IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1339/7/7/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 6th December 2023

Before:

Hodge Malek KC
(Chair)
William Bishop
Eamonn Doran

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Mark McLaren Class Representative Limited

Class Representative

v

MOL (Europe Africa) Ltd and Others

Non-Settling Defendants

Compania Sud Americana De Vapores S.A.

Twelfth Defendant

A P P E A R AN C E S

Sarah Ford KC & Nicholas Gibson (On behalf of the Class Representative)
Mark Hoskins KC & Michael Quayle (On behalf of the Non-Settling Defendants)
Sarah Abram KC (On behalf of the Twelfth Defendant)

Digital Transcription by Epiq Europe Ltd
Lower Ground 20 Furnival Street London EC4A 1JS
Tel No: 020 7404 1400 Fax No: 020 7404 1424
Email: ukclient@epiqglobal.co.uk

Wednesday, 6 December 2023

(10.31)

CHAIR: Some of us are joining our live stream on our website so I must start, therefore, with the usual warning. An official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether oral or visual, of the proceedings, and breach of that provision is punishable as contempt of court. I am Hodge Malek, I am sitting today with Mr Bishop and Mr Doran. Can you just do the presentations as to who is who today?

MS FORD: Yes, I appear with Mr Gibson for the Class Representative. Ms Abram KC appears for CSAV and Mr Hoskins KC appears with Mr Quayle for the Non-Settling Defendants.

CHAIR: Let us just start off as to where we are. As I see it, there are six issues for today, so let us just clarify what the issues are. If there is anything else to add to the agenda, I will add it. First, is the settlement sum within a reasonable range such that in broad terms we should approve it subject to looking at the precise wording? Two is the split between damages and costs. Three is the proposed barring order. Four is the reversion mechanism. Five is distribution now or later. Six is the funding arrangements issue, and later on today, or maybe tomorrow, there will be directions on the stakeholder funding application. Does anyone else want to add something to the agenda? (No audible response) No, okay. So, let us look at where we are on each of those issues in order so we can see where we are for the rest of the day. On the settlement sum, is it within a reasonable range such that in broad terms we should approve it, subject to looking at the detailed terms? As a Panel, we have looked at all the submissions, looked at the evidence, and we are satisfied that it is within a reasonable range. It makes sense and what I do not want to happen is, particularly

where recoveries are relatively modest, this whole exercise of approving settlements becomes satellite litigation in itself at great cost which will eat up whatever recoveries there are going to be. So I would rather everything kept in very simple terms, and that do not expect a huge, long CAT-like judgment at the end of this. We really need to be focused on dealing with litigation in a cost-effective way. On the second issue, on the split between damages and costs, I would like to know how that split was done. Who proposed the split between damaged and costs? How it has been calculated and how it is proposed to deal with the costs. On the third issue, which is the barring order, there are really two issues on that. One is – well maybe there is more – but the first issue is: do we have jurisdiction in the absence of contribution proceedings on foot to make a barring order, given the wording of section 2(1) of the Civil Liability (Contribution) Act 1978? And the second is that, if we do have jurisdiction, should we be exercising it? I understand where the co-Defendants are coming from in relation to both of those issues and that the Settling Parties have calculated that the claims against them represent 1.7 per cent of the field and what they are saying is, we will reduce the damages claim against the co-Defendants by that percentage. But what if that percentage is wrong? What if it is 5 percent at the end of the day and it comes out at trial that it is 5 percent. What are we meant to do and if that is a real concern of the co-Defendants, as I think it is, that the percentage may not be right, is there a mechanism that can be put forward that adjusts the deduction when it comes to judgment and it may be that you can only do that by consent. So if, for example, it is not 1.5 but it is 5 per cent, that at trial and the damages figures is reduced by 5 per cent, and that way, the co-Defendants who are not settling are not going to be prejudiced, but I do think we need to look at the interests of the co-Defendants because at the end of the day, it is in their interests as well that this matter is settled. You take out one Defendant, it reduces the costs of the litigation and the claim against them is

going to be reduced proportionately. So, there is a benefit for them, but at the moment they are not happy with it and we can understand why they are not happy with it, but then is there a mechanism that can be done that can deal with their concerns, because I do not think Hoskins is in the business of being a luddite; you know, he is a practical guy and if there is a practical route that can satisfy what his concerns are, then it is worth pursuing. The fourth issue is the reversion mechanism and having read the settlement agreement, clauses 4.5 to 4.7, it is not clear to me, at least for me anyway and I am a simple guy, as to what is being asked of us at this stage because when you read those paragraphs it is saying: we will make a joint application to the Tribunal at distribution for this reversion mechanism. It is not saying: Tribunal, now you should cast in stone and say that reversion mechanism will kick in, because if that is what we are being asked to do, you may end up being disappointed because I do not know what is going to happened at trial. I do not know how this whole thing is going to be structured. I do not know what contribution notices there may be between the Defendants, but if the co-Defendants end up issuing contribution notices as I expect they will do, you may end up having a situation where the Tribunal at trial is going to allocate particular sums to particular Defendants. So, the Tribunal may say: okay, you are joint and severally liable for 100 million, or they may say no, you are not jointly and severally liable, you are only liable for your own shipments. Then they will say, as between all of you, one thing is clear, I can allocate how much of that hundred million you are going to be liable for, and if they say to one Defendant – each Defendant, let us say there are 10 defendants, you are all liable for particular sums, is it going to be right at the end of the day that, for example, one Defendant pays 10 million in respect of his own shipments, and then he is told that 10 million is not all going to the class members; a lot of them are not going to claim, and maybe there is 2 million change somewhere. Is it right that 2 million change goes to pay a co-infringer

in respect of his shipments? It may well be that the Tribunal, looking at it at the end of the day, will say, “we do not like this suggestion for a reversion”. They may say, “we do like it”, but it is too early, in my view, to make a decision on that. So, you have to think of where you are on that. The fifth issue, is distribution now or later? We are all agreed as a panel that the reasons for distribution later are good reasons, particularly given the size of the amount, and so we do think that the settlement sum should be held and you do not need to make a determination. But that one of the consequences of that is we are not in a position to know what it is going to look like, how it is going to be distributes in respect of which claimants and is it going to be in silos, and stuff like that, one representing one group of claimants, another representing another group of claimants. We just do not know and so that does have an impact on some of the other issues we have got to look at. The sixth issue is the funding arrangements issue, and as you know, I directed earlier that it is not really for me to deal with that, given that the main Tribunal is dealing with that, and assuming the main Tribunal is going to deal with it, do we make an order approving the settlement if that is what we want to do? Do we make that order now unconditionally, or do we make it conditionally upon that issue being resolved -- and we will hear submissions on that. So, that is where we are in broad terms and I think it is really for the Settling Parties to set out their pitch on each of the six issues and it may well be that as we go through we can deal with it issue by issue and in so far as I would like to hear Hoskins on anything, he can make his submission as we get to the relevant issue, but I will be hearing from him, certainly on the barring order and on the reversion mechanism. If he has got any views or assistance he can give on any other point, I am not going to stop him from saying it because we are all here to resolve this in a practical way, if we can, and that he can perhaps contribute on some of the other issues even though he is not here for that. We just want to get the right answer. That is all I really care about.

Okay. So do you want to start by taking us through the settlement agreement, and then we will then go through matters issue by issue. I am sorry to throw you out of your order. You probably had a speech all ready and all that, but I know you well enough that you are capable of doing it issue by issue, and you do not need to work from a script. If I thought there was any problem, I would not do it this way. Okay, so if you start off with that shall we.

MS FORD: Sir, I am very happy to proceed on that basis. The settlement agreement is at hearing bundle 1, tab 2, page 43.

CHAIR: Yes.

MS FORD: If we start, please, with clause 2.

CHAIR: Yes.

MS FORD: It is headed, it is on page 43, headed, "Terms of Settlement". The Tribunal will see that the parties agree that in full and final settlement of the collective proceedings as against CSAV, subject to the Tribunal making a Collective Settlement Approval Order, CSAV shall pay McLaren on behalf of the class a total of £1,500,000, defined as "the settlement sum". Clause 2.2 then explains how the settlement sum is broken up, and it comprises the damages sum. The damages sum, if the Tribunal looks across the page at page 42, is defined as "the sum of £1,120,000", payable to McLaren on behalf of the class.

CHAIR: Yes.

MS FORD: Then £100,000 by way of contribution to McLaren's cost of the approval application and in the event that those costs are less than the £100,000, they then go to CSAV's share of the costs of the collective action in accordance of clause 2.2C.

CHAIR: Yes. So, that is a convenient time to just talk about issue two, is it not?

MS FORD: The division between them.

CHAIR: Yes, because the – as I understand – just explain to me what is happening

on the hundred thousand. Let us deal with the hundred thousand. Is the idea that that hundred thousand is going in a pool or is that hundred thousand actually going to be used for the purposes of paying the costs of this application?

MS FORD: My understanding is that it is the second – that it is intended to be used to pay the costs of this application. Insofar as it is not used up, then it can then be allocated to satisfy CSAV's liabilities to make contribution to the £280,000 costs.

CHAIR: Let me just make a note of that. Now, as regards the 280, when I look at Friel paragraphs 20-22 on the other application, it seems to me that what is proposed is that the 280, although it is being paid by the Defendant in respect of their liability for the costs, it is going to go into the general pool and hence on the calculations you give credit for 1.7 per cent of it, as opposed 100 per cent for it for the purposes of that application. Is that right?

MS FORD: Yes. So I just make clear that the second application is contingent on the Tribunal's approval of this application, so certainly in our mind, we do not come on to those additional elements of it, unless and until the Tribunal is satisfied that this is a reasonable -- a just and reasonable settlement applying the statutory text.

CHAIR: But one of the issues – I know there is a bit of blurring between the two applications. We have got to be satisfied with this settlement agreement generally, and in doing that, there is a significant element of that which is £280,000 where I would have thought would make a lot of sense to be allocated in respect of costs incurred, actually or notionally, in relation to this particular Defendant as opposed to going into the general pool, because once it goes into the general pool, you are only giving credit effectively for 1.7 percent of it. So, it does feed both into the stakeholder's application and then whether or not we should be approving this settlement in the knowledge of where that 280 is going to be allocated, and that if the 280, you are going to tell me, is allocated generally and not specifically earmarked actually or notionally in respect of

this Defendant, even though this Defendant is paying it, then there may be different considerations.

MS FORD: Well, I think that is probably a point on which I need to take instructions.

CHAIR: You probably need to, it is quite an issue but by the time you leave today I will want answers on that and I want to be satisfied on that, okay? But at the moment when I look at both applications, I am not completely relaxed about the idea of how that is going to – you intend to allocate that 280. Just putting it on the table so you know where we are at the moment. There are no fixed views but that is where we are at the moment. So, let us carry on with this. At least I understand that the 280 as I understand it is going to be allocated notionally to the costs of the whole proceedings and when it comes to the stakeholder application, you are effectively going to give credit for 1.7 per cent of it.

MS FORD: That is the intention.

CHAIR: Yes, and you are --

MS FORD: I certainly make it clear; I have not attended this hearing -- because the Tribunal has indicated that they are not being listed at the same time, I have not attended this hearing with the intention of making a stakeholder application.

CHAIR: You do not have to make the stakeholder application. All I am saying is that the – we will come to the stakeholder application at the end of this – once we have dealt with all of this and hopefully we will come to it later on today, but in deciding whether or not to approve the settlement, it is a lot easier for us to approve it knowing that the 280 is treated in one particular way than in another possible way, and there are different ways of treating these things. At the end of the day, we just want to get to a position that we as a Tribunal are comfortable with this settlement overall. Okay, let us carry on then.

MS FORD: Sir, I understand that the first concern that the Tribunal has expressed is

to understand how the division is made up as between the damages sum and the costs figures. Would it assist to deal with that now, or would you prefer to go through the --

CHAIR: No, what I really wanted to know was, I have read obviously what is said about this in the evidence, is that -- is it a question of the relevant Defendant saying: look we are going to give you 1.5 million; we think that is a fair amount to pay, and then you go to them and say well, it would suit us if you allocate one point -- whatever it is -- in relation to damages and you allocate 100,000 for the cost of this application and 280 for this. Is that – I just want to know how you got to those particular figures because they seem to be – you know, 280 seems to be quite a specific figure.

MS FORD: No, that is not how we got to that figure, and I can show you what Ms Hollway says in her statement about how the 280 figure came up.

CHAIR: Let us have a look, yes.

MS FORD: It is hearing bundle tab 3.

CHAIR: Yes.

MS FORD: Then the part that deals with costs starts at page 73.

CHAIR: Yes.

MS FORD: The Tribunal will see that the proposed settlement provides that CSAV will pay 280,000 in costs and then the rest of the paragraphs go to explain how that sum was reached. The starting point was that, as recorded in paragraph 56, the Class Representative commenced settlement discussions with CSAV on the basis of its costs to 31 December 2022.

CHAIR: Yes.

MS FORD: Ms Hollway gives a fairly detailed explanation in the following paragraphs as to how those costs are compiled, and the sum that comes out of that exercise is at paragraph 58 where it says on that basis the Class Representative's total costs

claimed as far as is relevant to CSAV to 31 December 2022 is 1,667,000 odd, defined as “the collective proceedings costs”.

CHAIR: Yes.

MS FORD: In 59 it is then explained that it was apparent that the Defendants have agreed amongst themselves that any adverse costs payment would be split equally between each Defendant group that anticipated on that particular issue. So, it is said that the Defendants, therefore, appear to accept that on their adverse costs liabilities, they are to be split equally between Defendant groups. So, on that basis CSAV can be presumed to be liable for one-fifth of the collective proceedings costs, which gives you the sum of £303,494. Paragraph 60 makes the point that litigants cannot usually proceed on the basis that one recovers 100 per cent of their costs incurred, and so for the purpose of settlement discussions, that figure assumes -- rounded down to assume the recovery of only 85 per cent in CSAV’s favour, so that got to the 280,000 figure.

CHAIR: Let me just see if I understand it. Are you saying that you received an offer for the 1.2 or whatever it is, and then they have offered you that but then you say: well, there’s the question of costs, and then you came up with the figure saying: we want 280 costs. Is that how it worked?

MS FORD: Sir, you are asking me about the conduct of the negotiations. I do not think that is a matter that is actually addressed in the evidence. Actually the way in which the negotiations took place, I can take instructions --

CHAIR: I just – I really want to know how -- You know, how that figure was -- You have said this is how you calculated it. I just want to know whether or not when they made their original offer, was it an offer that said: we are going to pay you X for damages, plus an unspecified sum for the costs; or did they say: we are making you an offer, a global figure, and then later on you split that global figure down to the

proportions you have got? That is all I am trying to really get from you.

MS FORD: I will take instructions on that. (After a pause) I am told that the way in which negotiations were conducted is that the Class Representative's position was that we must recover the 280,000 in respect of costs sand the contribution in respect of the costs of the application.

CHAIR: Yes.

(10.55)

MS FORD: And then the sum that was recovered in respect of damages was separately negotiated and separately justified based on the considerations that go into the damages sums. So, it was not that there was a global sum which was then allocated as between the two; it was separately justified, essentially. I was half-way through showing you where we got the 280 from, because it does go on. 280,000 was assuming an 85 per cent recovery, but it only went up to the date of the start of negotiations. So it is 31 December 2022.

And so, obviously there were costs incurred post 31 December 2022. Paragraph 62 makes the point that the Class Representative's total costs were some 2,186,000 odd, of which CSAV's one fifth share would actually be £437,207, and so the 280 that was actually negotiated and accepted actually represents 64 percent of CSAV's share of the total costs to 31 March 2023. Now, that was considered to be an acceptable figure not least because, the point is made in 63 below, following the CPO hearing there was a recovery of costs of 65 percent payment on account for the costs in issue, and then following the appeal of the Tribunal's CPO decision before the Court of Appeal there was a recovery of 62.5 percent of the total costs claim. And so, a recovery from CSAV of 64 percent in total was considered to be an acceptable recovery of costs, but that was a sum which was built up from the factors that have been set out in Ms Hollway's statement, not one that was carved out of an overall settlement.

CHAIR: That is very helpful; that is all I really want to understand. We are not dealing with a scenario whereby you get an offer of, let us say 1.5 million, and then later on you justify the split ex post facto. What you are saying is, you got an offer for damages, with that offer for damages you said 'okay we will take that offer', presumably for 1.12 million, and then you say well, we have now got to agree a figure on costs and we agree 280 for the reasons that I have just seen here, and that we agree another 100,000 for the reasons to just deal with the costs of this hearing, and then that also feeds back to the other point with which we are going to deal. In those circumstances, if it is a specific figure that has been made in relation to this specific Defendant, is it right to put it for the purpose of the stakeholder application, and generally in these proceedings, to put it in the general pool, and we will come back to that. Yes.

MS FORD: I am reminded, my instructions were that both Settling Parties were prepared to accept a limited waiver of privilege in order to respond to the Tribunal's question in the manner that I have done. Obviously, that is not intended to waive privilege...

CHAIR: Yes, I think that, you know, you can try and play the privilege card with me but it does not really have a huge amount of weight, given all the detail you have put in about how you reach these figures and how you have negotiated things, and it is pretty difficult… And that is why, quite often when you are dealing with something like a Beddoe application it is sort of ex parte and the other side are not there, and you are quite open with the court, and you have got to be open with us in order to get an effective order. And so, quite often privilege does not really cut much ice, and there is already a limited waiver of privilege just making the application. What is unusual about this is that we have Hoskins here and that this is in open Tribunal, but I do not think it necessarily follows that when you are asking for a settlement to be approved it needs to be an open court, let alone other parties are here. Because, if for example

the settlement does not go ahead, you do not want the other parties necessarily to know about the detail of your negotiations, but we are where we are. But that is fine, okay. Let us carry on going through the agreement, shall we?

MS FORD: Yes, so that is continued at 2.2, page 28. Sorry, 2.2, starting at page 43.

CHAIR: So, we have got past 2.2, on page 43.

MS FORD: Yes.

CHAIR: Okay.

MS FORD: Yes, so we were dealing with the breakdown of the costs and the damages sum in 2.2. 2.3 is the mechanism for the payment of the settlement sum.

CHAIR: Yes, so where we have got to at the moment is that the Tribunal is happy with the damages sum, and I think we are happy with the costs sum, you have dealt with that. So, we have got past that bit subject to the allocation point on the costs, which you are going to take instructions on later and you will address me on that. We are now coming up to the barring provisions, take us through that.

MS FORD: We are. There is a paragraph in clause 2.5 which is relevant to the barring provision.

CHAIR: Yes.

MS FORD: And, that is the paragraph where 'In consideration of payment of the settlement sum' --

CHAIR: Yes.

MS FORD: 'the Class Representative agrees, as far as it is legally able to and subject to the Tribunal making the collective settlement through the order, that it would not seek and irrevocably waives all of its or their rights, first of all as against CSAV and CSAV Released Parties, in respect of CSAV's conduct as set out in the decision, and also against any of the Non-Settling Defendants any claims in connection with or relating to CSAV's liability or CSAV released parties liability for the conduct as set out

in the decision.' And that, the Tribunal will appreciate, is relevant to the barring provisions because it is --

CHAIR: Yes.

MS FORD: -- carving out, in particular, vis-à-vis the Non-Settling Defendants. We then come to clause 3, which is headed the 'barring provision'. Clause 3.1 is recording the agreement as between the parties, that CSAV's highest estimated share on the relevant market during the relevant period was 1.7 percent, and that is defined as the percentage market share. The basis for that is Mr Robinson's report. I can take the Tribunal to the relevant provisions of that if that will assist because it does feed into why we say that there is not really a problem, in terms of the Non-Settling Defendants...

CHAIR: I have looked at Robinson and all that. I understand how you got the 1.7 but the real question is, does Hoskins accept that 1.7, and if he does not, on what basis. Because, as I understand it you say, 'Well, look, if you are not happy about the barring provision now is the time to speak up. There is provision you are here today and you are in a position to argue it, and if we have got it wrong then you need to explain why we have got it wrong, and then we can have a debate and deal with it now.' And, it makes a lot of sense that if I am going to settle, if the Defendant is going to settle, it needs to know that they are not going to be hit on the back door and end up being embroiled in expensive litigation which they do not want. But let us just hear from Mr Hoskins on the 1.7 percent, just to know where we are. Mr Hoskins, if you could just tell us where we are on the 1.7 percent.

MR HOSKINS: We are not happy with...

CHAIR: Could you just explain why you are not happy with 1.7.

MR HOSKINS: With the 1.7.

CHAIR: Yes. You do not mind dealing with it this way, Mr Hoskins? I know...

MR HOSKINS: Oh, it is fine, yes.

CHAIR: Okay.

MR HOSKINS: Thanks very much. Our basic point is, you cannot and should not determine definitively the extent of CSAV's, let us call it 'liability', at this hearing. Because, this sort of hearing just is not appropriate for doing that and it would be premature to fix a figure, absent agreement as you said earlier. If there was an agreement between the parties, that is different. At the moment there is no agreement between the parties.

CHAIR: But --

MR HOSKINS: So, what we… Sorry.

CHAIR: But on that, what I need to really pin you down on is whether you are amenable, your clients are amenable in principle, to having a mechanism whereby these guys are out of the proceedings, which is to your advantage, and the claim against you is reduced by a sensible proportion, in which case I would have thought a rational person on your side, unless you are going to be a Luddite, would welcome that reduction in the claim against you. But is it really this… what is driving your position, is it this 1.7 point? And if it is, the point I made earlier is, that is something that, if the other side are willing to do it, is something that your clients can live with. Because if I was in your shoes I would be keen to get these people out because these proceedings are expensive; the more Defendants you have the more expense you have. If you are going to get appropriate credit, that is the critical thing if I was in your shoes, if you are going to get appropriate credit then it is a bit of a no-brainer, but you need to make sure you do get the appropriate credit and hence I would be nervous if I was in your shoes, at this early stage when you do not actually… you cannot be sure what that percentage is going to be, you do not want to be hit both ways. You do not want to have the trial, and let us say you go down, and then it transpires that actually the percentages are all wrong, and they say 'Well, you are liable on a joint and several

basis.' But if on the other hand the cake is reduced to a figure that is the right figure, objectively speaking, then that makes sense. Now, what they are trying to do is that they are trying to say 'Well look Malek, you can come up and decide what the right figure is today.' And I would be quite happy to reach a decision on what the right figure is today having seen the evidence that we have had from Robinson it makes a lot of sense. But if there is a flaw there and there is a counter-analysis which actually says, 'Well look Malek, you can be really careful about this 1.7.' It may in fact be much higher, on the other hand it could be even lower which is to your advantage. And that, if you are looking for a mechanism, you probably would not want a two-way mechanism, i.e. if it turns out that it is 1 percent you will want the credit for the 1.7 percent, but if it turns out that it is 5 percent actually you want to have credit for the 5 percent. So, it is really… if you can address me on two things. One is, what is the attitude of your clients to this revised mechanism, if that is going to be acceptable to the other side, whereby it is not cast in stone, this 1.7, and if it transpires it is a different figure at trial then you get credit for the different figure. And, two is that if that is not acceptable, and clearly you are going to have to take instructions, then what is the problem with the 1.7 on the evidence I have got? Because, what they are saying is, 'Well look, this is your opportunity. You have had plenty of time to respond and come up with your own formulation.' And, you are probably going to tell me, 'Look, I am not in a position at this stage in the proceedings to come up with what the figure is, in fact it would probably be quite expensive to get an expert now to do the analysis to come up with a sure enough figure that makes my clients comfortable.' And, just see how you respond to that.

MR HOSKINS: Sir, (inaudible) I will need to take instructions.

CHAIR: Yes.

MR HOSKINS: But subject to instructions, if we are protected in terms of if the

percentage is higher than 1.7, if we are not prejudiced in any way because we get the benefit of that, then that clearly goes to the concern we have with the 1.7. Simply, we do not know standing here now, what it is going to be...

CHAIR: No, I agree, but the way I look at it is that we are all very practical and your clients are big boys, they are not into the world of games, and that if there is something that you can live with and they can live with, then it is worth doing. But if it is something that you are potentially going to be stung at the end of the day by the scorpion's tail, you are saying 'Look, I am not really interested in this and I want to insist on whatever my rights are, and to preserve my rights of contribution.' And, one of the other things I wanted to have a feel for is that, although there is this argument about what section 2(1) means and whether it can apply in relation to where the contribution claim has not actually come up, I would imagine at some stage, and you will address me on this, that there will be contribution notices between the Defendants, if only to protect each of them against a joint and several liability order.

MR HOSKINS: There might be, I just cannot speculate. As you are aware, sometimes in these claims the defendants do issue contribution claims --

CHAIR: I know sometimes they do, sometimes they do not.

MR HOSKINS: Sometimes they do not.

CHAIR: But this --

MR HOSKINS: Sometimes they reach an agreement behind the scenes. I am not saying that is what has happened in this case, but there are sometimes formal contribution claims, sometimes decided not, sometimes agreements between the parties that are just commercial agreements as to how to split (inaudible).

CHAIR: But on the percentage figure.

MR HOSKINS: Yes.

CHAIR: You can see some merit in having a… what I have suggested is a possible...

MR HOSKINS: If someone puts a proposition to us --

CHAIR: Yes, but they --

MR HOSKINS: Addressed our concern, then of course we would consider it.

CHAIR: Well, I put the proposition to all the parties as to what it should be, but if at the end of the day the percentage turns out to be higher than 1.7 percent then there would be a haircut on the claim against the remaining Defendants by whatever that figure is. If in fact the percentage is lower than 1.7 there is not going to be a deduction because they have put their colours to the mast, they have given Robinson's analysis and he is saying it is 1.7. We can say it is 1.7, but I do not want them to have a sort of free kick later on down the line, in litigation where they are no longer going to be parties.

MR HOSKINS: Just off the top of my head, 1.7 is proposed on the basis that market share would be the appropriate approach --

CHAIR: Well it may not be, but that is what they are saying, yes.

MR HOSKINS: That is right, so my point is that the appropriate figure may not be simply at the end of the day, the Tribunal decides that CSAV's market share of the relevant shipments was X, because for example in relation to contribution claim the test is 'just and equitable', and in some cases that might be just market share, but for example in the Samsung case the Court of Appeal took the view that 'just and equitable' probably required you to look at market share and causation, and the extent to which (inaudible).

CHAIR: Yes.

MR HOSKINS: So, it is not quite as neat as saying the contribution claim is market share, there are a few lines there, but --

CHAIR: But when you look at the underlying decision or findings it is somewhat simpler I think, because the culpability as per the findings of this particular Defendant

is not necessarily the same level as the other Defendants, so I think it is a bit of an academic point there. But on… what you want to do is to be protected that when it comes to trial, if the court does decide that it is in the game of assessing contribution between people, that the haircut can be greater than 1.7 percent if that is what the court decides. And, on that basis they can go from the proceedings, and you are not prejudiced.

MR HOSKINS: If there is a commercial deal either brokered by this Tribunal acceptable to all, or put to us that we are happy with, of course we will consider it. Because as you say, we are not in the game of… we have no interest in stopping a settlement. That is not why we are here, we are just here to protect our position, and if as well as a commercial deal between CSAV and the CR there is something that protects our position that can be offered too, of course we will consider it, absolutely.

CHAIR: Yes, but the point I made earlier is that what I do not want to happen is all of this to become a very expensive exercise in itself, and that if that resolution, a proposal is going to be put, it needs to be put probably today and thrashed out today, and it is not a particularly complicated point, that the decision is going to be made certainly by the time we have to reach a formal conclusion. But if you just expand a bit on the 1.7 percent, you just say '1.7 percent market share', and you say, 'market share can be an element in assessing contribution, but not the sole element'.

MR HOSKINS: That is right. So, standing here today the crystal ball is not powerful enough to know whether that is right or not. It might be the right way to do it, it might not, but there is absolutely no way that here today we can look into the future and reach that conclusion, you simply do not have the evidence before you to be as sure about that. And equally, it is important to know what evidence you do have before you, if we can look at fourth report of Mr Robinson, so that is in bundle one, tab nine, page 168.

CHAIR: Yes.

MR HOSKINS: The evidence that is relied upon which is incredibly preliminary, and that is not a complaint it is just where --

CHAIR: Yes, that is all it can be at this juncture.

MR HOSKINS: -- they are, exactly.

CHAIR: Yes.

MR HOSKINS: But the source of the market share data, you will see it is publicly available fact books prepared by NYK, so it is not based on disclosure from the parties, which has as you know been provided, so it is based on these fact books. 2.7, Mr Robinson candidly accepts that there are limitations of the data, then he goes through some of the limitations in the data. And for example, I will not take you through them all, 2.11, second sentence, 'The NYK fact books do not specify whether the figures are on a global or regional basis, what types of vehicles these vehicles are transporting i.e. cars, vans, trucks etc; or whether the vehicles transported are new or second-hand', and then he has various assumptions. But then. just over the page he says, 'but the market share stated above may be different if only new vehicle carrying was considered'. And then 2.12, 'Additionally, market share data is unavailable on a route-by-route basis. However it is likely that market shares on certain routes will differ from overall global market share, insofar as it is likely that only a subsection of companies will service any given route.' So I make the point that the evidence which is proffered in order for the Tribunal to decide whether the terms of the settlement are just and reasonable, because that is why we are all here today, is not fit to determine the question that would arise at trial, 'What is CSAV's share of the relevant carriage?', what would be a relevant share if one gets into the contribution in terms of 'just and equitable'. So this is necessarily preliminary, and remember what we are… sorry.

CHAIR: But wait. Let us not confuse two things. The settlement they are proposing

can still be reasonable.

MR HOSKINS: That is right.

CHAIR: The question is, whether or not we ourselves exercise our jurisdiction under section two to make a barring order.

MR HOSKINS: That is right.

CHAIR: Because at the moment we have got past the figures of damages and costs, and we are satisfied with that. We are now looking at the barring order, and all I am trying to establish at the moment is what your position is. You have given a rational reason why your clients are understandably nervous about the 1.7 --

MR HOSKINS: Yes.

CHAIR: -- and their argument is that, 'No, this is your shot; you knew that the Tribunal was going to be asked to make a barring order, and at this stage you should file your own evidence.' And then you say in return to that, 'No, it is not a question of us filing any evidence of our own, we have really just two points.' The first point is, if you look at the evidence that has been filed it, it is not conclusive in itself as to market share for the reasons you have given. And two, that you cannot conclude at this stage that the only element in fixing the level of contribution is market share because other things come into it, though I put to you that given the nature of this particular Defendant I would be surprised if the court is going to come to a higher figure than market share, because of the lesser culpability. Because I think that that is probably where we are on that, so if you can sit down, I understand where you are.

MR HOSKINS: Can I raise one other point, because if I am just setting out my stall..

CHAIR: That is all we are doing, is setting out your stall so we understand.

MR HOSKINS: That is right. There is one other basket on my stall, which I would like to put on --

CHAIR: Yes, put it on the table, yes.

MR HOSKINS: -- the radar, if that is okay. Which is, let us just be aware, let us understand what this part of the settlement agreement is trying to do, because this is not simply the barring order. If you are thinking of the draft order, you have got paragraph six which is the barring order stricto sensu, which is, you are not allowed to bring a contribution claim. What the second order that is being sought is seeking to do is trying to determine in advance of the trial the extent of the Class Representative's claim against the Non-Settling Defendants, that is actually what has been done in this clause. Now when you understand that, trying to determine in advance of trial the extent of the Non-Settling Defendants responsibility to the claimant, that is a substantive issue; that is precisely the sort of issue that will have to be determined at trial. And what the applicants today are asking you to do is, in relation to that substantive issue fit for trial, is to decide it determinatively now. That is what the application is, you decide now the scope of the claim against us, but the carve-out is 1.7 percent. And when it is understood in that way it is a merit point, that is not how merit points are dealt with. You cannot simply turn up an application to decide whether the terms of a settlement are just and reasonable, and demand that the Tribunal, and demand that the Non-Settling Defendants, treat it as if it was a preliminary issue, and decide that merit issue. And that is what is actually happening here, so that is the third part of my stall --

CHAIR: We will come back to that.

MR HOSKINS: -- we just should not be doing that.

CHAIR: Ford will have an answer to that, and I will not give you my answer now but I think that it is not as simple as that, and that when you are dealing with barring orders at this stage you are going to have an element of rough and ready justice, just as you will have at trial when it comes to ascertaining the level of damages and how that is going to be apportioned between the parties, but I understand where you are.

MR HOSKINS: That is the stall.

CHAIR: Your stall is pretty clear.

MR HOSKINS: Set.

CHAIR: And all we are doing at the moment, we are going through the settlement agreement, Ford is just taking us through the relevant issues. Where there is an issue, and the answer is clear and we can resolve it straight away, we are resolving those straight away. But the barring order is one of those ones where, let us just see what it provides and then we will have full argument at the relevant stage over the next day or maybe tomorrow, and then we thrash it out and get to the bottom of it. It is really helpful though, to have your stall… yes. Yes.

MS ABRAM: I hear what you are saying Sir about hearing full submissions later on --

CHAIR: Exactly, we are just trying to identify… Look, it is so important to identify what the issues are, go through each of the clauses, and where there is a major issue which we cannot resolve quickly that is going to be for the next phase. Yes.

MS ABRAM: I think that is fair, so if I may just set out what my stall will be --

CHAIR: Yes, of course you can --

MS ABRAM: -- on those --

CHAIR: It's a matter of stalls, yes, that is...

MS ABRAM: -- on those points. So as to the 1.7 percent Mr Hoskins has taken you to some evidence, and I regret to say he has not taken you to the key evidence on market share, so --

CHAIR: Yes.

MS ABRAM: -- we will need to show you that.

CHAIR: Yes, of course.

MS ABRAM: And our submission is going to be that market share is the best show in town for the Non-Settling Defendants, and it really does not help them at all. And so,

I will want to show you the evidence there that goes to that.

CHAIR: But on this, are you prepared to consider the mechanism I put forward, to protect the co-Defendants? Because when you look at it, it is not just the 1.7 issue. They have got this issue of law about the interpretation of section two, and it is not an easy answer because whatever answer we give could go easily up to the Court of Appeal, and then you are talking about just ridiculous amounts of cost and delay, which I want to avoid. But when you look at the wording at section 2(1), their point is saying 'Look Tribunal, we have not brought the contribution claim; there are no contribution proceedings, and we know you have got this argument about subsection five but that is dealing with something completely different.' And so it is a controversial, unresolved point of law, that you can all roll the dice if you want, and there are risks for everyone in rolling those dice. There is a risk for you, there is a risk for Hoskins' clients as well. And so, if there is a mechanism that can deal with the scenario that 'what if 1.7 percent is not the relevant percentage?' If the Tribunal at the end of the day does not need to resolve that issue, and the 1.7 is accepted as the relevant haircut, then that is the end of it anyway; if at the end of the day that is not the relevant haircut, again it does not really concern your clients, as long as you have a barring order because you are out of the proceedings. What you do not want to happen is that your client does not want to settle now and then find itself embroiled in a trial where the costs are out of all proportion with the level of claim.

(11.20)

MS ABRAM: Yes, or that there is any risk in the future that my client might be brought back in.

CHAIR: That is right, and that is why I am saying that what you will have to have is an order that you are out and so come what may, you are not going to be required to pay any more money and you are not going to be involved in these proceedings unless

someone serves a witness summons or a non-party disclosure application. That is the end of it for you. And there is a mechanism, which I put forward, that may work; it may not work, but it is something that you should explore because of the legal risks that we have.

MS ABRAM: May I just make sure, because I suspect that I am not the only one in the room that is not fully clear on what the proposed mechanism is – can I just make sure that I have understood it?

CHAIR: That your clients go out of the proceedings and there is a barring order. That means no one can claim against your client in respect of this matter but when it comes to the damages claim, the damages claim for now is reduced by 1.7 per cent. However, if the Tribunal at the end of the day decides that that 1.7 per cent should be a higher percentage, for whatever reason, on the basis of figuring out contribution or whatever, then the haircut, and the overall damages claim, will be the higher percentage that they reach. If they do not get to that position and no one argues it, then it is still going to be 1.7 per cent, but it has to be open to the Defendants to argue at trial that that 1.7 per cent should be a higher figure. They are not going to argue it is going to be a lower figure, so no one needs to worry about that, but that is what I am proposing in lieu of everyone rolling a dice and that – if this settlement was 100 million or something, yes, of course, it is worth arguing these points and if you go to the Court of Appeal and the Supreme Court and like all these CAT cases here, go on appeal, but you do not have the luxury of time. The more you are involved in these proceedings, the more money that you spend, and we are talking about three and fourpence relative to the size of this case as well. And so I am just suggesting that people need to be practical and come up with a formula that everyone is happy with and I think it is perfectly possible to come up with a formula, but I cannot impose a formula on you because of the argument about the interpretation of section 2(1) and

that if Mr Hoskins is right about that he has his own barring order because he can say, "Look, Malek, you can't do what you want to do unless we agree" and I am saying to him, "Are you a Luddite?" and he says, "No", and then it is in his interests to agree something that reduces the claim against him and for you – certainly from your point of view, it is no skin off your back that there is a possibility of the percentage being higher because you are out of the proceedings. The person who probably needs to consider it more is Ms Ford because what she has to think about is, "Are my clients willing to accept the possibility that the figure might be higher than 1.7 per cent?", but then if that is right and the actual figure is more than 1.7 per cent, well, there should be the haircut anyway. So, that is where we are.

MS ABRAM: I hear that, Sir. On that basis, then the mechanism obviously would not be any skin off the nose of my client.

CHAIR: No, exactly.

MS ABRAM: So I would not be concerned by that. We would still say, though, that there is no world in which CSAV's liability could be higher than 1.7 per cent and there is no basis being put forward for that, but I will address you on that –

CHAIR: Yes. Of course, Mr Hoskins can argue that later.

MS FORD: Sir, it has been very helpful to hear you set out the elements of the mechanism that you had in mind. It might be helpful to look at how that impacts on to the provisions of the settlement agreement.

CHAIR: Yes, sure. At the moment, you are just taking me through the settlement agreement. We are identifying the relevant clauses. We are getting rid of the points that we think we can get rid of straightaway and the bigger points, like the barring order, is going to be subject to fuller argument later on today and you will have probably had time to take instructions on what I have put forward here.

MS FORD: Yes.

CHAIR: Yes, so we go back to –

MS FORD: We go back to page 44 then, paragraph 2 of the barring provision.

CHAIR: Yes.

MS FORD: So, you envisaged that CSAV would get a barring order, that is point two, paragraph 3.3(a) of what the parties contemplate seeking from the Tribunal, so a barring provision on the lines of that referred to at paragraph 6.131 of the Tribunal Guide, which was the reference on the second Defendant's claim for contribution from CSAV. So, that is what was provisionally indicated would happen. The damages claim is reduced by 1.7 per cent. That is also reflected in terms of the settlement agreement in 3.1.

CHAIR: Correct.

MS FORD: Where we respectfully depart company from the Tribunal is the notion that one could then revisit the position if the Tribunal were to decide that the 1.7 per cent should –

CHAIR: That is where you are going to have to – if you want to be sure that you are going to get through this in a reasonable period of time, that is where the give and take is going to have to take place. Look, Mr Hoskins is going to have to give and take for the reasons we have discussed because he is going to give up his card that he relies on the interpretation of section 2(1) and he is not going to appeal it. You have to take a view as to whether or not that is something that prejudices you sufficiently greatly that you want to roll the dice because you may take the view, "Well, look, if at the end of the day the figure is going to be 1.5 or was it 1.7, or was it 2 per cent – it does not even make a huge difference in the scheme of things. If you are getting a fair sum from this Defendant and you have fewer Defendants to deal with, it is well worth doing but someone may take the view that no, let us just go out and keep firing the guns and then you find that actually you may not get the result you are hoping for.

MS FORD: Sir, I will be making the submission that this is not an issue which will be governed by whether or not we are prepared to engage in give or take.

CHAIR: Yes.

MS FORD: It is an issue which is governed by the statutory purposes which underpin the scheme. I will be showing the Tribunal one of the key statutory purposes is the government's desire to encourage and facilitate settlement of proceedings – collective proceedings.

CHAIR: Yes.

MS FORD: And it would be inconsistent with that statutory goal if the Tribunal were to leave open the possibility that a settlement could be reached on the basis of a particular percentage proportion of the share of damages and then approve that settlement on the basis of the evidence as it stands at the point where it is asked to approve it, but nevertheless permit that to then be reopened at a later point in the proceedings.

CHAIR: Yes, I understand. You do not have to accept what I propose, but you also have to understand that Mr Hoskins has certain rights, and he will argue that (a) we cannot make that assessment now, but (b), even if we were able to, we do not have that jurisdiction. He may be right, he may be wrong. I may agree with him. I may not agree with him, but history tells me, of all the times I have been in this CAT for years and years, that everything I seem to decide ends up in the Court of Appeal. And that if that is what is going to happen, it is going to cause havoc to whatever you want to do on this settlement because you need to know now or relatively soon where you stand. And everyone knows me. I am a very practical person. I'm trying to get something forward in the interests of your client and in a way that does not prejudice his interests. Now, I am saying you can roll the dice. That is absolutely fine. You have every right to do that and I will come to a view, or we will all come to a view as

to who is right and who is wrong. I really do not mind. It is up to you which way you want to play it, but clearly, you cannot make a decision now on your feet. You need to speak to your clients and decide where you are, but everyone is clever here. They all know what the strengths and weaknesses are. And no one is going to tell your client it is absolutely clear what section 2(1) means, that this Tribunal cannot go one way or another in which way it makes a decision. I have not made a decision at all on the interpretation of section 2(1). All I know is that there are respectable arguments both ways and once you are in that 'respectable arguments' part of the corral, you end up in the Court of Appeal. That is my experience in this place.

MS FORD: Sir, I think we would very much echo the need for finality.

CHAIR: Yes, that is what we want, but you say it works one way. You want finality to know that it is 1.7 so when you get a trial you know the haircut is 1.7. I say, "Look, you're talking about small change." It is not going to be 10 per cent. You know it is going to be either below 1.7, 1.7 or maybe a bit more than 1.7 and that is a risk that you will be able to assess with your clients but if you are going to get it through without any litigation risk or appeal risk, it has to be some give or take. I do not think it is a huge potential downside for your clients, but it is up to you. It is up to your clients. And you cannot make that decision on your feet.

MS FORD: I certainly hear what you say about that.

CHAIR: Yes.

MS FORD: In the meantime, we obviously –

CHAIR: In a way, I am on no one's side and I am on everyone's side because I can see it makes a huge amount of sense to settle this and that the amount that has been put on the table is within a reasonable range. I am not saying they are paying too much. I am not saying they are paying too little, but it is within a reasonable range. It is totally rational, and I really do not want this barring order point to be the thing that

scuppers something that is something desirable. It is clearly desirable to have settlement, but you can still have a settlement with the proposal that I have put forward. It is not that there is not going to be a settlement, but I can see when you look at the relevant Defendant's point of view, they just want certainty for themselves. They are the ones who are paying a sum in order to get out of this and what they do not want to do is to pay a sum and still be within it. But you can take us through the barring provisions and then we will go through the rest of the document and then by the time you need to address the barring order in more detail, you will have taken instructions and so will Mr Hoskins and then we will see whether or not there is a practical way forward but my desire, insofar as it is a desire, is to get all of this resolved in a way that everyone can move forward and we can say, "This has been done", and that the CSAV can walk away from this litigation and forget about it. That is what I am aiming to do. Okay. Anything else you want to say on the barring provision just by way of opening?

MS FORD: No, Sir, I think that pretty much covers (inaudible).

So, we are moving on to clause 4 which is distribution and reversion.

CHAIR: We can take a break now. We will take a break until 10 to 12. Which is the next provision you are going to take us through?

MS FORD: I was going to deal with clause 4.

CHAIR: Yes, and that is a relatively short point. Okay. We will deal with that after the break.

(11.39)

(Adjourned for a short time)

(11.51)

CHAIR: In case there is any doubt, Ms Ford, my intention is, if we can, to have a resolution today or tomorrow on your application so everyone knows where they

stand. Because it is not acceptable to me that vast sums of money are being spent on a settlement of this size.

MS FORD: Sir, that is a very welcome indication. We very much agree with that sentiment. I have had the opportunity to take initial instructions on the points that you were raising before the break, and it is something that we certainly see the sense in relation to this particular settlement of trying not to end up in the Court of Appeal.

CHAIR: No, you do not want to. And the Hoskins points are Court of Appeal points. Almost as night follows day, I would give him permission to appeal if I was against him and I would give you permission to appeal if I was against you. It is a point that could go either way.

MS FORD: And that in a way spills over into the reverter point as well because if there were a resolution that could pragmatically be achieved on the barring order but then the parties ended up in the Court of Appeal anyway on the matter of the reverter, that obviously undermines --

CHAIR: No, but I think the reversion point is that the way I looked at your settlement agreement at paragraphs 4.5 to 4.7, you said that you would be making a joint application to the Tribunal at the end of the day and to me that is perfectly acceptable to make the application. It may be accepted, it may not be accepted, but it is perfectly acceptable to us as a panel that you have at least liberty to apply. And when we get to that provision, we will come back to the Non-Settling Defendants' position on this, but if that is where we come to, that no one has been bound either way, I would be surprised if they are saying, "Well, I need you to resolve an application now" which should clearly be made at the end of the day. I understand what their points are about the reversion mechanism, but it is not a point that I feel comfortable in making a decision until we know how the Tribunal intends to deal with the damages issues and is it going to apportion the damages and all of that, it is just too early. But what

you proposed, I can understand it and it makes sense.

MS FORD: I am grateful for that indication and maybe that deals with --

CHAIR: But when we get to the reversion paragraph, what you will need to do is take me through paragraph 4 and then I will put questions to Mr Hoskins and then we will go and see if it is a live issue. If it is a live issue, it gets parked to this afternoon to be argued in more detail. All right? Thank you.

MS FORD: So, clause 4, distribution remit. Then 4.1 is simply recording the confirmation that CSAV is the first Defendant that settled in these collective proceedings.

CHAIR: Yes.

MS FORD: Clause 4.2 is recording the agreement that:

"The damages sum shall be held in escrow until the conclusion of the collective proceedings or such other time as McLaren considers it economical, proportionate and in the interests of the class to seek to distribute it and the Tribunal approves McLaren's distribution application."

I understand that the Tribunal is content in principle with the reasoning behind holding it in escrow.

CHAIR: Yes, this is an issue that I have said where we are and if you are happy with that, and I am sure you are and no one else is complaining about it, then that issue, I cannot remember which number it is, that issue has been resolved. Yes, thank you.

MS FORD: There is then a reference to the distribution application and that is a concept which is then declined given 4.3:

"McLaren should in due course make an application seeking the Tribunal's approval to distribute them the sum (less any deduction for costs, fees and disbursements approved by the Tribunal) to represented persons in accordance with the distribution plan prepared by McLaren in conjunction with the claims administrator in a manner

that McLaren considers to be just and reasonable (the 'Distribution Application')."

That is the point, Sir, that you have just alluded to, that this is not the last opportunity the Tribunal will have to satisfy itself that it is going to --

CHAIR: No, and what you propose there is perfectly sensible.

MS FORD: And then we do emphasise what is recorded at the end of 4.3:

"McLaren's main objective will be to make as many represented persons as possible aware of their right to a share of the distribution sum and to encourage them to come forward to claim their share of the distribution sum."

So that is an important intention which is recorded in the betterment agreement. Then 4.4 essentially is McLaren providing CSAV with notice of the distribution application as and when it is made. And then there are provisions. At 4.5 is the first mention of the reverter. It said that if any of the distribution sum remains after distribution and after any other payments directed by the Tribunal, McLaren will seek a direction from the Tribunal for a damages sum or remaining of the distribution sum, whichever is lower, or revert back to CSAV by way of process, and the final subparagraph, paragraph 6.125 of the Tribunal Guide, the reverter.

CHAIR: Yes.

MS FORD: 4.6 is then moving on to deal with the scenario where reverter provisions in a similar form are agreed with other Defendants in potential future settlements.

CHAIR: Yes.

MS FORD: And this is where we set out the proposal that would be on a first in, last out basis.

CHAIR: Yes, I can see that.

MS FORD: And 4.7 is simply giving an illustrative example of the way in which that would work. And 4.8 is, for the avoidance of doubt, a provision confirming that:

"Any terms of this agreement relating to the reverter will only be enforceable following

the Tribunal's approval of the reversion method set out in the agreement."

CHAIR: Okay, so on this 4.5 to 4.8, there is a number of points. One is: now is not the time to determine that. You can agree as a matter of contract that is what you are going to apply for, but you have made it pretty clear in 4.8 that at the end of the day it is going to be the Tribunal that determines this. You can make your joint application, it can be accepted, it can be rejected. And I do not have a crystal ball here that we can rely on with any accuracy because one scenario is that all the Tribunal does is come up with a global sum and says that it is all joint and several liability and that is it. Another, the Tribunal can say that actually we are actually going to say as against each Defendant what their contribution is. Or it may have a mechanism whereby it identifies a precise amount of damages which are going to go to different categories of that claim depending on which ship had shipped their vehicle. And whether this is fair or not may depend on how those decisions are made because Hoskins' clients may say at the end of the day, "We only want to be responsible for our own shipments. Why should our damages that we pay in respect of our shipments be used to reimburse someone else who is a member of a cartel so they do not end up paying anything in respect of their shipments and that the money that we are paying in respect of our shipments goes into that pool?" So you can see what they could argue, but it is too early.

Let me speak to Mr Hoskins and see where he is on this because we do not want to have a huge argument on something that is really for another day.

MR HOSKINS: I completely agree. Let us take the prior question of when should this issue be decided? Because if the Tribunal decides it is later, then you do not need to get into the rest of --

CHAIR: It is later.

MR HOSKINS: May I make submissions, just make some points on that?

CHAIR: No, but if you are going to say that we need to determine this whole issue of reverter today, then that is one thing. When I said I do not have the information and a crystal ball to make that determination today, I cannot be better than the crystal ball that I do not have. And if you are saying, “Malek, please make a ruling on whether or not if this reversion application is being made it is going to be accepted in advance”, I just cannot do it, can I?

MR HOSKINS: No, I agree with that. I would make a quick point about a potential advantage to deciding it today, but if that is going to be, if the scale is already there and I put something on it that shifts it to there, then --

CHAIR: I do not want you to say you have not had a fair hearing, but --

MR HOSKINS: Yes, that is why I am only going to be quick. I am not going to take a lot of time.

CHAIR: The thing is that I have had this so many times, including with you, but you have two levels of submissions. Your skeleton argument are your submissions and I use these hearings to bring out the points I need real help on, I am not sure of, and you elaborate on what you have done. So if you think I am cutting you off, it is not that I have not considered what you said, but please, I will humour you for five minutes. You can have five minutes, okay? Okay, let us hear it.

MR HOSKINS: The question is what shall we do about the proposed reversion, which is an agreement to make an application later.

CHAIR: That is all it is.

MR HOSKINS: That is right.

CHAIR: And I am not going to give them, I do not mean that pejoratively, but I am not going to say that this application has got any merit at all.

MR HOSKINS: And I do not want you to do that. I would discourage you strongly from that.

CHAIR: Exactly, but I do not want to get into that unless I have to.

MR HOSKINS: I understand.

CHAIR: Yes, okay.

MR HOSKINS: We are in exactly the same place and I just had a little point to make that will shift the scales that way but will not shift the scales from where you are at the moment. So it is up to you whether --

CHAIR: No, but I do not want Hoskins to go round saying --

MR HOSKINS: I would never say that.

CHAIR: -- Malek did not allow me to say --

MR HOSKINS: I would never say that.

CHAIR: Please make your point and I will note it down.

MR HOSKINS: Exactly, and then we will all be done.

CHAIR: Okay.

MR HOSKINS: The Class Representative has said that it intends to adopt the same approach to the other Defendants. So what was likely to happen is it is not just simply we will get to the end of this and there will be one application for reversion. There will be a queue of reversions of this sort.

CHAIR: Only if there are intervening settlements.

MR HOSKINS: Absolutely, yes, of course, only if there are intervening settlements. And there is a risk that this sort of ... the trouble is with prioritising people by giving them this cherry, saying that if you settle first you get a better position on reversion, of course as people settle, people that settle later get the rough end of the stick. They do not get the cherry; they get the stick. And so this mechanism, there is a risk, but higher than that, they will progressively make it harder to settle the cases because the cherries will have gone. And that is the only point that I put in the balance.

There is a more important point, Sir, which you raised actually, the Tribunal raised,

about the reversion and the scope of the reversion because you are required under the Act and the rules to determine whether the settlement, the terms of the settlement, are just and reasonable. And you raised the question about rule 93(6), which is about the fact that undistributed damages awards cannot be subject to reversion. They have to go to charity. And you asked me as a sort of good citizen just if there were any points that I had to raise and the problem with the settlement, I think it is easily fixed, but I will raise the point, is if you go to paragraph 4.5, the proposed reversion covers any of the (capital D, capital S) Distribution Sum that remains. And the Distribution Sum as defined on page 42 --

CHAIR: Yes.

MR HOSKINS: -- includes both funds received from further settlements and damages awarded.

CHAIR: Correct.

MR HOSKINS: So at the moment you have a proposed reversion that would be unlawful, and again it is up to you whether you want to decide that now, but it seems more sensible to get that right now, you cannot have a reversion in relation to undistributed damages sums, but that is just a question, I think, of definition rather than a point of principle in the settlement. I do not know if Ms Ford is --

CHAIR: Yes, (inaudible).

MR HOSKINS: She should have come to the same conclusion in light of the Tribunal's question because that is what (inaudible).

CHAIR: I cannot say what I would do at the end of the day if I was the chairman dealing with this, but I would certainly be happier that if there is an excess it goes to charity than it goes back to someone who has been found to have, let us say, infringed, much happier, and there is a public policy involved there. And that is why I do not really want to say too much about this because I do not want to find --

MR HOSKINS: If I might, Sir, my point is the reversion as currently drafted is not legally possible.

CHAIR: You say you cannot even do it at all.

MR HOSKINS: That is right. It is not a question of choosing between reversion to defendants and to charity. You cannot revert undistributed damages awards. You can revert undistributed settlement funds.

CHAIR: Yes, I understand. But what you can do is revert on a private basis any paid damages by way of a settlement. But if there is an award by the Tribunal you do not have that option.

MR HOSKINS: That is right. And the whole purpose of that is to encourage settlement because you might get the cherry back if you settle. You do not get any prospects of getting it back if you go to trial.

CHAIR: Yes, exactly. And so you are saying that actually there needs to be a proviso in clause 4.5 to make that clear.

MR HOSKINS: It is a drafting tidy up point.

CHAIR: Yes.

MR HOSKINS: As long as the Class Representative accepts the legal position is as I have just described it.

CHAIR: Yes. I think that, subject to that one point, then I am happy with clause 4.

MR HOSKINS: I thought you might be, Sir.

CHAIR: Yes. Ms Ford. (Pause). So, Ms Ford, where we are on clause 4, I am happy with clause 4, subject to you considering, and you do not need to do it now, this point that Mr Hoskins raised about the charity and what you can do in relation to settlement sums and under undistributed damages sums if there is an award and where the charity fits in. And that you will have time between now and this afternoon to do any changes, if you feel there are changes, if you feel there are no changes when we come

back to this point later, we can argue it.

MS FORD: Sir, yes. I think an immediate response now, which is that we accept the legal position that one cannot have a reversion in relation to sums which are damages awards rather than settlements.

CHAIR: Yes, that is what he is saying.

MS FORD: We do not dispute that at all.

CHAIR: He is saying just make that clear in the wording and it is not a big deal, I think, that as long as there is a proviso in here that makes that clear, then I do not think there is much between us, is there?

(12.09)

MS FORD: So the effect of the first in, last out mechanism is that CSAV never gets more than 100 per cent of the money it put in. And because it is first in, last out, money from other sources gets distributed first and so CSAV's reverter should not be coming from sources from which it is unlawful. It only ever --

CHAIR: I agree.

CHAIR: I agree, but just needs to make it clear.

MS FORD: I can check whether or not there are any tweaks that need to be made in order to make that clear, but in our submission the position on the agreement is not unlawful, it is that the reverter will only operate as --

CHAIR: There are two ways of dealing with it. You either amend this agreement and put a proviso in there which is just maybe one line. Or you have a letter from both of you that confirms that that will not happen and that is not the intention, and everyone will be happy with that as well. But let us not leave it unwritten somewhere.

MS FORD: We will verify that step is necessary or whether or not, in fact, when one carefully reads the provisions, it is evident, but --

CHAIR: But the clarificatory letter means that it is no skin off anyone's back, it is there

and Hoskins is going to be relaxed and that we do not need to worry about it anymore, but the point is raised, it is something that I think I raised the other day in a letter, and as long as it is covered it is fine.

So on the reversion, we have dealt with the reversion, and the Tribunal is happy with the reversion as worded subject to that one caveat. So you are okay up to now, subject to the two points that have been left open for this afternoon.

MS FORD: Which is the barring order.

CHAIR: The barring order and the costs, what happens to the 280 and how that is going to be allocated, and you know what my preference is and you will see how that feeds into everything else.

So that is clause 4. Yes?

MS FORD: Clause 5 is essentially making provision for making the present application for approval and what should happen if the application were to be unsuccessful. I do not understand that to be --

CHAIR: No, that is absolutely fine.

MS FORD: Clause 6 is concerned with the related application in relation to costs, fees and disbursements which is going to be heard for directions today but not substantively.

CHAIR: Yes.

MS FORD: Clauses 7, 8 and 9 are stay of collective proceedings against CSAV, release and waiver and agreement not to sue.

CHAIR: Yes.

MS FORD: Clause 10 is a non-admission clause which is fairly standard.

CHAIR: Yes.

MS FORD: Clause 11 concerns the binding effect of the settlement agreement, and then clauses 12 to 19 are the boilerplate-type provisions.

CHAIR: So we are not far from resolving your application, hopefully. So are we back to the – is it really the barring order that is left?

MS FORD: It sounds like the barring order may be the sticking point, and I am conscious that you, Sir, have indicated that we should have an opportunity to take --

CHAIR: What I am thinking about is we come back at two and then the parties will have the chance to consider that and that the only other issue, which perhaps we could deal with now, is issue six. We have dealt with issue one, that is fine. Issue two we have nearly dealt with. Issue three we have not dealt with but we are trying to resolve. Issue four we have dealt with, issue five we have dealt with, and so is this a question about what is the relationship between us approving this order and what the main Tribunal is doing on the funding arrangements. Can we deal with that?

MS FORD: Yes. The question is that if the Tribunal were minded to approve the settlement it should do so unconditionally without reference to the funding position. The reason for that is that CSAV has entered into the settlement in knowledge of the funding position and in knowledge of what was going on in *PACCAR* and suchlike, and that is simply one of the relevant litigation risks that the Settling Parties would have factored in when they entered into their settlement. So in our submission the Tribunal should --

CHAIR: What happens if the main Tribunal says: “Well, we are just not happy with this?”

MS FORD: The funding?

CHAIR: Yes.

MS FORD: In our submission that is irrelevant to a matter that ought to have been resolved by the time we get there. The parties will have settled based on the perceived litigation risks as at the date the Tribunal approves the settlement, and indeed that is factually what the parties have done; they have entered into a settlement agreement

subject to the Tribunal's approval in the knowledge that these issues were out there. That is the way in which Settling Parties have to address all aspects of litigation risk. It cannot be the case, in my submission, that one then re-opens it again in relation to subsequent events.

CHAIR: But the percentage of this settlement sum is in costs and does it not have an impact on that?

MS FORD: I wonder if I might take instructions?

CHAIR: Yes, take instructions. (Pause)

MS FORD: I am told that the position is that the Class Representative still has a liability to pay the costs that have been incurred, even if the funding agreement were to transpire to be unlawful and unenforceable. Now, of course, the Tribunal has the point that we do not accept for a moment that that is the case but nevertheless if it were to be the case the Class Representative still has to be paid costs incurred. Of course, it may be that there is no means to do so if there is lawful funding agreement, but that does mean that the costs which have been agreed to be paid which go towards costs incurred to date under the settlement agreement would still go towards settlement of those costs. I think Ms Abram may have something to add.

CHAIR: Yes.

MS ABRAM: In my submission, there are two ways in which the Tribunal can deal with this possibility that the funding arrangements might stand up, and actually the point I want to make goes to the damages element of the award, not the costs element of the award, as to which we take Ms Ford's point. Let us imagine that you approve the settlement and we pay the damages sum and then the funding arrangements fall over with the consequence that the CPO is revoked and Mr McLaren is no longer the Class Representative. In that case, there would be a total failure basis in respect of the damages award, because there would be no one to distribute the award, he would

not be the Class Representative anymore, so he would not be able to give it. So we have a claim in unjust enrichment against the holder of those funds which I think would presumably be Scott+Scott on behalf of Mr McLaren at that stage. So one can deal with that in one of two ways, and we are in the Tribunal's hands. Either the Tribunal makes a conditional order to recognise that, subject to the settlement arrangements being sorted out and approved. Or one makes the final settlement award now and we then make a claim for unjust enrichment if and when that --

CHAIR: The problem is there is a stakeholder cross-application and you will find a significant amount of the damages are intended to be distributed now and paid out to the funder, and that could complicate things.

MS ABRAM: I cannot make any submissions to you on that.

CHAIR: When is the Tribunal going to determine this issue of funding? Ms Ford, do you have a hearing date, or anything like that, or the timings?

MS FORD: My understanding of what has happened is that the Tribunal asked for written submissions and we have provided written submissions which again I have only the loosest of understandings of what the substance of those are because we have asked specialist costs counsel to deal with them, but my understanding is that the Tribunal has found that the funding agreement in the *Sony* proceedings is not unlawful and that our agreement is extremely similar if not, in many respects, better or less vulnerable than the agreement which has been found to be acceptable by the Tribunal, and so I do not believe there is actually a formal hearing listed and one assumes that it would only be if the Tribunal could see that there was nevertheless an ongoing issue that assistance might be requested.

I am told that there is now a direction that there will be opportunity to reply to our submissions that have gone in and so presumably at that point the Tribunal will decide whether or not there remains an issue or not.

CHAIR: What are the timings on this?

MS FORD: Those behind me are checking. (Pause) It may be that the Defendants are able to assist as to whether they are proposing to file submissions or not. We obviously do not know at this stage.

CHAIR: Mr Hoskins, what is happening on this? I just want to get to the bottom of it.

MR HOSKINS: I am similarly dependent upon those behind me trying to look it up. I have not been dealing with the funding issues either. So I do not have it at the top of my head.

CHAIR: You do not know. But you can tell us at two o'clock when it comes back. The two options we have is either to accept the point that you have made, and we need to get to the bottom of your point today, or we say that any order is conditional upon that being resolved, and obviously we are aware of the *Sony* ruling, but you never know in this Tribunal what is going to be appealed and what is not going to be appealed, and so we will have to take a view on that this afternoon.

MS FORD: Sir, yes. And while we are stall-setting I should point out that we do not accept that in the event that the funding agreement would fall over, there would necessarily be a course that Ms Abram has indicated in terms of unjust enrichment. That is obviously a matter that would need to be addressed in due course.

CHAIR: You will have change of position and all that sort of stuff, and that is why it may be better for everyone that any order we make, particularly as you are not intending to distribute at this stage, is either conditional or liberty to apply in the light of the decision that the main Tribunal makes in relation to the funding arrangements.

MS FORD: Well, Sir, you have my point that in my submission that would not be appropriate given that the parties have entered into an agreement with their eyes open in the knowledge that these matters were out there.

CHAIR: I agree at the end of the day we, as a Tribunal, have to be satisfied. Stage

one is you reach an agreement, and as between you two that is your agreement, but stage two is that we have to approve an agreement and if we are aware that there is this one issue that is still live, are we comfortable in making an unqualified order while that has not been resolved, because it is not necessarily in the interests of anyone that if the funding agreement does not work, you get all the complications that will follow if – it will probably need further thought and working out, and I am not sure whether, if you want to know where you stand today, that it is going to be possible just for me just to say today: Yes, you are absolutely fine, I am going to approve it, let us forget about the funding application before the main Tribunal; or am I going to say that actually this order does not take effect until the main Tribunal has ruled on that, as to which there be liberty to apply in the light of any decision that comes out.

MS FORD: Sir, the functional position from our perspective is that even if the funding agreement were invalid and the funder has on that basis no entitlement to be paid, nevertheless the Class Representative has engagement letters with solicitors, counsel and suchlike, which remain valid, they are not undermined by the position of the funding, and in those circumstances there is still an obligation to pay those fees and that is what the costs under the agreement are referable to.

CHAIR: Ms Abram's point is different, is it not? We are initially talking about the costs position which I was concerned about. She has actually sent no money. The real problem is in relation to the damages because if, at the end of the day, the funding arrangement goes, you have no Class Representative because there is no CPO and so where does the money go, and then before you know it you have a mess, because then you will have an argument: I have just paid you some money, there has been a total failure of consideration, and we do not want that; we want something that is simple and practical.

MS FORD: Mr Gibson makes the point, Sir, behind your question is that what one

would do would be to revoke the CPO retrospectively and in its entirety. That would not necessarily be the position in circumstances where--

CHAIR: That is the point --

MS FORD: -- sums have been recovered under --

CHAIR: We do not know what they are going to do. That is the problem. Look, if I had my crystal ball I can tell you what I think they are likely to do but I do not want to bind them because it is their decision to make. But I do not want to step on anyone's toes, but you have the *Sony* decision and you are not asking for distribution now and so hopefully you will have a resolution on your other point – we will hear from Hoskins about timetable – but you will have a resolution of the other issue, one would hope in January – one would really hope – because I appreciate you have the May application – I cannot remember the dates, probably the 8th or 9th or something – you have that and you want all of this to be resolved well before then before you end up spending more money over the three and four pence we are arguing about today. I really do want to come to a position today that everyone knows where they are.

MS FORD: We heartily echo that sentiment.

CHAIR: So we will come back at two. If everyone can look at the barring order, you think further about whether or not this order can be made conditionally, in which case you can think about some wording to go in the draft order. You will try and get the wording on the barring order right, subject to speaking to Mr Hoskins and his clients and hopefully you will get to a landing on that because it really is a no-brainer that everyone will benefit from the barring order under the proposal I have put forward.

MS FORD: The barring order or reverter?

CHAIR: No, the reverter you have dealt with. The reverter: you are going to write a letter, are you not, confirming the position about the damages award. You are going to say: We refer to this clause. For the avoidance of doubt this clause is not intended

to cover damages awards by the Tribunal which will be covered by the relevant rule, whichever one we cited in the letter.

MS FORD: Subject to instructions I envisage that will be --

CHAIR: What I do not want to do unless I have to is to delay this any further, so someone can work on that letter. So the big thing to work out is whether or not you can come to a landing on the barring order if you can, then we are going to get everything resolved today. If you cannot then obviously we have a full argument to hear this afternoon. We have plenty of time to deal with the barring order, but certainly it is in no one's interest to have that in the context of this case. It is just not big enough and it is just going to lead to delay, which no one wants.

So I think we all know where we are now, what needs to be done. We will come back at two and we will see where we are. If you have any drafts and stuff like that, amended draft order, draft letter dealing with the reverter provision, I can look at that if it is sent through before two. If not, then just hand it up and we will go through it.

So we will adjourn until two. Thank you very much, everyone.

(12.29)

(The luncheon adjournment)

(14.02)

CHAIR: Yes, Ms Ford.

MS FORD: Progress has been made. Can I deal first with the point about the reverter?

CHAIR: Let me look at the wording. (Pause) Mr Hoskins, is that all right with you?

MR HOSKINS: I think --

CHAIR: It is the point that we --

MR HOSKINS: It looks like it covers the --

CHAIR: It is covered to my satisfaction.

MR HOSKINS: Absolutely.

CHAIR: Thank you very much.

MS FORD: The next is the position in relation to the barring order, and we have reached an agreement in principle as to some appropriate wording. It is subject to two caveats. One is that we may slightly twiddle with the wording; I understand there may be some wording-related suggestions that we can perhaps take offline, but the agreement in principle is there. The other is that I understand Mr Hoskins needs to take instructions from his client in Japan and so it is an agreement in principle subject to final instructions, but perhaps I can tell the Tribunal where we have got to.

CHAIR: Tell me what it is in principle. As long as Mr Hoskins is happy for that to be done in open court.

MR HOSKINS: I am fine with it.

CHAIR: Okay.

MS FORD: It is envisaged that there will be a section of the order which would be by consent, rather than being made as an order by the Tribunal, so an order by consent. The first paragraph within that section would say the Non-Settling Defendants will not claim contribution from CSAV.

CHAIR: Yes.

MS FORD: The second paragraph would then say: “In the event that the Tribunal determines that CSAV’s proportionate liability for damages in relation to the collective proceedings is a sum greater than 1.7 per cent of the total damages [and that is then defined as higher proportionate share] then the total value of commerce relevant to the collective proceedings and the damages which the Class Representative seeks from the Non-Settling Defendants will be further reduced by the difference between 1.7 per cent and the higher proportionate share.”

There is then a further paragraph which says: “The Non-Settling Defendants undertake

not to appeal this collective settlement", and that is intended to give the requisite closure that we do not all end up in the Court of Appeal. Then a slightly different point in relation to funding may not need to be in the part by consent – it will probably appear elsewhere in the order if the Tribunal actually makes the order. What we would suggest is liberty to apply in relation to the Class Representative's funding, and that should enable any matters arising from questions as to the funding agreement then to be brought before the Tribunal as appropriate.

CHAIR: That is fine. The final thing is what do we do about these related costs? I have been thinking about it. I will hear from you first and I will tell you what I think.

MR HOSKINS: May I just make one comment on the agreement? It is premised on the basis that in the settlement agreement between the CR and CSAV the Class Representative agrees with CSAV, the 1.7 carve-out. The way --

CHAIR: What there is going to have to be is there is going to have to be a supplemental settlement agreement. There is one that has already been signed that covers that point and obviously you will want to see what the wording is going to be.

MR HOSKINS: It is a different point.

CHAIR: It is a different point.

MR HOSKINS: The mechanism of the order of consent that has just been read out assumes the 1.7 per cent is already off the claim and, of course, because the settlement has not been approved yet there has not been an amended claim form, etc. I just want to point out that the premise of the mechanism there will presumably be an amended claim form that says not the 1.7 per cent. There is nothing claimed against us. Then there would be the consent order which works with that amendment.

CHAIR: Okay, that is fine. What will happen is that if we give the approval today, the order is going to have to be agreed between the parties, and hopefully by then you have your instructions from Japan, and then it is fine. But then I can make – at least

for today's purposes – a liberty to apply in the barring order provisions in case it all falls to pieces.

MR HOSKINS: It is more a clarification of this bit.

CHAIR: But are you starting to get instructions from your clients?

MR HOSKINS: Yes.

MS FORD: Sir, on that point, it is right that there is already a provision for us to refute our claim accordingly, so we can undertake in accordance with that relevant provision --

CHAIR: You do not need to amend the agreement at all then.

MS FORD: No, there is no inconsistency between the terms of the agreement and what is now being --

CHAIR: On the 280, where are we? There is a number of ways of doing it. We can park the issue and say that none of the costs can be distributed until further order, which is going to be the position anyway, apart from the 100,000 which I think you should be able to distribute that. If we are going to do that, then the issue is parked and no one is going to be harmed and then later on today we can deal with the application anyway.

MS FORD: Certainly we say that any concerns the Tribunal may have do relate to that application rather than this application, so in that respect it is essentially a matter for another day. But I can offer a little bit of further clarification in the hope that that puts the Tribunal's mind at rest in the meantime. Each recovery of costs that the Class Representative received is treated as recovered costs, and that is the case – for example, that was the case for the costs recovered following the CPO hearing and the costs recovered following the Court of Appeal, and in the same way the costs recovered from CSAV following settlement are treated as recovered costs. Then what happens to those recovered costs is then governed by a series of contractual

provisions as between the funder and the stakeholders which we can show to the Tribunal in the context of dealing with this separate application, but it is provisions to which CSAV is self-evidently not party, so it does not impact on them in any way.

CHAIR: But there is nothing in this agreement, if I approve this agreement, that prejudices this whole question of what happens to that cost. That is the most important thing.

MS FORD: Absolutely not.

CHAIR: And if we are going to have a debate about the costs in any detail, which we will have, it is better that we do it because you are the only people involved and we will work that one out – we will start working it out later on today.

MS FORD: That is absolutely the position.

CHAIR: That is fine. Thank you very much. Mr Hoskins?

MR HOSKINS: The housekeeping. In terms of the application today I would ask that there be no order as to costs as between the Class Representative --

CHAIR: I have not made the order yet.

MR HOSKINS: That is fine. So each bear their own costs and it is not wrapped up in the costs at the end of the day. That is simply the point I am making. We all walk away from this in the --

CHAIR: That is very generous of you. That is very sensible. Do you agree with that?

MS FORD: We have no objection.

CHAIR: No order as to costs when you draft the order. That is fine.

(14.12)

For Judgment, see [2023] CAT 75

(14.37)

CHAIR: Now, if we can go through, Ms Ford, the order, as to how it is going to look – can we do that now?

MS FORD: Sir, yes.

CHAIR: So, have you got the wording or are we just going to work from the one we have in the bundle?

MS FORD: We have not amended it, but the only amendments are the ones that I read out to you.

CHAIR: Yes, okay, well, let us look at it now then.

MS FORD: Tab 1, page 60.

CHAIR: Let me just go through the recitals. What I mean – the recital – upon the Tribunal reading this letter of 6 December.

MS FORD: So, the letter is actually still in draft form. I think there was a typo spotted and such like so they can provide it in a final form.

CHAIR: Okay, but it will be dated today, will it?

MS FORD: I suspect it will be, yes, as it is completed today.

CHAIR: Yes, yes, that is fine. So, we will need to amend paragraph 7, will we not?

MS FORD: Paragraphs 6 and 7 will now come out because they are not being made by order. What has been agreed is by consent.

CHAIR: Okay.

MS FORD: So, we can take those out and add in at the end the “by consent” section which will include the three paragraphs that I read out to the Tribunal.

CHAIR: Yes, okay, and you will probably have to have something in the recitals as well then, yes. Notification. Costs is fine. I do not think we need to change that, and we will have to have something to reflect what I have said in the order about the 280. You do not need to draft it now but to reflect what I said that that 280 is not going to be – it is frozen, effectively. It is not going to be allocated generally to the costs of the whole case. You understand what the issue is, do you not? It is only the 280.

MS FORD: Yes, so that point is understood, that it is going to be pending resolution

of the subsequent draft –

CHAIR: Yes.

MS FORD: -- application, yes.

CHAIR: Yes. And then it will have something about the order is subject to the ruling on the funding arrangements.

MS FORD: That was the liberty to apply paragraph which was going to go in.

CHAIR: But what I do not envisage is the damages to be paid before it has been resolved because they will say that if the CPO is revoked, they have an unjust enrichment and we do not want to have that as a complication, but what we want is something that makes it clear that the approval – this whole process is subject to the funding arrangements to be approved. If they are not approved, it is going to be liberty to apply to work out where we are as a result of that.

MS FORD: That probably then bites on paragraph 2, does it not, in that paragraph 2 at the moment is envisaging within 28 days there will be payment of the damages sum.

CHAIR: Yes.

MS FORD: Although that is then going to be held in escrow so it may be that the further order – we can try and find a mechanism that means there will be liberty to apply.

CHAIR: Yes. What you have to do is to work out with Ms Abram a wording that covers the scenario that if the CPO is revoked, you come back here and then money has not gone down the drain and it is still being held in escrow but how you do it is a matter between you two, subject to me looking at it later.

MS FORD: Yes, I am sure we can sort it out.

CHAIR: And Mr Hoskins, you will get instructions by tomorrow sometime.

MR HOSKINS: (inaudible) … in relation to what we are doing on the funding, it -- there is no final decision made, so we may be putting in submissions; we may not.

CHAIR: So, you do not know whether or not you are making submissions on the funding?

MR HOSKINS: No, but the timetable is, I think we are due Monday. There's a reply the following Monday, so all the sort of written stuff will be into the Tribunal by 18 December, so it isn't going to be a long process.

CHAIR: They have put in their application and saying, "Please approve this".

MR HOSKINS: Yes.

CHAIR: They have got *Sony* as a help. You are still considering whether you want to oppose that.

MR HOSKINS: Correct.

CHAIR: If you do not oppose it, it is very likely that an order can be made pretty quickly.

MR HOSKINS: It is a matter for the Tribunal then to satisfy itself –

CHAIR: Of course it is, yes.

MR HOSKINS: Absolutely.

CHAIR: But whichever way you look at it, it is going to be resolved hopefully by early next year.

MR HOSKINS: That is right.

CHAIR: Okay, that is fine. Is there anything else I need to deal with?

MS FORD: There is one small typo that we recognised in paragraph 11. That gives the liberty to apply in relation to 3 and 5 of the order and at the moment it is drafted, "liberty to apply to the Class Representative and the Non-Settling Defendants" but actually, if the Tribunal looks at the context of 3 and 5 of the order, it relates to – what was envisaged, I think there, and it is simply a typo was that the liberty to apply would be to represented persons in relation to the damages sum under 3 and the opt-in opt-out deadline under 5.

CHAIR: Yes. No, that is fine. By the time you send me the draft order, you will have agreed the terms of the barring and everything with Mr Hoskins and then that is it.

MS FORD: Yes.

CHAIR: Yes, okay. That is fine. Right, so I think that is it on this aspect. We will have a break until three and then we will see your side. Will that hearing be in private?

MS FORD: Sir, I do not think it will be in private, simply because certainly for our part we envisaged only very limited exchange with the Tribunal concerning what directions are appropriate to the hearing of the application.

CHAIR: Yes, but it is going to be a bit more than that. In order to decide what directions that are going to be made, we are going to have to talk about the application.

MS FORD: In that case, not knowing what matters the Tribunal need to traverse, it might be prudent for that to be in private.

CHAIR: Yes. I do not see any great need for that type of application to be in public, not least because we may need to discuss things that might be covered by LPP. I just do not know, so what I am going to direct is that when you come back at three, there will not be any livestream and it will just be you and your side, and we will work through whatever we need to work through. Does anyone have any observations about that?

MR HOSKINS: No.

CHAIR: We will rise until three and, of course, I have given an ex tempore ruling of the Tribunal. I may fiddle about with the wording slightly when it comes back but by and large, that is the substance of the reasoning, the ruling of the Tribunal.

(14:46)

(The proceedings in public adjourned)

(see note at end of transcript)

(15.06)

CHAIR: Shall we just go through Malek's list? The first is that the CAT has been sent the priority agreement and I have deliberately not seen it because I wanted to ask you whether or not we should see it and does that pose any difficulties. I certainly would not want to look at it in open court and other people seeing it, but is there any difficulty with us three looking at it?

MS FORD: I think the position is that we are content for the Tribunal to see it. It may be that because it is a confidential document which is needed to be put in place insofar as it needs to be addressed in submissions.

CHAIR: Yes, that is fine. So we will look at it and we will be sensitive to the point you have just made.

The second point is that I would have thought we would have to wait until the funding arrangement has been approved by the Main Tribunal before we deal with this because I do not want to have a situation whereby theoretically they decide that there is a problem with it. I would rather have that resolved. And hopefully that is going to be resolved fairly quickly and so any countdown for your submission can start for a period after that has been resolved.

MS FORD: Sir, I certainly see the logic of that, and I am told that there is no objection to that. There are things that perhaps might be capable of being done in the meantime. We are very conscious that this is a matter that affects the interests of the class and so it is a matter that we considered they should be given notice of and given the opportunity to make submissions on or be heard on insofar as they wish.

CHAIR: Yes.

MS FORD: And that is a timetable that I would suggest can be put into train, notice given and the opportunity for them to start considering it and make application to be

heard if they wish, pending --

CHAIR: I agree, and we will come to that at the very end. But it is certainly that that process will have to start. The thing that ... well, there are a couple of things about this application, is that should we really be going through this process now given (a) we are at a very early stage in the proceedings and (b) how little we are actually talking about and that I do not necessarily feel comfortable making a decision which will affect the class members so early on. Because what you are proposing, and we have discussed this before, that you take a haircut prior to the money being, let us say, put into allocated for damages and that haircut is going to be larger because what you are doing is putting the 280 in the pool and then giving credit for 1.7 per cent of that 280. You understand the point I am making as to how that works. You look at Friel paragraph 20 to 22. We are not going to resolve that now, but it is all one thing that there is an element of concern. So when it comes to you doing your submissions you need to address me on that.

MS FORD: Absolutely, and we appreciate that goes absolutely to the heart of this application.

CHAIR: It does.

MS FORD: We are very happy to grapple with it when we --

CHAIR: Yes, grapple in your submissions. And also remember that you are in an unusual position because you are effectively asking the Tribunal to make an order where you are representing more than one hat and so you do have a duty of full and frank disclosure. And what I expect you to do is when you come and do your written submissions it will be a warts and all. There is this point here, there is that point there, this is the advantage of doing it, this is the disadvantage of doing it. Just look at it globally and so when you come back we can deal with it and we will come to the right answer, whatever that answer is.

Or you may take the view that in the scheme of things we are dealing with a sufficiently small amount of money relative to the whole thing, we park it until you have a significant sum where it may matter. But it is up to you as to when you bring it before the Tribunal. I am totally relaxed either way, but we will have to bite the bullet at some stage and whether it is now when you are talking about three and four pence or later when it is a much more significant sum, then it is up to you when you come before the Tribunal. But when you do come I just want a warts and all analysis and I will want a skeleton argument to be filed, maybe let us say seven days before the hearing date because it gives me more time. If I have other hearings, it does not help me if you serve it two days when I am in court on something else. If you send it seven days there is more of a guarantee that I will read it at least once, if not twice, before the hearing. So if we can have it seven days before. And the estimate is half a day to resolve it, have a half a day hearing, and the normal approach is that we will want to resolve it there and then without you waiting, you know, weeks and weeks for some written judgment, which is not desirable in something like this. And you do not need to have a huge legal team. It is up to you who turns up, but we realise that we are not dealing with a huge amount of money. So do you want to propose any sort of timetable that sounds right to you? And the timetable should really start from, at least as regards this Tribunal, it should start from when you have got the ruling on the funding arrangement.

MS FORD: Sir, yes. There was a draft directions order that came with the application. Slightly unhelpfully I am told that we printed out the incorrect order, the substantive order rather than the draft directions order.

CHAIR: Just pass it up and then we can --

MS FORD: I am afraid I have one lone copy. I do not know if, sorry, that is rather unsatisfactory. I think somebody has inadvertently printed out the wrong order. I do

not know if one could quickly run off some copies.

CHAIR: Is it the one, the draft order I have here?

MS FORD: It is the draft directions order that accompanied the ... that looks possibly it. My copy is --

CHAIR: Anyway, it does not matter. We will make sure we get the right one. Just copy it and then we will go from there. Three copies, please.

MS FORD: I think it transpires that nobody actually has a copy because the wrong one happened to be printed out.

CHAIR: But I have one. As long as it is the same order that I have, we are okay.

MR GIBSON: I can make an annotate copy.

CHAIR: Yes, exactly.

MR GIBSON: If you have a copy already, then --

CHAIR: Exactly, so we only need two up here.

MR GIBSON: Thank you, Sir.

CHAIR: As long as it is the same one as I have.

MR GIBSON: It says directions on it, draft directions order.

CHAIR: No, it just says draft order.

MR GIBSON: I think you may have the same one that we have multiple copies of, which is the substantive order.

CHAIR: Okay. Do you think I have it? (Pause). Yes, okay. Let us have a look. It ends with paragraph 6, yes? About when you file your skeleton argument.

MS FORD: I am afraid I am now without an order.

CHAIR: It is okay, we will go through it and we will make a directions order. (Pause).

MS FORD: It may be that, could we make progress on the contents of the notice that we sent to you?

CHAIR: Of course we can, yes. Let us do that while we are waiting. (Pause). Thanks

very much.

MS FORD: So there was not a specific provision in the Rules which specifically read on to this issue, but we felt that it was one that it was appropriate to notify the class and give them the opportunity to be heard about it if they wished to do so. And so that is the purpose of this notice.

CHAIR: You have a particular website, have you not, that --

MS FORD: Yes, the Class Representative has a website, yes.

CHAIR: Are people engaging and are you getting engagement?

MS FORD: A certain number of them are, I believe. It is not possible to tell whether that is the entirety of the class. (Pause). Yes, so I am told that various persons have registered their interest and if they have registered their interest and given their consent then they can get emails directly so emails are sent out --

CHAIR: That is good.

MS FORD: -- keeping them posted. And so I think it will be envisaged that that will be one way in which this notice would be --

CHAIR: Yes.

MS FORD: -- circulated.

CHAIR: The thing is you will have to amend page 2, will you not, at the top?

MS FORD: Yes.

CHAIR: Because you will not send this out until you have the approval anyway, will you?

MS FORD: The formal order approving the settlement application.

CHAIR: Yes.

MS FORD: Yes, I think that must be right.

CHAIR: So that wording needs to be changed.

MS FORD: And the parts about it not being contingent can now come out because

the first step has been resolved. Yes, so we would update the paragraph that begins "on 27 September 2023" to make the point that the approval has now been granted and an order made. (Pause).

CHAIR: Let us just have it there. (Pause). Yes. The skeleton argument that you are going to prepare is going to be the pros and cons on the basis that we say. Is that skeleton argument going to be available to the class members and, if so, how?

MS FORD: I cannot see any reason why not and there may be some redaction of confidentiality, but we would envisage that would be very limited.

CHAIR: Yes. It would be sensible, at least in relation to those for whom you have email addresses, that they be sent a copy of your submissions so they have a good idea what is involved and what the issues are.

MS FORD: I personally have no objection to that at all. My only hesitation is that this is quite complex material and I query whether it is --

CHAIR: But the thing is, this on its own does not really give them an indication of what the complexities and the issues are. And so you read this and you just think this is just a circular, I cannot make head nor tail of it. Is there something that could help them?

MS FORD: Might it be possible to indicate that if they wish to have a copy of the skeleton argument it is available at, for example, here on the website? And that way they do not receive this confusing document if they do not want to see it.

CHAIR: Yes, that is fine. That is fine.

MS FORD: They can if they want to.

CHAIR: That seems a sensible ... (pause).

MS FORD: And I am told that the actual application itself will also be made available on the website once we have an order from the Tribunal in terms of the directions, etc.

CHAIR: Yes. So it may be that on this notice or somewhere else on the website you

make it clear what there is and we just want to make sure that anyone that, if there is any effective points that people want to make, they can make them at the hearing. It is unlikely that we will get a cast of thousands on that, but they should have the ability to at least say something.

MS FORD: Sir, we agree with that.

CHAIR: Okay.

MS FORD: And I think the notice does actually, at the bottom of page 2, it currently says: “The costs application can be viewed online.”

CHAIR: Yes.

MS FORD: We will make a specific reference there to the skeleton as and when it is published.

CHAIR: Say that on whatever date we envisage, we may want to fix a date now, assuming that you will ... I do not know how long it is going to take to resolve your application with the Main Tribunal, but one would have thought we should be able to deal with this in February.

MS FORD: That is our hope. I do not know, I am afraid, how long the Tribunal may take to come to a resolution on the funding issues.

CHAIR: Yes, so we do not put a date or anything, we will just say in due course that you will be notified of the date of the hearing and seven days before the hearing we will put on the web the written submissions. (Pause). Okay. And then once you have amended this and got all this in a form, if you send it through to the Registry just for a final approval.

MS FORD: Yes.

CHAIR: And then you can send it out. Shall we now look at the draft directions? (Pause). You will have to change the recitals a bit, will you not?

MS FORD: Yes, they will need to be updated to reflect the order. That would come

in after the recital that refers to the CSAO application we are concerned with.

MS FORD: Correct, yes. (Pause).

CHAIR: Well, we are going to have to say this is going to be listed on a date to be fixed, is it not, with an estimate of half a day? (Pause). We may, in the interests of open justice and the fact that you represent these class members, we may end up having to have it in open court and only bits, if there are bits that are really sensitive, we have those bits either you just by pointing to me the material or --

MS FORD: Yes, I think that was broadly how we envisaged it would happen.

CHAIR: Yes.

MS FORD: There are indications in the bundle of those parts that we think are sufficiently sensitive that that would be the case. I think there is a separate --

CHAIR: Yes, I may come back to that point about the bits that you want to redact. But let us go through the order first, shall we? So 1 is going to be listed for half a day. It will be listed through the normal channels anyway.

MS FORD: Yes.

CHAIR: The form we have just dealt with.

MS FORD: Paragraph 1 comes out because that is no longer relevant.

CHAIR: Well, it is going to be listed --

MS FORD: Okay, I am sorry.

CHAIR: -- on a date to be fixed.

MS FORD: Yes.

CHAIR: With an estimate of half a day. Then 2, you are going to give notice, we have just dealt with that. And I presume you are going to give notice prior to the funding arrangement being approved by the Tribunal. We might as well start this process now.

MS FORD: Yes, so we will send to the Tribunal an updated version of the notice and, subject to any further comments you may have, that can then be given.

(15.24)

CHAIR: Yes. And I am not around next week, so if we can do everything by Friday and then that would be clear, and hopefully also by Monday you will have the finalised ruling from today, so everything will be in place. I presume you will put the ruling from today on your website so everyone can see what is going on.

Then what about the timing of the submissions? We can still put a date, can we not?

MS FORD: Yes. It may be that the dates could be more generous than what is indicated here in the sense that what we were concerned with here was trying to get this application ready to be heard at the same time as the one that is being heard today. Now that is no longer a concern, it may be that they can have more time if necessary to review and to make their application. I think the key point is that there is then sufficient time for the Class Representative to review any applications that are received and take them into account.

CHAIR: Yes. We would want this probably before the last week of January, would we not?

MS FORD: Assuming that --

CHAIR: Your junior is proposing a date. Let us see what he wants.

MR GIBSON: Sir, I was just making the point that if you are away next week then you will presumably make the order before you leave.

CHAIR: That is the idea. I want to make it on Friday.

MR GIBSON: I will do everything I can to facilitate that, Sir, and we have provision in paragraph 2 for the notice to be given within two business days of you making the order, which would take us to Tuesday, and from there we can see how long we are giving the class to comment. I think the end of January would be very generous because that gives them --

CHAIR: Exactly. So if we had it the end of the third week of January, whatever that

date is. So pick the Friday at the end of the third week of January and put 2 p.m. on that day.

MS FORD: That will take us to the 19th.

CHAIR: The 19th. That is all right. That should give them plenty of time, I would have thought.

MS FORD: Yes, but it does – it is over the festive period.

CHAIR: Unless you want to give more time. It is fine to me. So when do you want to give us the costs application bundle and any authorities bundle?

MS FORD: I wonder whether it might make sense to specify periods back from whenever it gets listed.

CHAIR: Yes, that is fine. What I would want is at least seven days before the hearing I would like to have the costs application bundle, the authorities and your skeleton argument all in one bundle and then you can work from that. So you can say seven days before you will lodge with the Tribunal, electronically and in hard copy bundles, that material.

MS FORD: Yes, that would be fine.

CHAIR: Yes. So the number of copies – let me just think. (Pause) If we say four hard copies of all of that, and, as I have said, the skeleton argument you will file at the same time. So the skeleton argument will refer to page numbers. When you refer to an authority you put the tab number of the authority. So it is all in one go.

MS FORD: Yes.

CHAIR: That is fine.

MS FORD: There is just a slight concern as to whether half a day will be sufficient.

CHAIR: Why?

MS FORD: Because I anticipate that this is an application that is going to involve a certain amount of traversing authorities which go to the realm, for example, of funders

in the collective proceedings and authorities which go to the underlying statutory purposes behind the Rules. That may take some time to traverse. I am also conscious that if we do get submissions from interested parties, they need time to be heard as well. Now, it may be that half a day is sufficient, but it might seem prudent to have a day available in case it is required.

CHAIR: I think the reality is that if you list it for half a day you will have a whole day because we will want to give, if we can, a ruling anyway. So you would spend the morning doing whatever you are doing and then in the afternoon we will want to give the ruling, and so effectively you will get a day. We can leave it as half a day but the whole day is going to be blanked out.

MS FORD: Right. Presumably that can be recorded in some way on the face of the order so that there is no concern.

CHAIR: We can put a day then. If you are worried about Listing not giving you a full – i.e. using the court in the afternoon for something else – then I can see why you are saying let us just put a day down and at least you have the court booked.

MS FORD: Or indeed sending the members of the Tribunal somewhere else.

CHAIR: Yes. That is fine, that is okay. Let us have a look at these redactions. The main redactions, as I understand it, are in Friel's statement.

MS FORD: They are, yes, and I have not --

CHAIR: Do not worry, I can do it now. We will look at Friel. It is better we get this resolved. Paragraph 41E is the first one.

MS FORD: Yes. There are a series of authorities that deal with the circumstances in which the Tribunal will grant confidential treatment to this sort of information.

CHAIR: There are quite a few authorities on ATE in particular, and if there is something that will reveal advice or a view as to the merits, one normally is quite willing to say that is going to be LPP and should be redacted. The question is are you saying

that this falls within that or are you just saying this is just confidential as opposed to privileged?

MS FORD: That is not the only basis on which one may seek confidentiality.

CHAIR: I know; I have said two separate things. One is: Is it privileged; and two is: Is it confidential, and on the privilege point it would only be privileged if it is going to reveal or indicate a view on the merits or the advice that has actually been given on the substance of the case. Confidentiality is a different ground and we are dealing with a hearing whereby what you are really just saying is that when we have the hearing do not read this out in public. Is that all we are really dealing with at this stage?

(15.34)

MS FORD: Yes, it may be that it needs to be reflected in the way in which it is expressed in any forthcoming judgment. I am conscious that this is the funder Woodsford's confidential information and so in far as the Tribunal has concerns about whether it merits confidential treatment, I wonder whether we could address any concerns that you might raise in the skeleton argument, such that you can take a view rather than me making submissions on the point now.

CHAIR: No, that is fine, but where it comes to, given that the nature of the hearing is effectively you and maybe other class members and that anything that is really sensitive or sensitive is not going to be referred to in open court but you would just refer us to the passage. The only thing that I need to be careful about is if I give a ruling at the end of that day, that I do not refer to something in open court that is confidential. Otherwise when you get the draft ruling you can always say: "Please blank out this and that," in the normal way.

MS FORD: Yes, I think that must be right and I think that we have, in the way you can see here, highlighted in red those parts that we do consider to be sensitive and so hopefully that would give, both for me as the advocate and you giving any extempore

judgment, a sort of warning that this material is considered sensitive unless the Tribunal thinks that it does not merit such treatment.

CHAIR: Yes. The way I look at it is, given the nature of the hearing, that we are unlikely to want to go into in any judgment the intricacies of some of this stuff and that in so far as inadvertently there is reference in the ruling to it, when you get the draft ruling you can indicate at that stage: "Look, Malek, you have made a mistake, you should not have please put that there." As long as you understand that if I see something that is red I will avoid reading it out during the hearing, then I think that is probably enough.

Let me just look a bit more because I have a few notes on this. (Pause) I am right at paragraph 60C what you are saying is that, of the £1.5 million, which is including the 280 costs, that in reality less than 50 per cent is going to go into the damages pool. (Pause) Because you are saying that £702,648 has been left in the damages pool.

MS FORD: Yes, so the 26.6 per cent figure is the amount for damages sum that is envisaged going towards --

CHAIR: Yes, but when you look at it globally there is £1.5 million coming in, you have got £1.12 specifically allocated for damages, you have got £100,000 which we have agreed how that is going to be dealt with, and you have got the 280 which we are not agreed at the moment as to how you are going to deal with that, that is in limbo. The way you have done it, you will be leaving less than 50 per cent of the £1.5 million going into the damages pool, or you may say let us just look at the £1.12 plus the 280, because the other 100 is being specifically earmarked already. It is how you treat that 280 which is critical as to how you get to these percentages here.

MS FORD: Yes, so --

CHAIR: Because once you allocate the 280 into the general costs pool or the general pool and that you give credit only for 1.7 per cent of that in these calculations, then

that is how you get these figures. You have heard what I said about that and that is something you do not need to answer today but it is going to be dealt with in your written submissions …

MS FORD: It would, but I can perhaps just --

CHAIR: … as to what is the appropriate route of doing this.

MS FORD: Perhaps I can just clarify. The 280 is treated as recovered costs along with all other recovered costs, so in this application we are taking into account not only the 280 from CSAV but also costs recoveries we have achieved from previous hearings and such like.

CHAIR: Exactly.

MS FORD: What is sought is 1.7 per cent of the damages, giving credit for 1.7 per cent of the recovered costs. So the intention is that there is double recovery, one is giving credit for --

CHAIR: I am not saying there is double recovery.

MS FORD: I may be misunderstanding what the Tribunal's concern is but …

CHAIR: The concern is that there are two ways which you can deal with the 280. Irrespective of how you have actually done it or how you actually intend to do it, there are two ways of doing it, are there not? There is one where you say: we have got this 280, it is specifically in relation to this Defendant, it is paid alongside these damages and so what we do is we take that into account on a 100 per cent basis in allocation; and you will come up with a higher figure. The second way of doing it is the way that you have done it, which is you say: I am looking at 1.7 per cent of the total damages, I have got my damages figure coming in, I have got my costs figure, we look at 1.7 per cent of the costs, deducing obviously recoveries to date, and that that 280 has gone into that aspect there. There are two ways of looking at it and when it comes to the submissions you are going to have to argue both sides of that point. You have got to

say this is why you have done it, this is an alternative way of doing it, and these are the pros and cons of both. When you are in your position you have no axe to grind either way. That is why it is always difficult for you. Forget about the pressure from behind you or from funders or anything, it does not really matter, your duty is to the Tribunal now, even if it does not sound great to everyone behind you; it is going to be what it is going to be.

MS FORD: That is fully understood.

CHAIR: Yes, and I am not resolving that issue now.

MS FORD: Also understood, and we will make sure that we address it. So the alternative is essentially the entirety of the 280 gets set off from the 1.7. I think that is the other scenario that you are asking me to address.

CHAIR: Yes.

MS FORD: Yes.

CHAIR: Then there will be more damages left in the pool.

MS FORD: Yes.

CHAIR: We just have to look at it. Ms Ford, thanks very much for your help today. I know you have had the brunt of everything but to get a ruling today and all resolved today you have to do a hearing in that way and I know that you are capable enough to deal with any question I ever put at you. If you were less experienced I certainly would not have done it that way but I know you well enough that whatever question I could throw at you, you always somehow come up with an answer. Whether or not I accept the answer is a different question, but you are perfectly capable of dealing with a hearing like this and it is only because you are able to do that that we have resolved it today. Otherwise you would have had the prospect of some sort of reserved ruling, coming back in a couple of months' time, which it just does not work when you are talking about this type of situation.

MS FORD: Absolutely. We are very grateful to the Tribunal for getting to the point where we can get an outcome today.

CHAIR: Yes, I got the message that you wanted an outcome today. That is fine. Anything else that we need to deal with? No? Okay, we will rise now. Hopefully I will see you some time in February.

(The Tribunal adjourned at 15.45 hours)

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Note:

The transcript of the session held in private has been published following confirmation from the solicitors for the Class Representative by letter dated 18 December 2023 that it does not consider the transcript confidential and is content for it to be published on the Tribunal's website.