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**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No: 1304/7/7/19

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

Wednesday 10<sup>th</sup> September 2025 - Thursday 11<sup>th</sup> September 2025

Before:

Hodge Malek KC  
Eamonn Doran  
Hugh Kelly

(Sitting as a Tribunal in England and Wales)

BETWEEN:

**JUSTIN GUTMANN**

**Class Representative**

v

(1) **FIRST MTR SOUTH WESTERN TRAINS LIMITED**  
(2) **STAGECOACH SOUTH WESTERN TRAINS LIMITED**

**Defendants**

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

Philip Moser KC and Stefan Kuppen (instructed by Charles Lyndon Limited) on behalf of  
Justin Gutmann.

Sarah Abram KC (instructed by Dentons UK and Middle East LLP) on behalf of Stagecoach  
South Western Trains Limited.

Ben Smiley on behalf of Charles Lyndon Limited.

Roger Mallalieu KC and Simon Teasdale on behalf of Woodsford Group Limited, ATE  
Insurers.

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Wednesday, 10 September 2025

(10.30 am)

(Proceedings delayed)

(10.37 am)

THE CHAIR: I will just read out the piece of paper.

Some of you are joining us livestream on our website, so I must start, therefore, with the customary warning: an official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings, and breach of that provision is punishable as contempt of court.

At the end of this hearing, or maybe shortly thereafter, there will be a ruling, which will be available on the website in due course for anyone interested.

Mr Moser.

MR MOSER: Sir, I'm grateful. I'm appearing on behalf of the class representative with Mr Kuppen. My learned friend Ms Abram KC appears for SSWT.

THE CHAIR: Yes.

MR MOSER: The non-settling party is obviously taking no part in this.

The stakeholders, two stakeholders or two groups of stakeholders sought permission to appear. My learned friend Mr Smiley is appearing for Charles Lyndon, and my learned friends Mr Mallalieu KC and Mr Teasdale appear for the funders and the insurers. That's by this Tribunal's order -- your order, sir -- of 7 July 2025, giving them 45 minutes each. No other stakeholders have sought to intervene, and no other stakeholders are represented here.

There are some non-stakeholder intervenors in writing, again by the Tribunal's order of 7 August 2025; that's the Access to Justice Foundation and the Fair Civil Justice

1 Limited's intervention, tabs 5 and 6 of the skeleton bundle.

2 You should have -- electronically and/or in hard copy, I'm not sure -- four bundles. In  
3 hard copy, it's six. There's a skeleton bundle, bundle A, bundle B -- in hard copy, that  
4 has three volumes -- and there is an authorities bundle.

5 I hope to go to relatively few documents within those bundles, but we'll see.

6 THE CHAIR: We'll take them to (inaudible).

7 Can you just sit down for a minute and I'll just say, you know, where we are.

8 MR MOSER: Yes.

9 THE CHAIR: As regards the intervenors in the form of the Access to Justice  
10 Foundation and Fair Civil Justice Limited, they both filed witness statements and they  
11 have supplied relatively short submissions. The Tribunal directed in the intervention  
12 rulings that they'd be permitted to file those, but indicated that they would not be given  
13 the right to make oral submissions.

14 We've read their material and I do find the contribution of both to be of  
15 significant -- well, assistance to the Tribunal, and their contributions are helpful. We  
16 don't think that it's fair to categorise the submissions of the Foundation -- or any of  
17 them, really -- as being sort of Luddite-type interventions, trying to put a spanner in the  
18 works. We found their analysis and documents they exhibited of assistance to us in  
19 getting to a fair resolution of what we have to deal with today.

20 As regards the skeleton arguments, we have read them. We have been through the  
21 various witness statements, but not necessarily in enough detail for this, and we  
22 haven't necessarily gone through the exhibits.

23 We have an understanding of the figures, but there's still an element of cloudiness,  
24 let's say, because it's quite clear that there's a difference of opinion between the CR  
25 and Woodsford as to what those costs are, what the actual rate of return is so far.  
26 There's a number of issues that have to be resolved there. But it may be helpful at

1 | this stage to tell the parties where we are.

2 | The first is that we accept that it's appropriate to have a payment to charity, which will  
3 | be the 4 million less the amounts being paid -- I think it's about £216,000 -- to the class  
4 | members who submitted valid claims. So, we're not going to increase that sum. But  
5 | we think that, in the particular circumstances of the case, that is a fair outcome,  
6 | particularly given the very disappointing take-up by class members, and we're grateful  
7 | for the positive approach taken by all the stakeholders, and that is the lawyers, class  
8 | representative, the ATE insurers and the funders, to agree that.

9 | As regards what happens to the -- where we are on the £10.2 million, that's the  
10 | non-ringfenced costs. The way we look at it is that when we had the settlement, it was  
11 | pretty clear to everyone that that was the ceiling of the liability in respect of that of the  
12 | defendant, and that that sum was basically going to go, that sum had gone, and I'm  
13 | sure the defendant had written off that sum in its own mind. I know you're shaking  
14 | your head, but the reality is the costs, fees and disbursements was always going to  
15 | exceed, or at least be up -- exceed £10.2 million when you look at all the figures, and  
16 | that's what's happened.

17 | There is one issue that I think we need to resolve first, which is the question of where  
18 | the sum for the charity is to come from. I think it's the position of the class  
19 | representative that that comes out of the non-ringfenced sum of £10.2 million, but it's  
20 | the position of Woodsford that half of the sum, I think that £4 million, should come out  
21 | of the balance of the settlement figure, the reversionary amount, over and above the  
22 | £10.2 million.

23 | I think we need to resolve that issue first before we deal with anything else, because  
24 | I'm sure that whilst the defendant has said they're neutral, I would be surprised if the  
25 | defendant is neutral about whether or not £2 million should go out of  
26 | a different -- I don't want to use "pot", but a different block, because it's one thing that

1 they accepted that they were kissing goodbye to the £10.2 million, which is the  
2 non-ringfenced costs, that would -- we are satisfied, whatever the figures are, the  
3 costs, fees and disbursements takes you over the £10.2 million. We looked at the  
4 figures. Whichever way we look at it, we're above £10.2 million.

5 So I think it's probably sensible if we start off with this one issue about whether or not  
6 the £2 million should come out of another source, which is presumably the other  
7 reversionary amount which SSWT says, "Well, we never agreed to any payment to  
8 charity to come out of that sum, we thought that what was going to happen is the  
9 ultimate limit of our liability after the settlement hearing was the £10.2", and there was  
10 negotiation over that, I know, between the parties, as to what that figure should be,  
11 and the view was taken that the absolute minimum was going to be higher than the  
12 original figure that was suggested, and that's why the parties came back -- that's my  
13 recollection -- with the £10.2 million. The view I took at the time is that whichever way  
14 you look at it, it is most probable, if not certain, looking at the arrangements between  
15 the parties and the costs already expended, that you were going to hit that  
16 £10.2 million, but at least the parties knew where they stood. So, I think what I would  
17 like to hear the parties on is: where is that £4 million going to come from?

18 I think, Mr Moser, if you could just start off, then I think we should hear from SSWT,  
19 then we should hear from Woodsford, and then SSWT will have a right of reply on that.  
20 So we all understand that you'll set the scene on this and your understanding and  
21 whether or not I've got it completely wrong -- I quite often do get things wrong -- and  
22 we'll go from there because I want that issue to be determined at the beginning,  
23 because once that issue's been determined, I'd have thought SSWT doesn't really  
24 have much of an input in the rest of the day, unless of course they want to help us on  
25 other things, and any help that you can provide is always gratefully received, even if  
26 you don't necessarily have a direct interest in something. If you think the parties have

1 missed something, I need to take something into account, please just tell me in the  
2 normal way, okay?

3 Mr Moser.

4  
5 Submissions by MR MOSER

6 MR MOSER: We're enormously grateful for that, which has cut through all sorts of  
7 things.

8 I will set the scene, if I may.

9 THE CHAIR: Yes, of course, that's what I wanted you to do. But knowing that the first  
10 issue I want to concentrate on is that one issue of where the £4 million comes from.

11 MR MOSER: Exactly. I'm going to be quite brief, and I will largely agree with  
12 everything you said.

13 I'll just say by way of introductory remark that, at least as far as the Access to Justice  
14 Foundation is concerned, we certainly don't take the view that their representations  
15 are somehow Luddite; in fact, we positively welcome most of what they say. The other  
16 intervention we'd take a different view on, but that doesn't matter for present purposes.  
17 The basis for the discussion about charity is, importantly, that which you have, with  
18 respect, quite correctly set out. As you anticipated in your judgment last year -- and I  
19 don't propose to turn it up, but you'll remember -- you doubted that the figure of  
20 £10.2 million is at all likely to be exceeded, and the actual class member claims may  
21 well be significantly lower than a 10 per cent take-up. Well, that sadly has come to  
22 pass.

23 I should say that no one is more disappointed than Mr Gutmann that the take-up was  
24 not higher, but we can come back to that subsequently if necessary. I'm prepared to  
25 make short submissions about the possible reasons for that in this particular case,  
26 which was, of course, the first one that attempted this sort of distribution in this country.

1 THE CHAIR: If I could say something on that. The first point to note is that we, as a  
2 Tribunal, using our, let's say, experience, when we looked at the American stuff, we  
3 didn't think it was likely, and we said at the time that it was going to be 10 per cent.  
4 We thought it was going to be fairly low, and it was fairly low. It was probably even  
5 lower than I thought it would be.

6 But having looked at the material from Epiq and what they did, we've got no criticism  
7 of Epiq or the way that it was handled. Hindsight's a wonderful thing, and that's not a  
8 fair way of doing it. But what we hope is that whatever lessons are to be learned will  
9 be learned. Epiq is a sophisticated operator, it generally knows what it's doing, and  
10 my experience of them is that they will learn from this and next time round it's going to  
11 get better and that's absolutely fine.

12 So, I've got no criticism about the way the administration plan was administered. It  
13 was flexible. They did make changes as they went along. So that's a positive thing.

14 (10.49 am)

15 (Audio interrupted due to a technical error)

16 (10.52 am)

17 MR MOSER: ... because everybody warns the public against doing that very thing,  
18 and the fear that this might be a scam or something. These are important points to  
19 bear in mind.

20 Going off script, my own view, if I may be permitted one, is I wonder whether, in time,  
21 there might be some centralised form of a distribution website for CAT awards, but  
22 that's an extrajudicial matter.

23 THE CHAIR: Yes, we can have a debate about that separately, but I think that  
24 the -- any ideas on these are gratefully received and that we, as you know, as  
25 a Tribunal, just want to get the balance right as well, and this hearing is pretty important  
26 for getting the balance right.

1 I think I've already indicated what my approach is likely to be today, and there's going  
2 to be no surprises, hopefully, in whatever ruling comes out today, but I do want to  
3 make it clear that whilst in the past I have said various things about the funders and  
4 the importance of funders and that they are given an adequate rate of return, we have  
5 to appreciate that they're not the only people that are necessary for the regime to  
6 function properly. Also, you need to have people who are willing to be class  
7 representatives. If these things become too hostile and aggressive, people are going  
8 to be less willing to put their names forward as class representatives because they're  
9 the people who have got no real skin in the game personally, they just do their best.  
10 Secondly, you've got the other element in all of this, which are the lawyers. If the  
11 lawyers are going to work hard and do their best on these cases, then suddenly you're  
12 going to find they're not going to get paid, they're going to say, "Well, I'm not really  
13 interested in doing this work".  
14 So, I think everyone's got the same interest in this, that these proceedings are properly  
15 funded and they go ahead and they're done properly, and if one of those three legs on  
16 the three-legged chair is cut, it doesn't work.  
17 But whilst the funders -- I've read the funders' submission. They've got their  
18 submission. You know, there's pretty fundamental problems in the way they're putting  
19 their approach. They can say, "Oh, yes, you've agreed the waterfall" and all that sort  
20 of stuff, but it's up to us as to how things are going to be distributed. Everyone knows  
21 that. But of course, we will take into account what the parties may have agreed. In  
22 that circumstance, at the end of the day, we have to look at each leg. If we ignore one  
23 leg or we punish one leg and one leg feels that this regime doesn't work for them,  
24 you're not going to have a chair that can stand up. I hope everyone listens to that.  
25 The other thing is that I don't really appreciate, but we're going to have to deal with it  
26 probably today, these types of disputes between funders and class representatives.



1 You've all got to work together. You've got to be fair to each other. Pushing too far in  
2 one case does have an impact in further cases, and I do think it's really important that  
3 funders and the lawyers work together in a positive way.

4 In Merricks, we've already expressed our disappointment with the way parties fall out.  
5 For good or bad reasons, that doesn't really matter. It's still disappointing when they  
6 fall out. I don't really want, on a case like this, where you've got a pretty good  
7 settlement at the end of the day, that's why we approved it, I don't really want to have  
8 a sour note at the end of it.

9 Maybe we are going to have a sour note at the end of it, and we'll have a good row at  
10 the end of the day, but I do want to avoid that if we can.

11 MR MOSER: Sir, again, from the class representative's point of view, we couldn't  
12 agree more with all of that. I mean, Mr Gutmann is something of a pioneer in  
13 representing collective proceedings classes.

14 THE CHAIR: He is, yes.

15 MR MOSER: He is anxious that both the funders and the lawyers be fairly  
16 remunerated. Of course --

17 THE CHAIR: I know, and so are we, and I think I've made that clear in previous rulings.

18 MR MOSER: Yes.

19 THE CHAIR: I'm not going to favour one of you over the others. It's stupid, at the end  
20 of the day, to do that.

21 MR MOSER: We have represented here, of course, the funders and the solicitors  
22 separately, and they'll be making the principal submissions on those sort of inter se  
23 points. The class representative, you know, remains hopeful that these matters can  
24 be resolved reasonably amicably. We shall see.

25 THE CHAIR: Well, hopefully, because, look, what we're going to do first, we're going  
26 to sort out the charitable thing --

1 MR MOSER: Yes.

2 THE CHAIR: -- and sort out where we are with SSWT.

3 MR MOSER: I'll set the scene in maybe two or three sentences, and then I'll probably  
4 sit down.

5 THE CHAIR: Yes, of course. Okay, that's fine.

6 MR MOSER: Your indication, Tribunal, that the charity payment is appropriate is very  
7 helpful, so 4 million. The context of that £4 million is in the context of the payment out  
8 of the balance of £10.2, which is in the region of £9.9. The non-ringfenced costs, as  
9 you say, with respect, it was clear to everyone that was the ceiling. We were always  
10 likely to exceed that.

11 The exact amount of costs claimed is, on one view, not going to be decisive as far as  
12 the payment between SSWT and the class representative is concerned, because even  
13 if one takes the most extreme view on the points of dispute, we're going to be in excess  
14 of the £9.9, and substantially so.

15 THE CHAIR: I agree, yes. But we knew that last time.

16 MR MOSER: We did, so no news here.

17 So as far as the class representative is concerned, how we would like to see the  
18 morning go is a relatively swift finding that the balance of what's left is to be paid over.  
19 £4 million goes to charity, we have suggested by way of an undertaking by the  
20 stakeholders. My learned friend Mr Mallalieu will put forward the funders' suggestion  
21 and, to be clear, we're not in opposition to that; we will let him make that point.

22 THE CHAIR: Of course, we'll deal with that, yes.

23 MR MOSER: And as far as that is concerned, at that point, the class representative  
24 steps back rather, because then it's a question of how it's going to be distributed, and  
25 the principal points are really between Charles Lyndon and Woodsford, unless it can  
26 be amicably resolved pursuant to the Tribunal's indication, which the class

1 representative would be very happy about.

2 That's all the scene I wanted to set. I hope that helps.

3 THE CHAIR: No, that does help. That's fine, you can sit down for now.

4 Ms Abram, you've heard what I've said, and really at this stage, if you could just help  
5 us on this idea that £2 million should come out of the other basket, which is not part of  
6 the £10.2 million non-ringfenced costs. That's what I really want to hear from you at  
7 the moment. We can hear you on other things later, but on that one point.

8  
9 Submissions by MS ABRAM, KC

10 MS ABRAM: If I may, just before I address that point, may I say two very short things.

11 THE CHAIR: Of course.

12 MS ABRAM: The first is that I just need to be clear about what I need to be neutral  
13 about today and what I don't need to be neutral about, because the Tribunal has the  
14 point that I have to be neutral in relation to the quantum of costs, fees and  
15 disbursements.

16 THE CHAIR: Yes.

17 MS ABRAM: So, as you said, sir, at the beginning, once the charity issue is dealt with  
18 effectively, although I might like to say lots of things, I'm contractually constrained to  
19 be neutral about that.

20 The question of a charity payment wasn't relevant when the settlement was approved,  
21 because you approved it without a payment to charity -- you're going to hear a bit more  
22 about that -- and so I don't have to be neutral on that.

23 So that just explains what I will and won't be talking about today.

24 THE CHAIR: Yes.

25 MS ABRAM: The second thing I want to say, just by way of overarching point, is that,  
26 from my client's perspective, what really matters is that the settlement that has been

1 negotiated so carefully and approved by the Tribunal should be respected and not  
2 amended or undermined after the fact. So, the question of whether or not a payment  
3 to charity can be retrospectively added into a settlement that didn't have a payment to  
4 charity to begin with raised a really significant question of the Tribunal's vires.

5 THE CHAIR: No, I think that if you -- and you were party to these representations. If  
6 you tell the Tribunal, "We think that the take-up is going to be 10 per cent", and your  
7 side were there at the hearing, and the Tribunal approves the process, and then it  
8 comes down to £216,000, the Tribunal is perfectly entitled to say, "We agreed this on  
9 a sort of false basis". There's no way that we would think that is a proper settlement  
10 if you're going to say £216,000 goes to class members and the rest goes to lawyers.  
11 We would never have accepted that, I can assure you.

12 But we may not need to get there, because the important point that I want to resolve  
13 is this whole question of whether this £4 million or any part of it should come out of  
14 anything other than the non-ringfenced costs.

15 Because, look, the reality is we've looked at the figures. The figures for costs, fees  
16 and disbursements, even on the most severe pruning to the tree, they're above  
17 £10.2 million. There's no doubt about that. So whichever way you look at it, that's  
18 gone.

19 MS ABRAM: So, it may be that the Tribunal is giving an indication that if there's not  
20 to be a payment to charity, then there will be a payment of £10.2 million in lawyers'  
21 fees, funders' fees and so on.

22 THE CHAIR: That's the reality. When I approved the settlement, there was no doubt  
23 in my mind that that £10.2 million had gone. That was absolutely -- because if you just  
24 look at the lowest figures possible, it's still above £10.2. We had this argument about  
25 whether it should be -- what was it? -- £9.75 or £9 million or whatever the figure was  
26 earlier, and it came up to £10.2 afterwards.

1 But, yes.

2 MS ABRAM: May I show you those, sir, how that fits with the terms of the settlement  
3 that you actually approved and the judgment you actually gave?

4 THE CHAIR: Oh, I know what -- I'm very happy to be taken to that. Show it to me.

5 MS ABRAM: I'm very grateful.

6 So, if we could start with the settlement agreement. So, in bundle A, tab 9.

7 THE CHAIR: Let's have a look at that. Yes.

8 Yes.

9 MS ABRAM: Okay. So, if we start at page 225 of the bundle, clause 2.6.

10 So, this is the real crunch clause for the purpose of this issue today.

11 THE CHAIR: Yes.

12 MS ABRAM: To the extent that the sum of the notified damages sum -- and that is  
13 what's turned out to be the £216,000, so take-up by the class --

14 THE CHAIR: Yes.

15 MS ABRAM: -- and the non-ringfenced costs as determined by order of the  
16 Tribunal -- so that's the costs, fees and disbursements, and I'll show you where the  
17 agreement says that -- is lower than the damages sum, which is the £25 million total  
18 pot in principle, the parties agree that SSWT will retain the remainder of the damages  
19 sum.

20 So, the agreement that the parties reached and that the Tribunal approved was that  
21 we pay out what the class take up, we pay out the non-ringfenced costs --

22 THE CHAIR: Yes.

23 MS ABRAM: -- and we don't pay out anything else. We keep whatever's left.

24 THE CHAIR: Correct.

25 MS ABRAM: Let me show you what the non-ringfenced costs are capable of  
26 consisting of. That's at page 221 of the bundle, so a whole list of definitions.

1 So, just above the second hole-punch:

2 "Non-ringfenced costs means the additional payment to be made by SSWT to the CR  
3 in respect of his costs, fees and disbursements." [as read]

4 So those are the contractual purposes for which a payment of non-ringfenced costs  
5 can be made, and they're the only contractual purposes for which a payment of  
6 non-ringfenced costs can be ordered.

7 So, we pay the uptake by the class, we pay the cost, fees and disbursements, and I'm  
8 neutral on what the appropriate order as to those is, up to the £10.2 million threshold,  
9 and we don't pay anything else. That's the agreement that's been approved by the  
10 Tribunal.

11 Of course, the Tribunal understood that that was the agreement that it was approving.

12 THE CHAIR: That's what I said a few minutes ago.

13 MS ABRAM: Yes.

14 So that gives rise to a question as to whether the Tribunal has vires to change the  
15 order that it's made approving that agreement.

16 THE CHAIR: But who said I'm changing anything?

17 MS ABRAM: Well, sir, you've made an order, and I'll show you the order. It's at tab 8  
18 of the bundle. If you look at paragraph 1 at page 213, you've made an order:

19 "Pursuant to section 49A(5) [which is the collective settlements provision] ... the  
20 Revised Proposed Collective Settlement is approved in the terms of the settlement  
21 agreement between the Class Representative and SSWT ..."

22 That's been approved. There isn't an extant appeal against that order. That order is  
23 done and dusted. So, the question is: where does the power to change that order, to  
24 change the settlement terms, come from? Because there's nothing in the rules there  
25 that says that a Tribunal --

26 THE CHAIR: But what the proposal is, is that all the other parties in this room have

1 | agreed that, out of the costs, fees and disbursements, they are accepting a haircut  
2 | which is the equivalent of the sum that they've agreed to pay to the Access to Justice  
3 | Foundation. That's an undertaking they give. Now, I don't see how that affects you if,  
4 | at the end of the day, the costs, fees and disbursements sum is £10.2 million or more.  
5 | I fully understand the point you're making, that if, for example, I thought the costs, fees  
6 | and disbursements were, let's say, £2 million, you then say, "Well, it's £2 million; I get  
7 | the rest of it because it comes back to me". I'm not saying that's not right.  
8 | What they've agreed to do is, doing the decent thing, they've realised that the take-up  
9 | has been really low, and they're to be commended by the fact that they've all sat down  
10 | and agreed and said, "Look, we appreciate, out of all the money we could have got,  
11 | we agree that that £4 million, less the £216,000, goes to the Access to Justice  
12 | Foundation". Nothing wrong. They're to be commended for that.  
13 | I don't think you're trying to stop that, as I understand it, but you clearly would have an  
14 | interest if the question was -- if the costs, fees and disbursements figure was way  
15 | below the £10.2. I fully understand that point.  
16 | Now, for you, really, you've got a number of angles. You could say, actually, the costs,  
17 | fees and disbursements is way below £10.2 million, in which case you're saying, "Well,  
18 | I've got an interest here now, because if it's way below, I don't want any of that balance  
19 | to go to charity", in which case that's not a particularly constructive approach to take.  
20 | Or you may say, "Look, I recognise that it's above £10.2 million; we actually positively  
21 | agree that it's a great idea that money should go to the Access to Justice Foundation",  
22 | and you think that's fine and you go along with it. You know, there's a number of  
23 | options for you.  
24 | But the one point that I think that you may want to resist -- and that's what I was looking  
25 | for your help on -- is the concept that, as suggested by Woodsford, actually, £2 million  
26 | out of the amount that they've agreed should go to charity should come from another

1 source other than the £10.2 million.

2 MS ABRAM: Yes. So, I'll address that point, if I may, and then also address the  
3 question of whether there's any vires within the terms of the settlement agreement to  
4 force a payment to charity within the £10.2 million, because I've shown you what the  
5 clauses are there.

6 THE CHAIR: There may be a misunderstanding on my part, but who has said that  
7 someone's forcing a payment to charity out of the £10.2 million against your interest?  
8 Because I can see -- if, as I said, the costs, fees and disbursements was only  
9 £2 million or £3 million or £4 million, I can fully understand you saying, "Malek, you  
10 can't rewrite the order you've made in the settlement agreement". But no one is asking  
11 us to do that, as I understand. Unless I've missed out something, no one is asking me  
12 to rewrite it for that purpose. If anyone is, then put your hand up and I'll look at it. But  
13 the only query is the one raised by Woodsford, which is they're saying, "Actually, we  
14 think that £2 million of that figure shouldn't come out of the £10.2 million, it should  
15 come out of the other thing", which is probably the £9 million difference between the  
16 figures already paid and the £25 million.

17 But that's where I think we are, unless I've missed something.

18 MS ABRAM: So, sir, the new news for us today is the Tribunal's view that it does  
19 consider that the costs, fees and disbursements are properly in excess of the circa  
20 £2 million figure.

21 THE CHAIR: Definitely. There's no doubt about that, yes.

22 MS ABRAM: Because, of course, the Tribunal hadn't conducted an assessment of  
23 that before and has never expressed any view about that question, save for noting at  
24 the previous hearing that you thought the costs looked likely to be in that area.

25 THE CHAIR: But we've got the figures now.

26 MS ABRAM: I hear what the Tribunal says, and I'll take instructions in the light of that.



1 That's new news from our --

2 THE CHAIR: No, no, look, until we came in today, you didn't know where we're coming  
3 from on -- no one knew -- on a number of issues, and obviously every party will need  
4 to take instructions in the light of what's happened and what we've already indicated,  
5 and everyone is entitled to say, "Look, Malek, you've got it wrong, we don't agree with  
6 your preliminary view", and if that's right, then we can have an argument about those  
7 points that people are not happy with.

8 I know it's not easy for you because, you know, you're on your feet and the scene is  
9 changing, and you normally want to take instructions to see where you are. But do  
10 you think it would be helpful if you took instructions and we have a break for it?

11 MS ABRAM: Let me address the £2 million point, because that is completely clear as  
12 a matter of law, the Woodsford £2 million point.

13 THE CHAIR: What I wanted to do -- and I thought I made it clear -- was to deal with  
14 the £2 million point and then we see where we are, because I think the £2 million point  
15 is something that is, at least from your point of view, fairly fundamental, and I wanted  
16 to at least get that out of the way before we go to all the next stages.

17 MS ABRAM: So, I've shown you the settlement agreement, and it's clear from that  
18 that there is no contractual basis for an extra £2 million beyond the £10.2 to be sought  
19 from SSWT. It's quite telling that Woodsford, in their own skeleton argument, whilst  
20 putting forward this proposal, say that they're not sure what the jurisdiction of the  
21 Tribunal would be to make this order.

22 THE CHAIR: Yes.

23 MS ABRAM: Clearly the Tribunal has got no jurisdiction. The only party that has  
24 suggested a jurisdiction -- and I should deal with it out of fairness to the AtJF -- is the  
25 AtJF, who said: well, the Tribunal's got the power to vary or revoke an order at any  
26 time after it's been made.

1 Now, we were slightly surprised, frankly, that the AtJF hadn't put in any reference to  
2 the line of authority on the scope of that provision in the CPR, which is equivalent.  
3 You may be familiar already with the authority, but I've put the most recent  
4 Court of Appeal case into the bundle, sir. This is the only way in which the Tribunal's  
5 order approving the settlement agreement could be varied after the fact in the absence  
6 of an extant appeal, and that would be relying on that rule, rule 115, that's mentioned  
7 by the AtJF.

8 I can show you the authority, if that's useful; it's Vodafone v IPCom most recently.

9 THE CHAIR: Well, look, judges don't like to decide issues unless they have to, and  
10 we've got enough issues to decide today. We could debate it, and it will take an hour  
11 or so, and then I'd have to give a ruling on it. I'm not sure if that's the best use of  
12 today's time, given the mass of people here, and god only knows how much it is costing  
13 per hour in lawyers' fees, et cetera, to do the hearing.

14 It's an interesting point, and I've got some views on it, but I think it's probably better  
15 that I don't express those views today. But, as I said, this is a pretty unusual situation,  
16 given that the settlement was approved on the basis of representations that the  
17 take-up figure was going to be significant.

18 I don't think we need to worry about that today. I think the key thing is to sort out  
19 whether or not this idea of £2 million is to come up, because that really does have an  
20 impact on your clients.

21 MS ABRAM: Well, the reason I raised that, sir, is because that's the only jurisdictional  
22 basis that's been posited for amending the Tribunal's order.

23 THE CHAIR: Well, we need to hear what they've got to say about that.

24 MS ABRAM: Woodsford don't stand behind that point. So the position is that the  
25 Tribunal has got nothing else before it as to how it might derive the vires to upset the  
26 collective settlement approval order and the collective settlement agreement without

1 the consent of the parties, just setting aside this question of what might happen within  
2 the £10.2 million, and if that's the case, you just can't make that order, whether or not  
3 you might like to make that order. The only jurisdictional basis that's been suggested  
4 is one that you've indicated you're not very keen to be addressed on in the first  
5 instance and Woodsford don't stand behind.

6 THE CHAIR: I was just going to hear whether you object to the £2 million or not.

7 MS ABRAM: We do.

8 THE CHAIR: Clearly you do, and then it's for Woodsford to explain how they put their  
9 case and then it's for you to reply, because I think it's important for you to know how  
10 they put it, because it wasn't clear to me how they put it. It's probably unfair to you to  
11 expect you to go through in detail until you know what the missile is.

12 So, let's hear what Woodsford's position is and then we'll come back to you.

13 Thank you very much.

14 Right, so who's ...

15  
16 Submissions by MR MALLALIEU, KC

17 MR MALLALIEU: Sir, thank you.

18 Before turning directly to the point that you've raised with Ms Abram and the parties,  
19 may I just make a couple of short points at the start.

20 First, and I appreciate that there are a lot of names and a lot of parties, and it's very  
21 convenient for us all to use shorthand, but can I be absolutely clear I represent not just  
22 Woodsford, but also the ATE insurers.

23 THE CHAIR: The ATE insurers as well, yes.

24 MR MALLALIEU: I think that is important.

25 The second point, sir, if I may just take the Tribunal's time very briefly, is to make the  
26 point that when we come to the issues later between myself and Mr Smiley for

1 Charles Lyndon, the point we do make is that there is only one stakeholder here that  
2 is taking a different position from the rest of the stakeholders, and that is  
3 Charles Lyndon. There is only one stakeholder that is advocating for a different  
4 approach to that which the parties themselves have agreed.

5 We, for Woodsford and the ATE insurers, are putting the position very forcefully,  
6 I hope, in relation to the position in terms of the priorities agreement, but no other  
7 stakeholder advocates a positive position of the type taken by Charles Lyndon, and I'll  
8 come back to that.

9 THE CHAIR: That's not surprising, for pretty obvious reasons.

10 MR MALLALIEU: Well, there may be reasons for some and for others, and  
11 I appreciate that some are in a difficult position, but it is a point I'll come back to. But,  
12 for present purposes, I just wanted to emphasise the point that I represent not just  
13 Woodsford, but also the ATE insurers.

14 So may I then come to the issue of the £2 million. We don't want to waste time.

15 THE CHAIR: Yes, certainly. The way I read it, it was just a suggestion, and you  
16 weren't pushing it, let's say, too hard, but --

17 MR MALLALIEU: Well, I'm slightly riding two horses, as Ms Abram has helpfully  
18 pointed out, which is that, as funders and insurers, we have some concerns ourselves  
19 as to the Tribunal's jurisdiction to revisit a settlement once there has been a settlement  
20 approval order. At the same time, to achieve the position we promote, we would have  
21 to persuade the Tribunal that it has that jurisdiction and it should exercise it in these  
22 circumstances.

23 I'm grateful for the way the Tribunal put our position. We think, in the circumstances,  
24 in light of the distribution that's been achieved, the proposal we make is a reasonable  
25 one, but we've heard what the Tribunal has said this morning, and if the Tribunal either  
26 has concerns about its jurisdiction or considers that, even if it had it, it wouldn't be

1 minded to exercise it in the circumstances, I don't intend to waste the Tribunal's time  
2 any further.

3 THE CHAIR: Okay. You can sit down. That's fine.

4 (11.21 am)

5  
6 Ruling (submitted to the Tribunal for approval)

7 (11.24 am)

8 THE CHAIR: So that's the end of the ruling. It will be reflected in the written ruling  
9 when that comes in due course.

10 We now have this issue of: what do we do as between the lawyers and the funders?  
11 That's the next big issue that's going to have to be resolved and we're going to  
12 probably have to look at some figures, because once you reach the conclusion that  
13 the costs, fees and disbursements is going to be, on any basis, more than  
14 £10.2 million, the only real remaining issue is how they are going to be allocated  
15 between the two.

16 We've already indicated that we understand what the positions are of the relevant  
17 parties, but we do feel, if possible, the funders and the lawyers should resolve this, if  
18 they can. If they think there's no prospect of resolving it between themselves,  
19 obviously we'll have to look at it and rule on it, but it's not great that this is now another  
20 case after Merricks where you've got a dispute, effectively, with funders, lawyers and  
21 the class representative. The class representative is sensible in trying to keep out of  
22 this bear fight (inaudible - audio feed interrupted).

23 We'll take our break now and we'll come back, let's say, at 11.45, and we'll see whether  
24 the class representative and the funders can think if there's a realistic possibility of  
25 resolving it or if we're asked to rule on it, in which case we will rule on it. I don't mind  
26 ruling on things, but I am concerned about the impact on the collective settlement

1 regime when we have these types of disputes.

2 I do fully appreciate the role of the funders, of course I do, and I've said that on  
3 a number of occasions. But we have also got to think: we do need (inaudible), we  
4 need funders, we do need lawyers who can take cases on. If they find that they're the  
5 ones who get a big haircut, then (inaudible - audio feed interrupted).

6 We will rise until 11.45 and let the parties think about where they are but, as I said,  
7 very happy to give rulings on anything. That's our job.

8 Thank you.

9 (11.28 am)

10 (A short break)

11 (11.46 am)

12 MR MALLALIEU: We're all slightly looking at each other. I think I'll probably take the  
13 lead --

14 THE CHAIR: You take the lead.

15 MR MALLALIEU: -- just for the moment, before passing over to any others.

16 THE CHAIR: That's fine, thank you.

17 MR MALLALIEU: Sir, thank you for the time during the adjournment.

18 Just two short points. I don't want to descend into the argument at this stage, because  
19 I'm sure we will come to that, which probably presages what I'm about to say by  
20 indicating that there is going to be an argument --

21 THE CHAIR: Yes, that's fine.

22 MR MALLALIEU: -- and an issue for you to decide on, sir.

23 The short point is, even if it was otherwise considered to be the correct approach in  
24 principle, and we are all in favour generally of parties doing whatever they can to  
25 resolve their disputes, as a matter of practicality, given where we are today, it simply  
26 is not going to be practical, given the number of stakeholders involved, the various

1 interests, to reach some agreement in short order to try and avoid the need for the  
2 Tribunal to deal with the issue.

3 We are, of course, not the only stakeholders in this, and I say that representing both  
4 Woodsford and the ATE insurers. Any suggestion would have to be considered in  
5 terms of its implication for all other stakeholders.

6 But we have a more fundamental point, which I will come to, which is that we say  
7 a departure from the priorities agreement in this case is itself something which would  
8 be the wrong approach in principle and would not be helpful to this jurisdiction.

9 So, for those short reasons, without descending into the detail of the argument we will  
10 come to, sir, unless anybody else has any reason to say otherwise, we are going to  
11 have to proceed to deal with that issue.

12 THE CHAIR: That's absolutely fine. Okay.

13 MR MOSER: I'm not planning to say anything for the time being, save this: that there  
14 is a certain amount of confidential material in the bundles, so if at some stage we do  
15 come to that, then there'll have to be some thought as to whether it's necessary to  
16 somehow go into camera.

17 THE CHAIR: Yes. People can say when they think that's being reached, but given  
18 that people are actually asking for money to be paid out, it's going to be hard to say  
19 the amounts being claimed are confidential or some sort of state secret that's going to  
20 make a problem for anyone if those figures are out. But we'll see. If someone says,  
21 "Look, I've got a good reason why we want you to sit in private", then we'll deal with  
22 that as and when.

23 MR MOSER: Indeed. On the whole, I think I'm right in saying the confidentiality is  
24 that of the stakeholders here represented, not so much of the class representative.  
25 So, again --

26 THE CHAIR: I agree. I don't think your side is really the one that's sort of raising this

1 as a possible point.

2 MR MOSER: No.

3 THE CHAIR: But everyone must realise that the Tribunal will not sit in private unless  
4 it's absolutely necessary in the interests of justice, and that quite often, if there are  
5 things which are sensitive, you do that by referring the Tribunal to the relevant passage  
6 in the evidence, without necessarily reading out the passages, and that avoids the  
7 problem.

8 MR MOSER: Exactly, sir.

9 THE CHAIR: Thank you very much.

10 Does anyone else want to say anything at this stage?

11 Okay. Let's hear from the lawyers.

12  
13 Submissions by MR SMILEY

14 MR SMILEY: I'm grateful, sir, and I should make clear I'm standing in for Mr Bacon,  
15 who is floating on the Red Sea as we speak.

16 THE CHAIR: Hopefully he's the right way up, yes.

17 MR SMILEY: I think we all share that hope, sir.

18 I rely, obviously, on his skeleton argument and will be supplementing that with oral  
19 submissions.

20 In terms of the confidentiality point, there are some areas of the evidence and of the  
21 submissions which are confidential in a way that is particularly sensitive in the light of  
22 the fact that there's the ongoing trains proceedings, and so Stagecoach --

23 THE CHAIR: Yes. You'll identify that as we go along.

24 MR SMILEY: Exactly. But what I intended to do in terms of structure was start with  
25 some overarching points, then deal with, as I understand it, a jurisdictional argument  
26 that is being raised by Woodsford and the ATE insurers. None of that should trespass



1 on confidential matters. But then when we get into the application of the principles to  
2 the facts of this case, there may be a number of areas where I'll either -- it may be  
3 more efficient if we do sit in private, but when we come to that, I will make the  
4 appropriate submissions.

5 THE CHAIR: That's absolutely fine.

6 MR SMILEY: So, starting with the overarching points.

7 Charles Lyndon is here making these submissions, but I should engage with a point  
8 made by Mr Mallalieu as to the lack of positive submissions in either direction by the  
9 other lawyer stakeholders. It should not be adopted, as it seems to be by Woodsford,  
10 as some kind of signal that those other lawyers disagree with the submissions that  
11 Charles Lyndon is making, and the submissions that Charles Lyndon is making would  
12 be to the benefit of those other lawyers.

13 As the Tribunal has observed, there are other reasons why those other parties are  
14 formally neutral. That shouldn't be taken as positively for Woodsford or positively for  
15 Charles Lyndon. They are neutral.

16 THE CHAIR: Let's identify, who is neutral? There is Hausfeld.

17 MR SMILEY: And there's counsel.

18 THE CHAIR: Yes.

19 MR SMILEY: So --

20 THE CHAIR: But they'll both benefit from the argument.

21 MR SMILEY: Indeed. The argument that we make is on behalf of them, and our  
22 proposal, as I'll come to, is one that would benefit them. But the submissions that  
23 I make are largely by reference to Charles Lyndon because it is Charles Lyndon that  
24 is putting forward the argument.

25 THE CHAIR: Yes.

26 MR SMILEY: In respect of Charles Lyndon's position, the overarching, key thing to

1 bear in mind is that Charles Lyndon conceived of and drove these proceedings forward  
2 from 2016, resulting in a settlement sum which was 64 per cent on the class  
3 representative's estimate before interest, and 89 to 140 per cent on Stagecoach's  
4 estimates as to the damages that would have been recovered.

5 Of course, the outcome in terms of distribution is disappointing, but, as the Tribunal  
6 has already observed, there's no criticism of Epiq or Charles Lyndon in that respect,  
7 and I'll come to the efforts that were made in that regard.

8 THE CHAIR: Well, let's get it right. There's no criticism about what's happened on  
9 the distribution process. As I made clear in the ruling and subsequent rulings, one  
10 would normally expect empirical evidence to be obtained as to the likely take-up, and  
11 I said I would have insisted upon that were it not for the fact that you were just about  
12 to start a trial and that I thought that this was a case whereby it wasn't an  
13 overwhelming case on the merits. If I thought there was a stronger case on the merits,  
14 I may have rejected it there and then, but I didn't because I thought this case was a  
15 follow-on, novel proposition, and so it wasn't one where I thought: gosh, it is  
16 overwhelmingly in favour of your side; I thought this is one that could easily go either  
17 way, and I made that clear at the time.

18 So when you say there's no criticism, there's no criticism about the process, but I have  
19 made it clear that there should have been more research on this distribution situation  
20 than was actually done, and we ended up in the unsatisfactory circumstance where  
21 the parties pointed to us the American figures on a particular report which we didn't  
22 think was particularly helpful, given that we thought that the level of take-up was going  
23 to be substantially less than the 10 per cent indicated.

24 But I'm going to be honest, I did not think that the level was going to be as low as  
25 £216,000. I thought it was going to be low, but I did not think it was going to be that  
26 low. I do want to put on the record that that was an unsatisfactory aspect of this, but

1 I understand why it was done, let's say, in a bit of a hurry, because you had the trial  
2 coming up.

3 MR SMILEY: I'm grateful, and we fully take that on board. No one is as disappointed,  
4 beyond Mr Gutmann, than Charles Lyndon, as to the distribution.

5 THE CHAIR: Yes.

6 MR SMILEY: In terms of what Charles Lyndon has had to put in, Charles Lyndon has  
7 self-funded since March 2021. It self-funded before the LFA and then it self-funded  
8 post-LFA since March 2021, a huge amount of time, even when promised external  
9 finance, which failed to materialise, and it did so ensuring that the class was always  
10 represented and that their interests were progressed.

11 Yet on Woodsford and the ATE's proposed distribution, Charles Lyndon would be left  
12 with essentially just over the sums already realised, just over £500,000, which would  
13 constitute a loss of 90 per cent, and I'll get into the figures in a bit more detail. That's  
14 a conservative estimate based on their deferred fees only. The sums would be more  
15 if calculated in a fairer way, frankly, which would include success fees.

16 It is only fair, we say, that the lawyers recover their costs, and we fully endorse the  
17 comments made by the Chair as to the three-legged stool, which is the basis for the  
18 competition regime.

19 We say -- final overarching point -- that our position is consistent, contrary to the  
20 protestations of Woodsford, with the contractual documents, which expressly refer to  
21 the order of the court and, therefore, the power of the court; the Tribunal here.  
22 Secondly, it's consistent with the principles of numerous authorities in this developing  
23 sphere.

24 So, what I thought I'd do next would be to take the Tribunal through not all, but some  
25 of the authorities where this jurisdictional issue has been dealt with.

26 We do know at the outset that Woodsford's recent jurisdictional challenges, as I read

1 the papers, is a flip-flop; that they had not previously said that the Tribunal didn't have  
2 the power to engage on distribution and, indeed, that wasn't the basis on which they  
3 intervened. So, we are somewhat surprised at the jurisdictional challenges being  
4 raised but, having been raised, we will address it.

5 THE CHAIR: The main point does seem to be you've agreed an arrangement, and  
6 they say you're stuck with it, and they say even if, at the end of the day, all the costs  
7 that have been incurred were reasonable costs, you know, you're holding the baby  
8 because that's what you've agreed. That's essentially what their position is, because  
9 I don't think -- I've looked at all the figures and stuff, and this is not a case where I say:  
10 I've looked at those figures, they look unreasonable, the rates look unreasonable, we  
11 need to get into the nitty-gritty or we need to get someone to look at them to determine  
12 what the reasonable rates are.

13 I appreciate that the budget was exceeded relatively early on, but we know why they  
14 were exceeded. You've explained that in detail. The rates are consistent with the  
15 rates that I would order anyway. I see much higher rates, as you probably know. This  
16 isn't a case where your solicitors are claiming unreasonable rates.

17 So there's no doubt in my mind that, unless, obviously, Woodsford wants to point to  
18 anything that appears to them to be unreasonable, the actual costs incurred are  
19 reasonable costs, and they could easily have been more than that, and also that the  
20 success fee does seem to be reasonable in all the circumstances, that you have got  
21 this settlement, the settlement in money terms is a success, and we are keen,  
22 obviously, that lawyers are not deterred from doing this.

23 We're also keen that the funders get a reasonable rate of return, and these funding  
24 agreements often have projected rates of return which are based on, let's say,  
25 optimistic levels of recovery, but then, of course, you need to see what is the actual  
26 recovery at the end of the day to determine what the funders are going to get, and no

1 one seems to dispute -- but there's a bit of a caveat on that -- that we have the power  
2 to determine what is the rate of return in any particular case.

3 MR SMILEY: That was just the point I was going to come to.

4 THE CHAIR: But what I wanted to flag was that we've been discussing amongst  
5 ourselves the actual figures and whether or not your figures are reasonable or  
6 unreasonable, and the view we've got up until now is that the fees are reasonably  
7 incurred. This is not a case that we've seen in other cases where we've looked at the  
8 figures and said, "Gosh, we think they're way beyond what they should be, they're  
9 outside a reasonable range". These fees seem to be relatively -- well, they are not  
10 high, let's put it that way. We're not talking about someone who's trying to get  
11 a massive profit out of this case.

12 MR SMILEY: I'm very grateful for the indication, and my understanding is that the  
13 challenge is absolutely not --

14 THE CHAIR: I don't think it is, no.

15 MR SMILEY: -- on the basis that the solicitors' fees were unreasonable. But as I do  
16 understand it, there is a challenge to the power of the Tribunal to engage with the  
17 distribution.

18 THE CHAIR: That's the big issue. The first thing they say is you look at what the  
19 contract is -- and they have their interpretation, you have your interpretation -- and  
20 then they say, as a Tribunal, we don't have the power to, in effect, rewrite the  
21 contractual bargain between them and you. You will say (a) that, as a matter of  
22 contract, they're wrong because of the flexibility in the agreement. That's your sort of  
23 starting point. And then you'll say: well, look, the Tribunal is not bound by what is in  
24 the agreements between us, because what we're trying to do is to figure out what is  
25 a reasonable, fair and proportionate amount to be paid to each of the stakeholders.

26 But then they will come around and say: well, look, even if, as a Tribunal, you say that

1 it is a reasonable amount for you to be paid, whatever the figure is going to be -- and  
2 clearly the view we've taken so far is the amounts you've claimed is a reasonable  
3 amount -- that doesn't matter because, as a matter of contract, it comes back to them  
4 because of the arrangements that you've agreed.

5 So, a lot of it is circular. We do need to break it down and come to hopefully some  
6 sort of outcome -- I'm not sure whether we'll do it today, but we might be able to do it  
7 today -- as to what the answer is.

8 MR SMILEY: I'm grateful, sir, and you have entirely predicted all of the submissions  
9 that my learned friend and I will be making, but I hope to put a bit more meat on those  
10 bones.

11 THE CHAIR: No, no, I want some detailed submissions on it. But with these hearings,  
12 everyone's had their advocacy in the sense that you put the written submissions in,  
13 you've got the evidence and all that. We start from there before -- it's different in trials,  
14 but these hearings, you're there. But there are points which we need to look at in  
15 detail, and the points between you and Woodsford, despite the time that has already  
16 been allocated was relatively limited for Woodsford, we're not going to impose those  
17 time limits because we do want to get the right answer on those, and that should be  
18 the focus, probably, for the rest of today.

19 Because everything else seems to be okay. It's in place. I don't think we've got any  
20 more disputes or whatever between the class representative or SSWT on anything.  
21 That's all been clarified. All that's left is the dispute between you two, and we should  
22 have enough time today to hear whatever you want to say, and if you've got more to  
23 say, we can finish that tomorrow morning. But let's get into the detail.

24 MR SMILEY: I'm grateful.

25 So, in terms of the contractual position, let's look first at the LFA, which is at A7, and  
26 the relevant clause is 3.1.8 on page 183.

1 We're within the class representative's principal obligations, and 3.1.8 requires the  
2 class representative to pay the funder's fee, save that the class representative's  
3 obligation to pay the funder's fee is reduced to the extent of the amount which the CAT  
4 orders and/or approves.

5 So even within the LFA itself, there is provision for the funder's fee itself to be reduced.  
6 There are other provisions within the LFA. I needn't take the Tribunal to them, but  
7 3.1.10, 9.1 and 13.1 have similar provisions for the Tribunal's intervention.

8 One point that my learned friend's clients make is: well, there needs to be contractual  
9 certainty, and these are sophisticated parties. But what's sauce for the goose is sauce  
10 for the gander. The sophisticated party that is Woodsford agreed contractually that  
11 the Tribunal would have the power to intervene, and that is something that we solidly  
12 rely on.

13 Then turning to the deed of priorities, the revised deed is at page 483 of bundle A,  
14 tab 31. Clause 3 says:

15 "It is agreed that, subject to any Order of the Court to the contrary ..." [as read]  
16 Et cetera, et cetera, et cetera.

17 So before one even gets into the waterfall on which my learned friend relies, there is  
18 the express power, granted by the sophisticated parties, with all the certainty or  
19 uncertainty that that provides, that the Tribunal can intervene.

20 So, it is not, as is said against us, a question of Charles Lyndon or the lawyers seeking  
21 to rewrite contracts; we are seeking to enforce the relevant parts of those contracts,  
22 agreed by Woodsford.

23 Turning, then, to the authorities.

24 The story starts with Kent v Apple, which is tab 6 of the authorities bundle.

25 THE CHAIR: Let me get that.

26 MR SMILEY: The bundle itself is not in chronological order, but I'm intending to go

1 through the authorities chronologically. (Pause)

2 THE CHAIR: Yes.

3 MR SMILEY: Within this decision of the Tribunal, it's at paragraph 38(2), which is  
4 within the decision on permission to appeal, says:

5 "The Tribunal has the means to control both the costs and direction of the case through  
6 case management and will have ample opportunity to ensure that any fee payable to  
7 the funder is proportionate and appropriate." [as read]

8 Next in time, tab 5 on page 174, this is the decision in the Gormsen v Meta case.

9 Paragraph 35, but starting at the bottom of the paragraph, where a point was made by

10 Mr Bacon, KC, for the PCR, with which the Tribunal in substance agrees:

11 "... the return to the funder, and questions of costs generally, are controlled by the  
12 Tribunal on settlement or judgment, and the Tribunal will be astute to ensure that a  
13 system intended to further access to justice does exactly that, and does not become  
14 a 'cash cow' either for lawyers or for funders."

15 Next, there is the decision in Gutmann v Apple, which is tab 9 of the bundle, and first  
16 paragraph 12 on page 243:

17 "Finally, and importantly, the Tribunal has a supervisory role in determining how  
18 proceeds are to be distributed at the end of the proceedings. This means the Tribunal  
19 can, at the end of proceedings, revisit whether it is prepared to endorse the payment  
20 of the agreed sums to the Funder. At this stage it may have better visibility as to the  
21 proportionality of the Funder's fee in relation to the damages awarded and the  
22 complexity of the proceedings and can, if necessary, require further evidence ..."

23 Then still within this judgment, on page 253, paragraph 38. This is under the heading:

24 "Are the mechanisms in the Gutmann LFA inappropriate, is the Funder's Return  
25 excessive and disproportionate, and does the LFA create a risk of conflicts of interest  
26 between the Funder and Mr Gutmann?"



1 At paragraph 38, the Tribunal says:

2 "The priorities relating to Table 1 may be relevant in the event that there are insufficient  
3 unclaimed damages to meet the Funder's fee. This could arise in quite different  
4 circumstances. For example, in one case it might be that the litigation has been  
5 relatively unsuccessful and that the total award of damages is small relative to the fee  
6 being charged by the Funder. In these circumstances the Tribunal may well refuse to  
7 give absolute priority to the Funder."

8 So specifically dealing with priorities:

9 "But in another case there may be a relatively large award of damages in  
10 circumstances where an efficient method has been derived for making payments to  
11 the class such that unclaimed damages are relatively small. If this were the position,  
12 there may be good reason for giving priority to the Funder to claim all or part of his fee  
13 prior to distribution to the class."

14 Then a further example is given.

15 So, this is not a situation which the tribunals haven't grappled with before, and  
16 priorities, funder's fees, are well within the jurisdiction of the Tribunal.

17 Moving on to the decision of this Tribunal on the settlement approval, that's at tab 4 of  
18 the authorities bundle, and at paragraph 53 on page 133, I remind the Tribunal of its  
19 own words.

20 THE CHAIR: Just give me one second. (Pause)

21 Yes. Which paragraph?

22 MR SMILEY: 53 on page 133.

23 There, the Tribunal says:

24 "... so the Tribunal is in the best possible position to ensure that any settlements and  
25 distribution plans are fair and reasonable for the class members. Not just fair and  
26 reasonable for the class representatives themselves and for the defendants, but we

1 will not ignore the interests of others such as the lawyers, the experts and the funders,  
2 because we have an interest not just in this case but in future cases. If the lawyers  
3 and the funders are not going to get a return in this case, then they may be deterred  
4 from acting in further cases."

5 Which is very similar to the comments made by the Tribunal at the outset of this  
6 hearing.

7 THE CHAIR: Well, probably I said it because I already said it before. At least I'm  
8 consistent with what we said last time.

9 MR SMILEY: No surprise at the consistency there, but we do endorse those words,  
10 both as said at the beginning of today and previously.

11 I apologise for the thoroughness of going through these authorities, but it is to meet a  
12 point that has been raised on the other side.

13 THE CHAIR: When there's an important issue that needs to be resolved, I'm quite  
14 happy to take things slowly, and we've got plenty of time, so don't worry. Whatever  
15 authority you want to show me -- and it's the same for Woodsford -- show it to me, and  
16 then at the end of the day, hopefully we'll come to a resolution.

17 So just keep going. That's fine.

18 MR SMILEY: I'll keep plugging on then.

19 Next in time is the CAT's decision in the McLaren case. That's at tab 15 of the bundle.

20 THE CHAIR: Yes.

21 MR SMILEY: We start in paragraph 17 on page 462.

22 THE CHAIR: But let me just get this, my notes.

23 MR SMILEY: If the Tribunal could just read to itself --

24 THE CHAIR: Give me the paragraph number.

25 MR SMILEY: Paragraph 17 and the judgment that's quoted in Le Patourel. (Pause)

26 THE CHAIR: Yes.

1 MR SMILEY: In that decision, the Tribunal not only -- and there are subsequent  
2 paragraphs where very similar points are made, so I won't labour those.

3 THE CHAIR: You mean we were repetitive, were we?

4 MR SMILEY: Not at all; rather that the point is sufficiently made for present purposes  
5 in the paragraph I've taken you to.

6 THE CHAIR: Okay.

7 MR SMILEY: But what the Tribunal then went on to do was consider jurisdiction, and  
8 it did so by reference to various rules, and ultimately decided that, in the circumstances  
9 of that case, where there'd already been a CSAO, the jurisdiction, the power, lay in  
10 rule 53.

11 We can see that at page 477. You might want to start on page 476, which is the  
12 heading, "Rule 53(2)(n)", and paragraph 51.

13 THE CHAIR: So which paragraph do you want me to look at?

14 MR SMILEY: So, paragraph 51 is where this section begins, and there the Tribunal  
15 quotes from rule 53 of the rules, which at 53(2)(n) says the Tribunal may give  
16 directions:

17 "(n) for the award of costs or expenses, including any allowances payable to persons  
18 in connection with their attendance before the Tribunal."

19 The Tribunal questions, at paragraph 52, whether the phrase "award of costs or  
20 expenses" includes the payment of stakeholder entitlements, including payments to  
21 funders, and concludes that it does.

22 The next in time and most authoritative, of course, is the Court of Appeal's decision in  
23 Gutmann v Apple. That's at tab 8 of the bundle. There's a fair amount of that  
24 judgment that we rely on. Probably for present purposes, I'll take the Tribunal to the  
25 relevant paragraphs, rather than reading them all out.

26 Starting on page 229 of the bundle --

1 THE CHAIR: Yes.

2 MR SMILEY: -- which is the beginning of the discussion on the issue before the court  
3 there, and at paragraph 78, in the middle of the paragraph, it says, by reference to  
4 section 47C(3) of the Act:

5 "It does not prescribe what the CR does with the damages once received and  
6 accordingly it would be open to him to pay the funder and the lawyers, subject always  
7 to the control of the CAT under its supervisory jurisdiction."

8 So, there, recognition that the amount paid to the funder and the lawyers is subject  
9 always to the control of the CAT under its supervisory jurisdiction.

10 "Sub-section (3)(b) contemplates that the CAT will make an order for a proportion of  
11 the damages to be paid on behalf of the class to such third party as the CAT thinks fit.

12 These are wide unrestricted powers given to the CAT which can clearly include  
13 payment to the funder or the lawyers of a proportion of the damages in priority to the  
14 class."

15 One of the key arguments that was raised in that decision was the extent to which  
16 there was a different approach to be taken on settlement or following a judgment, and  
17 what the court determined was there should not be a difference of approach; the same  
18 approach should be taken in respect of both.

19 Then paragraph 81, over the page:

20 "There is nothing surprising or unusual about the CAT ordering payment to funders or  
21 lawyers from the award in priority to the class. Subsection (3) is predicated on the  
22 CAT having entered judgment in favour of the class so that there has been a  
23 successful outcome to the proceedings, which have only been possible because the  
24 funder was prepared to fund them on the terms of the LFA, which entitles the funder  
25 to its return in the event of a successful outcome, subject always to the amount that it  
26 recovers by way of return being approved by the CAT."

1 Then a submission by Lord Wolfson is engaged with.

2 "The Government response was not contemplating that funders and lawyers would  
3 not be entitled to make an appropriate recovery of costs, fees and disbursements  
4 incurred in collective proceedings from a damages award where the commercial reality  
5 is that those proceedings could not have been pursued and brought to a successful  
6 conclusion without the benefit of litigation funding. The supervisory jurisdiction of the  
7 CAT will ensure that what is recovered is not excessive."

8 But what we emphasise there is the reference not just to funders, but to lawyers.

9 Then page 235, paragraph 93. This is where the Court of Appeal was engaging with  
10 the point I made earlier as to the incoherence of a different approach where it is  
11 dealing with damages in a judgment and damages in a settlement. The second  
12 sentence of paragraph 93:

13 "In my judgment, the supposed distinction lacked any coherence. In both the case of  
14 a settlement and an award by the CAT at the end of collective proceedings, what the  
15 CR receives is 'damages'. As the CAT said in the first sentence of [21] of the McLaren  
16 judgment quoted at [89] above: 'In cases where there is a successful outcome,  
17 whether by way of settlement or judgment against defendants, it is for the Tribunal to  
18 determine how any damages are to be dealt with in terms of distribution to class  
19 members, and payments of costs and expenses, including any return for funders.'" ...

20 94. I agree with Mr Bacon KC [who seems to have the agreement of the court on  
21 repeated occasions] that the idea of two lines of distinct jurisprudence, one for awards  
22 by the CAT and one for settlements is unthinkable and unprincipled."

23 Then paragraph 97, which is over the page, the overall conclusion of the court:

24 "... I have concluded that the CAT does have jurisdiction to order that the funder's fee  
25 or return can be paid out of the damages awarded to the class in priority to the class.

26 Whether or not such an order should be made would be a matter for the CAT in the

1 exercise of its supervisory jurisdiction ..."

2 Paragraph 99:

3 "... the arrangement made in the LFA was importantly always subject to the  
4 supervisory jurisdiction of the CAT to determine what is the appropriate order to make."

5 So just as in our case, in that case, the contracts recognised the supervisory  
6 jurisdiction. Any issue as to the reasonableness of the funder's return is to be  
7 addressed at the time of distribution.

8 Then penultimate decision, that of the CAT in Merricks, which is at tab 17 of the  
9 bundle.

10 THE CHAIR: Let me just understand something.

11 Let's say we say that the funder's return should be two, okay? Times two. I know your  
12 figure is it's 2.49, but we'll hear Woodsford as to how they calculate the rate of return  
13 that's already been done so far. And we say: well, we think a reasonable rate of return  
14 is that.

15 We also say: we think, having looked at all your costs -- and that includes your  
16 disbursements in the form of counsel and the costs of Hausfeld -- are reasonable, and  
17 we say you should be paid that sum out of the non-ringfenced damages sum.

18 Is there an argument that, yes, we're entitled to make that order and we say the rate  
19 of return for the funders should be that or whatever; is there a risk that the funder will  
20 then say: well, because of a matter of contract between you and us, we will take part  
21 of that to give us a greater rate of return than the Tribunal has already indicated is the  
22 appropriate rate of return? I don't know, I'm just trying to think what --

23 MR SMILEY: If that argument was raised, it would be a bad one because of the  
24 contractual provision for the order of the Tribunal. So as soon as the Tribunal makes  
25 an order saying the appropriate distribution is X, the parties are held to that because  
26 they've contractually provided for that.

1 THE CHAIR: Okay. I just don't want there to be another battle afterwards, depending  
2 on what we rule.

3 MR SMILEY: Well, certainly --

4 THE CHAIR: If at the end of the day we say that we think the appropriate funder's  
5 return is, let's say, X, and we come up with a figure as to what that should be, and we  
6 also say that your fees are reasonably incurred and should be paid and that all fits  
7 within the maths, we're not going to have a problem.

8 MR SMILEY: Well, I'll wait to hear what Mr Mallalieu says, because ultimately it's  
9 a matter for Woodsford, but our position is that what we are relying on is both the  
10 jurisdiction provided by the authorities that I've cited and the provision in the contracts  
11 themselves.

12 THE CHAIR: Everyone knows the funder's return is subject to whatever the Tribunal  
13 decides is the reasonable rate of return for that particular case, and we can only  
14 determine that at this stage, once we know what's happened and what's in the pot. Of  
15 course, funders tend to have very large rates of return in their agreements in case you  
16 have a sort of really great outcome, for example, you get a judgment, the judgment is  
17 for a large sum of money, you don't have a huge amount of money relative to that  
18 being claimed by the class members, and there's a big fund to be distributed, and you  
19 can see in those types of case that the funder will say: look, we should get a high rate  
20 of return because this is one of those cases where there's plenty of money in the kitty  
21 to play with.

22 But I just want to make sure we're not missing a trick and it's just going to come and  
23 be taken out, because if we decide that we think, yes, the funder's rate of return should  
24 be this on the facts of this particular case, and then we also decide that the amounts  
25 of your costs and disbursements is reasonable, as we think they are, there's not going  
26 to be some sort of other fight between you under some sort of provision in the

1 | arrangements between you that should go to counsel or arbitration or perhaps go to  
2 | court.

3 | MR SMILEY: One of the issues raised by Woodsford is the use of a contractual  
4 | dispute mechanism. I will come to that.

5 | THE CHAIR: Yes. I think we're going to have to see that, because the last thing  
6 | anyone wants is for this to be the first stage of a much longer battle between the  
7 | lawyers and the funders. I don't think the funders want it. I'm sure the lawyers don't  
8 | want it.

9 | MR SMILEY: Certainly, on behalf of the lawyers, we certainly don't.

10 | THE CHAIR: Yes.

11 | MR SMILEY: I will wait to hear what Mr Mallalieu says in response.

12 | Our position, as I've said, is that we are relying on the contracts themselves.

13 | THE CHAIR: The other query I had at this stage on the stuff you've shown us so far  
14 | is that we expressed a view on rule 53 in the [2024] CAT 47 decision. Has that point  
15 | been considered in other cases or by the Court of Appeal?

16 | MR SMILEY: Not that I'm aware of. Mr Mallalieu's shaking his head.

17 | THE CHAIR: No. He would know if it had been, yes.

18 | MR MALLALIEU: As far as I'm aware, it hasn't.

19 | THE CHAIR: Yes. Okay.

20 | MR SMILEY: So that is the current understanding, and I do note that the Tribunal  
21 | observed that it would be preferable if the rules were made clearer, but we are where  
22 | we are with the rules as they stand.

23 | THE CHAIR: We are where we are, yes, but if no one's said it's not good or --

24 | MR SMILEY: As I understand it, that decision has not been overturned, nor has there  
25 | been any other judgment or observation.

26 | THE CHAIR: No, that's fine.



1 MR SMILEY: I was going to turn to the Merricks decision, which is at tab 17, and start  
2 on page 571.

3 THE CHAIR: Which tab is it?

4 MR SMILEY: 17.

5 This is really grappling with the idea that, there having been an order agreed between  
6 the parties in that case, the Tribunal doesn't have the power to rewrite it. We obviously  
7 say we're not rewriting it, but in any event.

8 Paragraph 112, what the Tribunal says is:

9 "The argument that when there is an application before the Tribunal and the parties  
10 provide a draft order then the Tribunal must either accept or reject the terms of that  
11 order is in our view fundamentally misconceived. The Tribunal must determine the  
12 application, but just because the parties have agreed on the terms of the order which  
13 they seek, that does not tie the hands of the Tribunal. The Tribunal must itself decide  
14 what is the appropriate order to make in the circumstances, in accordance with the  
15 governing statutory provisions."

16 Then, in paragraph 113, there's consideration of the question of distribution. We  
17 needn't get into the detail of those questions, but that is what the Tribunal was  
18 grappling with there.

19 At paragraph 114, over the page, there's then consideration of the statutory provisions,  
20 section 49A, at paragraph 114, and rule 94 at paragraph 115.

21 At paragraph 116, there's consideration of the distinction between the terms of the  
22 proposed settlement and the distribution of sums to be received, which is made clear  
23 in the CAT Rules. Importantly:

24 "We think it is implicit in the CAT Rules that not only the terms of the settlement but  
25 also the distribution arrangement proposed ... require the approval ..."

26 THE CHAIR: I don't think that point is in dispute.

1 MR SMILEY: At paragraph 117:

2 "We note that what we find to be the correct approach appears to be reflected in the  
3 2023 LFA which, as usual for a funding agreement, provides for a stipulated return for  
4 the funder. Here, that return comprises both the net costs ... and ... [an] overall costs  
5 commitment ..."

6 As here, there's a recognition, as observed at paragraph 118:

7 "It is there expressly recognised that it is for the Tribunal to determine to what extent  
8 the Return should be paid to Innsworth."

9 We're in the same position here.

10 Then at paragraph 167, which is on page 589:

11 "The Application expressly leaves the decision of what return should be paid to  
12 Innsworth by way of profit return out of Pot 3 to the discretion of the Tribunal. As noted  
13 above, cl. 8.3 of the 2023 LFA expressly recognises the discretion of the Tribunal to  
14 determine the extent of Innsworth's return. That is in line with the statutory scheme,  
15 as analysed by the Court of Appeal in ... Gutmann. Although the specific question on  
16 appeal in that case was whether following a judgment for damages the Tribunal could  
17 order payment of costs and a funder's fee in priority to distribution to the class or only  
18 out of unclaimed damages, the Court there stressed (a) that the power of the Tribunal  
19 on an award of damages should not differ from its power on approval of a settlement  
20 [the point I made earlier], and (b) that the Tribunal had a broad discretion to determine  
21 how any award or settlement should be dealt with in terms of distribution to CMs, and  
22 payment of costs and expenses including any return to the funder, in the exercise of  
23 its wide supervisory jurisdiction ..."

24 Paragraph 168 quotes from that judgment.

25 So, we say that the power is there, and we say that is reflected in the Tribunal's  
26 intervention rulings.

1 THE CHAIR: On (inaudible), we obviously have power to determine rate of return.  
2 We also have a power to determine what are the reasonable costs of your client. But  
3 there's an issue between you and the funder as to which costs are properly allocated  
4 to Trains 1 and, within that, as between the claim against the settling defendant and  
5 the claim against the non-settling defendant, and I had understood that that was on  
6 a particular basis.

7 You know -- just looking at my notes -- last time I noted that you've got T1 and T2.  
8 The general costs, let's say, which could easily fall within both cases, you put those  
9 50/50 between the two sets of proceedings -- that's what I understood last time -- and  
10 then within that T1, you were splitting it, up until the application for a settlement, 50/50,  
11 because you said you've got two defendants -- within that -- you got -- let's say you  
12 got £100. You say the general costs, £50 goes into -- you can correct me in  
13 a minute -- T2, £50 goes within T1. Of that £50 in T1, you've got two defendants; one  
14 defendant you settled with, another defendant you haven't settled with. Were you not  
15 applying that 50 per cent, 50/50, between those two for those costs up until the date  
16 of the application to settle?

17 MR SMILEY: Let me --

18 THE CHAIR: Just check.

19 MR SMILEY: -- turn my back. (Pause)

20 So --

21 THE CHAIR: So, I've got Antzoulatos or whatever, paragraph 38, I've seen that. But  
22 let's see if I've got it right, as to how I understood the sort of general cost that could  
23 fall into --

24 MR SMILEY: Well, I have a very nifty diagram that's been presented to me.

25 So, of the £100, it is split 50/50, T1 and T2.

26 THE CHAIR: Understood that. I got that one right.

1 MR SMILEY: Then an important thing to remember is that there are three defendants  
2 in T1.

3 THE CHAIR: Three defendants in T1. That's right, yes.

4 MR SMILEY: So that is then split 16-and-two-thirds, 16-and-two-thirds and  
5 16-and-two-thirds; the £50 becomes each of those.

6 THE CHAIR: Okay. But what you're saying is of the £50, in these proceedings -- okay.

7 MR SMILEY: I hope that's addressed the question. I think what started the question,  
8 though, was an issue as to the extent to which this Tribunal needs to make rulings as  
9 to the appropriate apportionment.

10 THE CHAIR: Correct, because as I understand it, there seems to be a dispute  
11 between you and Woodsford as to the appropriate apportionment now, coming to this  
12 stage. I didn't think there was a dispute last time. Whatever it was, I thought that was  
13 all agreed. But it seems there's now some sort of dispute as to how it's going to be  
14 allocated, because I think there's an argument that you actually allocate all costs to  
15 this case, ie T1, than you did before; is that right?

16 MR SMILEY: Well, there is an issue --

17 THE CHAIR: Let me just hear from your solicitor. He'll explain it.

18 MR SMILEY: Sorry, are you just inviting Mr Burnett --

19 THE CHAIR: I am, yes. Mr Burnett, sorry. Yes. Do you want to explain it? (Pause)  
20 I just want to make sure I understand it before we move on, that's all.

21 MR BURNETT: Thank you very much.

22 Where there's £100 that goes in at the top, we've apportioned it £50 to Trains 2 and  
23 then £50 to Trains 1, and then when there were three defendants, that obviously gets  
24 split three ways: 16-and-two-thirds, 16-and-two-thirds and 16-and-two-thirds.

25 Woodsford, however, from sort of about maybe two years ago, decided that the  
26 apportionment should be £75 out of £100 to Trains 1 and £25 to Trains 2.

1 THE CHAIR: Okay.

2 MR BURNETT: So that would then basically give a split of £25, £25 and £25.

3 So, if we'd actually adopted that split, our costs here would be materially higher.

4 THE CHAIR: Yes, okay. That's fine.

5 MR BURNETT: Thank you. Thank you very much.

6 MR SMILEY: Yes. I was going to come to that detail --

7 THE CHAIR: We will come to it maybe later, but I just wanted to make sure.

8 MR SMILEY: Yes.

9 THE CHAIR: There does seem to be a potential dispute there.

10 MR SMILEY: There does. In a sense, though, what we are inviting the Tribunal to do

11 is to cut through that and reach a decision as to, overall, on distribution of what is now

12 £6.2 million, what is the fair, just and proportionate distribution? That is what the LFA

13 provides for and that is what the deed of priorities provides for. I'll come to what our

14 proposal is, in fact, and how that works through, and I will contrast that with the

15 proposal of Woodsford, which we say is neither fair nor just nor proportionate.

16 THE CHAIR: What it may be is that what we're doing is we're looking at the £10.2 and

17 we're saying, looking at the whole thing, appreciating that the undertaking you're giving

18 means that, actually, at the end of the day, you're going to be arguing about £6.2, let's

19 just work from the £6.2, but that's just a shorthand, that we would probably have to

20 work from the £10.2, otherwise it may be said by SSWT we don't have jurisdiction to

21 do that.

22 MR SMILEY: Absolutely.

23 THE CHAIR: I think we all understand that you're talking about a shorthand when you

24 say £6.2.

25 MR SMILEY: Absolutely.

26 THE CHAIR: What you're saying is it's a £10.2 but, at the end of the day, it's going to

1 have to be reduced pro-rata to reflect the undertaking you've given.

2 MR SMILEY: Indeed, sir, and the calculations that I think both parties have produced

3 do take into account the £4 million in different ways.

4 THE CHAIR: Yes.

5 MR SMILEY: But that is just merely a reflection of the haircut that, by virtue of our

6 undertakings, we have each agreed. So --

7 THE CHAIR: So, both of you are going to take the same percentage deduction,

8 haircut, irrespective of which way you look at it?

9 MR SMILEY: Well, we are all working from the same pot of £6.2 million left behind.

10 THE CHAIR: Yes, exactly. You're still working to the same £6.2. Okay.

11 MR SMILEY: I was just finishing in terms of authority with the fact that in each of the

12 intervention rulings, the Tribunal recognised the interests that we each as stakeholders

13 have, and Charles Lyndon's interest as stakeholder is because of this dispute.

14 THE CHAIR: Yes.

15 MR SMILEY: It's the distribution inter se point that Charles Lyndon has --

16 THE CHAIR: And everyone agrees you've got a legitimate interest to have this point

17 resolved. They obviously would say it's going to be resolved against you, but you've

18 got the right to have that heard and determined.

19 MR SMILEY: Well, my understanding was the position is that the Tribunal does not

20 have the power to determine issues inter se. That is my understanding of their

21 position.

22 THE CHAIR: But they're not saying you can't intervene at this stage; you're here.

23 MR MALLALIEU: I'm not standing up saying Mr Smiley should be sitting down. No,

24 I'm not.

25 THE CHAIR: Exactly, he's not saying --

26 MR MALLALIEU: I disagree with him, but he's entitled to say it.

1 MR SMILEY: Well, that's been ruled on anyway. I mean, we are here.

2 THE CHAIR: It's been ruled on.

3 Look, he obviously disagrees with what we're saying. We understand that. But he's  
4 not saying you're not allowed to intervene to argue that point, and you are here, and  
5 we are going to determine at that point.

6 MR SMILEY: Indeed.

7 So just drawing the threads from the various authorities that I've taken the Tribunal to,  
8 in terms of the principles to be applied, the test is, as per those authorities, what is the  
9 just, reasonable and proportionate allocation. That's drawn essentially from rule 4 of  
10 the CAT Rules, and it is necessary to have regard to all the stakeholders and to strike  
11 an appropriate balance, the three-legged stool analogy that the chair used at the  
12 outset of the hearing. We accept that, in doing that, the Tribunal takes into account  
13 all the circumstances, and that one such piece of factual background is the various  
14 contracts that were signed up to.

15 But that is not determinative, on any view, and particularly where those very contracts  
16 provide for the Tribunal's intervention. Other factors that are clearly relevant, as  
17 reflected in those decisions, are the returns of all the stakeholders, and we would say  
18 other relevant circumstances include the circumstances surrounding the entering of  
19 the original contracts and how things then worked out in practice. The key criteria are  
20 fairness and proportionality for all the stakeholders.

21 So that's the -- and I apologise, it's taken a while, but I thought it was important to sort  
22 of lay the baseline for the principles before getting into the detail of their application.

23 Turning then to the application.

24 There's an element of repetition, but it is important to reiterate, what we are not seeking  
25 to do is rewrite the contract. What we are seeking to do is ensure that the contractual  
26 provisions which provided for the Tribunal's involvement are respected and applied,

1 with the result of a fair outcome for all stakeholders. That does include  
2 Charles Lyndon, it does include counsel, and it does include Hausfeld, as well as the  
3 ATE insurers and Woodsford.

4 As I've said, while counsel and Hausfeld have not made a positive support for our  
5 position, nor have they made a positive support for Woodsford or the ATE insurers'  
6 position. They are neutral. While standing or sitting here, they are not represented  
7 today. But what we say would apply equally to their position, and what we're inviting  
8 is not that we are treated more favourably, but that the lawyers are treated equally  
9 fairly.

10 THE CHAIR: It's easier for us that they're not all separately represented, arguing the  
11 point, otherwise we'd have three sets of counsel making the same point. But they will  
12 benefit or not benefit from whatever ruling we give if you're right. But I'm not really  
13 impressed by the jury point that the mere fact they haven't put in a separate  
14 application, I somehow have to read into a view that they don't think that what you are  
15 asking for is right or wrong. I just don't read it either way, you know. Totally neutral.

16 MR SMILEY: I was seeking to make good that point.

17 THE CHAIR: It is just totally neutral.

18 MR SMILEY: It's neutrality --

19 THE CHAIR: In the scheme of things, I need to know whether you're right or not. If  
20 you're right, you're right, if you're wrong, you're wrong, irrespective of whether or not  
21 they take out a separate application.

22 MR SMILEY: Precisely. I don't pray in aid the fact that they're not shouting up that --

23 THE CHAIR: No, and I'd rather they didn't, so ...

24 MR SMILEY: In terms of the amount of investment put in by the respective parties,  
25 and particularly the lawyers, the most useful document, in my submission, is  
26 Mr Burnett's table in his third witness statement, which is in -- it's a late addition to



1 bundle B, and it's at page 1317 of bundle B. It will be right at the back. (Pause)

2 THE CHAIR: Could you put it up on the screen for me?

3 MR SMILEY: So, we're at page 1317.

4 THE CHAIR: My one ends at 1315.

5 MR SMILEY: Ah. I'm sure we can have them printed over the ... (Pause)

6 THE CHAIR: We've got it. It's okay.

7 Yes.

8 MR SMILEY: I'd rather it didn't go up on screen because a number of the figures are

9 highlighted, which indicates that they are confidential. I therefore won't be reading

10 them out.

11 THE CHAIR: Oh, I've been through all these figures. Yes, no --

12 MR SMILEY: It's updated. There is a version of it that the Tribunal may be recalling.

13 This is updated to fix errors in I think it's Ms Antzoulatos's first witness statement.

14 THE CHAIR: Yes.

15 MR SMILEY: But what one can see there is from Charles Lyndon's perspective, the

16 total costs in the middle column for Trains 1, and then a breakdown to the right of the

17 total costs attributable to Stagecoach, because we say that is the appropriate

18 approach in circumstances where it is the Stagecoach claim that has been settled.

19 THE CHAIR: On the last column, that's on the basis of your allocation as between the

20 two, Trains 1 and Trains 2.

21 MR SMILEY: Indeed, and as observed by Mr Burnett, if we adopted the allocation

22 proposed by Woodsford, our figures would go up. That is quite a significant difference

23 and shows that these are conservative figures.

24 One can see there the amounts put in and the amounts outstanding, because row 2

25 is paid fees. So that is all that has been recovered. And then one has the extent of

26 pre-LFA fees above it and post-LFA deferred and success fees below it. They are

1 very significant sums on any view.

2 A similar breakdown can be seen for Hausfeld, for counsel, and then lower, the ATE  
3 premia, and then lower still, the final page, the Woodsford fees.

4 So those are the figures that we are talking about.

5 THE CHAIR: But aren't the ATE insurers asking for more money than the figures here,  
6 or not?

7 MR SMILEY: I don't believe so. I'll be corrected if I'm wrong, but I --

8 THE CHAIR: It's important I know what's common ground and what's not common  
9 ground.

10 MR MALLALIEU: I don't have the reference immediately to hand, but I understood it  
11 wasn't disputed from the CR's witness statements that the full post-CPO deferred  
12 premium -- so that figure that you see in the top right-hand corner -- sorry, one column  
13 in on page 1320 -- in fact, it's not highlighted, so I can say it, I think -- the  
14 £5 million-odd post-CPO deferred premium, we understood it wasn't disputed that the  
15 effect of the policy was that the full payment of that was due, subject to it being put  
16 through the waterfall.

17 MR SMILEY: Yes, I think the debate there may depend on an issue that we will  
18 probably need to grapple with, which is whether the --

19 MR MALLALIEU: I don't think it does because I don't think the ACIF affects the  
20 amount of the premium.

21 MR SMILEY: Okay. Well, I'll take --

22 MR MALLALIEU: I'll find the reference in the CR's witness statement.

23 THE CHAIR: I just want to make sure that when it comes to the ATE insurers, these  
24 figures are agreed and there's not something I've missed?

25 MR MALLALIEU: They're not.

26 THE CHAIR: As figures, they're not --

1 MR MALLALIEU: The figures are, but the attempt to apportion them, in particular in  
2 relation to the post-CPO deferred premium, which we're looking at, the idea that only  
3 a fraction of it becomes payable at this stage is not accepted. The effect of the policy  
4 is that the full policy premium becomes payable at this stage, and I had understood  
5 that that wasn't an issue, subject to it then being put into the waterfall and only being  
6 paid --

7 THE CHAIR: I understand that, but I just want to make sure that that -- I think that's  
8 the one I wanted to make sure was not in issue.

9 MR SMILEY: Absolutely. I will double check that. I had understood it to be --

10 THE CHAIR: Yes. Tell us in the afternoon. We can start off when we come back at  
11 2.00, and we can just check to make sure that one is -- there's no contention over that.

12 MR SMILEY: Absolutely.

13 What I was going to then do -- and it will probably take me to the short  
14 adjournment -- was take the tribunal to Ms Antzoulatos's second witness statement,  
15 which sets out, as we understand it, the contrast between what Woodsford is  
16 proposing and how that would be allocated, and the Charles Lyndon's proposal and  
17 how that would be allocated, and the basis for -- before one gets into the detail, but  
18 the headline basis for our allocation being a fair one and theirs being unfair.

19 So that's at tab 14 of bundle B on page 1073.

20 THE CHAIR: So what page are we looking at?

21 MR SMILEY: We can start at 1071. Just to place the Tribunal, this is the part of  
22 Ms Antzoulatos's witness statement that is dealing with the amount of money.

23 THE CHAIR: What tab is it?

24 MR SMILEY: Sorry, tab 14. I thought I'd said that. Bundle B, tab 14. Bundle B2 if  
25 we're -- thank you.

26 THE CHAIR: Yes.

1 MR SMILEY: So, Ms Antzoulatos's table 1, which is over the page at 1072, updates  
2 the costs, fees and disbursements, and this is a very similar table to the one I've just  
3 taken the Tribunal to. But at paragraph 23, underneath table 1, Ms Antzoulatos  
4 highlights -- and it is all confidential, which is why I'm being careful in what I say.

5 THE CHAIR: Yes.

6 MR SMILEY: She highlights the percentage of Charles Lyndon's costs incurred in  
7 relation to Trains which have been recovered to date, and then sets out the proportion  
8 of Charles Lyndon's fees, excluding the success fee, funded by WGL. Then it sets out  
9 the figures, the percentages, if the success fee is taken into account.

10 It can immediately be seen that the amounts recovered, which on Woodsford and the  
11 ATE insurers' case wouldn't materially change, are extremely low. It is important to  
12 note that these are on Charles Lyndon's conservative calculation of its fees. It has not  
13 charged any success fees since 10 May 2023.

14 THE CHAIR: Of that figure in line 2, where you say only that figure of their total  
15 incurred fees has been paid, when you say incurred fees, does that include  
16 disbursements, or does that --

17 MR SMILEY: No, that's our profit cost. That's the Charles Lyndon fee.

18 THE CHAIR: Exactly. So, it's -- yes, because your disbursements are incurred,  
19 obviously.

20 MR SMILEY: Yes. So those are separate, sorry.

21 MR MALLALIEU: (Inaudible) disbursements.

22 THE CHAIR: Exactly. But it's a bit misleading when you say incurred fees. What's  
23 been incurred is not only their profit, but also the disbursement, including counsel.

24 So, it's clear now, you're only talking about their own fees and not their --

25 MR SMILEY: Yes. I apologise. In the context, I thought it was sufficiently clear that  
26 what is -- because it's looking at table 1 and it's referring to Charles Lyndon's fees,

1 and counsel's fees are set out separately.

2 THE CHAIR: Exactly.

3 MR SMILEY: So, it's specifically dealing with --

4 THE CHAIR: So, we look at what those figures are, but you've amended those figures  
5 slightly.

6 MR SMILEY: If one carries on within this witness statement --

7 THE CHAIR: Yes, let me just go back. (Pause)

8 Yes, carry on. Yes, let's go on.

9 MR SMILEY: Then paragraph 26 in scenario 1, which is if the whole of the proposed  
10 charitable donation comes out of the non-ringfenced costs -- so this is the calculation  
11 that's been done assuming it's £6.2 that we're talking about, and fully taking on board  
12 that that is subject to an undertaking and bearing in mind Ms Abram's points. This is  
13 where we say Woodsford's proposed payments to each stakeholder can be seen to  
14 be plainly unfair.

15 THE CHAIR: What paragraph are you looking at now?

16 MR SMILEY: Apologies. It's under the heading "Scenario 1", it's paragraph 26, and  
17 then the table is over the page. It's table 3.

18 Again, it's difficult because I can't read out the figures, but if the Tribunal would  
19 observe, this table sets out Woodsford's proposal, which would mean that the solicitors  
20 as a whole would receive -- you can see -- so in the table you can see Woodsford's  
21 outlay is row 1, and then the second two rows are Charles Lyndon and Hausfeld.  
22 Footnote 1 next to the figure in Charles Lyndon's row explains the allocation between  
23 Charles Lyndon and Hausfeld that's been carried out in this table, and it's essentially  
24 adding those two figures together and then splitting them.

25 But as one can see from the percentages in the final column, it would mean  
26 Charles Lyndon receiving 10.17 per cent -- sorry, I've just read it out, but they a very --

1 THE CHAIR: That percentage I don't think is harmful to --

2 MR SMILEY: Well, it's not harmful to my client --

3 THE CHAIR: Yes.

4 MR SMILEY: -- but it was put in as confidential.

5 THE CHAIR: Yes.

6 MR SMILEY: It's receipt of only a very small percentage of the deferred fees, a loss  
7 of entirely the rest of those deferred fees, no success fee whatsoever, in  
8 circumstances where, as we say, we drove this and received a settlement and  
9 obtained the settlement, and our total MOIC, on this basis, is calculated as 0.10x.

10 You can see that at the bottom, under the table, on page 1076. At paragraphs 27 and  
11 28, there's a breakdown of what the loss is to the solicitors' capital and what the loss  
12 is to counsel's capital, the additional amount that Woodsford would receive and the  
13 breakdown of each stakeholder's MOIC on Woodsford's proposal.

14 THE CHAIR: Then when I go back to table 3, the outlay figure for WGL at just over  
15 £2 million or whatever it is --

16 MR SMILEY: Yes.

17 THE CHAIR: -- is that a figure that you agree? Because --

18 MR SMILEY: Our proposal is that they keep that figure -- our proposal is at table 4,  
19 so you can see it at 1077. I appreciate we're just after 1.00, but so that the Tribunal  
20 knows where I'm going with this.

21 The Charles Lyndon's proposal is explained from paragraph 30 and is set out in  
22 tabular form at table 4, and one can see there that. We set out what we say  
23 Woodsford's contractual entitlement is, and we say they don't get anything further  
24 because they've already received more than that; in fact, more than double that.

25 THE CHAIR: Let me just write down the figures. I can write down the figure for the  
26 outlay and say that's agreed. You're not saying that's affected.

1 MR MALLALIEU: Sir, I think you've mentioned twice that you understand that's  
2 agreed. That is not agreed.

3 THE CHAIR: I'm getting confused because I understood that if you start fiddling  
4 around with the percentage allocations as between Trains 1 and Trains 2 and within  
5 Trains 1, we're going to come up with a different outlay figure.

6 MR MALLALIEU: The outlay figure differs between the figure that CL have proposed  
7 and the figure that's provided for in the LFA, which we propose for a couple of reasons,  
8 which it would take a few minutes to unpack.

9 THE CHAIR: Well, we'll go through it, but what I want to have unpacked is to  
10 understand what the difference -- you can put it on a piece of paper for us, what they  
11 say your outlay is, what you say your outlay is, why you say that outlay is that, then  
12 we want to see how much have you already received out of that outlay to date.

13 MR MALLALIEU: I think we can do that for you, certainly, over the adjournment.

14 THE CHAIR: Yes. Let's have it on a piece of paper so it's in my brain and I fully  
15 understand where the things -- because what we will want to do is to make sure that  
16 whatever rate of return you get does not fall below a reasonable rate of return in all  
17 the circumstances, if you see what I mean.

18 MR MALLALIEU: I understand.

19 THE CHAIR: I need to look and see, on different cases, what the actual rate of return  
20 to date is, and then what you're asking for over and above that. Then we can have  
21 a sensible discussion.

22 So, we'll come back at 2.00 to do that.

23 (1.05 pm)

24 (The short adjournment)

25 (2.05 pm)

26 THE CHAIR: Just let me speak for one second.

1 What we have to determine today, hopefully, is what's everyone going to get? And  
2 we've got the lawyers, we've got the funders and we've got the ATE insurers.

3 One possible outcome at the end of today would be we just give a precise figure for  
4 what each of those three segments gets and you know where you are, or we may have  
5 to be a lot more precise and mechanical about the whole exercise. But we can  
6 probably come back to that later.

7 But what we do want to do is to figure out what is the reasonable rate of return and  
8 what that figure amounts to for both the insurers and the funders. We do, if we can,  
9 want a figure of what that is. But in determining that, we have to determine what is  
10 the right figure for the lawyers. But there is this fundamental argument that, because  
11 of the contractual arrangements, even if we feel that there is a fair and reasonable  
12 figure for the lawyers, we shouldn't give it to them because of the waterfall  
13 arrangements, and that's what we seem to be focusing on at the moment.

14 But what I wanted help from you in particular is: where are we on the figures on the  
15 ATE insurers? I think we understand the other figures, but if you can just take us  
16 through that, that would be very helpful.

17 MR MALLALIEU: Well, sir, that's partly the reason why I was on my feet, because I'm  
18 guilty of a breach of promise, which is I promised you a note when we returned at 2.00,  
19 setting out the competing positions, for want of a better expression, on the outlay.

20 THE CHAIR: Yes.

21 MR MALLALIEU: We've produced one, but Mr Smiley's client is still considering it and  
22 taking instructions.

23 THE CHAIR: Oh, okay, that's fine. We can come back to that later then.

24 MR MALLALIEU: So, we've not quite got to the bottom of it, but we hope we will be  
25 able to pass that up relatively shortly.

26 So that's why I'm on my feet. I'm not trying to take away Mr Smiley's thunder. So



1 that's all I have to say at the moment, unless, sir, there are particular points you want  
2 me to address sort of on an interim basis in the middle of Mr Smiley's case.

3 THE CHAIR: No, no, that's absolutely fine. That's helpful.

4 As long as everyone understands where we are as a Tribunal, given what we said in  
5 previous decisions, we do consider that it is up to us to determine what should be the  
6 funder's return in any particular case, irrespective of what has been contractually  
7 agreed, although that's an important consideration. I'm not saying we ignore what's  
8 been agreed, we'll take that into consideration as a factor, but at the end of the day,  
9 taking that into consideration as a factor, we will determine what is the reasonable  
10 return for the funder.

11 MR MALLALIEU: Sir, yes, and again, I'm keen not to interrupt Mr Smiley, because  
12 I was only on my feet for that specific purpose.

13 THE CHAIR: Yes.

14 MR MALLALIEU: Obviously you haven't heard from us yet on the point of principle.

15 THE CHAIR: Of course, of course.

16 MR MALLALIEU: Just in relation to that, and to try and bring some clarity, which is  
17 always a precursor to doing the exact opposite --

18 THE CHAIR: Yes.

19 MR MALLALIEU: -- but to try and do so, we do not dispute the principle that when the  
20 Tribunal is assessing what is recoverable by a class representative in terms of costs,  
21 fees and disbursements, it has a jurisdiction to determine the amounts that are  
22 payable from the amounts that are sought, if that makes sense. In other words, subject  
23 to the point that was raised by the class representative, which is whether that's slightly  
24 more limited in the context of a settlement, but as a matter of broad principle, the idea  
25 that the Tribunal has a jurisdiction to say, "Well, you're asking for X, but you can only  
26 have Y for these reasons" is not an issue.

1 What we have an issue with is the question of where there are sums which are  
2 prima facie sums which should otherwise be allowed -- so, in other words, in the usual  
3 circumstances, the funder's fee is X or the solicitors' fee is Y -- whether the Tribunal  
4 can and/or should in that situation then go on to say: well, a further circumstance we  
5 are going to take into account is if we award X and we award Y, that's going to get put  
6 into a waterfall, which means, in fact, the funder will get X, but the solicitor will only get  
7 part of Y, or whatever it might be, and then in light of that, we're going to go back and  
8 revisit X and Y to arrive at a position where we're happier with the outcome through  
9 the waterfall.

10 Does that make some kind of sense?

11 THE CHAIR: Yes, it does, but ...

12 (Audio feed interrupted)

13 What we're not going to do is unpick the rate of return so far. What that means is that  
14 there's already been a distribution. We know how much the funder has received, we  
15 know how much the ATE insurers have received, and we also know how much the  
16 lawyers have received, and I know that there's a calculation which you don't accept,  
17 and this is one of the things for the table, that you have had 2.49 per cent already.

18 MR MALLALIEU: Yes.

19 THE CHAIR: What I'm saying is we're not minded to take away anything that's already  
20 been paid, let's say, off your pot, if you understand what I mean.

21 MR MALLALIEU: I understand entirely what you mean. I'm being silent, sir, because  
22 I know you're aware that I disagree with that analysis. We are in a net loss position at  
23 this stage.

24 THE CHAIR: I know. No, of course --

25 MR MALLALIEU: We say we haven't had 2.9, and --

26 THE CHAIR: I want to know what your calculation is for that rate of return and how

1 | you get there in clear terms --

2 | MR MALLALIEU: Yes.

3 | THE CHAIR: -- so when we come to a ruling, I know what rate of return I'm giving you.

4 | I'm sure you understand what I mean.

5 | MR MALLALIEU: I understand entirely, sir, yes.

6 | THE CHAIR: Yes. As regards the ATE insurers, is that figure controversial, as

7 | regards --

8 | MR MALLALIEU: I believe it is, but that will also -- the scope of the controversy will

9 | hopefully be clearly set out in the table that I keep on promising but never delivering.

10 | THE CHAIR: When I've looked at their table, they say, just doing this from memory,

11 | that the basic entitlement was 1.68, but they say that they've been paid, like,

12 | 2.1-something-or-other, and so they say they've got, in inverted commas, a rate of

13 | return of 1.35, whatever the figure is, and I do need to understand from this schedule

14 | you're going to give to me whether that is agreed or not agreed and what you say the

15 | equivalent is, because I really do want to know what rate of return you've already

16 | received in both of your hands.

17 | MR MALLALIEU: That is understood, and we will endeavour to do that.

18 | THE CHAIR: I know what they're saying those figures are, but the way I'd understood

19 | your evidence and your submissions was that you don't agree with that.

20 | MR MALLALIEU: We don't.

21 | THE CHAIR: So, I looked at the table that I was shown. I could immediately see that

22 | it doesn't really fit in with what I understood you're saying. It's so helpful to have it all

23 | on one piece of paper, because I'm a simple person; I like to see things in very simple

24 | terms I can work with and say: yes, I now know what I'm doing.

25 | MR MALLALIEU: Sir, as I say, we are, as I understand it, working on the piece of

26 | paper. It may be growing -- not the piece of paper itself, but what's on it -- as we

1 speak, but we're working on the piece of paper, and we'll get that to you.

2 THE CHAIR: Well, I don't mind if it grows, I don't really mind it, and if we have to, we  
3 can come back tomorrow. But, you know, what I am keen is that, if we can, we leave  
4 this hearing knowing where everyone stands.

5 MR MALLALIEU: Entirely understood, sir.

6 THE CHAIR: The other alternative is you wait for weeks and weeks for some sort of  
7 reserved judgment to come and it's only then you know where you stand, and then  
8 you've got more uncertainty and that, which is not ideal.

9 MR MALLALIEU: Right.

10 Again, I'm deliberately avoiding the temptation to address the wider issues because  
11 I know I will have my opportunity in due course, sir, so --

12 THE CHAIR: Yes, of course. I'm not sure if you've done any hearings before me, but,  
13 you know, there are two levels of advocacy. The first level is really important for  
14 hearings like this, is what you put in your witness statements and what you put in your  
15 skeleton arguments, and generally they're looked at and those points are not lost and  
16 hopefully they're understood, and if they're not understood, we ask you questions  
17 during the hearing. But the second level is, during the hearing, we concentrate on  
18 what are the really difficult points where we really do need your help, and that's what  
19 we're trying to do now.

20 MR MALLALIEU: Sir, I'm very happy to help, but I'm acutely aware that Mr Smiley's  
21 bouncing up and down because he wants to be able to continue with his submissions.  
22 I'm very happy now to address any questions the Tribunal has.

23 THE CHAIR: No, let him finish what he's going to say, but I don't want you to think  
24 that just because you haven't said something orally, it's not appreciated that there are,  
25 let's say, issues on certain things which are more fully expanded in your skeleton  
26 argument.

1 MR MALLALIEU: I wouldn't think that, sir, but I'm very grateful.

2 THE CHAIR: No, it's scary as an advocate because sometimes you don't know what  
3 people have read and then you could fall between two stools. But, yes, that's fine.  
4 Let's hear from Mr Smiley.

5 MR SMILEY: I am grateful, sir. I have also heard loud and clear the indication that if  
6 it's in writing, there's a good chance that it's been read and understood, so I'm --

7 THE CHAIR: Well, no, we can say it's been read; I'm not sure about the second half,  
8 and that's why some of the questions I'm asking are --

9 MR SMILEY: Where I intended to leave off was so that the Tribunal was left with  
10 table 4, which set out what Charles Lyndon's proposal is, which is at page 1077 of  
11 bundle B.

12 THE CHAIR: Yes, let's look at that.

13 MR SMILEY: There is obviously a difficulty in going through it, given it is all  
14 highlighted, but what one gets to at the end -- and it's at paragraph 31 on  
15 page 179 -- and can't be confidential in itself are what we say on our figures our  
16 proposal results in, in terms of MOIC for the different parties. I accept that there are  
17 disputes about whether we are starting from the same place, and we're not starting  
18 from the same place, but applied to the figures that we put forward, at paragraph 31,  
19 Ms Antzoulatos explains that we're proposing a 2.49x for the funders.

20 THE CHAIR: Yes.

21 MR SMILEY: So, they get more than us and, as I'll come to, they get about the level  
22 of an average winner on the Crescent analysis. We say that each of the other parties  
23 get 1.47x. That's the proposal that we put forward.

24 As explained in paragraph 32 of the witness statement, it goes on to contrast that with  
25 the extent to which, on Woodsford's figures, they would be getting much, much more  
26 and the lawyers would be suffering a significant loss.

1 THE CHAIR: You see, the problem with that is where we were before lunchtime, is  
2 that I can see what you say are the rates of return, but they're based on your figures.

3 MR SMILEY: That's what I was just coming to.

4 THE CHAIR: Woodsford's figures are different. I just need to make sure that  
5 I understand what the competing positions are. I also need to know whether or not it's  
6 necessary, at the end of the day, to work out precisely who's right about the base  
7 figures, or are we really dealing with a situation where we just need to come up with  
8 the figures and see where they are and not do it by reference to rates of return?

9 So I may say: well, I think it's -- if we're looking at the ATE, looking at what's been  
10 agreed, what they've been paid, a just and reasonable outcome is that they get X as  
11 a figure, or do I need to do it in a different way, which is I need to say, looking at all  
12 the things I think a reasonable rate of return is, is why, and we base it on why?

13 But the problem with doing it in isolation from what the actual figures are is there's not  
14 enough in the kitty for everyone. So, if I say their rate of return should be 1.5, the  
15 others should be a different rate of return, if the underlying figures are different, you're  
16 going to find there's not enough money to come up with it.

17 But anyway, let's just see, when this schedule comes, if some light is --

18 MR SMILEY: Absolutely. The fact that a number of Charles Lyndon members have  
19 come into the room makes me think that the table may be nearer to completion than it  
20 was --

21 THE CHAIR: Nearing completion. So, when the table's available, start working from  
22 the table, as long as everyone is happy with it. Yes.

23 MR SMILEY: But what I was going to say was we in Charles Lyndon's position are in  
24 your hands. We have put forward a proposal which is based on specific rates of return,  
25 based on our versions of the figures. It could be that different rates of return are  
26 adopted by the Tribunal, it could be that the same rates of return are adopted by virtue

1 of different figures, or it could be that one takes a much more simplified approach and  
2 takes £6.2 million and divvies it up. That is ultimately a matter for the Tribunal,  
3 depending on where we land on the various avenues of dispute.

4 THE CHAIR: Yes.

5 MR SMILEY: But it's those avenues of dispute that I was going to then come to, to  
6 see whether the Tribunal is attracted to what we say the figures are and the resolution  
7 of those disputes on those figures, because as my learned friend said to me in the  
8 break, there are a number of different rabbit holes one could get lost in.

9 THE CHAIR: Oh, there's plenty of that, yes. That's why, you know, your third  
10 alternative has got some attraction, and it's much easier to follow your third alternative  
11 than anything else. But if we are going to have to go down 1 or 2, then it's a lot more  
12 elaborate a process. But at the end of the day, funders and insurers are all  
13 businessmen; at the end of the day, they care about what comes in, how much is  
14 actually coming in, and to them, whether the rate of return is one figure or another,  
15 ultimately, if you've got a limited cake, you've got a limited cake.

16 MR SMILEY: Absolutely.

17 I'm pleased to announce that the table is complete and is in the process of being  
18 printed.

19 THE CHAIR: Okay. We'll see what it looks like.

20 MR SMILEY: We await that with bated breath.

21 In the meantime, what I thought I'd do next would be to go through some critical points  
22 that if the Tribunal is going to get into the starting point, what is the appropriate funder's  
23 fee, et cetera, I'm going to point the Tribunal to where the evidence is found and give  
24 the high-level responses and identify what the disputes are.

25 The key disputes, as I understand it, are: firstly, whether there should be what's called  
26 an adverse costs indemnity fee or not; secondly, the funder's fee; thirdly, allocation

1 between Trains 1 and Trains 2, the proportions of that; and, fourthly -- and it's more of  
2 a broad point -- whether Woodsford's reliance on the funding notices is an accurate  
3 picture or provides an inaccurate picture.

4 So, starting with the adverse costs indemnity fee. The evidence for this is in  
5 Mr Gutmann's sixth witness statement at paragraphs 49 to 66, and his seventh  
6 witness statement at paragraphs 17 to 30.

7 THE CHAIR: Give me the references. Gutmann 6, yes.

8 MR SMILEY: 49 to 66, and 7 at 17 to 30.

9 Paragraph 17 starts on page 948.

10 THE CHAIR: You're doing it too quickly for me to write down.

11 MR SMILEY: Sorry.

12 THE CHAIR: So, I've got 6, paragraphs what?

13 MR SMILEY: 49 to 66.

14 THE CHAIR: Yes, I've got that one. Yes.

15 MR SMILEY: And 7, paragraphs 17 to 30.

16 THE CHAIR: Yes.

17 MR SMILEY: It is going to be very difficult for me to make submissions on the facts of  
18 this without going into confidential material, and so there are two routes, essentially:  
19 either this part of my submissions are largely private, or I simply direct the Tribunal to  
20 where the relevant material is.

21 THE CHAIR: Well, if we're going to deal with it that way, going into private, one  
22 sensible way of doing it is that you both put your arguments in that same session in  
23 private on that aspect, and we come back to other things not in private.

24 But I think you're probably right that this aspect could be dealt with either by just giving  
25 us the paragraph numbers, or that you actually explain it in more detail and then  
26 Woodsford respond in detail in private.



1 MR MALLALIEU: I'm content entirely either way. It depends to some extent on how  
2 Mr Smiley is going to put his case on this, because there are factual matters which, if  
3 he needs to go to, really should be dealt with in private. There's a more general point,  
4 I think, that can be made.

5 So, I'm not attempting to be critical of him or direct him in any particular direction, but  
6 it depends to some extent on the level of detail he intends to go into in dealing with  
7 this point.

8 THE CHAIR: The problem as a Tribunal is I don't know what level of detail this is,  
9 because if he's saying, "You just read all those paragraphs", that's going into quite  
10 a level of detail that you should be able to respond to. That's the problem.

11 MR MALLALIEU: Yes. I'm not trying to dodge the question; I'm trying to pass the  
12 buck.

13 THE CHAIR: You're trying to pass it back to him.

14 MR MALLALIEU: I'm trying to suggest that Mr Smiley may be the better person to  
15 indicate whether he thinks this is likely to require a closed session than I am, because  
16 until I hear what he says --

17 THE CHAIR: It's the same for me.

18 MR MALLALIEU: Yes. So, it sounds like, to some extent, Mr Smiley may be the  
19 Tribunal in his own cause on this point.

20 MR SMILEY: That's why I introduced it in the way I did, which is that I do think that,  
21 in terms of what the factual dispute is, insofar as there is a factual dispute, it is going  
22 to be very difficult for me to make those submissions in any way that is productive or  
23 useful openly.

24 THE CHAIR: Okay.

25 MR SMILEY: So, I could simply deal with it by reference --

26 THE CHAIR: Let's look at the table and we can come back to this. He's outlined what

1 the key disputes are. What I suggest we probably do -- is it the same private point in  
2 relation to each of these four items?

3 MR SMILEY: It's not. The funder's fee I think is possible to deal with at a higher level  
4 because the dispute between the parties -- I don't need to go into the figures.

5 THE CHAIR: Okay, yes.

6 MR SMILEY: The dispute between the parties is a principled one as much as  
7 anything.

8 The allocation between Trains 1 and Trains 2 I think is likewise possible for me to deal  
9 with without getting into the private, confidential material. Likewise, the funding  
10 notices.

11 THE CHAIR: So, it's only this one. Okay.

12 MR SMILEY: It is really only this one.

13 THE CHAIR: Yes.

14 MR SMILEY: Which is why I flagged it at the outset.

15 THE CHAIR: Okay. Let's look at the table and then we'll come back to -- we'll go  
16 into --

17 MR SMILEY: I've not yet seen the table, so I'm just as excited as anyone.

18 MR MALLALIEU: Sir, we've only just seen the additions that Charles Lyndon have  
19 made.

20 THE CHAIR: Oh, okay.

21 MR MALLALIEU: So, we will need a few minutes just to check.

22 THE CHAIR: What we'll do then -- we're going into closed session anyway now, and  
23 so arrangements need to be made for that. If we come back at 2.35, it'll give you  
24 a chance to look at that at the same time.

25 MR MALLALIEU: I'm very grateful.

26 THE CHAIR: Then the people in the registry will do whatever they need to do for the

1 | purposes of ensuring that the next part of the hearing is in private, and only the relevant  
2 | people are in the room. Yes.

3 | Thank you very much.

4 | (2.27 pm)

5 | (A short break)

6 | (3.13 pm)

7 |  
8 | HEARING IN PRIVATE – Transcript extracted.

9 | (4.30 pm)

10 | (The hearing adjourned until 10.30 am on Thursday, 11 September 2025)