

This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive record.

**IN THE COMPETITION**

CaseNo: 1289/7/7/18

**APPEAL**  
**TRIBUNAL**

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

Tuesday 4<sup>th</sup> - Wednesday 5<sup>th</sup> June 2024

Before:

The Honourable Mr Justice Roth  
Dr William Bishop  
Professor Stephen Wilks

(Sitting as a Tribunal in England and Wales)

**BETWEEN:**

**Road Haulage Association Limited**

**Proposed Class Representative**

**RHA Used Trucks Limited**

**Proposed Sub-Class Representative**

V

**MAN SE and Others**

**Defendants**

**A P P E A R A N C E S**

James Flynn KC, David Went, Harriet Hartshorn and David Illingworth on behalf of Road Haulage Association Limited

David Scannell KC and Laurence Page on behalf of RHA Used Trucks Limited  
Daniel Jowell KC and Tom Pascoe on behalf of MAN (First to Third Proposed Defendants)

James White on behalf of Iveco (Fourth to Seventh Proposed Defendants)

Meredith Pickford KC and Nikolaus Grubeck on behalf of DAF (Eighth to Tenth Proposed Defendants)

Jamie Carpenter KC on behalf of the Proposed Defendants

Mark Hoskins KC and Jacob Rabinowitz on behalf of Volvo Lastvagnar Aktiebolag (Objector).

Ben Rayment on behalf of Daimler AG (Objector)

Wednesday, 5 June 2024

(10.34 am)

THE CHAIR: Yes, Mr Scannell, before you start, I think, Mr Flynn, you were going to update us on certain matters.

Submissions by MR FLYNN (continued)

MR FLYNN: Yes, sir, I can take this in whatever order is convenient to the Tribunal.

In relation to the first question that I think I was asked on the homework front, was the PACCAR amendment, which is obviously a contingency, may or may not happen, but I think I can say there is no current intention at all on either the RHA's side or Therium's to revise the arrangements in accordance with any changes that are brought in by those statutory amendments, so the arrangements as they stand will be those which continue.

THE CHAIR: Yes.

MR FLYNN: I think the second point -- I suppose I could also mention ATE since I did say that I would.

I think there the position has not materially changed. There were constructive discussions and advances in meetings and calls yesterday, and that is continuing today, but we have not got to a final outcome.

Then I think there was the budget you asked about.

1           We are of course well aware that the budget, the initial  
2           budget put in last time, if I can put it that way, would  
3           need revising and the question for us was when would be  
4           the opportune period for doing that when many of the  
5           sort of contingencies like the length of the opt-in  
6           period or other appeals had actually been cleared away.  
7           So we had envisaged doing it later, but of course, we  
8           are happy to provide the Tribunal with a revised budget  
9           based on what we know today.

10           You mentioned the period of a fortnight yesterday;  
11           I have been asked to ask for 21 days if that is possible  
12           because there will be a lot of people to consult on  
13           this, and I should say particularly one reason we did  
14           not put it in the budget for now is because the overall  
15           funding commitment has of course remained the same on  
16           our side of things, although Therium has come up with  
17           6 million of funding for Mr Scannell's side of the  
18           debate, and I think it is only right to signal that with  
19           all the, shall I say, events that have happened in the  
20           course of this litigation, we do expect to need to  
21           increase the budget to take us all the way to trial.

22       THE CHAIR: You say increase the budget; do you mean  
23           increase the funding?

24       MR FLYNN: I do, so funding behind a budget which would be  
25           increased beyond that which you have seen, and that is

1           why I say we need to clear our lines, as it were, which  
2           is why I mentioned 21 days.

3       THE CHAIR: Yes. The reason we looked at a budget before  
4           was to make sure that the funding you have will enable  
5           you to take the case to trial. You say, which we  
6           understand, the budget needs revision, it is out of  
7           date, but the same point then arises that we need to be  
8           satisfied you have the funding to take the case to trial  
9           as it now costs.

10           Now, you may have some -- it may be that you have  
11           made some recovery of costs, I do not know what --  
12           I have not followed through what has happened on costs  
13           of appeals and whether there have been costs orders in  
14           your favour and so on, but that can be taken into  
15           account.

16       MR FLYNN: Not at the Court of Appeal, I might say.

17       THE CHAIR: Certainly I think we made a costs order here,  
18           did we not, after the last hearing?

19       MR FLYNN: Yes.

20       THE CHAIR: So that will no doubt be taken into account, but  
21           we need to see the budget and what funding you have in  
22           order to make the CPO which we are doing in 2024, not,  
23           for all these reasons, in 2019 or 2018.

24       MR FLYNN: Yes.

25       PROFESSOR WILKS: If I could just add to that.

1 MR FLYNN: Yes, of course.

2 PROFESSOR WILKS: The 28 million is still valid, then, that  
3 is the commitment?

4 MR FLYNN: Yes, that is right.

5 PROFESSOR WILKS: In one of your submissions, you pointed  
6 out, or Therium pointed out that of the seven tranches  
7 they have already committed five or incepted five,  
8 whether it is spent or not I am less sure. So it would  
9 seem that a substantial shortfall might exist, and  
10 although you are going to look for additional funding it  
11 might be rather substantial additional funding; would  
12 that be correct?

13 MR FLYNN: Well, we will be looking for more. I mean, it  
14 depends what you would characterise as substantial, and  
15 I hesitate to bandy amounts around now, but, yes, we  
16 would, if we went to trial on the existing budget, be  
17 bumping up to the limit of the funding. So we will be  
18 looking for a material increase and Therium is well  
19 aware of that and discussions have already been taking  
20 place. So that is --

21 PROFESSOR WILKS: But they are inconclusive as yet?

22 MR FLYNN: Yes, but as you have seen, Therium in evidence,  
23 I think to you last time round, as I think we are  
24 calling it, said that they were willing to consider  
25 increases to the budget and they have always been as

1           good as their word when it came to it, so we pursue  
2           those discussions, and the Tribunal will want to be  
3           satisfied, I fully understand, that we have the funds to  
4           undertake the exercise.

5       THE CHAIR:   Yes, we will.

6       MR FLYNN:    Yes.

7       THE CHAIR:   I think we are a bit surprised that has not been  
8           completed by this hearing because, as we understood it,  
9           subject to the ATE point where we appreciate some of the  
10          difficulties, the hope was that we would be able to move  
11          swiftly to making a CPO if you satisfy us on the points  
12          raised by the OEMs, but it is clear we cannot.

13      MR FLYNN:    Well, I understand and I hear what the Tribunal  
14           is saying to us. Obviously the focus on the remitted  
15           matters we understood would be on making sure that the  
16           used claim was properly set up and properly funded,  
17           which in my submission it is, but I entirely take the  
18           Tribunal's point and we will revert on that as I have  
19           undertaken.

20      THE CHAIR:   Yes, well, you say 21 days; it is obviously  
21           desirable if you do satisfy us on the conflicts points,  
22           the remitted points that the CPO is issued before the  
23           summer. I think you more than anyone are keen now to  
24           get on with it.

25      MR FLYNN:    Well, you do not need --

1 THE CHAIR: We need help to do that.

2 MR FLYNN: You do not need me to say that, yes, we are, but  
3 all these things are complex.

4 THE CHAIR: Yes.

5 MR FLYNN: Now, sir, there were other matters that, as it  
6 were, arose in discussion yesterday, I do not know if  
7 you want me to deal with that now or if we take that in  
8 the course of --

9 THE CHAIR: Well, not by way of reply at the moment to --  
10 I mean, you have given your response to Mr Pickford.

11 MR FLYNN: Yes.

12 THE CHAIR: I think that is what we are primarily addressing  
13 and we were going to hear from Mr Scannell who was all  
14 ready to go, I think, when I turned to you --

15 MR FLYNN: Yes.

16 THE CHAIR: -- in response, so other points we can pick up  
17 later.

18 MR FLYNN: Very good. Thank you, sir.

19 THE CHAIR: Thank you.

20 Yes, Mr Scannell.

21 Submissions by MR SCANNELL

22 MR SCANNELL: Good morning, Mr Chairman and members of the  
23 Tribunal, David Scannell for RHA Used Trucks Limited.

24 I propose to address only Mr Pickford's submission  
25 on incentives, not his submissions on the Therium



1 information barrier.

2 Mr Pickford suggested to you yesterday that Therium  
3 has a binary choice to make whether to pursue  
4 £150 million by favouring the new trucks claim or  
5 £30 million by favouring the used trucks claim.

6 As Mr Flynn explained yesterday, it is unclear what  
7 Mr Pickford thinks Therium were up to spending months  
8 negotiating a funding arrangement with the used trucks  
9 representative if, as soon as that was signed and  
10 possibly even before that was signed, they were plotting  
11 to undermine it in favour of a different funding  
12 arrangement with the RHA, but apart from that point, the  
13 figures that Mr Pickford relied on in support of this  
14 imagined problem are wrong.

15 The scenario that Mr Pickford represented as one  
16 that might arise is one in which the used trucks claim  
17 is successful and the new trucks claim fails. That  
18 would result in Therium recovering, he said, only  
19 £33 million and that is why it might favour the new  
20 trucks claim, but even if one accepts that that  
21 possibility is more than merely fanciful, it is simply  
22 not the case that Therium would walk away on that  
23 scenario with only £33 million.

24 The blind spot in Mr Pickford's argument is exactly  
25 the same blind spot as we encountered yesterday. He

1 does not seem to appreciate that the RHA is the class  
2 representative for all of the common issues in this  
3 case, on behalf of the new trucks group and on behalf of  
4 the used trucks group. There is simply no way that  
5 I can win this case without the common issues going my  
6 way, and what that means is that if the used trucks  
7 claim is successful, yes, the proposed sub-class  
8 representative will have been successful on the specific  
9 points for used trucks, but it will also necessarily  
10 mean that all of the common issues have gone the used  
11 trucks way which means that the RHA has been successful  
12 which means in turn that Therium will recover, including  
13 multiples, under the RHA funding agreement.

14 Now, as Professor Wilks rightly pointed out  
15 yesterday, all of this is covered in the priorities  
16 agreement, and just for your note, I am not proposing to  
17 turn this up, but just for your note because there was  
18 some uncertainty as to locations of documents yesterday,  
19 the priorities agreement is in {RM-G/7/29} and the  
20 distribution of used trucks proceeds is at {RM-G/7/34}  
21 of that tab. Alternatively you can use the E bundle,  
22 {RM-E/12/40} and the relevant provisions are on page  
23 {RM-E/12/45}. So the predicate of Mr Pickford's  
24 incentives theory is flawed, but beyond the mathematical  
25 flaw there is also a commercial flaw in his argument.

1           It is unclear in particular what he means when he  
2 suggests that Therium as a whole might somehow  
3 soft-pedal on one side of this claim and place a greater  
4 emphasis on another part of the claim.

5           The simple fact is that the used trucks funding  
6 agreement covers in full the anticipated budget of the  
7 used trucks sub-class representative. The same, subject  
8 to the discussion the chairman has just had with  
9 Mr Flynn, is true on the RHA side: the funding covers  
10 the anticipated budget.

11          Now, in those circumstances, it is clear that each  
12 of the RHA and the proposed sub-class representative  
13 will fight on behalf of their clients fearlessly and to  
14 the best of their ability. There is simply nothing that  
15 Therium can do to stop that. As the chairman sagely  
16 pointed out yesterday, Therium's role in all of this is  
17 important but it is, at the end of the day, the funder,  
18 it is not the representative of either of the parties.

19          The final point I would make in response to this  
20 point from DAF is that we do not accept that there is  
21 any realistic risk of Therium pulling the plug on the  
22 PSCR's funding. I emphasise that what I am talking  
23 about here is Therium Atlas pulling the plug on the  
24 PSCR's funding because there is simply no contractual  
25 mechanism whereby Therium RHA could do that let alone

1 Therium as a whole as it was described yesterday.

2 The Therium that we saw referred to in clause 16.3  
3 of the used trucks litigation funding agreement is  
4 Therium Atlas only. It is so defined in that agreement.

5 Under that provision, Therium Atlas must continue to  
6 fund the used trucks claim unless the circumstances set  
7 out in that clause obtain. In order for those  
8 circumstances to obtain, an independent King's Counsel  
9 would have to produce a written opinion stating that the  
10 prospects of securing recovery are no higher than 51%.

11 Now, recovery, Mr Pickford did not mention this  
12 yesterday, but recovery is a defined term in the LFA,  
13 and it means any of the amounts that the used trucks  
14 sub-class is claiming.

15 THE CHAIR: It means, sorry?

16 MR SCANNELL: Any of the amounts that the used trucks  
17 sub-class is claiming. It does not mean all of it; it  
18 just means any of it.

19 So it is in fact, with respect, highly unlikely that  
20 Therium Atlas would be able to procure such an opinion.  
21 The alternative is that an independent King's Counsel  
22 issues a written opinion stating that no reasonable  
23 privately-paying litigant would continue this claim  
24 given the objective of getting a reasonable return for  
25 the claimants, having satisfied Therium's requirements.

1           Now, it was suggested yesterday that that is a low  
2           threshold. I do not accept that it is a low threshold,  
3           it is actually a high threshold, particularly given the  
4           nature of these proceedings being collective proceedings  
5           with a huge number of claimants being represented, and  
6           given also the commercial realities of this situation.

7           If the proposed sub-class representative pulls the  
8           plug on the sub-class funding that has been provided,  
9           Therium Atlas -- that is to say if Therium Atlas pull  
10          the plug they would be relinquishing their possibility  
11          of getting a return on their investment, their  
12          contingency fee, and that is the only reason that  
13          Therium Atlas has entered into this arrangement in the  
14          first place.

15          So commercially too, in my submission, the  
16          incentives argument simply does not work.

17       THE CHAIR: As I understand that alternative in 16.3 which  
18          you have just been addressing, it says there must be  
19          a situation where no reasonable privately-paying  
20          litigant, with the objective of (a), getting Therium its  
21          compensation, and above that, getting a reasonable  
22          return to the sub-class members. That is the condition.

23       MR SCANNELL: Yes.

24       THE CHAIR: So that if, which one can see that you would not  
25          sensibly continue with litigation if all you are going

1           to get is the funder's fee and nothing left over for you  
2           as a claimant, and under the waterfall I think --  
3           waterfall you call it -- Therium's fee gets paid first  
4           out of the proceeds; is that right?

5       MR SCANNELL: Therium gets paid first.

6       THE CHAIR: Yes.

7       MR SCANNELL: The pot is spent on common costs, then the  
8           used trucks proceeds would come in. So Therium Atlas  
9           would be paid what it has paid to fund the used trucks  
10          claim. Then the multiples that Therium is entitled to  
11          under the RHA agreement would be payable.

12      THE CHAIR: Yes, and then --

13      MR SCANNELL: And then the claimants. Actually, there's ATE  
14          insurance before that happens.

15      THE CHAIR: Yes, so what it is saying is, well, if there  
16          does not seem at that point, because the likely recovery  
17          is so limited that you are not going to get much left  
18          over for the claimants, then they can stop funding the  
19          claim.

20      MR SCANNELL: Yes.

21      THE CHAIR: Any claimant would operate the same way, I would  
22          have thought, because they are not going to continue  
23          a claim when there is no prospect of getting more than  
24          the fees you have got to pay to your funder.

25      MR SCANNELL: Yes, and really what that clause comes down to

1 is that a King's Counsel would have to say: look, I am  
2 aware of the dynamics of this litigation, I know that  
3 there is a pool of claimants out there who have suffered  
4 a loss as a result of these cartelists' behaviour, what  
5 we are trying to do is get redress for them, but of  
6 course Therium is in the way and Therium's costs are  
7 going to have to be paid. My written opinion is that no  
8 reasonable private funder would continue to fund this,  
9 presumably because that private funder feels, well, the  
10 claimants are not going to get a reasonable return once  
11 Therium is dealt with because Therium has to be paid so  
12 much.

13 THE CHAIR: Can I interrupt you? You said no reasonable  
14 private funder. I thought that what the King's Counsel  
15 was saying it is no reasonable privately-paying  
16 litigant.

17 MR SCANNELL: Sorry, it is that, I am sorry, I do not have  
18 the wording in front of me and perhaps I should do.

19 THE CHAIR: But it is an important distinction --

20 MR SCANNELL: Yes.

21 THE CHAIR: -- it is looking at the claimant --

22 MR SCANNELL: Yes.

23 THE CHAIR: -- as it were. If this was a private claim, but  
24 with third party funding, a private claimant would not  
25 continue it because there is no prospect of a reasonable

1           return above the amount that it has to pay to the  
2           funder. Is that not what it is saying?

3       MR SCANNELL: Well, I think it is still logically  
4           presupposing that these are collective proceedings and  
5           that what is being asked is will the pool of claimants  
6           get a reasonable return, reasonable redress, in  
7           circumstances where there is this objective in the  
8           background that Therium has to be paid first.

9           I think that is the guts of it.

10       THE CHAIR: Yes.

11       MR SCANNELL: It is perhaps not very well put, but my point  
12           is that when one considers the size of the pool and the  
13           likely recoveries it may be in fact that that is a very  
14           high threshold indeed to overcome, because the  
15           expectation will be that even if there are bumps along  
16           the road in this litigation, the recovery will be large,  
17           Therium will be satisfied and there will be enough in  
18           the pot to pay a reasonable return to the claimants. It  
19           would actually be quite a surprising and extreme opinion  
20           from an independent King's Counsel to the contrary, but  
21           of course I cannot predict what the precise  
22           circumstances obtaining at the time of that opinion  
23           would be, but we do not accept a priori that that is  
24           a low threshold or that it somehow gives Therium Atlas  
25           pretty much free rein to pull the plug on the used



1           trucks claim whenever it wishes. It is very far from  
2           that indeed, and more importantly, it provides no  
3           possibility whatever for Therium RHA to do that or  
4           Therium as a whole to do that.

5       THE CHAIR: Yes.

6       MR SCANNELL: Thank you.

7       THE CHAIR: I think, Mr Flynn, the other point we'd asked  
8           you about was the board membership of the companies, the  
9           two Therium subsidiaries.

10      MR FLYNN: Yes, that is right, sir, and I understand that  
11           a letter is going or has gone with the names identifying  
12           the boards of those two entities, so I will take  
13           instructions as to whether that has been sent. It is  
14           being sent if it has not actually gone.

15      THE CHAIR: When are we going to get it?

16      MR FLYNN: You are going to get it -- I will make sure you  
17           get it, you know, within -- before you rise. I believe  
18           the letter has been written, I understand it is to be  
19           sent now. I do not mean to be obscure about this, I had  
20           understood that the letter was ready to go.

21      THE CHAIR: Yes. But have you seen it?

22      MR FLYNN: I have seen a draft and I have seen some names  
23           and the structure that is in place, and the boards are  
24           two people who work for an investment advisory company  
25           based in Jersey, so that is what you will see of the two

1 funds, and then you will see that the role of TMCL,  
2 I forget what that abbreviation is for, as advisers to  
3 the funds.

4 So it will probably be helpful to have the letter in  
5 front of one to --

6 THE CHAIR: Yes, it would.

7 MR FLYNN: But that --

8 THE CHAIR: I mean, I think it is relevant to the argument  
9 that we are now hearing, and it is right also that  
10 Mr Pickford should be able to see it. We had rather  
11 hoped that we would have it before we start because it  
12 is not asking for any elaborate exploration of evidence.  
13 Will we have it by lunchtime?

14 MR FLYNN: Yes.

15 THE CHAIR: Well, I think any comments that might result  
16 from that obviously can be made after you have seen it.

17 MR PICKFORD: Thank you, sir. I did have some short reply  
18 points in relation to Mr Scannell's submissions. Shall  
19 I deliver those now or I can deliver those altogether  
20 when I deal with this issue about the constitution of  
21 the respective boards?

22 THE CHAIR: Well, no, deal with that now. I do not know how  
23 much of an issue the boards will be, but we just want to  
24 know, but why do you not deal with that now and then we  
25 will move on.

1 Submissions in reply by MR PICKFORD

2 MR PICKFORD: Thank you, sir. Very briefly, Mr Scannell's  
3 core point on the maths, as he calls it, is essentially  
4 the point that we had from Professor Wilks yesterday and  
5 the answer that I would give in relation to  
6 Mr Scannell's point is the same one that I gave  
7 yesterday: those provisions may ameliorate -- the  
8 provisions in relation to common costs may ameliorate  
9 some of the difference in incentives, but they do not  
10 remove them. There has been no proof or demonstration  
11 that the incentives that I explained that Therium Atlas  
12 is likely -- sorry, that Therium as a whole is likely to  
13 have to prefer the recovery on the main RHA claim remain  
14 and they are likely to be stronger than its incentives  
15 in relation to the RUTL claim.

16 It is also important to point out, because I think  
17 it got slightly lost in the submissions this morning,  
18 that of course in order to wield influence, Therium  
19 Atlas does not actually have to terminate the agreement.  
20 Everyone knows that it has the ability to terminate the  
21 agreement, so the power is there on its side to wield  
22 influence in relation to settlement discussions.

23 So it is a submission in effectively two parts on  
24 that. Obviously in extremis it may pull the plug, and  
25 that is what Mr Scannell was addressing, but of course

1           it does not actually have to pull the plug in order to  
2           still wield power, and if the parties as everyone knows  
3           that it has the power to do something in the situations  
4           that we covered yesterday, then they will know that they  
5           are negotiating in that context. So that is the point  
6           on that.

7           There is then Mr Scannell's point that there is  
8           simply -- he was seeking to suggest, I think, that there  
9           was basically no risk that the threshold provision that  
10          we discussed at some length yesterday was ever going to  
11          be surpassed so that Therium Atlas was going to get the  
12          discretion that we discussed. That is a very surprising  
13          submission in my submission, because if that is right it  
14          means that what they are saying is that this investment  
15          from Therium's point of view is an absolute sure thing.

16       THE CHAIR: I do not think he was saying there is no risk;  
17                he said it is a high threshold.

18       MR PICKFORD: Well, if it is a very, very low risk what on  
19          earth are Therium doing getting back a 450% return?  
20          A 450% return suggests that there is a pretty big risk  
21          here because you only get that kind of extraordinary  
22          return, in my submission, if you are taking a big risk,  
23          and Mr Scannell's submission is that the risk is  
24          incredibly small and we can -- the Tribunal can really  
25          ignore the possibility of it arising.

1           The Tribunal obviously cannot ignore the possibility  
2           of it arising. As, sir, you pointed out, it is from the  
3           point of view of a litigant, and it is not just that  
4           Therium has to secure a return, its return that it has  
5           sought to contract for, but also that it has to be  
6           a reasonable return for claimants as well, and we say  
7           particularly in relation to the used trucks claim where  
8           there is a big issue about pass-on, there must be a big  
9           issue about whether it is ever going to yield the kind  
10          of sums that the claimants hope.

11          So that is the point on that.

12       THE CHAIR: DAF is going to be saying there is pass-on, is  
13          it not?

14       MR PICKFORD: Sorry?

15       THE CHAIR: Your client is going to be arguing that there is  
16          pass-on?

17       MR PICKFORD: Yes, we are going to be arguing there is  
18          pass-on, but that has not necessarily been terribly  
19          successful in this litigation so far, and that is why we  
20          are fighting hard for the interests of the used truck  
21          group now because we have a common interest with them on  
22          that and we want to make sure that is a claim that on  
23          this issue can be successfully pursued.

24          Now, the final point is that Mr Scannell says, well,  
25          do not worry, because this is --

1 THE CHAIR: Sorry to interrupt you.

2 MR PICKFORD: Sorry.

3 THE CHAIR: How do you suggest it should be successfully  
4 pursued when, as we have heard, there is significant  
5 difficulty getting a wholly independent funder? They  
6 have talked, I think, to four separate funders. The one  
7 they thought they had secured agreement with then pulled  
8 out at the last minute and in fact was demanding  
9 a higher return than Therium Atlas has agreed to. So if  
10 you want it to be pursued, how is it going to be  
11 pursued?

12 MR PICKFORD: Well, there are two answers, sir, to that  
13 question. The first is that in answer to a question  
14 from the Tribunal Mr Flynn was at pains to point out  
15 that Therium was not a funder of last resort. He made  
16 it very clear, he said in terms that they had a number  
17 of other funding options, but those were his submissions  
18 yesterday.

19 Well, if that is correct -- and obviously one takes  
20 his submissions as being correct -- then there must be  
21 the option, given time, of actually finding a separate  
22 funder.

23 Now, my submission is not that they must necessarily  
24 find a separate funder. My submission is the problems  
25 that they have given themselves would be solved at

1 a stroke if they did so. It is what the Court of Appeal  
2 expected them to do, it is what the Court of Appeal  
3 believed was going to be necessary, almost certainly,  
4 and it would meet, assuming there was not any connection  
5 between that funder and Therium, all of the points that  
6 I was making in my submissions yesterday.

7 So in my submission, on what we heard from Mr Flynn  
8 that option actually does remain on the table.

9 Obviously it might take more time. Second point --

10 THE CHAIR: Well, the option of continuing to look is  
11 available. Whether it will be successful we do not  
12 know, but it is -- I mean, we are not naive on the  
13 Tribunal, you do not really want the claim to be  
14 pursued. The best outcome from DAF is a high level of  
15 pass-through to used trucks and no claim by used truck  
16 purchasers. That is the best outcome, is it not,  
17 because then you are not liable to the new truck  
18 purchasers and you have got no used trucks purchasers  
19 claiming.

20 MR PICKFORD: Yes, that is certainly true, sir, but there is  
21 a hierarchy of outcomes. That is the best possible one,  
22 but the next one is that there is pass-on, there is high  
23 pass-on, even if those claimants are in the claim  
24 because on the maths -- and I gave an illustrative  
25 example yesterday -- we still benefit from that. So

1           that is the next best option. The worst option --

2       THE CHAIR: At the moment you benefit with the degree of  
3           opt-in to date.

4       MR PICKFORD: Yes.

5       THE CHAIR: But what the balance of new and used will be at  
6           the end of the opt-in period, we do not know, you might  
7           not benefit.

8       MR PICKFORD: Of course, sir, but obviously I am here to  
9           make submissions to you based on our best commercial  
10          evaluation of what is ultimately in our legitimate  
11          interests. My point here -- I have never shied away  
12          from saying we are making submissions in our own  
13          interests, obviously we are, but they are legitimate  
14          because we share a common interest with -- we share  
15          a common interest with the used trucks group in resale  
16          pass-on.

17                Then the very worst, right at the bottom, is the  
18          possibility that we have got, for instance, a badly-run  
19          claim or a claim that goes wrong in relation to used  
20          trucks somehow which actually could lead to a worse  
21          result for us than otherwise. So that is my answer in  
22          relation to that.

23                Coming back then I think to the point I was going to  
24          respond to -- actually, sorry, I think I was going to  
25          give you a second answer to an earlier question. I am



1           now forgetting what the earlier question was. My junior  
2           may remind me.

3           But coming back to Mr Scannell's point, he said,  
4           well, do not worry because this is Therium Atlas  
5           exercising the decision-making here, and of course what  
6           he did not address at all in that context was my point  
7           that Therium Atlas is advised by, for example,  
8           Mr John Byrne who is the CEO of Therium with all of his  
9           incentives and obligations to Therium as a whole. So it  
10          does not get him anywhere to say, do not worry, it is  
11          Therium Atlas, that is the whole point of a substantial  
12          part of my submissions yesterday.

13          Can I just take instructions for a moment, if I may?

14          (Pause)

15          Sir, other than the issue of whatever we are going  
16          to be told in the letter from the RHA, that does deal  
17          with the points that I wanted to make in reply.

18          Because we did not get any information from the RHA,  
19          we did our own researches in relation to the  
20          compositions of the boards this morning, but we can deal  
21          with that.

22          THE CHAIR: Let us wait and see what we get, yes, thank you.

23          MR PICKFORD: I am grateful.

24          THE CHAIR: We will wait until we get the letter after lunch  
25          and we will move on.

1 I think the next logical area is to turn to other  
2 aspects of funding which is Mr Carpenter.

3 Submissions by MR CARPENTER

4 MR CARPENTER: Yes, thank you, sir.

5 Happily there is only one point remaining from those  
6 that were set out in the joint funding response. It is  
7 rather more prosaic than those that have troubled the  
8 Tribunal so far in this hearing, but it is short and it  
9 ought to be capable of consensual resolution, and it  
10 relates to the definition of the tranches, the six  
11 tranches of funding in the PSCR LFA.

12 To explain what the issue is, can we bring up,  
13 please, {RM-G/7/6}, and it's the bottom half of that  
14 page that we are interested in. This is from the  
15 definitions section of the PSCR LFA and it defines the  
16 various tranches, they are all in effectively identical  
17 form, and they all say, just taking tranche 1 as an  
18 example:

19 "... the steps in the Collective Proceedings and the  
20 funding requirement, as detailed in the Project Plan, up  
21 to the maximum of the Committed Funds in respect of that  
22 first tranche."

23 And the Project Plan is a defined term in the top  
24 half of that page if we can look at that, which is:

25 " ... the project plan and budget for the Claim,

1 including the Solicitor's estimate of the Funding  
2 required to pursue the Claim and an outline  
3 timetable..."

4 And so on.

5 THE CHAIR: Sorry, just to interrupt, "Therium" here means  
6 Therium Atlas?

7 MR CARPENTER: Yes. The way these tranche definitions feed  
8 into the provision of funding appears in clauses 2.3  
9 onwards. It is the same tab, it is page 8 {RM-G/7/8}.

10 Effectively what you have between 2.3 and 2.7 is  
11 a succession of materially identical provisions that say  
12 each time, if we just take 2.3 as an example:

13 "At the option of Therium, exercisable on the  
14 exhaustion of the Committed Funds for Tranche 1, Therium  
15 shall have the exclusive right but not the obligation to  
16 fund Tranche 2 ..."

17 Our point is really a simple one, and it is just  
18 a drafting one, that we say that as these provisions  
19 currently stand they appear to be contractually  
20 incoherent in that it is not clear whether these  
21 tranches are simply pots of money so that when the money  
22 is exhausted that is the end of tranche 1 and Therium  
23 has the right to incept tranche 2, or whether as the  
24 definitions suggest in the way that they refer to steps  
25 in the proceedings and refer to the project plan, as

1           whether the tranches are defined by reference to the  
2           work that is done, so in effect what you have is a set  
3           of sub-budgets for different stages of the proceedings,  
4           and the impression was that it was the latter, not least  
5           because of course the wording of the definition of the  
6           tranches refers to steps in the proceedings and it also  
7           refers to the project plan, but the problem with that is  
8           that there is no document which might meet the  
9           definition of the project plan which sets out anything  
10          that could be regarded as six tranches.

11                 The only document that we have is the specific  
12          budget that the PSCR has produced which is an annex to  
13          the litigation plan, and I will show you that, if I may,  
14          in {RM-E/12/190}.

15   THE CHAIR:   Have you got the electronic reference?

16   MR CARPENTER:  Yes, {RM-E/12/190}, yes, so that is coming up  
17                   on the screen.  That is just to show you the front page.  
18                   If can just scroll down a page {RM-E/12/191} you will  
19                   see, sir, in paragraph 3 this budget is broken down into  
20                   13 stages, not six stages, and then beginning on the  
21                   next page {RM-E/12/192} if we can look at that and just  
22                   pause here and I am only going to pull out this one  
23                   because the way this has been dealt with rather seems to  
24                   support our view that the tranches are defined by  
25                   reference to work to be done.  Sorry, can we go back up

1 a page, please, and look at the top half of that page,  
2 stage 1 is:

3 "Work up to [the] Remittal Hearing."

4 There is a figure for the overall budget for this  
5 stage.

6 Now, I do not want to get too lost in the maths  
7 here, but that is a VAT-exclusive figure but the budget  
8 for solicitors' fees is 100% of the figure, but they are  
9 actually we know on a 70% CFA. So cutting through any  
10 mathematical complications and at a time when it was not  
11 clear whether RUTL was going to be able to recover VAT,  
12 we are now told that it can, but at a time when we did  
13 not know if it could or not, we calculated that the PSCR  
14 would need more than the million pounds to get through  
15 to the end of this hearing.

16 So if that was tranche 1, then there did not seem to  
17 be enough money in the pot because tranche 1 is  
18 £1 million, and the response to that was to increase  
19 tranche 1 to 1.2 million which rather seemed to support  
20 the view that these tranches are indeed defined by  
21 reference to steps in the proceedings, but, if that is  
22 right, there is no document that defines those six  
23 tranches in that way.

24 Without wanting to labour the point too much, sir,  
25 it really comes down to this: it is either one or the

1           other, and we do not really care which it is, but  
2           whichever it is, the LFA needs to be drafted in the  
3           right way for it to work.

4           So if it is simply a pot of money and all that  
5           matters is when you have used up your 1 million you ask  
6           Therium for the next 1 million, then the definitions of  
7           tranches should not be referring to steps in the  
8           proceedings and should not be referring to the project  
9           plan, but, if it is in fact a series of mini-budgets  
10          that are set by reference to steps in the proceedings,  
11          then there should be a document which conforms to those  
12          six tranches, and it is really nothing more or less than  
13          that, sir.

14       THE CHAIR: Yes, thank you.

15           I think Mr Scannell, this concerns your funding or  
16           your client's funding agreement.

17           Submissions in reply by MR SCANNELL

18       MR SCANNELL: Yes, Mr Chairman, although concerns in the  
19           loosest possible sense because we struggle to see why  
20           this particular point should be of concern to the  
21           proposed defendants.

22           Quite apart from anything else, Mr Fidler,  
23           a solicitor for Tyr, representing the proposed sub-class  
24           representative, has put in a witness statement long  
25           before my learned friend's skeleton argument, explaining

1 the reasons why the tranches are structured in the way  
2 that they are, but the bigger picture point is that the  
3 proposed sub-class representative and its legal advisers  
4 and its experts are happy for the tranches to be  
5 structured the way they are, so is Therium Atlas.

6 Overall, the payment of those tranches will meet  
7 their anticipated costs. The budget, of course, has  
8 been broken down into steps so that the LFA can  
9 understand where the budget figure is coming from, but  
10 so long as everybody is content with the arrangement and  
11 is content to work under those contractual conditions,  
12 we really fail to see why this is of concern to the  
13 defendants.

14 There is no particular reason or logic behind having  
15 tranches which coincide with the happenstance of the  
16 breakdown of a budget into steps in the litigation.  
17 What is important is that the funding covers the budget,  
18 and it does cover the budget.

19 THE CHAIR: If we could just go back for a moment to the  
20 litigation funding agreement which I think is  
21 {RM-G/7/6}, I think which we just looked at, whether it  
22 is of legitimate concern to the defendants, it just  
23 would be helpful for us to understand how it works as we  
24 are approving it. They need not, as you say,  
25 necessarily be defined in the same way, but when it

1           says:

2           "'Tranche 1' means ... steps in the Collective  
3           Proceedings ... as detailed in the Project Plan..."

4           Is it simply saying no more than this: that you have  
5           taken the various steps that are in the project plan and  
6           you have got to a point where you have used the amount  
7           that is labelled in the ceiling of tranche 1?

8       MR SCANNELL: Yes, in practice that is how this will --

9       THE CHAIR: It does not matter whether those are what in the  
10       project plan is step 1 and half of step 2.

11       MR SCANNELL: Absolutely, yes.

12       THE CHAIR: You have just got to a point by following that  
13       plan where you have reached the ceiling of tranche 1 and  
14       at that point, given that the funder is primarily  
15       interested in the amount, they will say: right, we now  
16       go into tranche 2 --

17       MR SCANNELL: Yes.

18       THE CHAIR: -- so that you can complete the second stage and  
19       go on --

20       MR SCANNELL: That is precisely it, and surely it will come  
21       as no surprise to the defendants to learn that when the  
22       used truck sub-class representative is coming to the end  
23       of tranche 1, they are going to contact Therium and ask  
24       for tranche 2 to be paid. That is the way these  
25       litigation funding agreements work.



1 I do not think I can take it any further than that.

2 THE CHAIR: Yes, I mean, Mr Carpenter, I am not sure  
3 technically you do have a right of reply, but is there  
4 anything you want to say by way of comment? I think we  
5 understand how it works.

6 MR CARPENTER: It does seem, sir, from your exchange with my  
7 learned friend that it is simply a pot of money and when  
8 that is exhausted you ask for the next one.

9 THE CHAIR: Yes.

10 MR CARPENTER: The wording is perhaps a little infelicitous  
11 and this is something that could have been clarified  
12 before today, but there we are, we have reached that  
13 point and I think there is nothing more I need to say.

14 THE CHAIR: No, I think it seems sufficiently clear to us,  
15 and we do not see a problem.

16 Right, I think then we would move to looking at the  
17 draft CPO and the Rule 81 notice and the points raised  
18 by Iveco.

19 I know it is a bit early, but perhaps it is then  
20 sensible to take a break now for ten minutes and then we  
21 will turn to you, Mr White.

22 (11.24 am)

23 (A short break)

24 (11.37 am)

25 THE CHAIR: Yes.

1 Submissions by MR WHITE

2 MR WHITE: Sir, as you are aware, I am covering points on  
3 the draft CPO, the notice, and we have one point on the  
4 pleadings as well.

5 THE CHAIR: Just to identify you, it is Mr White for --

6 MR WHITE: Mr White, representing Iveco.

7 As the Tribunal noted yesterday, the issues since  
8 the times that the remitted matter responses were filed  
9 have narrowed, but there are still a number of issues  
10 that are on the table.

11 Just so the Tribunal has a road map of the issues  
12 that I will cover, there are four open points on the  
13 draft CPO. They are the exclusion of dissolved  
14 companies, the exclusion of cost plus operators, the end  
15 date of the claim period in respect of lessees of  
16 trucks, which is the point that we noted yesterday very  
17 briefly, and the opt-in period.

18 I will then be making one point on the draft Rule 81  
19 notice which concerns the characterisation of the  
20 infringement in that document, and I will also make one  
21 point on the pleadings concerning compound interest and  
22 financing losses.

23 Sir, in addition to that, I understand that  
24 Mr Pickford will make one point on the notice which is  
25 the point that he raised yesterday at the end of the day

1           around the waiver of class member or certain potential  
2           class member obligations which may need a consequential  
3           amendment to the notice to be made.

4       THE CHAIR:   Yes.   Just to be clear, you are instructed by  
5           Iveco.

6       MR WHITE:   Yes.

7       THE CHAIR:   Are all these points -- you shared out,  
8           sensibly, your submissions between the various OEMs and  
9           defendants.   Are all these points adopted by everybody  
10          else?

11      MR WHITE:   I understand that they are, but I cannot speak  
12          for everyone.

13      MR PICKFORD:   Yes, they are.

14      MR JOWELL:   Indeed.

15      MR HOSKINS:   We are still heads down.   Not by us.

16      THE CHAIR:   And Daimler similarly, thank you.

17      MR WHITE:   So sir, I will start with the draft CPO, and all  
18          of these points, of course, assume that the CPO is made.  
19          There are, of course, the outstanding points around ATE  
20          insurance and the budgets and the potential shortfall  
21          that were covered earlier.

22               The first point, as I said, concerns the exclusion  
23          of dissolved companies, and I may be able to take this  
24          point quite quickly as I am not sure how much there  
25          really is between the parties following our skeleton

1 arguments. We did write to the RHA overnight to check  
2 whether we are now ad idem on this issue, but  
3 unfortunately we have not had a response. So if I might  
4 just turn up what the latest position is which is set  
5 out in our skeleton argument, it can be found at  
6 {RM-A/4/2}. I will be focusing on paragraphs 5 and 6.

7 So at the start of paragraph 5 we note the language  
8 that is used in the draft CPO that was filed with the  
9 replies by way of exclusion of dissolved companies, and  
10 the wording there is, and I quote, there will be an  
11 exclusion for:

12 "... any legal person who was dissolved for  
13 a continuous period of six years or more as at [the date  
14 of the CPO]."

15 Then also in paragraph 5 we set out the wording set  
16 out in the RHA's skeleton argument which refers to  
17 a similar exclusion but it is slightly differently  
18 articulated, and so in a skeleton the RHA accepts that:

19 "... a dissolved company falling within the class  
20 definition for which an application to restore [has] not  
21 been made within six years before the date of the CPO  
22 could not form part of the collective proceedings."

23 So the version of the exclusion in their skeleton  
24 argument stands to exclude a dissolved legal person when  
25 no application to restore has been made in the six-year

1 period before the date of the CPO, and that is an  
2 exclusion which does not come out quite so clearly from  
3 the wording in the draft CPO as it stands.

4 Then in our skeleton argument at paragraph 6, we  
5 essentially confirm that we are content with the  
6 articulation of the issue in the RHA's skeleton argument  
7 and we propose in paragraph 6 some wording that could be  
8 added to the draft CPO in place of the wording that is  
9 currently there to reflect what the RHA say in their  
10 skeleton and the wording that we have put in paragraph 6  
11 is:

12 "... any dissolved legal entity in respect of which  
13 an application to restore has not been made within the  
14 six year period before [the date of the CPO]."

15 Is excluded.

16 Sir, as I say, it may be that I do not need to say  
17 much more than that if the RHA agree to that wording.  
18 If they do not agree, then of course I will need to say  
19 something more.

20 THE CHAIR: Yes, well, perhaps we should hear on that right  
21 now from Mr Flynn.

22 MR WHITE: Of course.

23 Submissions by MR FLYNN

24 MR FLYNN: Sir, we do not agree. We think it should be as  
25 in the draft CPO and as explained in our skeleton, which

1 is we did not think it needed to be said at all, but  
2 there seemed to be some concern that somehow we were --  
3 perhaps I should say you can see this in our skeleton,  
4 paragraph 29 to 31, and we did not think it needed to be  
5 said because a company which has been dissolved for more  
6 than six years cannot be recreated, cannot be  
7 reconstituted, but we were happy to clarify that, since  
8 the point seemed to be of concern to Iveco, that if the  
9 company had not -- had been dissolved for more than six  
10 years, then it was not going to be possible for it to  
11 opt in.

12 We think that the wording in our skeleton about the  
13 application having not been made within six years, on  
14 which Iveco fastened, actually imposes an additional  
15 limitation which is not in the statute. So we do not  
16 see why, for example, a company that was dissolved, in  
17 respect of a company that was dissolved say last year,  
18 that an opt-in could not be made and an application for  
19 that company to be restored to the register at that  
20 point, and it would not have to have the cut-off with  
21 the perhaps then infelicitous wording in our skeleton  
22 which -- as I say on which Iveco has fastened.

23 I am not sure there is much between us because the  
24 principled objection surely should be that companies  
25 that can be restored, should be able to form part of the

1 claim and opt in, and those that cannot we are not  
2 trying to smuggle them in by some means or other, I am  
3 not sure that we could.

4 So our position is that the wording in the draft CPO  
5 is the one that the Tribunal should accept and not this  
6 variant which I think in some cases would limit the  
7 rights of companies currently dissolved but within the  
8 period for reconstituting themselves would be barred  
9 out.

10 THE CHAIR: I am actually a bit baffled by all this.

11 I mean, if this was an opt-out there might be some  
12 point here, but it is an opt-in collective proceedings.  
13 A company that does not exist cannot opt in  
14 self-evidently; it would have to be restored in order to  
15 opt in.

16 MR FLYNN: Yes.

17 THE CHAIR: So I don't see what the -- you have excluded --  
18 the point about natural persons is quite different  
19 because they have administrators or legal  
20 representatives and whatever who might be able to act  
21 for their estate, but in this case any company that is  
22 dissolved cannot be a member of the class unless it is  
23 restored, can it?

24 MR FLYNN: No, and it can only opt in during the opt-in  
25 window, but there is a possibility that it could be

1           restored in that time.

2       THE CHAIR: In that time, yes.

3       MR FLYNN: So a cut-off by reference to an application to  
4           restore not made six years before the date of the CPO  
5           seems to us to shut out the problem.

6       THE CHAIR: I can understand why you do not like that  
7           wording, but, Mr White, I just do not see what the  
8           concern is.

9                               Submissions by MR WHITE

10      MR WHITE: So in my submission the exclusion needs to do two  
11           things: it needs to reflect the Companies Act, so that  
12           is where the six years comes from, because you cannot  
13           make an application to restore a dissolved legal entity  
14           if it has been dissolved for more than six years, but we  
15           say that in addition the application to restore needs to  
16           have been made by the date that the CPO is made, and we  
17           make that point --

18      THE CHAIR: Well, that is where of course -- that is why  
19           there is a substantive difference between you.

20      MR WHITE: Yes, and so that is -- it is now clear, because,  
21           as I say, the wording we included in our skeleton was  
22           derived from the RHA's own skeleton, so it was not clear  
23           that this was going to necessarily be an issue, but  
24           I think it is clear what the issue is, it is the second  
25           of the two things that we say that the exclusion must



1 do, namely an application to restore needs to have been  
2 made by the date of the CPO, and there are two  
3 substantive elements to our point there.

4 The first is that as the Tribunal is aware,  
5 proceedings brought by or on behalf of a legal entity  
6 that is dissolved, ie does not exist, is a nullity as  
7 a matter of law, and, for example, if a dissolved legal  
8 entity came before the Tribunal today pursuing  
9 a section 47A claim, that claim would not go any  
10 further, it simply would have no effect, and we say that  
11 the same principle applies in collective proceedings,  
12 and we say that the important date here is the date of  
13 the CPO because that is the date on which the Tribunal  
14 combines within collective proceedings a set of  
15 section 47A claims and, therefore, there is an active  
16 collective claim proceeding before the Tribunal, and so  
17 therefore a company needs to exist by the date the CPO  
18 is made or at least an application to restore needs to  
19 have been made.

20 THE CHAIR: Is that the date when the Tribunal combines  
21 a set of claims if you do not know how many claims there  
22 are, or is it the date when people opt in that their  
23 claim is made? Because if it is the date when they opt  
24 in, then there is no claim by someone until that person  
25 opts in.

1 MR WHITE: Yes, although the CPO will of course have effect  
2 on the date that it is made and it will be clear  
3 precisely who is within the proceedings once the opt-in  
4 period closes.

5 THE CHAIR: Who can opt into the proceedings.

6 MR WHITE: Who can opt into the proceedings.

7 If I might just make one further point on this which  
8 might help to explain how we see this, so we have --  
9 I do not propose to turn up these particular authorities  
10 unless it is helpful to do so, but we also have regard  
11 to the Tribunal's judgment in *Merricks* 3 of which, sir,  
12 you were the chairman, and in that case a question arose  
13 as to whether a CPO could include claims which do not  
14 exist, and the Tribunal in that case emphasised that it  
15 is fundamental to the CPO application that all potential  
16 class members have existing claims, and the same  
17 conclusion was reached in the *Neill v Sony* case where  
18 the chairman was Mr Tidswell, and it was again  
19 emphasised there that the purpose of the collective  
20 proceedings regime is to combine claims, ie combine  
21 claims when the CPO is made, which must be extant. For  
22 the transcript and your note the reference in *Merricks* 3  
23 is at paragraph 26. It is in the authorities bundle  
24 {RMJA/9} and the *Sony* case is {RMJA/10} paragraphs 64  
25 and 70.

1 THE CHAIR: If a company is restored to the register --

2 MR WHITE: If the company is restored to the register or an  
3 application has been made by the date the CPO is made  
4 then they stand to fall within the proceedings on our  
5 proposed exclusion. If the company is dissolved on the  
6 date the CPO is made and no application to restore has  
7 been made but an application to restore is made later,  
8 they would, on our proposed exclusion, be excluded from  
9 the proceedings, and that is --

10 THE CHAIR: It is not the application to restore; it is the  
11 actual restoration.

12 MR WHITE: It is the actual restoration, yes, and we say --

13 THE CHAIR: I do not know how long it takes to get  
14 restoration anyway --

15 MR WHITE: Nor do I.

16 THE CHAIR: -- and whether this is a realistic risk.

17 MR WHITE: Sir, I agree with you that what matters is that  
18 the company is in fact restored to the register. We  
19 were willing to agree to the inclusion of potential  
20 class members where an application to restore has been  
21 made on a pragmatic basis based on the language that was  
22 in the RHA skeleton argument, but I agree with you, sir,  
23 that strictly speaking, you need to be on the register  
24 in order to exist, but we took the position we did on  
25 a pragmatic basis which we are happy to stick with.

1           So what happens to claims that come into existence  
2           after the date that the CPO is made was a question that  
3           arose also in the *Sony* case, and there Mr Tidswell at  
4           paragraph 70 referred to the need for what he described  
5           as "procedural gymnastics" where the class  
6           representative may need to make a further application  
7           after the date of the CPO to seek to include whatever  
8           additional claims might come into existence after the  
9           date of the CPO to have them added.

10       THE CHAIR: Was *Sony* an opt-in or --

11       MR WHITE: It was an opt-out case.

12       THE CHAIR: I mean, that is very different because that is  
13           the whole point. In an opt-out you are including all  
14           the claims. In an opt-in, you are not, you are just  
15           enabling people to opt in.

16       MR WHITE: But the Tribunal is still making a CPO on a date  
17           before the opt-in date which combines in principle  
18           a series of section 47A claims, and so we say that that  
19           is the date on which a company needs to either exist or  
20           on a pragmatic basis have had an application made for  
21           its restoration. So that is why we were content with  
22           the language that the RHA proposed in their skeleton  
23           argument and why we oppose the language that currently  
24           appears in the draft CPO.

25       THE CHAIR: Well, Mr Flynn, whether this is a point of

1 practical implication it is hard to tell because I do  
2 not know if somebody makes an application to be restored  
3 the day before the CPO in fact they will be restored  
4 within the six months, assuming you get the six months  
5 that you are asking for, and if they are not restored  
6 they cannot opt in any way, they will have to exist in  
7 order to opt in, it seems to me.

8 Submissions by MR FLYNN

9 MR FLYNN: Our understanding is, yes, they would have to  
10 exist to be able to opt in within the opt-in period. We  
11 do not think it is correct to say everything  
12 crystallises at the date of the CPO. The CPO says these  
13 claims are suitable for collective proceedings: turn up,  
14 sign up, if you think you have one.

15 THE CHAIR: Yes. You have not done any research on how long  
16 it takes to get restored?

17 MR FLYNN: I have not.

18 THE CHAIR: Because if it takes six months to get restored,  
19 there is a nice argument on principle, but it has no  
20 practical significance.

21 MR FLYNN: Well, there would be, but there are also  
22 provisions which allow the ex post ratification of  
23 activities taken on behalf of the previously dissolved  
24 and now restored company, so I do not think the cut-off  
25 is as neat as that, and our point essentially is that to

1 say all this has to be done by the date of the CPO is  
2 potentially going to shut some people out who have  
3 a claim and could, in ordinary circumstances apply  
4 (inaudible).

5 THE CHAIR: It seems to me -- but I have not discussed it  
6 with my colleagues -- it is a legal question, the point  
7 that has been taken is a point of law that the Tribunal  
8 cannot make a CPO covering people who do not exist at  
9 the date of the CPO, even if it is an opt-in CPO, it is  
10 a question of how the statute --

11 MR FLYNN: But as you said, sir, it is different for  
12 opt-outs and opt-ins. The effect of an opt-in CPO is to  
13 say that claims by those falling within the class who  
14 front up during the opt-in period can be made -- can be  
15 determined in the collective proceedings, and that,  
16 I think, is different from the cut-off date that has  
17 been referred to in some of the opt-out CPOs.

18 THE CHAIR: Yes, well, I can see that.

19 Well, I think we have the arguments. I think that  
20 is something probably we would like to consider and we  
21 will look at *Merricks 3* and *Sony*, because this has  
22 implications for other opt-in claims.

23 MR FLYNN: Fully understood, sir. Just to understand that  
24 our position is that the wording should be as in the  
25 draft CPO and not in the way that that was explained in

1           our skeleton.

2       THE CHAIR: Yes, no, we understand, and we see the -- but it  
3           seems to me that it is really a question of law of  
4           whether it has to be a claim existing as at the date of  
5           the CPO or where it is an opt-in class action it can be  
6           a claim that -- the person making the claims, and there  
7           is a claim that can be brought within the opt-in period,  
8           that is the issue between you, I think.

9       MR FLYNN: That is the issue, and then the question is  
10          whether a company that is dissolved at a particular  
11          point but can be restored has that claim.

12       THE CHAIR: Yes. Just one moment. (Pause)

13                Dr Bishop has done some quick research and it seems  
14                it is about four months to restore, so there is  
15                a period, and it is of some practical relevance  
16                therefore.

17                       Submissions in reply by MR WHITE

18       MR WHITE: Sir, just two very quick points. We agree that  
19          it is a point of law and to the extent that the Tribunal  
20          would have concerns with the reference to a need for an  
21          application to have been made by the date of the CPO as  
22          opposed to the company in fact existing, then we would  
23          of course be happy for the company to need to be  
24          actually in existence as of the date of the CPO as  
25          opposed to an application needing to have been made.

1           As I said earlier, we referred to an application  
2           needing to be made in our skeleton on a pragmatic basis,  
3           but, as a strict matter of law, if that is the way the  
4           Tribunal sees it, then we would be happy to remove that  
5           wording. So the exclusion would perhaps be any  
6           dissolved legal entity in respect of which --  
7           a dissolved legal entity which has not come back, been  
8           restored to the register by the date of the CPO, stands  
9           to be excluded.

10       THE CHAIR: Yes. Well, I think we will consider that and  
11       give our ruling on that in writing.

12       MR FLYNN: It is a legal matter and companies, unlike  
13       people, can be resurrected and have a half-life --

14       THE CHAIR: Yes.

15       MR FLYNN: -- and their acts are retrospectively validated,  
16       so it would not be right to cut them off at the date of  
17       the CPO.

18       THE CHAIR: Yes. No, one can see the logic of that.

19       MR FLYNN: I am grateful.

20       THE CHAIR: It is a question of really what the statute  
21       allows, I think.

22                Right, so that is the first of your points,  
23       Mr White.

24       MR WHITE: It is. The second of my points also on the draft  
25       CPO concerns the exclusion of cost plus suppliers of



1 road haulage services.

2 At the time of the responses there were two cost  
3 plus points in issue, but there is now just one. To  
4 summarise the remaining issue as we understand it the  
5 CPO judgment requires the exclusion of suppliers of road  
6 haulage services who use an open book or cost plus  
7 business model, and that exclusion was ordered because  
8 the business models of those suppliers result in the  
9 cost of the truck being passed on in full to their  
10 customers which means that those suppliers themselves do  
11 not suffer any loss because any overcharge that would be  
12 incurred would be passed on in full by reason of their  
13 business model, and the RHA seeks to give effect to that  
14 exclusion by excluding suppliers of road haulage  
15 services who operate on an open book basis, and those  
16 suppliers pass on the cost of the truck in full and,  
17 importantly, permit their customers to inspect their  
18 books to verify the costs that have been passed on.

19 Now, we agree that open book suppliers stand to be  
20 excluded, but we say that that exclusion does not go far  
21 enough on its own, and that is because there are very  
22 similar arrangements where, like open book, the full  
23 cost of the truck is passed on to the suppliers'  
24 customers by reason of their business model but, unlike  
25 open book, the customers do not have the right to

1 inspect the suppliers' books.

2 THE CHAIR: So you say that cost plus includes open book but  
3 it is not identical to open book because there is  
4 a category within cost plus that is not open book?

5 MR WHITE: That is the language that we use. I believe in  
6 practice the terms may not be fixed, but there are  
7 certainly scenarios where the cost of the truck is  
8 passed on in full and customers are permitted to inspect  
9 the books, and scenarios where the cost of the truck is  
10 passed on in full but the customers do not inspect the  
11 books. In both scenarios, we already know by reason of  
12 the business model in question that the cost of the  
13 truck is passed on in full, the supplier does not suffer  
14 any loss, and they therefore stand to be excluded from  
15 the class.

16 THE CHAIR: So looking at the -- to make sure I have the  
17 point exactly, if one looks at the CPO itself, the draft  
18 CPO which might be helpful, that has been produced, I do  
19 not know what the electronic reference is.

20 MR WHITE: It is {RM-E/6/4} is where this particular  
21 exclusion features.

22 So at (f) you have a reference to an exclusion for:

23 "Any person engaged in Road Haulage Operations  
24 exclusively on an Open Book (defined below) basis."

25 Then below you have a definition of open book which

1 means:

2 "... supplying Road Haulage Operations through

3 a cost-plus contract --"

4 THE CHAIR: Sorry, could we scroll down to that, please.

5 MR WHITE: I am sorry, it is not on the screen.

6 THE CHAIR: "Open Book", yes. Your concern or objection is

7 to the last bit of that definition:

8 "... and where the customer can inspect the

9 books ..."

10 MR WHITE: Yes, that is the point of difference.

11 THE CHAIR: So if that were deleted "and where the customer

12 can inspect the books", then it is just a language

13 point, but it is defined, so it does not matter.

14 MR WHITE: That is one way of dealing with it --

15 THE CHAIR: But that would meet your point?

16 MR WHITE: That would meet my point, but in my submission we

17 would also need to amend what is said in (f) so that it

18 is clear it would probably need to say:

19 "Any person engaged in Road Haulage Operations

20 exclusively on an Open Book or cost plus basis."

21 THE CHAIR: Well, no, because open book is defined as cost

22 plus, once you delete the --

23 MR WHITE: Sir, could I perhaps turn up the way that we

24 propose to deal with it, I agree there are different

25 ways this might be dealt with.

1 THE CHAIR: Yes, but that would meet it, because that is the  
2 bit of the definition you are uncomfortable with.

3 MR WHITE: It is the point of difference between open book  
4 and cost plus. What we say would be the clearest thing  
5 to do would be to refer in (f) to both the language  
6 "open book" and "cost plus" and then have separate  
7 definitions for each of open book and cost plus.

8 THE CHAIR: Well, you can do that.

9 MR WHITE: Sir, I intended to turn up the judgment to  
10 explain why it is we take this position and why we say  
11 it is consistent with what you have found, and I was  
12 then going to turn to the RHA's witness evidence to set  
13 out their position before turning up an Iveco witness  
14 statement.

15 THE CHAIR: Why do not we just hear from Mr Flynn --

16 MR WHITE: That was why I was signposting what I might do in  
17 case you might want to hear from him first.

18 THE CHAIR: -- before having to go to there.

19 Yes, Mr Flynn.

20 Submissions by MR FLYNN

21 MR FLYNN: Sir, you may recollect the way this came up at  
22 the CPO hearing, but you may well not.

23 THE CHAIR: It was a little while ago.

24 MR FLYNN: It was a while ago, and my recollection may be  
25 faulty, but we had envisaged a situation in which where

1           there was full cost pass-on from a haulier to someone  
2           who was a claimant, they would be able to recover for  
3           the cost of that truck as well, and you thought that was  
4           a step too far, and that is why this exclusion is there.

5           Now, we understand, or I understand that in the  
6           industry people talk about open book contracts, they  
7           talk about cost plus contracts, and they may mean the  
8           same thing or they may mean different things when they  
9           say them, so I think -- and I think Mr White submits --  
10          they are not really terms of art, so it is a question of  
11          the definition.

12          The key, I think, is that the entirety of the cost  
13          is paid for by the customer receiving the road haulage  
14          operations, and I think you just said something similar.

15          Iveco are proposing a rather more complex version of  
16          cost plus which is where the parties agree that a figure  
17          will represent the cost of supplying the road haulage  
18          operations including the cost of the relevant trucks.

19          We think the definition in the proposed exclusion is  
20          a better one and more fairly represents what you say in  
21          the judgment, that it is the entirety of the cost of  
22          purchasing or leasing the applicable relevant trucks is  
23          paid for by the customer.

24          Again, whether this is a point of huge practical  
25          importance we are not sure.

1 THE CHAIR: Sorry, interrupting you, it is not that that is  
2 the problem, it is that you add an additional  
3 requirement in your definition "and where the customer  
4 can inspect the books", and although you say, well, that  
5 is usually what happens in cost plus contracts, the  
6 concern of the OEMs is that there are cost plus  
7 contracts where the entirety of the cost is passed on,  
8 but it does not include the right of the customer to  
9 inspect the books.

10 MR FLYNN: The facility to inspect, no, I understand and  
11 take the point, sir, and as I said, I think the key for  
12 us is the point without the "and where", so I understand  
13 what you are saying on that, and --

14 THE CHAIR: So if we delete -- are you content to delete  
15 that last condition?

16 MR FLYNN: Well, I think perhaps I should take instructions  
17 on it, but I do not actually see -- if -- as I say, it  
18 is not clear what the practical import of these things  
19 are, and if you asked different people in the industry  
20 what "open book" or "cost plus" meant, as I think you  
21 said they would use it pretty interchangeably and they  
22 might have different meanings.

23 THE CHAIR: Yes. There was, I think, some difference in the  
24 evidence. I just turned up the judgment to look at that  
25 section.

1 MR FLYNN: Yes.

2 THE CHAIR: I think that Mr White in principle is correct  
3 that we said that where the cost is fully passed on to  
4 the customer then they should be excluded. It may be  
5 that in practice those situations, you have a right to  
6 inspect the books, but that is not the key point, so one  
7 need not have that and should not have that as  
8 a determining factor.

9 MR FLYNN: Yes, I cannot push back further than that, sir.

10 THE CHAIR: I think it does not really matter how one  
11 defines it because you get -- "open book" is given  
12 a specific definition here. I think it might be  
13 sensible, rather than making this too complicated to  
14 make (f) to say:

15 "... an open book/cost plus basis (defined below)."

16 Then have the definition "open book/cost plus  
17 means", and so on, without the "and".

18 MR FLYNN: Yes, supplying the operations.

19 THE CHAIR: Yes.

20 MR FLYNN: (inaudible).

21 THE CHAIR: Rather than having yet another definition, just  
22 putting them together, because it is clear they often  
23 are used interchangeably, and that would meet Mr White's  
24 point.

25 MR WHITE: Yes, we would be satisfied with that.

1 THE CHAIR: Yes, so we will say that change should be made.

2 MR FLYNN: Very good.

3 MR WHITE: Thank you, sir.

4 Submissions by MR WHITE

5 MR WHITE: The next point is the one we mentioned very  
6 briefly around the end of the potential claim period for  
7 lessees, certain lessees, and, as I said yesterday, the  
8 point that we raise goes to the end of the claim period  
9 which is identified in the CPO, and in particular, which  
10 trucks are caught by the longer of the two potential  
11 claim periods set out therein. The point does not go,  
12 as I said yesterday, to the division of issues between  
13 the separate sub-class representatives and nor do we  
14 seek to make substantive points around how one might  
15 analyse overcharge issues on trucks that have been  
16 resold or leased or that have not been resold or leased.

17 The point we take is derived from the CPO judgment  
18 and there the Tribunal concluded that the long-stop end  
19 date for the claim period for CPO purposes should be no  
20 later than 31 January 2014 for new trucks to reflect the  
21 possibility of run-off, but that where a truck has been  
22 resold, there should be a slightly longer potential end  
23 date of the claim period of no later than  
24 31 January 2015 to reflect, again, potential run-off.

25 If I could turn up the relevant part of the judgment



1           it is in {RM-B/2/88}. The relevant paragraph is 213.  
2           The specific part of that paragraph that I have in mind  
3           is about halfway down and starts on the right-hand side,  
4           the word "on" that runs over:

5                 "On the basis of the material ..."

6                 I will just read that:

7                 "On the basis of the material we have seen and in  
8           the circumstances of this case, we consider that  
9           a reasonable run-off [period] for the RHA action is  
10          31 January 2014 for new trucks and any EURO emissions  
11          claim, given that this covers the date when EURO VI  
12          emissions trucks became mandatory; and one year later  
13          (ie 31 January 2015) for used trucks to allow a modest  
14          extension for resale."

15                The Tribunal then goes on to note the precise dates  
16           in respect of any run-off period are of course a matter  
17           for evidence in due course.

18                So, sir, we say that for the purpose of the dates  
19           that should appear in the CPO, the end of the claim  
20           period in respect of new trucks ought to reflect the  
21           judgment and be 31 January 2014, and that the end date  
22           for the claim period in respect of used trucks should  
23           also reflect the judgment and be 31 January 2015 with  
24           the differentiating factor between a new truck and  
25           a used truck for that purpose again reflecting what is

1       said in the judgment and a used truck is one that has  
2       been resold rather than anything else.

3               That is the view the Tribunal took in the CPO  
4       judgment on the basis of the evidence that was before it  
5       at that time after an extensive set of evidence before  
6       it and also a long CPO hearing.

7               An issue arises now because the RHA and RUTL now  
8       propose to treat all leases, save for the very first  
9       lease of a new truck, as a used truck, and we understand  
10      that that allocation of issues arises due to a potential  
11      conflict that is noted in Mr Smith's first witness  
12      statement which I will not turn up, but the effect of  
13      that change is at least potentially that almost all  
14      leases now stand potentially to fall within the period  
15      of time that benefits from the longer potential claim  
16      period whereas that is not what the CPO judgment says,  
17      and with that being so in the first instance in our  
18      response on the remitted matters, we ask the RHA and  
19      RUTL to provide some further information as to why they  
20      are seeking a change of position, and we did that  
21      because without a very good reason for the finding in  
22      the CPO judgment changing, we see that the CPO ought to  
23      reflect what the judgment says in paragraph 213.

24              In my submission, the burden on the RHA and RUTL in  
25      seeking a different outcome is a heavy one, and that is

1 not only because we have the prior finding of the  
2 Tribunal but also the long-stop end dates for the claim  
3 period in the judgment are already a material period of  
4 time after the date that the infringement actually  
5 ceased in January 2011, so it is already the case that  
6 there are many businesses who may opt into the  
7 proceedings but whose claims ultimately amount to  
8 nothing because there is proven at trial to in fact be  
9 no run-off period at all or a much shorter run-off  
10 period than might be suggested in the CPO. So any  
11 expansion of the businesses who fall potentially within  
12 the dates set out in the CPO should not be approached  
13 lightly.

14 In response to our request for additional  
15 information as to why a material change of position when  
16 compared with the CPO judgment is said to be justified,  
17 the RHA, to my knowledge, has said nothing about this,  
18 and RUTL provided only a very short response in their  
19 skeleton argument at paragraph 51, and there it  
20 suggested that all trucks save for the very first -- all  
21 leases save for the very first lease of a new truck as  
22 a matter of fact have been used which mean that all  
23 leases save for the very first lease should benefit from  
24 the longer of the two potential claim periods.

25 In my submission, as a starting point, we do not see

1       that such a brief explanation in just a sentence or two  
2       in RUTL's skeleton argument can possibly justify  
3       a change of position following a detailed consideration  
4       by the Tribunal at the CPO hearing and in its  
5       preparation of its judgment, but in any event on our  
6       side we are not clear from the very short comment that  
7       is made as to why, contrary to the view the Tribunal  
8       took, each and every lease, save for the very first  
9       lease of a new truck, should be classified as used.

10       For example, there might be some short sequential  
11       leases of new trucks and it is not clear why each of  
12       those leases stands to be treated as a used truck  
13       transaction as opposed to a new truck transaction, which  
14       is the effect of the division of issues and the  
15       definition of "used" on the current claim documents, and  
16       so in my submission, neither the RHA who said nothing,  
17       nor RUTL, have done even nearly enough to persuade the  
18       Tribunal that a different set of trucks stands to fall  
19       within the longer of the two potential claim periods.  
20       There is no basis to change the position set out in the  
21       CPO judgment.

22       So what we are asking the Tribunal to do is to  
23       confirm that for the purpose of the claim period that  
24       appears in the CPO, the trucks that stand to fall within  
25       the longer of the two potential claim periods are those

1           that have been resold rather than anything else. It is  
2           maintaining the status quo rather than changing the  
3           position. So that is what I have to say about this  
4           issue.

5       THE CHAIR: Yes. I may say to the best I recall in looking  
6           at run-off periods in the judgment we were not  
7           particularly focused on leases, so that is my personal  
8           recollection, and the problems they raise, but it is  
9           clearly a point of some potential significance.

10           Yes, Mr Scannell, I think it really concerns the  
11           RUTL sub-class.

12                       Submissions by MR SCANNELL

13       MR SCANNELL: Yes, it does. The submission that we are  
14           dealing with here is a rather confused one by Iveco.  
15           They say that it is not in fact concerned about the  
16           scope of the used truck sub-class common issues, but  
17           scratch a little and it is fairly evident what the  
18           objection is.

19           The objection is, as I described it yesterday, that  
20           they would prefer for the used truck sub-class common  
21           issues not to include leases at all, and then the reason  
22           becomes clear: the reason is that they want rather  
23           opportunistically to make those leases subject to the  
24           new trucks run-off period.

25           Now, I dealt yesterday with the question of whether

1           or not the used truck sub-class common issues should  
2           include leases, and I do not propose to repeat the  
3           points that I made in that connection yesterday. We say  
4           that it is abundantly clear that the used truck  
5           sub-class representative should deal with all of the  
6           losses caused to lessees of used trucks other than the  
7           first lease, and we accept that the first lease is a new  
8           trucks issue.

9       THE CHAIR: What did we say about spot hire?

10      MR SCANNELL: For spot hire, the considerations are rather  
11           different, and the reason is that the experts are, as  
12           things stand at the moment, rather unclear on how to  
13           deal with spot leases. So the sums at stake in relation  
14           to spot hires might be very, very small indeed, where,  
15           for example, a truck is hired for a day or two and the  
16           losses might amount to pence and not pounds, and where  
17           Dr Davis came out on this and where Mr Wilkinson has  
18           subsequently come out is that it is difficult to know  
19           whether or not spot hires are characterised by exactly  
20           the same features as other types of leases and pending  
21           disclosure it is too early to say whether it is more  
22           appropriate for them to be dealt with along with new  
23           trucks or along with used trucks.

24           As things stand at the moment, they are categorised  
25           as used truck sub-class common issues. That might

1 change, it is not a definitive position. I think that  
2 is the fairest way that I can put that, and that is  
3 explained in the expert methodology report of  
4 Mr Wilkinson, in particular at footnote 86 and the  
5 reference to that is {RM-C/12/127} and cross-referring  
6 to the fourth supplemental report of Dr Davis, and it is  
7 the footnote down at the bottom.

8 THE CHAIR: Is it envisaged that there will be many who  
9 engaged in spot hiring of trucks who will opt in?

10 MR SCANNELL: Yes, it may be that the group is also  
11 vanishingly small, and so I think where the experts have  
12 come out is: let us see where we stand in relation to  
13 spot hires after disclosure and when we have a clearer  
14 picture of whether or not the cohort of potential  
15 claimants is large and whether the losses are large and  
16 whether or not the contracts themselves have more --  
17 have features which make it safe to align them with  
18 leases or with some other arrangement, and pending the  
19 disclosure in particular, their approach is to treat  
20 them as used trucks issues.

21 Now, as to what the run-off period for leases should  
22 be, the first point is in fact the point that you have  
23 just made, Mr Chairman, that in the CPO judgment of  
24 2022, the focus was on what the run-off period should be  
25 for used trucks purchases, not used trucks leases, and

1       so there is no question of a change of approach or  
2       acting in a way which is inconsistent with the judgment  
3       that has already been handed down by the Tribunal; we  
4       are now dealing with a different question.

5             First, we are dealing with the question of whether  
6       it is appropriate for leases to be included as used  
7       truck sub-class common issues, and I dealt with that  
8       yesterday and we say clearly that is right, they should  
9       be included. Now we have to decide what the appropriate  
10      run-off period should be for those claims.

11            Now, it is true that used trucks purchases have been  
12      dealt with in the judgment and the date for that is  
13      31 January 2015 and it is also true that the reason that  
14      was given there, which is a perfectly logical reason in  
15      the context of used trucks purchases, is that an  
16      additional period of time would be necessary for resale.

17            All of that is true, but thinking about it, a longer  
18      period for used trucks, even purchases, is also  
19      appropriate for other reasons. The most obvious reason  
20      is that the effects of the infringement on used trucks  
21      will obviously take longer to manifest than the effects  
22      on new trucks.

23            Whatever mechanism one uses to estimate the effect  
24      of the cartel on used trucks, that time-lag is likely to  
25      be significant. So if we consider, for example, the



1 approach that was taken by Dr Davis initially and by  
2 Dr Wilkinson now, they have both imagined that there are  
3 three possible vectors of harm that could apply to used  
4 trucks buyers. One of them is a reduced supply vector,  
5 another is a substitution effect, and another is  
6 a mechanistic relationship between new trucks prices and  
7 used trucks prices.

8 So just so that we are clear on what each of those  
9 is, the substitution effect kicks in because new trucks  
10 prices are cartellised, they are higher. A view was  
11 taken by those who are interested in purchasing trucks,  
12 or leasing them for that matter, that those prices are  
13 higher and so they will buy a used truck instead because  
14 the used truck is considered to be substitutable with  
15 the new truck. That creates more demand for used  
16 trucks, that increases prices, and so harm is suffered  
17 by used trucks buyers.

18 With reduced supply, the hypothesis is that with  
19 reduced demand for new trucks because of the higher  
20 prices, the OEMs actually supply fewer new trucks.  
21 There are fewer new trucks on the market and that means  
22 that over time there will be fewer used trucks on the  
23 market. That will exacerbate the problem under the  
24 substitution effect because there will now be fewer used  
25 trucks to buy or to lease.

1 Under the third mechanism, the mechanistic  
2 relationship between new trucks and used trucks, the  
3 hypothesis is that if the price of the new truck is  
4 higher than when a dealer, for example, comes to sell  
5 that truck secondhand, the price is going to be higher,  
6 but under all of those possible vectors of causing  
7 damage to used trucks buyers, there will be a delay  
8 between the harm that is suffered at the new trucks  
9 level and the harm that is suffered at the used trucks  
10 level. There is not simultaneity between the two. All  
11 of those considerations apply just as much to leases as  
12 to purchases. I have touched on a few of those already  
13 in describing what the vectors actually are.

14 The further point is that used trucks lease prices  
15 are likely to be a function of used trucks purchase  
16 prices. Lessors factor in the capital cost of trucks  
17 when they are deciding what it will cost to lease the  
18 trucks, and for that reason, for example, Mr Wilkinson  
19 in his expert methodology report, taking the same  
20 approach in this respect as Dr Davis took, applies the  
21 same run-off period to both used trucks purchases and  
22 used trucks leases in his various regressions covering  
23 all permutations of leased trucks.

24 Seen in that context, having a run-off period for  
25 used trucks whether they are purchases or leases which

1 is just one year after the run-off period for new trucks  
2 is actually, if anything, generous to the defendants.  
3 The reduced supply vector of harm could take years to  
4 manifest where there is a reduced supply of new trucks  
5 on the market and, therefore, over a period of time,  
6 fewer used trucks on the market resulting in higher  
7 prices at the used trucks level.

8 So for all of those reasons we say that it is right  
9 that the run-off period for used trucks leases should be  
10 the same as the run-off period for used trucks purchases  
11 which was considered in 2022, and in other words, that  
12 it should end on 31 January 2015.

13 THE CHAIR: In theory, would that not mean, and possibly  
14 more than in theory, if somebody, a lessor rental  
15 company, bought a truck in February 2014 and then leased  
16 it out, the purchaser, the leasing company, would not be  
17 able to claim because it bought a new truck after the  
18 cut-off period, but the lessees would be able to claim  
19 because they are entering into leases, paying rental, in  
20 the additional one-year period. In other words, they  
21 are renting a truck but it is a truck that was only  
22 purchased new after the cut-off date for new trucks.

23 MR SCANNELL: Yes, I think in principle that is right. The  
24 first lessee of course would not be a used trucks  
25 claimant anyway.

1 THE CHAIR: Not the first one.

2 MR SCANNELL: The first lessee would be a new trucks lessee,  
3 so in a sense that is correct.

4 THE CHAIR: The others would and yet they are really falling  
5 outside what conceptually should be the claim because  
6 the new truck was purchased after the cut-off date for  
7 new trucks.

8 MR SCANNELL: Yes, I do see the point. Could I take that  
9 point away to consult with the expert in relation to  
10 that? The only safe way to deal with that point would  
11 be to ensure that I am singing from the same hymn sheet  
12 as Mr Wilkinson.

13 THE CHAIR: What I am thinking is whether one is looking at  
14 dealing with lessees, if they lease a truck that was  
15 purchased before 31 January 2014. If they lease  
16 a truck, the cut-off date for the lease is  
17 31 January 2015, but the truck that they lease must be  
18 one that had been acquired new before 31 January 2014.

19 MR SCANNELL: Yes, it should be possible to tweak the  
20 language to cover that.

21 THE CHAIR: Whether that creates practical -- well, probably  
22 not for an opt-in class because they are going to be  
23 identifying their trucks, and there will be people with  
24 in many cases, as I understand it, two, three, four,  
25 five trucks, so one will be able to work these things

1 out.

2 MR SCANNELL: Yes.

3 THE CHAIR: So it will be --

4 MR SCANNELL: The intention -- I believe the intention is  
5 not to overstate the extent of the used trucks claim and  
6 not to be claiming for leases of trucks which were  
7 bought outside the claim period for new trucks.

8 THE CHAIR: That is the point that I was making.

9 MR SCANNELL: Yes, I take the point.

10 THE CHAIR: Yes.

11 Yes, subject to that point, which I think  
12 Mr Scannell accepts, do you want to address the more  
13 fundamental point about the continuing effect on lease  
14 prices?

15 Submissions in reply by MR WHITE

16 MR WHITE: Sir, those points, in my submission, are properly  
17 for a later stage, for detailed analysis once there is  
18 evidence on the issue from both parties. At this stage,  
19 all the Tribunal needs to do is set the potential end  
20 dates for -- well, the actual end dates for the claim  
21 period for opting in purposes which stand to reflect the  
22 potential run-off periods, and my point is that that  
23 point has already been considered as part of the CPO  
24 judgment and therefore the starting point, if not the  
25 end point, ought to be that the periods that the

1 Tribunal concluded ought to be the end dates for new  
2 trucks and resold trucks respectively should remain in  
3 place.

4 In my submission, the responses that my learned  
5 friend gave are not sufficient to satisfy the Tribunal,  
6 in my submission, that a change of approach is  
7 justified.

8 Sir, you identified the points of confusion that  
9 would arise in respect of a new truck purchased  
10 in February 2014 which is then leased when the new truck  
11 would fall outside of the claim period but the lease  
12 might fall within the claim period which all starts  
13 looking rather peculiar, and then there are other  
14 examples where the approach that my learned friend seeks  
15 to take is not necessarily appropriate. There is the  
16 short sequential leases of a new truck example I gave  
17 earlier, there is also the example of a new truck which  
18 is spot hired, so a short spot hire, and then is leased  
19 out on a short-term basis, and in that example both the  
20 spot hire and the short-term lease would be treated as  
21 a used truck which would potentially benefit from the  
22 longer of the two potential claim periods, and it is not  
23 obviously clear why that is appropriate to consider  
24 those transactions as used truck transactions as opposed  
25 to new truck transactions.

1           So, sir, in my submission, the simplest course  
2           through all of this is simply to adopt the finding that  
3           is made in the CPO judgment as part of the CPO. Issues  
4           of substantive analysis as to precisely how these issues  
5           will come out in due course is a matter for due course  
6           by reference to detailed evidence and further argument  
7           from the parties and further consideration by the  
8           Tribunal, but before that debate has taken place and  
9           before that debate meaningfully can take place, as  
10          I say, the safest course is to follow the language that  
11          is used in the CPO judgment which is what we are  
12          seeking.

13       THE CHAIR: Well, we will have to decide it, will we not,  
14          now, because it affects the composition of the class and  
15          who can opt in. I do not see how we can kick this down  
16          the line.

17       MR WHITE: Well, sir, of course these are only -- the end  
18          dates in the CPO reflect the long-stop potential run-off  
19          periods. As I said at the outset, the infringement  
20          itself ended in January 2011. It might be that there is  
21          no run-off period at all, it might be that the run-off  
22          period is considerably shorter than January 2014  
23          or January 2015, and so what the Tribunal, as we  
24          understood it, was doing in its judgment was saying: we  
25          will set a long stop run-off period provisionally for

1 the purpose of the CPO and the way that we see this to  
2 be appropriately done is to take new trucks, trucks that  
3 have not been resold on the one hand, and apply  
4 the January 2014 date, and resold trucks on the other  
5 hand and apply the January 2015 date, and in due course  
6 we will need to see where all this comes out, and in my  
7 submission, that is where things should start and  
8 finish, unless there is compelling evidence before the  
9 Tribunal now to justify a change of approach.

10 THE CHAIR: I understand that, but what I am saying is I do  
11 not think we can kick the can down the road. Either we  
12 allow someone who in late 2014 entered into, say,  
13 a one-year lease of a four-year-old truck to be in the  
14 class or we do not, but we have got to make that clear,  
15 do we not?

16 MR WHITE: Sir, one could explore these issues, in my  
17 submission, it may get complicated because of course on  
18 one view the pricing of a leased truck will take into  
19 account the underlying truck that is being leased and  
20 part of that may include whether or not it has been  
21 resold, and so in my submission, for the purpose of the  
22 CPO where definitive findings on potential run-off  
23 periods cannot, in my respectful submission, sensibly be  
24 made because we do not have all of the evidence that  
25 needs to be made, only a provisional view can be taken.



1 THE CHAIR: We cannot decide whether they succeed, that is  
2 absolutely right, but we have to decide whether they can  
3 be included in the claim at all.

4 MR WHITE: Yes.

5 THE CHAIR: That we have to decide because if they are not  
6 included, they cannot opt in; if they are included, it  
7 is no good deciding after a lot of evidence in a year  
8 and a half's time that they should be included if they  
9 have not opted in.

10 MR WHITE: Yes, and I suppose my answer to that might be  
11 that if the Tribunal were to remain with the dates that  
12 are in the judgment which is what I am seeking, and in  
13 due course it were to be found that there were a run-off  
14 period for leases of trucks that were second leases of  
15 new trucks that ran to 2015, then that person would fall  
16 outside the class in our class definition, whereas they  
17 would have fallen within the class on my learned  
18 friend's definition and I think that is the situation,  
19 sir, perhaps that you have in mind, but my submission is  
20 that we are not sure how realistic a concern that is  
21 given that we are talking here about long stop run-off  
22 periods. These are the longest possible run-off periods  
23 in my submission that the Tribunal considered to be  
24 plausible, so the potential category of persons who  
25 might fall outside the class on our approach is not

1           necessarily a realistic concern because -- or at least  
2           they may be few in number, and so we --

3       THE CHAIR: Well, it may not be of concern but it is  
4           obviously of sufficient concern for you to take the  
5           point, and it is of sufficient concern for Mr Scannell  
6           to push against you. So it seems that there is some  
7           sense that this might be of some significance otherwise  
8           you would not be arguing so strongly that it should not  
9           be included.

10       MR WHITE: Sir, I only argue it strongly because we say that  
11           this issue has been considered at the CPO hearing, and  
12           subject to any compelling reason that convinces the  
13           Tribunal to change its mind on the issue, we should  
14           stick with what the Tribunal concluded in the judgment,  
15           and in my submission, no compelling further evidence has  
16           been provided, and so the position should not change.

17       THE CHAIR: We have that point.

18       MR SCANNELL: Mr Chairman, I will just add in relation to  
19           that that if that is the only basis for the submission  
20           that is made by Iveco, then if you are satisfied that  
21           the CPO judgment was not actually considering the  
22           question of what the run-off period for leases should  
23           be, then that objection should fall away.

24       THE CHAIR: Yes, well, I need to discuss that with the other  
25           members of the Tribunal.

1           We are not going to rule on that straightaway.

2       MR WHITE: So, sir, in any event, whichever way the Tribunal  
3           rules, if my learned friend's approach is adopted, of  
4           course, the tweak that was discussed earlier to the  
5           language would need to be made, and that is on the  
6           transcript.

7       THE CHAIR: There are various ways it can be dealt with.

8       MR WHITE: Sir, subject to anything further on that for  
9           present purposes --

10      THE CHAIR: Yes. We can probably squeeze in your next  
11           point, the opt-in period before lunch, I think.

12                           Submissions by MR WHITE

13      MR WHITE: Yes, I think that is right, and then the final  
14           two points are shorter than these, but it may be, as you  
15           say, sir, that they fall after lunch.

16           So as you say, our fourth point and final point on  
17           the CPO concerns the opt-in period, and at the outset  
18           I should say that our point here is to ensure that the  
19           opt-in period is no longer than is necessary, and so  
20           whilst of course we recognise that potential class  
21           members need to be given a fair opportunity to opt in,  
22           equally the opt-in period should not be so long that,  
23           for example, it stands to complicate or delay the future  
24           case management of these proceedings by reason of the  
25           class having not closed. An example as to how that

1           might happen arises in the context of disclosure to be  
2           provided by class members, which is a specific feature  
3           of these proceedings as envisaged by both the RHA and  
4           the Tribunal in its judgment, and it should also, the  
5           opt-in period, not unnecessarily delay the point at  
6           which the OEMs can understand the total scale of the  
7           proceedings brought against them and also the  
8           composition of the class, and as a further introductory  
9           point, it is important to recognise that uniquely in  
10          these proceedings the proceedings were first publicised  
11          almost eight years ago. The proceedings were brought  
12          almost six years ago, we are almost two years to the day  
13          since the CPO judgment was handed down and almost a year  
14          has passed since the Court of Appeal's judgment was  
15          handed down. So we are hardly in territory where there  
16          has been a dearth of opportunity for the RHA to engage  
17          with potential class members to ensure that they are  
18          aware of the proceedings and what they need to do when  
19          the time comes to opt in, and on the contrary, we  
20          already know that there has been extensive engagement by  
21          the RHA with potential class members as the Tribunal  
22          will have seen in the evidence.

23                 So with that all being so, our starting point is  
24                 that it is not necessarily justified for the class to  
25                 remain open for a further six months as of the date the

1 CPO is ultimately made which, as we know by reason of  
2 the ATE issue and the budget issue etc, is not  
3 necessarily going to happen imminently. We will have to  
4 see when those issues are resolved and if they are  
5 resolved.

6 With that being so, Iveco and the other OEMs seek  
7 a shorter opt-in period, again, because we seek the  
8 opt-in period to be no longer than is necessary, and we  
9 have proposed a period of around three months for the  
10 Tribunal's consideration, and our suggestion of around  
11 three months generally takes into account the factors  
12 that I have already mentioned, so the time that has  
13 already passed, the legitimate interests of the OEMs in  
14 ensuring efficient case management in due course and  
15 understanding the nature of the claims brought against  
16 them. It also takes into account the RHA's unique  
17 position as the industry association with deep-rooted  
18 links to potential class members.

19 Sir, our proposal also takes into account the opt-in  
20 periods that have been ordered in other cases. Now, we  
21 recognise that in other CPO cases the proceedings are  
22 advanced primarily on an opt-out basis, but many of  
23 those cases, like these proceedings, include opt-in  
24 periods in those cases for individuals domiciled outside  
25 the UK, and so we do say that there is practice of the

1 Tribunal which is relevant to the discretion that is to  
2 be exercised in this case, and it is appropriate,  
3 therefore, to have regard to what the opt-in periods  
4 were in those other cases.

5 I do not propose to turn to the CPOs themselves, but  
6 just so the Tribunal is aware, the most commonly ordered  
7 opt-in period in those other cases is a period of around  
8 three months. The cases, for the transcript, in which  
9 a period of around three months was ordered are *McLaren*,  
10 *Gutmann v Govia* --

11 THE CHAIR: You have got them in your skeleton argument,  
12 have you not, at footnote 17.

13 MR WHITE: You have got them. We also note in those cases  
14 the Tribunal was constituted by different panels with  
15 different chairs, and so we say they are representative  
16 of the practice of the Tribunal on the issue of opt-in  
17 periods, and sir, then you will have also seen our  
18 reference to the range of opt-in periods which, at the  
19 lowest, comes in at less than one month, which we do not  
20 seek in these proceedings to be clear, that is in the  
21 *Boyle* proceedings. There is then two-and-a-half months  
22 in *Kent* and up to four-and-a-half months in *Qualcomm*.

23 So we take that as our starting point. Again, for  
24 the Tribunal's consideration, or at least the opt-in  
25 period needs to fall within the range ordered in other

1 cases.

2 That takes me on to the RHA's efforts to explain why  
3 a longer period is necessary and specifically why,  
4 despite the time that has passed and the work that  
5 should, in my submission, already have been done to line  
6 themselves up to secure the opt-ins that they seek,  
7 I will just explain why in my submission they do not  
8 justify an opt-in period of six months.

9 Sir, just briefly, the RHA makes a point against the  
10 relevance of the CPOs in the other cases, and just my  
11 brief point on that is those cases do involve an opt-in  
12 period and so the Tribunal did need to consider what  
13 would be a fair opportunity for class members to opt in  
14 in those proceedings, and so they are appropriate for  
15 the Tribunal to have regard in this case.

16 Then on to the substantive points the RHA takes.  
17 They say that the class members need to understand what  
18 they refer to as complex contracts before they are able  
19 to opt in, but, sir, save for the conflict point which  
20 has resulted in certain changes to the arrangements, in  
21 large part the arrangements that the potential class  
22 members are required to consider are substantively the  
23 same as the arrangements that have been in place for now  
24 a very long period of time, and again, the RHA has  
25 hardly been short of time to ensure that it is clear to

1 class members as to precisely what the core features  
2 from their perspective of the arrangements that they are  
3 required to enter into are, and further, the specific  
4 function of the notice, of course, is to clearly explain  
5 to potential class members what they are required to do  
6 and to make things as clear as possible for them and so  
7 if there is some complexity in the arrangements they  
8 need to enter into which the RHA considers to be not  
9 clear in the notice, then of course the notice could be  
10 amended accordingly. It is not a reason why the opt-in  
11 period needs to be any longer.

12 There are then a series of points in Mr Smith's  
13 second witness statement. I will not turn up Mr Smith's  
14 witness statement in the interests of time, but I will  
15 make some brief submissions on what we see to be the  
16 headline points in the judgment, and for the transcript,  
17 the relevant reference is {RM-E/2/2} and it is  
18 paragraph 7.

19 So Mr Smith, his first point on my list, at least,  
20 is he refers to the need for tailored communications to  
21 be provided to class members, but it is not clear to us  
22 why tailored communications are required at all in  
23 circumstances where the function of the Rule 81 notice,  
24 as I said, is to provide information that is sufficient  
25 for class members to understand what they need to do,



1           what the claim is about and what the documents that they  
2           will be required to consider say and their essential  
3           features. Even if some form of tailored communications  
4           were to be provided, they could only be tailored to  
5           a certain extent because they would need to reflect what  
6           the Rule 81 notice will say because that is the  
7           communication that is to be approved by the Tribunal,  
8           and it is not open to the RHA or to RUTL to start to  
9           create different forms of communications that have not  
10          been approved by the Tribunal in their substance.

11                 So that is tailored communications. Mr Smith also  
12          refers to the alleged fact that potential class members  
13          or some of them are unsophisticated. Well, in the vast  
14          majority of other collective proceedings, the class in  
15          question is comprised of consumers who in my submission  
16          can safely be assumed to be less sophisticated than the  
17          class of businesses in these proceedings, and also  
18          whatever potential lack of sophistication there might be  
19          again, the RHA, as the industry association, is well  
20          placed to make matters clear to them and understand what  
21          issues they might face and address those, make the  
22          notice clear, etc.

23        THE CHAIR: I think the unsophisticated means not that the  
24          RHA cannot make matters clear; it is that they have not  
25          got the sort of organisation and administrative

1 structure of a sophisticated business to consider  
2 communications, assess them and respond. That is where  
3 it comes in, the timing. It is not about what they are  
4 told; it is about how they process letters of this sort  
5 and some of them are one or two truck companies and they  
6 may be driver-owned, so the driver might be in Poland  
7 making a delivery when the letter arrives.

8 MR WHITE: Then that goes, sir, to the point that I made  
9 earlier around the time that has already passed because  
10 when the CPO is made will not be the first time that  
11 potential class members will have been made aware of  
12 these proceedings. There has been plenty of time to  
13 ensure that class members are aware of what is going on  
14 in these proceedings.

15 THE CHAIR: But they will have to opt in now.

16 MR WHITE: They will have to opt in now, but the specific  
17 steps that they need to take in order to opt in are  
18 relatively straightforward. As I understand it, they  
19 need to register an interest and they then need to  
20 follow a link and enter their details.

21 THE CHAIR: Yes.

22 MR WHITE: That does not necessarily take a particularly  
23 long period of time. Mr Smith, in part of his witness  
24 statement, suggests that even some of the smaller  
25 potential class members which may be the ones, sir, that

1       you have in mind, can be successfully contacted over  
2       a period of around one or two months, then the  
3       relatively simple steps that need to be taken from there  
4       rather suggest to me at least that a period of  
5       three months could be workable and sufficient. The  
6       reference for that particular point in Mr Smith's  
7       statement is paragraph 7(b).

8       THE CHAIR: Yes.

9       MR WHITE: So, sir, that is what I have to say on  
10       sophistication.

11       There is also a reference around the number of class  
12       members who stand to opt in which is said to justify  
13       a potentially longer opt-in period. In my submission,  
14       it is not inevitable that if there are larger numbers of  
15       potential class members who stand to opt in that  
16       a longer opt-in period is needed. For example, it does  
17       not obviously require an additional period of time for  
18       hundreds of people to fill in their details through  
19       a link than it does for thousands of people to do it.  
20       What needs to happen is that each of those people or  
21       businesses actually take the step that is necessary in  
22       order to opt in, so simply because they are a large  
23       number that need to do something does not mean that  
24       doing that thing needs to take a long time.

25       I also again refer to the other CPO cases which,

1       unlike these proceedings which concern a class  
2       representative who is the industry association with  
3       close links to potential class members, etc, in those  
4       other cases we are talking about class members who are  
5       consumers domiciled overseas who might never have heard  
6       of the class representative in question, and there  
7       a potential opt-in period of a much shorter period of  
8       time seemed to be appropriate.

9               The final point that Mr Smith makes which I propose  
10       to address are points around potential inertia or lack  
11       of engagement from class members, and again in my  
12       submission if class members are informed that now is the  
13       time to take action, these proceedings have been  
14       continuing for a long period of time, there has been  
15       plenty of opportunity for class members to be made aware  
16       of them, and if a communication is received saying, "Now  
17       is the time you need to act if you want to be part of  
18       these proceedings", in my submission the obvious  
19       inference is not so much that they would be inert but  
20       rather they would be rather active, that now is the time  
21       they need to do something if they want to form part of  
22       the proceedings and they would in my submission be more  
23       likely to be motivated to take action than not.

24              So, sir, I conclude by saying that we of course  
25       accept that potential class members must have a fair

1 opportunity to opt in, but equally the opt-in period  
2 should not be any longer than is necessary, and in my  
3 submission the material before the Tribunal is not  
4 indicative of a six-month period being necessary, and  
5 instead a shorter period would be adequate, and in any  
6 event, sir, if the CPO in this case is not ultimately  
7 made for, say, a month or two months by reason of the  
8 outstanding issues we say that it would certainly be  
9 inappropriate for a six-month period to run from the  
10 date a CPO is made much later in a year such that, if  
11 a six-month period were used, we would be looking until  
12 2025 before the opt-in period closes which would in my  
13 submission be clearly inappropriate.

14 Sir, that is what I have to say on the opt-in  
15 period.

16 THE CHAIR: Well, that takes us almost exactly to 1.00, so  
17 we will return at 2.00.

18 (12.58 pm)

19 (The short adjournment)

20 (2.04 pm)

21 THE CHAIR: Mr Flynn, on the question of the opt-in period,  
22 we are not persuaded that there is a read across from  
23 the opt-in elements of what are basically opt-out  
24 collective proceedings to these proceedings where the  
25 whole foundation is that they are purely opt-in and we

1 think that three months is too short in all the  
2 circumstances.

3 At the same time, we think that there does need to  
4 now be some progress in this matter and we are concerned  
5 if the delay is too long, and we think the OEMs, for  
6 their part, are entitled to know the size of the class  
7 that they are having to deal with.

8 From what you told us it is going to take -- you  
9 wanted 21 days to produce the budget, the costs budget,  
10 and we need confirmation also from Therium that they are  
11 going to fund that budget. So on any view, there will  
12 not be a CPO until early July at the earliest. So what  
13 we have in mind is to rule that the cut-off date for opt  
14 in will be 31 December of this year.

15 That means that if there is any delay in producing  
16 the budget, delay on the part of Therium, that will eat  
17 into the period for opting in. So there is some  
18 encouragement for the RHA and Therium to produce its  
19 material quickly, but that is the position we have  
20 reached unless you wish to push against that and say it  
21 should be six months in any event.

22 MR FLYNN: I do not, sir. I understand the incentive and

23 I do not push further than that. Thank you.

24 THE CHAIR: On the leases and dealing with lessees and the  
25 run-off period, we will give our ruling on that in

1 writing together with the question of how we deal with  
2 companies, dissolved companies. So we are not going to  
3 deal with that now.

4 Now, what is happening, Mr Flynn, about the letter?

5 Submissions by MR FLYNN

6 MR FLYNN: That is just what I was going to say. It has  
7 been sent and it is on Opus. It has been emailed around  
8 the parties and it is in the correspondence bundle on  
9 Opus. I am sorry if that means that the Tribunal itself  
10 has not yet --

11 THE CHAIR: It would have been helpful to email it to the  
12 Tribunal as well so we could have looked at it before  
13 coming in.

14 MR FLYNN: I apologise that that did not happen, sir. The  
15 bundle reference then, it is the last item in the  
16 correspondence bundle which is RM-H. It is {RM-H/29} in  
17 the correspondence bundle. (Pause)

18 THE CHAIR: Just so that I am sure I understand this, under  
19 the LFA and that clause, 16.3, a decision from Therium  
20 Used, which I take it means Therium Atlas --

21 MR FLYNN: It does.

22 THE CHAIR: -- to exercise its right to terminate, which you  
23 would have thought would be a board decision, but is  
24 paragraph 3 saying the board has effectively delegated  
25 that decision to Luke Aubert and Nigel Crocker? They

1           are the only individuals. So they will take the  
2           decision, not the full board; is that what they are  
3           saying?

4       MR FLYNN: I think what is being said, that those are the  
5           persons who composed the board and the investment  
6           committee, so for the task that they carry out of  
7           administering the fund for, in this case, Therium Atlas,  
8           those are the people, and my understanding is that they,  
9           as it says, they are advised, as you see in the next  
10          paragraph, they are advised by the respective teams --  
11          well, the Atlas team is the first one and they are  
12          advised --

13       THE CHAIR: Yes, well, that one I can understand.

14       MR FLYNN: They advise the investment committee, and the  
15          board and the investment committee seem to have the same  
16          composition although they are no doubt slightly  
17          different entities.

18       THE CHAIR: I mean, the thing that is slightly puzzling is  
19          the statement:

20                "Whilst other individuals sit on the board of  
21          Therium RHA and Therium Used..."

22                Well, Therium RHA is only concerned with these  
23          proceedings, and Therium used is only concerned with --  
24          I mean, that is what Therium used has been set up for,  
25          the sub-class proceedings. So --



1 MR FLYNN: I mean, I do not know so I will not give  
2 evidence, but there may be other tasks which these  
3 company fund cells have to carry out, administrative  
4 tax, for example.

5 THE CHAIR: Sorry, the structure may be complicated. The  
6 question we asked is who is on the board of these two  
7 companies. What this says is other individuals sit on  
8 the boards, and then it names two. So clearly it is  
9 expressly stated it is not just those two, and the  
10 question that prompted this was who are the board that  
11 would exercise the decision that could arise under  
12 clause 16.3. One would expect that is a board decision.  
13 Is that board decision delegated to these two  
14 individuals, or is it the decision of the whole board,  
15 in which case, who are the other people?

16 MR FLYNN: My understanding is -- and this was intended to  
17 answer the Tribunal's question and concern -- is that  
18 that decision would be taken by those individuals as the  
19 board and investment committee in respect of that  
20 investment. So I do not know what other  
21 responsibilities of other board members might be.

22 MR PICKFORD: Sir, it may be that I can assist a little in  
23 relation to this.

24 THE CHAIR: Yes. Yes, Mr Pickford.

25

1 Submissions by MR PICKFORD

2 MR PICKFORD: May I hand up, please, what we managed to find  
3 out this morning, which is, I think what the Tribunal  
4 actually asked for, which is information on the members  
5 of the boards of the respective organisation. There are  
6 two. (Handed).

7 Sir, members of the Tribunal, I can take you through  
8 this. Hopefully you should have two A4 sheets each.

9 One is for Therium Litigation Finance Atlas FP IC. One  
10 is for Therium RHA IC.

11 THE CHAIR: One is Therium Finance (inaudible).

12 MR PICKFORD: One should be Therium Litigation Finance Atlas  
13 FP IC, and one should be Therium RHA IC.

14 THE CHAIR: Therium RHA? Yes.

15 MR PICKFORD: Thank you. You might have thought from the  
16 letter that the RHA has provided that you are being  
17 given the impression that everything is entirely  
18 separate, as indeed Mr Purslow said it was in his  
19 witness statement. What you have not been told, clearly  
20 in a letter written very carefully, is that in relation  
21 to the first entity, Therium RHA IC that I am going to  
22 deal with, so that is the main Therium entity for new  
23 trucks, we have a board which is composed of three  
24 directors. We have Lorie Andrea Del Rosario,  
25 Tapiwa Munyawiri and Luke Dennis Aubert. So does the

1 Tribunal see that; we have those three directors?

2 THE CHAIR: Yes.

3 MR PICKFORD: They are described respectively as client  
4 director, director and client director. So that is  
5 Therium RHA.

6 Then Therium Atlas, as we have been calling it, so  
7 this is now the used trucks fund, they have a board  
8 composed of five persons, Nigel Crocker and David Robert  
9 Wilson are different, but Tapiwa Cuthbert Munyawiri,  
10 Luke Dennis Aubert and Lorie Andrea Del Rosario are  
11 precisely the same. So there is a very substantial  
12 overlap between the two boards of the two supposed to be  
13 separate entities.

14 So that is, in our submission, a little surprising  
15 given what we were told by Mr Purslow and what we are  
16 told in the letter, and there are other oddities, we  
17 say, in the letter too.

18 The first is I think the point that, sir, you have  
19 already picked up on which is that they seek to  
20 reconcile this particular conundrum where there does  
21 appear to be considerable overlap between the boards by  
22 saying, well, the individuals that sit on the boards in  
23 respect of this investment. So they try to make  
24 a distinction between the entities generally and the  
25 boards generally and then a board in respect of this

1 investment, but each of these vehicles only has one  
2 investment: the RHA vehicle is the vehicle by which the  
3 RHA's new truck claim is financed. The --

4 MR FLYNN: May I just interrupt, only to assist my friend.

5 That is not the case in respect of Atlas. Atlas, I am  
6 told, has other investments, and that is why it talks  
7 about this investment.

8 It is true Therium RHA IC is a specific SPV, as  
9 I understand it, with one claim in their portfolio, but  
10 that is not the case of Atlas which has other  
11 investments. I just make that point so my friend is  
12 aware.

13 MR PICKFORD: I am grateful for that further information,  
14 but I do not think it changes anything in relation to  
15 the obvious problem that we have here which is if we  
16 just focus then on Therium RHA, putting to one side  
17 Atlas just for the moment, we are led to believe that in  
18 respect of this investment for Therium RHA, the board is  
19 composed differently from the board that in fact we see  
20 set out in the list of directors which actually makes up  
21 the board as we would understand the term.

22 There is no explanation given by the RHA or Therium  
23 about whether there is even a power to delegate board  
24 decisions to only certain members of the board. We have  
25 no information from the memorandum and articles in

1 relation to that. So that is the first -- one of many  
2 puzzles.

3 Another puzzle is that Mr Purslow told us when he  
4 described the structure of the decision-making tree, and  
5 I took the Tribunal to it yesterday, it is  
6 paragraph 18.4 of his witness statement, we do not need  
7 to go back to it, but what he was very clear about was  
8 this: he says ultimately the decisions are going to be  
9 taken by the boards of these investment vehicles, and  
10 that is going to be on the basis of the recommendations  
11 of the investment committees of these vehicles, plainly  
12 implying that they were separate things, and what we are  
13 now told is that they are not separate at all. There is  
14 no separate board for the purposes of the investment  
15 decisions from the investment committee, apparently,  
16 which is contrary to what Mr Purslow said at 18.4.

17 Sir, it looks like you might have it, but would you  
18 like the reference for that, I can see that you are...

19 THE CHAIR: Well, I have it open.

20 MR PICKFORD: Right, thank you. So he explains how the  
21 investment committee will make recommendations to the  
22 board of the investing entity on the exercise of the  
23 entity's rights for the board of the investing entity to  
24 action. So certainly as you would fairly read that  
25 description there is an investment committee that is

1           going to make recommendations to the board of the  
2           vehicle, and in fact what we are being told is that  
3           there is an investment committee that makes  
4           recommendations to itself, not the board, some  
5           alternative board.

6           So, sir, members of the Tribunal, we say that this  
7           is not real separation at all. It demonstrates, on the  
8           contrary, a highly incestuous relationship which is the  
9           opposite of that which is conducive to avoiding  
10          conflicts and inappropriate information flows. There is  
11          complete cross-fertilisation between the actual boards  
12          of these two entities.

13          It is very unfortunate, and I do not wish to say  
14          anything that I should not in relation to this, but it  
15          is not the impression that Mr Purslow gives and it is  
16          not the impression, to be fair, that their letter gives,  
17          and I think that is all I can say in relation to that.

18          I would add these further points: that we asked last  
19          night for the formal documents that underpin what they  
20          say is the true structure. So we have here a letter  
21          which says, well, the true structure is that we have got  
22          this quasi-board, and anticipating that we would like to  
23          have some evidence to support what it was that we were  
24          going to be told today, we asked for: can you give us  
25          the underlying documents which demonstrate the

1 structures that you are now going to tell us about.

2 They have not done that. We simply have this  
3 letter. So we do not know when it was decided that the  
4 true board was going to be different from the board as  
5 described in this letter.

6 The final point to make is this: that what we now  
7 are told explicitly here -- and one sees it also from  
8 the records from the Jersey Financial Services  
9 Commission -- is that of course these are the fund  
10 administrators. They are CSC Global Services, a company  
11 based in Jersey. So the reality of this is these are  
12 professional providers of services to financial firms  
13 based in the UK, no doubt so that they can gain the tax  
14 advantages of being in Jersey, and they will obviously  
15 no doubt take the decisions they are supposed to take  
16 themselves as board members, but they are doing so on  
17 advice, and the reality is, the practical reality of  
18 this one can well see is that it is very unlikely they  
19 are going to deviate from the advice that they are given  
20 by the company that is employing them for these  
21 purposes. Whatever it is that John Byrne thinks is the  
22 right decision is going to filter through ultimately,  
23 one can imagine pretty well 100% of the time, into the  
24 decision that is taken by these investment -- these  
25 professional services companies.

1       PROFESSOR WILKS:  So, Mr Pickford, you are saying that CSC  
2       Global Services is not a subsidiary in any way of  
3       Therium, it is an outsourced service company; is that  
4       your understanding?

5       MR PICKFORD:  That is my understanding, yes.

6       THE CHAIR:  The five fund administrators, they may be  
7       handling the advising on how to invest, where to get the  
8       best returns and so on, but it does not mean they are  
9       taking any decisions at all --

10      MR PICKFORD:  No, quite.

11      THE CHAIR:  -- with regard to the litigation, so I do not  
12      see the relevance of CSE Global.

13      MR PICKFORD:  My point is this: I don't think anyone is  
14      suggesting that CSE Global, who is the company that  
15      employs these various directors, are going to be  
16      second-guessing decisions under clause 16.3.  They are  
17      going to be executing the advice that they are given.

18               So coming back to the witness statement from  
19      Mr Purslow, we were given the impression that there was  
20      this clear separation whereby it does not even matter  
21      necessarily what Mr Byrne thinks or the other advisers  
22      at the Therium level because this all goes up to,  
23      through a separate investment committee for each one, to  
24      separate boards for each one.

25               The reality of that is that there are not properly



1           separate boards, in my submission, and the vehicle that  
2           it goes up to is just -- is a separate services company  
3           which is no doubt very helpful from a tax point of view,  
4           but it is not realistically and it is not advanced  
5           realistically as going to be second-guessing the key  
6           decisions which are the points that I was concerned with  
7           in my submissions yesterday.

8           So what I say is that the alleged separation that we  
9           see here is not sufficient, it is not good enough.

10       THE CHAIR: Yes. I think what we will do is we will not --  
11       we have just been given a lot of information, both from  
12       Mr Flynn, your solicitors, I can only repeat it is  
13       regrettable that this letter was not sent to the  
14       Tribunal so that we could have considered it over lunch,  
15       and now from Mr Pickford. Now, we will at an  
16       appropriate point rise to consider these matters and  
17       what we do about it.

18           For the moment I think we will just press on with  
19       the outstanding matters on our, as it were, agenda to  
20       cover that and then we will come back to this.

21       MR FLYNN: Very well, sir.

22       THE CHAIR: So I think we will just go on with the --  
23       I think it is the Rule 81 notice, is that right,  
24       Mr White?

25

1 Submissions by MR WHITE

2 MR WHITE: Yes, sir, I am grateful.

3 As I said earlier, I have just one point to take  
4 which concerns the characterisation of the infringement  
5 and then there is another point --

6 THE CHAIR: Yes, and the other point is?

7 MR WHITE: I just want to make clear that Mr Pickford KC  
8 will be dealing with another point on the notice.

9 THE CHAIR: Yes, you mentioned that.

10 MR WHITE: Yes.

11 THE CHAIR: Yes, so --

12 MR WHITE: Sir, perhaps before I get on to the substance of  
13 the point that I am taking, there is also the more  
14 general point on the issues where you were with me on  
15 the draft CPO, some changes will need to be carried  
16 across to the notice as well.

17 So, for example, on the open book point, a change  
18 will need to be carried across to the notice. It is  
19 straightforward, but --

20 THE CHAIR: Yes, that must follow, yes.

21 MR WHITE: So the issue that I am raising, it concerns, as  
22 I say, the characterisation of the infringement in the  
23 notice because the notice as it stands describes the  
24 infringement in numerous places as a "cartel".

25 THE CHAIR: Can we look at the notice, please?

1 MR WHITE: Yes. The notice is at {RM-E/7}. Given the first  
2 point I mentioned was the cartel point, that is as good  
3 a point as any to start with, it appears as a defined  
4 term even on page {RM-E/7/6} of the notice at the bottom  
5 of the page, and then the term is used throughout. I do  
6 not propose to go through page by page to show where it  
7 appears.

8 In our skeleton argument, we say that that is  
9 clearly inappropriate in these follow-on proceedings  
10 where the basis for the follow-on action that is brought  
11 is obviously the European Commission infringement  
12 decisions that the RHA and RUTL have chosen to rely  
13 upon.

14 THE CHAIR: Yes.

15 MR WHITE: And those infringement decisions do not describe  
16 the infringing conduct as a cartel.

17 THE CHAIR: But our courts have.

18 MR WHITE: Well, sir, these are proceedings which follow on  
19 from the European Commission's infringement decisions.

20 THE CHAIR: So was the *Royal Mail* case, was it not?

21 MR WHITE: It was the follow-on case.

22 THE CHAIR: Could we not use the definition from the  
23 Court of Appeal's decision in *Royal Mail*?

24 MR WHITE: Well, sir, in these proceedings, they are at  
25 a very early stage.

1 THE CHAIR: But what is the objection to using the  
2 definition from the Court of Appeal saying "described by  
3 the Court of Appeal as follows..."

4 MR WHITE: These are different proceedings. For example, in  
5 the *Royal Mail* proceedings, Iveco was not a party, it  
6 did not concern it, so I appreciate it was the same  
7 underlying infringement decision, I cannot get away from  
8 that point.

9 THE CHAIR: They are describing the decision of the  
10 Commission.

11 MR WHITE: Yes, but my submission, and I cannot take it too  
12 much further than this, is that the basis of these  
13 proceedings is the European Commission infringement  
14 decisions.

15 THE CHAIR: Yes.

16 MR WHITE: So the language --

17 THE CHAIR: The statement in the press release also called  
18 it a cartel.

19 MR WHITE: Well, in describing the infringement that is  
20 found as a matter of law in the settlement decision, the  
21 decision itself does not anywhere refer to the term  
22 "cartel" when describing the infringement, and that is  
23 the point that is relevant, in my submission, to the way  
24 that the infringement should be characterised in the  
25 notice, which --

1 THE CHAIR: The Commission characterised it as a cartel in  
2 its public statement.

3 MR WHITE: It refers to the fact that the procedure is under  
4 the cartel procedure, but it does not --

5 THE CHAIR: No, I thought it went further than that, did it  
6 not? Can we turn up the Commission press release?  
7 I think it has been referred to. Is it in the --  
8 somebody's skeleton, but it is in the bundle, is it not?

9 MR WHITE: I am not sure where it is myself.

10 THE CHAIR: Mr Flynn, do you have the reference?

11 MR SCANNELL: It will be {K/1}.

12 THE CHAIR: Sorry, it is the 19 July 2016 press release.

13 MR WHITE: I will wait for it to appear on the screen.

14 THE CHAIR: If you look at the heading, that is the  
15 statement of objections, I think. This is 2014. No, it  
16 is the press release of July 2016.

17 It is referenced in paragraph 43 of the skeleton.

18 What is the reference, please? It is in paragraph 43 of  
19 the skeleton of Mr Flynn and Mr Went.

20 MR FLYNN: Yes, and I am afraid that is not then hyperlinked  
21 to the --

22 THE CHAIR: No, they are not hyperlinked, but presumably it  
23 is in the bundle somewhere.

24 MR FLYNN: Yes, and we are trying to find it because the  
25 reference we have given, or got, is an incorrect one.

1 MR SCANNELL: Could we try {K/1/2}. I do not think we were  
2 actually at {K/1}. We were at {K/.01}.

3 THE CHAIR: No, that is the decision. It is not on Opus.  
4 He has just got it from the internet.

5 Mr Collier, the referendaire has found it on the  
6 internet and it reads:

7 "Antitrust: commission fines truck producers  
8 €2.93 billion for participating in a cartel."

9 Then it goes on to state:

10 "MAN was not fined as it revealed the existence of  
11 the cartel to the Commission."

12 So I think that is the Commission's characterisation  
13 in popular terms, and this is not a judgment of the  
14 court, this is a notice going out to hauliers in  
15 language that they should be able to understand, for  
16 popular consumption, just like the Commission's press  
17 release. So I cannot see what can be the objection to  
18 using the term that the Commission used when talking  
19 about the decision for which this is a follow-on action.

20 This is not a legal document in the sense of  
21 a judgment, and I think you will find that as I said in  
22 the judgments of the Court of Appeal, it is used  
23 extensively.

24 MR WHITE: Sir, if the concern is around language that is  
25 easy to understand, the language we were proposing to

1           substitute --

2       THE CHAIR: It is not for you to draft this notice.

3       MR WHITE: It is not, it is for the Tribunal to approve.

4       THE CHAIR: It is to be approved by the Tribunal and  
5           prepared by the class representative, and what is wrong  
6           with it? That is what I want to know. You might want  
7           to draft it differently, but what is objectionable about  
8           it?

9       MR WHITE: I cannot put the point any more highly than  
10          I have. The underlying binding infringement decision  
11          does not describe the infringement as a "cartel". The  
12          press release is not the infringement decision itself,  
13          and in my submission, the notice should reflect what  
14          is --

15       THE CHAIR: Well, the decision is described, is it not,  
16          specifically on the first page in the bottom bullet on  
17          page 1 of the notice. That is the summary of the  
18          decision itself which you do not object to because it is  
19          effectively the language of the decision.

20       MR WHITE: Yes, and the language of the decision should be  
21          used throughout.

22       THE CHAIR: So there it is explaining in some detail what  
23          the decision actually was, and here it is providing, in  
24          colloquial language, a summary. If you cannot put the  
25          point any higher than you have, frankly --

1 MR WHITE: I cannot put it any more highly than I have. You  
2 have my submissions on it.

3 THE CHAIR: Yes.

4 We think, Mr White, you have put the point, we think  
5 it is hopeless, and we see nothing wrong with the  
6 language that has been used.

7 MR WHITE: Sir, if I could clarify, I hear the Tribunal's  
8 decision on the word "cartel". There was also another  
9 point we took where -- it is the response to question 3  
10 in the notice, and the language that appears at the top  
11 of page 7, I will give the reference so it can come up  
12 on screen {RM-E/7/7}.

13 THE CHAIR: We can also find it -- yes, and the bit you are  
14 objecting to there is what?

15 MR WHITE: So the sentence at the top of that page reads:

16 "The Cartel activities occurred between  
17 17 January 1997 [to] 18 January 2011 and included: (a)  
18 exchanging information on and fixing gross list prices  
19 of Trucks..."

20 Etc.

21 The reference to fixing gross list prices of trucks  
22 is what we object to, because that language does not  
23 appear in the infringement decision and indeed, the  
24 infringement decision does not establish an infringement  
25 of that kind, so we seek the removal of those words so



1           as not to misrepresent the infringement that is actually  
2           found in the infringement decision.

3       DR BISHOP: Mr White, even if it did misrepresent it in some  
4           sense, this is just a notice going out to people  
5           saying: you might be able to get some compensation for  
6           some illegal activity. What prejudice is caused? I do  
7           not understand.

8       MR WHITE: The prejudice to the OEMs is that it  
9           mischaracterises the nature of the case that is being  
10          advanced against us, in particular, the nature of the  
11          infringement that forms the basis of these proceedings,  
12          and so it is prejudicial to us for that to  
13          be mischaracterised to class members.

14       DR BISHOP: So you can sue the RHA for defamation,  
15          I suppose, but I mean --

16       MR WHITE: I am not sure I would go that --

17       DR BISHOP: -- that is quite a different concern. I mean,  
18          (inaudible) a small factor is --

19       MR WHITE: The other point of course is it is not in the  
20          interests of class members to have a misunderstanding of  
21          the nature of the infringement that forms the basis of  
22          the proceedings; it is in their interest to understand  
23          what these proceedings actually concern, and they do not  
24          concern something like a price-fixing arrangement  
25          because that is not what the infringement decision

1 finds, that is not the basis of these proceedings. It  
2 is prejudicial to us and it is also not in the interests  
3 of class members.

4 THE CHAIR: Well, you did not object to the bullet at the  
5 bottom of page 1, so just to cut this short, if instead  
6 of "fixing" it says "colluding on", which is the  
7 language on page {RM-E/7/1}, that would be all right?

8 MR WHITE: Yes.

9 THE CHAIR: Right, well let us just change that. It is not  
10 going to make much difference to anyone, but just to  
11 deal with this, and say "colluding on gross list  
12 prices", Mr Flynn.

13 MR FLYNN: I do not suppose that makes much difference.  
14 Recital 51 of the settlement decision says that on  
15 occasions the OEMs agreed their respective gross price  
16 increases.

17 THE CHAIR: Well, let us just say colluding on gross list  
18 prices and leave it at that.

19 Yes, anything else?

20 Submissions by MR WHITE

21 MR WHITE: One final point, this time on the pleadings and  
22 this concerns compound interest and financing losses.

23 Sir, you will recall --

24 THE CHAIR: Yes, there are two sets of pleadings now.

25 MR WHITE: There are. Each proposed class representative

1           has their own pleading and the issue arises in both of  
2           those pleadings.

3       THE CHAIR:   Yes.

4       MR WHITE:   You will recall, sir, in the CPO judgment the  
5           Tribunal concluded -- well, firstly it noted that the  
6           RHA had not advanced a methodology in respect of  
7           financing losses/compound interest, therefore they could  
8           not be certified. That is consistent with the practice  
9           of the Tribunal generally that there needs to be  
10          a methodology which is adequate, identifies a common  
11          issue, in order for a particular claim to be certified,  
12          the *Merricks 2* case is another example, and in the  
13          period since the CPO judgment, no methodology in respect  
14          of financing losses or compound interest has been  
15          advanced by either the RHA or RUTL, and, therefore, we  
16          remain in precisely the same position as we were at the  
17          time of the CPO judgment, and in those circumstances the  
18          CPO itself appropriately omits any reference to a claim  
19          for compound interest or financing losses. So, so far,  
20          so good there, but inexplicably, in my submission, the  
21          pleaded cases do assert positive claims in respect of  
22          compound interest and financing losses.

23                 If I could turn up a couple of points in the  
24                 pleadings, I will not go through each and every example,  
25                 but just so the Tribunal can see that there are positive

1       pleas as to compound interest.

2               The first point I would like to turn up is in the  
3       RHA's claim form which is in {RM-E/8} and at the bottom  
4       of page {RM-E/8/6} and it then runs on to page  
5       {RM-E/8/7}.

6               Yes, and paragraph 10. There it says:

7               "The Class Representative further claims damages in  
8       respect of losses suffered by all Class Members  
9       (including [RUTL]) ... occasioned by the additional cost  
10      of financing inflated Relevant Truck prices and/or other  
11      increased costs ... alternatively compound or simple  
12      interest ..."

13              Before I comment on that, if I could turn to RUTL's  
14      draft pleading, and a new version of that pleading was  
15      filed just this morning which in fact exacerbates the  
16      issue that I am raising rather than taking steps to  
17      rectify it, that is in {RM-E/18/13} and it is  
18      paragraph 44, and there it says:

19              "The Used Trucks Sub-Class Representative claims (i)  
20      the additional costs of financing Purchased Used  
21      Relevant Trucks and/or of Leased Used Relevant Trucks  
22      acquired at an inflated price; and (ii) compound  
23      interest, alternatively simple interest."

24              In the version of the pleading that they relied upon  
25      before this morning they only pleaded compound interest

1 and not financing losses, so they have added the  
2 reference to financing losses.

3 So in my submission, sir, there are in the pleadings  
4 positive pleas in respect of compound interest and  
5 financing losses which are advanced in lieu of the  
6 methodology for those claims and in lieu of those claims  
7 standing to being certified and so our point is a simple  
8 one that if there is no certified or certifiable claim  
9 on a particular issue then that claim cannot be advanced  
10 as part of the pleadings at this certification stage,  
11 and the only point the RHA has taken against us on that  
12 so far as I could see is that in the CPO judgment the  
13 Tribunal did not rule out the possibility that a claim  
14 for compound interest might be advanced at a later  
15 stage, and of course, it is right the Tribunal did not  
16 rule out the possibility of that claim being advanced on  
17 a certifiable basis in due course, but today there is no  
18 methodology in support of a certifiable case on either  
19 of those issues, they do not stand to be certified, they  
20 are not in the CPO and they should not be in the  
21 pleading either.

22 So the solution that we propose is that the  
23 offending paragraph should be amended or deleted,  
24 effectively, save insofar as they refer to simple  
25 interest, and just for your note and for the transcript,

1 the relevant paragraphs that would need to be  
2 amended/deleted are in the RHA's claim form  
3 paragraphs 10, 31.5, 31.6 and 64, and in RUTL's claim  
4 form it is paragraph 44 which I turned up.

5 Sir, that is my point on the pleadings.

6 THE CHAIR: Yes, just a moment. (Pause)

7 Yes, thank you. Mr Flynn can you help us on that?

8 Submissions by MR FLYNN

9 MR FLYNN: Yes, sir, members of the Tribunal, in short

10 I think this is a misunderstanding of the regime, and  
11 I think when the matter was being discussed before you  
12 on the last occasion my search of the transcript  
13 suggests it was Mr Hoskins who drew your attention to  
14 Rule 74 paragraph 6 which says a collective proceedings  
15 order and a collective settlement order may be limited  
16 to only some parts or issues in the claims to which it  
17 relates, and the point is that we have claims and the  
18 claim form, and you will decide whether parts of those  
19 are capable of being determined on a collective basis.

20 We have put down the marker that it is possible that  
21 at a subsequent stage the issue of compound interest  
22 could be raised on a collective basis with a methodology  
23 from Dr Davis or whatever, that has not happened yet,  
24 but that does not stop us making the claim.

25 All that it means is that it is not covered by the

1 collective proceedings order, so it will not be at this  
2 stage determined collectively, so there is absolutely no  
3 reason to delete it from the claim form, it is perfectly  
4 validly made, it is just not to be determined on  
5 a collective basis, at least as things stand, and I do  
6 not think I can elaborate the point further than that.

7 THE CHAIR: Yes. So, Mr White, you have heard that. So  
8 these are the claims that are brought, but the CPO  
9 restricts what will be determined at this stage, and so  
10 there will not be a determination that they can have  
11 compound interest unless there is an amendment to the  
12 CPO, but the claims, nonetheless, particularly where not  
13 all part of the claims may be determined, they can then  
14 be continued just as the damages will not be determined  
15 because it is not an aggregate damages claim. It will  
16 then be after the principals fall -- total amounts and  
17 methodology and so on are determined, there will then  
18 have to be -- the individual members of the class will  
19 put forward the amount they seek to recover, as  
20 I understand it, and whether they wish to -- then  
21 compound interest is pursued or not one will see.

22 But the point I think Mr Flynn is making is that it  
23 is not to be struck out at this stage because they wish  
24 to make that claim albeit the Tribunal said: well you  
25 cannot do it now within the collective umbrella.

1           So you are not prejudiced by it being there, and you  
2           do not have to respond to it at this stage.

3                       Submissions in reply by MR WHITE

4       MR WHITE: Our point is simply that if the claims are not  
5           certified in respect to compound interest or financing  
6           losses then it is more straightforward, if nothing else,  
7           and I put it more highly that it is inappropriate for  
8           them to form part of the pleading.

9       THE CHAIR: Well, it has to be pleaded now, otherwise there  
10          might be limitation arguments if it is not put in the  
11          claim now and sought to be introduced by amendment. So  
12          one can see why they want to have it pleaded, but it is  
13          equivalent almost to it being stayed, that part of the  
14          claim. So you are not prejudiced by it.

15       MR WHITE: Sir, I think you have heard what I have to say on  
16          it.

17       THE CHAIR: Yes, I think that is fine, with the  
18          clarification that has been given. So that will not be  
19          part of the collective proceedings, but it can stay in  
20          the pleading.

21               Mr Pickford, you had a point on the -- is it the  
22          pleading or the notice?

23                       Submissions by MR PICKFORD

24       MR PICKFORD: It is on the notice, sir.

25               The point is this: we had understood --



1 THE CHAIR: Just a minute, could I turn up the notice?

2 Perhaps we could kindly have it back up, please. It is  
3 {RM-E/7}.

4 MR PICKFORD: It is {RM-E/7}, yes, and after an introduction  
5 I am going to be going to page {RM-E/7/3}, but if  
6 I could set out what the point is first and then we can  
7 look at the notice in more detail.

8 THE CHAIR: Yes.

9 MR PICKFORD: So we had understood from a combination of  
10 correspondence and the notice itself that potential  
11 class members were to be given an entirely fresh start  
12 as to whether to have an ongoing relationship with the  
13 RHA and its funders, Therium, or not. That was what we  
14 understood was the intention behind the ability to opt  
15 in again.

16 However, somewhat late in the day it has emerged  
17 that the RHA appear to want to hold potential class  
18 members who previously signed up for the claim but who  
19 no longer wish to opt in to a host of, we say, onerous  
20 obligations contained in documents that they originally  
21 signed up to and indeed contained in some documents that  
22 are brand new, and that is despite the PCMs not having  
23 been made aware of the conflict issue at the time they  
24 signed up and therefore not having given informed  
25 consent when they did so, and it is despite the

1           arrangements having been completely recast since they  
2           originally signed up, including, in particular, as to  
3           funding.

4           Now, the obligations that the RHA appear to wish to  
5           hold PCMs to mean that if they do not continue their  
6           claims with the RHA and RUTL, they will face  
7           exceptionally curtailed options, and --

8       THE CHAIR:   Exceptionally curtailed ...?

9       MR PICKFORD:  Options.  So they are being told: you do not  
10           have to opt in, that is fine, free choice, and what we  
11           say is when one looks at the implications for any class  
12           member that does not opt in, because of the obligations  
13           that the RHA is saying they still have to bear, in fact  
14           there is no point ever in not opting in, and the key  
15           point that I am going to come on to develop is this:  
16           that if you are a potential class member and you decide  
17           that you do not want to opt in because you are not happy  
18           with the new finance arrangement or you are not happy  
19           with the way that the conflict has been dealt, and you  
20           want to exercise your rights to deal direct with an OEM  
21           and settle with an OEM, you have to pay any monies that  
22           you receive from that on trust -- sorry, you have to pay  
23           it to the RHA solicitors to be held on trust for  
24           Therium, and indeed, the six insurers in relation to the  
25           provision of ATE.

1           So we say that it is, because of those provisions  
2           that I am going to come on to consider, pointless not to  
3           opt in, because you are still going to be tied to the  
4           RHA and to Therium and to the insurers in any event, so  
5           the claimants are being given a Hobson's choice, and  
6           I say there are three problems with that.

7           The first is that it is unfair to potential class  
8           members, and that is obviously something that will be of  
9           concern to the Tribunal.

10          The second is that it is problematic from  
11          defendants' perspective because what it means is it is  
12          going to become much harder to reach a commercial  
13          settlement with potential class members which is  
14          something of direct concern to us and indeed will be of  
15          concern to the Tribunal given the importance of  
16          encouraging settlement.

17          Then last but not least the proposed arrangements  
18          fail to give effect to the judgment of the  
19          Court of Appeal, and if we could in fact just go to  
20          that, please, before coming back to the notice, that is  
21          to be found in {RM-B/4} and I am looking at paragraph 94  
22          which is on page external page 26, so {RM-B/4/26}.

23          If one looks, please, at paragraph 94 about five  
24          lines up from the bottom, we see a sentence beginning:

25          "That obvious conflict [referring to the conflict

1           that was the core of the Court of Appeal's concern]  
2           requires to be addressed at the start of the proceedings  
3           when PCMs opt in, rather than at an indeterminate point  
4           in the future; and it requires the RHA to put in place  
5           separate representation and a Chinese Wall of the kind  
6           I have described, and then to obtain the informed  
7           consent of the PCMs to the RHA acting for them under  
8           that arrangement."

9           So that is what the Court of Appeal told the RHA in  
10          no uncertain terms, and what that necessarily entails is  
11          that someone who never gave their informed consent  
12          should not be bound by arrangements they previously  
13          signed when they were not given informed consent. It is  
14          not a particularly surprising submission, because  
15          otherwise they are not being given a fresh start.

16          So purely for the Tribunal's reference, if you wish  
17          to look at the archaeology of this point, I am going to  
18          give you two references to the correspondence, but I do  
19          not particularly want to go to the correspondence  
20          because I think I can cut through that by going to the  
21          notice instead, but there is a letter from Freshfields  
22          on behalf of Volvo which is at {RM-H/5/1}, and that was  
23          when the key ingredients of this question were first  
24          canvassed, and then there is a response to that letter  
25          at {RM-H/6}, and in a nutshell, although the response

1           was not a model of clarity, we believed at that point  
2           that those being given the opportunity to opt in or not  
3           were given a complete fresh start, that is they were not  
4           going to be required to adhere to various other old  
5           obligations.

6           Now, the revised notice which was provided on 20 May  
7           is hopefully a document that you have still got, but if  
8           not, it is at {RM-E/7} and for my purposes we begin on  
9           page {RM-E/7/3}. Do the Tribunal members have that?

10          Thank you.

11          So if I could ask the Tribunal, please, to read the  
12          bullet point which is -- this is the beauty of  
13          electronic documents. I think it is about a third of  
14          the way down. It is:

15          "Even if you have already signed up to the  
16          Claim ..."

17          Can I ask --

18          THE CHAIR: The one that is underlined?

19          MR PICKFORD: The one that is underlined, exactly. (Pause)

20          PROFESSOR WILKS: So the last sentence answers your point,  
21          does it not?

22          MR PICKFORD: Well, you would think so, quite.

23          PROFESSOR WILKS: It is in English.

24          MR PICKFORD: Well, it is in English, yes. We thought it  
25          did. Unfortunately the story does not end there.

1           So, yes, in the light of that, we thought, okay,  
2           well, this is all good, it is all sufficiently clear,  
3           they are not going to be held to any of those  
4           obligations, but we thought, well, we should just out of  
5           an abundance of caution write a letter to make sure that  
6           our understanding is correct.

7           So if we could go, please, to our letter which is at  
8           {RM-H/21}. Does the Tribunal have that letter?

9       THE CHAIR: Yes.

10       MR PICKFORD: Thank you. So you will see from that letter  
11           that initially there is some background and indeed there  
12           is reference to earlier correspondence at paragraph 2.

13           The key paragraph is paragraph 3 where we say what  
14           our understanding is, so:

15           "We understand the above to mean that a PCM who  
16           decides not to opt into the Claim will be released from  
17           all obligations under any of the agreements to which  
18           they have signed up (ie the original version of the  
19           Litigation Management Agreement, the relevant Deed of  
20           Adherence, the original Litigation Funding Agreement and  
21           the original Priorities Agreement). Please confirm that  
22           this is the case and that the Draft Rule 81 Notice will  
23           be amended accordingly."

24           We then proposed a particular form of amendment  
25           which the Tribunal may find convenient to read now

1           because it is actually an amendment that I still propose  
2           in the light of my submission.

3       THE CHAIR:   So this was a letter sent on Monday.

4       MR PICKFORD:   This was a letter sent -- yes.   So  
5           I appreciate, sir, that this has arisen relatively late,  
6           but the reason why it has arisen late is, because just  
7           as Professor Wilks mentioned --

8       THE CHAIR:   Do not worry, I am just trying to -- I am just  
9           realising that it has arisen late; I am not saying you  
10          are not entitled to advance it.

11          Right, so that was your letter.

12       MR PICKFORD:   That was our letter.   Then we had a response  
13          very quickly from the RHA, and that response is the next  
14          tab in the bundle, so it is tab {RM-H/22}, and that  
15          says:

16               "The understanding set out in paragraph 3 of your  
17               letter is incorrect.   As stated in our letter of  
18               13 May 2024 and the draft Rule 81 Notice, the  
19               obligations that the RHA is willing to waive are those  
20               requiring signed-up PCMs to opt in to the collective  
21               proceedings if and when a CPO is made."

22          So what that appears to imply is that those are the  
23          only things that are being waived, and that all other  
24          obligations on the signed-up PCMs remain, and if that is  
25          so, that, we say, is an entirely unsatisfactory basis

1           for the Tribunal to certify --

2       THE CHAIR: Can you show us these other obligations?

3       MR PICKFORD: Yes, with pleasure. So probably the best  
4           thing to do is to -- well, I can do it in one of two  
5           ways, and it depends what the Tribunal is most  
6           interested in.

7           What I was originally planning to do was to show you  
8           the old litigation management agreement and how that  
9           binds the PCMs through to obligations which remain. In  
10          fact, I think that is best, I think if I try and  
11          shortcut it, it may become confusing, so I am going to  
12          go from the beginning. It still should be possible to  
13          do it relatively quickly.

14          If we could begin, please, with the original  
15          litigation management agreement which everyone signed up  
16          to, so that is to be found at {RM-G/3}. The first  
17          clause to draw to your attention is 4.7 which is found  
18          on page {RM-G/3/11}, and that provides that:

19          "The Claimant agrees to enter into a Deed of  
20          Adherence, in the form set out in the Litigation Funding  
21          Agreement, which confirms its obligations to comply with  
22          the terms of the Litigation Funding Agreement which  
23          applies to it. Further, in entering into this  
24          Agreement, the Claimant agrees to be bound by the terms  
25          of the Litigation Funding Agreement and the Priorities



1 Agreement as a Claimant and agrees that Therium shall be  
2 entitled to rely on the Claimant's agreement pursuant to  
3 [that] section."

4 Then if one goes back -- well, if one looks at page  
5 {RM-G/3/6} you will see that the definition of the  
6 litigation funding agreement says it can be varied from  
7 time to time. That is the only point from that.

8 Then if you go on to page {RM-G/3/13}, you see:

9 "Treatment of claims proceeds."

10 At 6.1:

11 "The Claimant agrees that the Claim Proceeds ...  
12 shall be dealt with in accordance with the [LFA] and  
13 distributed in accordance with the Priorities Agreement  
14 and the Claimant agrees to be bound by the terms of the  
15 conditions of the [LFA] and Priorities Agreement as if  
16 it is a party to those agreements."

17 So again, being reinforced there.

18 Then we see at 9.2 that there is provision for PCMs  
19 to be able to terminate on three months' notice. That  
20 is paragraph 9.2 {RM-G/3/15}.

21 So they are allowed out of this agreement, but only  
22 on certain conditions, and the key conditions are those  
23 that are in clause 11.2, and they are to be found on  
24 page {RM-G/3/16}.

25 So 11.2 provides that:

1            "If the Claimant has terminated the Agreement  
2            pursuant to clause 9.2, the Claimant will (a) be liable  
3            to pay the cost of funding the Claim to the date of  
4            termination (which will be calculated as a pro rata  
5            amount based on the number of trucks that are part of  
6            the Claimant's Claim relative to the number of trucks  
7            that comprise the overall Claims) and (b) remain liable  
8            to any obligations under the Litigation Funding  
9            Agreement."

10           So even if you decide to terminate, you are still  
11           obliged by your various obligations under the LFA.

12           So if one then goes to the LFA to see what they are  
13           still bound by, it is not quite clear to us whether the  
14           RHA thinks that PCMs will be bound by the original or  
15           the new LFA. I think it must be the new LFA because  
16           currently at least the old LFA was held to be  
17           unenforceable.

18           So if one goes to the new LFA, that is to be found  
19           at --

20           THE CHAIR: You say they would be bound by the new LFA on  
21           the basis of what?

22           MR PICKFORD: On the basis that it says that they continue  
23           to be bound by the litigation funding agreement as  
24           varied and also because we see how --

25           DR BISHOP: It does not say varied.

1 MR PICKFORD: If you go back to -- I am trying to go  
2 a little bit too quickly. If one goes back to the  
3 definition of the agreement -- on page {RM-G/3/6}, the  
4 LFA is defined, so if we go back to page 6.

5 THE CHAIR: Yes:

6 "... dated ... May ... as may be varied..."

7 MR PICKFORD: Yes.

8 THE CHAIR: But is the new agreement a variation or is it  
9 a complete replacement?

10 MR PICKFORD: Well -- I have two points to make. If  
11 Mr Flynn is going to tell us: do not worry, they are not  
12 bound by any of these agreements anymore, then I can sit  
13 down because we have not got a problem.

14 THE CHAIR: The unfortunate thing is this has arisen so late  
15 that it depends on potentially analysing various clauses  
16 which have not been in the usual way the subject of  
17 skeleton argument.

18 MR PICKFORD: Yes.

19 THE CHAIR: It is not very satisfactory.

20 MR PICKFORD: I understand that, sir.

21 THE CHAIR: I think it might be easier if we just ask  
22 Mr Flynn, and then you can sort of develop your  
23 submissions, to just explain the position, because you  
24 get the general point that is being made that when one  
25 looks at the notice it suggests that if you do not want

1 to -- you are free to decide whether you want to  
2 continue or not, and if you do not, then you walk away  
3 and what is being said is, well, actually, you walk away  
4 with strings attached.

5 Is that right? How is this all supposed to work?

6 Submissions by MR FLYNN

7 MR FLYNN: Well, what the notice, I think, says, and what  
8 the idea is, if you do not want to opt in, then you do  
9 not have to, and to the extent that you have signed  
10 a document that says you will opt in, that is waived.  
11 So that is --

12 THE CHAIR: You are obviously not opting in, but are you  
13 bound by a whole lot of other obligations?

14 MR FLYNN: Yes, there will be continuing obligations for  
15 a number of fairly good reasons. One of them is what  
16 I might call the failsafe proceedings, so instructions  
17 have been given for the -- you will remember the  
18 protective proceedings in the High Court claim, so  
19 people who do not opt in but are party to that will  
20 still need to be capable of giving instructions to the  
21 solicitors and covered by insurance.

22 It is also the fact that -- and I think standard in  
23 these sort of agreements that what you are not free to  
24 do, I think, if you sign up and then do not want to go  
25 through with it, what you are not free to do is possibly

1           what Mr Pickford would like to do, is to go and have  
2           a sort of private free-riding settlement with the  
3           defendants.

4           The claim so far has advanced to the stage that it  
5           has got to by virtue of the funding provided, and it is  
6           absolutely standard in these agreements that the funder  
7           does not release the person dropping out from the  
8           waterfall, if I can put it that way.

9           In my submission what Mr Pickford has yet to show is  
10          what in any of these arrangements would prevent someone  
11          who decides they do not want to opt in, they do not want  
12          to continue in these proceedings, what would prevent  
13          them from not signing up?

14          I mean, they are given a free choice, and they are  
15          released from any obligation to do so, but that --

16       THE CHAIR: When you say they cannot have free-riding of the  
17          settlement with the defendant, I see that when  
18          proceedings have got going that if you opt in then after  
19          six months or a year and a lot of disclosure and so on  
20          you then go and do a private settlement with the  
21          defendant, that would be taking advantage of having been  
22          part of an ongoing claim and then doing your private  
23          deal and you cannot bypass your obligations to the  
24          funder, but this is a bit different because these  
25          proceedings have never got going until now. There has

1           never been a CPO, and in those circumstances it is  
2           rather different, is it not? Why should you then -- if  
3           you do not opt in now because you think well the actual  
4           structure of the proceedings may be, because of the  
5           conflict arrangements or whatever, does not appeal to  
6           you, if you negotiate or indeed start your own private  
7           action against one of the defendants and recover, why  
8           should you have to hand over part of those proceeds to  
9           Therium?

10       MR FLYNN: For the reason that they have signed up to these  
11           arrangements in the meantime. If this was someone who  
12           had had no connection with the RHA proceedings and was  
13           considering whether or not to opt in, then, you know,  
14           there is no objection at all, and of course, if the CPO  
15           is granted, the opt-in window closes and we know who is  
16           in the class, then the defendants will be able to settle  
17           with the class on any basis that they see fit, but the  
18           people we are concerned with are those who have in the  
19           meantime entrusted their litigation rights and strategy  
20           to the RHA's scheme under these agreements. That has  
21           been brought to this stage by the efforts of the RHA and  
22           funded by the funder, and they do not -- and as I say,  
23           this is quite normal -- they do not just get to walk  
24           away from that and be a sort of free operator.

25       THE CHAIR: But they signed up on the basis that is not now

1           the basis on which the claim is going forward in terms  
2           of how pass-on is going to be managed.

3       MR FLYNN: That is true, that is true, they have signed up  
4           on the basis of the documents they have seen and the  
5           presentations they have heard. That I recognise.

6       THE CHAIR: But the position is, which is what Mr Pickford  
7           was suggesting, he is right, is he, to say that if  
8           someone who had registered now does not opt in and  
9           therefore is not part of these proceedings once they  
10          start and then brings a private action against --  
11          independently against one of these defendants and  
12          recovers or settles, they will have to hand over part of  
13          the proceeds to Therium.

14       MR PICKFORD: It is all.

15       THE CHAIR: Mr Pickford says the entire proceeds are held on  
16          trust for Therium; is that right?

17       MR FLYNN: I have not got the provisions in front of me,  
18          but, yes, they do, yes, they do, but in my submission  
19          that does not affect their choice, their free choice,  
20          whether or not to opt in, which we do not enforce.

21       THE CHAIR: It makes it a pretty unattractive choice, does  
22          it not?

23               In practical terms, leave aside any legal issues at  
24          the moment, I would have thought it is pretty unlikely  
25          in practice that many people who did opt in are not

1           going to opt in again because they were interested in it  
2           before you have put in fair arrangements, they will  
3           still be interested in joining in, they have had every  
4           opportunity to bring a private action, there might  
5           indeed -- I am trying to remember what was the date of  
6           the -- potentially, I do not know about the specific  
7           limitation provisions, but they might have limitation  
8           problems in even starting a private action now.

9           So in realistic terms, this is probably not  
10          a significant concern that people who have opted in the  
11          first time are not going to renew their opt-in. Why do  
12          you really need these provisions because they do strike  
13          me as a bit oppressive?

14       MR FLYNN: Well, one reason is the one that I started with  
15          which is the protective proceedings.

16       THE CHAIR: Well, you can deal with that separately. That  
17          is a separate thing, and insofar as you are managing  
18          their claim, the protective claim in the High Court,  
19          they remain bound for that purpose.

20       MR FLYNN: It comes under these agreements, though. It is  
21          not contractually separate. These are efforts that the  
22          RHA has made on behalf of those who have signed up. So  
23          there would be a problem if someone who was a claimant  
24          in the High Court protective proceedings chooses not to  
25          opt in, as they may do, and then is released from all



1 obligations, as Mr Pickford would have it.

2 THE CHAIR: But that is because the RHA has incurred costs  
3 of bringing the High Court proceedings.

4 MR FLYNN: And needs their instructions and needs to retain  
5 that relationship for their protection against adverse  
6 costs and so forth, so it is not as simple as saying  
7 they can just be released or that can be dealt with  
8 elsewhere. That is --

9 THE CHAIR: Have they all -- everyone is the subject of High  
10 Court proceedings, are they?

11 MR FLYNN: I do not know that it is everyone. It is the  
12 majority, possibly a large majority, but obviously they  
13 are named claimants in those, and I do not know to what  
14 extent --

15 THE CHAIR: Is it a group action in the High Court?

16 MR FLYNN: I think the proceedings were issued and then  
17 immediately stayed, so it has not been the subject of  
18 a GLO, as far as I am -- in fact I am sure it is not.

19 THE CHAIR: I mean, there could be a carve-out for any  
20 liability incurred on their behalf in the High Court  
21 proceedings. It could be limited to that, could it not?

22 MR FLYNN: There could be contractual arrangements to --

23 THE CHAIR: I mean, they could be released from all  
24 obligations other than with regard to liability for  
25 costs incurred on their behalf in High Court

1           proceedings.

2       MR FLYNN:   Yes, well --

3       THE CHAIR:   And it could be limited to that.

4       MR FLYNN:   Well, of course, there could be mechanisms.  It  
5           may be --

6       THE CHAIR:   That would be -- I understand the point about  
7           the High Court, but that is a rather more limited point,  
8           and if that were the extent of the continuing  
9           obligation, that could be made clear, but it would not  
10          apply more widely.

11      MR FLYNN:   I understand that, sir.

12                 It is being suggested --

13      THE CHAIR:   If we rise, can you take instructions?  I do not  
14          know if Mr Pickford would be entirely satisfied with  
15          that, but it seems to me at first blush -- and this has  
16          all come on us rather suddenly without a chance to think  
17          about it in advance as we, as you know, like to do -- as  
18          one way of resolving this point.

19      MR FLYNN:   Yes.

20      THE CHAIR:   But it does seem at the moment to be quite  
21          potentially extensive in terms of obligation going far  
22          beyond just protecting the position on costs of High  
23          Court proceedings which will not be that great for any  
24          individual because as you have pointed out, they were  
25          immediately stayed.

1 MR FLYNN: Yes.

2 THE CHAIR: Will you take instructions on that?

3 MR FLYNN: I will take instructions.

4 THE CHAIR: We will rise for ten minutes.

5 (3.28 pm)

6 (A short break)

7 (3.54 pm)

8 THE CHAIR: Mr Flynn, we are conscious that this is a new  
9 matter that has really arisen in the last couple of days  
10 and that it might be fair to give you more time to take  
11 instructions and consider the implications if that is  
12 something that you would wish to do.

13 MR FLYNN: Well, I am grateful for that, sir, and probably  
14 it would be sensible given that there are a few  
15 contractual mechanics to consider, but I think I can say  
16 that what we think the principle should be is actually  
17 a bit of equality here because if the idea is that the  
18 potential class members are given a fresh start and  
19 a free choice as to whether or not to opt in, what we do  
20 not want is the OEMs now starting to pick them off and  
21 make settlement offers or particularly telling them not  
22 to opt in, to wait until the end of the period and they  
23 will be all right, or otherwise whittling down the  
24 potential class.

25 Now, if we give up the protections that are in the

1 documentation as matters stand, then I think it is only  
2 fair that there should be a sort of quid pro quo and  
3 obviously the details of that might take some working  
4 out.

5 Subject to that, it seems to us that, yes,  
6 contractual mechanisms could be provided to protect the  
7 High Court position as may be necessary and not only the  
8 costs of it but the instructions, as I said, and the  
9 insurance position, so that could probably be capable of  
10 being settled there.

11 THE CHAIR: Yes, well, there might have to be some  
12 consideration of quite what is fair. We appreciate that  
13 if there are any settlements it is because they have  
14 started proceedings in the High Court, otherwise they  
15 might be out of time and would get nothing, so that they  
16 are getting some benefit from work the RHA has done for  
17 them.

18 MR FLYNN: Yes.

19 THE CHAIR: Equally, they should not be put in a position  
20 where the choice to opt in or not is really leaving them  
21 with a rather hamstrung choice which was the point being  
22 made.

23 MR FLYNN: Yes.

24 THE CHAIR: But we think that probably this would benefit  
25 from further consideration by the RHA and its advisers

1           and Therium to look at what the possibilities are.

2           We appreciate the point about individual  
3           settlements, but that indeed may be precisely the point  
4           that motivates this issue being raised in the first  
5           place.

6       MR FLYNN: Well, it may not be entirely solicitude for the  
7           position of the proposed class members, and Mr Pickford  
8           fairly said as much.

9       THE CHAIR: Yes. I mean, Mr Pickford, is there anything you  
10          want to add to that?

11                   Submissions in reply by MR PICKFORD

12       MR PICKFORD: Well, sir, the proposals that the Tribunal  
13           suggested whereby there is a carve-out for the High  
14           Court -- the costs of the High Court proceedings would  
15           be acceptable to us as a means through so long as that  
16           carve-out was not a back door for then costs being  
17           allocated from these proceedings to the High Court  
18           proceedings. We are simply talking about effectively  
19           the High Court-specific proceedings.

20       THE CHAIR: Yes.

21       MR PICKFORD: Secondly, RUTL would need to provide the same  
22           confirmation as the RHA in relation to the obligations  
23           that RUTL considers that it is now owed.

24           In that regard, I do not need to take the Tribunal  
25           through it now, but the Tribunal will see if in its own

1           time it wants to look at the new RUTL LFA which is to be  
2           found at {RM-E/12} and then if one looks at pages  
3           {RM-E/12/14-15}, you will see that there is a recital  
4           there. We have got it up, so I will explain the point.

5       THE CHAIR: Yes, it is up, 15.

6       MR PICKFORD: It is page {RM-E/12/15} recital (C). It is  
7           quite small on mine. Oh that is good, even with my bad  
8           eyesight I can just about read that. So that provides  
9           that:

10                "Under the terms of a Litigation Management  
11           Agreement between the RHA and each potential Claimant  
12           ('the LMA') and the authority documents, the Claimants  
13           have duly appointed the RHA to sign documents and make  
14           decisions in relation to the Collective Proceedings on  
15           their behalf. The RHA is duly authorised to enter into  
16           this Agreement on behalf of the Claimants under the  
17           powers of attorney or authority documents granted to the  
18           RHA by the Claimants."

19           So recital (C) there anticipates that they are  
20           already relying on powers granted under the LMA to sign  
21           claimants up to this new LFA, because this actually  
22           appears in, I think, unless I have given you the wrong  
23           reference, this should be the reference to the RUTL LFA,  
24           if we go back to the first page which I think is perhaps  
25           {RM-E/12/14}.

1 THE CHAIR: Yes.

2 MR PICKFORD: Yes, exactly. So this is the used class LFA,  
3 and so we have exactly the same situation obviously on  
4 both RHA and RUTL and indeed it is quite surprising,  
5 this particular provision, because although they are  
6 with the one hand saying everyone has a new chance to  
7 opt in, they have already signed all the claimants up to  
8 the new LFA, so when there was a discussion about how  
9 does it work and which LFA are they bound by when I was  
10 asked, apparently they believe that they have the  
11 ability to bind everyone to new agreements.

12 THE CHAIR: Yes, well, I think that is all matters that can  
13 be explored.

14 I appreciate the High Court proceedings costs are  
15 not a concern for you and that was my immediate  
16 reaction, but I do see that any settlement may be partly  
17 the result of the High Court proceedings having been  
18 started because that is how there is an existing claim  
19 against you, and so it may go beyond just the costs  
20 because the bringing of those proceedings was something  
21 from which any settling party might therefore derive  
22 a benefit, but I will not say any more at the moment.

23 We suggest putting this back because there is of  
24 course the other outstanding matter, namely the position  
25 on funding.

1           We fully appreciate the importance of commercial  
2           funding from third party funders of these proceedings,  
3           like all collective proceedings. We do not want to  
4           deter funders from undertaking to fund these  
5           proceedings. However, we have to say we are  
6           disappointed -- that is perhaps a mild word -- with the  
7           quality of the information we have been given by Therium  
8           where it was clear following the Court of Appeal  
9           judgment that a separation in funding arrangements would  
10          be required and Therium would have appreciated that.

11          When one looks at what Mr Purslow said in his second  
12          witness statement at paragraph 18.4, the information we  
13          now have in the letter of today from the RHA's  
14          solicitors, and then the information from the Jersey  
15          companies' registry, they do not all sit happily  
16          together, and we think we do not have proper information  
17          on which we can be satisfied that there is adequate  
18          separation in the funding arrangements made by Therium.

19          So we feel we cannot be satisfied on what we have  
20          today that it is appropriate to approve those  
21          arrangements, and we have to put this back for a further  
22          hearing to address funding, and given the constraints on  
23          the Tribunal members, that will have to be in the week  
24          of 15 July, that is the first available time that we  
25          have, and we would like further evidence from Therium



1 explaining how this actually is going to operate.

2 We would like to be informed what is the role of  
3 CSE Global which appears to employ all the directors,  
4 all the material directors, at least, of the two funding  
5 entities.

6 We would like to know who for Therium Atlas will  
7 take the decision on behalf of that company under  
8 clause 16.3 of the proposed funding agreement should  
9 that situation arise and, in particular, what, if any,  
10 arrangements are made for the directors of Therium RHA  
11 who are also directors of Therium Atlas, not to be  
12 involved in that decision, and we would like to  
13 understand what information barriers as referred to by  
14 Mr Purslow in his witness statement, his second witness  
15 statement, are to be put in place as between the  
16 directors of Therium RHA who are also directors of  
17 Therium -- well, between the directors of Therium RHA  
18 and their fellow directors of Therium Atlas with regard  
19 to that decision-making, because at the moment we have  
20 to say we find the position and explanations rather  
21 unsatisfactory.

22 MR FLYNN: Sir, I apologise again for the way in which it  
23 has been presented, and I hear what you have said.

24 I mean plainly another -- more evidence is going to have  
25 to come in on this, and we will await directions in

1           relation to a further hearing.

2       THE CHAIR:   Yes.   We will not give directions now until  
3           a date is actually fixed.

4           I think that is probably prudent to allow a day.

5       MR FLYNN:   Yes.

6       THE CHAIR:   But it certainly will not need more.   Once we  
7           have got a fixed date, then we can give directions for  
8           service of additional evidence and skeleton arguments  
9           and that can also then, in skeleton arguments, address  
10          what I have called the new point about the class members  
11          who opted in last time but might not opt in this time  
12          and what their obligations are, and then that can be  
13          explained by reference to the clauses of the contract,  
14          we can look at all that in advance of the hearing.   That  
15          seems to us the only sensible way of dealing with those  
16          two issues.

17          Then I think, someone will correct me if I am wrong,  
18          that we have covered everything on the, as it were,  
19          agenda of points being raised; is that right?

20       MR PICKFORD:   Certainly from my perspective.

21       MR JOWELL:   And for us.

22       MR WHITE:   Same for us.

23       MR JOWELL:   I am reminded that of course the ATE insurance  
24          is also outstanding.   Yes, there is another matter.  
25          Presumably that will also need to be dealt with --

1 THE CHAIR: It may be that that can be resolved before, but  
2 obviously there will have to be -- and we are told that  
3 it is likely to not take that long and that that can be  
4 resolved, yes.

5 Sorry, Mr Scannell, did you wish to add anything?

6 MR SCANNELL: I did want to return very briefly with  
7 a request in relation to your question, Mr Chairman,  
8 relating to the run-off period for leased trucks and the  
9 question that you quite fairly asked which was to the  
10 effect of whether or not one could have a lease loss on  
11 a truck which was bought outside the new trucks purchase  
12 run-off period. So we are talking about a truck which  
13 is bought after the end of January 2014 and leased that  
14 year, so leased within the used period but bought  
15 outside the new trucks period.

16 The suggestion that they should not form part of the  
17 leased claims has a superficial attraction of course  
18 because it is tempting to think that all of the lease  
19 losses are somehow parasitic on purchase losses, and so  
20 they should not be included for that reason, but  
21 I understand that the position is in fact less clear-cut  
22 than that.

23 The market for leased trucks is likely to have  
24 remained affected by the cartel long after the run-off  
25 date for new trucks purchases and there is, I am told by

1 my experts, a plausible economic reason why the relevant  
2 price for those leases would be the used trucks price  
3 and not the new trucks price.

4 Now, I am conscious of where we are on time. If it  
5 would assist, the proposed sub-class representative  
6 would be content, particularly given that the matter has  
7 been reserved, to file a short one or two-page written  
8 submission explaining why it is the case that lease  
9 losses of the sort that I have just described should  
10 form part of the used trucks sub-class claim,  
11 notwithstanding that of course it is accepted that that  
12 truck was purchased for the first time outside the  
13 run-off period for the new trucks claims.

14 We would of course be content for Iveco to respond  
15 to that, but we could put in a one or two-page  
16 submission certainly by Friday.

17 THE CHAIR: Yes, that seems sensible, Mr Scannell. If you  
18 can do that by Friday.

19 MR SCANNELL: I am grateful.

20 THE CHAIR: And if any response from Iveco on behalf of the  
21 defendants could come by the end of the following  
22 Wednesday.

23 MR WHITE: Provided we have a week to respond, then, yes,  
24 that is fine, which I think that would result in us  
25 having a week to respond if they have a week from now

1           and then we have a week from the date that they file  
2           their document.

3       THE CHAIR: They do not have a week from now because today  
4           is Tuesday.

5       MR WHITE: Oh, the end of the week, apologies.

6       MR SCANNELL: My offer was two days from today.

7       MR WHITE: Apologies, I had misunderstood. I seek a week to  
8           allow us time to consider what they have said and put  
9           together our response.

10      THE CHAIR: It is only a short submission on this one point.  
11           No, sorry, by the end of Wednesday, because it will  
12           enable us to deal with that matter then before we get  
13           embroiled in something else. Yes, but you will get by  
14           4.00 pm on the day after tomorrow.

15      MR SCANNELL: I am grateful.

16           Is the Tribunal minded to impose page limits on both  
17           of these submissions? I think it may be sensible.

18      THE CHAIR: This is just dealing with the -- well, I would  
19           have thought, what, you said one or two pages.

20      MR SCANNELL: I did.

21      THE CHAIR: If we say five pages each, that will give you  
22           rather more.

23      MR SCANNELL: I am grateful, yes. If there is a cap on it,  
24           I am not saying we will go to five pages, but, yes.

25      THE CHAIR: Thank you very much. Well, we have made a lot

1           of progress, although not perhaps complete progress as  
2           we had hoped.

3           We are conscious there are a few matters on which we  
4           have reserved our decision, leased trucks being one. We  
5           expect to produce that decision -- I will seek to --  
6           I will not commit to doing that, but one possibility is  
7           that we do that before the hearing in July so that at  
8           least we know where we are, and I hope can then proceed  
9           to a definite conclusion on this.

10       MR FLYNN: I am very grateful, sir.

11       THE CHAIR: Thank you all.

12       (4.13 pm)

13                       (The hearing adjourned)