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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 10th September 2025 - Thursday 11th 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

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.

Thursday, 11 September 2025

(10.36 am)

Housekeeping

THE CHAIR: We'll start off today in open court and then we'll go to closed session to finish that first point.

Some of you are joining us live stream on our website, so I must start therefore with the customary warning: the official recording is being made and an authorised transcript will be produced, but it's 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.

What I want to talk about first is the sort of timetable -- where we are on time. As I see it, we've got to deal with the first four points of principle between you two, and we're still on the first one.

Then we've got to deal with the general point that you haven't yet argued, which is the extent to which everyone is bound, including the Tribunal, by the priorities agreement and the waterfall.

Then we will want to look at the maths again. That may require a bit more work on the part of the two parties in dispute over that. Then we'll see if we're in a position today to give a ruling as to how the, what is in reality the £6.2 million, is left.

What everyone has to appreciate is that whilst the settlement, at the time of the settlement was entered into, that it was what looked like a very successful outcome -- you've got a substantial amount of damages and costs to be returned -- the actual outcome is not a great success, and everyone has to appreciate that. It is not a great success in the view of this Tribunal to spend £18 million, or whatever the figure is, to distribute £216,000 to class members. That is not a success in my view when you look at it overall. It's a success in one sense, I've already accepted that. It's not

1 a success in any other sense.

2 But what makes it acceptable to the Tribunal is a sensible approach taken by all the
3 stakeholders and the class representative, but as a proxy, in a rough way, for the
4 public interest and for the class members who haven't claimed, that £3.8 million should
5 go to charity. That's why yesterday I said that the stakeholders and the class
6 representative are to be commended in appreciating the reality and accepting that the
7 responsible thing is to put something back in society. So, I am not in the business of
8 criticising anyone in this case over what has happened.

9 So, with that statement at the beginning, everyone's got to appreciate that although
10 this is listed for half a day, this may take longer than half a day before we actually get
11 there. If people want to leave, they're fine to leave; they don't need to stay until the
12 end of the day. But I think I just want to get through the points I've already said,
13 because until we've worked out the points I've indicated, we're not really in a position
14 to decide how the £6.2 billion is distributed.

15 Yes.

16 MR MALLALIEU: Thank you. Those points are all, of course, noted. I won't go into
17 any detail. On our part, for my clients, we of course fully appreciate the point that the
18 distribution in this case was deeply disappointing. That was not what anybody wanted.

19 THE CHAIR: Look, I'll make it clear: I'm happy the way Woodsford has handled this
20 and the way they've responded to the low take up. I do not regard Woodsford as some
21 sort of "fly-by-night" outfit; they are a proper, responsible funder who have a reputation
22 and it's not a bad reputation.

23 MR MALLALIEU: Well, sir, I won't therefore go into those points in any more detail.
24 We do, on our side of the court, and I think elsewhere, share the concern about time.
25 For our part --

26 THE CHAIR: Yes.

1 MR MALLALIEU: -- we are very keen. There are some, if I may say so, what we say
2 are important points here, which I think, as the Tribunal mentioned at the start of
3 yesterday, may have a knock on effect for other cases that come before this Tribunal.
4 Indeed, we say there's a very real risk of that.

5 Those points are important; they're points of principle. And we do say that we need
6 a fair opportunity and an equality of arms in addressing those points, which no criticism
7 at all of Mr Smiley, but as at this stage, the time we have to address them is
8 diminishing. And --

9 THE CHAIR: That's on the assumption we're going to finish at lunchtime. But I think
10 that we will carry on until we've got enough information from you, and you've made the
11 submissions you have. Because, look, I just want to focus on what's really important
12 and that's what you're doing here, so that's absolutely fine.

13 MR MALLALIEU: Sir, thank you. I don't want to commit the self-fulfilling prophecy of
14 spending too much time talking about the lack of time that's available, because that
15 doesn't help anything.

16 THE CHAIR: It eats into time, yes.

17 MR MALLALIEU: But in that regard, I should just mention that I understand some
18 others here representing parties may have difficulties this afternoon. For my part,
19 I have a commitment at 3.00 pm, which is not in front of a superior court, so if I have
20 to be here, I will be here. But it is a difficulty that I'll have to resolve. But I think there
21 are others who may have other commitments this afternoon as well.

22 THE CHAIR: Fair enough. Well, we'll just see how we go.

23 MR MALLALIEU: Sir, thank you. The only other point from me then, unless you have
24 anything else, since we're just dealing with housekeeping, sir, is we have handed up
25 a document that you asked for.

26 THE CHAIR: Oh, yes, right.

1 MR MALLALIEU: Which is the extract from Mr Friel's second witness statement,
2 paragraphs 23 through to 28.

3 THE CHAIR: I've got that now.

4 MR MALLALIEU: Just to introduce it very briefly and give you the reference, I think
5 probably the key part the Tribunal wanted is the second page of that, which is the table
6 of how, on our case, the entitlements under the various agreements would result in
7 payments to the various stakeholders. You can just see in relation to that that stage 1
8 is reimbursement of outlay, which in accordance with the revised deed of priorities
9 obviously goes to the funder first, and then thereafter, essentially a proportionate
10 return of what's left -- what is available -- is distributed at an equal proportion between
11 the remaining stakeholders.

12 Again, I won't take time with submissions --

13 THE CHAIR: I find it quite hard to read it when it's all in blue. Now, I can read it clearly
14 without my glasses. That's very, very helpful.

15 MR MALLALIEU: Thank you. Just to give you the reference in case -- because we
16 had to go back to the original document, so it doesn't have the bundle references at
17 the bottom.

18 THE CHAIR: Yes.

19 MR MALLALIEU: The first page is B/10/267.

20 THE CHAIR: 26 ...

21 MR MALLALIEU: 267.

22 THE CHAIR: I've just got one query before you sit down. When we look at the
23 schedule you gave us yesterday, the joint schedule.

24 MR MALLALIEU: Yes.

25 THE CHAIR: Just looking at what we've got to deal with today. We're still in open
26 court, we'll go into chambers in a minute. As regards the adverse costs indemnity fee,

1 which is £1.5 million.

2 MR MALLALIEU: Yes, sir.

3 THE CHAIR: That's across the three defendants in these proceedings?

4 MR MALLALIEU: It is. That indemnity applied to each and any and all of the
5 defendants.

6 THE CHAIR: And so, if we decide to allocate that, one third, one third, one third, that
7 would be on one view £500,000.

8 MR MALLALIEU: Well, as a matter of maths it would be £500,000. As to whether the
9 view that that's the correct approach is correct, we would say that is wrong. The
10 adverse costs indemnity fee relates to the indemnity that Woodsford provided for the
11 Trains 1 proceedings, and what we are dealing with here is the recoveries that have
12 been made, and the distribution of those recoveries, at this first stage of the Trains 1
13 proceedings.

14 The funding agreements and the conditional fee agreements and everything else are
15 not one agreement in relation to SSWT, one agreement in relation to the second
16 Trains 1 defendant, and one agreement in relation to the third Trains 1
17 defendant -- they are funding agreements for the Trains 1 cases.

18 What we have is a pot which is the first -- it may be the only, depending on what
19 happens to the rest of the defendants, or there may be more. But at the moment what
20 we have is the first pot of Trains 1 recoveries. That's what we are considering the
21 allocation of to the stakeholders.

22 THE CHAIR: Obviously, I'll have to hear Mr Smiley respond to that because he's got
23 a right to respond to that. But the fact is that once you've got the settlement, the
24 settlement was by SSWT in respect to the claim against it, you were no longer under
25 any risk of paying -- or anyone was no longer under any risk of having to pay adverse
26 costs against them.

1 We'd have to see what the implication of that is, but we'll hear Mr Smiley on that. If
2 need be, you can come back to that once he's finished on this section we're dealing
3 with at the moment.

4 Mr Smiley.

5 MR SMILEY: I wonder whether it'd be easiest to just finish the whole ACIF, to go into
6 camera and then we can finish the whole ACIF.

7 THE CHAIR: Exactly. So, we'll go into camera now. We'll then deal with ACIF, give
8 a ruling on that, and then we move on to the next one.

9 MR SMILEY: Thank you. Yes, absolutely.

10 THE CHAIR: Is the live stream being now cut? Thank you very much. Thank you.
11

12 HEARING IN PRIVATE – Transcript extracted.

13 THE CHAIR: So that deals with the first point. Then we will come back later to what
14 the implications are of that, what the figure should be. Let's look at the next point.
15

16 Discussion re Funder's Fee

17 Submissions by MR SMILEY

18 MR SMILEY: So, sir, the next point is in respect of the funder's fee, and if I could hand
19 up an updated version of the table produced overnight.

20 THE CHAIR: Okay, let's see what funder's fee is.

21 MR SMILEY: Exactly, and I'm handing up to two tables.

22 THE CHAIR: Yes, but have all the parties got this?

23 MR SMILEY: Woodsford has --

24 THE CHAIR: Make sure everyone has a copy.

25 MR SMILEY: -- but I'm handing them down so that other people have it.

26 TRIBUNAL MEMBER: Okay. Make sure everyone's got a copy. Okay.

1 THE CHAIR: And let me get this right: so, you've handed this: it's headed, "A
2 confidential note for Tribunal on contractual entitlements". So, what's the change
3 between the other one that you gave us yesterday?
4 MR SMILEY: It's in the row called "funder's fee".
5 THE CHAIR: Okay, let's have a look at that.
6 MR SMILEY: And it's to Charles Lyndon's case on the contractual entitlement.
7 THE CHAIR: Okay, so what --
8 MR SMILEY: And it has come up from --
9 THE CHAIR: Let's just see where we are. So, look, we've got -- we've just dealt with
10 the adverse costs indemnity fee.
11 MR SMILEY: Yes.
12 THE CHAIR: I'll put a tick on that, query £500,000, okay? So, we will resolve that
13 a bit later.
14 MR SMILEY: And necessarily, in those circumstances, the adverse costs exit fee does
15 come down, if that follows, as a matter of logic.
16 THE CHAIR: We have to come back to what that figure is now.
17 MR SMILEY: So, on their matters. It would be the £562,500.
18 THE CHAIR: Yes. And then?
19 MR SMILEY: There would be the dividing by three issue that would arise again.
20 THE CHAIR: Yes, okay. So, we'll come back to that. (Pause)
21 Okay, next one.
22 MR SMILEY: So, the only change in this document from the version that the Tribunal
23 was handed yesterday is in the funder's fee row, under the Charles Lyndon's case on
24 contractual entitlement, the figure has come up slightly from a £5.8 something figure
25 to a £5.9 something figure.
26 THE CHAIR: Okay.

1 MR SMILEY: And in the explanation of the parties' cases, there's a slight finessing of
2 the wording as to what Charles Lyndon says, and I'll explain that now.

3 THE CHAIR: So, the old one? Is it better just to scrap the old one and forget about
4 it?

5 MR SMILEY: Depending on the extent to which the Tribunal has marked it up, it's
6 either better to scrap it or plug in the new figure for the funder's fee --

7 THE CHAIR: Yes.

8 MR SMILEY: -- that is in the new version.

9 THE CHAIR: Yes, I've made notes. Okay. (Pause)

10 MR SMILEY: I thought it would be useful for the Tribunal to simply set out in broad
11 terms what the debate is, because the funder's fee is, on Woodsford's case, the full
12 £21 million.

13 THE CHAIR: Yes, exactly.

14 MR SMILEY: An alternative middle route is the full £21 million divided by three, and
15 a more nuanced, worked through route, is Charles Lyndon's case, which is the
16 £5.99 million, and in a sense, which of those it is, is, on Charles Lyndon's case, not
17 particularly relevant, because what we propose, our proposal, is not based on what
18 the funder's fee is contractually; our case is based on what the appropriate MOIC is,
19 which is not calculated by reference to the funder's fee, it's calculated by reference to
20 the input and the outlay.

21 So, the funder's fee itself is, on one view, a distraction, on another view, that the
22 Tribunal may wish to take it into account in determining the extent to which it's fair to
23 reduce Woodsford's fee. And that's how it fits into the debate.

24 THE CHAIR: But at the end of the day, we look to see what's been already paid and
25 that we've got that figure. We look to see what's left, and one approach would be to
26 say, well, we want to make sure, insofar as we can, seeing how much is left, that

1 everyone gets at least their costs. That means your time, your disbursements and the
2 funder's actual costs of what they've actually had to pay out.

3 As a sort of see what that looks like, what figure do we get? And then we look at the
4 next stage as to what we're going to do, because that's what I need to have, hopefully
5 by the end of today: a clear picture of that, that very basic thing, because of course,
6 we'd want to talk about rates of return for everyone.

7 But, you know, with a very limited pot of what's left, no one is going to get some
8 massive rate of return on this, in respect of this. There just isn't the money, and that's
9 partly because the parties have agreed they're going to give £3.8 million to the charity,
10 which I've said is a very good thing, a very positive thing. But if everyone's looking at
11 this, that this case is going to be some sort of great precedent as to what are the
12 appropriate rates of return, this is not going to be the case. You know, the case where
13 that will really be very important is where there's lots of money to share out, and there's
14 enough money to give people very significant rates of return. This is not one of them.

15 So, when people talk about this case, that it's going to be some sort of great precedent
16 on rates of return, I don't think it is. I think it's going to be a case where we're going to
17 have to see what there is left, and there may not be a huge amount of money left to
18 give people significant rates of return. The tin has got what's in the tin. I can't add
19 money, put a few more shillings into the pot. Where's that money going to come from?

20 MR SMILEY: Absolutely, sir, and it's for that reason that I don't intend to dwell for
21 a long time on this issue, because, in a sense, the bigger issue is whether one looks
22 at the outlay by reference to Stagecoach alone, or by reference to all of Trains 1.
23 That's the key issue when it comes to determining what is the appropriate rate of
24 return, because the rate of return is calculated by reference to that figure.

25 So, what I was going to do was just draw the Tribunal's attention to where the dispute
26 is on the funder's fee -- and it is £21m versus £7m versus £5.9m -- and point the

1 Tribunal to where, having handed up this table, which works through how we get to
2 our £5.9m figure. I wasn't intending to go through --

3 THE CHAIR: Where is that table? Which one?

4 MR SMILEY: Sorry, it's the second table that was handed up. So, what this does is
5 explains how we get to our £5.9m figure.

6 THE CHAIR: Let me just read this, okay?

7 MR SMILEY: If the Tribunal's doing that, it should have open the LFA at the relevant
8 provisions, which is 10.1, 10.2 and 10.3, which is at tab 7 of bundle A on page 190.

9 THE CHAIR: So, you want me to get bundle A?

10 MR SMILEY: Well, no, sir. What I was actually proposing to do was simply draw to
11 your attention, this is how we get to our £5.9m. But, based on your indication,
12 the £5.9m is not a particularly pertinent factor in the Tribunal's reasoning. So, it's not
13 something I was intending to dwell on. It would take a considerable length of time
14 working through what are pretty complex contractual provisions. But if the Tribunal is
15 minded to go to it, the relevant provisions are 10.1, 10.2 and 10.3, at page 190, tab 7
16 of bundle A.

17 THE CHAIR: Do you want to ask a question?

18 TRIBUNAL MEMBER: Can I just ask a quick question?

19 MR SMILEY: Absolutely.

20 TRIBUNAL MEMBER: In the note you talk about table 10.3 of the LFA. I was trying
21 to recreate your £5.8 million last night, and I failed, so hopefully I can follow the
22 £5.99 million, but I couldn't find a table 10.3.

23 MR SMILEY: Apologies, it's not a table. It's provision 10.3.

24 TRIBUNAL MEMBER: Oh, good.

25 MR SMILEY: That is very helpful, and I'm grateful for the overnight work that the
26 Tribunal is not alone in putting in.

1 But what this seeks to do is explain why, because of our different approaches to
2 whether it's £6 million or £2 million that you start with, on our case, one doesn't simply
3 divide the £21 million by 3, which is £7m; one actually gets to a slightly lower figure,
4 which is £5.9m.

5 It doesn't matter, for the purposes of the Tribunal, because the critical dispute between
6 the parties is whether one starts with the £2 million or one starts with the £6 million.

7 The arguments that we make in respect of both of those issues are overlapping,
8 because essentially clauses 10.1 to 10.3 are concerned with payments in the case of
9 settlement. Here, the only settlement was made with Stagecoach, which is one of
10 three defendants. That leaves open the possibility of a further funder's fee, if or when
11 there are settlements or judgments against the remaining defendants.

12 If one takes the funder's approach of £21 million, and likewise their approach of
13 £6 million in terms of input, it undermines fundamentally the principle of risk and
14 reward. Woodsford is no longer at risk as against Stagecoach, and its reward should
15 be limited by reference to Stagecoach. It also undermines the principle of investment
16 and reward, because Woodsford only invested, as against Stagecoach, the
17 £2 million-odd figure. Yes, it has incurred £6 million, because the £6 million LFA figure
18 has been exhausted, but it would be wrong in principle, when the Tribunal is
19 determining what is the fair distribution of settlement proceeds as against one
20 defendant to take into account either the funder's investment as against all three
21 defendants, or what the funder might have received if the settlement was against, and
22 was with, all three defendants.

23 That's just looking at it from the Woodsford end. There is a knock-on effect of
24 Woodsford's approach, which is that the funder gets everything, and the solicitors, the
25 third leg of the stool, get next to nothing. Essentially, Woodsford benefits with
26 guaranteed returns while the solicitors lose, and that's in a context where Woodsford

1 | itself, in its evidence, such as in Friel 2, the table that was just handed up by
2 | Mr Mallalieu -- actually, it's in a slightly different table, but I needn't take the Tribunal
3 | to it. But what Mr Friel does is he does apportion in certain of his tables, seemingly
4 | where it suits him, he apportions it by reference to particular defendants, and
5 | particularly does that in respect of the lawyers' fees. Well, if that can be done with the
6 | lawyers' fees, it's appropriate for it to be done with the funder's fee and with the
7 | funder's investment.

8 | So, we do say that there is a risk of cross-subsidisation if what happens is that
9 | Woodsford is using a funder's fee for Trains 1 in respect of funding Trains 2. The
10 | evidence for that is in bundle B at page 156, tab 9.

11 | THE CHAIR: Yes.

12 | MR SMILEY: This is an email from Mark Spiteri, the CFO of Woodsford, to Stephen
13 | Littleford of Charles Lyndon. Under the heading "consolidation" in the second
14 | paragraph, what he says is:

15 | "You are correct that we have used a different apportionment method for costs and
16 | disbursements compared to fees. The simple reason for this is because the costs and
17 | disbursements budget was exhausted in T1, so we are prepared to use some funding
18 | commitment from T2 to pay disbursements on T1 in order to ensure that suppliers
19 | continued to be paid (and don't stop work)." [as read]

20 | So, there is evidence of cross-subsidisation between the pots, between the claims.
21 | That is, between T1 and T2.

22 | MR MALLALIEU: Yes, so it's not -- I'm sorry, I thought you were saying
23 | cross-subsidisation between claims against --

24 | MR SMILEY: No, this is cross-subsidisation between T1 and T2.

25 | THE CHAIR: Okay, yes, I think that's fairly clear.

26 | MR SMILEY: Yes, that's what I was --

1 THE CHAIR: Yes, I can see that.

2 MR SMILEY: So, put simply, that is why we say, whether one looks at the funder's
3 fee as £5.9m or £7m or £21m, it's more appropriate to either use the £5.9m or
4 the £7m, but really what the Tribunal is concerned about is whether one looks at the
5 input as a 6-odd number or a 2-odd number, and we say it is plainly more appropriate
6 for the 2-odd number to be the reference point in circumstances where that is the
7 investment on the Stagecoach case.

8 So that was the second of my four points. Those first two points are really directed at
9 looking at the Woodsford end of the telescope. The other factor, when considering
10 the fair allocation between funders and lawyers, is the lawyers. So, the final two points
11 are firstly in respect of allocation between Trains 1 and Trains 2. And the final point,
12 the final of the four points, was funding notices being the relevant source of evidence
13 as to Charles Lyndon's fees.

14 So, as to allocation between Trains 1 and Trains 2 -- I should say I can probably deal
15 with these submissions openly. We can probably come out of camera.

16 THE CHAIR: Oh, we're out of camera, aren't we?

17 MR SMILEY: Oh, are we? Okay.

18 THE CHAIR: I thought we were. Put us all back in.

19 MR SMILEY: Yes, I think the intention had been, but I hadn't noticed any change
20 in -- I'm on camera.

21 THE CHAIR: Is live stream on now? And how long has it been on for? (Pause).
22 When it comes to publishing the transcript of this hearing, a lot of what's been said
23 earlier on this topic should be in the publicly available transcript, so everyone can see
24 what was said. Do you have any comment?

25 MR MALLALIEU: If we take it from the end of the judgment on the adverse costs?

26 THE CHAIR: Thank you very much. That's a sensible way.

1 So, from the end of the brief reasons on the first issue, to now, should have been in
2 open court, and I now deem it was in open court, and that will be reflected in the
3 publicly available transcript.

4 MR SMILEY: I'm very grateful, sir. Shall I continue?

5 THE CHAIR: Please do so. We're looking at the --

6 MR SMILEY: We're now looking at allocation between Trains 1 and Trains 2.

7 THE CHAIR: Yes, we're looking at that, yes.

8 MR SMILEY: The point here is essentially one of the conservative basis of
9 Charles Lyndon's fee calculation. Because Woodsford allocated 75 per cent of costs
10 to Trains 1, whereas the class rep, through Charles Lyndon, allocated it 50/50,
11 Trains 1 and Trains 2. So, you may recall my natty picture that my solicitors had drawn
12 yesterday. So, whereas 16 2/3 per cent was allocated to the Stagecoach fees by
13 Charles Lyndon --

14 THE CHAIR: Sorry, 16 2/3 per cent by Charles Lyndon to own fees.

15 MR SMILEY: Whereas, if we adopted the Woodsford approach, it would go up to
16 25 per cent. Because they do it per defendant.

17 THE CHAIR: Yes.

18 MR SMILEY: So, it's a relatively short point, but there are three sub-points to make in
19 respect of this. The evidence for this is found in Ms Antzoulatos's first witness
20 statement at paragraphs 39 to 41, which is in the bundle. I needn't take the Tribunal
21 to it. There are three points to make. Firstly, this was a change of position because,
22 from September 2021 to January 2024, Woodsford had accepted the fees to be dealt
23 with on a 50/50 basis.

24 The second point is it was applied inconsistently by Woodsford itself, and
25 Ms Antzoulatos gives examples of that.

26 The third point, and it's an important one in terms of the fairness of allocation of the

1 proceeds, is it reduced the available funding to Charles Lyndon because of the
2 disputes over it -- and I'll come also to the funding notices, that's the next
3 issue -- forcing Charles Lyndon to self-fund with a figure of 88 per cent.

4 So, we say, taking that into account, what the Tribunal could do is, in fact -- and we
5 would be prepared to do this -- request us to provide updated figures on a basis of
6 25 per cent, as opposed to 16 2/3 per cent. Alternatively, given that no one is going
7 to get their full allocation, we just entreat the Tribunal to take into account the fact that
8 our figures are lower than they otherwise would be.

9 The fourth issue, before we get into the sort of justification for the particular MOIC that
10 we put forward --

11 THE CHAIR: But on that last point, it would be helpful to have the maths on the
12 different alternatives.

13 MR SMILEY: I'm sure that can be produced.

14 THE CHAIR: Yes. So, you've done your calculation on the basis of 16 2/3 per cent,
15 and Woodsford are saying, no, the appropriate way is 25 per cent. At the end of the
16 day, it may or may not have an impact on the ultimate figures that everyone gets, but
17 I think it's certainly useful to have the two alternatives so that we can understand the
18 impact it has on the --

19 MR SMILEY: Understood. And I'm sure those behind me heard that loud and clearly.

20 THE CHAIR: (Audio error) I'm always happy to hear.

21 MR MOSER: From the class representative's point of view ... I speak in a strange
22 way, in a sort of vacuum of instructions, but it would be useful to have some indication
23 as to which allocation is preferred, between T1 and T2, because it will, of course, have
24 an effect on T2, eventually -- potentially or actually.

25 Since some time will have been spent here on debating it all, it would save time and
26 cost eventually -- whichever way the Tribunal decided -- if the matter were, resolved.

1 But I merely comment, and otherwise leave it to everybody else, including the Tribunal,
2 as to what they wish to do about it.

3 THE CHAIR: It's helpful to know what the ramifications are.

4 MR MALLALIEU: Sir, can I just make a brief observation in response to Mr Moser's
5 observation? The purpose of the discussion that we are having at the moment is to
6 do with how these sums have been allocated by reference to sums incurred under the
7 funding agreements.

8 None of this, of course, binds the class representative in relation to the costs that he
9 can seek to recover from the defendants. Indeed, as you'll be aware, sir, the usual
10 position with common costs -- the very reason they're described as common costs -- is
11 that a party incurs common costs because they are all common to the claim pursued
12 against a number of defendants, and essentially the inherent definition within them is
13 that whether you've sued one defendant or four defendants, you would have incurred
14 those costs, which are common to all of them.

15 The extra costs that you incur suing the individual defendants are individual costs,
16 which are separate. But the whole point of the common costs is usually -- it's different
17 here because we're in a settlement position -- but if you win against defendant one
18 and lose against defendants two, three and four, you look to recover all of your
19 common costs against defendant one.

20 THE CHAIR: Okay. So what you'd rather we do is to say whatever we determine for
21 the purpose of distributing a limited settlement sum, as between you and
22 Charles Lyndon, that does not bind the parties as to the allocation of costs for the
23 purposes of -- as between the class representatives and the defendants when it comes
24 to the trials that have either taken place or will take place.

25 MR MALLALIEU: Indeed, sir. It's not for me to advise the class rep, and I'm not
26 remotely seeking to do so. But of course, a point in time may come where, if the

1 class rep is successful against other defendants, he may seek to recover more than
2 just essentially a 25 per cent share of his common costs against those defendants.
3 He's not limited by anything this Tribunal says to only ever recovering a 25 per cent
4 share of common costs against any defendant; that would be a matter for the
5 section 51 Senior Courts Act discretion of -- sorry, a different discretion -- the general
6 cost discretion of the Tribunal dealing with the argument about adverse costs. It's not
7 anything that this decision will bind him on.

8 THE CHAIR: For my part -- I'll just check with my colleagues -- I agree with that
9 approach. Because what we don't want to do is determine for the purposes of costs
10 as between the parties, what the position is going to be. That's going to require a great
11 deal more argument, and the court has got his own discretion as to how they deal with
12 it.

13 We're just talking about now what the position is for the exercise we're carrying out in
14 determining how to split a limited pot, and we're just dealing with the position as
15 between you two.

16 MR MALLALIEU: Indeed, sir, and its relevance goes to the points that Mr Smiley's
17 been addressing on issues such as funder's outlay. But of course, actually, it doesn't
18 really go very far anyway, because we all agree that the maximum sum under the
19 budget has been spent. The real argument is whether, when we come to look at
20 parties' entitlements in consequence of that, we look at it on an SSWT siloed basis, or
21 on a Trains 1 basis, so --

22 THE CHAIR: I think, yes.

23 MR MALLALIEU: It's a matter for Mr Smiley. I stood up in response to Mr Moser, but
24 I'm not sure this is an argument that takes us very far. I do encourage the court to be
25 careful in the class representatives' interests, as well as the other stakeholders'
26 interests, in saying anything which might be said to impose a fetter on the

1 recoverability of costs against other defendants.

2 THE CHAIR: So, we've dealt with Mr Moser's concern now, by what I've just said.

3 MR MALLALIEU: Sir, I would hope so, but Mr Smiley may have something to say.

4 MR SMILEY: No, just briefly --

5 THE CHAIR: I'll put it in the written ruling, to make it absolutely clear. You'll be sent
6 the draft ruling, and if you don't think it's clear enough, I can make it even clearer. But
7 it's an important point, and I don't really want to prejudice either the defendants in this
8 action and other action, nor do I want to prejudice the class representatives. It's clearly
9 a point that needs to be argued before whoever has to decide that on a clean sheet
10 basis.

11 MR MALLALIEU: Yes, of course, none of this affects Ms Abram's client, of course,
12 she's protected by the terms of the settlement.

13 THE CHAIR: She is, of course.

14 MR MALLALIEU: It's in relation to the other defendants going forward.

15 THE CHAIR: Yes.

16 MR SMILEY: For the sake of completeness, I should just redraw the Tribunal's
17 attention to its own order approving the settlement, which is at tab 8 of bundle A. At
18 paragraph 17 of that on page 217 --

19 THE CHAIR: Yes.

20 MR MALLALIEU: -- it provides:

21 "The Class Representative shall not seek to recover from the Non-Settling Defendant
22 (and/or any of its direct or indirect shareholders, and/or other members of their
23 corporate groups), the SE Defendants and/or the GTR Defendants any costs, fees or
24 disbursements to the extent attributable to the claim against SSWT."

25 So, there is already an order that to an extent protects the non-SSWT defendants. We
26 say that the logic of that order is followed through into our submissions, which is there

1 is to an extent a siloing of costs, but I endorse the position that it this is not the forum
2 for the Tribunal to be making decisions as to cost orders between claimant and
3 defendant. The decision that is being made today is solely about distribution between
4 the stakeholders.

5 THE CHAIR: Yes, thank you.

6 MR SMILEY: So that is allocation. The fourth and final issue is the funding notices,
7 which is what Woodsford relies on as the appropriate calculation of Charles Lyndon's
8 costs entitlements. We say that those notices provide an inaccurate and incomplete
9 picture; they understate Charles Lyndon's true costs. That's set out in some detail by
10 Ms Antzoulatos in her first witness statement at paragraph 50 and following.

11 I simply summarise by reference to that, but do take the Tribunal to page 95 of
12 bundle B, tab 9.

13 THE CHAIR: You want the Tribunal to say that in deciding the allocation, we're not
14 bound by the funding notices?

15 MR SMILEY: Indeed. There are good reasons for that. The first is it doesn't capture
16 all of Charles Lyndon's work, so it doesn't capture pre-LFA work, it doesn't capture
17 distribution costs, and it doesn't capture the costs of this very hearing.

18 The second point, and that's what made good at page 95, is it doesn't capture the
19 impact of the delays in payment by Woodsford to Charles Lyndon. At page 95, in
20 paragraph 52, I won't read it out because it is marked confidential.

21 THE CHAIR: Yes.

22 MR SMILEY: There is a table setting out the dates of the funding notices and the
23 length of time --

24 THE CHAIR: It varies. Some of it takes a long time, some of it's pretty prompt.

25 MR SMILEY: The "promptness", the Tribunal may note, happens over the page, and
26 the Tribunal may take into account the timing of that, relative to when Woodsford was

1 going to receive a substantial sum from the settlement. So, what Woodsford was
2 doing, as a --

3 MR MALLALIEU: It seems remarkably cynical, when even on the first page, we can
4 see payments within 17 days and 15 days. Also, there's no evidence to support that
5 sort of cynical observation.

6 THE CHAIR: The way I look at it is, is that Woodsford has a right to look at the fees,
7 and sometimes it's pretty easy and you can come up and say: yes, that's not
8 a problem.

9 Other times it requires a lot more detailed analysis. If Woodsford are in the business
10 of deliberately holding back payment for their own cash flow purposes, they're not
11 going to be very popular as funders, I don't think. I don't think that's how it probably
12 worked in the real world on this; they're not -- if I thought that they were deliberately
13 holding back payment for some sort of collateral advantage, they'd be in trouble, let's
14 be honest. But I don't think that. When I looked at that table earlier, I see it takes time.

15 MR SMILEY: Sir --

16 THE CHAIR: But you can say the impact has been that there has been delays in
17 payment.

18 MR SMILEY: That was my premise. I said at the meeting that --

19 THE CHAIR: No, you were saying something else.

20 MR SMILEY: As I saw it, the short periods, the six, eight and eight --

21 THE CHAIR: Yes.

22 MR SMILEY: -- there is a correlation. I'm not saying causation, I'm saying correlation.

23 THE CHAIR: What I want to make clear is there's an insinuation which is not
24 appreciated, and it's not going to get you very far.

25 MR SMILEY: Understood.

26 THE CHAIR: What we are happy to deal with is the fact that, yes, there have been

1 delays, but these things sometimes take more time than everyone hopes. But I don't
2 think it was a deliberate decision by them basically to mess you up, or just for their
3 own cash flow purposes. Because if they were doing that, they'll get a reputation in
4 the market, and no one will want to work with them.

5 As I said, I don't believe that they are that type of organisation. They look at the long
6 term; I don't think they look at the short term anyway.

7 So that's that point. As a matter of fact, there has been some delays, and that has an
8 impact.

9 MR SMILEY: That is why I took the -- that was the purpose of taking the Tribunal to.

10 THE CHAIR: That's the only point I'm happy with, but I thought the evidence there
11 was something a bit more about that. But on a slightly different slant.

12 MR SMILEY: The next point tied to the delays is the payment of VAT, which is dealt
13 with by Ms Antzoulatos in --

14 THE CHAIR: Yes, I can understand the VAT issue, yes.

15 MR SMILEY: The penultimate point on this is a refusal to consolidate the LFAs for
16 Trains 1 and Trains 2, which Ms Antzoulatos also deals with. The final point on this,
17 and it feeds into this risk/reward balancing act, is that the funding notices were issued
18 on the basis that they would be 50/50: 50 per cent deferred and 50 per cent paid. But
19 the reality, as the Tribunal will recall, is that in fact 100 per cent from March 2021 was
20 deferred, because of the budget being exceeded.

21 So those are the four --

22 THE CHAIR: So that's March 20 ...

23 MR SMILEY: 21.

24 THE CHAIR: 21. So 100 per cent deferred, because budget exceeded. I understand,
25 and I think Woodsford understands, why that budget was exceeded. Sometimes these
26 cases are really difficult to budget right through to the end, and the budget is

1 always -- is a budget, you know, and I don't think from what I've seen that you
2 unreasonably exceeded that budget. Litigation goes the way it goes; sometimes it's
3 outside your control; sometimes disclosure costs a lot more than it should do, which
4 is always a very big factor; other times you've got a defendant, and you have various
5 contested applications and all that, and of course it's going to get much higher.

6 But I'm not going to make any criticism from what I've seen so far about the fact that
7 the budget was exceeded. I don't think Woodsford would make any criticism, either.

8 MR SMILEY: Well, Woodsford do rely on that.

9 THE CHAIR: They rely on it, but I don't.

10 MR MALLALIEU: We don't say the budget was unreasonably exceeded, we simply
11 say that there was a pre-agreed consequence of that, which is, you know, 100 per cent
12 deferred. That's how funders cater for this thing. They have to have a budget at the
13 start, and you have to come to an arrangement with the solicitors as to what will
14 happen to fees which go over budget. So insofar as we rely on it, we simply say we
15 rely on what everybody agreed the consequence would be.

16 THE CHAIR: Yes, okay.

17 MR MALLALIEU: Yes.

18 MR SMILEY: Sir, I'm now coming to the justification for our MOIC, and this is the sort
19 of final big issue that remains, and then I'll sit down and I appreciate --

20 THE CHAIR: Do we want to deal with that separately? We've got these three issues
21 to deal with now. Unless you say that we need to -- it's sensible. I don't really mind
22 which way we do.

23 MR SMILEY: From our perspective, these are all factors that tie into the overall
24 assessment --

25 THE CHAIR: Okay.

26 MR SMILEY: -- as to the fair allocation of the £6.2 million.

1 THE CHAIR: Okay.

2 MR SMILEY: And so, in a sense --

3 THE CHAIR: Happy to hear it now, yes.

4 MR SMILEY: So, the Tribunal will recall that our proposal is for Woodsford to keep
5 everything that it has received. Woodsford thereby, on our calculation by using the
6 £2 million as opposed to the £6 million, having an MOIC of 2.49X, and everyone else
7 having an MOIC of 1.47X. We say that is fair, reasonable and proportionate, and we
8 note that contrary to certain suggestions in Mr Friel's third witness statement, this is
9 not suggesting that everyone gets the same MOIC; Woodsford notably gets
10 a substantially greater MOIC.

11 There are specific factors that we say require the lawyers to receive a more fair
12 allocation.

13 The first: it is wrong for Woodsford to say that only the funder and only the
14 ATE insurers invested in this case; the lawyers invested time, which has both an
15 opportunity cost and a capital outlay, in terms of overheads and salaries.

16 The second point is that level three of the waterfall, the Tribunal will appreciate that
17 the waterfall comes in stages, and what happens at level three is not alike. It has
18 Woodsford's return, but it includes the lawyers, deferred fees and then beneath that at
19 level four, one has the remaining out of budget fees. And so, the lawyers come in
20 respect of that key point of exceeding the budget. That's why Charles Lyndon would
21 suffer greatly by the strict application of that waterfall. And this budget point is an
22 important one, and I absolutely hear what the Tribunal says, and I absolutely hear
23 what Mr Mallalieu says, but it is important in considering the fair distribution, that one
24 looks at the justification for the budget and the circumstances in which it was agreed,
25 and what happened next. (Pause)

26 So, an obvious point: the budget was agreed extremely early, in September 2018, that

1 was before the delays caused by Merricks and the appeal there; it was before the
2 appeal in this case, as dealt with in Ms Antzoulatos's first witness statement in
3 paragraph 28. (Pause)

4 In the circumstances where the budget was exceeded so that Charles Lyndon wasn't
5 being paid any more, if we could go, please, to tab nine of bundle B and page 86.
6 (Pause)

7 And it's paragraph 29, which is confidential material, which I invite the Tribunal to read
8 to itself. (Pause)

9 Which obviously put Charles Lyndon in an impossible position, in terms of what it was
10 to do, absent more money.

11 In terms of more money, Ms Antzoulatos deals with that at paragraphs 30 and
12 following. Again, that's confidential material, and again, I won't read it out, but the
13 Tribunal may recall what she describes there in terms of what occurred, what was
14 offered and what happened.

15 THE CHAIR: And on those two paragraphs, what's the justification, given that you're
16 going to ask us to rely on them in a judgment, for keeping that confidential? Because,
17 you know, we've got a duty as a Tribunal, open justice and everything, as we go along,
18 to satisfy ourselves that it's appropriate to continue maintaining confidentiality of
19 material. (Pause)

20 MR SMILEY: We're content for that not to be confidential, if Woodsford is.

21 THE CHAIR: We'll have to see what Woodsford will say about that.

22 MR SMILEY: The --

23 THE CHAIR: Let's see what he's got to say about that, sorry. (Pause)

24 We'll take our break now anyway, and when we come back, you can tell us whether
25 both of you are still maintaining -- that should remain confidential, and we'll see if
26 Woodsford are. If we come back at 11.55 am.

1 (11.44 am)

2 (A short break)

3 (12.05 pm)

4 THE CHAIR: Where are we on 29 to 33? Do you want to say something? Okay.

5 MS ABRAM: That's all right. Just making a surprise cameo.

6 THE CHAIR: Yes.

7 MS ABRAM: I won't take very long.

8 THE CHAIR: A guest appearance.

9 MS ABRAM: So, just a point that's been agreed between Mr Moser and me about the

10 form of order, because we've been thinking about that as between the main parties.

11 THE CHAIR: Oh, yes.

12 MS ABRAM: So, we understand that the structure will be that there'll be the

13 undertaking given by the stakeholders as to the payment to charity --

14 THE CHAIR: Yes.

15 MS ABRAM: -- and there will be an order for the payment by my client, by SSWT, in

16 the sum that's been agreed. And then it seems, to Mr Moser and to me, it's common

17 ground that there should be provision in the order that once we've made that payment,

18 the proceedings, the claim against my client should be discontinued, because there

19 will no longer be any --

20 THE CHAIR: There's nothing else, is there?

21 MS ABRAM: There's no extant issue, yes. Just to be clear, to tie up all the potential

22 loose ends and make it super clear that it's over, and to have a provision for

23 discontinuance, that's all.

24 THE CHAIR: Yes. The only additional thing that I was going to ask at the end, but

25 now you're standing you can do it now, is whether or not your clients have a position

26 whether they consider that it's appropriate in all the circumstances for the £3.8 million

1 to go to charity. If they do, then when it comes to the judgment, we can say all the
2 parties agree that's the appropriate thing to do in all the circumstances. If your clients
3 are not prepared to say that, then obviously I can reflect whatever the actual position
4 is. I just want to give your clients the opportunity of saying what their position is.
5 I know up until now they said they're neutral, subject to the point that you don't want
6 to have to pay more than £10.2 million, but if your client's position is that they would
7 like to say anything else, then they can, but they don't have to. (Pause)

8 You don't need to say it now.

9 MS ABRAM: I can't say any more now.

10 THE CHAIR: Of course, but you'll be able to say something this afternoon, if you want
11 to say anything, and then once we finish today, the train is gone. So, this is your
12 opportunity if you're going to say it today.

13 MS ABRAM: I'm not sure if it's left the station or reached the end of the tracks.

14 THE CHAIR: Well, I don't know. Hopefully it will reach the end of the track once you
15 get the order, at least for you, that the proceedings are discontinued against your
16 clients.

17 MS ABRAM: Yes.

18 THE CHAIR: But thanks very much. Okay.

19 Paragraphs 29 to 33.

20 MR MALLALIEU: Sir, yes. The short point, and I won't bother you with the responsive
21 evidence on this: as a matter of the contents of the witness statement and what's
22 asserted as a matter of fact, we don't agree to it --

23 THE CHAIR: Of course you don't.

24 MR MALLALIEU: -- but in terms of the confidentiality, we are entirely content that that
25 is not confidential.

26 THE CHAIR: So, the paragraphs 29 to 33 are not confidential, and so obviously can

1 be made available to the intervening parties insofar as they'd like to see it as well.

2 Thank you.

3 MR SMILEY: I'm grateful.

4 So, Tribunal, you'll be pleased to hear that I'm on the final furlong of my submissions.

5 THE CHAIR: Okay.

6 MR SMILEY: Thank you for the enthusiasm.

7 The two points I was going to finish with were related to the marketplace.

8 One very short point, and it goes to what the Tribunal indicated about this not being

9 a precedent for future cases, and that is in part because what we're talking about is

10 a specific LFA negotiated at a specific time, and the specific time, as dealt with by

11 Ms Antzoulatos in her second witness statement, at paragraphs 41 to 45, which is at

12 tab 14 of bundle B, pages 184 to 186, she describes there the difficulties in obtaining

13 funding at all, because this was so very early in the life of this regime. That's an

14 important point in terms of -- sort of -- take it or leave it approach to the contractual

15 terms.

16 And then the second marketplace issue that I was going to address the court on relies

17 on the Crescent Report, which the Tribunal may have seen. It's exhibited to

18 Ms Antzoulatos's first witness statement.

19 THE CHAIR: Yes. I've read that, and I thought it was great, quite helpful. Well, that's

20 what I thought when I read it, but maybe I'll be told by someone else that it wasn't

21 helpful. But when I read it, and that was whenever it was served, I haven't reread it

22 again, but there's nothing specific you want us to look at, we will.

23 MR SMILEY: Well, without troubling the Tribunal taking up too much time, there are

24 two sections of it that we particularly rely upon.

25 THE CHAIR: Yes.

26 MR SMILEY: The first is section 3.2, which simply summarises Crescent's

1 conclusions, and it's page 230 of bundle B.

2 THE CHAIR: Yes, let's have a look at that. (Pause)

3 Bundle B, what tab number?

4 MR SMILEY: Tab nine.

5 THE CHAIR: Yes. (Pause)

6 MR SMILEY: And what the Crescent Report, which is based, as it says on its own
7 experience, and data provided publicly by Burford, they've calculated average MOICs,
8 and it can be seen in figure 4.A, the target average return on successful cases. So,
9 the target that funders seek, we rely on that, and you can see the central case -- the
10 range of the central case, and that our proposed MOIC is around that central case
11 figure.

12 And then at page 235 towards the back of the main report, section 3.7 at the bottom
13 deals with distribution of returns, but what we rely on in particular is the chart overleaf,
14 which is described in 3.7 on 225 as evidence from the Burford data. It shows the
15 distribution of returns by each layer of MOIC. Note the loss ratio identified by
16 investments that return less than 0.5 MOIC. The bars represent the distribution, the
17 lines represent the aggregate contribution of the category, the overall return on the
18 right hand axis.

19 But overleaf, one has the graph, the explanation of the graph says the average return
20 for the winners in the litigation.

21 THE CHAIR: So, what page?

22 MR SMILEY: Page 236 now.

23 THE CHAIR: Yes.

24 MR SMILEY: So, you have the graph, which no doubt the Tribunal can digest on as it
25 wishes, but the key takeaway is from this graph, it can be seen that the average return
26 for the winners in the litigation is a 2.6X MOIC. And so, what we're seeking, at 2.49X

1 for a winner, but a winner in a disappointing case, we say is fair and reasonable.

2 And so, one final point that I believe is being taken against us is we ought to have
3 taken, and I think it was --

4 THE CHAIR: On the 2.49 rate of return, as I understand it, the funder doesn't accept
5 the maths, so they will say on the maths, if they get the amount that you say they
6 should, they'll be getting a lesser return.

7 MR SMILEY: Yes, but that's the debate over whether it's £2 million or £6 million.

8 THE CHAIR: Yes.

9 MR SMILEY: And we proceed on the assumption that our submissions on that are
10 accepted, because we are talking about the settlement of the Stagecoach case, so we
11 should be looking at the returns on the investment into the Stagecoach case. The
12 investment into the Stagecoach case was the £2 million figure. (Pause)

13 So, sir, the one small point before I conclude, is about the contractual dispute
14 resolution mechanism, which, as I understand it, is being said against us. We ought
15 to be using that, rather than having the debate in front of you now, and we say that
16 misconstrues those contracts and is unrealistic in the circumstances of this case. The
17 evidence for that is Mr Gutmann's seventh witness statement to paragraphs 31 to 33,
18 which is at pages 953 to 955, and it's reflected in our written submissions at paragraph
19 40.

20 So, to sum up, this regime is only workable if all stakeholders, including lawyers, can
21 expect adequate returns reflecting their risk and their contribution. If Woodsford's
22 position is adopted, then the funder here will profit massively, and the lawyers will
23 suffer a very significant loss. That is not fair and that is not reasonable, and that is
24 why we entreat you to accept our proposal. Unless I can assist further?

25 THE CHAIR: You've been very helpful. Yes, well, we'll deal with the various issues
26 that have been raised, hopefully today, though we may have to leave this last issue,

1 the actual MOIC, once we've done all the calculations and see what that figure is. Or
2 we may look at it a different way. But I'd rather, as a Tribunal, get our minds around
3 everything else before we see what the appropriate MOIC is for each of the
4 stakeholders. Of course, we've still got the argument we've got to get to the bottom
5 of, about the implications of the contractual arrangements between you.

6 MR SMILEY: Yes, sir. And you have my submissions from yesterday as to --

7 THE CHAIR: Yes, I understand what your submissions are, which is that even those
8 clauses are all subject to the Tribunal. Everyone's accepted that they say that's what
9 it is, whereas the other side say, well, that wording in relation to it all being subject to
10 the Tribunal does not take away their contractual entitlement, and it doesn't qualify.
11 You say it does qualify; they say it doesn't qualify. We'll obviously have to take a view
12 on who's right on that once we've heard all the submissions on that.

13 Thank you. You can sit down, yes.

14 Can you do it in the same order as he has? It's easier for my notes, if that's okay.

15 Reply submissions by MR MALLALIEU, KC

16 MR MALLALIEU: I'm going to attempt to do so, although I think there are one or two
17 bits where Mr Smiley and I may sort of slightly pass each other in terms of the
18 approach that we're taking, rather than clashing head on. I think there's enough where
19 we clash head on, that we'll hopefully be able to try and do that.

20 THE CHAIR: Yes.

21 MR MALLALIEU: This is my first opportunity -- I appreciate that you've heard from me
22 briefly on some short points as we've been going through, but this is my first
23 opportunity to address the issues of substance. So can I just firstly start by just trying
24 to summarise what we say in a nutshell, and then I'm going to come to the issues in
25 a little more detail.

26 What we say really is very much at the heart of this is the first thing that is important

1 to understand is what this case is, and what was being funded in relation to this case.
2 Our short position in relation to that -- I know the Tribunal have the point already, so
3 I'm not going to labour it at this stage -- is that the funding arrangements here, whether
4 we're talking about the LFAs or indeed the CFAs that the solicitors and counsel have
5 entered into, are funding arrangements for funding the Trains 1 litigation. Now, in that
6 context, you of course, when you have litigation, indeed litigation against a single
7 defendant, you have the possibility that you might succeed in part, on the way through
8 before you get a final outcome. But certainly, where you have multi-defendant
9 litigation, you have the situation where you may succeed against one and not others,
10 or you may succeed against one earlier than you succeed against others. What you
11 have shone a spotlight on in multi-defendant litigation is the prospect that there may
12 be recoveries on a periodic basis. So, it's not all going to be, necessarily, you get to
13 a trial at the end, there's one decision; there either is or there isn't a pot of money;
14 there may be pots of monies as the case go along.
15 And so, the issue that the parties, knowing that this is what they're entering into, have
16 to grapple with at the outset is how you deal with that. Our short point is that where
17 parties, knowing that that is the position, specifically set down and say, well, if that
18 happens, this is how we are going to deal with it, this is how it will be divided up
19 between us; and provided -- and this is, of course, an important qualification in this
20 Tribunal -- provided what they agreed between them is not going to have any impact
21 on the class members, then either, we say, that should be determinative of how any
22 proceeds that are received are then distributed amongst those stakeholders; or it
23 should be the overarching criterion which the Tribunal takes into account, if it has any
24 jurisdiction to otherwise interfere in that distribution between the stakeholders. And it
25 would require, we say, astonishingly strong reasons, which are not present in this
26 case, for there to be a departure from it.

1 So, where that brings us in relation to this particular hearing is that there are really two
2 parts to this hearing. One was very brief, and one, unfortunately has taken a lot longer.
3 The brief part was that the class representative made an application for payment out
4 of the non-ringfenced costs, under the settlement and the collective settlement
5 approval order, for his costs, fees and disbursements. And as I say, that part was
6 dealt with simply. The Tribunal took the view that, on any basis, the proper costs and
7 disbursements payable to the class representative were going to exceed the available
8 sums, and therefore there was no difficulty with the class representative having that
9 order.

10 The second part of this hearing is dealing with Charles Lyndon's intervention, and
11 effectively application, that what then happens to that sum should be dealt with in
12 a different way to the way in which the parties to the various funding agreements have
13 all already agreed it should be dealt with, and that's what we're dealing with now. They
14 are saying that this Tribunal has a general jurisdiction to just interfere with what the
15 parties have said, on a broad, essentially equitable basis; what is fair and reasonable
16 in all the circumstances.

17 Of course, it's the second point that's taken up all the time, and it's the point that we
18 say was entirely unnecessary. We say there could and should have been -- this isn't
19 a criticism of the Tribunal, it's addressing the arguments -- really a much shorter
20 hearing here. The class representative should have had its £6.2 million and, absent
21 any conclusion that there was anything improper in the costs that were being paid to
22 the class representative, the question of how that £6.2 million was divided up between
23 the stakeholders was a matter left between the stakeholders, and indeed one which
24 had already been resolved between them.

25 THE CHAIR: That's what I hoped was, and seems not (Audio error) to have fulfilled.
26 But I thought it was likely to be agreed amongst all of you, that you'd come up with

1 a formula that you could all live with. But the fact is, you haven't.

2 MR MALLALIEU: But we have. That, we say, is the whole point.

3 THE CHAIR: But that's the chicken and egg point. Because you say that, yes, you've
4 done that in the past under the priorities agreement, and we've got no power to open
5 it up. But, on the other hand, Woodsford are in this for the long term, and if there are
6 going to be outcomes whereby the lawyers are holding the baby, and we have
7 a two-legged rather than a three-legged chair, there's going to be difficulties for the
8 regime. And of course, we are going to take into account what's been agreed. Of
9 course we will. And that's, as you say, an important factor. That's not the only factor
10 in us deciding what should happen to the £6.2 million. That's where I am at the
11 moment. Obviously, your position is different. Your position is that we can't do it at
12 all, but if we can, you should be quite careful about when you do, let's say, depart from
13 what you say has been contractually agreed. What they say is, yes, we've
14 contractually agreed something which is always subject to the Tribunal's discretion, in
15 which case it's not cast in stone.

16 But I understand where the dividing lines are. But I do want to make it clear that we
17 do regard it as important what the parties have agreed.

18 MR MALLALIEU: Well, sir, if I may, I think I had appreciated that the Tribunal's
19 present inclination, if I can put it that way, in relation to this matter -- of course, in
20 relation to the first point, it's for me to persuade you otherwise. On the second point,
21 that if the Tribunal has the jurisdiction to do what Charles Lyndon invites, then of
22 course I entirely agree with the Tribunal that the prior agreement between the parties
23 is an important issue. Indeed, we would say it was the crucial and fundamental issue.
24 On that -- and of course, I'm going to come back to this -- on that, of course, we would
25 say that the Charles Lyndon approach is essentially to disregard that, and is just to
26 say the Tribunal has a completely open discretion, essentially without regard to that.

1 THE CHAIR: You know I don't agree with that.

2 MR MALLALIEU: Well, I'm grateful the Tribunal doesn't agree with that. I hope that,
3 in due course, I'll be able to persuade the Tribunal also to agree with my primary point.

4 THE CHAIR: Yes, of course.

5 MR MALLALIEU: So, I'll move on, if I may, rather than just teeing up my points, and
6 actually dive into them.

7 THE CHAIR: Yes. That's a very helpful summary, and it's always good to give
8 an overview at the beginning. Thank you.

9 MR MALLALIEU: Thank you. Then can I just turn to a second point, just to identify
10 what we say is an important and key issue here, which is that we say that, even if we
11 are playing on the pitch that Charles Lyndon think we're playing on, we're dealing with
12 the issue as they do, we say that the approach that they take fails to acknowledge, let
13 alone properly take into account, the fundamental difference in risks that different
14 stakeholders take.

15 So, we saw this, this was somewhat apparent when we've heard references to, for
16 example, Charles Lyndon's investment, and it's being compared on an equal basis
17 with Woodsford's investment. I'm just speaking here at the moment for the funder, I'll
18 come back to the ATE insurers in due course. Of course, there is a fundamental
19 difference. Woodsford, from the outset of this litigation, a funder from the outset of the
20 litigation, invests hard cash. Money goes out of its bank account to pay others, and
21 that's the nature of its investment. And of course, that contrasts -- and this is no
22 criticism at all of any of the legal representatives, or indeed funders here -- that
23 contrasts with what solicitors and counsel do. What they do, and I'll come to the
24 specifics of this case, but in general terms, as we know, with these sorts of
25 arrangements, what those legal representatives do is they limit their income. So, they
26 don't lay out, and of course, we've already dealt with the point. I think at one point

1 earlier today, the Tribunal asked Mr Smiley a question about what is Charles Lyndon's
2 outlay in terms of fees and disbursements. Well, they have no outlay in terms of
3 disbursements, because Woodsford pays them.

4 THE CHAIR: Yes. And what I'd want to have a bit of clarity on a bit later is what
5 disbursements have yet to be paid. Because you've got the £6.2 million, if there's
6 more disbursements to be paid, I'd like to know what those figures are. So, for
7 example, if Epiq has done some work, and I think that that work is (Audio error) not
8 too high, I'd want to make sure that that's factored in, if there's unpaid fees.

9 MR MALLALIEU: So, I'll come back to that. But at the moment I don't understand in
10 terms of the period that we're looking at that --

11 THE CHAIR: I don't understand either.

12 MR MALLALIEU: -- that there are, but I'll double check on that and come back to you.

13 THE CHAIR: Making sure that no one's left out, that we come up with a calculation,
14 and then someone says, "Oh, by the way, there's this other element that needs to be
15 paid", and there's no funding for it.

16 MR MALLALIEU: We'll double check on that and come back to you.

17 But the point I'm making at the moment is that there is a fundamental difference in the
18 nature of the relationship that the different stakeholders have, and of course it's
19 different again for the ATE insurers. But, again, just focusing on the legal
20 representatives, they differ from case to case. We all know this. But in broad terms,
21 in these sorts of cases, the legal representatives tend to act not on a complete CFA.
22 So not "no win, no fee", at least at the start. They act on the basis that they get
23 a percentage of their fees, no matter what, paid by the funder. They then get made
24 whole, up to their full base fees, at a certain point, and they may get a success fee on
25 top of that, to acknowledge the risk that they've taken, at a certain point.

26 It's also entirely common -- indeed, there was some exchange between the Tribunal

1 and the bar earlier -- that of course there are budgets in these cases. No funder is
2 going to invest in a case without knowing at the outset what funding it's going to
3 provide. They won't provide open-ended funding. That's not how these things work.
4 So, a budget is set. And again, quite commonly, part of the arrangement that is arrived
5 at is, if there are going to be over-budget fees, then there's usually sometimes
6 provision for reconsideration of the budgets, and whether any additional funding will
7 be provided. And then there's usually provision that if over-budget fees are incurred,
8 and the budget hasn't been extended, then the conditionality of the solicitors and
9 counsel's arrangements will increase, so that commonly the solicitors will go on to fully
10 deferred and contingent fees at that point.

11 But my point in relation to this is, this is all a fundamentally different position. What
12 the legal representatives are doing is limiting and deferring their income, and making
13 it contingent, rather than laying out hard cash. Where this becomes significant is then
14 when we look at the position at the end, because when we get to the position at the
15 end, of course, until the funder receives its outlay back, what it has spent, there's no
16 suggestion of it having any kind of income or indeed being able to cover its overheads.
17 Whereas, with the legal representatives, of course, what they are then doing is hoping
18 to top up the partial income that they have received to their profit costs. And, of course,
19 the reason we use the term "profit costs" with solicitors is because the solicitors' usual
20 hourly rate doesn't just cover their overheads --

21 THE CHAIR: You're talking about the contingent element rather than the paid or
22 deferred fees?

23 MR MALLALIEU: Yes. So, you have the deferred fees, which are part of their normal
24 hourly rate, and then the hope is that in due course they will be made up to their full
25 hourly rate.

26 THE CHAIR: Yes.

1 MR MALLALIEU: Which is, we use the term "profit costs" because of course the
2 solicitors' full hourly rate doesn't just cover their overheads, it includes an element of
3 profit. And then they hope that on top of that they will get a success fee, to reflect the
4 risk that they have taken.

5 THE CHAIR: If I look at it in my very simple way, is that the funder, come what may,
6 is covering the paid and deferred fee element.

7 MR MALLALIEU: The funder is covering the paid fee element.

8 THE CHAIR: The paid fee element, yes. Not the deferred fee element?

9 MR MALLALIEU: The deferred fee element is hopefully payable out of recoveries.

10 THE CHAIR: Exactly, out of the recoveries. And the contingency element represents
11 in reality a profit over and above that, and that lawyers they spend their time on this
12 case rather than some other case, and that to them, time is real -- cost is a real thing.
13 As regards you, but insofar as you put money in, that's a real cost. But I also consider
14 that you are taking a risk, and in principle, that risk should be covered as well.
15 Because what you've done is: you're putting your neck on the line with real
16 implications, as if the proceedings end in a sort of meltdown scenario, you're going to
17 pick up a bill. Obviously, some of it will be covered by the ATE if need be, but that's
18 only going to be the adverse costs. But you'll end up holding a pretty big baby if one
19 just ignores that risk and what you've taken on. That's something, to me, that's got
20 value.

21 MR MALLALIEU: Well, I don't think there would be any dispute -- I don't think even
22 from Charles Lyndon -- that that has value.

23 THE CHAIR: Yes.

24 MR MALLALIEU: The point I'm seeking to emphasise is that, of course, from the
25 position of the funder, it lays out hard cash from day 1; it's not simply deferring its
26 income; it lays out hard cash from day 1.

1 THE CHAIR: Of course it does.

2 MR MALLALIEU: It has zero income and zero return until -- the first thing that has to
3 happen is what it has spent has to be repaid. Even when that happens, it still has zero
4 income and zero return. All that first step is doing is making it good for its outlay;
5 bringing it back to zero.

6 If you compare that with the solicitors, they have some income. It may not be the full
7 income that they want, but throughout they have some full income. What they're
8 hoping to be made up to is "full income", if I can use that expression.

9 So that first stage of repayment of the outlay is a very different issue, because that is
10 reflecting the different risk, which is that the funder lays out hard cash. So that is why
11 in almost all funding agreements, you will see provision in the waterfall, which says, at
12 either the first or the second tier, the first thing that happens out of proceeds is the
13 funder recoups his outlay. Because that's a recognition by all involved -- and we see
14 it in this agreement -- that there is a different layer, a different type of risk being taken.
15 So that that's the only point that --

16 THE CHAIR: Do you accept that you've already got back your outlay?

17 MR MALLALIEU: No, I don't. We are short, in broad terms, about £800,000 on our
18 outlay at this stage. But all of this turns on the question of: what is our outlay?

19 THE CHAIR: Yes, okay.

20 MR MALLALIEU: By that, I'm not really talking about adding up the maths. It really
21 turns on this question: is our outlay £6 million odd or is our outlay £2 million correct?

22 THE CHAIR: And it's £6 million if you take into account the full costs of T1.

23 MR MALLALIEU: Yes.

24 THE CHAIR: And it's £2 million if you divide that by one third.

25 MR MALLALIEU: Yes.

26 THE CHAIR: And they say you divide it by one third, and you say you don't divide by

1 one third.

2 MR MALLALIEU: That puts it in a nutshell.

3 THE CHAIR: It is pretty simple when you look at it, but it is a very important issue in
4 determining whether you've got your outlay back.

5 MR MALLALIEU: It is. It's crucially important, we say.

6 THE CHAIR: Yes.

7 MR MALLALIEU: This is why I entirely agree, if I may say, with both the observations
8 of the Tribunal and Mr Smiley, that if what we end up looking at is a fact-dependent
9 question of analysing the particular risks of this case -- what is the reasonable rate of
10 return by reference to the risks of this case -- then, despite the eminence of this
11 Tribunal, it is unlikely that that decision in and of itself is one that's going to have wider
12 implications.

13 But this question of where funders invest, where ATE insurers underwrite claims
14 against multiple defendants, whether, if only partial success is achieved, they are to
15 receive the returns on the basis that they are said, in fact, to be treated as only having
16 funded, for these purposes, one third or one quarter or whatever it is, of the case,
17 depending on how many defendants there are.

18 That is a point of importance which will have implications for future cases. It is a point
19 which will make funders and ATE insurers and others think very carefully about their
20 appetite for funding future cases.

21 THE CHAIR: Well, it doesn't necessarily follow. What one could do is to say looking
22 at the reality of the situation here, and what's left and what's available, the just way of
23 dealing with it on the facts of this specific case is either to treat it as £6 million or
24 £2 million.

25 I do think that, for the reasons you've just given, you know, this may not be the ideal
26 case to determine that conclusively for proceedings going forward. Because what may

1 be appropriate in a case where there's a limited pot may not be appropriate in a case
2 where there's not a limited pot. Because, you know, if it was down to me and there
3 was lots of money, I'd be very happy to give Woodsford a very substantial return. And
4 if there was enough money, it would be a really good return, which will help to
5 cross-subsidize their book.

6 But we don't have that situation here, however much we want it to be. We don't have
7 that situation in this case. That's why I'm looking forward to having a case where there
8 is a big pot where I can give a definitive ruling as to what these rates of return should
9 be. But this is, for whatever the reason is -- I think we all understand what the reasons
10 are -- this is not that case.

11 I've made it clear earlier that I don't think anyone's messing us around, and I don't
12 think anyone's really messing each other around. You know, we are where we are,
13 and we've got a very limited pot, but I do not want this decision to be cited against
14 funders for future cases as to where this Tribunal, at least I, think what the returns
15 should be to funders when there's a really good outcome and there's a big pot and
16 everyone can be looked after in an appropriate way, but I just don't see this as that
17 case.

18 I know as lawyers, we all like to say: I've been in an important case establishes this
19 principle and that principle, but I'm not convinced that this is that case.

20 You can say what you want to say, but I'm just saying I'm not convinced that what I'm
21 aiming to do on this case is to set out fundamental principles as to allocation across
22 individual defendants when it comes to distribution, because I am constrained by
23 what's in the pot.

24 MR MALLALIEU: Thank you. Sir, just three points I think in relation to that.

25 THE CHAIR: Yes.

26 MR MALLALIEU: The first is I think probably all of us -- at least all of us bar those sat

1 on the right hand side of this room -- are looking forward to a case where there is a big
2 pot to be distributed.

3 THE CHAIR: Yes.

4 MR MALLALIEU: The second point, putting slight levity aside, is that, of course, we
5 would say in relation to the position where we are now, we acknowledge the position
6 where we are now because this is catered for; that's the whole point, it's catered for
7 under the revised deed of priorities.

8 So whilst we're talking about headline figures of £21 million being the contractual
9 funder's return at this stage, we entirely accept -- indeed, it's our case that when you
10 put all that through the deed of priorities, which is there to cater for it, in fact the return
11 we would actually be getting at this point is £4 million.

12 So. we're not seeking -- of course we couldn't because the pot wouldn't allow it -- but
13 we're not seeking a huge reward here. That is just for your reference, sir. In fact, it's
14 the non-blue document that you handed up. It's the table at paragraph 25 of Friel 2,
15 which is page 268 of bundle B. I'm not inviting you to turn it up, I'm just giving you the
16 reference.

17 THE CHAIR: Yes.

18 MR MALLALIEU: The third short point we would just make in relation to that, and it's
19 again one of the points that will touch on again and again. I'm not going to try and be
20 repetitive, but it's just a theme that could come up more than once.

21 THE CHAIR: You are being repetitive, but it's fine.

22 MR MALLALIEU: Of course, we are -- to use that expression -- where we are, but the
23 important qualification to that is: at this stage. This is an ongoing claim. There may
24 well be, there may not be, more proceeds to go into the mix in due course which will,
25 of course, increase everybody's return.

26 If, as we say, the way to look at this is to operate the waterfall as agreed, then of

1 course the nature of a waterfall is it flows down and some of it stops at a certain point.
2 But to use the term used by maybe the Foundation or Civil Justice, they talk about
3 a funnel at the top and what's poured into it. Of course, at the moment we're only
4 pouring the pot that we have into it, but there may be further pots. That comes back
5 to the point that we have at all times to remember that we are talking here about the
6 Trains 1 litigation.

7 THE CHAIR: But can I just make a point? It's one of the things that's been in my
8 mind. What I'm wary of is saying, "The appropriate rate of return for this case is X".
9 The reason for that is that you've got an ongoing trial against other defendants, and,
10 whatever the result of that, I haven't a clue what the result is going to be, but whatever
11 the result of that, I don't want it to be said, if they settle or if there's a judgment or
12 whatever, that your rate of return should be whatever the rate of return you get now.
13 Because, let's put it this way. Let's say you get, you know, a large sum of money on
14 the other one, there's a lot to play with. You don't want to come before me and say,
15 "Well, look, we've settled with the other one", and someone stands up and says, "Well,
16 this Tribunal has already decided the appropriate rate of return on this case is this",
17 which is certainly going to lose out if that's what's going to happen.

18 So, I'm very conscious that I do not want to give a ruling which says the appropriate
19 rate of return is a particular ratio or whatever, for all purposes in this litigation, it may
20 not be.

21 MR MALLALIEU: Sir, we say there's actually a very simple way to avoid doing that,
22 because that is --

23 THE CHAIR: So, what you're saying -- what I've always understood your point is to
24 say, well, don't worry, you don't need to worry about that, because all you need to do
25 is apply what's been contractually agreed and the deed of priority.

26 MR MALLALIEU: Absolutely. So, the very simple answer to this -- this is why we

1 shouldn't be here, because the whole point of these agreements is to prevent this; is
2 to deal with the situation, essentially, of ongoing litigation.

3 If I make a revised deed -- sorry, we don't need to worry about the revised bit. A deed
4 of priority serves no purpose, really, if there's a huge sum of money available for
5 distribution, because everybody's going to get paid, and the order in which they get
6 paid, assuming the money is available, doesn't really matter. Everybody's going to get
7 paid, so you don't need to worry about it. A deed of priority serves no purpose. If
8 there's no money, if the whole claim fails, nobody's going to get paid, and there's
9 nothing that's going to be paid out. The deeds of priority are only there to deal with
10 this sort of situation; to say we have ongoing litigation, but we've got some money, or
11 we've concluded the whole litigation, and we've only got some money. In that situation,
12 what happens to it? And so, to come to the point you just raised a moment ago, sir, if
13 I may, we say you don't need, unless you really wish to, to grapple with the question
14 of the appropriate rate of return, subject to resolving the point about what is and isn't
15 the correct funder's outlay here. We say where you end up is in a position where you
16 say, well, frankly, whatever the appropriate rate of return is, looking at this now,
17 because of the limited pot available, nobody's going to get close to what they want in
18 terms of this, and what the rate of return is that might be allowed. All we can do at this
19 stage is say that there's £6.2 million available, the contractual entitlements are this;
20 none of those are so extravagant that there's a risk that, if this pot is distributed now,
21 somebody's going to get something that they shouldn't, because it's prima facie
22 unreasonable. And the parties have agreed that in this situation, where there's only
23 a limited pot, this is how it should be distributed between them. There we go, we're all
24 done.

25 THE CHAIR: I think that what you've done is you've put it all in a nutshell what, in
26 reality, we're arguing about -- yes.

1 MR MALLALIEU: Can I then come -- and the interchanges, of course, are very, very
2 helpful, and I'm happy to be taken wherever would assist the Tribunal.

3 THE CHAIR: I know, I can tell, that you are sufficiently experienced to answer any
4 question I ask. You'll find that if I just sit there and don't ask any questions, either I'm
5 satisfied with what the answer is, or I feel that it's unfair to expect you to answer on
6 your feet. So, I will continue asking questions as and when they arise, because I know
7 that you're able to give answers to them.

8 MR MALLALIEU: Well, I'm not sure about the first point about my ability, but the
9 questions themselves are very welcome. The great advantage is I've got Mr Teasdale,
10 who does know all the answers. So, if I don't, he will.

11 THE CHAIR: Okay, but among you, you will have the answers, that's fine.

12 MR MALLALIEU: Sir, thank you. Can I then move on, because I want to tackle directly
13 this point about jurisdiction. I want to do this because we say it's important, but
14 equally, and I know you have the point, which is, in any event, it's not the be-all and
15 end-all, because we say that if you do have the jurisdiction, the only proper exercise
16 of it would be in the form that we say. But I do want to just address the jurisdiction
17 point, if I may.

18 THE CHAIR: That would be helpful.

19 MR MALLALIEU: A short, very short run up to it is that we acknowledge and accept
20 entirely the point that the Tribunal has made more than once about the, I think it's
21 a stool that we've come to describe it as, with multiple legs, in terms of --

22 THE CHAIR: Yes.

23 MR MALLALIEU: And we don't need to fall out about how many legs it has. I mean,
24 we would say there's probably more than three, because you've got the class rep, the
25 funders, solicitors, counsel, the insurers, but it doesn't really matter. The point is, if
26 you start taking the legs away, it's going to become unstable. And I think we'd all

1 agree with that. We'd also agree with the point that's been made that it's probably not
2 very helpful for the relatively nascent jurisdiction that this Tribunal still is, particularly
3 in terms of opt-out proceedings, to have disputes of this kind in successful cases, let
4 alone in cases which are ongoing. Nobody wants a row. Nobody wants to wash their
5 dirty linen in public.

6 THE CHAIR: Yes.

7 MR MALLALIEU: So, we accept all of that. But we do say that that all overlaps to the
8 point that, firstly, of course, the best way to avoid the row is to do exactly what all the
9 stakeholders did, which is to reach a prior agreement about how this situation will be
10 resolved. That resolves the row. It means we wouldn't be here today. If
11 Charles Lyndon weren't asking the Tribunal to depart from their agreement to the
12 priorities, we wouldn't be here now.

13 THE CHAIR: So, you say the best way to avoid a row is for the parties to reach
14 a private agreement, and that we've got that. You say it's a priorities agreement, and
15 it must follow, and the Tribunal basically sticks to it.

16 MR MALLALIEU: Yes.

17 THE CHAIR: Yes. What you're saying is that if we show, let's say, an unreasonable
18 interference with the contractual bargain, and people think it's completely open ended,
19 then we're going to have more rows. I'm keen to have less rows, but, I mean, we'll
20 have more rows if we say it's all completely open ended and we effectively ignore what
21 the parties have agreed. Yes.

22 MR MALLALIEU: Absolutely. Everybody --

23 THE CHAIR: That's why at the moment we're at this, as a minimum it's a very
24 important factor, but you say it's not just an important factor, it's an overriding factor in
25 the sense that you're not going to -- it's a conclusive factor.

26 MR MALLALIEU: Yes, conclusive or decisive.

1 THE CHAIR: Yes.

2 MR MALLALIEU: You're absolutely right, that is one of the dangers, and I'll come back
3 to these in a minute, which is, if the Tribunal adopts the Charles Lyndon approach,
4 which is, well, despite what's in the deed of priorities, the Tribunal can just decide the
5 distribution between the stakeholders on a general, just and equitable basis, which is
6 essentially their case, then really what the Tribunal opens itself up to the risk of is that
7 whatever these parties agree between themselves to allocate their risk when they
8 enter into these matters, whoever is dissatisfied -- and the brutal reality is there's
9 normally always at least one person who's dissatisfied -- whoever is dissatisfied at the
10 end is going to pop up and say, "Well, just ignore that, can you exercise your just and
11 equitable jurisdiction by reference to the outcome of the case". It may well be
12 solicitors, it may be counsel, it may be somebody else, but the Tribunal invites, if I can
13 put it that way, those arguments, and that is not something we say is either necessary
14 or helpful for this jurisdiction.

15 Can I then come to the point about jurisdiction? So, we entirely accept, of course, that
16 the Tribunal -- and we'll look briefly at some of the authorities -- that the Tribunal, of
17 course, has jurisdiction to decide what sums are to be awarded to the class
18 representative out of pots of money that are available for that purpose. And, of course,
19 it's already dealt with that at the start by saying it's content that the £6.2 million should
20 be awarded to the class representative, and that's decided on entirely conventional
21 grounds. The Tribunal here dealt with it very shortly because it was entirely satisfied
22 that the sum was more -- that the sum of reasonable or proper costs incurred was
23 plainly more than the sum available to pay.

24 But what we say it doesn't have jurisdiction to do, or it would be an improper exercise
25 of the jurisdiction to do, would be to say, well, the class representative can have this
26 amount for costs, fees and disbursements on conventional grounds, but in terms of

1 | how that is going to be distributed, we are going to adjust or interfere -- I don't mean
2 | that in a pejorative sense -- in the distribution between the stakeholders. And we say
3 | that with one fundamentally important caveat, which explains all of the cases that
4 | Mr Smiley relied on, which is, provided that the allocation of that pot will not impinge
5 | on the interests of the class. And on that point, of course, there is a fundamental
6 | difference between the Tribunal's position when it is considering what should happen
7 | to a pot of distributable damages, so damages which are available for payment to the
8 | class, and/or the various stakeholders. And we know, and we will see in the
9 | Court of Appeal case, of course, that it's quite clear the Tribunal has power in that
10 | situation to say what will be distributed to the class as opposed to what will go to the
11 | stakeholders. So, to that extent, the Tribunal has a power to intervene or interfere in
12 | the distribution of the available pots, where it affects the interests of the class.
13 | Gutmann is very clear that that exists, whether we're talking about settlements or
14 | judgments. And, in exercising that power, the Tribunal has to decide whether and to
15 | what extent it will give the stakeholders priority over the class. If there's £50 million
16 | worth of damages available, should the class get all of it, or should some of it go to,
17 | contribute to, the stakeholders' rewards?

18 | But we are not in that position. We're not dealing here with distributable damages.
19 | We are dealing here with undistributed damages. And what happens to that pot,
20 | particularly now that we've resolved the question of payment to charity, has no impact
21 | on the class. It is entirely inter the stakeholders.

22 | If I can just make what will no doubt be an unhelpful comparison to a different situation,
23 | but I'm going to attempt it anyway, we are here in opt-out collective action proceedings,
24 | and of course, it's inherent to those proceedings that the class members, the intended
25 | beneficiaries of the action, are never party to the funding arrangements. The class
26 | representative is acting in their best interests, and so it's understandable and obvious

1 and important that the CAT has a supervisory jurisdiction over anything that might
2 affect those class members. It doesn't just accept what the class representative has
3 done, or wants, even though the class representative will act -- and I'm not suggesting
4 otherwise, Mr Gutmann will act in the best interests of the class. The CAT doesn't just
5 accept what the class rep says or does, it has a supervisory jurisdiction to protect the
6 interests of the class.

7 However, in other litigation, of course, in other large-scale litigation, for example, group
8 litigation orders, the class in that context, the claimants, would all in fact be parties to
9 the funding arrangements. They'd have retainers with their solicitors. They may well
10 be party usually to the litigation funding agreement, and thus its portfolio funding for
11 the solicitor. They'll be party to the insurance policies. In that situation, if the court
12 gave a judgment, there would be no suggestion of the court in that case, the court
13 dealing with the substantive issues, interfering in what, out of any damages were paid,
14 were going to be spent on solicitors, on the funders, or on the insurer. That would be
15 a matter of private contract. The only reason, we say, for the court to have
16 a supervisory jurisdiction to interfere in the distribution in opt-out collective action
17 proceedings is to protect the interests of the class. In the context we are in, that
18 requirement for a supervisory jurisdiction does not exist because the class's interests
19 are not at risk.

20 Sir, is that an appropriate point?

21 THE CHAIR: Yes, I think that's a good time to have a break. Come back at 2.00.

22 MR MALLALIEU: Sir, thank you.

23 (1.00 pm)

24 (The short adjournment)

25 (2.06 pm)

26 MS ABRAM: So, I promise that it's not that I insist on always being the first to speak

1 in any session, okay, just to get my name on the closing credits.

2 THE CHAIR: Okay.

3 MS ABRAM: You asked me to come back to you on that question about the charity
4 payments.

5 THE CHAIR: Yes.

6 MS ABRAM: So, so just in a sentence, the answer is that SSWT is content for that
7 sum to be paid to charity.

8 THE CHAIR: Yes, that's brilliant then. I can say that all the parties have helped on
9 this in a constructive way. Yes. Thank you very much.

10 MR MOSER: Sir, obviously the class representative welcomes that sentiment. I rise
11 merely to say that due to a personal commitment or a professional commitment in fact,
12 but me personally, I will have to leave by about 3.00, but my learned friend Mr Kuppen
13 will be here. The class representative doesn't in fact plan to say anything more, but
14 Mr Kuppen will be saying nothing more on my behalf.

15 THE CHAIR: So, when you need to leave, just disappear.

16 MR MOSER: Yes. All right. I will disappear without fanfare.

17 THE CHAIR: Yes. Thank you.

18 Your turn again now.

19 MR MALLALIEU: It's me, I think. Sir, I'm not going to say nothing. The Tribunal may
20 think that's unfortunate, but that, I'm afraid, is my role. Just a very short issue.

21 THE CHAIR: On that issue, but on the issue we just dealt with, you have said a lot.

22 MR MALLALIEU: On the issue we've just dealt with, I've got nothing more to say. But
23 I have things to say on other issues.

24 So just on a very short point, on the disbursements point, you asked if there were any
25 unpaid disbursements. The figures are just being checked. We think the short answer
26 is that there are some very modest unpaid disbursements. We think the total figure is

1 | ballpark about £50,000.

2 | THE CHAIR: How many?

3 | MR MALLALIEU: About £50,000. But what we hope to do is we think there are

4 | probably three, and we hope to just pin them down and between us, at some point we

5 | will pass up a short note or one of us will stand and just confirm the figures.

6 | THE CHAIR: You think that there's about £50,000 to pay and everyone's content that

7 | they do get paid in due course, I presume?

8 | MR MALLALIEU: Sir, I think that's right.

9 | THE CHAIR: I would have thought so -- to pay, will be paid, and you'll give us

10 | a schedule of what they are.

11 | MR MALLALIEU: Yes. A schedule may be glorifying it, although Mr Smiley's solicitors

12 | seem to be very good at schedules this week.

13 | THE CHAIR: A letter.

14 | MR MALLALIEU: So perhaps it will be. But we will give we'll give you the details of

15 | them in one form or another, sir.

16 | THE CHAIR: And just so I can understand, for example, there's a report by Crescent

17 | which we've looked at. Have they been paid or have they not been paid?

18 | MR MALLALIEU: To some extent, I will defer to Mr Smiley on this because he will

19 | know more about who has actually been paid and not.

20 | MR SMILEY: My understanding is that they haven't been paid and that they're

21 | £25,000, which features in Mr Burnett's third witness statement.

22 | THE CHAIR: As we know what's been paid and what hasn't been paid, then that's all

23 | we need to know.

24 | MR SMILEY: That forms part of the £50,000. That is half of the figure that we're talking

25 | about.

26 | THE CHAIR: Yes. That's okay. Yes. That's fair enough.

1 MR MALLALIEU: So, unless there's anything on that point, I'm going to pick up where
2 I left off, so to speak. I was dealing with the point in relation to jurisdiction. I dealt with
3 the point about, if we are correct, of course, one of the reasons why the Tribunal
4 wouldn't be expected to have jurisdiction to interfere here is because it has no effect
5 on the interests of the class.

6 THE CHAIR: Yes.

7 MR MALLALIEU: Can I come to the question of those it would have an effect on. I'll
8 deal with this fairly shortly because I know the Tribunal has some of these points.

9 THE CHAIR: You've made the point already that there's no jurisdiction --

10 MR MALLALIEU: Yes.

11 THE CHAIR: As it has no effect on the class. And our job is to sort of look at the class
12 in a sort of overriding consideration in their best interests. And you say once you get
13 here, well, the class is all sorted.

14 MR MALLALIEU: The class is protected.

15 THE CHAIR: Yes. They've got the £216,000, no further claims coming in, and that's
16 the end of it.

17 MR MALLALIEU: Indeed. In terms of those who would be affected though, or the
18 what the effects would be, the first point --

19 THE CHAIR: What, if we have jurisdiction, you mean?

20 MR MALLALIEU: Sorry, sir. Yes. If you, if you had jurisdiction.

21 THE CHAIR: So, if you had jurisdiction, yes?

22 MR MALLALIEU: If Charles Lyndon are correct on the basis that you have jurisdiction
23 and it's this sort of broad, equitable jurisdiction to just step back and do whatever is
24 fair and reasonable in all the circumstances, then we say that that would have
25 a number of effects which would be deleterious.

26 The first we say, and we've touched on this to some extent already, is the obvious

1 effect we say would have on funding, on the prospects of funding being available, and
2 of insurance being available through insurers, for the conduct of opt- collective actions
3 in this regime. That effect would be entirely contrary to the interests of the class more
4 widely, and indeed to the purpose of this regime. It's a very short and obvious point.
5 Restricted funding is not going to benefit those who are said to have been damaged
6 by anti-competitive actions.

7 THE CHAIR: Yes.

8 MR MALLALIEU: One of the points we make in passing in relation to that, of course,
9 is that if this Tribunal goes down the road that Charles Lyndon have invited it to, the
10 issue that immediately arises in this case is going to make it particularly difficult in the
11 context of multi-defendant cases, which are not uncommon, because -- you have my
12 point -- it is precisely in those sorts of cases that these prior agreements between the
13 stakeholders are crucially important. In that regard, sir, I'll come back to it in due
14 course, but I'm just going to give you a reference in passing. I don't invite you to turn
15 it up.

16 THE CHAIR: Yes.

17 MR MALLALIEU: We do say it was an inherent part of this funding arrangement. Of
18 course, everybody knew the sort of action that was being brought, but it was always
19 an inherent aspect of it from the outset that this was a case where there might be
20 successive recoveries; where things might come along, not necessarily in dribs and
21 drabs or pots or whatever you might want to call it, but that you wouldn't necessarily
22 expect everything to happen at once. But it was all part of the same case, and the
23 reference to support that is clause 9.5 of the litigation funding agreement, which is
24 page 190 of bundle A. I'm not inviting you to turn it up unless you want to, but --

25 THE CHAIR: All right.

26 MR MALLALIEU: Clause 9.5 expressly provides for successive recoveries of

1 stakeholder proceedings within the same claim, within the same case.

2 THE CHAIR: You'd expect that.

3 MR MALLALIEU: Yes, absolutely. But it's an inherent part of these cases that this is
4 how they work. You fund a case, everybody signs up to CFAs for a case, but you
5 anticipate that the income from the case, the proceeds, may come along in stages.
6 And we're here at stage one. There may or may not be stage two.

7 Now, in support of my general point, sir, can I take you to one document, though, which
8 is in bundle B? Sorry, I said bundle B for the litigation funding agreement. That's my
9 fault. It's bundle A, I apologise. Mixing up my A's and my Bs. The document I would
10 like you to come to --

11 THE CHAIR: Clause 9.5 the LFA?

12 MR MALLALIEU: Yes. Which is bundle A page 190. But the document I would like
13 you to turn up if you would be so kind is in bundle B.

14 THE CHAIR: Yes.

15 MR MALLALIEU: Tab 10, page 345. B/10/345.

16 THE CHAIR: Yes.

17 MR MALLALIEU: This is a document -- I don't know if the Tribunal's had an
18 opportunity to see it or consider it -- but this is a letter written by the Association of
19 Litigation Funders. I imagine the Association of Litigation Funders, or at least its role,
20 is not unfamiliar to this Tribunal.

21 THE CHAIR: I have read this, but I haven't read it in the last couple of days.

22 MR MALLALIEU: So, I'm not going to take you all through it line by line, but I'm just
23 going to highlight some parts of it. As I say, I'm sure the role of the ALF is well known,
24 indeed at certification stage issues such as whether funders are members of the ALF
25 and whether they comply with its terms, is often a factor which is argued about at the
26 certification stage.

1 THE CHAIR: Yes.

2 MR MALLALIEU: And I know that Charles Lyndon have said: oh well, it should be
3 approached with a degree of caution, not least because it's an Association of Litigation
4 Funders who have particular interests. Indeed, I think somebody from Woodsford is
5 one of the members of the board. But none of that, we say, undermines the
6 importance or relevance of this document.

7 THE CHAIR: It depends what they say, but I think there's no presumption that
8 anything that they say is taken as sort of party pre and whatever.

9 MR MALLALIEU: No, well.

10 THE CHAIR: They are a reputable body.

11 MR MALLALIEU: I would say they're more than reputable.

12 THE CHAIR: They're generally very sensible and over the last few years they've been
13 willing to sort of revisit things and learn from what's happened.

14 MR MALLALIEU: Absolutely so, and of course they are the body essentially to which
15 the voluntary regulation of litigation funding in this jurisdiction has been left pending,
16 of course, the outcome of the review that's taking place.

17 THE CHAIR: Yes.

18 MR MALLALIEU: As I say, they're a body whose code of conduct is often referred to
19 when the Tribunal considers the suitability of litigation funding agreements. So just in
20 relation to it, the points I want to pick up, if we can pick it up at the bottom of page 1,
21 paragraph 7. --

22 THE CHAIR: Yes.

23 MR MALLALIEU: -- where it identifies the common ground. So, this is essentially the
24 stool point, the legs of the stool. And then if we come over the page, at paragraph 9 --

25 THE CHAIR: Yes.

26 MR MALLALIEU: -- it identifies -- and it puts it far more pithily than I've done and much

1 more quickly than I've done -- that there are two separate issues here.

2 One is the money that will enter the top of the waterfall, so what comes from the
3 proceeds. And whilst that amount might be agreed in a contract between the class
4 representative and reviewed at the certification stage, the CAT retains discretion at
5 the end of the case to vary the terms of the contract, and adjust that amount entering
6 into the top of the waterfall. So that's the point that, for example, the funder can
7 contract for a particular level of reward, or the solicitors can contract for a particular
8 level of fees, but the Tribunal has the jurisdiction to say, well, how much of that am
9 I going to give to the class representative for his costs, fees and disbursements? And
10 that was stage one of what we dealt with very early stages yesterday.

11 And then at paragraph 10, the second issue is the focus of ALF's submission, namely
12 the operation of the waterfall. Once the CAT --

13 THE CHAIR: It doesn't mean that -- that's just an argument of paragraph 9.

14 MR MALLALIEU: Well, I don't think there's any dispute in paragraph 9. We all accept,
15 I think everybody before you accepts that, for example, if a funder agrees a funder's
16 fee, or if a solicitor says "our hourly rates are £1,000 an hour", and they agree that
17 with the class representative, then in terms of what the class representative can
18 recover as costs, the Tribunal isn't bound by that. It can decide what's reasonable.

19 THE CHAIR: One of the key issues between you is whether or not our discretion is
20 limited to that.

21 MR MALLALIEU: Yes. And that's --

22 THE CHAIR: That's the key issue that we were thinking -- because as a statement,
23 paragraph 9 is fair enough. But the question is: is that the limit of the discretion?
24 That's what we're trying to get to the bottom of.

25 MR MALLALIEU: Absolutely, sir, which is why I was coming to paragraph 10, which
26 was described as the second issue, because the second issue is the focus of the

1 submission, namely the operation of the waterfall, once the CAT has determined the
2 amount to enter the top. So, the bit that's uncontentious. And ALF's submission is
3 that the CAT should not intervene. It doesn't express the deal with the point of whether
4 it can, I'll deal with that. But it's saying that if you can, you should not intervene in the
5 negotiated waterfall amongst the constituents. If the CAT were to intervene, it would
6 lead to each constituent, each "stakeholder" is the word we've used, applying
7 separately to the CAT, in each case, in its own economic advantage, burdening the
8 CAT, increasing its duration and cost and casting the economic relationships between
9 the constituents into chaos.

10 I'll skip contractual certainty at paragraph 11 and pick it up at 12. In CAT proceedings
11 each -- I'm going to substitute the word "stakeholder" -- stakeholder is already taking
12 a known risk, that of the amount that will enter the top of the waterfall, but they're not
13 expecting to take a second order of risk of the waterfall itself being scrambled by the
14 CAT's intervention into previously negotiated arm's length arrangements amongst the
15 stakeholders, each of whom is a sophisticated commercial party operating in
16 a competitive market.

17 It's one thing for stakeholders to take a calculated commercial risk; depending on the
18 outcome of the litigation, they may only receive a limited reward. It's another if the
19 carefully calibrated mechanism for the sharing of that reward between the various risk
20 taking stakeholders is capable of being upset, because of the ex-post actions by one
21 of them. The lower the degree of certainty stakeholders have, the less likely it is they
22 will be able to continue supporting the opt-out collective proceedings regime. That is
23 a significant expression of concern by a body which represents funders who are
24 represented, or who are party to, in the loosest sense, a very substantial number of
25 the cases which are brought before, and funded before, this Tribunal. It echoes the
26 concerns we have, and we say it is an important submission for the Tribunal to take

1 into account.

2 THE CHAIR: Let's just look at it in very simple terms. What we have is a good
3 summary of the position that funders are taking in this case.

4 MR MALLALIEU: Yes.

5 THE CHAIR: That's what it is, that's what I take from it. And you say that that
6 interpretation is favoured by the ALF. Whether that interpretation is right or wrong is
7 not going to be determined by whether one or more person is making that point. Either
8 you're right, in which case you're right for the reasons you've given, which are brilliantly
9 summarised in this letter, or you're wrong. And where I think that the real gap is, is
10 looking at the relevant clause -- and we'll want to look at it together in a minute -- is:
11 what do you mean by subject to an order to the contrary by the court or the CAT?
12 Because if what you're saying is: that is simply only dealing with the question of what
13 goes in, if you see what I mean --

14 MR MALLALIEU: Yes.

15 THE CHAIR: -- then you will say that that's the end of it, or at least the jurisdiction, if
16 there is anything to depart from it, is a very, very, very narrow jurisdiction.
17 If, on the other hand, if those words mean what I understand Mr Smiley has been
18 saying, is that it means that we have a discretion, not just as to what goes in, but how
19 it goes down.

20 That's how -- you know, I look at these things in quite simple terms, and it's not really
21 rocket science, but at the end of the day, we're going to have to come to a view as to
22 which is the correct route.

23 When I was preparing this case, I sort of had it in three ways, that we can look at it.
24 We can say that, priority agreement gives no flexibility in this respect. All the CAT can
25 do is simply apply the priorities agreement at paragraphs -- and use the waterfall at
26 paragraphs 3.1 to 3.4. You say there's an element of caveat emptor, you're stuck with

1 what's been agreed and the funders and other stakeholders need certainty, and that's
2 what caveat emptor does give: whether it's a good bargain or a bad bargain, you're
3 getting certainty, and that you also avoid the sort of dispute that we're seeing today,
4 which as you know, I don't encourage.

5 And so you also say as part of that -- you've added this bit in, which is that -- our
6 priority, as regards our jurisdiction, is, in opt-out claims, is to look at the interests of
7 the class members and make sure they're not disadvantaged by the conflicts of
8 interest here. But you say: "we're not at that stage, this is not a factor, because that's
9 been ascertained at £216,000".

10 Whatever happens as between you and the other stakeholders makes no difference
11 at all to them, and so when you look at this clause, you say that when we look at the
12 clause, we should be interpreting that reference subject to any order of the court,
13 simply to the top of paragraph 3 as to what goes in, rather than the waterfall itself.

14 The second way of looking at it, which I think Mr Smiley has been addressing, is that
15 where it says the deed of priority gives flexibility, everything's always subject to the
16 jurisdiction, the Tribunal, and when it says subject to any order of the court, that means
17 that applies generally in relation to that clause, and we have a freestanding jurisdiction,
18 and in effect, we can ignore what's been agreed at 3.1 to 3.4, particularly in a case
19 where the funds are limited. That's what he seems to be saying; if I've got it wrong,
20 then I'm sure he'll tell me later.

21 And then the third way of looking at it, is to say, well, you look at the terms of the
22 priorities agreement and that what's been agreed as part of the waterfall at
23 paragraphs 3.1 to 3.4 are an important factor, and what I would say is important but
24 not decisive factor, and the CAT can intervene where it would lead to a result that is
25 unjust for one of the stakeholders, and it would be unjust to leave lawyers in the lurch
26 on this wording, and that if there is no such power, it can be a real disincentive for

1 lawyers to act for class representatives, and so they say it's inherent that we at least
2 have this power, because of that, and we've seen other areas of law -- and I don't want
3 to pick out any particulars of areas of law because people have to practice
4 there -- where you find that there's a huge disparity of the willingness of the "high
5 quality bar" to act for claimants, and you have a situation whereby the big players and
6 the really good advocates are out there to maximise their skills, will act for defendants
7 generally, because that's where you know you're going to get, whatever happens,
8 a really good fee, and that the rest of the Bar is scrambling around acting for claimants
9 on relatively low fixed fees. And that has an impact in the quality of representation.

10 No one wants to have a situation whereby defendants have a Rolls Royce team, that
11 expense is not a real factor, and then they're facing opponents who are feeling a bit
12 vulnerable, and it's not particularly attractive for the profession.

13 So, we can look at what's happening on this individual case, we can look at the impact
14 of other cases and the system generally.

15 So those are the three possibilities that I foresaw, once I'd read all the submissions. It
16 may be that it could be any one of those outcomes, and that's what the whole idea of
17 today is, to sort of shake it and see which one is the right route to take, but I hope we
18 can all agree that those are the three broad possibilities, even if we may or may not
19 agree on the result today. It may be it's going to take a bit more time to figure out
20 which is right and which two are wrong.

21 MR MALLALIEU: Sir, I think that's an admirable summary, if I may say so. There'll
22 be some difference, in particular, in the nuances of the third category, as to what each
23 side -- if we were in the third category -- would say is the weight and how decisive or
24 otherwise, and how significant the circumstances would have to be for there to be
25 a departure in the third. But subject to that --

26 THE CHAIR: Let me make it clear: at the moment, where we are, having heard the

1 CL's position, is we are not in number two.

2 MR MALLALIEU: I'm grateful to hear that.

3 THE CHAIR: And so what --

4 MR MALLALIEU: The question is whether one or three.

5 THE CHAIR: Exactly, and that's probably -- one of the reasons why I summarised is
6 for you to see what you really need to focus on, and I don't think you need to focus on
7 two.

8 MR MALLALIEU: Well, sir, I'm grateful to hear that, and that will help me, I hope,
9 shorten my submissions.

10 As to where we were, sir, the relevant I'm not going back to it, but in terms of the points
11 I've made about the effect on funding, the relevance of that goes in particular to if we
12 are in three, because of course, if we are in three and the court does have a jurisdiction
13 but gives weight -- how much weight would be an issue for argument -- but weight to
14 the prior agreement of the parties, it is, of course, important to consider the
15 circumstances in which the Tribunal could and should exercise that discretion, and
16 one factor it will take into account is how that exercise of discretion might impact on
17 the collective proceedings regime generally, on class members generally, for example,
18 by the availability of funding, and the short point we make is the greater the uncertainty
19 is, the point made by ALF, the greater the risk, that you don't have a stool in the first
20 place. It's not just that the legs of the stool are falling out with each other, but you
21 don't have the funding in the first place, and you just don't have the stool. We can all
22 talk about the legs, but if you don't have a stool, you don't even get to worrying about
23 the legs.

24 So that's the relevance.

25 THE CHAIR: I don't think it's as black and white as that, but we'll get there.

26 MR MALLALIEU: Well, sir, it's my job to try and make it so, whether it is or it isn't.

1 Unusually, sometimes it's my job to try and make it less black and white. But anyway.
2 So can I then come to -- again, I'm not going to labour this point, because it's very
3 plain that the Tribunal understands where everybody's coming from and what the
4 arguments are -- there are, within the facts of this case, practical examples of the
5 difficulties that are caused if priority agreements are not given effect. I took you
6 yesterday to -- I'm only going to give you the reference to the email in relation to the
7 AmTrust policy that was going to be taken out --

8 THE CHAIR: I saw that, yes.

9 MR MALLALIEU: -- where, as you will have seen, the reason it couldn't was
10 because --

11 THE CHAIR: (Overspeaking) the deed of priority.

12 MR MALLALIEU: -- that deed of priority couldn't be agreed. That illustrates how
13 crucial these documents are. That reference is B/13/109.

14 THE CHAIR: B/13, yes?

15 MR MALLALIEU: 13/109.

16 THE CHAIR: And that's the AmTrust --

17 MR MALLALIEU: I'm just going to mention -- and again in the interest of time, I'm not
18 going to invite you to turn it up unless it would assist -- that in relation to the post-CPO
19 £10 million policy on Trains 1, there was originally an endorsement on that which
20 provided that the policy would be cancelled if a deed of priority could not be agreed.
21 So, the whole £10 million policy would have been cancelled. It was endorsement one
22 in the policy. The reference for that is A, tab 26, 399.

23 THE CHAIR: I must admit I haven't looked at --

24 MR MALLALIEU: We could turn it up, but the endorsement speaks for itself. The
25 endorsement was removed in due course because a deed of priority was agreed -- the
26 very deed of priority we're talking about here. Without that deed of priority, which we

1 say Charles Lyndon is now seeking to go behind, that policy would have gone.

2 So, we do say there are very real, very practical significances which we can see in this
3 case, but we can also see one about more generally.

4 We also have the point which we've already touched on -- I don't need to develop
5 about the prospect of what this jurisdiction will have to deal with every time there are
6 proceeds available, which -- we're here today, we'll be back again. It is my concern --

7 THE CHAIR: But not every time. I think we can agree it becomes an issue when
8 there's a limited pot and in particular where there's multiple defendants.

9 MR MALLALIEU: Yes.

10 THE CHAIR: I'm not so pessimistic that it's going to happen every case. I'm just
11 hopeful that in future cases it's going to be clear cut one way or another. Yes.

12 MR MALLALIEU: Yes, but we say there's a very simple way to mitigate that risk, which
13 is either to give effect to, or give very, very substantial weight to, the parties prior
14 agreement.

15 THE CHAIR: Yes, yes.

16 MR MALLALIEU: So, we've made those points.

17 Can I then come to the authorities. I'm going to deal with the authorities fairly shortly,
18 not least because of the time available. But can I start with --

19 THE CHAIR: You say "the time available", but what we're going to do is that you're
20 going to make your submissions and that'll be probably the end of your submissions,
21 then we'll hear what Mr Smiley's got to say in reply. We'll then see where we are as
22 a Tribunal. If we're able to give a ruling today, we'll give a ruling today, depending on
23 the time. If we're not able, then it's going to have to come in the post, if you see what
24 I mean. And then if it comes in the post, there's going to be an element of delay.

25 But in any event, we will have some questions of our own to both of you about some
26 of the figures. So, I will want at least half an hour for that last process. So, you can

1 deduct from that -- by the time we get to 4.00 pm, ideally, both of you should have
2 finished.

3 MR MALLALIEU: I --

4 THE CHAIR: I don't expect Mr Smiley to say a huge amount in reply because no one's
5 ever won a case on a reply. If he could be brief, I'd be appreciated.

6 MR MALLALIEU: That is noted, I'm sure, by all of us. Thank you.

7 THE CHAIR: Yes.

8 MR MALLALIEU: So, coming then to the cases, I was going to presage this --

9 THE CHAIR: Yes.

10 MR MALLALIEU: -- by an overarching point which I think I made earlier, which is that
11 the Charles Lyndon's approach to the cases that we have looked at is to say: look at
12 these cases; they talk about the Tribunal having a supervisory jurisdiction to deal with
13 priorities.

14 When we come to look at the context, which is all important, we can see the context
15 in which that comes about is the context in which the Tribunal is dealing with priorities
16 as between stakeholders as an entity -- a collective entity -- and the class members
17 as the other entity, not between the stakeholders. And that's the fundamental
18 difference.

19 THE CHAIR: I understand that was your point. I'll have my own views about that, but
20 yes, I understand.

21 MR MALLALIEU: Well, well, sir, I'm acutely aware that I'm in front of a Tribunal which
22 features at least in part in some of these authorities.

23 THE CHAIR: Yes. I think it is helpful to look at the authorities, and I do appreciate the
24 point you're making.

25 MR MALLALIEU: Sir, I'm grateful.

26 So can I pick it up --

1 THE CHAIR: Can you just give me one minute just to note something down?

2 MR MALLALIEU: Yes, of course, sir. (Pause)

3 THE CHAIR: Yes.

4 MR MALLALIEU: Sir, I'm not going to go to every authority that Mr Smiley referred to,
5 nor every authority that's referred to in his skeleton argument, because as I understand
6 it, they were advanced in support of the same proposition. We can address the same
7 proposition through the authorities I'll go to.

8 But if there is an authority that you consider I have failed to deal with in a way which
9 means I haven't addressed the point that the Tribunal takes from it, then, of course,
10 please let me know and I will address it.

11 THE CHAIR: Look, if we don't give ruling today, and I think that this wants some help
12 on a particular authority, the Registrar will send you an email and then you'll have the
13 opportunity to deal with it then. I agree that you're trying to, to a certain extent, do
14 a shortcut. That's absolutely fine.

15 MR MALLALIEU: Sir, thank you.

16 Can I invite the Tribunal then, in the authorities bundle, firstly to tab 8, page 206, which
17 I hope is the Court of Appeal decision in Gutmann.

18 THE CHAIR: Yes.

19 MR MALLALIEU: Again, sort of a slight whistle stop tour through it, but I'm going to
20 pick it up on page 208, paragraph 2. I'm sure we're all familiar with this decision. But
21 of course, it's important to put it in the context of what the Court of Appeal was dealing
22 with.

23 THE CHAIR: Yes.

24 MR MALLALIEU: The central issue, of course, in Gutmann was, as it says at ground 2:
25 "The powers of the CAT at the conclusion of collective proceedings to make an order
26 that the funder's fee or return be paid out of damages awarded to the class in priority

1 to the class."

2 So that was the central issue: can you have funder's return paid out of distributable
3 damages, which of course, would then mean that the class members would potentially
4 receive less by way of damages than they otherwise would, as opposed to the situation
5 with, out of undistributed damages, where the class members are unaffected.

6 THE CHAIR: Do we know, has anyone appealed this or not? (Overspeaking)

7 MR MALLALIEU: My last understanding -- but I don't know what the position is -- was
8 that there had been an application for permission to appeal to the Supreme Court.
9 I don't know where it presently stands.

10 THE CHAIR: Just shows that on these cases there's so much at stake; almost
11 everything gets appealed.

12 MR MALLALIEU: Sir, yes. I don't know if permission has been granted, but
13 I understand an application was put in.

14 THE CHAIR: Okay.

15 MR MALLALIEU: Still waiting. I thought that was the case.

16 THE CHAIR: What's the answer?

17 MR MALLALIEU: It's still waiting; it's not been determined.

18 THE CHAIR: At the Supreme Court. Yes.

19 MR MALLALIEU: I thought I would have known had it been either allowed or
20 dismissed, but I'm grateful for the confirmation.

21 Sir, if we can then come on within this to page 216.

22 THE CHAIR: Yes.

23 MR MALLALIEU: This is the Court of Appeal recording the determination of the
24 Tribunal. In fact, we can see above at 25 what the argument advanced for Apple was,
25 was:

26 "That the [class representative] had no right to contract to alienate a part of the

1 damages."

2 Then at 26, the Tribunal had pointed out:

3 "That the priorities [in the funding agreement] may be relevant in the event that there
4 are insufficient unclaimed damages to meet the funder's fee, for example if the
5 litigation has been relatively unsuccessful."

6 This is one of the points relied on: this is where there's reference to priority in the next
7 sentence, points relied on by a Charles Lyndon:

8 "In those circumstances ..."

9 And it's important to note that: "in those circumstances".

10 "... the CAT may well refuse to give absolute priority to the funder."

11 So that is the CAT having jurisdiction to interfere with the funding arrangement,
12 because the priorities in the funding arrangement affect the interests of the class.

13 Then it goes on to note:

14 "In another case there might be a large award of damages where an efficient method
15 has been devised for making payments to the class, so that unclaimed damages are
16 relatively small. If that were the position, there might be good reason for giving priority
17 to the funder to claim all or part of the fee prior to distribution."

18 So that's demurrer that is saying that same issue, dealing with the priorities of the
19 stakeholders in contrast to the priorities of the class, the Tribunal has jurisdiction to
20 determine that in the situation where what is being determined is whether the class
21 should or should not essentially surrender some of its damages to the
22 stakeholders -- in this particular context, the funder.

23 Sir, that is the context in which the court, over the page, is dealing with the Tribunal's
24 supervisory jurisdiction.

25 THE CHAIR: Yes.

26 MR MALLALIEU: So, we see at 27, second sentence:

1 "The LFA specifically contemplates that the CAT may not agree to the costs and fees
2 being paid out of damages, engaging Table 2 and ... Waterfall 2, in which case the
3 priority of the funder over the class does not arise."

4 So, the issue which warrants the exercise of the supervisory jurisdiction doesn't arise
5 because there's no conflict between stakeholders and class.

6 Then as at 28:

7 "As for conflicts between the funder and the class, the CAT said that, up to a point,
8 these were inevitable ... It considered that the protection written into the LFA, coupled
9 with the supervisory jurisdiction made the ... conflict manageable."

10 This was off the back of Apple's argument that Mr Gutmann was not a suitable person
11 to be certified because he'd had the temerity to enter into an agreement which created
12 the potential for damages to be paid to the funder in priority to the class. What the
13 CAT was saying, which the Court of Appeal endorsed, was: well, no, that doesn't mean
14 that -- that isn't wholly inappropriate, because that can be managed through the LFA
15 itself and ultimately through the supervisory jurisdiction, which, as we've seen, allows
16 the Tribunal to manage the conflict where the interests of the class are at risk.

17 Sir, that's what we say about this, because a lot of weight is placed in particular in the
18 skeleton argument and to some extent in submissions on, obviously, the authority of
19 the Court of Appeal, indicating that it has the jurisdiction that Charles Lyndon contends
20 for. In my submission, that was not the issue before the Court of Appeal and it's not
21 the jurisdiction that they are suggesting exists.

22 If it assists further, we can pick it up at page 230, paragraphs 81 and 82. So we can
23 see --

24 THE CHAIR: 81.

25 MR MALLALIEU: So, at the very end of 81:

26 "The supervisory jurisdiction of the CAT will ensure that what is recovered is not

1 excessive."

2 Sir, that's the other jurisdiction -- the one that we talked about, in other words, what
3 can be awarded to the class representative by way of costs, fees and disbursements.
4 Nobody disputes the Tribunal has the jurisdiction to say: well, class representative,
5 you've applied for X, you can only have Y.

6 Then it talks at 82 about "the wide powers conferred on the CAT". I'm not going to
7 invite the Tribunal to go all the way through it, but at partway through that it refers to,
8 again:

9 "This would include ordering that the funders and the lawyers paid in priority to the
10 class." Again, that is the context in which all of these observations are made, and
11 that's the jurisdiction that's being referred to.

12 THE CHAIR: But I think that's previous sentence is (Audio issue) the other side are
13 sort of (Audio issue) looking at.

14 MR MALLALIEU: Sorry sir, did the previous --

15 THE CHAIR: "The general principles give the CAT broad overarching powers to
16 ensure that costs and expenses are dealt with fairly and proportionately and in
17 accordance with the principles of justice."

18 Because I think they're relying on it.

19 MR MALLALIEU: Absolutely.

20 THE CHAIR: You're saying that you look at this in the context of the Gutmann decision
21 and what they had to decide. He says within the course of this, principles are stated
22 in much wider terms. At the end of the day, we will have to specifically focus on
23 a particular issue, which wasn't the focus of the court at the time when it made its
24 decision. And that's something I'm very conscious about, because I know that judges
25 will say something, broad statements which you could try and take out of context and
26 then say: well, that applies across the board on everything, and then you'll probably

1 get a wrong result.

2 Sometimes those broad principles are right across the board, and that that's absolutely
3 fine. But we have to decide as part of this application whether that's right or not. And
4 I don't see this authority as a fetter either way on that key question between you two.
5 I can see it as the words on the page, of course I can, but we're being asked to look
6 at a slightly different -- maybe more than slightly different -- scenario the court was
7 considering in that case.

8 MR MALLALIEU: Sir, I will take that and bank that, if I can put it that way, because it's
9 Charles Lyndon that advanced this authority as establishing the jurisdiction that they
10 say exists. I say it doesn't do that, and exactly the point, sir, if I may say, which is it
11 doesn't -- I'm saying there isn't a jurisdiction. But my point in relation to this case is
12 this case does not do what Charles Lyndon say, which is it establishes a jurisdiction.

13 THE CHAIR: What I'm inclined at the moment to say is it's an open question, whether
14 that jurisdiction extends to the scenario that we've got at the moment.

15 MR MALLALIEU: Well --

16 THE CHAIR: Deciding that open question. I will look at the authorities and what these
17 passages say, appreciating that whilst you've got general principles, we need to see
18 whether or not applying those general principles applies in this type of scenario.

19 MR MALLALIEU: Sir, yes, and my final point --

20 THE CHAIR: So that's a policy question, as well as a wording, the actual wording of
21 the agreement question.

22 MR MALLALIEU: My final point then in relation to Gutmann, just picking up on the
23 sentence you attracted my attention to, the point being addressed in Gutmann, of
24 course, what was being said by Apple everybody acknowledged and agreed wasn't in
25 dispute, as it isn't in dispute here, that the CAT's rules allow it to control what goes in
26 the top of the funnel, what should be given to the class representative for his costs,

1 fees and disbursements. That wasn't in issue.

2 THE CHAIR: No doubt that (Audio error).

3 MR MALLALIEU: What was being said by Apple in Gutmann was that the general
4 jurisdiction the CAT has does not then permit it to allow some of the classes damages
5 to be used to pay the funder, and to deal with that priority. What and what the
6 Court of Appeal said, because it looked at the whole general context, it concluded that
7 insofar as the CAT has a general jurisdiction, there were good reasons to conclude
8 that that jurisdiction did extend that far, and I don't need to rehearse them all. But the
9 most obvious and overpowering one is because it means that litigation can be funded
10 and the tribunal can control the balance of the interests between the class and the
11 stakeholders.

12 THE CHAIR: Yes.

13 MR MALLALIEU: Our short point is that insofar as you're looking at any suggestion of
14 some general jurisdiction, the question here: does that extend to interfering in prior
15 agreements between the stakeholders? There is no reason, by reference to the
16 objectives for which the CAT was set up, the rules that were written, to conclude that
17 that jurisdiction would extend that far. That's my point.

18 THE CHAIR: And you're either right or you're wrong. The point that I think we
19 understand, but it's such an important, fundamental point, I've got no difficulty in you
20 reinforcing it and taking it slowly, because I do want to get this one right.

21 MR MALLALIEU: Sir, can I then take you to tab 17?

22 THE CHAIR: Yes.

23 MR MALLALIEU: Which is the merits decision. Again, I'm aware of the constitution
24 of the Tribunal and --

25 THE CHAIR: I think Merricks is under challenge so.

26 MR MALLALIEU: It is under challenge.

1 THE CHAIR: But I'm not sure how far that's got, but.

2 MR MALLALIEU: I'm not at this stage going to any issue about, for example, the
3 calculation of the ROI or anything like that.

4 THE CHAIR: No.

5 MR MALLALIEU: I just wanted to pick up page 557, paragraph 81. In that case, the
6 Tribunal was looking at whether the terms of settlement were just and reasonable and
7 it identified it, and we can see what the issue was there. And you can see the
8 submission there from the funder, that the settlement had to be just and reasonable to
9 all stakeholders, including the funder. The Tribunal did not accept that submission
10 and said the focus of the statutory test is on the class members.

11 That, of course, was looking at a different question: were the terms of settlement just
12 and reasonable? But in my submission, the reason for the conclusion by the Tribunal
13 as to what was relevant to the determination of that issue goes directly to the point I'm
14 making, which is that the primary concern of the CAT is the protection of the class in
15 this situation, or this sort of situation.

16 THE CHAIR: (Audio error) can be confident that paragraph was written. Certainly,
17 I didn't have this current scenario behind this is when the (audio error) paragraph that
18 we've just seen particular paragraph to (audio error) I think we're gonna have (audio
19 error) cases of (audio error) about this type of situation.

20 MR MALLALIEU: So it may be that I'm seeking to knock down points which I don't
21 need to knock down because the Tribunal's concluded it doesn't help them. But if
22 I can just --

23 THE CHAIR: I'm not saying any of this doesn't help us. I think it is helpful to have
24 (audio error) setting out your principles. But those authorities are in a different context,
25 and we've got to see what is the correct either the application of those principles or
26 what is the correct principle for the type of scenario we're dealing with here today.

1 MR MALLALIEU: Well, sir, my short point on the authorities is that the authorities are
2 in a different context and don't establish a jurisdiction. So, I will, in light of the
3 Tribunal's indication that that is the approach the Tribunal takes, I will take them very
4 shortly.

5 THE CHAIR: What I'm going to say is I'm not going to say one way or another because
6 I think there's a lot more thought that needs to be put into this. But what I'm saying is
7 that, at the moment, we will, of course, when looking at these authorities, bear in mind
8 what issue they're actually deciding in the context of those decisions, and that may
9 feed into what conclusions that we can safely draw in dealing with this particular
10 scenario, which I accept is different from the scenarios considered both in
11 Gutmann v Apple and in Merricks.

12 MR MALLALIEU: Sir, thank you. Can I just then briefly, two further references in
13 Merricks.

14 THE CHAIR: Yes.

15 MR MALLALIEU: Page 572, paragraph 116.

16 THE CHAIR: Yes.

17 MR MALLALIEU: This was referred to by Mr Smiley and I think is in their skeleton
18 argument for CL. "The distinction between the terms of the proposed settlement and
19 the distribution of the sums is made clear in the CAT rules", and then this was the part
20 relied on:

21 "We think it's implicit in the CAT rules that not only the terms of the settlement, but
22 also the distribution arrangements proposed in the application require the approval of
23 the Tribunal". [as read]

24 Again, this is advanced to say that that is indicating that the previously constituted
25 Tribunal in Merricks took the view that it could interfere in distribution arrangements
26 and had the jurisdiction to do so.

1 Firstly, of course, the point is, well, whether they're right or wrong, if that was the view
2 they took, is the very argument we're having now here. But of course, that wasn't;
3 they weren't, as, sir, you've already indicated. That wasn't the issue that they were
4 dealing with. Where they're referring to distribution there, they're referring to the
5 question of the distribution of the sums to the class. What's the proposed method and
6 mechanism of distribution of sums to the class. So, they're referring to a completely
7 different --

8 THE CHAIR: So, there's another thing that's pending (audio error).

9 MR MALLALIEU: On the issue of --

10 THE CHAIR: What next after this is this just a judgment that (audio error) is at a certain
11 stage (audio error).

12 MR MALLALIEU: Oh yes. Sir, I'm aware of that, yes.

13 Then finally in this, can I take you please, to page 589. I'll take the Tribunal, please,
14 to page 589. Again, just because this was referred to by Mr Smiley -- I now can't find
15 it, I forgot to note down the paragraph number --

16 THE CHAIR: It's 167 I'm --

17 MR MALLALIEU: I'm grateful. I meant to highlight it, but I forgot. 167. Again, this is
18 just a cross reference back to Gutmann. It refers to, over the page, the Tribunal's
19 broad discretion to determine how any award or settlement should be dealt with in
20 terms of distribution to CMs -- class members -- and payment of costs and expenses,
21 including any return to the funder in the exercise of its wide supervisory jurisdiction.
22 Now, (a) it doesn't take us much further because it's a cross reference back to
23 Gutmann, and we've already seen the context of Gutmann. But (b), again, it's that
24 same dichotomy that the Tribunal is saying the jurisdiction exists to deal with. It's the
25 distribution as between the class members on the one hand, and payments to
26 stakeholders, including the funder on the other.

1 That's why, it's referring to it, and that's the importance of that jurisdiction. And that's
2 why it can be seen that the Court of Appeal would conclude that general case
3 management powers might be said to extend to having to control that conflict. So can
4 I just then turn to the McLaren decision, which I think is -- one of the McLaren
5 decisions -- the Tribunal's decision at tab 15, page 452.

6 THE CHAIR: Yes.

7 MR MALLALIEU: So again, just trying to pick this up at the relevant points that were
8 referred to. If we can pick it up at page 462. This is a dictum that I think has already
9 been mentioned.

10 THE CHAIR: Yes.

11 MR MALLALIEU: But it's referring here -- I'm not going to read it all out -- to the
12 potential conflicts of interest, again, between the class members and those who work
13 together to make the proceedings possible. So that's on the one hand, the class
14 members, on the other hand, the various stakeholders. Then the observations about
15 the stool, as we seem to be referring to it during the course of this hearing. Then at
16 the final part on that page:

17 "Lawyers and funders may agree terms with the CR, but at the end of the day the
18 payment of costs and expenses is subject to the approval of the Tribunal which must
19 balance the interests of not just the class members and stakeholders, but bear in mind
20 the importance of a workable collective proceedings regime." [as read]

21 I wouldn't dispute any of that, but insofar as this is said to establish that there is
22 a jurisdiction, not (a) to look at the cost to be awarded to the class rep and not just to
23 look at the conflicts and priorities between the class rep and the stakeholders, but to
24 interfere and intervene in the prior agreements between the stakeholders per se, as
25 to how the sums given to the class rep should be distributed, then my short submission
26 is that this judgment was not purporting to and does not establish that. But, again, I'm

1 acutely aware of the Tribunal that I'm addressing.

2 THE CHAIR: Yes, I think that the approach at paragraph 17 is a pretty fundamental
3 approach. And I don't know whether the Court of Appeal has said anything about this
4 particular paragraph, in *Gutmann v Apple*, maybe we should check that later. But
5 generally the approach I'm inclined to take, subject to detailed issues about how it
6 works out in the context that we've got, where we're taking the class members out of
7 the equation, but I am keen that we have regime outcomes, which are ones where
8 everyone can live and ones that do not discourage any of the stakeholders, because
9 we need all three. (Inaudible) the more the stakeholders, and you're right about that,
10 but in the context of this particular case, we've got three stakeholders, and we've got
11 a limited pot. We're just going to have to see how that factors in, in the result. But I'm
12 very conscious that what I'm looking for is encapsulated in paragraph 7.

13 MR MALLALIEU: Sir, I understand that, and of course you have our points that, in
14 terms of discouragement to stakeholders, nothing is going to be more discouraging to
15 stakeholders, considering supporting future CAT applications, than the idea that what
16 they agree between themselves is subject to some broad, equitable jurisdiction at the
17 end of it, which could mean that they don't know where they stand.

18 THE CHAIR: Yes, I understand that's your point, and I made that pretty clearly, and
19 obviously you look at it from the point of view of funders, and ATE, Smiley looks at it
20 from the point of view of the lawyers, and we have to look at it from the point of view
21 in addition to the collective proceedings regime as a whole. But where that comes
22 out, I really don't know at this stage because we haven't discussed it amongst
23 ourselves.

24 MR MALLALIEU: Well, if I may, I am trying not to look at it from the perspective of
25 funders and insurers on one side and solicitors on the other, and the reason I'm not is
26 because the reason we're here today, is because it suits the solicitors on the facts of

1 this particular case, in these particular circumstances, to go behind the contractual
2 arrangements. On another day, it might be the funder, on another day, it might be the
3 insurer, it might be counsel, it might be a different stakeholder. My point is to try and
4 look at it from the point of view of the stakeholders collectively, because if we end up
5 in this position where individually, any stakeholder can pop up at the end and do this,
6 that is discouraging to all of the stakeholders. In another case, I could be standing
7 here representing the solicitors, saying we don't want a different stakeholder to
8 undermine the contractual arrangements.

9 So, it suits the solicitors in this case, but it shouldn't be taken that this is a solicitor
10 against funder insurer battle generally. We say, in fact, it's the interests of all the
11 stakeholders that are prejudiced by the approach that takes.

12 THE CHAIR: What Smiley says, whether right or wrong, is that you look at what was
13 agreed, it's got subject to the order of the court to the contrary. He says as
14 a stakeholder, he's entitled to ask the Tribunal to make an order to the contrary. And
15 you say, "No, Smiley, you've got it wrong, you've misunderstood this". What you're
16 saying is that that provision only deals with what goes in into the pot, ie into the system.
17 It doesn't deal with 3.1 to 3.4, which is the priorities' end to say. And I think you can
18 be confident that we understand where that difference is.

19 MR MALLALIEU: Sir, in those circumstances, I'm not going to delay any further on
20 the cases. I am going to proceed on the assumption that, because they went to
21 a general point, and I've explained my position on the general point, the Tribunal
22 understands my case, and I'm going to move on.

23 THE CHAIR: The way you put your case in your skeleton today is very clear and it's
24 very helpful. I have to be fair to you and fair to Smiley, is that we haven't decided
25 amongst ourselves -- which is right on the circumstances of this case -- whether it's
26 one or three. I'm just putting it on the table. It's better, as an advocate, you know

1 | where we are, and me keeping quiet for the whole hearing, and then he's starting to
2 | get a judgment, he said, "Well, I didn't know where they were coming from, where's
3 | this come from?" So, I find I get the best out of advocates, particularly the ones who
4 | are able of your level, is to put on the table where we are, what the concerns are, and
5 | you have the opportunity of dealing with it and you are dealing with it.

6 | But, I've got to say, this is not an issue that we as a panel have been through together,
7 | and we will need to, but what I think is only one of three, we've got (Audio error)
8 | Tribunal come up with the answer.

9 | MR MALLALIEU: Sir, I'm going to move on from the cases.

10 | Can I come then to page 189 of bundle A -- if we need to turn it up, I'm not sure we
11 | do -- which is the LFA, and the provision in it that says subject to any order of the court
12 | to the contrary, the class --

13 | THE CHAIR: Let's have a look. Is it the deed of priorities we need to look at as well?

14 | MR MALLALIEU: We can look at the deed of priorities.

15 | THE CHAIR: Let's look at both of them, and then we know what we're talking about.

16 | MR MALLALIEU: I meant the deed of priorities, sorry, that's my mistake. I meant to
17 | say that the revised deed of priority is not --

18 | THE CHAIR: That's what I thought.

19 | MR MALLALIEU: Excuse me, I was in the wrong bundle. I've given myself the wrong
20 | reference, excuse me for a moment. It's bundle 8, page 481.

21 | THE CHAIR: The priorities. Yes, okay.

22 | MR MALLALIEU: Okay. (Pause)

23 | THE CHAIR: I can put the authorities bundle away then?

24 | MR MALLALIEU: Yes, sir, you can. Thank you. (Pause)

25 | Sir, we should be on -- at 481 is the start of the revised deed of priorities, and 483 --

26 | THE CHAIR: Let me find the tab.

1 MR MALLALIEU: -- is the page with the relevant term in.

2 THE CHAIR: So, this is the priority agreement.

3 MR MALLALIEU: This is the revised deed of priorities, what we're generally referring

4 to as "the priorities agreement".

5 THE CHAIR: Yes, I'll just make a note. (Pause)

6 MR MALLALIEU: And I'll just invite the Tribunal to note at this stage, because I'll come

7 back to it --

8 THE CHAIR: Yes.

9 MR MALLALIEU: -- that this revised deed of priorities is entered into in July 2023.

10 THE CHAIR: That's it, yes. That's that version. I've been working from this version.

11 So, looking at page 483.

12 MR MALLALIEU: So, there was an original deed of priorities. There was also the

13 litigation funding agreement, itself originally had a waterfall, an order of priorities in it.

14 THE CHAIR: I remember that.

15 MR MALLALIEU: And whilst the wording differs slightly, they all have a provision

16 broadly equivalent to paragraph 3, which is the subject of any order of the court to the

17 contrary.

18 THE CHAIR: We'll just work from this.

19 MR MALLALIEU: We can just work from this.

20 So, the priority is, well, it speaks for itself:

21 "It's agreed that, subject to any order of the court to the contrary, all sums due to any

22 of the parties pursuant to the agreements shall be paid out of any stakeholder

23 proceeds." [As read]

24 I don't need to read all that. "Shall be paid out to all stakeholder proceeds in

25 accordance with the terms of this agreement", is the essence of it.

26 THE CHAIR: The dispute between you is whether that subject to the order of the court

1 to the contrary only qualifies one half or both halves. That's the dispute.

2 MR MALLALIEU: Yes, and so the starting point is to consider: what is the purpose?

3 What's the reason why that provision would be in there?

4 THE CHAIR: Yes.

5 MR MALLALIEU: And we say the starting point, and indeed the end point, is that the
6 very obvious reason and purpose of that agreement, is to qualify the obligations under
7 the agreements that are referred to. (Pause)

8 So, it's agreed:

9 "Subject to any order of the court to the contrary, all sums due to any of the parties
10 pursuant to the agreements shall be paid out of any stakeholder proceeds in
11 accordance with the terms of this agreement." [As read]

12 So, the agreements encompass a wide range of documents, but as you will see from
13 the first page of this priorities agreement, this priorities agreement is between
14 Mr Gutmann, the funders, the solicitors, both sets of solicitors' counsel, the insurers.

15 So, the whole set of parties, and there's a whole set of agreements which say, for
16 example, under the CFAs, and I'm going to turn to one of the CFAs briefly in
17 a few minutes.

18 THE CHAIR: Yes.

19 MR MALLALIEU: I'll be careful not to read out the terms which I'm not meant to read
20 out, or at least I hope I will be, but I'll identify them to the Tribunal.

21 In broad terms, CFAs typically provide, for example, "You will pay us so much, win or
22 lose, you'll top us up to our full profit costs if you win and you'll pay us a success fee if
23 you win". (Pause)

24 The insurance policies will provide for payment of a premium. Sometimes they're
25 between the class rep and the insurer, sometimes they're between the funder and the
26 insurer.

1 The funding agreement will provide for certain payments to be made. In this particular
2 case, there's a specific clause in the funding agreement which writes down the class
3 rep's liability to the sums allowed. Sometimes that is or isn't there, but in this case
4 there is.

5 The more fundamental point is that the purpose of this provision is to ensure that in
6 terms of what is said to be payable in accordance with the priorities agreement, it is
7 limited to the sums that the CAT permits to be put into the top. In other words, the
8 amounts payable under the agreements are not what the agreements provide for, they
9 are what the agreements provide for subject to any decision of the court to the
10 contrary, exercising the jurisdiction it undoubtedly has, to reduce the amounts that are
11 awarded to the class representative for its costs, fees and disbursements.

12 And so, the function of this is to say there can't be any confusion here, that what goes
13 into the waterfall is everything everybody's entitled to under their agreements,
14 regardless of what the court has awarded to the class rep. What goes into the waterfall
15 is what's payable under the agreements, subject to any order of the court, in other
16 words, what the court's allowed to the class rep. That's its purpose.

17 THE CHAIR: And you look at the purpose and see what Mr Smiley says in response
18 to that.

19 MR MALLALIEU: Yes, and that has a perfectly legitimate, understandable and
20 obvious reason, because that is the recognised jurisdiction of the CAT, and that serves
21 to ensure that nobody can pop up and say, "Well, we know the Tribunal only said that
22 the class representative can have X amount for the solicitor's costs, but our retainer
23 says we can have Y amounts, and so we in fact want the Y figure put into the waterfall,
24 which therefore disadvantages the other stakeholders".

25 THE CHAIR: And you are saying that we should look at ICS for the purpose of what
26 the rules of construction are?

1 MR MALLALIEU: Indeed.

2 So that's the very short point in relation --

3 THE CHAIR: Is ICS in the bundle?

4 MR MALLALIEU: It isn't. It could be, but I don't think any of us has embarked on
5 a forensic, detailed examination of the principles of contractual construction, not least
6 because we were sure that this Tribunal will be well aware of them.

7 THE CHAIR: Well, no, that may or -- the problem is your you're dealing with a Tribunal
8 that has a mixture of disciplines, and so whilst it's fair to assume that I'm familiar with
9 ICS and Mr Doran is, it may not be a universal position, so I think it would be helpful
10 for you to acknowledge that we can look at the ICS case and apply that, even though
11 it hasn't been cited in open court.

12 MR MALLALIEU: If the Tribunal will be assisted by any further submissions in writing
13 or otherwise, we will respond to it.

14 THE CHAIR: The way I look at it is that, if you look at ICS and Chitty, they're both
15 fairly clear on what the test is, and certainly that's what I'm inclined to do. Unless
16 someone says, "Look, you missed something", that's what I'm going to do.

17 MR MALLALIEU: Thank you, sir.

18 So, my primary point is that there is a plain and obvious purpose and sensible reason
19 for that provision to be there.

20 THE CHAIR: Yes.

21 MR MALLALIEU: It is directed to ensuring that the waterfall is only applied to what the
22 court has permitted to be paid, by reference to the agreements, not to permit the
23 waterfall to be ripped up by any of the parties that are then entering into it. And, of
24 course, it would be somewhat ironic if the parties are entering into this detailed
25 provision for priorities, expecting that on Charles Lyndon's case, in fact, the Tribunal
26 has a completely broad, equitable jurisdiction to simply do whatever it wants with it, in

1 any event.

2 My secondary point in relation to this -- if I'm wrong about my first point, which I hope
3 I'm not, but if I am wrong about my first point --

4 THE CHAIR: Yes.

5 MR MALLALIEU: -- and it is said that whether the Tribunal has a statutory jurisdiction
6 or not, that in effect, by including this phase, the parties are giving it jurisdiction, then
7 in my submission, that is a limited jurisdiction. It's not, again, intended to say: any
8 party to this party's agreement who is entering into it can ask the court to depart from
9 the priorities agreement; it is simply a caveat saying that if the court does have
10 jurisdiction to do so, and the court itself concludes in some way that that order of
11 priorities is inappropriate, the court can do so. And if it does so, the parties are bound
12 by that. But it is not inviting, nor indeed allowing the parties who are subscribing to it
13 to say: we are going to positively invite the court to depart from what we've expressly
14 agreed to.

15 If my primary position is wrong, and this effectively does give the court some
16 jurisdiction, it is a very limited jurisdiction and it doesn't permit of and can't be intended
17 to permit of one of the parties who's subscribing to this agreement to seek to
18 undermine it.

19 THE CHAIR: On your first point: on one view, it's all fairly circular, and different
20 directions you can go around in the circle. You say: one test is does the Tribunal have
21 this jurisdiction to award costs, fees and disbursements in such way as it thinks fit as
22 between the stakeholders? And if it doesn't, does this give it jurisdiction?

23 That's going in one direction. If you go the other direction, you would say that it may
24 be the CAT, absent that clause, does not have that jurisdiction, but this clause in fact
25 gives them that jurisdiction.

26 What I'm trying to illustrate is that these arguments are not all one way; that these are

1 relatively complicated arguments, and that it's easy to argue one position or the other.
2 That's all I was just trying to make, is that there's more than one direction you can go
3 in the circle. And that you should assume that the circle only goes one way.

4 MR MALLALIEU: Sir, I'm not assuming the circle goes one way -- I've been going
5 round in circles myself dealing with some of these arguments.

6 I'm well aware of the different directions that they can be approached from, but it is
7 our position that, in fact: (a) there is a very logical explanation for the clause to be in
8 there, which makes perfect sense and doesn't invoke or give the court the jurisdiction
9 that it's contended for; or (b) if we're wrong about that, it's a very limited jurisdiction
10 which doesn't admit of and permit of what is happening here today.

11 THE CHAIR: Well, that's one direction. And then the other direction I've just dealt
12 with.

13 MR MALLALIEU: Yes. I'm not going to labour the point, because the court plainly
14 understands the arguments and, I think, where we stand on it.

15 Our third point, if I may, is the point that the Tribunal already has, but just since we're
16 in the context, I just repeat it. If we're wrong on all of that, and the court has jurisdiction
17 or is given jurisdiction by virtue of this clause --

18 THE CHAIR: Yes.

19 MR MALLALIEU: -- then that is a jurisdiction which must be exercised by giving, we
20 say, fundamental weight to the parties' agreement. So, in other words, if there is
21 a jurisdiction, the first and overwhelming consideration, we say, is the terms of what
22 the parties have agreed between themselves.

23 The very short and simple reason for that is because if the Tribunal is in a position of
24 saying it's just looking at what is fair and equitable between the stakeholders -- and
25 that's all we're dealing with here: what's fair and equitable between the
26 stakeholders -- in a context where everybody has entered into a risk-based

1 agreement -- everybody at the start of the case takes a risk as to how the case may
2 come out, and everybody takes a commercial decision as to what risk they're prepared
3 to take, what reward they want for that risk. Then when considering, in light of the
4 outcome, what's fair and equitable as between those stakeholders -- and that is all we
5 are dealing with -- the most obvious and clear indication of what is fair and equitable
6 between them is what they agreed.

7 Sir, in that regard, I'm now moving from saying: you can't do this, or if you are to do
8 this, you can only do this by giving fundamental and overwhelming weight to the terms
9 of the agreement, to saying: well, if we're in a more flexible situation, where the
10 Tribunal can approach this on a just and equitable basis, what should it do?

11 Because our next line of argument is: even if I failed on everything so far, then when
12 we get to this point, the Tribunal still has to say: what should it do? In that regard,
13 Mr Smiley, I think at one point in his submissions said: well, of course, one of the
14 fundamental things -- he may not have used the term fundamental; I'm not attributing
15 that to him -- one of the significant factors the Tribunal must take into account are the
16 circumstances when the parties, the stakeholders, entered into these agreements.

17 Because of course it would be one thing, if the Tribunal has this broad jurisdiction and
18 can exercise it in this way, to look at a case where the arrangements had been entered
19 into many, many years before, and there had been lots of unexpected events which
20 meant that if this broad jurisdiction does exist, there might be significant factors which
21 said: there's some fairness which needs adjusting. It's another thing if those
22 circumstances are different.

23 In that regard, I really just have one short point to make, which is the point I've already
24 touched on, which is that whilst the litigation funding agreements were entered into
25 many years ago -- and of course, it's one of the points that we rely on generally on
26 behalf of the funders -- explaining why it's only fair and just that we get the reward that

1 we seek -- because of course, we funded this case, and we have done and we've been
2 out of our money for many years -- what's really important to note is that this deed of
3 priorities was entered into in July of 2023.

4 And why that is important is because -- can I invite the Tribunal to turn to bundle B,
5 tab 9.

6 THE CHAIR: And how long are you going to take on this point?

7 MR MALLALIEU: On this particular point, about 2 minutes, I hope.

8 THE CHAIR: Oh yes, then we'll hear that before we break.

9 MR MALLALIEU: Then I'm going to move on.

10 THE CHAIR: Yes, yes. You've got to think about the shorthand writers. Yes. So,
11 bundle B ...

12 MR MALLALIEU: Bundle B, tab 9, which should be the first witness statement of
13 Ms Antzoulatos. I hope I'm pronouncing that correctly.

14 THE CHAIR: Well, I doubt it, but yes.

15 MR MALLALIEU: Well, sir, as somebody who's quite used to having my own name
16 mispronounced and misspelt, I hope Ms Antzoulatos, if I get that remotely correctly,
17 won't take any offence.

18 THE CHAIR: Well, I have one judgment where my name was spelled three different
19 ways. So, I'm used to it, yes.

20 MR MALLALIEU: Sir, I hope it will be understood that if I get it wrong, no offence is
21 intended in doing so.

22 THE CHAIR: No, of course not.

23 MR MALLALIEU: So, tab 9, page 87.

24 THE CHAIR: Yes.

25 MR MALLALIEU: So that's Ms Antzoulatos's first witness statement.

26 THE CHAIR: Yes, and this is bundle B, yes?

1 MR MALLALIEU: This is bundle B. Because I just want to set the time at which the
2 parties -- the stakeholders -- agreed --

3 THE CHAIR: Oh, and this is open, isn't it? That's fine.

4 MR MALLALIEU: -- the consequences. I think we are open in this.

5 THE CHAIR: Yes, it is. Yes.

6 MR MALLALIEU: I mean I don't need to delve into the detail of it, but if we can pick it
7 up at paragraph 31. I'm not going to actually read it out.

8 THE CHAIR: Yes.

9 MR MALLALIEU: But what I invite the Tribunal to note at the circumstances, going on
10 from paragraph 31 ... (Pause)

11 I'll have to check the paragraph numbering, and I'll come back to it, but I can make the
12 point generally and then come back to you with the reference. So, the point generally
13 is that by July 2023 --

14 THE CHAIR: Yes.

15 MR MALLALIEU: -- it was known, and indeed Mr Smiley made this point himself, that
16 the budget had been exhausted for years.

17 THE CHAIR: Since 2021.

18 MR MALLALIEU: Since 2021. So what was known in July 2023 was that:
19 Charles Lyndon were out of the budget; that any further fees they incurred would be
20 out of budget fees and therefore would fall into tier 4 of the priorities deed, the waterfall;
21 and that they would not be getting discounted fees at all, and therefore they would be
22 not be getting any top up to those deferred fees at tier 3 of the waterfall in the event of
23 any success.

24 The reason all of that is important is because if we are in the turf that Mr Smiley wants
25 us to be in, you're deciding not what's just and equitable in relation to the claim
26 generally involving defendants and claimants, not what's just and equitable as

1 between stakeholders in the class, but what's just and equitable between the
2 stakeholders.

3 I go back to my point that a fundamental aspect of that must be what they agreed
4 between themselves, and what they agreed between themselves in July 2023 -- it
5 can't be right that they then stand up, as Mr Smiley did, and say: oh well, this deed of
6 priorities shouldn't be applied because it doesn't reflect the fact that when we entered
7 into the LFA, that set a budget, which by 2021 was exhausted.

8 THE CHAIR: Yes, but --

9 MR MALLALIEU: Because they knew the bargain, again, that they re-entered into in
10 2023.

11 THE CHAIR: In determining what's just and equitable as between the stakeholders,
12 it's fair to say that the Tribunal should take into account what has been agreed, I think.
13 We've got that far so far.

14 The real issue is whether or not that is a -- how you want to say, conclusive or
15 determinative. Is there an element that whereby we can say: yes, we appreciate that
16 was agreed, but for whatever the reasons are -- and we can look at those -- we don't
17 think it's just and equitable to do it in a particular way.

18 But at the moment, subject to speaking to my colleagues, I'm not against you on the
19 concept that we should be looking at what's been agreed, at the very minimum, as an
20 important factor. Because you will say: well, look, you've got big boys here; they know
21 what the risks are; there's an element of sophistication on both sides, so you really
22 should be looking at what they've agreed.

23 But of course, what they'll say is the same point that they've been saying before, I don't
24 need to repeat that. Yes.

25 MR MALLALIEU: So yes, the only thing --

26 THE CHAIR: Have you finished this point?

1 MR MALLALIEU: The only point I'm adding to that is the point that it was Mr Smiley
2 who said that the context in which these agreements are entered into is relevant.
3 I agree with him to this question of the exercise of any jurisdiction. The important point
4 is: what followed from that was lots of talk about the fact that when the LFA was
5 entered into, budgets were set and then the budgets were exhausted, which meant
6 Charles Lyndon went on to wholly contingent fees.

7 My fundamental point is, it's important to remember that when we're giving weight to
8 the agreement, that agreement was entered into a time when that was known. This
9 isn't an agreement that was entered into six years ago before that was known, it was
10 an agreement entered into at a time when that was known.

11 THE CHAIR: How long do you think you're going to be before you finish your --

12 MR MALLALIEU: Well, sir, I'm going to come on to deal with the point about allocation
13 now, which is the other important point. That's probably going to take me -- well, I don't
14 know, but I'm somewhat -- it's going to be at least 15 minutes, it might be 20 minutes.

15 THE CHAIR: So, you'll probably finish your submissions within 20 minutes?

16 MR MALLALIEU: That might be a little optimistic, but I will attempt to.

17 THE CHAIR: Then Smiley will have a short window of no more than maximum
18 15 minutes, and then we'll have our questions. But the way the timing looks is I don't
19 think we're going to be able to give you a decision today, even though I'd rather do
20 that. But I just don't see we can have enough time to agree amongst ourselves what
21 the answer is going to be.

22 So, what we'll do is we'll rise, we'll come back at 3.40 pm, and we'll go from there.

23 (3.29 pm)

24 (A short break)

25 (3.43 pm)

26 THE CHAIR: Carry on.

1 MR MALLALIEU: I'm afraid it's me at the start of this session, not Ms Abram, but
2 anyway, it's --

3 THE CHAIR: No. It's nice. Come on, let's go.

4 MR MALLALIEU: So can we come, then, straight to the point about siloing allocation,
5 however, what we want to call it. So this is the question of: do we look at this, when
6 we're talking about stakeholders entitlements, by reference to the question of the fact
7 that the claim has only concluded in relation to SSWT, or do we look at it, as we say,
8 as a proper way to look at it, as the parties looked at it when they entered into their
9 various funding arrangements? On the basis that what is being funded here is Trains 1
10 claim, against three defendants, and that if there is any degree of success against
11 those defendants collectively, then that is a proceed in the Trains 1 litigation, which
12 falls to be dealt with under the waterfall and the funding arrangements.

13 THE CHAIR: Yes.

14 MR MALLALIEU: So, you've already seen the litigation funding arrangement that's in
15 this case, and I'm not going to invite you to turn that up unless it would assist you to
16 do so. In that case, I took the right call. What I do invite you -- in considering your
17 determination -- is, of course, to bear that in mind, because we say it's quite clear
18 when you look at that, it's clear beyond any sensible counterargument, that that
19 funding arrangement is a funding arrangement in relation to the Trains 1 litigation. And
20 indeed I flagged up -- but I'm not going to invite you to turn it up -- clause 9.5 of that
21 funding arrangement, which deals expressly with the point of the potential for
22 successive recoveries to be achieved, exactly the sort of situation, and indeed it
23 expressly uses the term in clause 9.5, successive recoveries from any defendant. So,
24 it's acknowledging the multiple defendant position and the prospect of successive
25 recoveries being received.

26 Can I just, though, give the Tribunal one example of another funding arrangement in

1 the case, just to illustrate the point that this is not exclusive to the funding
2 arrangements, and I'm not picking on anybody, but I'm just going to pick -- because
3 it's the first in order of time -- tab 14 of bundle A., which is the original CFA between
4 Charles Lyndon and Mr Gutmann.

5 There are others: there are later CFAs; there are counsel CFAs; they're all in bundle A.
6 I'm not going to waste the Tribunal's time going through them all, because I say when
7 you do look at them, it's exactly the same point, to the same effect. But if I can invite
8 the Tribunal to tab 14, and I'm going to tread a little carefully here, and what I'm going
9 to do -- because as I understand it, this is confidential, or at least parts of it are -- is
10 I'm simply going to identify relevant sections, I'm not going to read them out, and then
11 I'm going to make a general observation.

12 THE CHAIR: Page number?

13 MR MALLALIEU: Sorry, sir. So, it starts on page 272.

14 THE CHAIR: Yes.

15 MR MALLALIEU: And if I'm going too far, I hope, Mr Smiley, if I mention something
16 he thinks I shouldn't, because since it's his client's CFA, I'm sure he will tell me.

17 THE CHAIR: (Audio error) I'm sorry.

18 MR MALLALIEU: Sir, can I just pick it up then on the first page in page 273, looking
19 at the definitions. So, the claim you can see, second entry down.

20 THE CHAIR: Yes, okay. Just give us the entries and then --

21 MR MALLALIEU: And then over the page, you can see the definition of "win". All of
22 this is fairly conventional.

23 THE CHAIR: Yes.

24 MR MALLALIEU: And again, making a general observation, which the Tribunal can
25 then apply to this particular agreement, it is conventional under a CFA -- it can be
26 different, but it's conventional under a CFA -- that any damages obtained by the client

1 triggers a win and triggers the solicitor's full entitlement to payments under the CFA.

2 THE CHAIR: I've seen different versions.

3 MR MALLALIEU: But thankfully we don't need to have to worry about those.

4 THE CHAIR: That's the version here, but I've certainly seen different versions.
5 Because some of them talk about damages that have actually been recovered and
6 how much comes in.

7 MR MALLALIEU: Absolutely, or you can have ones --

8 THE CHAIR: You could have a situation whereby -- might applies, and the defendant
9 goes into liquidation, and that's sometimes not an unheard of situation when there's
10 a large adverse judgment, next thing is they go into liquidation, then you've got an
11 issue.

12 MR MALLALIEU: Indeed, sir. So, you see other variants, particularly large-scale
13 litigation, for example, a win only happens if more than a certain amount of damages
14 are achieved, things of that kind. We don't need to worry about that.

15 THE CHAIR: No, we don't. On this one it's clear, yes.

16 MR MALLALIEU: So, can I then come on to page 275?

17 THE CHAIR: Yes.

18 MR MALLALIEU: Because then, at 4.1, you can see the consequences of a win. So,
19 we've talked about general CFAs.

20 THE CHAIR: Yes.

21 MR MALLALIEU: Any entitlement to damages is a win. And then the general
22 consequence on the CFA is that triggers a full entitlement to the solicitors' payment for
23 everything they've done, and again the Tribunal can compare that with what the
24 provision is there. (Pause)

25 Can I just pick up a specific --

26 THE CHAIR: Can you accept that, at the end of the day, even if there's a contractual

1 right to entitlement when it comes to the Tribunal's jurisdiction, when it exercises and
2 decides how much they get, particularly where there's a limited pot, they can say,
3 actually, whatever said here, you're not going to get.

4 MR MALLALIEU: Absolutely, sir, and that's the very point that's addressed in the
5 revised deed of priorities where, by reference to the agreements, and this is one of the
6 agreements, it says you will be paid what you're entitled to under the agreements,
7 subject to any order of the court to the contrary.

8 So, the court can look at the solicitor's claim for fees, or the class representative's
9 claim for fees on behalf of the solicitor, exercising the jurisdiction, everybody accepts
10 it has, it can say that's too high, you only get this. If you looked just at the CFA, the
11 CFA on its face would say the client pays the full amount of the fees. But the payment
12 under the waterfall is then abrogated, because the waterfall takes into account the
13 contrary order of the court, which has reduced the amount that's payable.

14 THE CHAIR: Yes.

15 MR MALLALIEU: And that's how it all works.

16 THE CHAIR: That's your point.

17 MR MALLALIEU: So just coming back to this document, I just flag up at the end of
18 4.1, the last -- I think it's about eight or nine words.

19 THE CHAIR: I know.

20 MR MALLALIEU: You will have seen that.

21 THE CHAIR: Yes.

22 MR MALLALIEU: And then the reassurance for the client, if I can put it that
23 way -- again, if I can invite your attention to the last line and a half --

24 THE CHAIR: I think the point I was making is that, when it comes to scenarios we've
25 got now on distribution, are we able to say that, well, whilst under the deed of priority,
26 you may get this? We've decided in all the circumstances, you're not going to get that,

1 for whatever the reasons are, or are you saying, no, we can't do that to them?

2 MR MALLALIEU: We say that's not the proper approach. The proper approach is for
3 the Tribunal to say: are any of the costs claimed by the class representative
4 unreasonable, or in this context, as the class representative put it, not properly
5 claimed? And the Tribunal then exercises that jurisdiction by reference to all the
6 circumstances of the case, including the outcome, including the amount that's been
7 distributed to the stakeholders, et cetera.

8 So, it could say: we would have let you have a fee of £10 million if you'd achieved
9 a great outcome, but you've not achieved a great outcome, and therefore we think
10 a fee of £10 million is unreasonable. Once it determines the amount that goes to the
11 class representative, the question of how that then gets shaken out between the
12 stakeholders is the priorities agreement -- and you have my point -- either the priorities
13 agreement applies -- my primary case -- or it's given significant weight -- my secondary
14 case.

15 THE CHAIR: Great. No problem.

16 MR MALLALIEU: So, you have that point, sir, and I'm grateful.

17 So just going back to 4.2. I just highlight -- I'm not going to read the last line and
18 a half -- but I just highlight, again, this comes to those words in the deed of priorities,
19 because it's common under a CFA -- there are different variants -- that whatever the
20 type of litigation is, the CFA will impose a liability on the client, the amount the other
21 side pays is usually less than that. Very few people get 100 per cent of their costs
22 back from the other side, and the clients' normally then liable for the balance. But the
23 reinsurance is provided by the deed of priority, because the deed of priority says, in
24 fact, the solicitor is only entitled to what's paid under the agreement, subject to any
25 contrary order of the court. And that has the effect, then, of ensuring that the client is
26 not subject to any shortfall liability. They are protected, and that is how these things

1 interact, and that's the purpose of the provision in the deed of priority.

2 We could look at solicitors and counsel CFAs, but my two short points there from this
3 agreement is:

4 Number 1, I invite the Tribunal to look at this or any of the other agreements. None of
5 them are siloed, none of them deal with an SSWT claim. They all deal with the Trains 1
6 claims. They all deal with, if you succeed, you are entitled in principle to your costs of
7 Trains 1; you're entitled in principle to your premium for Train 1; you're entitled in
8 principle to your funder's fee for Trains 1.

9 What then happens is down to the deed of priorities, which is recognising that, in that
10 situation, you may only have got partial success, you may only have got home against
11 one defendant, and that is catered for, not by saying you're not entitled in principle to
12 your fee, but by saying you only get that part of it which can be paid out pro-rata under
13 the deed of priorities, in light of how much you've got at this stage, and then if you get
14 to another stage where there's more poured in the pot at the top, it flows down, and
15 what's left out of your total entitlement gets topped up and topped up until hopefully it
16 reaches full payment, or if it doesn't, you've got the best you can out of the funds that
17 are available.

18 That is -- it sounds like a sort of bold thing to say -- how it works. That is how these
19 things are intended to work, that is how they are drafted, that's how they're understood
20 to work, and the only thing that seeks to drive a coach and horses through that is
21 somebody popping up at the end and saying, well, actually forget the deed of priorities.
22 So, that ties directly into the point about the allocation. Indeed, we say it effectively
23 answers the point about allocation, because it is simply wrong. It is misguided and
24 wrong to say when you are looking at the funder's fee, you analyse the LFA, you work
25 out the contractual entitlement under the LFA, as if the funder's fee is limited, to
26 a success in relation to SSWT. It's not. The funder's fee is calculated on the basis

1 | there has been a partial success in Trains 1.

2 | THE CHAIR: It comes to the one third --

3 | MR MALLALIEU: Absolutely.

4 | THE CHAIR: -- 100 per cent point. On the one third 100 per cent point, I would like
5 | you, at some stage, to just deal with the point -- I suppose summarise -- at
6 | paragraph 13.2 of our ruling. You can do that in a minute, but, I know that may be
7 | something that we want to look at. Well, do you want to look at it now, and then we
8 | can just get it over and done with?

9 | MR MALLALIEU: Sir, I think I may have missed the reference, would you mind ...

10 | THE CHAIR: Yes, it's paragraph 13.2 of the ruling that we gave at the time the
11 | settlement was approved. If you look at that, it's in bundle A, tab 2, page 28. It's just
12 | something that we will want to have covered. The answer may be quite simple, but
13 | I do want to have that covered.

14 | What that says is that -- well, you can read it yourself. It's basically deemed with what
15 | SSWT will:

16 | "2. Paid to the CR £4.75 million in respect of the CR's costs, fees and disbursements
17 | prior to the distribution, to be paid within 21 days of the notice being given under
18 | rule 94.13 of the Tribunal Rules. The starting point of the negotiations is one third of
19 | the CR's costs, fees and disbursements and occurred up to 31 July 2023 would be in
20 | principle recoverable either from SSWT or CR, minus the cost of awards already made
21 | in the SSWT and SE proceedings. Given the uncertainty, the litigation, recoverability
22 | of the costs, the settling parties agreed on £4.75 million." [as read]

23 | That was the clear basis on which we approved the settlement. I just want to hear
24 | what both sides observations have on that. You may say it's totally irrelevant; it's just
25 | dealing with a different direction, or you may say there's something else.

26 | Mr Smiley will have to deal with this insofar as he wants to.

1 MR MALLALIEU: Sir, my short point in relation to it is that the two points are not hitting
2 each other on the head; they're slightly missing each other.

3 What this is dealing with, and perhaps it's a tribute to the skills of Ms Abram, this is
4 dealing with the position in relation to what SSWT was prepared to pay by way of costs
5 as part of the settlement. It made clear, and indeed the settlement agreement -- we
6 don't need to turn it up -- contains various provisions to essentially ensure that they
7 can't be exposed to any further claim for costs down the line, et cetera, et cetera, and
8 they made clear what their exposure in relation to costs was. That's entirely for them
9 to do, and as part of the settlement, it was for the class representative on advice to
10 accept that or not.

11 THE CHAIR: That's a different direction.

12 MR MALLALIEU: That's not the same thing as under the CFAs, the LFAs or the
13 policies, what the effect is of a partial success in a claim that's been funded on
14 a collective basis as a Trains 1 litigation against three defendants.

15 They obviously interact, because the fact that the class representative in reaching this
16 settlement has been prepared to limit his claim for costs against SSWT limits what's
17 going into the pot. That's fine. There is plenty of scope for an argument which could
18 have been had, for example, if there had been a judgment against SSWT, but not the
19 other defendants, then in my submission the class representative, if sensible, would
20 have been standing up and saying: SSWT is liable in principle for all of our common
21 costs, because we don't know if we're going to succeed against the other defendants,
22 and up to this point, all of our common costs we would have had to incur in pursuing
23 SSWT alone anyway, and therefore SSWT is liable in principle, and if SSWT can get
24 a contribution in due course from other defendants, good luck to it and that's its
25 problem, but as the class representative, we get all of our costs.

26 But this was the settlement. And SSWT have negotiated and have put a limit on their

1 costs, and that's fine. But none of that goes to the question of when you then say:
2 well, let's look at the funding arrangements which fund this litigation as Trains 1
3 litigation, as they all plainly do. Does what -- for example, let's talk about the solicitors'
4 CFA, and again, I'll try and do it in abstract terms.

5 Has there been a recovery of damages? Is there a win? Is there anything in the
6 solicitors' CFA that says: in the event of a win, our entitlement is limited to our fees in
7 relation to the defendant we've won against? No, there is not. Is there in the LFA?
8 No. Is there in the premium? No. In the policy? No. Is there in counsel's CFAs?
9 No.

10 Because whatever the limitations might have been on the costs SSWT has to pay and
11 what goes into the pot at the top, is not the same question as to what the entitlements
12 are of the parties under their contracts. It's a completely different question. It affects
13 the two because one is what goes into the pot, and then the second is how it gets
14 distributed, but they are different questions.

15 In my respectful submission, there can be no doubt that under the agreements, the
16 contractual entitlements are on a Trains 1 basis.

17 Now, sir, there's one second point I just want to make in relation to that. And it's this:
18 even if I'm wrong about that, and I keep on starting points by saying "even if I'm wrong",
19 which is acknowledging my own fallibility.

20 THE CHAIR: Yes, I know.

21 MR MALLALIEU: But even if I'm wrong about that, we simply don't accept the
22 proposition that if in some way our entitlement under the LFA -- or indeed speaking
23 now as insurer, our entitlement to our premium under the CPO policy -- is to be simply
24 divided by one third. The reason for that is because if you were to say, for
25 example -- and I'll stick with the funder's outlay -- if you were to say: what of our
26 funder's outlay is SSWT? We say it's a heck of a lot more than a third.

1 We say, going back to the point, these are common costs. All of our costs, in fact, all
2 of the outlay was incurred pursuing SSWT, just as it was all incurred pursuing the other
3 defendants. And just as the class representative, depending on their measure of
4 success, could have sought those costs against any one or all of the defendants that
5 they succeeded against.

6 So, we don't accept the proposition that contractually -- indeed, we just say this is
7 completely nonstarter, looking at the agreements -- there's any basis for dividing the
8 funder's outlay or the premium by a third. It just doesn't work; it's not what the
9 agreements say at all. But even if there was, even if there was something in these
10 agreements which said, "on success", our outlay will be calculated by reference to our
11 investment in relation to SSWT. There's no clear and obvious reason why that should
12 be a division of a third. (Pause)

13 THE CHAIR: That covers quite a few points.

14 MR MALLALIEU: It does. I appreciate I've dealt with them quite quickly, but I'm
15 already over the time I sort of allotted to myself, or at least coming to the end of it. So,
16 I'm moving fairly quickly.

17 This is a crucial issue, this question of apportionment, and I not usually keen to sort of
18 set harum-scarums, although I've done it a few times today in the course of this.

19 But this is, when we go back to this question of where the real implications of
20 a potential judgment lie, this idea that if funders fund or insurers insure, or indeed
21 solicitors agree to act on CFAs, or indeed counsel agree to act on CFAs for cases
22 involving multiple defendants, that if you only achieve a partial success, your
23 entitlement -- put aside for a moment how much of it you get paid out of the pot --

24 THE CHAIR: (Overspeaking) the pot.

25 MR MALLALIEU: But your entitlement is limited in some non-contractual way because
26 it's said that although the claim is all of the defendants, although your fees are all of

1 the defendants, but because you've only succeeded against one defendant, your
2 entitlement is limited in some way, we say would be a fundamental problem for the
3 funding of multi defendant litigation.

4 That's it from me on apportionment. I now come very quickly to the last remaining
5 points. The one point I've not developed in any detail -- it may be that there's a number
6 which I've forgotten, and Mr Teasdale will tell me about -- is the point about MOIC and
7 ROI, to throw a couple of acronyms onto the table.

8 The fundamental reason for that is that if we're in that territory, I say something's gone
9 wrong; it's not really where we should be, because my starting point is, at number 1,
10 the entitlements are worked out by reference to the deed of priorities, either because
11 it directly applies in the tribunal can't interfere with it, or because we get back to the
12 same position if it is to be taken into account, because of the circumstances it was
13 entered into and the overwhelming weight that is going to be given to it.

14 Number 2, that contractually working out those entitlements, there can be no proper
15 doubt that they're to be worked out on a Trains 1 basis, or even if they're not, the idea
16 of dividing by a third just doesn't make any sense. We get to a position where we say,
17 that on any basis that we look at this, the entitlements are, as we have set out in
18 page 286 of bundle B. It's that document, sir, that you asked to be handed up without
19 the blue highlighting.

20 THE CHAIR: It's Friel.

21 MR MALLALIEU: It's Friel 2, it's not 286. It's if I'm doing this. (Pause)

22 THE CHAIR: Paragraph 25.

23 MR MALLALIEU: I'm grateful, it is. It's 268; I've got my eight and my six reversed.
24 It's late in the day. I apologise.

25 THE CHAIR: Second para 25.

26 MR MALLALIEU: So that is the table that applies.

1 THE CHAIR: Yes.

2 MR MALLALIEU: Once we accept that the contractual entitlements are to be
3 calculated by reference to the contract, which I hope shouldn't be a surprise, then this
4 is how it applies.

5 The point that we would emphasise from that is if we look at that, we can see what
6 happens here. So, the first point is -- and you've got the paragraph numbers in the
7 second column which read across to the deed of priority, so that helps us, and we
8 don't need to look it up.

9 The first thing that happens is that the funder -- the party that has actually laid money
10 out, is in negative financial situation -- gets made up to zero.

11 What then happens, the next part -- you can see all have the same percentage down
12 the right hand side -- because the next phase, all of the phases under 3.3 are shared
13 out pari passu on a purely equitable basis, across the stakeholders, in accordance
14 with their agreement, whereby: Woodsford gets its success fee; the ATE insurers get
15 the deferred premium -- or don't, because they in fact, they would only get 17 per cent
16 of it; the solicitors get their deferred success fees; counsel gets their deferred success
17 fees; and we don't get to the next level of the waterfall, because at the moment there's
18 not enough going in the pot.

19 So that's, we say, how it all works out. We say, when you look at that, this question of
20 this Tribunal having to determine now: what is a reasonable rate of return for the funder
21 under the funding arrangement, generally? Or what is the reasonable -- MOIC really
22 doesn't arise.

23 If I can pick up on an exchange between the Tribunal and the bench earlier, if we are
24 going to get into those issues -- we don't need to get into those issues, because the
25 simple position is that whatever is going to be paid out in light of the available pot at
26 the moment is not going to get close to what everybody says their contractual

1 entitlements are.

2 THE CHAIR: (Overspeaking).

3 MR MALLALIEU: So, we don't need to worry about whether at their extremis, those
4 contractual entitlements are unreasonable. The best time for the Tribunal, if it ever
5 has to, to deal with that argument, is when it knows the overall outcome of the case;
6 when it can take all the factors into account, and it doesn't need to deal with that now.
7 But if --

8 THE CHAIR: Yes. Well, as I said before, I'm reluctant, in the interests of all parties,
9 including your client, to say that on the facts of this particular case -- rate of return or
10 the MOIC, whatever you (Audio error) particular rate. Because that could give you
11 (Audio error) further down the line.

12 Yes.

13 MR MALLALIEU: Thank you. Apologies. I just, I was listening, but I was just also
14 picking up a point.

15 THE CHAIR: No, I'm sure whatever he said is important.

16 MR MALLALIEU: Well, not more important than what the Tribunal says, even though
17 anything Mr Teasdale says is always very important.

18 So, I've dealt with the point of allocation, I hope, comprehensively but briskly, because
19 we say it's absolutely a straightforward point.

20 THE CHAIR: We'll look at your written submissions again before we write the ruling.
21 We're not going to give a ruling today, that's the thing. We will certainly read your
22 written submissions.

23 MR MALLALIEU: In two minutes -- two minutes is optimistic -- but in just very short
24 order, because as I say, we say it's simply the wrong turf when we're talking about
25 MOIC and ROIC. But can I just make it clear I am not doing that because we shy
26 away remotely from saying that the returns are reasonable. If the Tribunal thinks this

1 is the wrong way to go about it, please tell me. But can I just give the Tribunal some
2 references that I would invite the Tribunal to consider if it is considering the question
3 of MOIC or ROI, whichever way it chooses to look at it.

4 The first is page 306 of bundle 2, which is Friel 2.

5 THE CHAIR: Bundle?

6 MR MALLALIEU: Sorry, bundle B, page 306 of bundle B. I don't know where the two
7 came from.

8 THE CHAIR: I always prefer the tab.

9 MR MALLALIEU: In that case, sir, it's, tab 10. So, this is the second witness statement
10 of Mr Friel.

11 THE CHAIR: I've been looking at that, yes.

12 MR MALLALIEU: It's pages 306 and 307. It's also perhaps helpful that I'm --

13 THE CHAIR: What are the paragraph numbers?

14 MR MALLALIEU: It starts at paragraph 108.

15 THE CHAIR: Yes.

16 MR MALLALIEU: And then it goes on because there's a certain length to it and it goes
17 on through to paragraph 122, for very good reason, because it illustrates the various
18 factors that were relevant to this case. It's also helpful that I'm not in fact reading it
19 out, because you'll notice that some of that at 114 is in red because it's commercially
20 confidential. But that identifies the case risks that were pertinent in relation to this
21 case, which we say would justify the full success fee. But in fact, of course, even on
22 our case, all we would see of it at this stage is 17.1% of it, which on any basis would
23 be more than reasonable.

24 Can I also direct the Tribunal to, within the same tab, pages 273 to 275, paragraphs 36
25 through to 42, which deal with Mr Friel's analysis in light of what we say the appropriate
26 returns are as to what, based on what we would get under the waterfall at the moment,

1 the MOIC would be, which we say, again, on any basis would be reasonable. Again,
2 I'm not going to go into that in any further detail at this stage.

3 Just last couple of points, in terms of the after-the-event insurer for the contingent
4 premium, you have the figure for the contingent premium on one of those tables that
5 Mr Smiley helpfully handed up. It's £5.04 million. The -- for the class, sorry -- for CL,
6 for Charles Lyndon, they contend again akin to the position in relation to the funder
7 that the starting point of the contractual entitlement should only be £1.68 million. For
8 the reasons I've already given, we say that that should be completely wrong. The
9 proper approach to this is, as we have seen in that table from Friel 2, that you have --

10 THE CHAIR: They've divided by a third, haven't they?

11 MR MALLALIEU: That is exactly what they've done.

12 THE CHAIR: They have, yes.

13 MR MALLALIEU: Yes. And we say for the same reasons, it's just not the basis on
14 which this claim was funded and insured, so it's the same point and the proper
15 treatment of it. The ATE insurer is not going to see at this stage the £5 million, it's
16 going to see, on our basis, 17.1 per cent of it. That's all it's going to see. So, we don't
17 need to worry about it, and there's no suggestion of any unreasonableness about it.

18 THE CHAIR: Is it agreed, the actual maths of what they've actually received to date?

19 MR MALLALIEU: Mr Smiley's maths is usually impeccable, and I don't, on this
20 occasion, dispute his division of £5 million into thirds to get to --

21 THE CHAIR: No, no. What they've actually been paid up until now -- according to
22 him -- the ATE insurers have been paid over £2 million.

23 MR MALLALIEU: Sorry, sir, I missed that.

24 THE CHAIR: I thought that's what he's saying. Let's have a look.

25 MR MALLALIEU: I may be misunderstanding, and it's my fault at the end of a long
26 day. I don't immediately appreciate where the figure of £2 million came from.

1 THE CHAIR: I think it's in his witness statement (audio error) witness statement,
2 according to that, and obviously you can correct it later if it's wrong. According to him,
3 you look at the ATE premium in Burnett's statement, which is at the end of bundle 3,
4 the pre-CPO deposit premium £294,000, pre-CPO contingent premium £504,000, and
5 then post-CPO deposit premium at £1.4 million. That's what he's saying.

6 MR MALLALIEU: Yes, but Mr Burnett is not saying here that any of the £5.4 million
7 has been paid.

8 THE CHAIR: No, he's not saying that.

9 MR MALLALIEU: So, he's saying --

10 THE CHAIR: His case is -- look, he fully accepts none of that's been paid.

11 MR MALLALIEU: So. Yes, absolutely. So, it's my fault; I misunderstood, sir.

12 THE CHAIR: I thought as regards what they've been paid so far; that's all I was asking
13 you.

14 MR MALLALIEU: The answer is zero for the --

15 THE CHAIR: For that item.

16 MR MALLALIEU: Yes.

17 THE CHAIR: But as regards what they've been paid for on everything, they've been
18 paid those three items?

19 MR MALLALIEU: The post-CPO insurer has been paid the pre -- sorry.

20 THE CHAIR: The deposit items.

21 MR MALLALIEU: The deposit premiums on the post-CPO policy.

22 THE CHAIR: Exactly. They've been paid those three items which add up to two point
23 something million.

24 MR MALLALIEU: Well, sir, I'd have to check whether that same insurance -- there are
25 two different. It may be simpler to keep it -- there are two different policies. There's
26 a pre-CPO policy where both the deposit premium has been paid.

1 THE CHAIR: Yes.

2 MR MALLALIEU: And the contingent premium has been paid.

3 THE CHAIR: Yes.

4 MR MALLALIEU: There is a post-CPO policy where the deposit premium has been
5 paid but the contingent premium has not been paid.

6 THE CHAIR: Correct. And if you need any clarification on it, you want to make any
7 clarification saying it's different ATE insurers, just put it in a letter in the next four days.

8 MR MALLALIEU: They are different insurers but the policies -- I don't think we need
9 to bother you with a letter because the policies are in bundle A. So, if at any point the
10 Tribunal needed to look and confirm who the insurers were, and that's me being lazy
11 and not doing it for you at this stage.

12 THE CHAIR: It's there.

13 MR MALLALIEU: But if we needed to confirm that, the policies are in bundle A.

14 THE CHAIR: Okay.

15 MR MALLALIEU: But there are two different -- it is probably simpler to keep to look at
16 them as two separate policies. There are two separate policies: one pre-CPO, and
17 one post-CPO. Pre-CPO deposit and contingent have been paid; post-CPO deposit
18 has been paid. And the issue between us is the contingent premium of £5 million and
19 whether it gets divided into thirds.

20 THE CHAIR: I understand, correct.

21 MR MALLALIEU: And on that I think, sir, you have my submissions and I'm not going
22 to repeat them.

23 That brings me to the most important bit of my submissions today, which is the end,
24 because I've literally just got the bullet points under the heading of the end here to
25 deal with. This is not repeating any of my submissions. This is simply inviting the
26 court, the Tribunal when it comes to deal with this, to ensure -- and I'm sure the

1 Tribunal would, but I hope I can be indulged for one minute -- that we deal with all of
2 the matters that need to be dealt with.

3 There is the argument about the effect of the revised deed of priority; there is the
4 argument about allocation and the calculation of funder's outlay, which in turn rolls
5 through to funder's success fee and the post-CPO contingent premium. It is also
6 important, of course, if I may say so, to ensure that what does not fall through the
7 cracks also are the other parts, such as the adverse costs indemnity fee, where we
8 need to determine £5 million or £1.5 million. My argument on that is the same. It's
9 exactly the same argument. Are we looking at Trains 1 funding, or are we looking at
10 SSWT funding.

11 THE CHAIR: Correct.

12 MR MALLALIEU: And the adverse costs exit fee, where there's no dispute as to the
13 payment of it in principle; the only question was is the amount thereof?

14 THE CHAIR: That's right. We've ruled on that, subject to the one third haircut point.

15 MR MALLALIEU: Sir, yes. My one observation on that is when you come to look at
16 Mr Smiley's table, you will recall that in his table he allowed zero for the adverse costs
17 indemnity fee. Of course, the Tribunal has ruled that there is an adverse costs
18 indemnity fee. My understanding is that Charles Lyndon's position is that despite this
19 Tribunal's ruling that we get an adverse costs indemnity fee, they don't propose any
20 more. So, they don't propose increasing what they say Woodsford should get to take
21 into account the decision against them.

22 THE CHAIR: I understand.

23 MR MALLALIEU: I say that's wrong. But of course, my primary position is none of
24 what they say matters anyway, because we arrive in a completely different position.

25 THE CHAIR: But on the question of contractual entitlement, we have not ruled on
26 whether you get any of it and, if so, how much.

1 MR MALLALIEU: Yes.

2 THE CHAIR: Okay.

3 MR MALLALIEU: The very final point is we do invite the Tribunal, and we've already
4 addressed it, but we do invite the Tribunal to exercise great caution in ensuring that
5 anything it says in relation to this does not limit any of the stakeholders. And I say this
6 on behalf of all of the stakeholders and the class representative. I appreciate I'm not
7 representing them, but I think it applies to everybody: does not limit the ability to seek
8 any sums going forward in light of the outcome of the litigation against the remaining
9 defendants. We say that that is important. Even if you were against me on all other
10 points, that is important.

11 THE CHAIR: (Inaudible).

12 MR MALLALIEU: We have, sir, but I hope I can be forgiven. And I think that is it, sir.
13 Thank you very much. Unless there are any questions?

14 THE CHAIR: Thank you very much.

15 Mr Smiley.

16 Reply submissions by MR SMILEY

17 MR SMILEY: I will be as brief as possible. I have a train to catch, so it's in my interest
18 as well as everything else.

19 THE CHAIR: You may not get it.

20 MR SMILEY: And I'll face the wrath of my wife if that's the case.

21 THE CHAIR: You're lucky. One hour and 45 minutes walking here, so you're lucky
22 you've even got a train.

23 MR SMILEY: The first thing to do is to make good on a promise, which was an
24 estimate of the revised lawyers' fees if the allocation was not 16 2/3 per cent but
25 25 per cent allocation.

26 THE CHAIR: We wanted that, yes. (Pause)

1 MR SMILEY: I don't propose going through it in any detail. You can see,
2 unsurprisingly, the figures just go up a little bit.

3 THE CHAIR: Yes, they would go up.

4 MR SMILEY: And so, when weighing in the balance the fair outcome, we would say
5 one looks at our fair outcome, with the higher figures that we would be entitled to if
6 there was more money in the pot. They.

7 THE CHAIR: But there isn't.

8 MR SMILEY: But there isn't. And that should be addressed fairly across the
9 stakeholders.

10 The second point that the Tribunal requested was where we are on unpaid
11 disbursements.

12 THE CHAIR: Yes.

13 MR SMILEY: I can help on that. It hasn't yet been confirmed by Woodsford as
14 accurate, but I don't believe there should be a dispute because I can give the
15 references. The first figure is the £25,000 for Crescent. That is found in Mr Burnett's
16 third witness statement in table 1 at the back of bundle B, page 1319.

17 The second figure is a £3,000 miscellaneous disbursements, which has been paid by
18 Charles Lyndon for the class rep. And that is paragraph 7 of Mr Burnett's third witness
19 statement on page 1317 of bundle B.

20 And the third and final of these categories of unpaid disbursements is Epiq,
21 overrunning slightly in respect of its distribution fees. That's a figure of £23,310.41,
22 which is found in Mr Gutmann's seventh witness statement at paragraph 14, page 947
23 of bundle B.

24 In terms of the big points, I won't get into the weeds, as it were in reply. I take on
25 board that no one's ever won a case in reply. I hope not to lose a case in reply.

26 THE CHAIR: (Overspeaking) but that's what one of my leaders once told me, but he

1 | may have been wrong about that.

2 | MR SMILEY: The Tribunal fully has on board my point about, we're not saying
3 | interfere or rewrite an agreement, we're saying the agreement provided for the
4 | Tribunal's involvement.

5 | But looking at the three ways the chair proposed of looking at it, we are not advocating
6 | route 2, in the way it was described -- I think "free reign" was what the Tribunal
7 | said -- we don't say simply disregard entirely the funder's fee in the waterfall in the
8 | agreements. We advocate, if I may be so bold, as route 2B, which is somewhere
9 | between route 2, as you put it, and route 3, as you put it. The funder's fee in the LFA
10 | and the waterfall in clause 3.1 to 3.4 of the deed of priority, are a factor. We are not
11 | saying ignore them, we are simply saying they are only one factor amongst many.
12 | They are not primary, they are not of particular importance, they are there to be given
13 | what weight they deserve, and we say they are outweighed by all the other factors that
14 | I have already rehearsed.

15 | THE CHAIR: We've got those factors, yes.

16 | MR SMILEY: If Mr Mallalieu were right, and the deed of priority waterfall was
17 | conclusive or decisive, then we pose the unanswered question -- or not accurately
18 | answered question -- why does it have the express provision for the Tribunal's other
19 | order? That is key.

20 | There was a point raised as to the proper interpretation of the contract. We would
21 | entreat the Tribunal to look not just at ICS, but at the run of authorities from the
22 | Supreme Court, Arnold and Bitten and the like, Chitty and the like, which say that the
23 | purposive approach to interpretation is not the way to go. The primary basis for
24 | interpreting a contract are the words used. The words used are clear.

25 | THE CHAIR: I think that what he's saying is you look at the words used, and you look
26 | at the purpose of the same time, and he's saying those words used only apply to what

1 goes in.

2 MR SMILEY: I was going to come to that.

3 THE CHAIR: Then you say: "No, those words are not limited to what goes in, those
4 words apply to the waterfall as well", and that's where, you know, it'd be useful for you
5 just to outline where you are.

6 MR SMILEY: Exactly, and I do have several answers to that:

7 The first is the obvious one, which is that the words are found in the waterfall. They're
8 not, therefore, dealing with what goes into the waterfall, they're dealing with the
9 waterfall itself.

10 The second is that the justification given by Mr Mallalieu for including them in the
11 waterfall, if they're actually dealing not with the waterfall, but what goes in the top of it,
12 is that it needs to reflect any changes made to the other agreements. But if the
13 changes have already been made to the other agreements, then you don't need those
14 words, because the other agreements have been changed, and so the waterfall would
15 work without those words.

16 The third point is that it simply does not say that, and that is not an appropriate use of
17 the words. The words should be used in their ordinary meaning.

18 And the fourth point is a similar one, which is Mr Mallalieu was sought to say that the
19 purpose of approach leads to a limitation in the wording, and the wording is not drafted
20 in a limited way, it's drafted openly.

21 The next point I was going to deal with is the point Mr Mallalieu started with, which is
22 about Charles Lyndon investing. It was said that Charles Lyndon doesn't invest in the
23 same way as a funder invests, and that's true to an extent, but it was grossly
24 overstated, because the point Mr Mallalieu was seeking to make was, well, they were
25 acting on a discounted CFA, therefore they received some money up front, and the
26 rest was deferred, and that also they didn't suffer the loss of outgoings in the same

1 way as the funder suffers a loss of giving money out. And that's wrong on both
2 accounts: it's wrong on the first account because from March 2021 everything was
3 deferred, so no money was coming in; it's wrong on the second count because,
4 actually, Mr Mallalieu was ignoring salaries, overheads, rent, admin costs, which
5 Charles Lyndon was incurring in paying for its fee earners, and it was not receiving
6 money in. So, it's not just the opportunity cost that I talked about before, but I also
7 mentioned that Charles Lyndon was incurring capital outlay itself in pushing forward
8 these proceedings.

9 On our case, what Woodsford is doing is recovering the outlay and getting a return,
10 but what Woodsford is imposing on us, is us not getting back even the deferred fees,
11 even the original work that was put in, ignoring success fees.

12 The Tribunal was careful about not wanting, potentially, being hesitant about
13 determining a particular rate of return. Obviously, we would say that the Tribunal has
14 the ability to approach this in different ways. If it doesn't want to impose a particular
15 rate of return, that is one route. But we would say it's pretty clear, in any event, that
16 this would not have precedential value, even for the subsequent settlements or
17 judgments in respect of this case, because what we're dealing with is the justice of
18 a situation, given the pot that there is. The pot will be different when it comes to
19 subsequent settlements.

20 The jurisdiction points. They say that, provided that the allocation of the pot won't
21 impinge on the interests of the class, then the Tribunal doesn't have jurisdiction, and
22 we simply don't agree that that's the appropriate reading of the authorities. I will not
23 be going -- you'll be grateful to hear -- back through those authorities, and we fully take
24 on board that each authority should be read in the context of what was in dispute, but
25 the breadth of the determinations of the Tribunals, where there is specific and express
26 reference to fairness not only to the class, but also to the lawyers and also to the

1 funders, that wasn't limiting what the Tribunals in each of those decisions were making,
2 to dispute between funders on the one hand and class on the other. It was also dealing
3 with fairness to each of the stakeholders, even if the dispute is just between two of the
4 stakeholders here, the funders and the lawyers.

5 THE CHAIR: Yes.

6 MR SMILEY: Mr Mallalieu pre-empted my points, in respect of the ALF document,
7 and frankly the big point, conflict of interest aside and the fact that there is a board
8 member from Woodsford on the board of ALF, the key point is it's merely submission
9 on what the law is. It's for the Tribunal to determine what the correct application of
10 those legal principles is.

11 In terms of the waterfall point -- I believe that the one of the submissions that
12 Mr Mallalieu made, if I've understood it correctly, is that the deed of priority is
13 determinative, in respect of the waterfall. But that leaves open, obviously, the
14 possibility of the Tribunal dealing with the funder's fee, which is obviously at the top of
15 the waterfall anyway. So one route opened, even keeping the waterfall in place without
16 altering it at all, would simply be to say: the funder's fee is too big, and reducing the
17 funder's fee, and that would have an impact on the outcome of the waterfall, that would
18 in fact benefit the lawyers who are at the bottom of the waterfall. But we say, in any
19 event, that there are the two routes to alteration of the waterfall, if the Tribunal needs
20 to -- one is the contractual route, and the other is the inherent power of the Tribunal,
21 in that respect.

22 The timing of the deed of priority --

23 THE CHAIR: You're saying that, in determining what the funder's fee should be, we
24 have our own power to determine what is a reasonable funder's fee in all the
25 circumstances, and that could easily feed into the waterfall. And so, you adjust it that
26 way.

1 MR SMILEY: Absolutely, but we say you could do it in either way. You could do it just
2 attacking the funder's fee, or you could do it by tweaking the waterfall as you see fit.

3 THE CHAIR: Yes, so that's another route that you're saying we've got. Okay.

4 MR SMILEY: Well, but each of them have a contractual basis and an inherent power
5 basis.

6 The timing of the revised deed of priority in July 2023, it's important to bear in mind
7 the circumstances of that. The revised deed priority was only entered into in order to
8 introduce the two new insurers. It wasn't a material alteration in respect of what the
9 priorities or the waterfall were. Yes, by that stage, the budget had been exhausted.

10 But by then, importantly, Charles Lyndon's hands were tied. There's plenty of
11 evidence for that. Paragraph 29 of Ms Antzoulatos's witness statement I've taken the
12 Tribunal to already.

13 I'd also refer the tribunal to paragraph 32 of Mr Gutmann's seventh witness statement,
14 that's at bundle B, tab 13, page 953.

15 The complaint about contractual uncertainty:

16 A. That is of their own making, insofar as they've agreed for the contracts to be subject
17 to the order of the court;

18 B. That is inherent in the regime, and all funders, all ATE insurers, know that when
19 they go into this regime. So, it's not something that the Tribunal -- if it made the
20 decision in Charles Lyndon's favour -- would be creating; that is already present.

21 The point about the LFA, and the comparisons of the LFA and the CFA, I believe I've
22 already made the submission, that if what the Tribunal does, as we ask it to do in
23 respect of funder's fee and deed of priority, then that carries through into the
24 agreements and vice versa. So what Mr Mallalieu was saying as, to what the
25 contractual requirements are:

26 A. We disagree with it, you've heard my submissions on apportionment;

1 B. In a sense, it falls away as an issue, once the court is engaging in determining the
2 fair outcome.

3 And then finally, yes, so on the allocation, I think it bears repeating. When dealing
4 with this case, when investing the sums in this case, there were three defendants and
5 then four defendants, and the investments were made with money put in to attack
6 defendant one, defendant two and defendant three. There were specific issues that
7 were being dealt with, engagement with specific sets of solicitors and barristers.
8 Those costs were incurred against those specific defendants, and as such, that should
9 be reflected in the outcome when there is a settlement against that specific defendant.
10 And finally, on the MOIC, I note that Mr Mallalieu has not engaged with our proposal,
11 as to a reasonable MOIC. He says that's because we don't get there. We say, well,
12 the Tribunal therefore doesn't have anything beyond the Crescent Report in our
13 proposal, as to regards what is a reasonable MOIC in the circumstances, if that is the
14 approach that the Tribunal were to take.

15 I'll just turn my back. (Pause)

16 THE CHAIR: You've answered most of my queries, there's only like one or two left.
17 Do you want to just ask them then?

18 TRIBUNAL MEMBER: Yes, so I think what we want to be able to do is to really
19 understand what the actual cash costs associated with T1 have been. And we've got,
20 I think, Burnett's third witness statement, which is a good starting point. So, I think it
21 would be helpful if -- not related to the attributable to the SSWT section, because we
22 know there's a difference of opinion on that -- in terms of the total costs column, it'd be
23 useful to get the funder's view as to whether or not they agree to that.

24 MR MALLALIEU: Could I just ask you -- we can find it, but it might be quicker -- if
25 there's a particular page reference in Burnett three? I'm grateful, thank you. 1317.

26 TRIBUNAL MEMBER: There was a late addition to the bundle.

1 THE CHAIR: We were looking at the end of bundle 3. (Pause)

2 As you say, late edition, it wasn't in my bundle at the beginning, but I think someone's
3 added it now.

4 MR MALLALIEU: I'm afraid I don't have an immediate answer to whether those figures
5 are agreed or not. It will take me a little time to get an answer to that.

6 TRIBUNAL MEMBER: Okay. That's fine. If you could.

7 MR MALLALIEU: Of course, sir, I absolutely will.

8 TRIBUNAL MEMBER: The second question, I think I know the answer to that, is: of
9 all the total costs in Trains 1 column, just understand which of those aren't paid,
10 because there's notes attached to all of them, saying which ones have been paid, with
11 just a few exceptions, the main ones being the ATE insurers' costs. We went through
12 those earlier, and there are four costs mentioned. I think we've all agreed that the first
13 three have been paid, the last one hasn't indeed.

14 And then at the bottom of that page, there's a reference to the funder's fee, which was
15 proposed by Woodsford, £21.4 million, and I just wanted to sort of -- we didn't talk
16 about the alternative view of that, that was put forward this morning, in the revised
17 calculation of £5.99 million, and it's just the question is what the funder's view is as to
18 the basis for calculating that? So, as you know, there's two funder's fees, one of
19 £21 million, one of £15 million, and Lyndon have sort of said, Well actually, you should
20 do it pro rata, but you've obviously based it on entirely on the second table, the
21 £21 million plus the additional fee. I just wondered if you had any comment on --

22 MR MALLALIEU: Sir, I was missing a point. I think you said there were two fees: one
23 of £21 million; one of £15 million. Was that intended to be a reference to the
24 £5.9 million, not £15 million? Or am I missing something?

25 TRIBUNAL MEMBER: So, in the loan funding agreement, there's two methods of
26 calculating the fee.

1 MR MALLALIEU: Yes.

2 TRIBUNAL MEMBER: One gives you a maximum of £21 million. The other gives you
3 a maximum of £15 million.

4 MR SMILEY: Yes, I think it's 10.1 versus 10.2, or ten point ...

5 TRIBUNAL MEMBER: Yes. So that's the tables 10.1 and 10.2 in the LFA. And we
6 had a calculation from Lyndon saying: you should use a mixture of those two to
7 calculate.

8 MR MALLALIEU: Yes. The reason for that is directly tied to the allocation point,
9 because the reason for that is that on the basis of Charles Lyndon's calculation, if you
10 calculate the outlay by reference to dividing everything SSWT only, then you get to
11 a position where Woodsford have already received more than their outlay. The
12 consequence of which is you fall into different parts of the LFA in terms of how you
13 calculate the success fee.

14 On our position, the counterfactual that if you calculate the funder's outlay by reference
15 to Trains 1, there's no suggestion that we are wrong that the funder's fee would be
16 £21 million. Indeed, Charles Lyndon, I think, expressly accepts -- they say it shouldn't
17 be -- but they accept that as a matter of the application, the LFA would be £21 million.
18 So, it's a consequence -- and you can perhaps see it best from Mr Smiley's table, the
19 two page document that had the table headed, "Summary of differences on contractual
20 entitlements". Because if we just look at that for a moment, you can see the very first
21 entry there is the two different calculations of funder's outlay, and underneath it the
22 two different calculations of sums received.

23 Now, for present purposes, we don't need to worry about the differences in those
24 calculations. The important point is that on our case, if we're right about calculation of
25 funder's outlay, the sum received is less than the outlay. Whereas on
26 Charles Lyndon's case, if they're right about funder's outlay, the sum received is

1 greater than the outlay.

2 The consequence of that is, in the LFA, there is one table which deals with: if you
3 receive some of your funder's fee other than from undistributed damages, and that
4 would be the table that's triggered if Charles Lyndon are correct here. Because if our
5 funder's outlay was less than the amounts received, then the balance of the amounts
6 received can pay the first part of our funder's fee. Therefore, we're under table 10.1,
7 I think it is -- 10.3. Yes, 10.3 isn't a table, 10.3 is the paragraph blending tables 10.1
8 and 10.2.

9 So, if Charles Lyndon are correct that the funder's outlay was less than the sums
10 received, you calculate the funder's fee by a combination of 10.1 and 10.2, applying
11 a formula that's set out in the paragraph in 10.3. If Charles Lyndon are wrong, and
12 the funder's outlay is calculated by reference to the total Trains 1 outlay, then the
13 funder's outlay was greater than the sum received, and you calculate the funder's fee
14 solely by reference to 10.2.

15 For the first time, I think Mr Smiley might be in agreement with me on something.

16 MR SMILEY: Happily, yes.

17 THE CHAIR: I think you've agreed on various other things. The tendency in these
18 hearings is you just focus on where you disagree.

19 MR MALLALIEU: So, I hope that addresses that question, sir.

20 THE CHAIR: Yes.

21 MR MALLALIEU: Which leaves us, I think, with the first question, which is about the
22 cash costs in Burnett 3, page 1113-17. I think, sir, you raised two points: whether the
23 figures were agreed; and whether they're paid.

24 Was the paid question only about the premium, or are there other parts of that you
25 would like to know whether they're paid or not?

26 THE CHAIR: I think we understand.

1 MR MALLALIEU: Sir, in that case, it's just a question of whether Woodsford agrees
2 the figures that are set out there, I think, is that the position?

3 I think we're not going to be able to give you an immediate answer to that, but what
4 we will do is check that and then if it's permissible to send an email or whatever with
5 either a confirmation or any small areas of disagreement, or however best we can
6 communicate to the Tribunal.

7 THE CHAIR: You do it by close of business on Monday.

8 MR MALLALIEU: Of course.

9 THE CHAIR: Then that's absolutely fine.

10 MR MALLALIEU: And we will of course, copy Charles Lyndon and indeed the other
11 interested parties in.

12 THE CHAIR: In the nature of things, it says if either party thinks there's quite didn't
13 have time to cover, I want to make sure I haven't missed anything. I'm not inviting you
14 to sort of long submissions, but sometimes --

15 MR MALLALIEU: Very dangerous.

16 THE CHAIR: -- with a hearing like this, there may be something that either of you just
17 feel that you didn't really cover, but assume anything that is in your skeleton arguments
18 has been covered, as has everything you've dealt with today, but if something's fallen
19 between the cracks for either of you, then we're quite happy to receive something just
20 pointing out whatever that has fallen through.

21 MR MALLALIEU: You described it as not an invitation, so it's a "not invitation" that I'll
22 be careful not to accept unless we think it really necessary.

23 THE CHAIR: Yes, unless you feel -- you know, but I know that, you know, it's 4.45 pm,
24 and ideally, we finish now, and we'll come back to it.

25 So, if I can just thank everyone for all the work they've put into this. Unfortunately,
26 we're in a position which I wanted to avoid. I'm not in a position to give a ruling now

1 because it's time to go. We will try and give a ruling as soon as we can, and that'll be
2 distributed in the normal way. But it may take a bit more time than I would have hoped.

3 MR MALLALIEU: I think on behalf of all, can we just thank the Tribunal and the
4 members for the extra time that you've allowed us in sitting late today? Thank you,
5 sir.

6 THE CHAIR: Yes, it's important that, you know, we get as much as possible from you.
7 Both the applicants today have done extremely well, but the fact is, however
8 persuasive you are, both can't be right on all the points.

9 MR MALLALIEU: If we could, we wouldn't be here.

10 THE CHAIR: Exactly. Thank you.

11 (4.46 pm)

12 (The hearing concluded)