when you -- it is plain as a pikestaff that the issue is there and needs to be grappled with, and, indeed, of course it is a little ironic that Mr Flynn should be saying, well, once they have pleaded their defences, well then we can really begin to think about that, then, you know, then we will know what we can do, which we are talking about something that -- it is pass-on, where the claimants have the information, they are going to be making the disclosure, it's them that will initially make the running in relation to this, so it's simply erroneous to suggest that there is some penny, magical penny will drop as soon as we've pleaded our defences and that will suddenly enable them to think about this properly. They can think about it and they should have done.

So now they are beginning, at least, to acknowledge that a little. They say that pass-on raises delicate

questions, as they say in their amended reply, but what they still don't do is actually properly grapple with how they are going to address it, and they hypothesise that the question of the close causal relationship could be addressed by sample cases, they say, but that's about as specific as they get. They say well maybe, you know, that issue can be grappled with in that way, but it's far from clear to us how a test case can be used to address the detailed issues that arise in relation to a causal relationship.

I mean, these are highly fact-specific matters, and there isn't an adequate explanation from the RHA as to how all of that is going to work. It is an incredibly high level of generality, and we say it is not sufficient.

The proposals are no more than vague and barely formed.

Now, Mr Flynn relied in his submissions on fourth Davis when grappling with issues of heterogeneity. In relation to pass-on, fourth Davis only devotes two short paragraphs to the issue, and that's obviously in contrast to the vastly more substantial exercise that he has undertaken, albeit, we still say, with inadequacies in relation to other issues.

It's true that he did -- Dr Davis -- devote more

attention to this issue in his second report, but, again, his proposals were in there, they were hypothetical, they were noncommittal, and that's not a criticism of him, because the RHA weren't commissioning a proposal to put into practice, because it wasn't seeking certification, but we say that it is a problem for the RHA when they haven't actually done sufficient work at all to explain to us how we are going to get through to the end.

Now, to draw these points to a close, the RHA's riposte, essentially, to all of this in writing -- well, I don't think it is a point that Mr Flynn particularly developed orally, is that, really, our objection here is a disguised submission that we are saying pass-on can't be dealt with at all, even on an individualised basis, and that simply is wrong. On the contrary, we say pass-on can and must be addressed, and it must be addressed at the outset with a proper plan, and it's not enough for the RHA to give the kind of attempted words of comfort that it appreciates the complexity of the issue without explaining how it's going to be grappled with.

Finally on this point, we say -- sorry, two further points -- we say it's something of a mark of desperation that the other argument that the RHA also articulates,

again it wasn't one, I think, that was particularly pursued by Mr Flynn orally, is it says, well, it doesn't matter so much about pass-on because of course we've got settlement, the possibility of settlement, and so even if we can only get so far, that will still help drive the parties towards settlement.

The problem with that submission is, obviously, you can only have a settlement -- the parties are only driven towards a settlement if they believe that there would be a just and fair determination of the underlying issues if they don't settle. It is the outside option of the core that always drives the parties to a settlement, and --

THE PRESIDENT: Well, they might -- I imagine parties do settle when they think there might be an unjust determination because they are stuck with the determination, but that's not an approach we would wish to favour.

MR PICKFORD: No. Quite, Sir. I think that's a fair point, but you have also made -- given the answer that I would have given.

Final point on pass-on is this; the RHA actually needs to grapple with pass-on now because it is actually relevant to its primary case on overcharge, because we've had some considerable discussion about the nature

of its case in respect of cost-plus arrangements, but we can't determine -- the Tribunal can't determine -- that issue of cost-plus arrangements, and their implications, without a detailed factual assessment of the arrangements for supply of services to determine whether they (a) were on a fully cost-plus basis, ostensibly, and whether, in practice, that's actually what happened, so these are, in fact, issues that arise on the RHA's own case in relation to its -- to actually developing its overcharge case for some of its potential claimants, so it can't simply ignore pass-on as a defendant issue, it's actually taken some of it on as its own.

THE PRESIDENT: Well, it's clearly got pass-on very significantly for purchasers of used trucks, hasn't it.

MR PICKFORD: It has. It has -- to be fair to them, they do have an approach which Dr Davis suggests in relation to that. He doesn't really grapple with it as a pass-on problem, he looks at it as a separate sub-class and seeks to look at it from the perspective of an econometric relationship for overcharge.

THE PRESIDENT: Yes, well, it is the overcharge to the purchaser of the used truck, but it is as a result of the pass-on.

MR PICKFORD: That's quite right, Sir, and indeed, we say, obviously, that is exactly right. It is the flip side,

and so they need to grapple with it there. They seek to sort of swerve around that in the way that I have just described, but we totally agree, Sir, with the point that, actually, that ultimately isn't going to be sufficient, because, really, it's the other side of the same coin and there is also the cost-plus arrangements which I have referred to as well, so they need to do better. It's something that everyone needs for damages, and, indeed, even -- they need it as part of their primary case, and they haven't looked at it with sufficient detail.

So then, turning to interest and taxation, and I can be pretty quick on these, because the same point, essentially, applies, as I have made in relation to pass-on. They haven't addressed sufficiently how they are going to deal with these matters which are of an inherently individualised nature, so Dr Davis does suggest certain methods which may be applicable on a common basis, but they obviously rely on a huge degree of approximation. So, for instance, for interest, he says that he hopes that with enough data it would be possible to draw a link between interest rates being paid and the characteristics of PCMs. For tax, he postulates a common approach involving identifying a common corporate tax structure at a given point in

time.

Now, these are, plainly, and manifestly, very bold approximations, and our concern is that when the time comes either this breaks down because it is clear that these are just insufficient and far too broad brush for complex issues, or that potentially they lead to important differences between claimants being excessively smoothed over when the inquiry is fundamentally an individualised one, and we say, particularly in relation to larger claimants, but actually across-the-board in relation to the claim, that there is a high risk that that sort of smoothing out could lead to substantial injustice with us paying potentially too much.

THE PRESIDENT: I don't quite follow this. I'm sure it is my failing. It is not suggesting interest and tax are common issues, so if the Tribunal gave a judgment, you say pass-on is terribly important for the reasons you have developed at length.

MR PICKFORD: Yes.

THE PRESIDENT: Suppose we gave a judgment saying that the individual -- and we were asked to do it on an individualised basis -- that the damages taking account of pass-on would be for each class member certainly subject then to questions of interest and tax which we

are not now addressing. There would then proceed, on an individual basis, not on a common basis, each of those claims for interest and tax, which is the way you say it should be done. The Tribunal will then have to think about how to manage the actions with however many thousands of individual claims for interest and tax, but you are saying that's the proper approach.

MR PICKFORD: Well --

THE PRESIDENT: To do it on an individual basis, and you would be settling with some, you would be not settling with others, you would be fighting others all the way, you may be asking for certain information from other ones on their tax returns, or whatever, or their capital allowances, but that's, as I understand it, the way you say it has to be done.

MR PICKFORD: Well, Sir, we certainly take some comfort in that, in that what we are primarily concerned about is what is being postulated by, for instance, Dr Davis, when he talks about potentially actually ultimately doing this on a common basis, and --

THE PRESIDENT: I don't think the RHA is saying that this should be dealt with as a common issue, interest and tax, I thought they were expressly saying they are not seeking that, but it may significantly advance all those claims if the basic damages are done on a common basis,

and then it would be left to case manage all these claims in exactly the same way, presumably, as Mr Harris was saying the High Court will do, or the CAT if it is transferred in the Adnams action.

MR PICKFORD: Sir, that is right. There is obviously a difference between interest and taxation in that interest, as I think the RHA in fact point out, I think they say, well, that's kind of part of our claim, so if it all turns out to be too complex, well then maybe we can effectively remove aspects of our claim. That will be our loss, and that's certainly true, and I don't think we would argue if they were going to abandon those points.

Taxation is obviously somewhat different because there is potential there for them being overcompensated unless the tax implications are properly taken into account.

THE PRESIDENT: Yes, but you are saying it should be done on a more individualised basis, and as I understand it the RHA are not suggesting anything else. I mean, Dr Davis has put forward some methods by which it might be considered, but that's not part of what we are being asked to accept for this purpose, and no doubt if there were, then, a series of awards subject to determination of tax, the Tribunal at that point will have to

consider, well, how are we going to deal with these 16,000 or whatever it is separate tax questions, and find some sensible way, and we might then say, well, what does the claimant suggest, and Mr Davies might come back and say, well, it can be done simply this way, and you might be saying, no it can't, it's got to be done 16,000 times, if that's what you want, and the Tribunal would have to think, well, what's the sensible case management of those questions.

MR PICKFORD: Yes. That's right, Sir, and in that respect there is less difference on the taxation point than as between individual proceedings, but I'm not sure it is the case that the RHA have necessarily committed on this issue -- we will obviously have to go back and double-check the pleadings --

THE PRESIDENT: Well, let's just ask Mr Flynn who has been listening, I'm sure, attentively. Mr Flynn, I mean, have I got it wrong? Are you asking that the collective proceedings will produce, on a common basis an assessment of the tax and interest? I think interest, we are talking about compound interest, presumably. Maybe I have misunderstood it.

MR FLYNN: Well, if you look at our skeleton as a short way of seeing what we are saying about this, Sir, so first bundle, tab 2, it is paragraph 51 which is {A/2/24},

summarises our position, which is that on each of these topics we say there are likely to be a common issue, they are all necessary to the resolution of each proposed class member's claim, and we do say they are capable of being resolved on a common basis, but we don't currently seek certification of these as common for which we've been much criticised, and then we explain separately our approach to pass-on, tax and interest where, in both cases, we say, well, it's principled and pragmatic, and in each -- in respect of each, I think as Mr Pickford has actually been through, we have suggested, or Dr Davis has suggested possible common methodologies for approaching these on a common basis, but we are not seeking these issues to be included in the certificate, if that's probably not the right word, at this stage.

THE PRESIDENT: So are you envisaging that at a later stage, after, as you would hope, a primary damages figure had been assessed, leaving aside pass-on because I think that's perhaps a bit different --

MR FLYNN: Yes. Yes.

THE PRESIDENT: -- there would then be an argument in which you would seek to say this can be done as a common issue, going forward, and it would be open to the defendants to say, "No it can't" --

MR FLYNN: Yes.
THE PRESIDENT: -- and the Tribunal would then assess, having then known what damages, primarily, as the principal sum is there, what's at stake and what's involved.
MR FLYNN: That's right Sir. At that stage there would be an issue of how those questions were to be addressed, and one possibility is that they would be addressed on a common basis, another possibility, my friends will be urging if we ever get to that stage, is that they cannot possibly be, and it is an individual one in every case, and there may be some solution in the middle.
THE PRESIDENT: Yes. Thank you.
MR PICKFORD: Sir, well, my only response, further response in relation to that, you have most of my submissions is that the RHA are adopting, as they do in relation to a number of aspects of these issues, a somewhat have their cake and eat it position there, in that they don't want to grapple -- they don't want to have to say that they are common but they do, in fact, ultimately want to come back and try and have the benefit of them being determined on a common basis, and obviously you have my submission in relation to how that would not be acceptable.
Sir, unless there are -- I'm just going to give my

instructing solicitors an opportunity just to -- I'm going to metaphorically turn around to see if there is anything else that anyone would like me to add, but I think I have probably got five minutes left. I have retained five minutes, if necessary, to come after Mr Jowell, but otherwise --

THE PRESIDENT: Mr Pickford, do you want us to metaphorically rise for five minutes?

MR PICKFORD: No I don't think so, I'm being told, indeed literally from behind in this case, that there is nothing further I think that needs to be added, so I'm very grateful, Sir, and I will have my five minutes later if necessary. Thank you.

THE PRESIDENT: Thank you, and Mr Singla has his electronic hand up.

MR SINGLA: Sir, just a very brief point. We are now left in a position where the RHA's proposed list of common issues at paragraph 47 of their claim form does contain the issue of whether interest should be awarded on a simple or compound basis, and it doesn't contain issues of pass-on and tax, so we would like clarity as to what the position is, because Mr Flynn and his pleadings seem to be taking different positions here.

If he is saying he wants it certified but then the precise mechanics to be sorted out later, that's rather

different to saying, "We don't want it certified at this stage", and until the pleaded case is clarified, it's quite difficult to understand what, actually, their position is.

THE PRESIDENT: Well, as I understand, and we can look at the claim form, but paragraph 51(b) says, in terms:

"The RHA does not currently seek certification of these issues as common", the three issues. We have pressed on pass-on because we have some concerns regarding pass-on, because of its centrality to the case, and as to whether it is, therefore -- whether the whole proceedings are suitable, if pass-on is not included, so we have pushed Mr Flynn on pass-on, and he has responded to that by accepting that, well, it might be possible to include them, but as far as tax and interest, where we have not pushed him at all on that, 51(b) is quite clear, read with (d), and now you say the claim form, which of course goes back much longer, has a list of things that are said to be common issues required, and you say it is inconsistent with that.

MR SINGLA: Well, yes. I mean, the claim form treats compound interest differently to tax and pass-on, because tax and pass-on don't feature in the list of proposed common issues.

THE PRESIDENT: Yes, no I see, you are quite right that

paragraph 47.12 says that it is -- they say it is a common issue, although I think it goes on to say, and it may be a little unclear -- as to what they are seeking, but at paragraph 52 they do say they are not seeking at the moment to have it dealt with on a common basis, so there is a certain tension, you are right to point out there, but as I understand the position, as Mr Flynn's now explained it, they are actually not seeking to have it certified as a common issue, even though they have, as it were, put down their marker to say, well, we think later on, if it arises -- of course it only arises if they get the primary damages in the first place -- that it might, then, be addressed on a common basis, and they would want to revisit it then.

MR SINGLA: Sir, the point I'm making, actually, is an important one, with respect, because I made this in relation to pass-on earlier where Mr Flynn, on his feet, was moving, but what we are faced with is, actually, quite serious movement in relation to a claim form that has been, now, amended twice, and, with respect, there is a quite important procedural issue that arises here, because what we can't face is movement in terms of what goes in and out of -- it is one thing, with respect, to tweak the wording of an issue, for example, if that's what we are dealing with, but we are actually, now,

facing a situation where the RHA is saying they do now want some of pass-on in the list, compound interest is in the list and they are now saying they want that out, and, with respect, we do say this application needs to be looked at within the four corners of their re-amended claim form.

THE PRESIDENT: Well, I mean, paragraph 52 says they reserve -- what they have said in 47 is they have listed what they regard as common issues, but paragraph 52 says they don't actually seek to have those three, now, any determination that they should be dealt with on a common basis, so they are not seeking that now, so that was their position, there has been some movement on pass-on.

MR SINGLA: Well Sir, with respect, 47.12 includes whether interest should be awarded on a simple or compound basis, and then at paragraph 50 of the claim form it says:

"47.11 and 12 will ultimately need to be dealt with in determining any final award of damages but it is premature to seek to deal with these issues".

Then in 51 they say:

"We are not, at this stage, seeking to have certified pass-on".

So there is something, on their pleaded case, in relation to compound interest, that they are seeking to

have it certified now, albeit dealt with later, and at 52 it's quite carefully worded, this, Sir, which is why I'm taking up some very precious time, but it's all quite carefully worded, 52 is:

"We reserve the possibility that they might seek at a later stage to have pass-on of the overcharge to their customers, interest rates and tax rate adjustments".

Now, interest rates is rather different, with respect, to whether or not they should be entitled to compound interest as a matter of principle, so we do submit this needs to be looked at quite carefully and we can't just have Mr Flynn dealing with it on the fly, as it were.

MR FLYNN: Well, perhaps I can just say that Mr Singla has been able to address the arguments on the basis, as I have explained to them and as the President just put to me, and is only now seeking to say there is something different in the claim form which, of course, can always be tidied up and amended, and as to the idea that there is a massive movement on pass-on, that simply came in reaction to a suggestion from you, Sir, that as regards pass-on in the new and used context, that was something that we would be looking at in any event, because that's pass-on within the class, and that's an entirely different issue, and I simply said yes, I could see that

that is an issue that, should you think that appropriate, one could say we would be dealing with now and you could certify that, but our position on the principal issue of pass-on, I think, has been clear right from the beginning and was clear to Mr Singla when he was making his submissions, and now he is alighting on wording in the claim form which one can always draft these things better, but it is pretty clear that we list them as issues that arise in common, and then we state for what we are seeking now, and I think the --

THE PRESIDENT: Yes, the one point that you -- Mr Singla has identified is that there is a difference between the principle of whether interest should be simple or compound and the question of rates, and whether, where you say in the skeleton, that at 51(b):

"The RHA doesn't currently seek certification of these issues as common", whether you mean only rates of interest or whether you mean the principle of whether it should be simple or compound which, in your claim form you have suggested you are seeking to be certified as a common issue.

MR FLYNN: Well, I mean, Mr Singla seems to think there is some cunning plan and some crafty wording going on here, I'm afraid it is nothing as Machiavellian as that, and the skeleton is pretty simple. We are not seeking

anything on interest to be certified now.

THE PRESIDENT: Right. Well that is a change from paragraph 47 because --

MR FLYNN: I understand that. I understand that. The skeleton for the hearing explains our position, and insofar as there is an untidiness in the claim form, that can always be resolved, but it isn't any form of ambush and my friends have perfectly well understood what our position was.

THE PRESIDENT: In any event, whether they understood it or not, you now, is this right, you now accept that the question of -- all questions relating to interest, including whether simple or compound and any rates, you are not seeking to have certified as a common issue at this stage? Is that correct?

MR FLYNN: That is precisely right, Sir.

THE PRESIDENT: Yes. Well that brings a clarity to the position, if we set that out in a judgment, that will make the position clear to everyone. Thank you.

So, I think we now have -- is this right -- we have Mr Jowell on other RHA issues. Is that it, Mr Jowell?

MR JOWELL: That is correct, Sir. Sorry, we are getting an echo but I think we are getting rid of it, I hope.

THE PRESIDENT: Well, we are getting some other background noises off. I think we will take a five-minute break.

MR JOWELL: We can't hear you. I don't know if you can hear us.

THE PRESIDENT: You can't hear me?

MR JOWELL: No, I'm not.

MR PICKFORD: We can hear you.

THE PRESIDENT: Well, could you tell Mr Jowell that what we will do is we will take a 10-minute break in which we will try and resolve the technical issues? Some of you can hear me and some of you can't, so if you can send Mr Jowell a message, this seems a good moment to take a break.

(3.27 pm)

(A short break)

(3.35 pm)

THE PRESIDENT: Yes, Mr Jowell? Can you hear us?

Submissions by MR JOWELL

MR JOWELL: Mr President, members of the Tribunal, I hope you can hear me now.

THE PRESIDENT: Yes.

MR JOWELL: I would like to start, if I may, with the question of the conflict of interest between new and used truck purchasers. First of all, where does conflict of interest between members of the class fit into the statutory regime? In our submission it fits in in two points. First of all, Rule 78(2)(a) provides

that the class representative must be able to act fairly and adequately in the interests of the class members, and we say that it is inherent in that, that if there is a conflict of interest between different groups of class members, the RHA can't act fairly or adequately.

The other place it comes in, is Rule 79(1)(b) which requires that the claims must raise common issues, and we say that part of what must be meant by a common issue is that members of the class can't have opposing interests in the resolution of that common issue.

So that is where we say it fits in to the regime, then what is a conflict of interest? Well, a good starting point is the definition that's found in the Canadian authorities. If I could take you to one case on that, it's the Elders Advocates of Alberta Society which is in {JA/94/105}. You will see there paragraph 521, it's up on the screen:

"Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. A class action should not be allowed if class members have conflicting interests ... if one class member is successful on a common issue, either all class members are successful or some class members are indifferent to that issue.

There is no common issue if success for one member of the class means loss for another".

So again emphasising the point that it isn't genuinely a common issue if there is a conflict of interest.

Now, the RHA, of course, proposes to include within its class both new truck buyers and pre-owned truck buyers, or used truck buyers, and in addition to whether -- and to what extent the cartel had an impact on new truck buyers as one of the common issues, it also seeks to have certified the question of whether, and to what extent, the cartel had an impact on used trucks, and a feature of RHA's methodology is that it will be seeking to estimate loss for each individual purchase using a bottom-up approach, and eschewing an aggregate award for determining the overcharge or to calculate damages.

You will see that in paragraph 49 of the RHA's claim form, and in quantifying damages to new truck buyers, as has really already been observed, they intend to do so in, essentially, three stages, according to Dr Davis. First of all, they intend to calculate an overcharge on the sale of the new truck. Secondly, they intend to calculate the overcharge on the sale of the new truck, or in other words the overcharge on the used truck, and

then they intend to deduct the second from the first.

So you will see that this is candidly identified in Dr Davis' reports on a number of occasions, so just to give you the references, we don't need to turn it up, but for the transcript, we see it in Volume F1, tab 5, page 86, we see it in paragraphs 212-215 of his report also at F5, pages 100-101, and it is implicit, also, in the table at Table 27 in those pages.

Maybe we can just look at his second report {F/5/101}, which is at {F/7/141}, so if we could pull up, instead -- yes, thank you very much -- and if we look at paragraph 346 you see what I have just said, that estimating the overcharge on the new truck, estimating the gain on the sale of the pre-owned truck, and then adjusting the two sums for the time value of money, but it's clear that there has to be a deduction of any used truck overcharge when calculating the damages for new truck buyers, so, as Mr Meredith Pickford put it, the two are opposite sides of the same coin.

The used truck buyers, naturally enough, will want any used truck overcharge to exist, and to be high, and the new truck buyers will wish that the used truck overcharge doesn't exist at all, or if it does exist, they want it to be as low as possible, and that, we say,

is a direct and intractable conflict of interest, and we say that the RHA simply can't be a proper representative of a class where there is such a conflict of interest between members of the class.

Now, the first attempt by my learned friend to answer this rather fundamental point is to say, well, many claimants bought both used trucks and new trucks, and Mr Flynn, in opening, said that 40 per cent of the class bought both used and new trucks.

Now, that doesn't really begin to work, because, I mean, to state the obvious, if 40 per cent bought both, that means that 60 per cent of the class bought either only used or only new, and so for 60 per cent of the class, there is no question they have a direct conflict of interest in relation to whether there was any overcharge on used trucks, and, secondly, as the President of the Tribunal observed, some class members will have bought a preponderance of new trucks over used trucks, and others will have bought a preponderance in the other direction, and so for those classes as well, those members of the class as well, they will have clear interests that are diametrically opposed, and so, really, the furthest that this point takes the RHA is to establish that there is a category of class members in the middle, as it were, that might have bought similar

numbers of used and new trucks, and whose actual interest or otherwise in the used truck overcharge may be difficult to discern but to say that there may be a minority in the class that is not clearly conflicted plainly doesn't eliminate the conflict for the class as a whole.

Now, the second argument advanced by my learned friend is reliance on the Canadian case of Sun-Rype Products and Infineon, and my learned friend was right, rightly observed, that actually the comments there are entirely obiter because actually, on the facts of the case, the indirect claimant class was not certified for other reasons, but more fundamentally, the situation was very different because the claimants were seeking an aggregate award of damages, and it's not difficult to see that in circumstances where you are seeking an aggregate amount of total overcharge, then you can defer the conflict of interest to the later distribution stage where the direct and the indirect consumer claimants can seek to fight it out for those aggregate damages between themselves, but here what we are seeking to do is very different, because here we are seeking to certify as a common issue the pre-owned overcharge, the used truck overcharge, and to do that at the outset, and on this issue the two sets of the group have diametrically

opposite positions. I see that Professor Bishop's hand has gone up.

DR BISHOP: I just had a little -- just a question for you. You said that the Canadian case which I can't remember the name of which you mentioned was obiter, but isn't that also true of the point you took us to in the Elder Advocates of Alberta case?

MR JOWELL: That may be true although I think it refers to other authorities, I think where the point wasn't obiter, but I take your point, and I don't mean to say that it's necessarily wrong on that point, I think my primary submission is simply that it's a very different situation where you have an aggregate pot of damages that you are seeking to obtain and then you can effectively defer the conflict, but that simply isn't the position here, and the final principal point made against us by Mr Flynn and by Dr Davis who seeks to make this point in his report as well, is that the question of whether there was an overcharge on pre-owned trucks is an empirical question, and that will be determined separately by a sub-class, and neutrally by the expert, and to that we say, well, it is an empirical question, but empirical questions are still capable, indeed quintessentially capable, of being subject to conflicts of interest, and we don't doubt that Dr Davis may

consider that he is able to determine that he can act as a neutral arbiter on this point, but what that ignores is that he doesn't operate in a vacuum from those instructing him, and, indeed, fundamentally that the outcome of the issue of whether there is a used truck overcharge, and the extent of any such overcharge, is not dependent on his judgment calls alone, but also upon the way that the case is brought by the RHA.

Now, the President raised with Mr Flynn a very pertinent example, if I may say so, of a settlement offer, just for used trucks, and of deciding whether that should be accepted. He also raised the example of how one would respond to positions advanced by the defendants, or the defendants' experts at different stages of the proceedings in response to Dr Davis' reports.

Now, those are all points which are unanswerable, but the Tribunal will appreciate, I think, that the conflict can arise in manifold ways, and at almost every stage of the prosecution of the action for an alleged overcharge on used trucks. The RHA, like any client, has to make a series of decisions and take actions or fail to take actions that are capable of influencing the outcome, so at its most fundamental, the RHA must decide who to instruct. They could continue to instruct

Dr Davis or they could instruct another expert. They must give the expert instructions and relevant documents, and they must give instructions to their lawyers, for example, to seek or not to seek particular documents and data and evidence that are relevant to the analysis, and where the empirical and econometric evidence is consistent with a range of arguable outcomes, the lawyers must cross-examine and advocate for a particular outcome and how all of those tasks are carried out depends on whose cause the lawyers are seeking to advance -- what outcome they are instructed to seek to advance, so let me give another example.

Suppose there is a specific disclosure application that can be made for certain data or documents, and let's suppose that there is reason to suppose that the data and documents in question might advance the cause of a used truck overcharge but suppose also, as is often the case, that that application is expensive, expensive to make, expensive for the documents to be reviewed, and those costs may be irrecoverable.

It will be in the interests of part of the class to make the application, and it will be in the interests of the other part of the class not to do so. How is the RHA fairly to decide what to do? It can't, because it is irredeemably conflicted.

Now, at the last moment the RHA has floated the idea of instructing a new legal team and new economists to be involved as advisory experts, but the fact remains that the RHA must still give instructions, must still decide on what steps to take in the action, and so that simply doesn't avoid the problem. What is required is a separate class and a separate representative for used truck buyers.

Now, in this regard the Tribunal very generously sought to throw the RHA two lifelines in opening. The first was the possibility of reconstituting their claim as one for aggregate damages, well, the RHA have declined that invitation, and the other was to use Rule 78(4) of the Tribunal rules to certify a separate representative for a sub-class. Well that also hasn't been taken up, but for our part we should just note that we understand that that rule is really dealing with a slightly different position. It is dealing with a position where some members may not have an interest in a particular issue at all. Now, we appreciate that the Guide also refers to a potential conflict of interest, and that might be, but we are doubtful that that particular rule is intended to be deployed where there is an actual and direct conflict of interest between members of the class, and in any event if the

RHA were to return with a separate representative for this sub-class under that rule, we would obviously need to be given the opportunity to scrutinise the precise arrangements and the precise proposal.

Now, they can't say that they weren't on notice. We drew this stark conflict of interest to the attention of the RHA over two years ago now, and they have chosen not to remedy it, so we say the only respectable possible outcome is for the Tribunal to refuse to certify at least this aspect of the claim. That's all I have to say about used and new, if I could go on, then, to run-off, which is another issue where we say there is a conflict of interest.

Now, as best we understand the position as expressed orally by Mr Flynn in some parts of their submissions, the RHA don't actually seem positively to believe or even positively assert, perhaps, their extraordinarily long run-off period of over eight years, and instead they seem to be positing it as a sort of conceivable or theoretical maximum by which they want to define their class.

Now, they put it slightly differently in their amended claim form, if I could just pull that up. It's in {C/1/14}, and if you see paragraph 37 you will see they define -- they refer to the run-off period, and if

you look at the bottom you will see:

"The RHA initially proposed that the relevant end date should be the date of the notice to be issued by the RHA", and if I could have the next page, please, page {C/1/15}:

" ... under Rule 81, however, the RHA recognises its application has taken longer", and they say:

"In the circumstances the RHA considers that the date on which the CPO application was adjourned by the Tribunal, pending the outcome of the appeal to the Supreme Court in Mastercard Incorporated & Ors v Walter Hugh Merricks CBE [2020] UKSC 51, is an appropriate end date which balances the competing considerations described at paragraph 6.37 of the Tribunal's 2015 Guide to Proceedings (namely, the need to define the class as narrowly as possible whilst also not arbitrarily excluding some people entitled to claim)".

So they say that their eight years is achieved after a balancing of those two factors.

Well, one dreads to think what sort of a run-off period they would have come up with if they hadn't taken into account the need to balance, is all we can say, and if we turn to the expert report of Dr Davis, it's pretty clear that he isn't prepared to put his name to

a run-off period of eight years. He doesn't suggest at any point that that is a likely scenario. Now, time won't permit me to take you through it, but if you have time at your leisure, I invite you to read paragraphs 167-176 of Dr Davis' report which you will find in Volume F1, tab 7, starting on page 73.

THE PRESIDENT: Sorry, which report?

MR JOWELL: This is Dr Davis, I think it is his second report --

THE PRESIDENT: Second. Thank you.

MR JOWELL: -- in tab 7, and you will see in those paragraphs he dances around the question of the run-off period, but what he does not say, and he is very careful not to say, is that he actually endorses or believes or even considers that the run-off period lasts the full eight to nine years. I mean, you would be able to ask him yourselves next week, and judging by what Mr Flynn said in opening, the RHA doesn't seem to believe it is realistic either.

Now, the points that have been raised that might justify a run-off period of this sort of length, such as the possibility of long-term contracts with prices fixed in advance, or emissions technology costs being introduced in 2014, well, neither of those come close to justifying a blanket run-off period of eight years. I

mean, the long-term contracts you could deal with just by extending the class to persons who committed to the contractual price within the relevant period, and even if you -- one takes seriously the possibility that the emissions technology costs could still have been affected years after the cartel ended in 2014, which is deeply implausible, it still wouldn't take you beyond the end of 2014.

THE PRESIDENT: As I understand the emissions technology infringement, it was to delay the introduction of emissions technology, so the loss would be suffered before -- up to 2014. Isn't that the infringement?

MR JOWELL: I would like to say yes, Mr President, but there are two aspects to the infringement in this respect. The one is the one you have described, and that's the basis of their separate claim based on emissions technology delays, but there is also mention in the decision of some form of collusion on costs of emissions technologies as those technologies were introduced, but the -- so the one we have to posit is that somehow, even though it is three years after the cartel has ended, it somehow still has an effect on those Euro 6 emission technology standards when they come in in 2014, but even that doesn't get you beyond 2014, so what the RHA seem to be doing is throwing the net as wide as they

conceivably can to kind of sort of catch a theoretical maximum.

Now, in an individual action claimants aren't meant to do that, and they typically don't do that. You are meant to plead a claim that you genuinely believe is realistically arguable, and so the question is, well, is this proper to do this in the context of a class action, and the answer to that must surely be it is even less appropriate because actually it is an irresponsible thing to do, because you are leading on, potentially, very large numbers of claimants in this case, to join the class without any genuine belief in the basis of their claim, and even more problematic is that this gives rise to a real risk of a conflict of interest between members of the class, and that's because at some point, as I think, Mr President, you observed, that claimants are going to have to come down and say what they actually do genuinely contend for as a run-off period, and then draw a line when the cartel effect did end, and at that point the RHA is going to have to expel all of those potentially thousands of other claimants buying thousands and thousands of trucks that fall on the wrong side of the dividing line, so let's say that the RHA comes down on one year, which is actually what Dr Davis hints may be his current best estimate. On

that basis, over seven years worth of purchasers suddenly stand to get nothing, and they may not take that standing down. I mean, they may not take that at all, and at that point one can see real prospects for conflict in the class and division, and no doubt the question of when there is any run-off period, when it ends, it's not the sort of thing that falls down from heaven objectively determined, it's going to be a matter on which a reasonable range of views are possible -- Professor Wilks, I think you may have a question.

PROFESSOR WILKS: Yes. Interesting discussion. Could I ask, do you resist the idea of a run-off at all, and if not, what criteria do you think we should be looking to?

MR JOWELL: Well, let's put it this way; we haven't resisted a run-off period of one year in relation to UKTC, and we say that, really, the acid test should be what is a realistic best estimate of the run-off period by their expert, and the hints that Dr Davis gives in his evidence are that it is around about that as well and at that point we wouldn't say that it is unarguable or inappropriate.

THE PRESIDENT: I mean, if their expert says, "I think it is reasonable to take this period", then it's fair, even if you -- if your expert says, "No, that's too long", it's reasonable for them, then, to advance that case. That's

what you do in an individual action, and sometimes you will have an argument and the defendants say no, no, that's too long, but your point is it needs to be supported.

MR JOWELL: He's not supporting it and he is not saying it is his best estimate. It's not saying it is realistic in any way, and so it's not appropriate, and it doesn't help to say, as Dr Davis does, well, the Tribunal will have all the model specifications before it, because, again, decisions have to be taken. Someone has to advocate for a particular position and marshal and present the evidence, and that gives rise to a real difficulty as to what position the RHA should be advocating. Should it be advocating for those in the run-off period or for the rest?

THE PRESIDENT: Yes.

MR JOWELL: Unless I can assist further on run-off, that's really, all I had to say. We say that --

THE PRESIDENT: No, I think we've got the point.

MR JOWELL: You have got the point.

The next point we have are non-UK Trucks.

THE PRESIDENT: Would you pause for a moment?

MR JOWELL: Yes of course.

THE PRESIDENT: We will just metaphorically rise for a minute.

MR JOWELL: I'm grateful. (Pause)

THE PRESIDENT: Mr Jowell, you don't need to address us on foreign trucks.

MR JOWELL: Well, I'm very grateful for that.

In that case I move on swiftly to the emissions standard delay, and it is important, I think, to grasp what they are seeking to establish and quantify here. They are, as in this -- on this aspect, as you have just observed, Mr President, they are seeking to quantify loss or damage caused by the attempted passing-on of the cost of introducing higher emissions by the defendants. Forgive me, that is not what they are seeking to do. What they are seeking to establish are any additional costs caused to the claimant class by reason of the potential delays to the introduction of emission standards compliant trucks by the defendants, and when one thinks -- considers that, really a moment's reflection reveals that it is going to be an exceptionally difficult exercise, and one that's going to bound to depend on all sorts of things very peculiar to the particular individual claimant within the class. It is certainly not the sort of thing that cries out as raising a common issue or capable of being resolved by a series of common issues, and -- but despite that, Dr Davis has sought to create an elaborate methodology

which is based on some rather heroic assumptions. He seeks to determine the counterfactual date for the sale of each of the Euro emission standard trucks, and they plan to derive, he says, from disclosure, but he doesn't tell us how he is going to derive that from disclosure. He sort of assumes that the manufacturers would or might have chosen to bring in the emission standard-compliant trucks earlier if they had not been concerting with others, which is a very questionable assumption, and he somehow, from disclosure, is going to derive when that would be, and he assumes that some purchasers might have chosen to buy such higher emission standard trucks at an earlier date, even if they had not been obliged to do so, and that also, of course, is a questionable assumption, but then the most questionable assumption of all is the assumption that there is a causal connection between the introduction of the higher Euro emission standards and the technology that led to lower fuel usage, or lower costs, and that is a very, very questionable assumption indeed, because the Euro standards were not directed to increased fuel efficiency.

THE PRESIDENT: Are you saying, can I understand, because we are not looking at merits.

MR JOWELL: No.

THE PRESIDENT: I mean, the RHA, who know a thing or two about trucks, say, yes, there is a connection that these standards do lead either technically or because of the way the truck manufacturers would act when introducing the standards, to more fuel-efficient trucks. That may be right, may be wrong. I haven't the slightest idea, but if they want to advance that case, and they will obviously have to produce evidence at trial, that's certainly a common issue. That's not an issue that varies according to who bought the truck. Why -- on what basis can we not accept that as an arguable point?

MR JOWELL: Well, I accept that point, but I do say that it does raise a very -- also a legal point about whether there is a proximate causal connection between those two things, because you are really talking about -- the delay relates to the emission standards, not to the fuel efficiency measures. The fuel efficiency -- (cross talk) that may be, but I think it is part of the context, if I may put it that way, that one -- that this model arises in the context, if you like, of a series of building blocks, each one of which is highly questionable. I put it no higher.

THE PRESIDENT: I think, to be fair, from my recollection, which may be faulty and you may know better because you are probably acting for the defendant in those cases as

well, in at least some of the individual actions, the same argument is being made, so -- as an additional head of loss. Either it is a good point or it isn't, but I don't think that -- I mean, if that's right, and we can only assume, and there is no application to have summary judgment on that, in your favour, if that were right, then those -- at least it could be said that those who bought a truck, and if they can show that on the balance of probabilities MAN would have had the Euro 5 emission standard introduced at the date they bought the truck but they hadn't, that then the extra fuel costs from the use of that truck was part of their loss.

MR JOWELL: Well, let me make --

THE PRESIDENT: Just taking the simplest counterfactual. One can postulate all sorts of other counterfactuals, but the simplest one that they would have bought the truck that they actually did buy, but that it would have been a truck that complied with Euro 4 when it wasn't.

MR JOWELL: Yes, but it being compliant with Euro 4 is not a loss, it is the co-terminus greater fuel efficiency that comes really from something a different -- a separate decision, actually.

THE PRESIDENT: Yes. Either that's made good or not.

MR JOWELL: Yes, but in any event, I think what is -- what

we can say in this claim is that it's going to -- not going to be one that benefits many, or at least most of the class members, because it can only apply to those that would have bought trucks in these delay windows, if you like, so it's most unlikely to apply, in this claim, other than to a minority of the class, those that bought in the periods of potential delay before each of the emission standards. Others that bought after, immediately after the emission standards come in, they are obviously not going to have any claim, so it is for a minority of the class, and it is also going to depend at the stages of ascertaining whether there is any loss, on highly individualised factors, such as the claimant's budget, what the truck was used for, what routes and loads it undertook, how the truck was driven by the particular driver, how the truck was maintained and so on, all of these are covered in the expert evidence, because these are all things that are going to affect the fuel efficiency of the truck, so, now -- and the question is can one seriously, meaningfully, control, for all of those variegated factors, in these kind of proceedings, and Dr Davis has sought to go through them and to -- in an increasingly elaborate model that he posits, to try and find common ways of resolving those sorts of factors, but in reality we say this is actually

bound to collapse into an individualised enquiry and it is simply masquerading as a common methodology. It is not genuinely capable of resolution on a common basis, and, actually, one point that shows that without any doubt is that you can't reach any damages figure until you put in each claimant's figure for interest, because, obviously, what you are talking about here is comparing the higher cost on the one hand of the truck, because these would have been higher cost trucks, against your fuel efficiency that you were then greater fuel efficiency that you might have got from the truck over a long period of time, and so interest is a crucial element, and Dr Davis accepts that, but we also just heard Mr Flynn saying that interest is not a common issue.

So that is actually fatal for this -- any notion that this aspect of the claim can arrive at loss on a common basis, on a completely common basis, at least, and so we say this is -- these claims are more suitably brought, if at all, in individual proceedings.

Finally, can I come to one class definition issue which has already been raised? And that is the question of hauliers that supplied on a cost-plus basis. Mr President, you have already seen footnote 24 of RHA's claim form, and there have already been exchanges on

that, and if I could just start, if I may, with first principles, a member of the class that doesn't have a viable claim should be excluded, and those claimants that have suffered no damage don't have a viable claim.

Now, it is acknowledged by RHA that the cost-plus hauliers have not suffered damages so they don't have a claim, and it follows very simply that they should therefore be excluded from the opt-in class, and --

THE PRESIDENT: Sorry to interrupt you, as I understood it there may be some cost-plus hauliers to which your submission goes directly, we are also told there are quite a number of hauliers who generally don't operate cost-plus or they do occasionally, or they do for some clients, so would your submission be, well, it is -- in respect of those -- how would we deal with those?

MR JOWELL: Well, one would say that those persons who only supplied on a cost-plus basis are excluded from the class. Now, there may be small numbers of those or there may not. We simply don't know. I'm not sure the RHA know either.

THE PRESIDENT: Yes.

MR JOWELL: But what you can't have, surely, are what RHA, I think, were originally planning, and are still planning because they haven't amended their claim, which is to include those people as sort of fronts.

THE PRESIDENT: No, we understand that. Yes.

MR JOWELL: They can't be front men for the other members of the class, sort of Trojan horses, and then one comes to their customers and I think what my learned friend wants to say is that insofar as they are already in the class in their capacity as buyers or renters of trucks then people that purchased from cost-plus hauliers should be included in the class also in that capacity. I think that is what he is trying to say, but the problem with that is that the claims by existing members of the class that purchased haulage services on an open book basis, if you like, from other members of the class, are not, at present, claims that are included in the claim as pleaded, and if you did actually seek to try and include them in the claim that would raise a whole further series of issues. For example, it might be that further potential conflicts of interest would arise because it might not be common ground as to whether a particular contract was cost-plus or not cost-plus. One can well see a debate about that, but at the moment, in any event, the wrong people are in the class, and other people, who it seems they want to claim for on a sort of front basis, aren't in the class, and we say should remain out of the class as well.

THE PRESIDENT: So just to understand, they are not

currently -- the customers who rented on a cost-plus basis, they are not in the class at the moment.

MR JOWELL: Well I think my learned friend, what he wants to say is that he is going to -- those that are already in the class in their existing capacity as buyers or renters of trucks, and that bought from others who were already in the class who were cost-plus hauliers, should be entitled to claim that aspect of damages.

Now, the problem with that is that the -- is that that, if you like, that downstream -- that claim by them in their capacity as downstream recipients of cost-plus haulage services has not been brought in the claim at present, and if it were, it would raise a number of issues, in our submission, that we would need to have time to consider, so, actually, this may seem a storm in a teacup if the numbers are small, but the proper way to proceed here is for these people, these cost-plus -- those that sell on a cost-plus basis only to be excluded from the class, and claims from them should be excluded.

You have my submissions on short-term leases, and I'm keen to allow Mr Hoskins his time in the sun and unless you have any questions, those are my submissions on those points.

THE PRESIDENT: Yes. We will just withdraw for a moment.

(Pause)

Yes, Mr Jowell, we've nothing to ask you.

MR JOWELL: I'm grateful. You did ask me one question which I didn't answer, which was regarding whether the emissions technology was brought in the individual actions, and the answer is that it was brought by VSW and it was dropped.

THE PRESIDENT: Oh, has it gone? I hadn't picked that up. Yes. Thank you.

Well, Mr Hoskins, you were anxious to have a good 30 minutes and you can have them.

MR HOSKINS: That's very kind, except Mr Pickford has reminded me, he is indebted for five minutes so I will have to leave him five minutes so I will crack on.

THE PRESIDENT: Well, I think we said we would sit until 5 o'clock, so there is time for Mr Pickford's five minutes.

Submissions by MR HOSKINS

MR HOSKINS: Mr Harris wants his 20 but I think that's a joke.

Sub-classes. Sub-classes. Can I start with the legal framework for sub-classes? So we can have the Tribunal rules to hand, please, and there is a definition of sub-class in Rule 2(1), so if you track down towards the end, it's just above sub (2), you will see:

"sub-class means a member of a distinct class of class members described in the collective proceedings order or a collective settlement order".

So that's the definition of a sub-class in the rules. I would like, next, to look at the rules on the identification of sub-classes. First of all, insofar as they relate to the claim form one finds that in Rule 75(3)(b), and that states:

"The collective proceedings claim form shall contain a description of any possible sub-class and how it is proposed that their interests may be represented".

Then in terms of the contents of any collective proceedings order one finds that in Rule 80(1)(c):

"A collective proceedings order shall authorise the class representative to act as such in continuing the collective proceedings and shall ..."

(c):

" ... describe or otherwise identify the class and any sub-classes".

Of course there is no obligation on the Tribunal to identify sub-classes in every CPO, only where it is decided it is appropriate and necessary.

In relation to the amendments, or the possibility to make amendments to the collective proceedings order, the Tribunal has power to identify or amend sub-classes

after the grant of a CPO, and one finds that power at Rule 85(1), if you want to read that to yourselves. It is a general power of variation and it applies to sub-classes.

THE PRESIDENT: Yes.

MR HOSKINS: And then in terms of case management, particularly dealing with sub-classes at trial, that's dealt with in Rule 88, case management of the collective proceedings. At sub (1):

"The Tribunal may, at any time, give any directions it thinks appropriate for the case management of the collective proceedings".

Then Rule 82(2)(a) and (b):

"Without limitation to the generality of paragraph (1) such directions may order that the common issues for the class be determined together".

And/or (b):

"The common issues for a sub-class be determined together".

Then finally in terms of judgment, Rule 91(1):

"A judgment or order of the Tribunal made in collective proceedings may specify the sub-class of represented persons or individual represented persons to whom it shall not apply".

So those are the panoply of different stages at

which sub-classes may be relevant, but of course that begs the crucial question of what role do sub-classes play, what role can they play in proceedings, because there is no specific provision in the act or the rules which determine when sub-classes could or should be identified in a collective proceedings order. In our submission it must follow from that that the Tribunal therefore has a wide discretion in regard to what role sub-classes can or should play in any particular proceedings.

There are, however, indications in the rules and indeed the Guide as to the sorts of roles that sub-classes might play. If we can go, first of all, to Rule 78(4) which Mr Jowell has already shown to you, 78(4):

"If the represented persons include a sub-class of persons whose claims raise common issues that are not shared by all the represented persons, the Tribunal may authorise a person who satisfies the criteria for approval in paragraph (1) to act as the class representative for that sub-class".

So that's the situation in which you have identified a sub-class and appoint a separate class representative for the sub-class, but of course not the language, again, the identification of a sub-class is not

mandatory in such cases, the word, "may", is used in Rule 78(4), and one finds a further indication of why one might do that, one might use that power in 78(4) in paragraph 6.35 of the Guide. 6.35 of the Guide says:

"Where the claim covers a sub-class of persons, the Tribunal may authorise a separate class representative for that sub-class pursuant to Rule 78(4) ..."

Which we've just seen:

" ... the use of sub-classes may be appropriate where there is a potential conflict between the interests of members of the broader class. For example, in cartel damages claims, different categories of purchasers may have conflicting interests that require separate representation".

Of course we've seen that potential use of the power in relation to used and new trucks, and that has been debated between the Tribunal and various of the advocates.

THE PRESIDENT: I think Mr Jowell said that is actually not what -- in his submission, Rule 78(4) was about and that was not really permissible.

MR HOSKINS: Well I think I may have to beg to differ with him, just because if the Guide, paragraph 6.35 is right, it refers expressly to Rule 78(4) being used for that purpose.

THE PRESIDENT: Yes.

MR HOSKINS: Guide paragraph 6.79 gives a further example of when sub-classes might be used:

"If it is not appropriate to make an aggregate award of damages for the entire class, it may be possible to proceed to determine the entitlement of sub-classes on a group basis, amending the CPO as appropriate to authorise the appointment of class representatives for those sub-classes. If that is not possible, the Tribunal may direct that the quantification of damages proceed as individual issues", so sub-classes can be used as a means of assessing damages where an aggregate damage award is not possible, and the final example one finds in the Guide, 6.126, that paragraph explains that it may be appropriate to define a sub-class where a defined group within the class is excluded from the terms of a settlement. Again, we've sort of touched on that as a possibility in terms of used and new trucks but there one has reference to that in the Guide.

Let me just say briefly the principles that we submit apply to this legal framework for sub-classes. There are four of them. First of all, there is no situation in which the identification of sub-classes is mandatory. Sub-classes are a case management tool to be used flexibly by the Tribunal. They are a means to an

end, and that end is the effective conduct of collective proceedings. They are not an end in themselves.

Secondly, the Tribunal may, if it considers it appropriate, identify sub-classes in its original collective proceedings order, but there is no obligation on it to do so.

Thirdly, the Tribunal may amend the collective proceedings order after it has been made so as to identify sub-classes, and, fourthly, the Tribunal has a wide discretion as to the use of sub-classes.

So, having established the legal framework, let's look at the UKTC and RHA's position on sub-classes in this particular case.

Let's start with the UKTC, because I think it's simplest and shortest to deal with. If we can go to their amended claim form, paragraph 46, one finds that in {B/1/20}, and if I could just ask you, please, to refresh your memory by reading paragraph 46? We don't need to get into the detail of the nine sub-classes identified. So it is simply the body of 46.

You will see there particularly I want to draw your attention to the amendment in red that whilst Dr Lilico identified nine possible sub-classes in his first report, he now considers that it would be premature to commit to final categorisation at the CPO stage, and we

understand from that, and we will be corrected if we are wrong, but we understand from that that the UKTC does not suggest that any collective proceedings order that it might obtain should identify sub-classes. That's our understanding of the amended paragraph 46 of the claim form, and I will come back to Dr Lilico's evidence on the issue as to why he considers there is now no need to identify sub-classes at this stage.

The RHA's application one finds at bundle {C/1/15}. It's paragraphs 38-41. I'm sure you will have read this, so I will just take you through the points.

Paragraphs 38 and 39:

"The RHA proposes six sub-classes for UK Trucks".

They divide the proposed class in three ways; 1) purchased against leased, secondly, affiliated sales channel against independent dealer, and thirdly, new against used. You see those three divisions in paragraph 39.

THE PRESIDENT: Yes.

MR HOSKINS: And paragraph 39 also states, the penultimate sentence, that:

"Those proposed sub-classes are based on Dr Davis' report".

Paragraph 40 deals with EEA countries which I don't need to deal with because you have indicated you don't

want to hear submissions on that, and paragraph 41, if you could just read that again, please, refresh your memory as to what they say there.

THE PRESIDENT: Yes.

MR HOSKINS: The point that's being made is that the RHA is not suggesting sub-classes to deal with a conflict, even in relation to new and used trucks. That's never been their position. The reason they are suggesting sub-classes should be identified in the order is based on their experts' current proposed methodology and no other reason. So that's the position of the UKTC. They don't want sub-classes in any CPO they get. The RHA does want six sub-classes in any CPO that it obtains, and Volvo/Renault's position is that it would not be appropriate to order any sub-classes at this stage, and that submission is supported by factual and expert evidence. The factual evidence is the first witness statement of Mr Corcoran, that's D/22 so Mr Corcoran you will see on {D/22/2} he is employed by the Volvo group, and if we could go to page 16 {D/22/16}, he is here --

THE PRESIDENT: Can you pause a moment? I have taken out the wrong ...

MR HOSKINS: Of course. D5, tab 22.

THE PRESIDENT: Yes.

MR HOSKINS: So he explains in paragraph 62 under the

heading, "sub-classes proposed by the RHA and UKTC", what he has been asked to comment on:

"I have been asked to comment on whether the 'subclasses' proposed by the RHA and UKTC bear any relation to how Volvo and Renault Trucks actually priced, sold and marketed and recorded the sales of their respective trucks during the relevant period".

So from a factual perspective he is looking at whether the sub-classes are appropriate. If you could please read paragraph 69 on page {D/22/17}?

THE PRESIDENT: Yes?

MR HOSKINS: And then over the page {D/22/18}, paragraphs 72-74.

I would like, then, to go to the expert evidence that supports this submission, which is Mr Biro's first report. One finds that at {F/19/7}. If I could ask you, please, to read paragraphs 21-24? So F3, tab 19, page 7.

THE PRESIDENT: Yes.

MR HOSKINS: Now, Dr Lilico, UKTC's expert, agrees with Mr Biro, if we can go to Dr Lilico's second report at {F/2/25}. You will see the heading -- I'm sorry, I will wait until you have the page.

You see the heading on page 25, 1.17, "That the sub-classes I proposed were inappropriate", so he is

meeting that argument, and if you go one, two, three, four, five paragraphs down there is a paragraph that begins, "On the other hand".

THE PRESIDENT: Yes.

MR HOSKINS: And if you pick that up in the third sentence of that paragraph:

"The subcategories I chose in my first Report ..."

If I could ask you to read that paragraph, and then you will see that what he actually does is set out, cites paragraphs 21, 22 and 24 of Mr Biro's report simply to say that he agrees with them.

THE PRESIDENT: Yes.

MR HOSKINS: And then to be fair you pick up the last paragraph, "These points seem correct to me", et cetera.

THE PRESIDENT: Yes, and then after the quote he says:

"The points seem correct ..."

But he thinks -- his preliminary view is that they probably will be the most appropriate. Yes.

MR HOSKINS: That's right, but he says, but let's not go nap on this until we've had further information, so there is actually common cause between Mr Biro and Dr Lilico that it is premature, or it would be premature to identify sub-classes at this stage.

So let's go to the RHA's position, because they are now the only ones who are suggesting sub-classes, and

that suggestion is based on the methodology of Dr Davis, so let's go to Dr Davis' first report, that's {F/5/12}.

THE PRESIDENT: Yes.

MR HOSKINS: You will see the heading in the middle of that page, "Sub-class definitions", and then in paragraph 24 he identifies the proposed six sub-classes, and as you have heard from others and as you are aware, Dr Davis' report describes a suggested common methodology that is to be applied to each of the six sub-classes, so there is one sort of overarching common methodology but it is then to give answers in six sub-classes or buckets, as Mr Singla called them.

You will see that in paragraph 25:

"The aim of this Report is to propose a common methodology ... for each Proposed Sub-Class of Proposed Class Members".

So he is looking for a common methodology for each sub-class. Over the page, page 14, paragraph 28 {F/5/14} he describes the common methodology. You will have seen this. We don't need to get into the detail of it. For our purposes it's just simply sufficient to note that he is proposing a common methodology, and then at paragraphs 31-32 {F/5/15} he explains that the common methodology will be used to estimate losses within each sub-class, and if you wanted to read to the fifth line

of paragraph 32 you will see that point being made.

Then if we can go to his second report, so it is the same bundle but this time tab 7, we can pick it up at page 21. {F/7/21}, paragraph 27(a):

"The Proposed Sub-Classes provide a framework within which there is a reasonable prospect that the Proposed Methodology can be applied (at trial) to evaluate the extent of any overcharge for members of the Proposed Sub-Classes {F/7/22}".

Then at page 24 {F/7/24}, if I could ask you to read paragraph 34 down to the word, "Similarly, I find Dr Israel's suggestion".

The point I particularly want to draw your attention to is the sentence that begins:

"While I agree with Mr Biro that flexibility in the definition of sub-classes is desirable ..."

He goes on to say:

"I do not see that he has raised a concern that would lead me to conclude that the Proposed Sub-Classes are not suitable as the appropriate starting point of a methodology that will be able to establish some basis in fact for the commonality requirement within each Proposed Sub-Class at the certification stage".

So what it appears is happening is that the RHA is seeking to rely on the fact that Dr Davis has proposed

a common methodology to be applied across six sub-classes, to bolster its argument that the commonality requirement is satisfied in spite of the diverse nature of truck transactions. It is the identification of a common methodology against the sub-classes that is then felt to be necessary to be relied upon in order to meet the commonality challenge.

Now, in our submission, the mistake the RHA has made is that it has failed to recognise the distinction between, on the one hand, its proposed economic methodology, and, on the other hand, the need to identify specific sub-classes in the CPO.

Let me just unpack that. The RHA can make its argument on commonality without having to have those six sub-classes specified in the CPO. It can simply have Dr Davis' report, his reflection that in his view there is a sufficient commonality. It doesn't follow that they can only make that argument if those six sub-classes are then identified or specified in the CPO.

Secondly, there is no necessary correlation between the formal identification of sub-classes in the CPO and the economic methodology that any expert might wish to apply. In order for an expert to apply a particular methodology, there doesn't have to be a sub-class, and the mere fact there is a sub-class doesn't constrain the

methodology that might be appropriate. There is no correlation. That's the mistake the RHA has made, and, on the contrary, as you have seen, Mr Biro has explained that there would actually be a danger that identifying sub-classes at this stage, on some form of assumption that this dictates or informs the form of economic methodology that might be carried out, would be potentially very damaging, and not just damaging for the defendants, potentially damaging for the claimants, and potentially damaging for the Tribunal's ability to have the best evidence before it, and this need, this importance of not straightjacketing the economic methodology by reference to sub-classes is actually recognised by Dr Davis himself. Let me show you three places in his second report where he recognises and accepts that danger. First of all at page 49, so we are still in {F/7/49}, paragraph 102, halfway down you will see a sentence that begins:

"Of course, it may be necessary in light of pleadings ..."

If you could read from there to the end of paragraph 102 please, so:

"Of course, it may be necessary", to the end of that paragraph. (Pause)

Then over the page at page 50, paragraph 107, again,

if you could read that please {F/7/50}.

Then on page 51, paragraph 111. {F/7/51}. Then finally, page {F/7/55} paragraph 118.

So let me conclude with our submissions in light of the evidence. The error made by the RHA is its assumption that in order to carry out Dr Davis' proposed methodology, specific sub-classes must be formally identified in any collective proceedings order. That is not the case. You do not need to identify particular sub-classes in order for a particular economic methodology to be pursued, and the inverse is equally true. The identification of particular sub-classes should not constrain an expert's choice and scope of methodology. There is simply no correlation or necessary correlation.

Once that is realised we submit it would be neither necessary nor appropriate to identify the sub-classes proposed by the RHA in any CPO it obtains at this stage for the reasons that they suggest, ie by reference to their economic methodology. Not necessary, it is not appropriate, and for those reasons we submit that no sub-classes should be identified in any CPO that is made at this stage of the proceedings whether for the UKTC because they don't seek any or for the RHA because the ones they seek are not appropriate at this stage. It's

neither necessary nor appropriate for the reasons they suggest.

Now if you were against me on that, we would make two alternative submissions. If you were minded to identify sub-classes in any CPO at this stage, we would suggest, first of all, that the Tribunal should make it clear that any decision on sub-classes at this stage does not tie the hands of any of the economists as to the methodology which they believe is appropriate to calculate any overcharge, and that's regardless of the reasons for which a sub-class might be identified, whether it is for the reasons put by the RHA or whether it is for reasons to deal with a conflict. The Tribunal should make it clear there is no correlation between identification of a sub-class and the ability to pursue a methodology. Further, or alternatively, the Tribunal should make it clear that any decision on sub-classes at this stage is not definitive, and may be revisited later in the proceedings, but you have my primary submission -- no sub-classes at this stage.

Sir, unless you have any questions for me, I have left Mr Pickford six minutes.

THE PRESIDENT: Yes. One potential division that obviously springs to mind from all we've heard if we were to go with the RHA CPO and whether we will or not is obviously

something we haven't decided, would be the new and used trucks, because it does seem to take on board what Mr Biro says, but on any view there are significant differences between them and then, of course, as you point out under the rules, whether we say it in the judgment or not, it is clear in the rules it can be revisited and further sub-classes may appear appropriate, but that does seem, and it doesn't split all the class members into one sub-class or another because, as we know, 40 per cent, I think, have bought both new and used trucks, but that those -- any analysis of price is likely to be different for the new and the used.

MR HOSKINS: Sir, I understand that and I understand why the Tribunal may wish to do that. The only caveat I would then put is that, again, it shouldn't constrain -- it shouldn't put a straitjacket on the economist because it may well be that they take the view that there is some merit in reading across between both sub-classes in order to determine a particular issue, I can't identify what it would be, but it might be useful to look at used trucks for new trucks or vice versa or both, so absolutely, if there is a good reason for identifying a sub-class the Tribunal, of course, should do it, but the only caveat then is that it shouldn't stop an expert

who believes it is appropriate to conduct a particular methodology from doing so.

THE PRESIDENT: No. I do not see how it could, really, because the expert must follow his or her opinion, I think it's all his in this case, but -- of what they think is the appropriate way of conducting their analysis, and if they say, "In my view it straddles both classes", or, indeed, "It splits a different way", then that's what they must faithfully do.

MR HOSKINS: Sir, that would meet our concern, absolutely.

THE PRESIDENT: Yes.

MR HOSKINS: We are not against sub-classes for the sake of it, we just don't want them used -- don't want it for the wrong reason and we don't want them then to be misused to try and constrain economic analysis. That's our simple point.

THE PRESIDENT: Yes. Thank you.

So, Mr Pickford, five minutes.

Submissions by MR PICKFORD

MR PICKFORD: Thank you. So I have two very short supplementary points on new and used trucks. We adopt everything that Mr Jowell says, and just make the following two additional points. Firstly, Mr Flynn has claimed that even if there is some conflict between class members they all, nonetheless, have the same

interest in maximising aggregate recovery. That was a submission he made in his oral submissions. That's obviously quite wrong. For example, it is highly likely that the interests of those who bought used trucks in maximising their returns goes against maximising proceeds for the entire class, because I think we understand from the RHA's evidence that about 25 per cent of the class only bought used trucks, and they will want the maximum amount of pass-on to be established. Ultimately that would lead to potentially 75 per cent who bought new trucks potentially getting nothing in extremis, so it's certainly not the case that every member of the class has the same interest in maximising aggregate recovery.

Second related point is that although Mr Flynn did seem somewhat uninterested in the possibility of there being two class representatives, the life line, as Mr Jowell described it, even if, contrary to Mr Jowell's submissions, it were otherwise an appropriate use of Rule 78(4), there would still be the problem, if one had two class representatives, of there being a single funder, and funders obviously have a very important role in litigation, and the funder's interests would be highly likely to conflict with one of the subgroup's. Indeed, the funder's interests, in our submission,

currently probably do conflict with one of the subgroups, because, of course, the funder does have an interest in maximising aggregate recovery because that's the pool, effectively, that ensures that, ultimately, it will make money in relation to the action, and that's contrary to the interests of those who purchased used trucks who do not have that same motivation and incentive.

Sir, I asked for five minutes, I think I have taken less. Those were the two points.

THE PRESIDENT: Yes. Thank you. Just pause a moment please. (Pause)

Yes. We've nothing further we want to ask you, but just some housekeeping matters. On Monday we will have the two experts. We certainly wouldn't spend more than half a day with either. We have no particular preference as to which order they come. It doesn't make any significant difference, but if you know or could let us know tomorrow really what's more convenient for the two gentlemen, I think, as to who's coming in the morning and who's coming in the afternoon, I expect they will want to watch each other anyway, so that's the first point.

Secondly, it may be that we will finish before 4.30 on Monday in which case if any of the defendants wants

to make any comment, as I think we were asked to permit on the expert evidence, they can do it then. One thing that we are very clear about is that we do not want to encroach on the time of Mr Flynn and Mr Thompson to make their replies on Tuesday, that they should have the full two-and-a-half hours each, so if there is anything else that somebody wishes to say about the expert evidence, you can let us know towards the end of Monday, and, if necessary, we will start slightly earlier, but at 10.30 on Tuesday we will get into replies, and there are a lot of you on the respondents' side, so you have to coordinate between you, but it is extremely important that both Mr Flynn and Mr Thompson have a full half day of court time each.

The other matter was we had some correspondence suggesting that we should rule as to which order UKTC and RHA make their replies on Tuesday. We honestly don't think to makes a great deal of difference, it's not going to affect the outcome. If you can't agree between you then we would have thought it sensible to follow the same order as for the openings, but if you wish to agree a different order you can. In a case of this nature, it's -- as I say, it's not going to affect the result.

Is there anything else you would like us -- yes,

Mr Thompson?

MR THOMPSON: Just -- I can assist the Tribunal, I may be able to speed things up, in that I have Dr Lilico here and given that indication Dr Lilico is available on Monday morning, and speaking for myself I know that Mr Flynn has strong views about who goes first on Tuesday, so I don't think we will agree it, so I think by default I will go first on Tuesday, and so if that makes things clear for everyone, then we can proceed on that basis.

THE PRESIDENT: Well, Mr Flynn, are you deeply concerned about this?

MR FLYNN: No, Sir, particularly not given your indication. We are perfectly happy for Dr Davis to go on Monday afternoon and for me to go on Tuesday afternoon, perfectly happy with that, and that's what we thought would be the logical order anyway, so thank you for that.

THE PRESIDENT: Well, that's what will happen, in which case we will now adjourn until 10.30 on Monday.

(5.10 pm)

(The hearing adjourned to 10.30 am on 26 April 2021)

I N D E X

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