IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1440/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Thursday 11th April 2024

Before:

Andrew Lenon KC
The Honourable Mr Justice Richards
Professor Anthony Neuberger
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Proposed Class Representative & Claimant

Clare Mary Joan Spottiswoode CBE

v

Proposed Defendants

Nexans France SAS & Others

A P P E A R AN C E S

Daniel Jowell KC, Nicholas Bacon KC & Gerard Rothschild (Instructed by Scott+Scott UK LLP) on behalf of Ms Spottiswoode
Paul Luckhurst (instructed by White & Case LLP) on behalf of Nexans France SAS and Nexans SA
Jemima Stratford & Fiona Banks (Instructed by Macfarlanes LLP) on behalf of Prysmian Cavi e Sistemi Srl and Prysmian SpA
Victoria Wakefield KC & Michael Armitage (Instructed by Addleshaw Goddard LLP) on behalf of NKT A/S and NKT Verwaltungs GMBH

Thursday, 11 April 2024

(10.30 am)

Housekeeping

THE CHAIRMAN: I'm going to start with the customary warning. Some of you are joining us via live stream on our website, so I must start therefore with the customary 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 audio or visual, of the proceedings and breach of that provision is punishable as a contempt of court. Thank you.

MR JOWELL: May it please the Tribunal. I appear with Mr Bacon KC and Mr Rothschild for Ms Spottiswoode CBE, the proposed class representative. Mr Luckhurst appears for the first and second proposed defendants, Nexans. Ms Wakefield,and Mr Armitage appear for the third and fourth proposed defendants, NKT, and Ms Stratford and Ms Banks appear for the fifth and sixth proposed defendants, Prysmian.

With the Tribunal's permission, what I would intend to do is to take you briefly through an outline of Ms Spottiswoode's application for a collective proceedings order and explain how the criteria are met. I then intend to take you through the re-amendments to

the claim form and the proposed draft order, and at appropriate moments, I will hand over to Mr Bacon and to Mr Rothschild to deal with certain particular points.

Submissions by MR JOWELL

This is an application for a collective proceedings order and such an order requires the Tribunal at the highest level to be satisfied that three requirements are met. First, under section 47B of the Competition Act as amended and Rule 78 of the Tribunal Rules, it must be satisfied that the class representative is a -- it is just and reasonable that the proposed representative should act on behalf of the class.

The second requirement is that -- under section 47B(5)(b) of the Competition Act and Rule 79 of the Tribunal Rules, is that it must be satisfied that the claims are eligible for inclusion in collective proceedings, and that eligibility requirement itself divides into three main aspects, as further specified in the rules. First, the claims must raise the same or related issues, or similar issues of fact and law. Second, the class must be adequately defined so that you know who is in and who is out of it. Thirdly, it must be deemed that they are suitable for collective proceedings.

The third requirement is one that effectively may be said to be read into the rules or imposed on top of the rules by case law and that is the requirement derived essentially from Canadian case law, in particular the *Microsoft v Pro-Sys* case, that there should be a methodology provided by the class representative which acts as what has been called a "broad blueprint" identifying the issues for trial and how they are to be resolved.

Now, that requirement, as the Tribunal has emphasised in the recent *Gormsen* case, is simply to ensure that arguable cases do not go off the rails, as it was put in that case, in terms of case management and that after an efficient and swift pre-trial process, the Tribunal is presented with a case that can substantively be tried with a minimum of procedural fuss and a maximum of focus on the substantive issues to be resolved.

So the first issue, therefore, is whether it is just and reasonable for Ms Spottiswoode to act as the class representative. You will have read, I hope, her witness statement and seen her CV. She has degrees in economics from both Cambridge and Yale Universities, is a commander of the British Empire and has an honorary doctorate from Brunel. She -- in terms of her

experience, she was a former director general of the then Office of Gas Supply, or OFGAS, between 1993 and 1998, and was in that role in a truly critical time when the industry was restructured to split the network from the supply of gas in this country.

Now, in addition to numerous directorships and non-executive positions in the energy industry and in philanthropic activities, she has in particular acted previously as a Norwich Union policy-holder advocate and in that role she represented the rights of numerous policyholders which required her to act both as a representative for a large group of people, also to assess complex economic models on their behalf, and to explain those models to them in a simple way so they were readily understandable and ultimately to negotiate a court-approved settlement on behalf of the policyholders, and in that capacity she received judicial praise. So we respectfully say that she is an eminently, indeed ideally qualified individual to represent the class and to act adequately and fairly in the interests of the class members.

MR JUSTICE RICHARDS: In my notes -- I mean --

MR JOWELL: Yes.

MR JUSTICE RICHARDS: -- tell me if this is a fair summary, I have made a note that Ms Spottiswoode has got an

extensive background in energy regulation and consumer redress. I think is that —— that sounds like that is a fair summary.

MR JOWELL: Yes, that is a fair summary. It has not been suggested that she has any conflict of interest and she has confirmed that she has none and no points of objection are taken to her.

Now, in addition to the personal suitability of the class representative, it is also —— there are also requirements as to costs, or provision for costs. Under Rule 78(2) it is necessary to establish whether the applicant will be able to pay the defendants' recoverable costs if ordered to do so, or at least that is a factor to be taken into account, and in addition, under Rule 78(3)(c), there is —— the Tribunal needs to give consideration as to whether there is an adequate plan with any estimate and details of arrangements as to costs, fees or disbursements. To deal with those aspects, if I may, I would like to hand over to Mr Bacon KC who will address you on those, unless you have further questions.

Submissions by MR BACON

MR BACON: May it please you, sir. You would have seen, I hope, and read the skeleton arguments that have been submitted which obviously post—date fairly extensive

submissions about certification in relation to funding and budgetary requirements. The position that we have reached is that the respondents —— the proposed respondents to the application have landed at the point where we are inviting the Tribunal to exercise its discretion at a gatekeeper level. There is no, in a sense, contentious issue for the Tribunal to determine beyond being satisfied at its gatekeeper level that the requirements of rules 78(2) and (3) are met. That is the context in which I make my submissions in the light of where the parties have helpfully, I would submit, arrived at.

There are really two aspects that, subject to your own intervention or questions, that I was seeking to address. One is the question of *PACCAR* and whether the litigation funding agreements meet the current legislative requirements, in other words are they enforceable. Secondly, questions have been raised about the "adequacy of the budget" that has been submitted. They are the two matters that I would seek to develop.

I am in the Tribunal's hands as to the approach one should take, but what I was planning on doing, first of all, was just to take you through the architecture of the litigation funding agreements. It is not completely obvious, at least from first reading, I suspect, how we

have arrived at where we have arrived at. There are various amendments that have been made, to litigation funding agreements and so on, so I will do that first. I can see that appears to be appreciated as a first step.

Then just to develop very briefly the case law on enforceability. By way of summary, so you have it in advance, the funder in this case has entered into an agreement under which it receives a multiple of the funding that is committed and we say that there are a series of cases in this Tribunal that establish that it is not necessary in those circumstances to meet the targets of section 58AA and the damages based agreements, which has caused all the fuss in the last year or so. As I say, the position is that there is no positive case being advanced that the LFA is unenforceable. It is important that I keep that in mind.

In relation to the budget, I am going to take you to the budget and explain why it is an adequate budget. So that is the plan.

Dealing then, first, with the architecture, could I take you first to the original litigation funding agreement, which you will have at {B/11/2}. So it is the certification hearing bundle, B/11/2, and this was

an exhibit to the witness statement that the proposed class representative submitted in support of the application. You will see that there is a finance agreement dated 20 June 2018 {B/11/3}, and it provides for financing in respect of the litigation. There is a "CPO Condition" at 2.1 which becomes amended in due course, which will be the focus of the *PACCAR* point, and then there are what are defined as "Investments" under clause 2.2, which essentially are commitments to funding pre—CPO and post—CPO, in simple language. At that stage, you will see that investments were then set out in what was paragraph 1 of Schedule 2 in the original agreement.

The "Adverse Costs" provisions are dealt with in clause 2.4 {B/11/4}. At that stage —— so in the early stage of funding —— the funder had agreed, in accordance with the budget plan that had been submitted, to provide £25 million in respect of adverse costs protection, comprising of 10 million of funds committed by Burford itself and up to 15 million by way of available after the event insurance cover, for which obviously there would be a premium.

There is an obligation at 2.4(b) which I draw to your attention. It partly explains why we are here today.

Now, the schedule 3 —— it is {B/11/22}, so if one scrolls down through the agreement to page 22, you should have the original schedule. Schedule 2 has been changed, but Schedule 3, as it then was, provides for Burford to receive by way of its entitlement the "Total Invested Amount", which is the sum that they have agreed to fund, plus "a multiple" —— you will see that, sir, in b(ii) —— of the sums invested.

MR JUSTICE RICHARDS: I did not understand this when I was reading it. I did not understand how the waterfall works, because it says:

"First, to the Claimants ..."

But without any limit.

MR BACON: Yes, well, it has been —— it has been amended so we will come to that in a moment.

MR JUSTICE RICHARDS: I see.

MR BACON: The point of referring this to you at the moment is to make the simple point that Burford has, throughout, been operating on the basis that it does not receive a percentage of the terms but instead a multiple. Unlike the authorities which you will have doubtless become familiar, the *PACCAR* issue has attached itself to arrangements under which there is a percentage return and not a multiple.

The first deed of variation —— the agreement was

varied in December 2021, and you see at that {B/12/3}, if we can turn to that, and the recital to the agreement, recital (C), refers to developments since the entry of the litigation funding agreement including the judgment of the Supreme Court in *Mastercard Inc v Merricks*. There was a wish to vary the budget plan set out in Schedule 2, and the contents of the revised budget plan set out in the agreement will replace the earlier Schedule 2 arrangements. Essentially, this provided for a greater level of commitment in relation to adverse costs cover. I am summarising the matter as best I can given the gatekeeper role we are in, but you will see from clause 2, if you scroll down the page through to {B/12/4}, that the financing agreement at clause 2.4 was amended, so there was now 25 million by way of available cover, 10 million by way of capital committed by Burford in respect of adverse costs to the extent that the ATE insurance is not incepted, and then a variation of the budget plan at (b). The revised budget plan is attached to the schedule, and the version that we are bringing up is the redacted version and it tells us the amounts of the budgeted provisions pre— and post—CPO. They have been amended simply to incorporate the additional costs of the ATE insurance, which provides for the additional ATE cover. I am going to

come back to this when we come to budgeting.

Just so you have it, the original budget, just so you have it, is at {B/6/2}. I will come back to it, but it might be helpful for you to see that at this stage. {B/6/2} is a detailed budget setting out the pre—CPO costs with a total, a subtotal, and the costs from the CPO with a subtotal, with a total budget of 21.5 million —— just over 21.5 million. The budget I took you to a moment ago varied that budget so as to incorporate within it the costs of ATE insurance which had become payable in the light of the decision to increase the level of adverse costs cover, and the redactions to the budget that I showed you are designed to protect the interests of the funder and the ATE insurer, because if we were to reveal the —— if we were to remove the redactions, one would immediately understand the level of cost of premium that was required from the funders and from the insurers which remains to this day in accordance with the authorities of this Tribunal in *Kent* and other cases, something which the Tribunal has not permitted the proposed respondents to see in any case that I have been involved in, certainly. So that explains the redactions. I will come back to the budget in due course.

By the time then we had got to the 22 December '21

variation, the overall budget had been increased to a sum of 30,715,000, which is a significant sum on any view. That includes 10 million of adverse costs cover provided by Burford in the event it is required.

Really for your note, no issue is taken over the terms of the ATE policy that was incepted, but for your note, the policy schedule is at {B/14/2}. I am not planning on taking you through it, because no issues arise in this case, but certainly in the gatekeeper role it is something that obviously you need to be aware of. The policy wording, as opposed to the schedule, is at {C/0.1/1}, again, for the record.

There was then a second variation to the litigation funding agreement, sir, on 20 December 2022, so a year later, and one will find at that {C/1/1}. Again, in the certification bundle, "Second Deed of Variation", and, again, the recitals tell us why this has come about, and you will immediately see from recital (B) that it arises as a result of the *PACCAR* decision, and there was uncertainty that necessarily arose as a result of that decision, which led, I would submit perfectly understandably on behalf of the class representative, that the funder was nervous about committing funds of this level, or of any level, in circumstances where it did not have confidence that

the litigation funding agreement underpinning the sums was enforceable; a perfectly natural reaction.

As a consequence, there was an agreement that the CPO condition, that I took you to right at the beginning of the LFA, was varied, and you see that variation at clause 2 of this deed. It is on {C/1/3}. This is what the parties have come to understand as being the funding condition which underpins the principal issue —— or one of the principal issues that the Tribunal is concerned with this morning. You will see there that Burford imposed a condition —— I need not read it out, it is familiar to you —— that effectively seeks the confidence and the comfort from the Tribunal as to the enforceability of the agreement as a precondition to advancing funds under the agreement. That was the purpose of that.

There was then an amendment to the Deed of Priorities, which I indicated had occurred, a moment ago. You will see that at {C/1.2/1}. This is dated 5 May 2023 and it created a new Deed of Priorities which dealt with solicitor's excess. It may be helpful if I take you to the original version, {B/11/22}. So I took you to the finance agreement at 22.

MR JUSTICE RICHARDS: Yes.

MR BACON: This was the document which you ——

MR JUSTICE RICHARDS: I did not understand.

MR BACON: You did not understand, yes.

So returning back to the amended version, which was at {C/1.2/2}, if you scroll down to {C/1.2/8}, you will see a much more extensive allocation of proceeds documents, which, with respect, makes a lot more sense, and I would submit accords much more acutely with what the Tribunal is accustomed to seeing in terms of waterfalls.

MR JUSTICE RICHARDS: I have not seen this document.

MR BACON: No, I —— as I —— I had anticipated that is the case. So we can just run through it very quickly. As I say, it is fairly standardised in terms of its approach to allocation of funds and proceeds.

First of all, any proceeds and costs awards are payable to the class.

THE CHAIRMAN: Yes, but I think that the point raised by Mr Justice Richards still stands: there does not seem to be any definition of what proceeds, there is no upper limit on proceeds.

MR BACON: The proceeds are defined in the LFA.

THE CHAIRMAN: Right.

MR BACON: Which we can go back to, but they are limited by the amount that is recovered by way of costs, damages, compensation, within the proceedings themselves.

THE CHAIRMAN: Right.

MR JUSTICE RICHARDS: Maybe this is the bit I did not understand. So suppose we fast—forward to trial and you get damages of 50 million for the class. I am sure you are hoping for more, but let us assume it is 50 million. How much —— those are proceeds as defined, it seems to me.

MR BACON: Yes.

MR JUSTICE RICHARDS: On the face of it, it all goes to the claimants. That is the bit I just do not understand.

MR BACON: The damages will be distributed in accordance with the distribution plan that the Tribunal ultimately puts in place, and Burford's entitlement to its return is taken from the undistributed damages which are not collected by the claimant cohort.

MR JUSTICE RICHARDS: So what this envisages is that the Tribunal makes a —— so if we fast—forward to trial, there is 50 million in the pot, it is envisaged that the Tribunal makes a distribution plan saying how much of that is to go to claimants ...

MR JOWELL: Can I assist?

MR JUSTICE RICHARDS: Yes, please.

MR JOWELL: The basis of this is that it is typical that not all claimants come forward to take their share of

the damages. So if, say, the basis is that everybody can claim their £100 but only 50% of the people actually bother to claim, then there will be undistributed proceeds, and it is out of those undistributed proceeds that the funders are then remunerated.

MR JUSTICE RICHARDS: I see ——

MR JOWELL: That is the attraction really of this system, because no one is effectively out of pocket, save by their own default.

MR JUSTICE RICHARDS: So the "first, to the Claimants ..." bit means first, to the claimants (to the extent they come forward in time), with that being regulated in some other document?

MR JOWELL: I think that's ——

MR BACON: Well, I think it means more than that. I think it means it comes to the claimant for the purpose of distribution. Everything comes to the class representative on behalf of the class. There is then a distribution which is incepted in accordance with the litigation plan, the project plan for distribution which has been provided for, and then, on the assumption that there will be some undistributed in terms of uncollected damages, the intention, originally certainly, was to take the funders' return from the undistributed damages.

There has been a variation to the litigation funding agreement, a third one, which I will come to in a moment, which possibly opens up the ability of the funder to look to the collected damages. I will come to that in a moment, because the authorities have moved in this Tribunal —— we saw it in the *Apple* case recently —— where questions over the ability of a funder to be paid in advance out of the collected damages, prior to distribution, has been upheld. So I will come to that.

MR JUSTICE RICHARDS: Okay.

MR BACON: But I think, in answer to your question, the reference to the monies being first paid to the class is a reflection of the fact that they come to the class for distribution to the class.

MR JUSTICE RICHARDS: Some may be then left undistributed and then the lower levels of the waterfall kick in?

MR BACON: Correct. Subject always —— important to point out, these waterfalls are all subject always to the Tribunal's overall supervisory jurisdiction on distribution.

If I may just turn my back one moment.

(Pause).

At clause 2.5 of the original LFA, so {B/11/2}, if I can just take you back to that. So 2.5 {B/11/4},

"Burford's Entitlement", there is an obligation on the class representative to:

"use her best endeavours to obtain orders from the Tribunal that:

"(A) Burford's Entitlement be paid to Burford; and

"... the Defendants pay the Class Representative's fees and costs in connection with the Proceedings ..."

And 2.5(a)(ii) {B/11/5}:

"Subject to ... 2.5(b), pay Burford's Entitlement to Burford in accordance with paragraph 1(b) of Schedule 3."

(b), an obligation:

"... to pay Burford's Entitlement shall be reduced to the extent of such amount which the Tribunal orders should be paid ... is paid:

"... by the Defendants to the Class Representative pursuant to a Costs Award or as agreed pursuant to collective settlement; and

"... to the Class Representative pursuant to ... 93(4) and (5) of the CAT Rules, in respect of Burford's Entitlement."

PROFESSOR NEUBERGER: Can I just verify, "Burford's Entitlement" means the costs plus the uplift ——

MR BACON: Correct.

PROFESSOR NEUBERGER: Thank you.

MR BACON: And just while we're on {B/11/5}, there was a reference in (c)(ii) to Burford's Entitlement being:

"... derived from, computed on the basis of and paid from costs recovered ..."

That has been removed by subsequent variation in the light of the *PACCAR* decision. So (c)(ii) has been altered and I'll come to that provision in a moment.

So, returning to the amended Deed of Priorities at {C/1.2/1}, I just wanted to draw your attention, if I may, to recital (D) {C/1.2/2}, because it is partly relevant to the budget point. This recital records, and ultimately is dealt with in the amendments, provision to alter the budget plan to cater for the fact that the budget may be exceeded by the solicitors in terms of their legal spend, and the solicitors have agreed, in the event that they incur fees that exceed the agreed budget, to convert that into a conditional fee arrangement, so they will not be entitled to any funding in respect of it, and will look ultimately to the proposed class representative proposed defendants in the case, the proposed defendants to the class representative claim, to pay those fees.

So, questions about overspend and adequacy of budget, so far as the solicitors are concerned, really ought not to be a concern for the Tribunal, because they

have agreed, effectively, to make them entirely conditional. You can see that taking place in the revised schedule at paragraph 1(c)(iii), there is a reference to the Conditional Fee —— a new reference to a conditional fee, which is the excess of the exceeded fees, to which I have already referred.

There was then, finally, sir, a third variation to the LFA, just to complete the architecture, at {C/2/1}, and that was the amendment which I drew to your attention a moment ago, deleting clause 2.5(c)(ii) from the litigation funding agreement so that it was entirely clear that Burford's return was not calculated by reference to the sums recovered. I think, on proper analysis, clause 2.2(c) was in fact wrong. I mean, it simply was not a proper record of what had been agreed, because the agreed position was the multiple, which clearly was not and is not designed to be fixed by reference to recoveries, it is fixed by reference to the level of funding committed.

So that is the position in relation to the litigation funding agreement and the ATE.

So far as the *PACCAR* point is concerned, my skeleton argument draws to your attention the now three or four cases in which it has been held that a litigation funding agreement which provides for the return to

the funder to be calculated as a multiple of the committed funding in the case is not a damages-based agreement falling within the DBA regulations and section 58AA, and we say as a matter of fact we fall into exactly that scenario. We always have been a multiple, and for those reasons we seek the Tribunal's ruling. We have sought to develop that by way of a tenth recital to the draft order, which you have probably seen, simply recording the Tribunal's satisfaction that the LFA is not a DBA.

Now, I can take you through the jurisprudence and the legal analysis, but I am not sure that is necessary. You have seen the authorities in the skeleton.

THE CHAIRMAN: Yes, subject to anything any of the other counsel submit, we are going to make the -- we are going to give the confirmation that you seek. I know that it is subject to ...

MR BACON: Appeals.

THE CHAIRMAN: Yes.

MR BACON: Yes, and it may be that in the end it becomes otiose with the bill that is currently passing through Parliament. But thank you for that.

The next issue then is the budget, and the point that really I am being asked to deal with here is a question of adequacy.

Can I just return back to, if I may, the rules themselves, because my learned friend took you to them. The authorities bundle, {AUTHA/6/1}. It is Rule 78. Because reading my learned friend's skeleton argument, one could be forgiven for thinking that the proposed respondents are somewhat overstating the requirements that are imposed on the Tribunal as gatekeeper as to the question of budgets. The rules provide, as has been pointed out, in 78(2)(d), that the Tribunal should consider whether the proposed class representative would be able to pay the defendants' recoverable costs. Well, we know that that is clear and satisfied by the ATE policies and the 10 million committed by Burford and no issue has arisen there.

Questions of estimates of costs are exclusively dealt with in (3)(c)(iii), and I would point out that the language of 78(3) is that the Tribunal shall take into account all the circumstances, including ...

"(c) ...(iii) any estimate of and details of arrangements as to costs, fees or disbursements which the Tribunal orders that the proposed class representative shall provide."

Well, there has been no order that there should be an estimate provided. Obviously the estimate and the budget have been provided voluntarily, as one must,

in accordance with the class representative's obligations to satisfy the Tribunal that it has made provision for its own costs and has some control over the lawyers, collectively, and experts' fees, and that is the purpose of the budget plan and the budget itself. There is little -- nothing more said in 78 which assists.

The guide in relation to budget has been referred to by both of us, by Ms Wakefield and myself, which is at {D/1/1} of the bundle, {D/1/7-8} deals with budget -- authorities bundle D {AUTHD/1/5}. So at 6.33 {AUTHD/1/8}, the Tribunal, about just over halfway down 6.33:

"... the Tribunal will have regard to the ... class representative's financial resources, including any relevant fee arrangements with its lawyers, third party funders or insurers. The costs budget appended to the collective proceedings plan ... is likely to assist the Tribunal's assessment in this regard."

The authorities indicate, as I have indicated -- submitted in the skeleton, that at the certification stage, the standard required in respect of budgeting or estimates is not sophisticated, it is high level. Of course the Tribunal can direct that there should be budgeting in a case. It is not something which either

side in this case has encouraged, but it is something which the court -- the Tribunal could plainly order, and in those circumstances there would necessarily be a much more detailed budget put in place, but the budget that is presented to the Tribunal in this case, which I have taken you to already, identifies clearly -- it is not just a headline figure, it identifies the solicitors' anticipated legal spend pre-CPO, disbursements, experts, other expenses, class representative fees, both pre- and post-CPO.

The landing point, as it were, this morning, as I read my learned friends' skeleton argument, is that, at paragraph 27, Ms Wakefield deals with the budget in her skeleton and she attaches two other example annexes which, with the greatest respect to her, one can take nothing from. I mean, there are different budgets set in different cases; they all take different forms. I did have cause to look at the budget in the *Trucks* litigation, which does not take the form of these two budgets that she has annexed. But 27.1.1 I think is where we have ended up, where her contention is that {AB/5/13}:

"The Tribunal will expect a budget ..."

Even at this gatekeeper level:

"... to set out 'assumptions and rates'."

And she cites by way of footnote 39 an order that was made in the *Merricks* case, which we were both involved in, and on any reading of the *Merricks* judgment, none of the judgment is directed to the quality or requirements of the budget. There was an order made for the provision of a budget and I cannot remember exactly why, but it may well have been the fact that we volunteered it. My submission is the Tribunal should exercise real caution about referring to an order as opposed to a judgment where one Tribunal may have taken the view that it requires further information in relation to the budget. It is not precedent and I am not convinced it is at all helpful for the Tribunal.

We would simply ask, what is the purpose of this? I mean, if they want to know the hourly rates that are being charged by counsel and by solicitors, what difference is it going to make? If there is a total for the entire litigation calculated by reference to litigation funding agreements and conditional fee agreements, which have been agreed at arm's length between the class representative and the lawyers, and I note the class representative is independently advised in these matters, to what end is this information going to assist the Tribunal in its gatekeeping function when certifying? That is really the question which we would

respectively ask of the respondents.

"Assumptions"; I mean, clearly if we were in a full-blown budgeting hearing, there would be a precedent H with assumptions and all the rest of it, but the problem with assumptions often is that they are necessarily dictated by their terms and they can be varied. If the costs fall outside the assumptions, as they often do, there will be a variation because the assumptions did not cater for the costs that have been incurred. So you have this fairly fluid discourse in relation to budgets right through the case.

I mean, *Merricks* is a classic example. Ms Wakefield refers to *Merricks*, but we all know what happened in *Merricks*. The original budget that was filed in *Merricks* I suspect was entirely emasculated by what ultimately happened in *Merricks* with the various appeals that took place in that case. In this case, we have responsible lawyers, we have responsible funders, we have a responsible class representative who has been advised independently, we have a budget which provides the key elements of the legal spend in sufficient detail and we respectfully submit that that ought to be enough, at the gatekeeper level, to satisfy the Tribunal on certification and that is my submission.

Unless there is anything else I can really assist

with, they are really the submissions I wish to make.

Thank you.

THE CHAIRMAN: Thank you very much.

MR JOWELL: I think that concludes our submissions then on the "just and reasonable" requirement. There remains the eligibility requirement and the methodology. I will seek to be quite brief on that, if I may.

THE CHAIRMAN: Would it be helpful to deal with funding now from the other counsel?

MR JOWELL: We are very much in your hands, if that would assist, yes.

Submissions by MS WAKEFIELD

MS WAKEFIELD: May it please the Tribunal. I am grateful for the opportunity to address you now. I am speaking solely to the budgeting point of course and not to the *PACCAR* point, which has already been disposed of.

So if I start with the rules, if I may, which Mr Bacon took you to, they are in {AUTHA/6/1}. Just to refresh our memory, we have, in 78(2):

"In determining whether it is just and reasonable for the applicant to act as the class representative, the Tribunal shall consider whether that person ..."

Then we have (a):

"Would fairly and adequately act in the interests of the class members."

Then (d):

"Will be able to pay the defendant's recoverable costs if ordered to do so ..."

The first of these, as Mr Bacon said, is expanded upon in 78(3). So we see that in the introductory words of 78(3):

"In determining whether the proposed class representative would ... fairly and adequately [act] in the interests of the class members ..."

Then we have (c)(iii):

"Any estimate of and details of arrangements as to costs, fees or disbursements which the Tribunal orders that the proposed class representative shall provide."

That falls under that chapeau of a proper plan for the litigation.

Mr Bacon is right to say that the reference to a costs budget emerges later on in the guide, but it emerges in two places, not in the single place to which Mr Bacon took you. So if we could go to the guide, which is at the back of the authorities bundle, in D/1 {AUTHD/1/1}, and we have paragraph 6.30, which is on {AUTHD/1/7}. We are in paragraph 6.30 and that sets out the various sub-elements of Rule 78(3). So we are in fair and adequate representation of the interests of class members. And we have first of all, on the prior

page, on page 6 {AUTHD/1/6}, you know, suitability, whether it is a pre—existing body and so on. Then on {AUTHD/1/7}:

"Any plan for the collective proceedings ..."

We have enumerated in the guide the various things that would be expected in the plan for the proceedings. At the bottom, after that list of bullet points:

"There should be appended to the litigation plan a costs budget to the end of trial. The purpose of the plan is to assist the Tribunal in deciding whether to make a CPO."

It is to be inferred the purpose of the costs budget in the preceding sentence also.

So that feeds into the first relevance of the costs budget.

Then we have the second reference to costs budget over the page, which Mr Bacon took you to {AUTHD/1/8}. In 6.33 we see that the guide takes the reference in the rules to an ability to pay the defendant's costs and embroiders that, and of course we know that the Tribunal can take into account all matters it sees fit, so it is also relevant that the proposed class representative can meet its own costs of funding the case and the costs budget will be relevant to that exercise. So you have those two different functions of the costs budget.

Now, this has featured in recent decisions of the Tribunal and I wondered if I might take you to the *Coll* case, there are two *Coll* judgments in the bundle. One of them was added yesterday and that should be in tab 4.1 of the authorities bundle. It is the decision of 3 February 2022. So we see in paragraph 2, which is —— for me, it is {AUTHB/4.1/3}. I will give you a moment to find it. So in paragraph 2, we see that the purpose of this hearing was to assess redactions that the PCR proposed to make in relation to her funding arrangements. That was to do with ATE in particular.

In paragraphs 8 to 10 {AUTHB/4.1/4}, over the page, we have "The Relevant Legal Background". These are the matters that I have taken you to. We start with the Act, which I did not go back to. Then Rule 78 in paragraph 9 {AUTHB/4.1/5}, and then in 10 we see an identification of the two ways in which the costs budget is relevant, or which financial considerations are relevant, perhaps I should say.

Then if we go forward to paragraph 26 {AUTHB/4.1/15} at this point, the Tribunal is considering relevance of ATE premia, because they are considering whether it is necessary to reveal the ATE premia, but it is a useful overview of how the Tribunal looks at the budget. So we

start with (1):

"The Litigation Budget reflects."

Here we have a total figure, just in that case, we have a detailed breakdown by phase, the same approach as in *Merricks*, the same approach as in *Le Patourel*, the same approach as it happens in the FX cases and here we have it in *Coll* as well. Divided into those phases estimated costs of each lawyer, estimates of time spent and their base rate, which is revealed, the figure through to trial, we see reference to "Phase 13" in the detailed breakdown. The conditionality of that was of course you only get to notice of administration if you win. So that is an analysis of what you already have in the litigation budget.

Then we have in (ii) the Tribunal focusing there on ability to meet funding, a 6.33 type test, and it is relevant to that of course that one may or may not need to know the ATE premium.

But we see in (2) and then (ii) {AUTHB/4.1/16} a point which the Tribunal may wish to bear in mind, which is it was obvious on the facts of that case that the total sums that needed to be extended would be met by the funder. So the bits that were being redacted did not leave one in any doubt as to the fact that everything would be covered that needed to be covered.

I will come back to those. I am told that there is a delay in what is being shown. I do not know if the Tribunal is looking at its own copy, but I am on {AUTHB/4.1/16}. So we see that in (ii).

Then over the page {AUTHB/4.1/17}, on 17, in paragraph (3) they say, on the facts of this case, we do not need to see the premium and we do not accept the criticism in this case that the litigation budget was inadequate in its detail. The Tribunal explains that it needed to be produced under paragraph 6.30, that is the earlier paragraph that Mr Bacon did not take you to:

"... because it will assist the Tribunal in deciding whether to make a CPO."

And it will:

"... for example, use it as a basis for assessing whether or not the PCR's approach and expectations as regards the progress of the litigation and resources required for each phase are realistic."

We have the second *Coll* judgment in the bundle as well. That is tab 8, and there is only one paragraph relevant in that judgment, which is paragraph 24, that is at page 13. Again, we simply see the Tribunal identify the different ways in which the budget is relevant. So you do look to ability to fund recoverable

costs, you do ——
MR JUSTICE RICHARDS: Sorry, are we still in authorities 4? Authorities B tab?
MS WAKEFIELD: B —— no, sorry, it is the second *Coll* so we are in tab 8 now. Sorry, I am going too quickly, probably {AUTHB/8/13}.
MR JUSTICE RICHARDS: Right, thank you.
MS WAKEFIELD: It is simply a confirmation that the Tribunal —— because of course that earlier hearing was to do with redactions, confidentiality. This is a certification hearing, the hearing we are having today, and again of course the Tribunal goes back and reminds themselves that the budget is relevant in those different ways.
So when one is thinking about the first way in which a budget is relevant, a satisfactory plan for proceedings, what is the anticipated scope of proceedings, is there an adequate amount for each phase and so on, we would absolutely agree, of course, that there is no need for a full cost budgeting exercise. We know that, it is obvious, and it was made plain in *Stellantis*. But we would also tentatively suggest —— and of course we are here simply to make submissions to assist the Tribunal in its gatekeeper functions —— but it is rather difficult to imagine how one could ask oneself what is the shape, the anticipated shape of

the proceedings and the anticipated budget for each phase of the proceedings when one does not have that information. We see that that granularity of information has been provided previously. In my experience it is the norm and this is the outlier, but that is just my own experience. In the *Merricks* case, to which Mr Bacon made reference, in fact that was not the order following judgment, it was the order following a CMC in which a higher-level budget had been put forward initially and the then president, Mr Justice Roth, said that is not good enough, in the transcript of the CMC —— I am sorry the transcript is not in the bundle, but he did not give judgment, but said, "Go away and give me the assumptions and the hourly rates", and then we drafted the budget which had those conventional phases working through the litigation.
It absolutely is the case that these proceedings will not work out taking exactly the shape that the PCR anticipates now. These things change and they change considerably over their lifetime. But what we do know is that the Tribunal, when it is considering case management applications, split trial applications, preliminary issue applications, third party disclosure applications, it goes back to the budget, and we have an

example of that in the bundle in the *Boyle v Govia* case, which is the case in which the expert witness was unavailable just before trial. We have that. It is tab 12 in the bundle and it is a decision of current presidents, so it probably is worth going to {AUTHB/12/1}, and we see in paragraph 9(3), which is on {AUTHB/12/8}, in which the Tribunal was considering the consequence of a change of expert just before the hearing, it notes that it has been very costly and it says, in the last sentence:
"We want to say nothing more about this, save that we consider the litigation budget quite carefully on certification, and we consider that it would be inappropriate not to require what is in effect a new budget to be reviewed and revisited by us."
Then later on in that same judgment, paragraph 13(3) on {AUTHB/12/12}, we see the order which fell out of that hearing, and (iii):
"There must be a fresh budget, setting out how the proceedings are to be brought to trial."
Here we see, again, the interaction between this requirement for a budget and the third sort of consideration or requirement which Mr Jowell referred to in opening, the blueprint to trial. There has to be some plan, even if it is not the one that ultimately

ends up taking us the whole way through.
I should say as well, the answer that has been given in general is: well, it is just a really big number and surely a really big number is good enough? But in my respectful submission, a really big number may go to the PCR's ability to fund proceedings —— I will come on to that shortly —— but it may well do that, but a really big number does not allow you safely to assess the quality and governance of the plan for the litigation. That is my submission. I also say that I just do not really understand the extent of push back that we have got to this point, because it must be the case that that first costs budget was prepared by reference to something. It must be that there were some sets of assumptions underpinning it: third party disclosure, perhaps, perhaps not; split trial, perhaps, perhaps not; length of the trial. There must be something in there so that the Tribunal can in due course form a view on whether proceedings have taken a different shape from that set out in the budget.
It may help, perhaps, at this point just to go back to the budget and refresh our memory of what it looks like. So that is in {B/6/2}. If you have it there, you will see that there are two phases: prior to CPO, post-CPO. Then the first four rows relate clearly to

the identity of the person who is being paid, essentially. Then the next four rows, they may relate to the identity of the person who is being paid, they may in a sense refer to a phase in proceedings, but it is not very clear. So if one thinks in particular of "disclosure costs", I think that those disclosure costs may be costs only of persons other than the solicitors and the counsel team and it may be that all of the solicitors' costs associated with disclosure are covered in "Solicitor's Costs". Similarly that may be the case for "Distribution Costs", so that may be it is anticipated that that is what will be paid to the notice of administration provider, but the post-judgment amount of nearly half a million pounds for the solicitors is their costs of distribution. I do not know, it is entirely opaque.

There is also a row of "Transactions Costs", and I am sure it is my fault, but I do not know what they are, and we do not know what goes into "Other costs" at all. So it is really just headings, broad headings with the single division costs budget prior and post.

So you have my submissions I think on the first way in which cost budgets are relevant, so that ——

THE CHAIRMAN: How much more detail do you say should be included?

MS WAKEFIELD: I say —— and of course it is a matter for you —— but I say it would be something like you have in the examples appended to our skeleton argument. So you have phases of proceedings and then you have a set of assumptions underneath it. The assumption might be attendance at trial, they will have a number of hours, they will have their hourly rates, you will have example brief fees, and the assumption would say that is on the basis the trial takes 10 weeks. Then, the Tribunal will know, if they say, well, actually the trial is going to be 30 weeks, the Tribunal would be able to say, "Goodness, what is going to go on with the budget then, is that all fine, is it still covered?". And they will say, "Yes, it is fine, because we can actually take something from disclosure because you know we ended up not doing third party disclosure". So it is relatively rough and ready but it allows a degree of interrogation going forward in terms of what has been spent already, which contingencies have come to pass, what has turned out to be more expensive and what has turned out to be less expensive, essentially. It is just that. That is why I say I am slightly surprised that it has developed into such an issue, because I thought that it would have been relatively easy to say nothing is set in stone at the moment, but we have prepared this budget on this set

of assumptions. That is it. Just go away and do exactly what we are told to do in *Merricks*. That is what I would anticipate the most straightforward way forward would be, but of course it is a matter for the Tribunal and not for me.

THE CHAIRMAN: I mean, I can see that putting in some assumptions about how the case is going to develop is one thing, but putting in details about everybody's charging rate and so on, that would seem to me to be otiose at this stage.

MS WAKEFIELD: It is not as necessary, is it? Because so long as one has the assumptions about how the case will develop and the amount that each stage will cost, one probably has the necessary detail to work out whether something has changed in a material way.

THE CHAIRMAN: Yes, I think that is the important point: if things change.

MS WAKEFIELD: Exactly, and then one can factor it into the ongoing duty to supervise and so on, and the case management decisions that inevitably you will have to make.

So that is my first point.

Then the second point is the other function of the costs budget, namely whether there is enough money to meet the PCR's costs, and this really relates to

the redactions in the revised budget. We absolutely do not want to know the ATE premium. This is not an application to have sight of the ATE premium, but the difficulty at present, the Tribunal might think, is that there is a lack of visibility in terms of what exactly that big number, the 30 million, covers.

So, if we look at the revised budget plan, that is at {B/12/8}. You will see it is entirely redacted. Mr Bacon took you there. He also took you to the prior LFA which this varies, and if I could just take you to that document, which is on the preceding tab, {B/11/1}. On page 13 {B/11/13} —— I am sorry, page 3, that was the wrong reference {B/11/3}, we see at that stage, in the original LFA in 2018, the total committed capital was a maximum amount of £30,715,000. We know that the reason given for the variation was an increase in adverse costs cover. But if we go back to the redacted, revised budget at {B/12/8}, we have two amounts there. That is the only information we have here, 4 million and 26 million, and if we add those sums together, they come to the same amount, the same total amount that was in the unvaried LFA even though they need to accommodate more things.

We know they —— we think we know that they need to accommodate £10 million committed towards adverse costs

on the part of Burford, and we know that the delta between this total and the costs budget is 9 million, so we have got an ATE premium we are not allowed to know the amount of, that's fine, we have got £10 million and we have got only 9 million extra. Now, I do not know, consistent with the PCR's desire to keep the premium confidential, how best the Tribunal revolves that difficult position, but as we saw in the Coll judgment, the Tribunal said: well, ultimately I do not mind so long as I have total confidence that the funding amount covers the costs budget. I am not entirely sure that this Tribunal can be quite as confident because I cannot get the numbers to add up, not helped by the fact that I am not allowed to know one of the numbers. But that is as far as I can go on the second point, but just so the Tribunal knows where we are coming from: it is not an application to be told the ATE premium, it is just a certainty that the proposed costs budget is entirely covered in this funding agreement, essentially, as are of course the adverse cover costs.

MR JUSTICE RICHARDS: Then what about the point that I think Mr Bacon made that even if the costs budget is exceeded the excess is converted into a conditional fee agreement?

MS WAKEFIELD: Only for the solicitors.

MR JUSTICE RICHARDS: Okay, the rebuttal is it is only for the solicitor's costs.

MS WAKEFIELD: Yes.

So those are my submissions in relation to the costs budget. I am sorry that I have spoken for some time. I have probably tried your patience, but thank you very much.

THE CHAIRMAN: Thank you very much.

MS WAKEFIELD: Thank you.

Reply submissions by MR BACON

MR BACON: Well, sir, the first point I would make is, with the greatest respect to Ms Wakefield, it does not sound like a gatekeeper type submission is being made, but this is a much more lower-level rather than high-level challenge to the budget, which, as I at least understand her submissions, has deviated a little, to say the least, from the skeleton.

There is nothing untoward or devious here or unclear about anything that is concerning the budget. The original budget, which you were taken to, the first budget -- I will just get my note -- so {B/6/2} -- sets out in some detail, with respect, the total costs that are being anticipated to be incurred pre-CPO and post-CPO. When I say sets them out in some detail, it breaks down the total figures into the fees payable to

the solicitors, the fees payable to counsel, to experts, public relations, distribution and transaction costs, to be read alongside the budget plan, which, as I -- sorry, the litigation plan, which I indicated, I think for your note, was {B/4/9}. I am not going to take you to it, but it is a detailed litigation plan in which there has been no suggestion the plan to which this budget is part of is an unreasonable plan or does not cater for topics or subjects or steps which should have been catered for.

Again, for the costs post-CPO, we are going to have a breakdown, and you will see, just to explain the difference in the figures, which has been the subject of correspondence before today, correspondence which has been somewhat mind-numbing, with respect to Ms Wakefield's solicitors. The original budget that you may have in front of you now at {B/6/2} calculated the solicitor's fees, as the footnote makes clear, by reference to full hourly rates. The revised budget, which is the redacted document which has featured in my learned friend's submissions -- sorry, I have just lost my note, bear with me -- it should be {B/12/1}. Is it my fault, I am clicking on the wrong button? Yes, {B/12/8} -- sorry, sir -- has a different figure for the investments pre-CPO, which we have explained in correspondence reflects the fact that

the solicitor's fees have been calculated in the revised budget by reference to discounted fees because of the conditional fee nature of the arrangements they have. So that explains the difference, together with the cost of the ATE premiums which have been taken out to finance the additional adverse costs that the budget revised plan provides for. There is no question at all that if we were to provide an unredacted version -- I can provide the Tribunal with an unredacted version if it wishes to see it, but if you are provided with it, you can immediately obviously see the premiums that are charged for the adverse costs, which is something we obviously pushed back on, legitimately, and if we were to do something else, which is to sort of redact just those premium costs and leave the solicitor's and counsel's fees and so on that remained, you would be able to work out the cost of the premiums, because you just deduct the total from the others.

So, the position is that the original budget recalculated at the discounted solicitor's rates is the budget that the class representative puts forward. We submit that at the gatekeeper level, nothing further is required. Assumptions and breakdowns of hourly rates and all the sort of things that -- the bells and whistles that my learned friend is advancing as being

required at this stage sounds very much like to me a precedent H type budget where you do have —— there is a requirement to put in assumptions and so on, which is not a requirement of the rules, and obviously each Tribunal will wish to proceed as each Tribunal wishes to proceed. The fact that a Tribunal very early on in the process of the development —— the embryonic stage of this Tribunal, required more detail than it does in latter cases is important. I mean, one can see why, perhaps, in *Merricks*, where the court was embarking on this opt out regime at a very embryonic stage might want to have been more cautious about the overall costs. In that case, the 10 million I think was considered to be an extraordinarily high level of costs to be providing for in respect of adverse costs. We are in cases now where two/three times that is not uncommon, and the more recent authorities that you have been taken to do not provide any justification f or demanding a t this gatekeeper stage something more detailed to be provided. To the contrary. In fact, Mr Justice Roth was in *Trucks* and he expressly referred to the budgeting process as being a high level engagement.

If there is something that concerns the Tribunal, of course the class representative for whom I act will assist the Tribunal. But, with respect, nothing in

the submissions that my learned friend has advanced requires any further work on our part.

Thank you.

THE CHAIRMAN: Thank you. We will take a five—minute break.

MR JOWELL: Thank you.

(11.49 am)

(A short break)

(12.02 pm)

MR BACON: Is there anything further you need from me at all?

THE CHAIRMAN: No. Thank you very much.

MR BACON: One observation I was going to make, just for the record, is that —— and it may give some comfort to the Tribunal in relation to budgeting, is that there is fluidity within these arrangements where there are some cases where the funder ties a particular stream of funding to a limit. Here, on instructions, there is flexibility within the budget. So if, for example, there was an underspend because there was not a full—blown CPO hearing, you can effectively borrow from Peter to pay Paul.

Thank you.

THE CHAIRMAN: Thank you very much.

MR BACON: If my role is no longer required, can I be excused?

THE CHAIRMAN: That is just the point I was discussing.

MR BACON: Yes. I am happy to stay, whichever the Tribunal prefers.

THE CHAIRMAN: We think it would be best for you to stay.

MR BACON: Thank you.

Further submissions by MR JOWELL

MR JOWELL: So if I may then turn on to the eligibility requirements and the methodological requirement.

The claim is one, in very broad terms, brought on behalf of domestic consumers of electricity in Great Britain from 2001. I will come on in due course to address you on the details of the class definition. The claim arises on the back of a European Commission decision of April 2014 which finds a cartel that lasted the best part of a decade between the producers of submarine and underground high—voltage power cables. That decision was appealed but all of the appeals, so far as relevant, have been dismissed and it is now final.

The essential hypothesis underlying the claim is that the cartel led to an overcharge in the price of those cables that were charged to certain transmission and distribution companies in Great Britain.

Then, the second aspect is that those costs were passed through in transmission and distribution network

charges and in renewables obligations to suppliers of electricity in Great Britain.

Then, finally, the third part of the piece is that those suppliers passed on their own elevated costs to ultimate electricity consumers.

It is clear, in our submission, that the claim raises certain common issues, most notably the existence and the extent of the initial overcharge, the existence and extent of passing on, both from the distribution companies and transmission companies to suppliers and by suppliers to consumers. The common issues are identified in paragraph 50 of our claim form {A/1.1/19} and elucidated somewhat by Mr Druce in his first report at section 2.10 {D/1/27}. So that, I think, deals with the aspect of eligibility that concerns common issues and it is not disputed that there are.

The test of suitability has been established —— which is another aspect of eligibility, has been —— that has been clarified by the Supreme Court in its Merricks judgment to be a test of relative suitability, relative to the claims being brought on an individual basis by individual claimants. Now, again, it is clear that the sheer number of class members, around 30 million, and the relatively low amounts at stake here mean that individual claims would be wholly impracticable, and nor

would it be feasible also in light of the nature of the class as a group of consumers —— end consumers. Nor is it contended —— rightly contended by the proposed defendants that the present claim could be brought as an opt—in claim by those consumers.

Now, some points have been taken in relation to the methodology that was outlined by Mr Druce in his first report, but those have all been responded to in his second and third reports, and I think no extant points remain on the basis of which certification is opposed on the basis of an inadequate methodology. There are certain points that they have asked to highlight to the Tribunal, which you will have seen, and I will come to some of those in due course, but there is no essential attack on the methodology as being inadequate.

Which then, I think, leads us to class definition in detail, and also to the issue of the case management of the renewables obligation issue. If I may deal with that second issue first and then I will pass on to Mr Rothschild to deal with some of the details on the class definition.

So, just by way of background —— I am sure you will be familiar —— the basis of the renewables obligation issue is this, that, assuming there was an overcharge,

did that lead to the number of renewable obligation certificates per MWh awarded to offshore windfarms being greater? That in a nutshell is the issue. More specifically, it is whether any alleged overcharge on intra array cables —— those are the cables that effectively link different parts of a windfarm —— inflated the transmission network use of system charges paid by offshore windfarms and therefore resulted in proportionately increased payments by suppliers under the Renewables Obligation scheme.

Now, under the Renewables Obligation scheme that was in force at the time, the renewable generators were entitled to a certain number of these renewable obligation certificates per unit of energy generated over a particular time period, and the suppliers were obliged to pay those renewable obligation certificates, essentially it's form of subsidy for those generators that produce renewable electricity and it was to encourage of course more renewable generation of electricity.

Now, the number of ROCs to which different renewable generation technologies were entitled were set by the Government from 2009 onward by way of a banding, so that effectively there was a different ratio of ROC depending on what type of renewable generation you were

involved in, whether it was landfill gas or windfarms and so on. Now, there are three banding decisions that are of relevance to the present claim, or of particular relevance —— there may be others, but there are three that are clearly of relevance. The first is in 2009, which awarded I think one—and—a—half ROCs per MWh to offshore wind. There was one then in 2010, which increased the level of support to two ROCs per MWh, and then there was one in 2013 which first maintained the level of support at two ROCs per MWh and then reduced it to 1.9 from 2015 to 2016, and then down to 1.8 ROCs thereafter. So, those are the three, if you like, decisions of the particular ratio of ROCs that are relevant.

Now, there is no real debate, I think, that banding levels were set by reference to, in part at least, windfarm costs, and there is also no dispute that those costs included the cost of intra array cables.

THE CHAIRMAN: Mr Jowell, we are familiar with the factual background to this issue.

MR JOWELL: I am grateful, yes.

THE CHAIRMAN: And we are satisfied that it would be appropriate to have the issue of the ROCs dealt with in conjunction with the London Array proceedings.

MR JOWELL: Oh, well, I am grateful for that. I think, if

I may ——

THE CHAIRMAN: That it should be CMC, but obviously there should be a CMC to discuss how the issue can be dealt with, but that does not seem to be contentious.

MR JOWELL: No, indeed.

THE CHAIRMAN: I mean, that is certainly something that is pressed for by the proposed defendants and, as I understand it, you now accept that that is an appropriate way forward.

MR JOWELL: Well, if I may, I should caveat that slightly, or perhaps just in certain respects. We say that if there were no London Array proceedings, it would not be appropriate for this to be heard as a preliminary issue. It is quintessentially something that would be appropriate to be heard as part of the trial. We can see that there is a —— in the sense of fairness — a benefit potentially of it being heard as part of the London Array proceedings and we do not ourselves object to that course for that reason, for the reasons of consistency.

However, it is essential, in my respectful submission, that the Tribunal should not reach a concluded view on that today because it has not heard from London Array itself, and it is its trial that is effectively being gatecrashed by this issue which no

longer, I think, arises in those proceedings, strictly speaking, because of Nexans' change of stance in which they have, having previously effectively taken the position that we took, they have now, opportunistically, one might say, reversed course and now concede the point in those proceedings. So it does not strictly arise in those proceedings, but nevertheless we do not object and I think we are all agreed that there should be a CMC in the near future to decide that point.

The other caveat we would make is this, that the Tribunal will need to give careful consideration to the scope of that issue, because it could be done on a purely quite narrow basis, which I think is what the proposed defendants are proposing, which is just the 2009 and 2010 decisions. It could also potentially also extend to the 2013 decision. It could also extend to other common issues between our proceedings and the London Array proceedings, most obviously the question of the overcharge in London Array.

THE CHAIRMAN: Yes.

MR JOWELL: Which is a component —— a small component, but a component of our overcharge. So all of those issues, we suggest, should be ventilated at a CMC, I think we proposed in the near future, in May and June.

The third point I just should lay down by way of marker is that we do think it is essential in advance of that CMC that we should receive the disclosure in the London Array proceedings so that we are on an equal footing with the proposed defendants and London Array and know essentially what the underlying material is there, because that will assist us in being able to formulate a concluded position on what the scope of the issues —— common issues, we say, we should be entitled to participate on.

MR JUSTICE RICHARDS: I got the sense from your skeleton argument that you were —— London Array agreed in principle that you should get some disclosure. Are there matters between you in London Array?

MR JOWELL: I think that the position remains unclear at present. We certainly seek that disclosure.

MR LUCKHURST: So we have agreed in principle that they should have that disclosure and we have raised that with the London Array claimants and they are yet to get back to us with the detail of that.

MR JOWELL: We would be grateful for a clear steer that that should be provided and comfortably in advance of the CMC.

MR JUSTICE RICHARDS: We cannot really order disclosure against London Array without hearing from London Array,

can we?

MR JOWELL: No, I see that, but ... that is why I said "a steer" rather than "an order", but I think it does make eminent sense to us, obviously subject to confidentiality concerns. Otherwise we are going to have to have two CMCs, one where we ask for the disclosure potentially and another where one debates the issue.

MR LUCKHURST: Sorry, just in light of what my learned friend has said, I should add that one of the points made by the London Array claimants is that the scope of the sharing of disclosure should be informed by the scope of the common issues. So there is a bit of a chicken and egg situation there.

MR JUSTICE RICHARDS: So is the order you are asking us to make then that there should be a CMC involving everyone in this room and London Array in May or June ——

MR JOWELL: Yes.

MR JUSTICE RICHARDS: —— ideally to discuss scope of a preliminary issue, parties to seek to agree between themselves a position on disclosure in advance of that, and indeed give disclosure in advance of that CMC?

MR JOWELL: Yes.

MR JUSTICE RICHARDS: But if, despite having tried, a position on disclosure cannot be agreed, that CMC will

have to be —— at least some of the business at that CMC will have to be disclosure?

MR JOWELL: Yes, and ideally to state that in the Tribunal's at least provisional view, the provision of that disclosure appears to be sensible to facilitate that CMC being effective, which would be desirable for all parties so that they know where they stand.

If I may ——

PROFESSOR NEUBERGER: Can I just query one thing? Is it agreed that if this preliminary issue be done that it would be done as part of the trial or is that —— part of the London Array trial, or is that still an open question?

MR JOWELL: I think what is envisaged is that it would be as part of the London Array trial, which starts in about a year, so there is time for it. But I think that it is still an open question. I mean, it may be that London Array will say, "This is no longer an issue in our proceedings and we think, if you want to deal with this, deal with this somewhere else", and if that is the case, the Tribunal will have to consider those submissions.

PROFESSOR NEUBERGER: Thank you.

MR JOWELL: So I think the next issues are certain issues as to the scope of the class and the question of

the participation of minors and after that I plan to come on to the re−amended claim form and the order. But, if I may, on those initial points about the scope of the class and the participation of minors, I will hand over to Mr Rothschild, if I may.

Submissions by MR ROTHSCHILD

MR ROTHSCHILD: Mr Chairman, members of the Tribunal, the class definition, or the proposed class definition is to be found in the draft CPO at {F/197.1/3}, paragraph 8. It may be helpful to have that on the screen.

The proposed defendants have raised a couple of class definition issues for the Tribunal to consider in the context of its gatekeeper role, although they do not actually object to certification on either of those.

The first issue they raise is whether the class is identifiable, focusing in particular on the words "bore cost of paying". The words "bore the cost of paying" are in the first couple of lines of the class definition. Those words were carefully and deliberately chosen for reasons of fairness, for reasons of practicality, and to avoid complication. Well, Prysmian's response to the CPO application queried whether those words might be replaced with the expression "paid directly". Prysmian did not actually make this point in their skeleton

argument for the hearing, but they briefly resurrected it in a short letter to the Tribunal sent at the start of this week, so for thoroughness, I should perhaps address that point.

So fairness first. Well, we recognise that either form of words, Prysmian's formulation "paid directly", or our formulation "bore the cost of paying", will reach the same result in many cases. That is to say, in many cases but not all cases, the person who directly paid for the consumption will also be the only person who bore the cost of paying, bore the loss. In other words, the person who wrote the cheque, the person who had the direct debit, the person who bought the prepayment credit at the newsagents will in many cases bear the entirety of the cost, but the crucial point is that that often will not be the case, because sometimes a contribution will have been made towards that direct payment.

We gave some examples in our skeleton argument of flat sharers or roommates or just a classic domestic arrangement between spouses, where it might be that only one of them actually made the direct payment but he or she did so using funds provided by others.

MR JUSTICE RICHARDS: So just to make sure I understand the drafting of your proposed class definition. All

people alive who bore, and personal representatives, the cost.

MR ROTHSCHILD: Yes.

MR JUSTICE RICHARDS: I mean, without sort of suggesting on the hoof drafting changes, does that really mean all people are live who bore all or part of the cost? Because in your situation you have got one person with a direct debit and you have got a roommate who is making a contribution. It might be said that both of them are bearing part of the cost in your scenario.

MR ROTHSCHILD: Yes, that is what we mean by the definition, yes.

THE CHAIRMAN: Could I ask −− this is actually quite an important point −− how do you anticipate that potential members of the class will establish that they bore any part of the cost? Looking at the matter overall, it does seem to the Tribunal that we need to concern ourselves at this stage with how an award is going to be distributed. I appreciate that what is said in the plan is that that can be put off for the time being, but realistically, in practical terms, how are people going to establish that they bore any part of the cost of an electricity bill in, say, 2001? How are they going to establish when they first started paying the electricity bill so they can be sure they comply with the limitation

requirements? How is that going to be dealt with?

Is it practical to expect people to come forward to prove that they paid a part of an electricity bill in 2002 if all they are going to get out of it is, say, for example, £10 or some fairly modest amount?

MR ROTHSCHILD: Yes, well ——

THE CHAIRMAN: Because what troubles the Tribunal is that these proceedings are going to be of minimal benefit to members of the class if it is going to be difficult —— if it is going to be problematic for them to come forward to claim any part of the damages. It is going to be a benefit to the lawyers and the funders, but is it going to be really of benefit to the members of the class, and if not, it is really appropriate that we should certify these proceedings?

MR ROTHSCHILD: Well, for present purposes, we say the definition is practical for people to be able to know whether they are in or out of the class. People will know whether they have made a contribution towards electricity.

THE CHAIRMAN: Really? 20 years ago?

MR ROTHSCHILD: They will most probably have financial records potentially accessible, and to the extent they do not, they will know that they put a share of their budget towards house expenditure.

THE CHAIRMAN: But with respect, that is just not realistic. People do not keep records of what they spent on electricity bills 20 years ago.
MR ROTHSCHILD: For the purposes of somebody knowing whether or not they should opt out. They will know essentially whether they contributed to household expenditure. The separate question is proving it for the purposes of claiming from the pot of aggregate damages.
The case law which we set out in our reply at section B2, and we can turn it up, it is {A/10/8}, emphasises it is not necessary at the distribution stage to adhere strictly to the compensatory principle. So we have not tied ourselves yet to a precise methodology for distribution, but it is not necessarily the case that we must compensate every individual who steps forward and goes to the trouble of identifying that they did pay, producing the receipts, with their exact compensation. There are alternative possibilities for distribution. One we have mooted there is just a credit applied generally on electricity bills. There will be other ways of doing it. One could prioritise the needier members of the class and give them a higher amount.
We have not yet committed to a particular method of distribution, but it need not trouble the Tribunal at the moment that every one of the potentially 30 million

individuals would need to produce bank statements and full documentary proof, because it is not necessary at the distribution stage for that to happen.
THE CHAIRMAN: Well, I accept that, but equally, the Tribunal needs to be satisfied that there is a realistic, practical way in which members of the class are going to come forward and claim their part of the damages. I quite accept it does not have to be exact, but that is not the point. At the moment, there seems to me to be a vacuum when it comes to actually explaining how these proceedings are ultimately going to be for the benefit of the class.
MR ROTHSCHILD: I can give some examples. Name on the electricity bill would be a starting point. Residence; if they were on the electoral register at the relevant date, that would show that they were present, and if they then signed a declaration to the effect that they formally stated that they contributed to an electricity bill, then that may well be taken at face value in the first instance.
THE CHAIRMAN: What about using the data of the suppliers of electricity?
MR ROTHSCHILD: That is a further possibility.
PROFESSOR NEUBERGER: Just, I do not understand the term, I mean, if you have got a household with various people

who share costs, are they all people who bear the cost of the electricity bill or is there one person, or does there have to be a formal agreement? I do not understand.
MR ROTHSCHILD: It may be that they only contributed in part. We are keen to avoid the problem of pass—on. I mean, there is a point which helps explain why the proposed defendants have an interest in raising this issue. If the class were to be cut down to only those who paid directly, as they suggest, then the claim would be significantly smaller to the extent it would exclude indirect payers, those who contributed, and doubtless the proposed defendants will say, well, those who directly paid, many of them, will have passed on their loss to others. We are dealing with a long time period here going back to 2001, and domestic arrangements change over a period of time, and so it would be most unfair to focus only on those who had exclusively paid entirely throughout that long period.
PROFESSOR NEUBERGER: But I can see your difficulty about pass—on and fairness and all that, but I still have the problem that I do not know, even if I observe a household where they share costs and somebody pays them, I have no idea whether the person who is not actually paying the bill is regarded as included or not

included in your class.
MR ROTHSCHILD: There is another way of looking at it, which is from the perspective of how one goes about calculating the aggregate damages, because for present purposes we are concerned with defining whose loss is being calculated by the Tribunal.
Now, all those who bore the cost of consumption of domestic electricity will have borne the full costs that Mr Druce identifies in his report. If some category are to be carved out, that makes the calculation of aggregate damages very much more complicated. It will be necessary to consider the pass—on within the household in an intricate way, which would overcomplicate the aggregate damages calculation.
PROFESSOR NEUBERGER: I can see the problem, but I am still left with the problem that I cannot identify whether somebody is a member of the class or not, whatever documentary evidence is available. I still just do not know what it means if people are in a joint household sharing costs. Are they both people who bear the cost of the bill ——
MR ROTHSCHILD: Yes, if they share the costs.
PROFESSOR NEUBERGER: But we are getting into detailed household arrangements of which there will be no evidence and people have different recollections.

MR ROTHSCHILD: Well, it will not be necessary for the Tribunal to consider that at the stage of the trial or calculating aggregate damages on our class definition. It would be, on the proposed defendants' alternative, of paid directly, because they doubtless would then say, well, those class members passed on their loss to others in the household. So we seek by this class definition to deal with the pass-on problem. We are in effect saying we want to include in the class all those to whom loss was passed on. All those who bore the cost or bore the loss --

THE CHAIRMAN: Adequacy applies to both of the definitions, which is the difficulty of proving that you either paid directly or that you were part of a household which paid the electricity bill. That is one problem I have.

The second problem I have is, is it practical to think that people are going to come forward and say, "Yes, can I have my £10, please; I have been paying my electricity bill since 2001 whatever"? I mean, is that really going to happen, or is there just going to be a huge residue of unclaimed money?

MR ROTHSCHILD: As I say, we address the topics of options for distribution at the reply. We went into further detail at paragraph 113, and perhaps that should be shown on the screen. That is {A/10/43} and following.

If we could go, please, to page {A/10/44}, and in particular I would invite the Tribunal to read paragraph 115 and 116 where we sought to address this point.

(Pause)

The judgment in the *Gutmann* case, which is there referred to in footnote 35 -- the relevant paragraph is not actually in the bundle, it is paragraph 173 of that *Gutmann* judgment. Perhaps I might read it out.

The Tribunal said:

"A helpful note had been submitted to show that Canadian and US courts, where distribution will involve relatively small amounts, have approved distribution methods whereby potential claimants set out and verify the facts of their claim in a formal declaration with limited or no supporting documentation." [As read]

In other words, there is precedent in other jurisdictions where the claim amounts are relatively small for a formal statement to suffice as proving membership of the class, and we are, on any view, concerned here with a very large proportion of the population.

MR JUSTICE RICHARDS: I suppose the concern -- I mean, I understand that. I suppose the concern that we are sharing with you, to want to be sure, even at this

certification stage, we have got to look at 79(2)(a) {AUTHA/6/2}:

"Whether collective proceedings are an appropriate means for the fair and efficient resolution of the common issues."

We have got to look at:

"The costs and ... benefits of continuing the collective proceedings".

What we are concerned about, certainly what I am concerned about, at this stage at least, is a situation where, if we fast-forward to the end of the proceedings, say you are successful and you get a sizeable award of damages and no one comes forward to collect because the paperwork is too much, or the sums are too small and -- or -- when we look back at the proceedings in such a scenario, what we would see is very lengthy and expensive and costly litigation that has not really benefited anyone other than the lawyers, put bluntly. That is what we are concerned about.

MR ROTHSCHILD: Well, without a crystal ball, one does not know exactly what will happen, but we are seeking to provide a method by which people could be compensated, and one must recognise the losses that have been caused by the cartel conduct. This regime is designed for the claims that would not be brought on an individual

basis. Of course nobody could go to the county court to bring a competition claim for tens of pounds, but there is this regime available and we are -- Ms Spottiswoode seeks to make the regime available to those who have suffered such loss should they wish to step forward.

It may be that ultimately the distribution method is done by way of a credit on bills, or something that is more automatic, and does not require individuals to step forward. Of course, should the case proceed, the Tribunal will doubtless scrutinise in detail the distribution methodology. But that is for a later stage, and obviously the Tribunal's points are carefully noted, and should a collective proceedings order be made, this will need to be addressed to satisfy any concerns that you have.

THE CHAIRMAN: But why should it be later on? Why can we not look at it now? I mean, what we do not want to happen is, as Mr Justice Richards suggests, we do not want to go on for two years, then, when it comes to distribution, find that there is nobody interested, or nobody can prove that they paid the bill 20 years ago. It would be too late then.

We can deal with it now, can we not? We can require the PCR to come forward with a practical method of distribution, and it does seem to me that some sort of

automated system whereby it is not necessary for class members to actually do anything to suggest —— to prove that they are members of the class would be the preferable one, for obvious reasons, particularly if the money at stake is very small.

MR ROTHSCHILD: Yes. I believe that is a point my learned leader was planning to address but had not.

Further submissions by MR JOWELL

MR JOWELL: Well, I was not planning to address it, because it has not been raised by the proposed defendants in their skeletons, but I am very happy to.

The first point is —— I think there are two fundamental points to appreciate. The first is that the Supreme Court, in its judgment in *Merricks*, Lord Briggs, particularly at paragraphs 77 through to 80 {AUTHB/4/28}, makes it very clear that distribution —— issues of distribution are not really matters for this stage, for certification.

THE CHAIRMAN: Well, shall we have a look at that?

MR JOWELL: Yes. Forgive me, I will have to get the reference. I am told it is {AUTHB/4/1}. I think if we go to, for example, paragraph 77 {AUTHB/4/28}, he says:

"For reasons already given, I consider that this approach discloses a clear error in law. A central

purpose of the power to award aggregate damages in collective proceedings is to avoid the need for individual assessment of loss. While there may be many cases in which some approximation towards individual loss may be achieved by a proposed distribution method, the mechanics will be likely to be so difficult and disproportionate, eg because of the modest amounts likely to be recovered by individuals in a large class, that some other method may be more reasonable, fair and therefore more just. For that purpose the statutory scheme provides scope for members within the class to be heard about the proposed distribution method. In many cases [he says] the selection of the fairest method will best be left until the size of the class and the amount of the aggregate damages are known."

THE CHAIRMAN: Yes, "in many cases". He does not say that it is something that cannot be properly considered at the certification stage.

MR JOWELL: No, but if I go on, if I may, to paragraph 80 {AUTHB/4/29}:

"Finally, the Court of Appeal ..."

This is "Prematurity":

"Finally, the Court of Appeal regarded any consideration of distribution proposals at, and for the purposes of, the certification stage as premature.

I agree that this will generally be true, not least because issues about distribution mainly engage the interests of the represented class inter se, rather than those of the proposed defendant. But there may be cases where the issues as to the suitability of the claims for collective proceedings will be better addressed when the whole of the representative's proposed scheme, including distribution proposals, are looked at in the round. In the present case there was nothing in the proposals for distribution which militated against certification, and an inappropriate element in the distribution proposals would normally be better dealt with at a later stage."

So I think it is at the very least a very clear steer that, normally at least, distribution should not be —— one should not attempt to grapple with final issues on distribution at the certification stage.

MR JUSTICE RICHARDS: But the point we are putting to you is it is not a point about interests of the respected class inter se. That is not the point we are putting to you. The point we are putting to you is that there might just not be enough in it for the represented class.

MR JOWELL: No, but the case law is very clear that low values per capita, as it were, or per class member should not interfere with the purpose of this —— with

certification under this legislation, which is precisely intended to compensate people who have such low value claims. Therefore, the thrust of all the case law is that the class representative, and indeed the Tribunal, must seek to be inventive and to seek to find ways such that the class may properly be —— even if it is in a very rough and ready way, may be properly compensated, and that the proposed defendants are not allowed to walk off with their ill—gotten gains.

Now, we have proposed —— we were alive to this point, and therefore we have floated different methods other than simply an individual compensatory claim in our claim form, such as the one that Mr Rothschild has mentioned in which the remainder could be paid directly to retail electricity suppliers by way of deduction on electricity bills.

Now, that, of course, would entirely avoid the point that, Mr Chairman, you fairly make about the difficulty of encouraging many class members to come forward with evidence, or even with a declaration, potentially, seeking compensation. But how that is to be done and whether it is to be necessary depend on, first, the size of any award and therefore the per capita amounts, and also the practicability of that and potentially getting the cooperation of Ofgem or others to assist in that

process, or indeed the proposed defendants, and depends upon the records that they have and the ability to make those deductions. So how that could be done is not an issue for today, it is an issue for a later day, but we were alive to it and we have included that as one alternative.

Another alternative is of course to seek to, as it were, skew the compensation so that you could do compensation of higher amounts on a "first come first served" basis, or to potentially skew the compensation to the most needy within the class. But these are all methods that are not for today, they are for another day. But we are alive to the point, we have shown we are alive to the point. It is not something that can or should properly interfere with the certification of the claims, but of course we are alive to the point that distribution must be done in a way that is practicable.

THE CHAIRMAN: You may be alive to it, but I mean, suppose we certify, then what happens next? I mean, we then coast on towards, hopefully, a final judgment. We still have the problem, do we not?

MR JOWELL: Well, no, we have —— there will be an issue, and once one knows what the amount is that is either agreed by way of settlement, or agreed by way of an award of the court, and then a method of distribution has to be

determined, and the Tribunal will of course supervise and have to approve that method of distribution. So it is not that we get to choose; you, the Tribunal, will have to approve it. I think we have done enough to show that there are methods of distribution, such as deductions to current or future electricity bills, that would not ——

THE CHAIRMAN: How far has that been explored?

MR JOWELL: Well, if the Tribunal wishes to have further exploration of that, then we can seek to do so. But what we have done is we have established that in other cases this method of distribution has been approved in principle, and again, if I can —— I think it is in the *Le Patourel* case —— forgive me, in the *Gutmann* case that was referred to and quoted on —— it is in our reply at paragraphs 14 to 19 {A/10/8}, you will see we refer to the various flexible distribution methods that are available to the CAT and that have been recognised judicially by the Court of Appeal both in the *Le Patourel* case and in the *Gutmann* case.

So you see at {A/10/9} we cite the comment of the Court of Appeal in *Le Patourel* where it notes that the —— we see the endorsement of innovative distribution methods, and you will see over the page {A/10/10} the *Gutmann*, where we have underlined the Court of

Appeal's comment that:

"Whilst we express no decided position upon the issue it certainly seems arguable that it is open to the CAT, if it accepts the appellants' gloomy forecast, to consider whether there are appropriate proxies to distribution to individual claimants such as ordering a prospective reduction in certain fares upon the basis that it is impossible from a practical perspective to cure the past than a forward—looking remedy might suffice."

So there has been judicial endorsement of those methods, we allude to those methods in our claim form, and in light of the fact that there has been no objection to that by the proposed defendants and the comments in the Supreme Court ——

THE CHAIRMAN: I understand that —— (overspeaking — inaudible) —— dealt with in more detail. But I mean, if this sort of idea of prospective reduction in bills is to be latched onto as a serious method of distribution, then it does seem to me that the practicality of it needs to be looked at now rather than in two years' time when it may turn out not to be practical, in which case we are left with a problem.

MR JOWELL: Well, I think one can start to explore the practicality, but one cannot reach a definitive view

until one knows the amounts at stake, and the case law is very clear that it is not necessary to come, at the certification stage, with a defined plan on precisely how you are to distribute. What we have done is to allude to different methods and no objection has been taken to those.

When you say, Mr Chairman, "now", I can see that if you wish us to try to explore these after certification and before trial, these methods, then we are content to do so, but it should not, in our respectful submission, impede certification itself. That would be contrary to the approach taken —— the very clear steer of the Supreme Court in *Merricks* ——

THE CHAIRMAN: Well ——

MR JOWELL: —— and indeed the approach of the Court of Appeal in all of these cases.

THE CHAIRMAN: —— I don't, for my own part, see that the amount of damage should necessarily be critical. I mean, if there is a practical way of reducing people's bills, then no doubt that can be adjusted, depending on the amount of the damages. So it does not seem to me that we need to wait and see how much the damages are before we start thinking about an appropriate method of distribution.

MR JOWELL: Well, in our submission, it is not ——

the appropriate method of distribution is not a matter for this stage of the proceedings, but if —— but there is nothing —— I can certainly accept that —— when I say "this stage", I mean the certification s tage. It should not impede certification w hen m ethods h ave been —— different m ethods h ave b een — — p otential m ethods have been floated a nd n o o bjection h as b een t aken t o t hem by the proposed defendants. So, in our submission, this would be making the same error that the court made in first instance in *Merricks*, if you were to impede certification on that basis. But certainly we have no difficulty at all in seeking to flesh out potential proposals for distribution soon after certification . Bear in mind, of course, that the Tribunal is always entitled to decertify cases.

MR JUSTICE RICHARDS: So you would urge us not to decline to certify because of concerns about this point at this stage, perhaps invite you to look at the imaginative alternatives that you mention in your reply, with the subtext perhaps being that if the response to those is not satisfactory , decertification could be on the agenda.

MR JOWELL: Well, yes, I mean, I think that decertification is , of course —— on the basis that distribution is impossible or impracticable, would be a very

disappointing outcome all round, and indeed it would reflect very poorly on the system. But, yes, of course, and we have no difficulty , of course, in seeking to advance, to bring forward, if you like , the work on —— some work on that, provided, of course, that we are not —— there is always a risk in sort of bringing forward enormous costs that are anticipated to be at a later stage to an earlier stage in proceedings that that does put a burden on the claimant and on the funding. But we have no, certainly in outline , in developing those proposals at an earlier stage. We have no difficulty with that at all .

MR JUSTICE RICHARDS: But suppose we did that and we asked you to explore the possibility of crediting consumers' electricity bills , and you tried hard, and you spend a bit of time and money investigating it and come back and say, "Sorry, cannot do it; the electricity companies will not play ball ; here are all of these problems"?

MR JOWELL: Well, then there do remain alternatives. So, in a number of the United States cases, for example, people have been able to claim, in some cases, on the basis of a simple declaration that is signed. In other cases, one can have, as I said , skewed distribution . So one could say that, as I said , the most needy, or those who apply first , potentially get a larger amount that

incentivises claimants.

But it is a feature of collective actions generally that not everyone, indeed not most of the class claims. That is, I'm afraid, a feature of these types of proceedings, and that has been recognised in the literature and the commentaries that led up to this legislation and that has been accepted, that there will be some proportion, perhaps a majority, of potential class members who do not claim. That is also what allows, potentially at least , the payment out of the funder by the undistributed proceeds. That is simply a feature of this system, which is still , I think, one that the English judicial mindset, if I may put it that way, is still grappling with, but it is a necessary feature of these types of actions.

MR JUSTICE RICHARDS: Yes, because given Mr Bacon's very helpful taking us through of the funding arrangements, if we got you to a point where you produced a perfect system, where absolutely everyone got paid automatically by all the money that was awarded by damages (if any), immediately goes out by way of credit to people's electricity bills , then it seems to me that there is nothing out of which the litigation funders can get paid.

MR JOWELL: Subject to Mr Bacon's —— the tweaks that have

been made to the funding arrangements that Mr Bacon showed you, whereby there is a best endeavours clause and so on, to ensure that the funders are fairly remunerated in some form.

MR JUSTICE RICHARDS: Oh, is that right?

MR JOWELL: Yes, that is right. I think those were the additional points. After I barged in and put it rather too simplistically , I think Mr Bacon took you to various changes that have made it rather more sophisticated .

MR BACON: I can deal with that, if you would like. It is the amended Deed of Priorities of 3 May, the most recent one —— 3 May 2023, which is at {C/1.2/1} of the bundle, under the heading of clause 2 {C/1.2/3}, "Allocation of Proceeds and Costs Awards". Just to remind the Tribunal, this is the document that produced the new waterfall arrangements, which we have referenced earlier , and the deed sought to amend, subject to clause 2 —— sorry, 2(a), do you see 2(a)?:

"Subject to Clause 2(b), the Parties agree that all Proceeds ..."

This was a point that I had identified :

"... all Proceeds and Costs Awards shall be allocated in accordance with the terms of the Schedule ..."

The original schedule, which I took you to, refers specifically to undistributed damages, and so the analysis that you gave a moment ago would be correct, but it is indeed the position in some cases still that -- I mean, *Merricks* was a case, I believe, where the funders looked only to the undistributed damages for payment out of their award. That has changed.

So, the sequence of authorities have led, most recently, to the *Apple* case that is in the bundle, where the Tribunal was specifically asked to rule on the legitimacy of a funding arrangement under which the funder had an entitlement, subject always to the supervisory and management jurisdiction of the Tribunal, to have so-called first dibs, as it were, on the proceeds prior to distribution the *Le Patourel v BT* case was part of the genesis of that, where the Court of Appeal expressly referred to the fact that it could not see any reason why, in an appropriate case, mechanisms could be put in place to ensure that the funder is paid at least something for the consideration that they provided in securing the recoveries. Therefore, Burford, in this case, sought a variation of the funding agreement, which always, as 2(a) and (b) make clear, particularly (b),

subject always to the specific allocations ordered by the Tribunal, there is flexibility now available to enable the proceeds to be used to discharge the funder's entitlement, not just undistributed damages.

MR JUSTICE RICHARDS: I do not think you did mention it during your submissions, but I overlooked the significance of it. So, the amended waterfall in the schedule takes out this proviso that Burford get paid out only --

MR BACON: Only -- yes, I think there was a bit of confusion when my learned friend, who did apologise for interrupting, sort of brought us back to undistributed damages. That was the original position; we have moved on from that.

MR JUSTICE RICHARDS: I see.

MR BACON: But the important point about it is, as it was in the *Apple* case, that from the class representative's point of view, obviously for whom I act, ultimately it is a matter for the Tribunal. I mean, obviously the funder is here and there is a contractual obligation on her to seek an order, but in the final analysis it is all about what the Tribunal itself considers to be the appropriate, fair and just solution to distribution where this all ends, which I think the best that the funder can get. I hope that helps.

MR JUSTICE RICHARDS: That does help, thank you.

MR JOWELL: I am conscious that I interrupted Mr Rothschild, who was intending to deal with that rather narrow point, and also about minors, but if there is anything further you would like from me on this larger point of distribution? In which case, we could either adjourn, if you prefer?

THE CHAIRMAN: Yes. 2 o'clock.

MR JOWELL: I am grateful.

(1.00 pm)

(The short adjournment)

(2.00 pm)

MR JOWELL: Before I hand over to Mr Rothschild again, I should just -- I would like to emphasise briefly a few points arising from the discussion earlier.

The first point is simply to note that, for the Tribunal's assistance, we have put into the trial bundle of authorities two authorities that were not previously there but which are referred to -- at least one of which is referred to in our reply, in section B2. The first of those is *Le Patourel* in the Court of Appeal. We quote paragraph 94 of that judgment at paragraph 16 of our reply {A/10/9}, but the Tribunal, before making any final decisions on this point, should have in mind the full passage, which is really from 91

to 94 and it sets out the argument on the question of whether an award of damages can be distributed via an account credit, and it reaches the conclusion that it can be, very clearly.

The other is *Gutmann*, the *Gutmann* authority at first instance. We mentioned the Court of Appeal judgment, but I think it is also useful for the Tribunal to see paragraphs 167 to 177 of the *Gutmann* judgment at first instance where some of the points that I mentioned regarding the experience in the United States of persons making claims on the basis of bare declarations where the amounts are very low and also the practice of imaginative and new innovative means of distribution generally are discussed and approved and the objectives behind the legislation are underlined, namely of disgorgement and punishment really of proposed defendants, as well as compensation, and the experience -- the well known experience that in some cases only a relatively small proportion of claimants do claim, but nevertheless the regime is considered to be properly fulfilled in its purposes.

So, I would invite you to look at those authorities.

The second point I would make is that Ms Spottiswoode herself, as I made clear in opening, has experience as a consumer champion, a genuine consumer

champion, in relation particularly to her experience with Norwich Union, and has well in mind her obligations to the class to ensure that they are properly compensated and that is uppermost in her mind, and therefore she has a firm determination to ensure that distribution is adequate.

The third point I would just highlight is that we did state that —— I did state that we would be perfectly content, after certification, to provide some further elaboration of potential distribution methods if the Tribunal would find it of assistance, and I do not resile from that at all. However, I should just put down one or two caveats. The one is that it may be that it will be difficult to get engagement with all persons whose cooperation would be required for certain methods of distribution at a relatively early stage, before there is any award of damages or any settlement in the offing. For example, it might be difficult to get the engagement of Ofgem or indeed distribution companies in the market, if their engagement was necessary. So I put that down. I would think that it would be near impossible to get their engagement before certification, because you would be coming along saying, "I might be a representative". But even at a very early stage after, it may still be that it is difficult to get their

engagement, so we do anticipate there may be some difficulties on that front.

The second is that, of course, prior to disclosure, knowing what data is available, and also prior to knowing what the amount of any award or settlement of damages is, it will not be possible to reach any final determination on the appropriate method of distribution, which is indeed why the courts —— senior courts have made clear that it really is a matter that is typically better dealt with at a later stage in the proceedings.

So those are just the additional points that I should flag.

With that, I will hand over to Mr Rothschild.

THE CHAIRMAN: Thank you.

Submissions by MR ROTHSCHILD

MR ROTHSCHILD: Just one further point from me on this morning's discussion. On class definition and how easy it is for an individual to know if they are in the class or not, I just point out one feature of the class definition, which is one is in it if one has paid at some point since 1 April 2001. One point is all that is necessary. One point in time.

So I said that there were ——

THE CHAIRMAN: What about if you first pay between the date in 2015 and 2016?

MR ROTHSCHILD: Mr Chairman, you are referring to the carve—out?

THE CHAIRMAN: Yes.

MR ROTHSCHILD: Well, likewise, one point in time.

THE CHAIRMAN: Yes.

MR ROTHSCHILD: But for present purposes, we are really considering the ease of individuals in deciding whether they need to opt out or to consider opting out.

MR JUSTICE RICHARDS: Obviously you have heard this morning questions from the panel about your proposed formulation of the class definition. One thing I am not hearing —— I mean, we understand why you have chosen the formulation that you have chosen. I am certainly not hearing from you anything to the effect of, "Our claim would be holed below the waterline if you went with the alternative formulation" by reference to names on bills. If there is a downside to the other formulation that is being proposed, I mean, I would welcome just a few minutes on what that downside is.

MR ROTHSCHILD: Well, there is a very significant downside, which is that almost certainly the proposed defendants would then plead some sort of pass—on defence and it would be necessary to ascertain how much had been passed on by the direct bill payers to others, to those who had contributed: the flat sharers, the spouse who had

contributed towards the cheque or the bank account from which one spouse had —— the other spouse had made the payment.

MR JUSTICE RICHARDS: But does that point not arise on your formulation as well? Because if we look at who has borne all or part of the costs, then if we look at examples of people working from home whose employers reimbursed them, then does your formulation catch the employer who has reimbursed the costs of the domestic heating for the employee?

MR ROTHSCHILD: Well, to the extent that ——

MR JUSTICE RICHARDS: Certainly you're going to get a pass—on case there.

MR ROTHSCHILD: There are many features. I am sure, sir, you have looked at Mr Druce's analysis, there are many parts to his methodology. It may be necessary —— a point I was about to come on to —— to make some adjustment for non—domestic consumption; the class definition only looks for domestic consumption. Mr Druce considers that would only require, if anything, a very small adjustment, but this will be significantly more complicated and it would also cut down the aggregate damages award very substantially, potentially.

So unless you have further questions, that is all

I propose to say on the first issue of class definition.

The second issue raised by the proposed defendants relates to domestic consumption, indeed the point I have only just touched on. NKT mention this very briefly in their skeleton argument at paragraphs 18 to 21 {AB/5/10−11}. It really seems to be no more than an observation that you might want to look at a passage in our expert, Mr Druce's, report on the topic. NKT do not articulate any particular problem with it. The context is where premises are classified as domestic but some of the electricity is for non−domestic consumption, running a business in other words. Mr Druce has identified sources of information on which he might draw to the extent an adjustment needs to be made to the total figures for electricity supplied to domestic premises on account of the categories of non−domestic consumption that the proposed defendants have raised. The evidence I am referring to is in Mr Druce's third report {D/26/116}, starting at page 116, paragraphs 359 through to 362. The Tribunal may have read it already. Mr Druce refers there, for example, to DCMS data on short term property lettings and Office of National Statistics data on working from home and operating a commercial business from home. It is obvious from this, I submit, that there are data sources available to

him which he could use to assess a discount on account of this particular issue, if a discount is needed once the scope of the issues have been pleaded out, and I submit that that is a sufficient initial blueprint for present purposes, we are obviously not at trial yet, we do not even yet have a defence from the proposed defendants. So my response to NKT's very short point is: the expert has dealt with this.

So unless there are questions at this stage, I propose to move on from class definition to the topic of minors.

The proposed claim covers the whole of Britain, and in England and Wales, full age is attained at 18, whereas in Scotland, people over 16 have legal capacity to enter into transactions. Now, the proposed defendants ask you to consider whether any special directions might be needed for these people. That, in my submission, elevates theory over practicality for several reasons.

The first is that the number of minors is negligible. Taking the Scottish position first, we are concerned with under−16s bearing the cost of domestic consumption of electricity. That such people exist seems improbable. But as to the English position, we are concerned with under−18s bearing the cost of

domestic consumption of electricity. There may be some, but given that the law requires compulsory education or training until age 18 and the great majority stay in full time education until 18, it is pretty obviously a small number.

The question arises: why do these people potentially need protection? Well, only to the extent that they might lack capacity to exercise their right to opt out of the collective proceedings, and if these under−18s have sufficient capacity to earn enough to pay for electricity, it seems likely that they are worldly enough to read a website on how to opt out of the proposed claim.

But in any event, we are actually not concerned with under−18s, but on proper analysis those under 17 and two−thirds. Why do I say that? Well, the opt out deadline is proposed to be three months after the Rule 81 notice and the Rule 81 notice could be one month after the CPO. In short, that means the opt out deadline is likely to be almost four months after the CPO, so those who were under 18 by the time of the deadline for opting out are those who were 17 and two−thirds at the cut−off date for the claim. So realistically, how many people under the age of 17 and two−thirds both pay towards electricity bills and lack

capacity to understand how to opt out? I would submit a very small number, if any, so that is why I say the numbers concerned with this point are negligible.

My second point is that this is a state of legal incapacity that they grow out of. When they attain the age of majority, they can seek permission to opt out of the claim if so minded. The CAT Rules make provision for late opt−outs in Rule 82(2) and (3). I do not know if you wish the operator to turn it up, but that is {AUTHA/6/3}. In short, those provisions allow opting out after the date given in the CPO with the permission of the Tribunal, and in my submission that is quite sufficient protection.

The third point is that these are individuals who have someone acting in their interests anyway, they do not need a special litigation friend, they have Ms Spottiswoode, and their claims are not materially different from those of the other proposed class members, and this Tribunal, if a CPO is granted, will be supervising Ms Spottiswoode. So in short, all of the class members, minor or otherwise are protected.

My fourth point relates to the authority from the Upper Tribunal which my learned friends for NKT cite in their skeleton argument. It is authority in the context of immigration matters. Immigration matters

are highly personal matters; being subject to immigration proceedings is an entirely different situation from being the potential beneficiary of collective proceedings, all the more so when the value of the claim per class member is in the tens of pounds, as here. So immigration proceedings, understandably, require a high degree of protection for minors who may not understand them, but in any event, my learned friends for NKT explain in their skeleton argument at paragraph 15 {AB/5/8} that even in the immigration context, the child does not actually require a litigation friend automatically, so all the more so here, I submit.

My fifth and last point is to draw attention to the reason the topic of minors has been raised. It is because of CAT Rule 77(2)(a). That is {AUTHA/6/1}. You will see that near the top of the screen:

"... the Tribunal ... may ... give directions ...

"(b) ... regarding any class member who is a child or person who lacks capacity."

There may be many —— it deals compendiously with children and others who lack capacity, and there may well be many in the proposed class who lack capacity, for reasons of mental health or otherwise, and there is really no reason, I submit, to treat children any

differently.

So in summary, the proportionate approach is to allow all of those who lack capacity at the time just to seek permission to opt out when they gain capacity if they are so minded, and Rule 82(2) allows the framework for that and no particular directions, I submit, are needed in anticipation.

So unless the Tribunal has questions for me at this stage, I propose to hand back to Mr Jowell.

Further submissions by MR JOWELL

MR JOWELL: I think it just remains for me to take you through the re—amended claim form and to deal with —— in the course of which I will deal with one or two points, and then the draft order.

The draft re—amended collective proceedings claim form you will find in {A/1.1/1}.

MR JUSTICE RICHARDS: Are the amendments opposed? I think I saw two proposed defendants say they did not oppose.

MR JOWELL: I think none of this is opposed, but I think I should simply just draw your attention very briefly to them, because certain of the points we have been asked to draw attention to.

The thrust of the amendments are on {A/1.1/10} and they involve —— the first, you will see they involve additional exclusions to the class. The first of those,

(a), is:

"Those who for the first time bore ... such cost in the period from 1 October 2015 to 9 May 2016 in respect of premises in England and Wales only."

You will be aware that that is because of the limitation point that we concede in respect of England, we do not concede in respect of Scotland and it is agreed that that will be an issue for trial.

The second is the exclusion of those who bore such costs after the date of the consent order giving permission for filing of the re—amended collective proceedings, and that is to cater for the so-called *Sony* point, which is this point that effectively one has to have a closed class of claimants as at the date of the date on the final version of the claim form. We anticipate that we will update in due course, prior to trial, to ensure that we get another swathe of new payers or new people that bore the cost of electricity.

So those are the two matters. I think the rest of the amendments are either reflections of those two points or are simply updates to the latest expert reports and so on, and as said, they are not opposed.

The latest version draft of the order I believe is now agreed. We are hopeful it is agreed. I will be

corrected if I am wrong. I think it is in the bundle in mark—up at {F/197.1/1}, and you will see that section A, if we could go over the page or down or over the page {F/197.1/2}, concerns the re—amendments.

Section B, if we could go over, please {F/197.1/3}, concerns the authorisation of the class representative.

Section C is the "Class Definition" as amended, which you will have seen.

D is "Forum" {F/197.1/4}, which is to be treated as taking place in England and Wales. Of course, if it is necessary, the forum can be —— the Tribunal has power to order that the forum for particular issues can be a different forum. In this case it might be appropriate for it to be Scotland for the purposes of any Scottish limitation debate, but we do not need to, I think, go into that now. So if that would be appropriate, it would simply be so that any appeal could potentially go to the Scottish Court of Appeal rather than the English Court of Appeal.

Section F is the ability of class members to opt out, which seems like a rather theoretical proposition in relation to this particular claim.

Over the page, please {F/197.1/5}, at G, we see a provision for the service of the defences and the replies. This was a bone of contention, but we have

given way in order to allow, at least as far as we are concerned, the proposed defendants a luxuriant four months or more to put in their defences, subject of course to the Tribunal's views.

H is the joint CMC that we have already canvassed with the London Array proceedings, and you will see that we propose, subject, of course, again, to the Tribunal, for it to be at a date in May or June of this year.

Then, finally, "Costs", which are costs in the case, other than the costs of the amendments relating to limitation, which I will reserve to trial.

So those are our submissions, unless we can be of further assistance.

THE CHAIRMAN: Thank you, Mr Jowell.

Submissions by MS WAKEFIELD

MS WAKEFIELD: If I might make some very brief observations, starting with the point which was canvassed this morning between the Tribunal and my learned friends Mr Jowell and Mr Rothschild. It is important, in my submission, not to lose sight of the various ways in which this "bore the cost" type issue emerges in the analysis of the regime. So, Professor Neuberger raised repeatedly the concern that he just could not understand who was in the class and that one has to understand that, and I say that is entirely right as the starting

point. We know under the regime, the statute and the rules that the Tribunal can only make a CPO if it is in relation to an identifiable class of persons, and when one looks at the words "who bore the cost", one is left scratching one's head slightly.

That came perhaps even further to the fore in the course of my learned friend Mr Rothschild's submissions in relation to domestic supply. That was one of my points, the methodology point, and we accept now that there is sufficient detail in Druce 3 for that not to be a serious issue. But where it overlaps with this point is that the reader of the class definition is meant to understand that the words "who bore the cost" applies only domestically and not commercially. So if I am a childminder and my husband bears some of the costs of our electricity bill, that is a relevant "bear the costs". But if I elevate the fees I charge to those whose children I look after, that isn't a relevant "who bore the cost". Those parents are outside the class but my husband is separately inside the class.

So it is a particularly unusual and nuanced reading of the words "who bore the cost" even if one could understand what is meant by "who bore the cost" in the first place. The reason it is so important to have

identifiability of the class at this stage, as a certification issue, is of course because the Tribunal is compelled by primary legislation to identify in the CPO who is in the class, it matters who is in the class and it matters so that they can exercise one of the only rights they have in the course of the whole proceedings, which is to opt in or to opt out. Of course, were any to opt out, it is also the case that their associated quantum has to flow with them. That is another way in which entitlement is not purely an issue for distribution, you have to have some idea now of what each person's participation is in the claim, who they are and what sort of loss they may either have borne or should be extracted from the aggregate damages award upon their opting out. That is a really important first stage.

The second stage in the analysis in which this idea, "bore the cost" idea, comes to the fore is of course cost–benefit and that was the assessment which the Tribunal kept on coming back to in the course of interrogating the point. Now, it is absolutely wrong to put forward a view of the law which says that anything to do with distribution is carved out of the cost–benefit analysis. That is not right. What happened in *Merricks* is that there was a discrete issue

in relation to distribution which was this. We proposed that distribution should take place on a flat per capita basis and the Tribunal said, entirely separately and just to do with distribution, that is wrong because distribution has to be compensatory. So it was a pure distribution question, it was not a cost–benefit question. My submission is the Tribunal can take into account anything the Tribunal thinks is relevant to the assessment of cost–benefit and that includes likely recovery, likelihood of a person knowing they are entitled to recover, likelihood of a person coming forward at the end, likely functioning of any mechanism that could facilitate it. That is squarely in the cost–benefit analysis, in my submission.

When we come to methods of distribution and the proposal that perhaps my learned friends could go away and think about whether this crediting off idea might work, it may be that the Tribunal could bear in mind the option that was taken in *Gutmann* of a contingent or a conditional certification if you were otherwise minded to certify. So in *Gutmann* the claim was certified subject to the provision of a new methodology on a certain point. That means that my learned friends could go forth to those with whom they need to speak and say, "We are certified, save for this,

this is the thing we need to sort out". So one could go as far as one can go at present, but then of course would need to come back and have further analysis of whether it works or not. Unlike in some of the other claims in which that has been suggested, the difference here of course is it is not the proposed defendants who hold the ability to facilitate the crediting off. In *Le Patourel*, if you sue BT, BT can say credit it off BT bills. In *Gutmann*, you sue the rail companies, they can say credit it off the rail fares. We make power cables. We cannot credit it off UK domestic electricity supply, we have got nothing we can do to facilitate that, so it really is engaging with those third parties and seeing if that is possible or not.

As part of that analysis, of course, it may be anticipated that the financial consequences of that sort of distribution mechanism, the costs involved, third party, because it is not a party before the Tribunal, would have to be factored in, and of course Mr Bacon addressed the Tribunal on the ability for the funder still to receive the necessary return on their investment if there is otherwise full distribution. I am not familiar with the various authorities. I cannot make submissions on that point. I am sure that he is entirely right, but I note the vires in

section 47C(6) is only to pay costs and expenses out of undistributed damages. So I take him at his word that the case law has developed, but it is not apparent on the face of the statutory regime how that works and of course that will need to be addressed as well, and of course will need to be addressed the way in which that mechanism in fact gets to all of those who bore the cost, because it only credits it off to those who are currently paying bills, and so that that class of the extra bearing the cost people, depending on their current domestic arrangements, still do not have any viable distribution mechanism.

MR JUSTICE RICHARDS: That would be true on your preferred formulation, if we limited to people whose name appear on the bill, then the same objection could be made ——

MS WAKEFIELD: It is a different objection, with respect, my Lord, because the class, as defined, would then receive the fruits of the litigation. The class is narrower, so those people, who on this analysis have suffered harm, are uncompensated. That remains true. But when one thinks of the proper constitution and management of these sorts of proceedings, one has a class and one has a proposed method of distribution to the class, otherwise we just do not know how we are getting to the "who bore the cost" people.

MR JUSTICE RICHARDS: So an individual might say, "Well, I left ..." —— a particular individual might have left England and Wales and moved to France and not currently be paying any electricity bills, even though he or she was until five years ago.

MS WAKEFIELD: Yes.

MR JUSTICE RICHARDS: On your formulation, that individual would not receive any credit to the electricity bill if that was the ultimate method of distribution that was made.

MS WAKEFIELD: That is right.

MR JUSTICE RICHARDS: But you say it is still better than their formulation because the class as a whole does.

MS WAKEFIELD: Yes, absolutely.

MR JUSTICE RICHARDS: I see.

MS WAKEFIELD: Absolutely.

I have got nothing further to say on the distribution point, who bore the cost, identifiability of the class, cost—benefit and so on, save that I would respectfully urge on the Tribunal, if I may, that prospect of the conditional certification.

Domestic consumption I have addressed already. We are content save for the fact that it really shows in sharp relief the difficulty with "who bore the cost".

Then, so far as minors are concerned, it is

essentially a matter for the Tribunal. I find it slightly surprising that the answer is not simply to limit the class by reference to an age. I know we keep on coming back to *Merricks*, and I apologise for that, but in *Merricks* it just says, over the age of 16 at the time of bearing the cost, and then one can deal with this in a quite straightforward fashion. If not, I agree that the numbers concerned are probably minimal. Again, it may be surprising that no legal analysis has been put forward from the PCR in this connection. We will doubtless all know that in the High Court, under the CPR, anyone under the age of 18 needs a litigation friend absent order of the court. It is not something that —— a court cannot just decide, well, I will allow all these claims to be litigated without even addressing my mind to it. That is an obligation. We have gone out and tried to identify the relevant authorities so far as Tribunals are concerned. We think actually it is more favourable to the PCR than the CPR would be, but nevertheless it is a little surprising that it is simply said to you, well, the claims of children can just be litigated, it does not really matter much. But there we are. We agree the numbers are probably small so it is very much not as central a point as the other points I have made just now.

THE CHAIRMAN: What do you say to the objection to your formulation of the class that it gives rise to pass—on complications, potentially?
MS WAKEFIELD: So, it may potentially, but frankly, no one has yet taken a view on whether that point would or would not be taken, so I cannot give you a straightforward answer, I am afraid. It could be that in the time —— if time is to be allowed to my learned friend to go away and think more about distribution, we could collectively think about whether that point does or does not arise as a matter of law, and if it does, whether we would take it or not.
THE CHAIRMAN: Yes, I mean, clearly, on any view, if that point is going to be taken, then it needs to be taken sooner rather than later.
MS WAKEFIELD: Of course. Absolutely. It is the sort of point that would be taken at this stage normally if the narrower proposal had been made, but yes, absolutely.
My learned friend Ms Stratford I think would like to address you on the ROC issue.
Submissions by MS STRATFORD
MS STRATFORD: Thank you.
Yes, as I think you know, Prysmian has to date taken the lead between the proposed defendants on what we are

all calling "the ROC issue", so I just wanted to address you very shortly on that, if I may, really picking up on your very helpful letter of last Friday, which asked us to consider the advantages and disadvantages of hearing the ROC issue as a preliminary issue. Obviously we are extremely grateful for the indication this morning that the Tribunal is minded to order a joint CMC and therefore I can confine my submissions, I think, in light of that. But we do submit that really whatever happens after today in terms of certification and funding and budget and so on, we should have a joint CMC with the London Array full team present as soon as possible.
I am sure it will not have escaped attention that Mr Jowell was slightly qualified in his support for this hiving off of the ROC issue, so his team only consent to the ROC issue being heard in London Array, and he was clear about that, and so I do just want to briefly explain why we see this issue as so important and why we would say really, irrespective of what happens with what currently seems like a very good idea that it should be accommodated within the extended London Array trial timetable, the ROC issue should be taken first.
So, coming back to advantages and disadvantages, candidly, we see several important advantages and few,

if any, disadvantages. In particular, the ROC issue, I should say, as we are all using that term, so I am focusing here on the 2009 and 2010 renewable obligations orders, they form a very significant part of this claim. In crude terms, it is worth a lot of money, about £287 million, or if it is more helpful to think of it in these terms, about 36% of the claim, and that is on the PCR's high case overcharge figures, just to stress that.
So coming back to the Tribunal's, respectfully, very understandable concerns expressed this morning and after the short adjournment about whether the claim will be worth it for individual consumers, it is relevant, we submit, that this is a very sizeable chunk of the claim and we do submit that all of the issues which the Tribunal was canvassing with Mr Jowell come into play with, if you like, bells and whistles on, when it comes to the question of the ROC issue, and perhaps I can just explain shortly why that is. Perhaps to put a bit of flesh on the bones, we can see the figures in our skeleton argument, that is at {AB/4/11}, and in particular if I could direct your attention perhaps to footnote 36. I realise there is a slight irony in my directing you only to a footnote of our skeleton argument, but nevertheless. We set out there

the relevant figures, and this is all taken from Mr Druce, so Ms Spottiswoode expert's evidence, and you can see from that that if you exclude the damages arising from ROC 2009 and 2010, the damages figure claimed, based on the high case, that is the 26% alleged overcharge, would reduce to 502.8 million, or on a per customer basis, each class member would then receive on that assumption £17.56. That is the high case. Then you will see, at the end of that footnote, the low case reduces the damages to 174.8 million and a per class member figure of £6.10. I do respectfully submit it is helpful to have those figures in mind.
I am very conscious that Mr Jowell has already outlined shortly the ROC issue and I am not going to try to traverse that ground again, but just to stress five short points, if I may, about the advantages of trying this issue first.
First ——
MR JUSTICE RICHARDS: Sorry, just to help me navigate these submissions, are you getting your retaliation in first in a sense in that even if London Array say ROC no longer arises in their claim —— in their case, you would still like a preliminary issue?
MS STRATFORD: I was going to come to that, because Mr Jowell made very clear that that is not

Ms Spottiswoode's position.
MR JUSTICE RICHARDS: Right, okay.
MS STRATFORD: That is firmly our position, absolutely. I wanted to make that clear. I am very conscious that London Array are not here. I think Mr Luckhurst may want to address you on what he has to say about the suggestion that the issue no longer has any relevance to London Array. Mr Jowell put it quite high, and that is not accepted. I can say something short on that, but obviously Mr Luckhurst is better placed, who is here for Nexans. As the Tribunal knows, he is better placed to address that directly.

But if I may, very briefly, just five points.

First —— this needs, at this point in the day, I think, no elaboration —— this litigation is undoubtedly complex. So we have got different products, both underground and submarine cables, different market and customer allocation cartels, it is a by object decision by the Commission, so we do not have any effects analysis and so on, the causal routes by which loss is said to have occurred are perhaps particularly myriad and varied, and I get Mr Jowell outlined those and I will not go back over that. But I do stress, complex litigation.

Second, in complex litigation of this type,

the Tribunal, for all sorts of good reasons, has repeatedly exercised its case management powers to proceed with trials in stages to make cases more manageable and efficient with the potential to give rise to very significant cost savings according to how those stages are resolved, and we cited in our skeleton, I think, just as one example, the *Merricks v Mastercard* case. I do not think I need to go to that now.

Third, we say this is just the sort of complex litigation that would benefit from a staged approach of the sort adopted in a number of other Tribunal cases, and I stress it is particularly important from our perspective here in respect of the ROC issue because it makes up such a significant chunk of the damages claimed. So I adverted to that already, but looking at the renewable obligation scheme overall, so not just limiting it to 2009/2010, the overall scheme amounts to almost 65% of the claim. These figures are at paragraph 12 of our skeleton {AB/4/4}. The 2009/2010 decisions, which we say should be the subject of the ROC issue, as I have said already, make up 36.4% of the overall loss claimed. So this, in our respectful submission, pre—eminently goes to these questions of cost—benefit that the Tribunal is rightly concerning itself with at the certification stage. Yet, we say

that this entire aspect of the claim is doomed to failure, and we do put it that strongly. It is true we have not pursued the strike—out claim that was issued given the existing dispute between the experts, but we do submit that Mr Druce's evidence in this regard rests on a series of wholly implausible positions which will be shown to be unsustainable at trial.
MR JOWELL: Forgive me for intervening, but I think this is a case of being willing to wound, but afraid to strike. If you are not going to bring a strike—out application, and they are not moving it, then it is not appropriate, in our submission, to seek to poison the well so blatantly by making submissions as to why evidence is supposedly implausible. Particularly in circumstances where I was shutdown from developing this point on the basis that it was all agreed.
MS STRATFORD: Well, I will move on, but I am not seeking to make a sotto voce strike—out application, that absolutely was not the point, but we are entitled to say that —— and it is well known, this is why we are so keen to have the ROC issue determined early and the strike out was not pursued expressly on the understanding, in discussion with the PCR team, that consideration was going to be given to hearing it as part of the London Array trial.

My fourth point is that given the significance of the ROC issue and the diametrically opposed positions of Ms Spottiswoode on the one hand and the proposed defendants, or currently proposed defendants on the other, we say there would be sizeable case management benefits to having it determined first, and we have set these out at paragraph 31 of our skeleton {AB/4/10}. I was not going to go through them now, but just to summarise, we envisage a staged approach taking the ROC issue first does have the potential to generate real efficiencies, not least —— and I stress this —— because the resolution of the issue will dramatically improve the prospects of any form of ADR.

Fifth —— and I know I really am pushing at an open door or open window on this —— an obvious window for determination of the ROC issue is the London Array trial window, given the overlapping relevance of the 2009 and 2010 decisions to both claims. Mr Jowell, in the course of his submissions on this, referred to that trial being "gatecrashed". We do not accept that characterisation of it. As the Tribunal well knows, this is something that the Tribunal envisaged might be appropriate by the president/chair of the joint CMC last June in both sets of proceedings, and that was why the trial estimate for London Array was increased from

four to six weeks. So I do not think it is helpful to talk in terms of "gatecrashing". We submit that was an efficient and constructive case management approach, both then and now, and we do submit this is a paradigm set of proceedings for trial of what has been termed a ubiquitous issue, and the Tribunal will have well in mind the language of the practice direction of the Tribunal on that, referring to issues concerning "the same or similar issues".

As I said a moment ago, I will leave it to Mr Luckhurst to address you on the London Array claim given that Nexans is of course a defendant to both. But in very brief summary, as the Tribunal, I am sure, has well in mind, London Array received subsidies under the 2010 decision, which was in itself an amendment to the 2009 decision, and we say that in order to understand 2010, you need to consider the 2009 decision, so that is why the two come, if you like, as a package.

London Array claims that it suffered an overcharge, but says it did not avoid any loss by taking any benefit from the overcharge under the ROC scheme. In other words, that the 2010 ROC banding decision was not increased by virtue of the overcharge. Ms Spottiswoode, on the other hand, claims the 2010 banding decision was increased by virtue of the cartel, and so one can

immediately see the potential for inconsistency and tension.

But beyond that —— and I just wanted to stress this —— there is, from our perspective, a wider risk of inconsistency, and if I could just take you to one authority, and I promise I will then wrap up. It is at {AUTHB/5.1/1}. It is the decision of the Tribunal in the *MIF Umbrella* proceedings, and I just thought it would be helpful for the Tribunal to see two paragraphs of that. The first paragraph is paragraph 15. I have not noted down the page number of paragraph 15, but it is not a long judgment. Ms Banks has kindly ... yes, page 7, {AUTHB/5.1/7}. I am grateful. So you can see, paragraph 15, the Tribunal noting that even where there was no risk of either over or under —compensation because the overcharges claimed do not overlap, and I stress

I am not saying that is the case here, but even where that is the case, and the Tribunal says {AUTHB/5.1/8}:

"... that does not mean to say that striving for consistency of outcome in the broader sense of deciding like cases alike is not a goal worth striving for."

Then I do not know if the Tribunal has had an opportunity to read points (1) and (2) there.

(Pause).

I am grateful. Then you can see the conclusions

the Tribunal reaches at paragraph 16.

So that is really what I wanted to say to explain very shortly the advantages of hiving off the ROC issue.

I should, I think, also say something about what Mr Jowell said about disclosure and seeing the disclosure from London Array. Mr Jowell made clear that his team wants to see the London Array disclosure prior to the joint CMC. Our position is that, on any view, that should not hold up the joint CMC or progress of the ROC issue more generally. The Tribunal will recall, we already have a very detailed series of expert reports on this issue between Mr Druce and Mr Moselle. Just to be clear and so that there is no misapprehension about this, Prysmian and NKT also do not have sight of any of the London Array documents. So it is not that Mr Jowell's team are alone in not having seen these. So we have not seen them. Frankly, we find it difficult to see how this will affect the ROC issue, which is deliberately a narrowly conceived point and from our perspective is almost a question of logic or mathematics as against the 2009 and 2010 decisions. So we say the decision stands for itself. But be that as it may, Nexans, for their part, have agreed to providing the disclosure relevant to the common issue, and so, subject to London Array's position, we certainly do not

have any issue with that occurring, as long as we also have sight of whatever the PCR is given access to and as long, as I say, as none of this holds up the hearing of this, what from our perspective is an important joint CMC.

So I think —— I hope I have made clear —— in particular made clear why we do see this as a very important issue which one way or another should be managed in such a way that it is heard separately and first. I do not think there is, from our perspective, anything else I need to cover on that.

PROFESSOR NEUBERGER: Can I just ask one question about ROC 2013?

MS STRATFORD: Yes.

PROFESSOR NEUBERGER: I am unclear in what you said. Which of the five points you make also apply to ROC 2013, and secondly, whether you had any decided view about whether it would be a bad thing or a good thing for ROC 2013 to be included?

MS STRATFORD: I am grateful for the question. We had deliberately framed the issue as relating only to 2009/2010. It could be considered whether it should be expanded, but it would be a significant expansion for reasons I will maybe explain.

First of all, there is no inefficiency, if I can put

it like that, in determining 2009 and 2010 separately from 2013. As I mentioned, the 2010 and 2009 come as a package, so they logically belong together. 2009, if you like, provides the context for 2010, which is the decision that is at play in London Array. The 2013 decision is not relevant to the subsidies provided to London Array, so that is the first reason why it is not part of the proposed issue.

It also turned on different advice and modelling by reference to different data. I will not attempt to elaborate it now, but it was introduced against a desire to slowly reduce the subsidy of offshore wind given the prevailing expectation that costs would fall with a further deployment of offshore wind. That is in Mr Moselle's evidence. So, what we do say is that, as a result of the Tribunal understanding the ROC scheme, having addressed 2009 and 2010, it would then be particularly well placed and it would undoubtedly lead to some efficiency when 2013 is then ultimately considered. Conversely, there would not be any inefficiency in not considering 2013 as part of London Array, because they really are separate decisions taken on the basis of different considerations and data.

So that is, I hope, a short but comprehensible explanation of our thinking.

PROFESSOR NEUBERGER: But the implication is that there would be no particular advantage in doing it together, but there might be disadvantages?

MS STRATFORD: Well, it would certainly introduce —— it would lengthen things and it would introduce further complexities and I would need to take instructions and no doubt much scratching of heads would need to go on about whether it was actually doable within the ——

PROFESSOR NEUBERGER: That is fine.

MS STRATFORD: —— extra two weeks.

PROFESSOR NEUBERGER: That gives us the clarification I wanted, thank you.

MS STRATFORD: I'm grateful.

THE CHAIRMAN: Thank you, Ms Stratford.

MS STRATFORD: Thank you.

Submissions by MR LUCKHURST

MR LUCKHURST: In light of the helpful indication from the Tribunal, I shall save detailed submissions on the ROCs issue for the CMC. I would, if you will indulge me, just make some very brief points in response to Mr Jowell, just so it is not suggested anything has not been responded to or accepted.

The first point is that we say that even if the London Array proceedings did not exist, there is merit in grappling with the ROCs issue at an early stage

and that is for the reasons given in paragraph 10 of my skeleton argument {AB/8/5} and given by Ms Stratford just now which I will not repeat.

The second point is that when you then do take into account the London Array claim, there is a risk of injustice to Nexans which should be mitigated insofar as possible.

The third point is that Mr Jowell described our draft amended pleading in London Array as "opportunistic". We would take issue with that characterisation. We have explained clearly in correspondence that it was following careful consideration of the regime with the experts, and in light of the expert evidence served in these proceedings, and I would submit that Nexans is to be commended for taking a consistent pleaded stance across the two claims.

The fourth point is that Mr Jowell says that the London Array claimants may say that the issue no longer arises and therefore resist a common issue being heard alongside their trial. They have not said that yet. I am not going to anticipate a submission that has not been made, but I say it would be without merit and we will deal with it if the point is even raised.

The fifth point is that we do not agree that

disclosure is required to have an effective CMC. The pleadings have been shared across both claims and the expert evidence served in these proceedings has been shared. We will obviously be cooperative and sensible in correspondence, we will listen to what is said, but we do not want it to be said that this sort of important point cannot be progressed before disputes about disclosure have been resolved.

Finally, I should just draw your attention to the letter from the London Array claimants, because they are not here and we said we would draw attention to it. Just for your reference, that is at {F/170/1}, and that is —— to the extent that they have set out their position, that is where it is set out. I will not go through it now, but just for your reference, that is where it is set out.

Unless I can be of any further assistance.

MS WAKEFIELD: I just need to clarify one thing that I said. When I was on my feet, I gave the reference of *Gutmann* for the conditional certification. I am told in fact it is *McLaren*. I got my various CPOs confused. I am sorry about that.

THE CHAIRMAN: Thank you.

Reply submissions by MR JOWELL

MR JOWELL: Yes, I was confused by that myself.

I would like to briefly just respond to Ms Wakefield's points about distribution and its role. She makes a fair point, that distribution is not completely out of consideration at the CPO stage. That is fair, but it is important to bear in mind very clearly the role that it plays, and it is, in my submission, a very narrow role. There has been, as I said previously, a very clear steer from the Supreme Court that it is not an independent, if you like, condition for certification that you need to show a fully-formed distribution method at the CPO stage.

First, what one does have is the requirement for a litigation plan, which we have, and which makes ample provision for distribution. We have a very large budget for distribution, I think it is something like £4 million in the budget. There are two different entities that have been retained in order to deal with distribution. Those are referred to in Ms Spottiswoode's witness statement. I will get you the reference in a moment, but one is a distribution -- one is a claims management -- yes, it is at paragraphs 57 and 58 {B/1/19-20}. One is Case Pilots, who are claims management administrators, and the other is a communications firm, DRD Partnership. Both have been retained for the purposes of distribution.

We have also canvassed in our reply, as you have seen, and in light of the evolving case law, alternative, potentially more efficient methods of distribution, but it is not necessary at the certification stage to go beyond that, in my submission, and particularly not in circumstances where no objections were taken by the proposed defendants in their responses to the CPO application on the grounds of inadequacy of the distribution claim.

The second point is this. Ms Wakefield fairly says that the question of distribution can come in within the cost-benefit criteria in Rule 79(2), but it is important to see where that cost-benefit analysis fits in to the overall scheme. Where it fits in is as one factor that goes to the suitability of the proceedings to be brought as collective proceedings. It is not an independent cost-benefit analysis that the Tribunal undertakes, it is a cost-benefit analysis with a view to determining whether the proceedings are suitable to be brought as collective proceedings, and what the Supreme Court made clear in *Merricks* is that suitability is not absolute suitability, that was the view of the minority, but the majority's view was that suitability is relative suitability, so relative to being brought as individual proceedings. That is why,

irrespective of where the cost-benefit analysis lies, and even if distribution feeds into that cost-benefit analysis to say that the costs are greater than the benefits, nevertheless, in a case like this one, it is plain that the proceedings are more suitably brought as collective proceedings rather than as individual proceedings, because individual proceedings are completely implausible and impossible in a case like this.

That is precisely the conclusion that Mr Justice Roth reached in *Gutmann* at first instance in the passage that I referred you to earlier this afternoon. He takes into account distribution and various other matters and comes to the conclusion that the costs of the proceedings outweigh the benefits, but he nevertheless reaches the conclusion that it is a suitable case to be brought as collective proceedings, bearing in mind the relative suitability test that there is. This is, of course, an a fortiori case, because this is truly also a consumer action, or at least -- I say a fortiori, at least as powerful as the *Gutmann* case.

So as for the notion of a conditional CPO, we say that that would hobble the CPO, because it would be impossible, on a conditional basis, to go and approach

people credibly. It is also just simply unnecessary and wholly inappropriate to condition a CPO on further elaboration of distribution for all the reasons that I have already stated. It is a matter for later down the track. We are content, of course, to assist the Tribunal and elaborate things, but it is not, in our respectful submission, even close to a basis for refusing fully to certify these collective proceedings.

MR JUSTICE RICHARDS: Do you say that a conditional CPO would call into question your funding, because I see your funding is conditional on certification?

MR JOWELL: Yes, indeed it would. Things would start to unravel, inevitably, and it is simply not appropriate. Forgive me, I went back to *Gutmann* and I searched *Gutmann* and all I found was a reference to a need to elaborate on the definition of "season tickets". I have not been back to *McLaren*, that was not a case I have had any connection with, but my recollection is -- my belief is that that was not made conditional on some distribution element being clarified, so far as I am aware, in *McLaren*, but I will be corrected if that is wrong.

MS WAKEFIELD: No, it was methodology.

MR JOWELL: It was methodology, indeed, of course which goes to the *Pro-Sys* -- which is the *Pro-Sys* element, which is

a requirement for a CPO, but administration is not —— administration of a distribution system is not part of that methodology, it only comes in, as I said, potentially, to suitability via the cost—benefit. Thank you very much.

I think Mr Rothschild and Mr Bacon may each have one or two points to add on this particular issue. Would it be —— would you like to hear them, or would you ——

THE CHAIRMAN: Yes, by all means.

Reply submissions by MR ROTHSCHILD

MR ROTHSCHILD: My learned friend Ms Wakefield continues to query whether there is sufficient clarity as to who is in the class. There is really a simple question for those reading the Rule 81 notice. It is: did you bear the financial burden of paying a bill for domestic electricity? That is the question in every—day language. To the extent there is any lack of clarity, then of course we could provide examples in the frequently asked questions on the claim website. It is not necessary to lengthen or complicate the class definition, guidance is sufficient.

But that is the simple question: did you bear the financial burden of paying a bill for domestic electricity? Those reading the notice, if the answer is "yes", then they have an opportunity to opt out if

they do not want Ms Spottiswoode to act on their behalf and they want to go alone, although it would be surprising if they would. If they do not want to opt out, then they just wait for further news as to whether there are any damages for this group of people.

Now, Ms Wakefield gave the example of the childminder, so applying that question to the childminder, the childminder who works from home. She pays for her own domestic use, she therefore bears the financial burden of paying a bill for domestic electricity, she is in the class. The parents whose children are looked after by the childminder, well, if they pay for their own electricity at home, they are in the class; they only have to pay once to be in the class. It overcomplicates it to look at specific bills; one looks at the specific individual and whether that individual has at any point borne the financial burden of paying a bill for domestic electricity. In my submission, this is a clear and workable definition.

It is also a fair approach to defining the class, because otherwise a significant number will miss out on the claim. There will be a somewhat arbitrary exclusion if the claim were confined, as was earlier suggested, to only those named on a bill. Sometimes the name on the bill is wrong, or not the name of the person who

actually paid. The distribution stage is a separate one. It may be that those named on the bill will be favoured a distribution, but for the purposes of defining the class and calculating the aggregate damages, this, in my submission, is the fairest and most practical approach. To the extent there is thought to be lack of clarity, guidance notes are the way forward, not elaboration or complication of a class definition, which is understandably couched in legal language and may need, as in every case, some further explanation, questions and answers for those who are unfamiliar with the process or unfamiliar with legal terminology.

Unless you have any questions, no further points.

Reply submissions by MR BACON

MR BACON: Sir, if I may, just a very quick response to Ms Wakefield's invitation to educate not only, it seems, herself, but also, respectfully, the Tribunal in respect of the development of the law and the deduction of funding costs from compensation, not just undistributed damages.

The authority is *Gutmann v Apple*. You have it at {AUTHB/25/1}. I can take you to the relevant paragraphs. I have already addressed you on it. That was one of the issues in issue, in play, and determined conclusively by the Tribunal in favour of the discretion

on the part of the Tribunal to make deductions from damages, or "proceeds" as it is called in that case.

Thank you.

THE CHAIRMAN: Mr Jowell, can I ask, has any thought been given to the timetable of the proceedings up to trial?

MR JOWELL: Not beyond the service of the defence and the replies ——

THE CHAIRMAN: Yes.

MR JOWELL: —— and of course the potential for a preliminary issue with the London Array claimants. I think we are waiting to see what happens with the preliminary issue before we go further, but it may be that that could be suitably canvassed at the CMC as well.

THE CHAIRMAN: I will ask the defendants' counsel, do you really need as long as four months for producing your defence?

MS STRATFORD: I seem to have drawn the short straw on that one. The short answer is, yes, this has been thought about carefully. You will have, I am sure, gathered from my submissions earlier we are very keen to get on with this, this is not a question of foot—dragging, but there are some difficult issues that need to be considered. There had been a suggestion from the PCR that there should be a consolidated defence. We pushed back strongly on that. That would have made matters

even slower and more difficult, but nevertheless it has to be recognised there are three sets of proposed defendants, six in total, and there, I expect, would need to be some degree of discussion and coordination between them while they take instructions and formulate their pleadings. We have of course got the summer period falling during the four months, which is why extra time has been allowed for that.

I am reminded by Ms Banks —— I am very grateful —— that four months was in the original plan of the PCR when they first proposed a timetable, so in our submission, it remains appropriate and realistic, and hopefully, if we have that date, it will not be a question of needing to ask for extensions or anything like that.

THE CHAIRMAN: Thank you.

MS STRATFORD: I am grateful.

THE CHAIRMAN: The Tribunal will now rise for approximately 15 minutes.

(3.13 pm)

(A short break)

(3.38 pm)

Order

THE CHAIRMAN: The Tribunal will issue a reserved judgment in due course. For today's purposes, the Tribunal is

satisfied that the claim is suitable to be brought in collective proceedings, that the funding agreement is not a DBA, and it approves the draft collective proceedings order subject to the following five points.

Firstly, as to the definition of the class, we prefer the defendants' formulation, that is to say the definition in paragraph 8 of the draft order adjusted as follows:

"All people alive who directly paid and personal representatives of deceased people who directly paid the cost of domestic consumption of electricity supplied by the distribution network in Great Britain on or after 1 April 2001."

With consequential amendments to the excisions from that group.

Secondly, the order should include a direction that the proposed defendants must set out in their respective defences if they are taking a point on pass—on and if so what their case is.

Thirdly, the order should include a direction that the PCR reports to the Tribunal within two months with proposals for a practicable and efficient methodology for the distribution of damages to the class not limited to a process for distribution of cash and not limited to

a process in which members of the class must come forward and prove their entitlement. The Tribunal will keep this aspect of the case under review, and in the absence of satisfactory proposals, the Tribunal will of course have the option of decertifying these proceedings.

Fourthly, the order should include the direction for a joint CMC with the London Array proceedings, if possible to take place in May or June.

Fifthly, the order should include a direction that the PCR must within three weeks set out the assumptions underlying her litigation budget, specifying the stages and durations of the stages of the proceedings in sufficient detail for the Tribunal to determine in future whether there has been a significant departure from the assumptions underlying the initial litigation budget, but not descending into details of charging rates and so on.

That is our order.

MR JOWELL: We are grateful.

On the two months, I do not know whether that is entirely written in stone. Might we suggest that we have a little longer given that the proposed defendants have —— there is something of a hiatus while the defences go in in four months' time, and if we are to

engage with third parties such as regulators, with no disrespect, they are not always known for their expeditious engagement and therefore it might not be possible to both engage with them, get responses and then consider the position within two months, and it would be a shame to simply come up with nothing that is constructive. So if it is possible to have a little longer, three months or four months, then I am sure we would be grateful.

THE CHAIRMAN: You can have three months.

MR JOWELL: I am grateful.

THE CHAIRMAN: Anything else?

MS WAKEFIELD: I think not. Thank you very much.

THE CHAIRMAN: Well, thank you very much to all the counsel and the solicitors for your very helpful submissions.

(3.44 pm)

(The hearing concluded)

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