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**IN THE COMPETITION**

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

**APPEAL**  
**TRIBUNAL**

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

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

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

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

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

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

20       MR FLYNN: Thank you.

21       THE PRESIDENT: Yes, Mr Harris?

22           Submission by MR HARRIS (Continued)

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

25           In the time available to me I have three principal

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

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

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

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

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

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

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

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

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

19 "A claimant database created ..."

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

3           Then of course there is McCulla and I'm going to be  
4           showing you McCulla under my next heading, "Individual  
5           actions", in a minute, but if the RHA class is certified  
6           then all of the RHA VOC will have to be removed but  
7           there is no methodology for that, but of course the  
8           RHA's position, or at least those of the underlying  
9           16,000 signed-up members of the RHA proposed class is  
10          that if the RHA CPO is not certified, they will proceed  
11          with the individual action, so on any view, all of the  
12          RHA VOC has to be --

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

15        MR HARRIS: Well, I will show you that.

16        THE PRESIDENT: Well, he said --

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

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

23        MR HARRIS: Well, exactly. That makes my point very well.

24          So what you are told today is something in the documents  
25          and then you are told something wholly imprecise about

1           what may or may not happen in the --

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

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

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

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

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

1 the same point applies to them.

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

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

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

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

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

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

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

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

25 "Edwin Coe has funding in place which means you can

1 pursue your claim without cost or risk".

2 But let me show you, if I may, another document.

3 This is for the Opus assistants bundle M, page 24

4 {M/24/1}, and that's a claim called A-Z Catering

5 Supplies Ltd, or at any rate that's the leading claimant

6 but if I may, you will see that there is a whole raft

7 of, on the face of it, small --

8 THE PRESIDENT: I think you have got --

9 MR HARRIS: It is the claim form at {M/24/1}, and then

10 {M/24/3} there is a list of the actual claimants for A-Z

11 Catering, and I don't know if that could please be

12 brought up on the screen, M/24/1, but let me give you

13 some figures. We've done it -- I will happily, if you

14 want me to provide these in writing -- we've been

15 through the claimants in this list that appears at the

16 annex, 84 claimants, and claimant number 2 has seven

17 trucks, it appears to be a small removal company,

18 claimant number 4 has ten trucks, claimant number 6 has

19 nine trucks. If you like, shall I send this in in

20 a table, Mr President, so you -- for your note?

21 THE PRESIDENT: Yes.

22 MR HARRIS: Claimant 8 is perhaps the most surprising.

23 Claimant 8 has one truck.

24 MR THOMPSON: Sorry, Sir, could Mr Harris give the

25 references to what he is referring to?

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

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

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

9 THE PRESIDENT: Are the particulars in the bundle?

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

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

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

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



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

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

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

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

14 MR HARRIS: There is.

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

17 MR HARRIS: You are quite right. Thank you very much.

18 Tab 25, page 4 is the list of the claimants. There are  
19 138 district or borough councils and that's all we need  
20 that schedule for. There are 138 of them, the first one  
21 being the District Council of Adur, if I have pronounced  
22 that correctly, but more relevantly for today's purposes  
23 is the next tab which are the schedules that were  
24 attached to those Particulars of Claim, and they  
25 identify the numbers of trucks for some of these

1 extremely small district councils.

2 THE PRESIDENT: Well, I mean I don't know if they are small.

3 I mean, district councils are not like a small family

4 business. They may not need many trucks --

5 MR HARRIS: Yes.

6 THE PRESIDENT: -- but they are, nonetheless, a substantial

7 entity.

8 MR HARRIS: Well, some of them at least in my experience are

9 extremely small and have extremely low funding, but I

10 take your point, I take your point, these are district

11 councils, some of them, not one man bands. However, the

12 point remains that some of them have made claims for

13 very small numbers of trucks, and there are lots with

14 small numbers of trucks.

15 Now, I'm obviously not going to go through this, but

16 I can provide a table, circulate it generally, but if

17 you were to look at Schedule 1A you can see that the

18 District Council of Adur, and you will see that the

19 number of trucks directly bought by that council from

20 the defendants was only three, and if you were to just

21 scan down it, you will see that, again, there are some

22 very small numbers in here. For example, the claimant

23 21 is five, and you can scroll through them, claimant 58

24 is eight.

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

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

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

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

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

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

18 MR HARRIS: There we go, exactly.

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

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

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

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

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

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

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

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

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

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

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

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

1 MR HARRIS: Exactly my point.

2 THE PRESIDENT: And this is a claim for 14,500-odd  
3 claimants.

4 MR HARRIS: 16,000-odd. Indeed.

5 THE PRESIDENT: 16,000-odd. Ah. It seems to run out at  
6 14,432.

7 MR HARRIS: I think it has been amended.

8 THE PRESIDENT: I see. Are you suggesting that's  
9 a procedurally efficient way of conducting litigation?

10 MR HARRIS: What we are saying is what it shows is that  
11 there is a practicable and, indeed, by these very  
12 claimants, it simply must be deemed to be a suitable  
13 action, otherwise they couldn't properly and responsibly  
14 have brought it.

15 THE PRESIDENT: Mr Harris, they may have brought it for  
16 their own reasons. From the court's perspective, do you  
17 think that's a procedurally efficient way of conducting  
18 such litigation?

19 MR HARRIS: We do, Sir, we do say that in just the same way  
20 that there are hundreds of claimants in some of the  
21 others, or tens of claimants in some of the others, in  
22 the UK litigation landscape that faces this Tribunal  
23 today, that is something that has to be regarded as  
24 a suitable way of proceeding.

25 Now, you can do it by way of test claimants, you can

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

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

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

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

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

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

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

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

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



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

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

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

25 MR HARRIS: Yes.

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

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

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

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

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

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

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

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

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

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

12        THE PRESIDENT: You get to the same place.

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

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

1 application of that nature in the middle of the hearing.

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

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

19 THE PRESIDENT: No. That's quite right.

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

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

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

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

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

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

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

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

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

6           MR HARRIS: Very good, but what I --

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

1 is in our skeleton.

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

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

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

1 even in the RHA action.

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

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

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

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

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

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

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

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

17          THE PRESIDENT: Paragraph 17.

18          MR HARRIS: Yes. Yes, and so there is -- so let's be clear.

19                    There is no application to amend to remove these  
20           companies.

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

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

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

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

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

14          THE PRESIDENT: Yes.

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

18          THE PRESIDENT: Yes.

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

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

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

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



1 as an opt-in.

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

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

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

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

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

24 THE PRESIDENT: Yes. Thank you.

25 MR HARRIS: Thank you.

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

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

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

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

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

18 MR PICKFORD: About 15 minutes, I think.

19 THE PRESIDENT: Hmm.

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

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

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

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

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

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

15                               Submission by MR PICKFORD

16       MR PICKFORD: I'm grateful Sir.

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

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

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

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

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

10          MR PICKFORD: Well I'm grateful, Sir.

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

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

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

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

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

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

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

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

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

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

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

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

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

17 Does the Tribunal have that?

18 THE PRESIDENT: Yes.

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

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

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

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

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



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

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

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

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

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

10 THE PRESIDENT: Yes.

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

15 THE PRESIDENT: Two.

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

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

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

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

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

17         (11.34 am)

18                                 (A short break)

19         (11.49 am)

20         THE PRESIDENT: Yes, Mr Jowell, is it?

21                                 Submission by MR JOWELL

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

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

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

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

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

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

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

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

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

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

11       THE PRESIDENT: Yes.

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

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

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

8 THE PRESIDENT: Yes.

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

11 THE PRESIDENT: Yes.

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

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

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

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

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

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

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

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

25          I would like to consider, first, the statutory

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

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

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

11           THE PRESIDENT: No. We can hear you. Can you hear us?

12           Mr Jowell, can you hear us? (Pause)

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

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

16           THE PRESIDENT: You are back. Yes.

17           MR JOWELL: I'm grateful.

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

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

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



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

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

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

19 THE PRESIDENT: Yes.

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

1 of the same claims, would be the most suitable.

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

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

15 MR JOWELL: Yes.

16 THE PRESIDENT: And you are effectively paraphrasing it.

17 MR JOWELL: Well I'm seeking to do a little more than that.

18 I'm seeking to somewhat elaborate on it, and if I may,  
19 but I need to set out, if you like, the basic provisions  
20 before I do that elaboration.

21 THE PRESIDENT: Yes.

22 MR JOWELL: So if I may, just to make certain observations,  
23 now, one accepts, of course, that it is limited, in  
24 78(2)(c) to the reference to the same claims, and so the  
25 question is, then, what are the same claims and the

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

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

1           78 and 79, what section -- what Rule 78(2)(c) means,  
2           when it speaks of the same claims, are claims that are  
3           eligible for inclusion in collective proceedings, and  
4           are the same claims -- and are for the same class and  
5           raise the same common issues, and if one pauses to think  
6           about it, that is also the most natural and common sense  
7           meaning of the, "The same claims", in the context of  
8           what is a class action regime, and where what is being  
9           considered is authorisation of the class representative.

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

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

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

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

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

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

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

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

4           Now, what that ignores is that the exception in  
5           11(a) is plainly intended to be an exception for persons  
6           that do not wish to be involved in collective  
7           proceedings at all. In other words, it is for people  
8           who probably either wish to bring individual proceedings  
9           or no proceedings, and the exception in subsection 11(a)  
10          was never intended -- it wasn't designed -- for class  
11          members as a wish to be part of some kind of parallel  
12          opt-in class, and the fact that UKTC have to propose  
13          that the Tribunal and class members engage in these  
14          sorts of acrobatics to try and circumvent the natural  
15          operation of the statute in our submission only goes to  
16          show that the statute wasn't meant to operate in this  
17          way.

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

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

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

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

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

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

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



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

3 What they say in paragraph 84, second sentence is:

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

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

21 THE PRESIDENT: Yes.

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

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

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

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

14 MR JOWELL: Those are model rules.

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

23 MR JOWELL: I take that point.

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

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

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

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

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

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

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

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

6           So those are our submissions on the competing --

7   THE PRESIDENT: Yes. Thank you very much.

8   MR JOWELL: I'm grateful. Thank you.

9   THE PRESIDENT: So next, is it Mr Singla?

10                               Submission by MR SINGLA

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

13           Before I do that could I very quickly correct  
14           a reference that I gave you in my submissions yesterday,  
15           please? It's yesterday's transcript, page 143 at line  
16           7, and I gave you a reference to Dr Lilico's third  
17           report, and I said there was an important paragraph  
18           there where he accepts that claimants are in different  
19           bargaining power positions, and I should have said it's  
20           paragraph 1.56 which is {F/3/15} and we do say that's  
21           a very important paragraph and a big concession in  
22           relation to heterogeneity.

23           So far as the RHA application is concerned --

24   DR BISHOP: Mr Singla, I'm sorry, I wanted to get that

25           reference accurately. Which of Dr Lilico's reports?

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

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

5 DR BISHOP: Okay. Thank you very much.

6 MR SINGLA: No, not at all.

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

25 Turning to overcharge, we submit that the starting

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3           individually?

4       MR SINGLA:  Yes.  We say this is not a case where the

5           commonality condition is satisfied.  That is our

6           submission.

7       THE PRESIDENT:  So if the McCulla case goes to trial we will

8           have to look at 16,000 claimants individually?

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

10          that --

11       THE PRESIDENT:  Well I want to know what you say, given the

12          submission you have just made.

13       MR SINGLA:  Well, we do say that these cases would be tried

14          more appropriately in the individual actions.  We do say

15          that the suitability condition is not satisfied.

16       THE PRESIDENT:  Well how do you say, then, the factual

17          aspect, if you say it has to be looked at by individual

18          claimant?  Is that what you are saying?

19       MR SINGLA:  Well, we are certainly saying that factual

20          evidence and disclosure are going to be very important,

21          whether this case is brought in the -- in an individual

22          context, or on a collective basis.

23       THE PRESIDENT:  Factual evidence from whom?

24       MR SINGLA:  From proposed class members, and --

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

1 disclosures from -- is that right?

2 MR SINGLA: That would certainly be the starting point.

3 THE PRESIDENT: I see. Fine. I understand.

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

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

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



1 an obligation to provide disclosure.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 Paragraph 126:

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

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

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

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



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

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

7           MR SINGLA: I'm grateful.

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

10          MR SINGLA: I'm grateful.

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

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

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

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

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

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

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

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

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

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

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

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

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

24        MR SINGLA: My understanding is that it has happened.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 THE PRESIDENT: 3.50.

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

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

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

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

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

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



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

5 THE PRESIDENT: Yes. It is. Yes.

6 MR HOSKINS: So that's what I would like to use my time for.  
7 20 minutes, I think 20 or 30, but I will deal with what  
8 you give me, Sir, but we do deserve a slot for that.

9 THE PRESIDENT: Well, if Mr Pickford has an hour-and-a-half,  
10 Mr Jowell has an hour on other issues, and Mr Hoskins  
11 has 30 minutes, that will -- sounds as though a truck  
12 was being driven rather fast through those -- when I was  
13 speaking -- then with -- it will take us slightly over  
14 5 o'clock because of the 10-minute break we should then  
15 conclude by very shortly after 5 o'clock. Does that  
16 cover what we are expecting to hear?

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

19 THE PRESIDENT: Yes.

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

22 THE PRESIDENT: Yes.

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

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

4       THE PRESIDENT:  Yes.  Thank you very much.  Very good.  We  
5           will return at -- well let's return at ten to two.  1.50.  
6       (12.56 pm)

7                               (Luncheon adjournment)

8       (1.51 pm)

9                               Submissions by MR PICKFORD

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

12       MR PICKFORD:  It is Sir, thank you.

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

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

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

1 which is the conflict between new and used trucks.

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

10 So those are my points that I intend to address.

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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



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

8 (Pause)

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

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

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

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

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

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

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

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

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

25 Second point, it is in respect of that target that

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

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

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

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

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

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

1 litigation seeking damages for personal injuries in  
2 Canada. The plaintiffs seek to certify a class pursuant  
3 to the relevant act, which is broadly defined to include  
4 all residents of Ontario, whether living or deceased,  
5 who have ever smoked cigarette products manufactured,  
6 marketed or sold by the defendants, so that's the  
7 context, and then the judge addresses the workable  
8 litigation plans and the need for them at paragraph  
9 75-78, so if we could please skip on to that? That's on  
10 page 20 of the bundle {JA/89/20}. So paragraph 75:

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

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

15 78:

16 "In my view ...

17 THE PRESIDENT: He says the class is 2.4 to 15 million.

18 {JA/89/21}.

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

1 is a clear path through to determination of damages.

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

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

7 78 first, two sentences:

8 "In my view --"

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

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

12 (Pause)

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

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

1           misunderstood the nature and degree of individualisation  
2           in Dr Davis' approach, and it is also a point that they  
3           make in their skeleton, and perhaps it is easiest to  
4           pick up their skeleton, actually, to consider this point  
5           in more detail. That's to be found in the A bundle, tab  
6           2, and I'm going to paragraph 40(b) which is on page 17.  
7           {A/2/17}.

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

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

14          THE PRESIDENT: Yes.

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

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



1           Now, if it really were true that the overcharge  
2 percentage were, say, 3 per cent for a claimant buying  
3 a particular make and model of truck in a given year,  
4 and say 2.5 per cent for a different claimant buying  
5 a different model in a different year, then that  
6 wouldn't really be an average at all, but that isn't  
7 what Dr Davis says he is going to do, so he has never  
8 said he is going to be producing an individual  
9 overcharge percentage that varies by claimant, by make,  
10 and by model of truck and by year. Only one of the  
11 RHA's points, the distribution channel, is relevant to  
12 his sub-classes, and there he simply distinguishes  
13 between direct and dealer purchases, and I would just  
14 like to give an example to illustrate the point so that  
15 we are clear about the degree of individuality that's  
16 really envisaged here, so let's take a given sub-class.  
17 Assume someone in that sub-class bought 10 trucks at  
18 £50,000 each, and that implies a value of commerce of  
19 £500,000. Let's say that it was a 2 per cent  
20 overcharge, so that would be a £10,000 overcharge.

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

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

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

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

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

1           Now, Dr Davis talks about using fleet size of a  
2 purchaser as a proxy for bargaining power, but he has no  
3 proxy to address the complex dynamics of the skill of  
4 DAF versus the dealer versus the customer. Now,  
5 Mr Ashworth, and we don't need to go to this, but for  
6 your reference it's paragraph 71, that's Volume D, tab  
7 19 at page 18, he explains a particularly striking  
8 example of the way in which bargaining ability can play  
9 out if a buyer negotiates a particularly good framework  
10 agreement which essentially establishes prices for  
11 a considerable period of time, and what that means is  
12 that the price for trucks potentially purchased during  
13 the infringement period may have been set, may have been  
14 bargained for, in a framework agreement that was  
15 negotiated outside the infringement period.

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

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

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

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

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

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

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

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

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

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

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

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

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

25           Now, the RHA purports to answer these types of

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

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

1           So that's one side of the coin.

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

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

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



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

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

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

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

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

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

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

15 Sir, I think that effect resets --

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

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

1 claim, so although --

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

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

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

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

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

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

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

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

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

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

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

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

21                 Now, in response the RHA --

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

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

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

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

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

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



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

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

12 MR PICKFORD: Yes, well --

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

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

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

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

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

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

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

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

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

15       THE PRESIDENT: Yes.

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

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

21       MR PICKFORD: Yes.

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

25       MR PICKFORD: Yes.

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

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

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

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

20          THE PRESIDENT: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

9 THE PRESIDENT: Mr Pickford you set that out in paragraphs  
10 27-28.

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

13 THE PRESIDENT: We have read it.

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

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

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

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

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

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

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

16 The proposals are no more than vague and barely  
17 formed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 time.

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

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

20 MR PICKFORD: Yes.

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



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

8           MR PICKFORD: Well --

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

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

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

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

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

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

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

1 consider, well, how are we going to deal with these  
2 16,000 or whatever it is separate tax questions, and  
3 find some sensible way, and we might then say, well,  
4 what does the claimant suggest, and Mr Davies might come  
5 back and say, well, it can be done simply this way, and  
6 you might be saying, no it can't, it's got to be done  
7 16,000 times, if that's what you want, and the Tribunal  
8 would have to think, well, what's the sensible case  
9 management of those questions.

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

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

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



1 MR FLYNN: Yes.

2 THE PRESIDENT: -- and the Tribunal would then assess,  
3 having then known what damages, primarily, as the  
4 principal sum is there, what's at stake and what's  
5 involved.

6 MR FLYNN: That's right Sir. At that stage there would be  
7 an issue of how those questions were to be addressed,  
8 and one possibility is that they would be addressed on  
9 a common basis, another possibility, my friends will be  
10 urging if we ever get to that stage, is that they cannot  
11 possibly be, and it is an individual one in every case,  
12 and there may be some solution in the middle.

13 THE PRESIDENT: Yes. Thank you.

14 MR PICKFORD: Sir, well, my only response, further response  
15 in relation to that, you have most of my submissions is  
16 that the RHA are adopting, as they do in relation to  
17 a number of aspects of these issues, a somewhat have  
18 their cake and eat it position there, in that they don't  
19 want to grapple -- they don't want to have to say that  
20 they are common but they do, in fact, ultimately want to  
21 come back and try and have the benefit of them being  
22 determined on a common basis, and obviously you have my  
23 submission in relation to how that would not be  
24 acceptable.

25 Sir, unless there are -- I'm just going to give my

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

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

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

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

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

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

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

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

7 "The RHA does not currently seek certification of  
8 these issues as common", the three issues. We have  
9 pressed on pass-on because we have some concerns  
10 regarding pass-on, because of its centrality to the  
11 case, and as to whether it is, therefore -- whether the  
12 whole proceedings are suitable, if pass-on is not  
13 included, so we have pushed Mr Flynn on pass-on, and he  
14 has responded to that by accepting that, well, it might  
15 be possible to include them, but as far as tax and  
16 interest, where we have not pushed him at all on that,  
17 51(b) is quite clear, read with (d), and now you say the  
18 claim form, which of course goes back much longer, has  
19 a list of things that are said to be common issues  
20 required, and you say it is inconsistent with that.

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

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

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

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



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

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

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

18 "47.11 and 12 will ultimately need to be dealt with  
19 in determining any final award of damages but it is  
20 premature to seek to deal with these issues".

21 Then in 51 they say:

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

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

1 have it certified now, albeit dealt with later, and at  
2 52 it's quite carefully worded, this, Sir, which is why  
3 I'm taking up some very precious time, but it's all  
4 quite carefully worded, 52 is:

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

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

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

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

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

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

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

1 anything on interest to be certified now.

2 THE PRESIDENT: Right. Well that is a change from paragraph  
3 47 because --

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

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

16 MR FLYNN: That is precisely right, Sir.

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

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

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

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

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

3 THE PRESIDENT: You can't hear me?

4 MR JOWELL: No, I'm not.

5 MR PICKFORD: We can hear you.

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

12 (3.27 pm)

13 (A short break)

14 (3.35 pm)

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

16 Submissions by MR JOWELL

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

19 THE PRESIDENT: Yes.

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

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

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

11 So that is where we say it fits in to the regime,  
12 then what is a conflict of interest? Well, a good  
13 starting point is the definition that's found in the  
14 Canadian authorities. If I could take you to one case  
15 on that, it's the Elders Advocates of Alberta Society  
16 which is in {JA/94/105}. You will see there paragraph  
17 521, it's up on the screen:

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

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

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

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

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

1           then they intend to deduct the second from the first.

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

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

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



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

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

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

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

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

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

3       DR BISHOP: I just had a little -- just a question for you.

4           You said that the Canadian case which I can't remember  
5           the name of which you mentioned was obiter, but isn't  
6           that also true of the point you took us to in the Elder  
7           Advocates of Alberta case?

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

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

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

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

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

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

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

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

9           Now, in this regard the Tribunal very generously  
10 sought to throw the RHA two lifelines in opening. The  
11 first was the possibility of reconstituting their claim  
12 as one for aggregate damages, well, the RHA have  
13 declined that invitation, and the other was to use Rule  
14 78(4) of the Tribunal rules to certify a separate  
15 representative for a sub-class. Well that also hasn't  
16 been taken up, but for our part we should just note that  
17 we understand that that rule is really dealing with  
18 a slightly different position. It is dealing with  
19 a position where some members may not have an interest  
20 in a particular issue at all. Now, we appreciate that  
21 the Guide also refers to a potential conflict of  
22 interest, and that might be, but we are doubtful that  
23 that particular rule is intended to be deployed where  
24 there is an actual and direct conflict of interest  
25 between members of the class, and in any event if the

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

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

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

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

1           you look at the bottom you will see:

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

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

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

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

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



1 a run-off period of eight years. He doesn't suggest at  
2 any point that that is a likely scenario. Now, time  
3 won't permit me to take you through it, but if you have  
4 time at your leisure, I invite you to read paragraphs  
5 167-176 of Dr Davis' report which you will find in  
6 Volume F1, tab 7, starting on page 73.

7 THE PRESIDENT: Sorry, which report?

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

10 THE PRESIDENT: Second. Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

16       THE PRESIDENT: Yes.

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

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

20       MR JOWELL: You have got the point.

21                 The next point we have are non-UK Trucks.

22       THE PRESIDENT: Would you pause for a moment?

23       MR JOWELL: Yes of course.

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

1 MR JOWELL: I'm grateful. (Pause)

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

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

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

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

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

25        MR JOWELL: No.

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

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

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



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

14 MR JOWELL: Well, let me make --

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

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

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

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

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

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

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

21 Finally, can I come to one class definition issue  
22 which has already been raised? And that is the question  
23 of hauliers that supplied on a cost-plus basis.

24 Mr President, you have already seen footnote 24 of RHA's  
25 claim form, and there have already been exchanges on

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

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

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

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

21       THE PRESIDENT:  Yes.

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

1 THE PRESIDENT: No, we understand that. Yes.

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

25 THE PRESIDENT: So just to understand, they are not

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

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

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

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

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

25           (Pause)

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

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

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

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

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

14           THE PRESIDENT: Well, I think we said we would sit until  
15           5 o'clock, so there is time for Mr Pickford's five  
16           minutes.

17   Submissions by MR HOSKINS

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

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

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

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

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

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

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

17 (c):

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

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

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



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

5 THE PRESIDENT: Yes.

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

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

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

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

17 And/or (b):

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

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

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

25 So those are the panoply of different stages at

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

11 There are, however, indications in the rules and  
12 indeed the Guide as to the sorts of roles that  
13 sub-classes might play. If we can go, first of all, to  
14 Rule 78(4) which Mr Jowell has already shown to you,  
15 78(4):

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

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

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

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

8 Which we've just seen:

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

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

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

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

1 THE PRESIDENT: Yes.

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

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

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

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

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

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

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

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

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

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

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

12 Paragraphs 38 and 39:

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

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

19 THE PRESIDENT: Yes.

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

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

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

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

4       THE PRESIDENT:   Yes.

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

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

23       MR HOSKINS:   Of course.  D5, tab 22.

24       THE PRESIDENT:  Yes.

25       MR HOSKINS:   So he explains in paragraph 62 under the

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

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

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

11 THE PRESIDENT: Yes?

12 MR HOSKINS: And then over the page {D/22/18}, paragraphs  
13 72-74.

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

19 THE PRESIDENT: Yes.

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

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



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

4 THE PRESIDENT: Yes.

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

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

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

12 THE PRESIDENT: Yes.

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

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

16 "The points seem correct ..."

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

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

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

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

3       THE PRESIDENT:   Yes.

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

13                 You will see that in paragraph 25:

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

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

1 of paragraph 32 you will see that point being made.

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

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

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

13 The point I particularly want to draw your attention  
14 to is the sentence that begins:

15 "While I agree with Mr Biro that flexibility in the  
16 definition of sub-classes is desirable ..."

17 He goes on to say:

18 "I do not see that he has raised a concern that  
19 would lead me to conclude that the Proposed Sub-Classes  
20 are not suitable as the appropriate starting point of a  
21 methodology that will be able to establish some basis in  
22 fact for the commonality requirement within each  
23 Proposed Sub-Class at the certification stage".

24 So what it appears is happening is that the RHA is  
25 seeking to rely on the fact that Dr Davis has proposed

1 a common methodology to be applied across six  
2 sub-classes, to bolster its argument that the  
3 commonality requirement is satisfied in spite of the  
4 diverse nature of truck transactions. It is the  
5 identification of a common methodology against the  
6 sub-classes that is then felt to be necessary to be  
7 relied upon in order to meet the commonality challenge.

8 Now, in our submission, the mistake the RHA has made  
9 is that it has failed to recognise the distinction  
10 between, on the one hand, its proposed economic  
11 methodology, and, on the other hand, the need to  
12 identify specific sub-classes in the CPO.

13 Let me just unpack that. The RHA can make its  
14 argument on commonality without having to have those six  
15 sub-classes specified in the CPO. It can simply have  
16 Dr Davis' report, his reflection that in his view there  
17 is a sufficient commonality. It doesn't follow that  
18 they can only make that argument if those six  
19 sub-classes are then identified or specified in the CPO.

20 Secondly, there is no necessary correlation between  
21 the formal identification of sub-classes in the CPO and  
22 the economic methodology that any expert might wish to  
23 apply. In order for an expert to apply a particular  
24 methodology, there doesn't have to be a sub-class, and  
25 the mere fact there is a sub-class doesn't constrain the

1 methodology that might be appropriate. There is no  
2 correlation. That's the mistake the RHA has made, and,  
3 on the contrary, as you have seen, Mr Biro has explained  
4 that there would actually be a danger that identifying  
5 sub-classes at this stage, on some form of assumption  
6 that this dictates or informs the form of economic  
7 methodology that might be carried out, would be  
8 potentially very damaging, and not just damaging for the  
9 defendants, potentially damaging for the claimants, and  
10 potentially damaging for the Tribunal's ability to have  
11 the best evidence before it, and this need, this  
12 importance of not straightjacketing the economic  
13 methodology by reference to sub-classes is actually  
14 recognised by Dr Davis himself. Let me show you three  
15 places in his second report where he recognises and  
16 accepts that danger. First of all at page 49, so we are  
17 still in {F/7/49}, paragraph 102, halfway down you will  
18 see a sentence that begins:

19 "Of course, it may be necessary in light of  
20 pleadings ..."

21 If you could read from there to the end of paragraph  
22 102 please, so:

23 "Of course, it may be necessary", to the end of that  
24 paragraph. (Pause)

25 Then over the page at page 50, paragraph 107, again,

1 if you could read that please {F/7/50}.

2 Then on page 51, paragraph 111. {F/7/51}. Then  
3 finally, page {F/7/55} paragraph 118.

4 So let me conclude with our submissions in light of  
5 the evidence. The error made by the RHA is its  
6 assumption that in order to carry out Dr Davis' proposed  
7 methodology, specific sub-classes must be formally  
8 identified in any collective proceedings order. That is  
9 not the case. You do not need to identify particular  
10 sub-classes in order for a particular economic  
11 methodology to be pursued, and the inverse is equally  
12 true. The identification of particular sub-classes  
13 should not constrain an expert's choice and scope of  
14 methodology. There is simply no correlation or  
15 necessary correlation.

16 Once that is realised we submit it would be neither  
17 necessary nor appropriate to identify the sub-classes  
18 proposed by the RHA in any CPO it obtains at this stage  
19 for the reasons that they suggest, ie by reference to  
20 their economic methodology. Not necessary, it is not  
21 appropriate, and for those reasons we submit that no  
22 sub-classes should be identified in any CPO that is made  
23 at this stage of the proceedings whether for the UKTC  
24 because they don't seek any or for the RHA because the  
25 ones they seek are not appropriate at this stage. It's

1           neither necessary nor appropriate for the reasons they  
2           suggest.

3           Now if you were against me on that, we would make  
4           two alternative submissions. If you were minded to  
5           identify sub-classes in any CPO at this stage, we would  
6           suggest, first of all, that the Tribunal should make it  
7           clear that any decision on sub-classes at this stage  
8           does not tie the hands of any of the economists as to  
9           the methodology which they believe is appropriate to  
10          calculate any overcharge, and that's regardless of the  
11          reasons for which a sub-class might be identified,  
12          whether it is for the reasons put by the RHA or whether  
13          it is for reasons to deal with a conflict. The Tribunal  
14          should make it clear there is no correlation between  
15          identification of a sub-class and the ability to pursue  
16          a methodology. Further, or alternatively, the Tribunal  
17          should make it clear that any decision on sub-classes at  
18          this stage is not definitive, and may be revisited later  
19          in the proceedings, but you have my primary  
20          submission -- no sub-classes at this stage.

21          Sir, unless you have any questions for me, I have  
22          left Mr Pickford six minutes.

23          THE PRESIDENT: Yes. One potential division that obviously  
24          springs to mind from all we've heard if we were to go  
25          with the RHA CPO and whether we will or not is obviously

1 something we haven't decided, would be the new and used  
2 trucks, because it does seem to take on board what  
3 Mr Biro says, but on any view there are significant  
4 differences between them and then, of course, as you  
5 point out under the rules, whether we say it in the  
6 judgment or not, it is clear in the rules it can be  
7 revisited and further sub-classes may appear  
8 appropriate, but that does seem, and it doesn't split  
9 all the class members into one sub-class or another  
10 because, as we know, 40 per cent, I think, have bought  
11 both new and used trucks, but that those -- any analysis  
12 of price is likely to be different for the new and the  
13 used.

14 MR HOSKINS: Sir, I understand that and I understand why the  
15 Tribunal may wish to do that. The only caveat I would  
16 then put is that, again, it shouldn't constrain -- it  
17 shouldn't put a straitjacket on the economist because it  
18 may well be that they take the view that there is some  
19 merit in reading across between both sub-classes in  
20 order to determine a particular issue, I can't identify  
21 what it would be, but it might be useful to look at used  
22 trucks for new trucks or vice versa or both, so  
23 absolutely, if there is a good reason for identifying  
24 a sub-class the Tribunal, of course, should do it, but  
25 the only caveat then is that it shouldn't stop an expert



1           who believes it is appropriate to conduct a particular  
2           methodology from doing so.

3       THE PRESIDENT:  No.  I do not see how it could, really,  
4           because the expert must follow his or her opinion,  
5           I think it's all his in this case, but -- of what they  
6           think is the appropriate way of conducting their  
7           analysis, and if they say, "In my view it straddles both  
8           classes", or, indeed, "It splits a different way", then  
9           that's what they must faithfully do.

10       MR HOSKINS:  Sir, that would meet our concern, absolutely.

11       THE PRESIDENT:  Yes.

12       MR HOSKINS:  We are not against sub-classes for the sake of  
13           it, we just don't want them used -- don't want it for  
14           the wrong reason and we don't want them then to be  
15           misused to try and constrain economic analysis.  That's  
16           our simple point.

17       THE PRESIDENT:  Yes.  Thank you.

18                   So, Mr Pickford, five minutes.

19                               Submissions by MR PICKFORD

20       MR PICKFORD:  Thank you.  So I have two very short  
21           supplementary points on new and used trucks.  We adopt  
22           everything that Mr Jowell says, and just make the  
23           following two additional points.  Firstly, Mr Flynn has  
24           claimed that even if there is some conflict between  
25           class members they all, nonetheless, have the same

1 interest in maximising aggregate recovery. That was  
2 a submission he made in his oral submissions. That's  
3 obviously quite wrong. For example, it is highly likely  
4 that the interests of those who bought used trucks in  
5 maximising their returns goes against maximising  
6 proceeds for the entire class, because I think we  
7 understand from the RHA's evidence that about 25 per  
8 cent of the class only bought used trucks, and they will  
9 want the maximum amount of pass-on to be established.  
10 Ultimately that would lead to potentially 75 per cent  
11 who bought new trucks potentially getting nothing in  
12 extremis, so it's certainly not the case that every  
13 member of the class has the same interest in maximising  
14 aggregate recovery.

15 Second related point is that although Mr Flynn did  
16 seem somewhat uninterested in the possibility of there  
17 being two class representatives, the life line, as  
18 Mr Jowell described it, even if, contrary to Mr Jowell's  
19 submissions, it were otherwise an appropriate use of  
20 Rule 78(4), there would still be the problem, if one had  
21 two class representatives, of there being a single  
22 funder, and funders obviously have a very important role  
23 in litigation, and the funder's interests would be  
24 highly likely to conflict with one of the subgroup's.  
25 Indeed, the funder's interests, in our submission,

1 currently probably do conflict with one of the  
2 subgroups, because, of course, the funder does have an  
3 interest in maximising aggregate recovery because that's  
4 the pool, effectively, that ensures that, ultimately, it  
5 will make money in relation to the action, and that's  
6 contrary to the interests of those who purchased used  
7 trucks who do not have that same motivation and  
8 incentive.

9 Sir, I asked for five minutes, I think I have taken  
10 less. Those were the two points.

11 THE PRESIDENT: Yes. Thank you. Just pause a moment  
12 please. (Pause)

13 Yes. We've nothing further we want to ask you, but  
14 just some housekeeping matters. On Monday we will have  
15 the two experts. We certainly wouldn't spend more than  
16 half a day with either. We have no particular  
17 preference as to which order they come. It doesn't make  
18 any significant difference, but if you know or could let  
19 us know tomorrow really what's more convenient for the  
20 two gentlemen, I think, as to who's coming in the  
21 morning and who's coming in the afternoon, I expect they  
22 will want to watch each other anyway, so that's the  
23 first point.

24 Secondly, it may be that we will finish before 4.30  
25 on Monday in which case if any of the defendants wants

1 to make any comment, as I think we were asked to permit  
2 on the expert evidence, they can do it then. One thing  
3 that we are very clear about is that we do not want to  
4 encroach on the time of Mr Flynn and Mr Thompson to make  
5 their replies on Tuesday, that they should have the full  
6 two-and-a-half hours each, so if there is anything else  
7 that somebody wishes to say about the expert evidence,  
8 you can let us know towards the end of Monday, and, if  
9 necessary, we will start slightly earlier, but at 10.30  
10 on Tuesday we will get into replies, and there are a lot  
11 of you on the respondents' side, so you have to  
12 coordinate between you, but it is extremely important  
13 that both Mr Flynn and Mr Thompson have a full half day  
14 of court time each.

15 The other matter was we had some correspondence  
16 suggesting that we should rule as to which order UKTC  
17 and RHA make their replies on Tuesday. We honestly  
18 don't think to makes a great deal of difference, it's  
19 not going to affect the outcome. If you can't agree  
20 between you then we would have thought it sensible to  
21 follow the same order as for the openings, but if you  
22 wish to agree a different order you can. In a case of  
23 this nature, it's -- as I say, it's not going to affect  
24 the result.

25 Is there anything else you would like us -- yes,

1 Mr Thompson?

2 MR THOMPSON: Just -- I can assist the Tribunal, I may be  
3 able to speed things up, in that I have Dr Lilico here  
4 and given that indication Dr Lilico is available on  
5 Monday morning, and speaking for myself I know that  
6 Mr Flynn has strong views about who goes first on  
7 Tuesday, so I don't think we will agree it, so I think  
8 by default I will go first on Tuesday, and so if that  
9 makes things clear for everyone, then we can proceed on  
10 that basis.

11 THE PRESIDENT: Well, Mr Flynn, are you deeply concerned  
12 about this?

13 MR FLYNN: No, Sir, particularly not given your indication.  
14 We are perfectly happy for Dr Davis to go on Monday  
15 afternoon and for me to go on Tuesday afternoon,  
16 perfectly happy with that, and that's what we thought  
17 would be the logical order anyway, so thank you for  
18 that.

19 THE PRESIDENT: Well, that's what will happen, in which case  
20 we will now adjourn until 10.30 on Monday.

21 (5.10 pm)

22 (The hearing adjourned to 10.30 am on 26 April 2021)

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