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IN THE COMPETITION
APPEAL
TRIBUNAL

Case No: 1339/7/7/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Thursday 15 January 2026

Before:
Hodge Malek KC
Bill Bishop
Eamonn Doran

(Sitting as a Tribunal in England and Wales)

Mark McLaren Class Representative Limited

Class Representative

V

MOL (Europe Africa) Limited and Others

Defendants

A P P E A R A N C E S

Sarah Ford KC, Nicholas Gibson, Sarah O'Keeffe on behalf of the Class Representative
(instructed by Scott+Scott UK LLP),

Professor David Bailey and Natalie Nguyen on behalf of the First to Third Defendants
(instructed by Arnold & Porter Kaye Scholer (UK) LLP)

Brendan McGurk KC and Angus Rodger on behalf of the Fifth Defendant (instructed by
Steptoe International (UK) LLP) (together, the Settling Parties)

Robert Marven KC on behalf of the Insurers (Litica Ltd, Lakehouse Risk Services Limited)

Roger Mallalieu KC, Simon Teasdale on behalf of the Funders (Woodsford Group Limited)

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Tel No: 020 7404 1400

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Thursday, 15 January 2026

(10.30 am)

(Proceedings delayed)

(10.34 am)

THE CHAIR: Some of you are joining us via livestream on our website, so I must start, therefore, with the customary warning. An official recording is being made, 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. Breach of that provision is punishable as contempt of court. The transcripts of today will be on the website later. I will give a ruling today, probably, and that will be on the website later as well.

Submissions by MS FORD

MS FORD: Members of the Tribunal, I appear with Mr Gibson for the Class Representative. Professor Bailey appears with Ms Nguyen for the MOL Defendants. Mr McGurk KC and Mr Rodger appear for NYKK. Mr Mallalieu KC and Mr Teasdale appear for Woodsford, and Mr Marven KC appears for the ATE insurers. As the Tribunal is aware, this is a joint application for a collective settlement approval order in respect of the proposed settlement between the Class Representative and the First to Third Defendants, MOL; and the Fifth Defendant, NYKK.

If it suits the Tribunal, what I was proposing to do in terms of structure was to work through the requirements of rule 94(9) of the CAT Rules, which is the rule that sets out those factors that the Tribunal should take into account in assessing whether the settlement is just and reasonable.

1 THE CHAIR: We can come to that later, can't we?

2 MS FORD: I'm in the Tribunal's hands.

3 THE CHAIR: You know me well enough. What I'm really going to want is a proper
4 feel for, if you're able to help me, is the range for the likely take-up in pounds from the
5 Class Members, because I don't want another Gutmann situation, and I want to have
6 the flexibility to know that when it comes to approving the distribution plan that it is on
7 an informed basis. I do not want to have a situation where only three or four percent
8 is claimed. I don't think that's likely, but that's an important consideration.

9 So I want you to address me on the likely take up in pounds figures. We've written
10 a letter to the parties today, and I want an answer to that, preferably in writing by
11 lunchtime. I think that's one consideration.

12 The second consideration is that if, and I'm not saying that will happen, I don't approve
13 the full amount of CFD funds, whether in this settlement or the previous settlements,
14 what's going to happen to that? Ideally, I'd want to have something that covers that
15 contingency, which is not covered at the moment. So you're proposing, for example,
16 the Guaranteed Sum of £20 million, then there's an extra sum, and in that extra sum
17 that's either going to go to class members, or you say that's going to go for costs, fees
18 and disbursements. I'm not particularly happy with that because it doesn't cover the
19 contingency if those costs, fees and disbursements are not approved.

20 I'm not saying what they're going to be at the end of the day, I just don't know. But
21 I will want to determine that at the end. But I want to have some flexibility on that.

22 Then, as regards to the £20 million, I still want some flexibility on that. What happens
23 if the CFD sum is not approved in full? Because there's no provision for it going back
24 to the Defendants, and as I understand the Defendants are saying, we understand
25 that's the end of that money. But I will want, if possible, to have a situation whereby if
26 it's not approved, it can go to charity. If it can go to charity, then I'm fairly relaxed about

1 everything else from today.

2 As regards what I expect other people to do, I want counsel for the funders to take me
3 through the various items which make up what they say is the entitlement, and what
4 do they propose is going to come out of the £20 million if it's approved today, because
5 you've got three options. One option is that the £20 million is approved today, and
6 that can go out, and I just leave it up to you to sort it out. The other option is I say: no,
7 we'll do what we've done on other cases, by and large we're not going to do anything
8 until we've got the distribution plan and we know where we are on take-up.

9 Or, more likely, is that we go through that schedule, we identify those ones which I'm
10 relaxed, or we're relaxed, in approving today, and then we'll see what that figure is.
11 So, let's say I approve a particular figure, we may take off what the cost recovery is
12 to date, and then we'll have an ultimate figure. But that will be a substantial figure, in
13 any event. That's going to be more than has ever been approved before. But that is
14 the third scenario.

15 I'm just trying to lay out where we are. So I've got concerns about non CFD-approved
16 sums. I will want to work with the funder to go through that schedule. Then for the
17 ATE insurers, obviously we'll need to look at what the ATE insurers are looking for.
18 Then we can discuss that with them.

19 As regards the adverse costs order, I presume that -- I'd like to know where that came
20 out of. So there was a figure of a couple of hundred thousand. There was an adverse
21 cost during the proceedings, and there were sums that was paid that way. There was
22 a lot more being paid the other way by the Defendants. So I'd like to know how that
23 works, and particularly with the ATE insurers, have the ATE insurers paid out anything
24 to date? If they have, have they been reimbursed and how they are going to be
25 reimbursed. So that's what I'll need to hear from counsel for the ATE insurers. Yes.

26 MS FORD: I'm grateful for that.

1 THE CHAIR: And once we've done all of that, then we can start doing what you want
2 to do, which is to go through each of the criteria.

3 MS FORD: Just picking up the second point that the Tribunal indicated for me, which
4 is the question of what happens if the Tribunal were not to approve payment out of the
5 total amount of the CFD sums.

6 THE CHAIR: Yes, exactly.

7 MS FORD: That is a matter which is addressed in the Settlement Agreement, and it's
8 one of the amendments that was made in the light of a similar concern that the Tribunal
9 expressed in the "K" Line and WWL settlements. So if the Tribunal looks, please, in
10 the settlement agreement at clause 3.8.

11 THE CHAIR: Could you give us the page number?

12 MS FORD: Page number 73 of the core bundle.

13 THE CHAIR: We've had this issue before.

14 MS FORD: Sir, yes. So we hope that what went in, in the light of it last time, covers
15 it.

16 THE CHAIR: Let me just get my pen.

17 MS FORD: So the first sentence, at 3.8, specifies that:

18 "... The Settlement Sum shall be held in escrow until the Tribunal approves the
19 payment out of any part of it. Any balance above the amounts directed by the Tribunal
20 to be paid out shall be applied as directed by the Tribunal, including by way of costs ..."

21 THE CHAIR: So you're saying you've covered that. So let's say, if we break it down,
22 let me get the figures. So we look at the Additional Damages, and that's £12.5 million.
23 And then it's decided actually nothing's been claimed by the class members. It's
24 £12.5 million, and I approve let's say £6 million to go up to the CR, and there'd be
25 a balance. You're saying that balance will go into the charity pot?

26 MS FORD: Yes. So clause 3.6 is the one that addresses a situation where if there is

1 a CFD shortfall amount:

2 "... McLaren may apply to the Tribunal for the Additional Damages Sum (or such lesser
3 amount of [the Additional] Damages Sum as remains after being used towards the
4 costs of the Distribution Process) to be paid towards the CFD Shortfall Amount.

5 THE CHAIR: Yes.

6 MS FORD: If that application were to be made and the Tribunal were to say no in
7 respect of any residual amount, then our understanding is that that's then governed
8 by clause 3.8, because the entirety of the settlement sum is held in escrow, and insofar
9 as the Tribunal has indicated that it will not be paid out, then the Tribunal has that
10 discretion in the second sentence.

11 THE CHAIR: That's fine, that's absolutely fine.

12 On the question, there's another question that's been raised, which is looking at the
13 merits and what the likely outcome is of this. I'm conscious in the past, certainly on
14 the first decision, that we didn't really express much of a view on the merits. The reality
15 was there are two reasons for that: (1) it was a very early stage in the proceedings, in
16 which case there wasn't much to go on to form a strong view of the merits. But (2),
17 more importantly, I was very conscious at the time that there were, let's say, other
18 proceedings against the remaining Defendants. It wouldn't be nice or fair to anyone
19 for us to express a view. I think, when I look at it now, having seen the submissions
20 from trial and the expert reports, I'm pretty confident that this is a strong case and that
21 you would get substantial damages, and that this is not a case where I can't form
22 a view. I can form a view, and that there's a lot of material on which to form a view.

23 What I may need help on is what if we refuse the settlement and say: look, just let the
24 Tribunal issue its judgment, I'm pretty confident that judgment will be for a substantial
25 sum, pretty confident, looking at it, how it went at trial. What's the sort of difference in
26 outcome and what's better for everyone and why are we settling now when I think it's

1 pretty obvious you're going to get substantial damages at the end of the day? Because
2 if there's substantial damages at the end of the day, the take-up, so far as the
3 Defendants are concerned, is irrelevant. They're going to have to pay the full amount.
4 They'll also have to pay the costs or a substantial amount of the costs. On the other
5 hand, they won't have to pay things like funders fees and stuff like that. That would
6 have to come out of the damages. But there will be a substantial amount available to
7 pay the funders, because if the take-up is as low as it could be, then there's going to
8 be a substantial sum out of the damages. So I do need to understand the what if
9 scenario, and why you're trying to settle.

10 I'm also conscious that we haven't got an independent opinion, but we don't need an
11 independent opinion on this one. We can form our own view as to the merits. You've
12 provided an opinion and your opposite numbers provided an opinion, and to a certain
13 extent, you're parti pris because you'll get your deferred fees and your uplift if the
14 settlement goes ahead. On the other hand, you are one of the, I'd say, great
15 professionals of the bar here, and I don't think you'd ever let that influence you. But
16 so it goes both ways. But it does still mean that -- it's more important that the Tribunal
17 forms its own independent view as to the likely outcome, because the views on the
18 merits are expressed by counsel on either side in the case. So it may be said they
19 have an incentive to a particular outcome, and we don't have an independent opinion.
20 Certainly, the independent opinions we had in the past were pretty helpful. But I think
21 those are the main thoughts that are going on in the Tribunal's mind when we were
22 looking at this together. So I'd like some of these broad issues to be addressed before
23 we start going into where the criteria, how do they fit in? Because that's the easiest
24 bit. The first bit is to get us to have a good picture on some of these global issues.

25 MS FORD: Sir, yes.

26 THE CHAIR: It's up to you in which order you want to deal with them, but you've heard

1 all the things that need to be covered in opening, and then once we've got a good feel
2 for those, then we move on to looking at the individual things. But I will want you to
3 take me through, for example, the material on the likely take-up. That's one of the
4 things requested, because having raised this as an issue and authorised someone to
5 do that research, it's all fairly woolly and inconclusive for the reasons you've explained.
6 I'm not criticising you for not coming up with a clear picture, but it's still fairly unclear,
7 and I'm not convinced at this stage that the take-up is going to be high.

8 What saves this, perhaps, is maybe the fleets, because you've got people who have
9 got an incentive to put major claims in, and you will do your best to make sure that as
10 many of those come in and put their claims, and you've got an incentive to do that,
11 because if we don't get a good take-up, that may affect what happens on the CFD.

12 As regards the individuals, it's a lot harder. I think that the amount per car is very
13 difficult to justify more than a very low sum, and then you may find that many people
14 will not bother to make a claim, and a lot will depend on what sort of information you're
15 looking for and how you approach it. I know you're working really hard on that. You
16 haven't come to a landing and we will have a separate hearing on the distribution plan,
17 but the proposals made to date all seem to be fairly sensible. You haven't wasted any
18 money on doing that.

19 But there is a learning process. When I look at these distribution plans, from the
20 earliest ones to the ones we are hopefully going to have here, it does seem to me that
21 everyone is learning and trying to get to what is the best way to get money out of this,
22 paid out to class members. It's not easy, and it's not one size fits all, but the surveys
23 that have been done are helpful. But I do need to have a really good feel as to where
24 you say the likely take-up range is going to be in pounds, shillings and pence terms.

25 Part of it may depend on what happens with the fleets, and I presume what you're
26 going to be doing is you're going to do a positive reach out to the particular fleets that

1 | you know about. So you actually go to them direct. Don't rely on the publicity. You
2 | know who they are. You actually approach them and say, "This is what we've got.
3 | Are you going to make a claim?", explain the process, and you may have a higher
4 | take-up, than the Gutmann scenario, but I am really conscious that the relevant period
5 | is some time ago. For each individual, it's going to be a pretty low amount.

6 | Okay. Which order do you want to do things in? I'm quite happy --

7 | MS FORD: Sir, I will address the Tribunal's point on merits first, and then I will come
8 | to take-up.

9 | THE CHAIR: Merits we can deal with, yes. On the merits.

10 | MS FORD: The Tribunal is correct that in comparison to the situation in previous
11 | settlements, there has been a reduction in the degree of litigation uncertainty and
12 | litigation risk on both sides, in the sense that we have now been through the trial
13 | period. We have heard what the witnesses have had to say.

14 | THE CHAIR: Yes.

15 | MS FORD: So in that sense, there is less uncertainty than there was when we were
16 | last seeking the Tribunal's approval for a settlement.

17 | THE CHAIR: Yes.

18 | MS FORD: However, there remains litigation uncertainty for both sides.

19 | THE CHAIR: Yes. When you say "remains litigation uncertainty", there's no real
20 | uncertainty that you're going to get a substantial sum. Not in my mind. The real
21 | litigation uncertainty is what that amount is going to be, and that's the really hard
22 | assessment of "What are you going to get?"

23 | Let's say you can see that the global loss is going to be X. You look at 40 per cent on
24 | a conservative level to reflect these two Defendants' shares. Where do we end up?
25 | I can see that there is room for debate as to precisely where we end up, and that's
26 | a task that -- you know, your side and the other side both looked at the globe and tried

1 to come to a view as to say what's fair and what's the right figure.

2 But I do need to be confident, at the end of the day, that what is driving this is that you
3 believe that this is the best outcome, irrespective of the interests of the funders and
4 the other stakeholders, but that's the best outcome, and why you're not going to
5 judgment. And if we do go to judgment, what's the difference going to be to everyone?
6 So I can have a clear understanding of what's driving the settlement on a case which
7 I think is probably one of the strongest cases that I've seen at the CAT. You know,
8 what's driving it, okay? This is not one of those cases where I think, oh, gosh, you
9 know, it could go either way. It's not. It's pretty clear to me that you're going to win
10 this. But what's not clear is what the range is.

11 MS FORD: Sir, indeed.

12 THE CHAIR: So the two uncertainties, for me, is: what is the realistic range for what
13 you are going to get if you win at trial? The other uncertainty is: how much is going to
14 be claimed by class members? Once we've got a good feel for those, then it's not
15 going to be that difficult to give a ruling, just going through the various criteria.

16 But we will leave today with a ruling. We're not going to -- I can't see any reason why
17 we can't make a decision today. Let us get comfortable with those two issues, and
18 then I think everything else will follow pretty easily.

19 MS FORD: Coming to the Tribunal's concern about the figures, then. As the Tribunal
20 will have seen from the evidence, the starting point is that there is a remaining dispute
21 between the parties concerning the share of liability that is represented by the settling
22 Defendants.

23 THE CHAIR: You're saying that we're talking about maybe 40 per cent range, and
24 there's a range between 40 and maybe 47 per cent.

25 MS FORD: The Class Representative's position is 47.7 per cent. MOL's position, as
26 we understand it, is that the Defendant's share is approximately 40 per cent --

1 THE CHAIR: Yes, exactly.

2 MS FORD: -- and NYKK reserves its position.

3 THE CHAIR: Yes. We're probably talking about a range of 40 to 47 per cent, or

4 47.5 per cent.

5 MS FORD: Subject to NYKK's position, which we understand to be reserved.

6 THE CHAIR: Yes, yes, I understand that. But the likely range is going to be 40 to

7 47.5 per cent.

8 MS FORD: Sir, yes. Mr Robinson's total damages figure at trial, for all the

9 Defendants, was £215 million.

10 THE CHAIR: And that £215 million is the upper level, including interest.

11 MS FORD: It is including interest, but it is his mid-point, I think I'm right in saying, of

12 the range of calculations.

13 THE CHAIR: £215 million is the mid-point?

14 MS FORD: £215 million is, I think I'm right in saying -- (Pause)

15 It was the scenario in which he had most confidence, but the Tribunal would have

16 gathered from reading the evidence that there was an issue about the Ongoing Loss

17 Period --

18 THE CHAIR: Yes.

19 MS FORD: -- and that at the highest level of recovery conceivable and the Ongoing

20 Loss Period, it could have come out higher.

21 THE CHAIR: Yes. So he thinks that £215 million is, to him, a plausible figure. I don't

22 want to put it too firmly.

23 Then if you take 40 per cent of that, okay, or 47.5 per cent of that, what are the figures

24 we get?

25 MS FORD: To be clear, the £215 million is if we win on everything and for all

26 Defendants. If we take these settling Defendants' share of that figure, if it was at the

1 40 per cent level, it would be £86.3 million.

2 THE CHAIR: Yes.

3 MS FORD: If it was at the higher level, it would be £102.9 million. That is assuming

4 that we succeed completely on all points. So it really is -- although I describe it as

5 mid-level, it nevertheless requires us to succeed all the way through.

6 THE CHAIR: So if you're talking about 40 per cent or 47 per cent, those are the two

7 figures you get.

8 MS FORD: Those are the two figures.

9 THE CHAIR: Either 86.3, or 102.9.

10 MS FORD: Yes.

11 THE CHAIR: Yes. Okay.

12 MS FORD: In terms of percentages --

13 THE CHAIR: But you're not going to win on all the points, are you? That --

14 MS FORD: As a matter of litigation risk, it is unlikely.

15 THE CHAIR: Yes.

16 MS FORD: That is essentially a high-level outcome. But on that measure, the

17 settlement sum that we have achieved from these Defendants, the £54 million,

18 represents between 52.5 per cent and 62.5 per cent of the total damages figure.

19 (Pause)

20 THE CHAIR: What I don't like about you using £54 million is that a lot of that is CFD.

21 If you say, "What is the sum that's going to go effectively representing the damages?",

22 we look at that as a percentage, you're going to come up with a different percentage,

23 because normally when you look at recoveries, you're going to look and say, "Well,

24 look, the cost, fees, disbursements are going to be covered by all these other sums".

25 But if you go to trial and you're going to get a particular figure, that's not going to be

26 affected, because the costs, *et cetera*, is going to be separate. So when you say to

1 me, "Well, you're not going to win on everything, but £54 million equals whatever the
2 percentage is" -- just give me the percentage again.

3 MS FORD: It's between 52.5 and 62.5, the total damages figure, depending on the
4 assumption one makes on shares.

5 THE CHAIR: Yes, exactly. But if we take out the CFD sum, then it's a different
6 percentage.

7 MS FORD: Well, we have set forward an alternative calculation, which may assist the
8 Tribunal on this. It doesn't take out the CFD sum, but what it does is it adds into the
9 £215 million a sum representing *inter partes* costs, because of course the £215 million
10 is solely damages.

11 THE CHAIR: Correct.

12 MS FORD: So if one adds in an estimate of current *inter partes* costs -- which I think
13 at the time we did this calculation was £15.8 million -- if you add that to the
14 £215 million, then the settlement sum of 54, which as the Tribunal appreciates then
15 includes both damages and costs, so it may be a more immediate comparison -- it
16 represents between 48.9 and 58.3 per cent of the Defendants' share of the total
17 damages, plus costs.

18 THE CHAIR: Let's do -- I like things really simple, you know. Just give me the figure,
19 or if you take out the CFD sums, what is that sum? Let's just do it simply. We take
20 out the £20 million, so effectively the Damages Sum. Let's leave in the distribution
21 costs, is £34 million. What's £34 million in terms of percentages?

22 MS FORD: I'm hoping somebody with a calculator may assist, because I hesitate to
23 do that sort of maths.

24 THE CHAIR: No, I agree. I've met people who can do that in their head, but --

25 MS FORD: It may be that we can provide that over the short adjournment.

26 THE CHAIR: Yes, we can do that when we have a break. But let's see what that is,

1 because I think that is an alternative way. When I do the ruling, I want to understand
2 all the different alternative ways and just shake the tree and see what it looks like.

3 MS FORD: It is of course important to remember, in relation to that measure, that the
4 £20 million figure -- Mr McLaren has explained where that comes from, and it's
5 essentially the mirror of the Guaranteed Damages Sum. The Guaranteed Damages
6 Sum is the £20 million, and he said that, "I've allocated a sum equivalent to the
7 Guaranteed Damages Sum for costs, fees and disbursements". So in many respects,
8 it may not be right to take an approach which says, "I'm going to take out that amount
9 out of the settlement figure". It is the amount which he has allocated on that basis, but
10 it is not --

11 THE CHAIR: If this case doesn't settle -- (Pause)

12 MS FORD: I'm told that the figures for a 40 per cent share are 39.39 per cent?

13 THE CHAIR: 39.39.

14 MS FORD: Then the figures for the larger share are 33 per cent.

15 THE CHAIR: Yes. So if we're looking at £34 million, the range is 33 to 39.39 per cent.

16 MS FORD: That's what has been done essentially on a calculator behind me, yes.

17 THE CHAIR: Yes. (Pause)

18 MS FORD: The Tribunal will have also seen that the MOL Defendants have addressed
19 this point in their evidence. This is Ms Wessel's evidence at paragraph 37 and 51.
20 From their perspective, they say the settlement sum represents many multiples of
21 MOL's estimate of the value of the claims against them.

22 THE CHAIR: Yes. They come up with a much lower figure.

23 MS FORD: Yes.

24 THE CHAIR: And, you know, it's pretty common before the Tribunal to have these
25 massive gaps between the experts on both sides. That's never really that desirable,
26 but we seem to be having this time and time again, where one side comes up with

1 a high figure and the other side comes up with an implausibly low figure. We'd much
2 rather have experts much closer than they are in most of these cases. But, you know,
3 the experts give whatever view they give.

4 MS FORD: On the part of the Class Representative, we also invite the Tribunal to
5 take into account the total amount which the Class Representative has negotiated by
6 way of settlement with all the Defendants collectively. If this proposed settlement is
7 approved, then the total recovery across these proceedings as a whole will be
8 £92.75 million. And we say that --

9 THE CHAIR: I understand that bit, but again, you know, of that, the minimum on your
10 claimed CFD, the minimum CFD costs are 34.361. So -- yes. Okay.

11 MS FORD: That gives the Tribunal a feel for the degree of uncertainty in terms of the
12 numbers.

13 There are also at least two ongoing uncertainties that both parties face. The first is
14 that in the event that judgment is handed down and the Class Representative recovers
15 as against these Defendants, then there will have to be a further trial to determine the
16 disputed issue of the appropriate shares of liability.

17 THE CHAIR: Yes, we've discussed that already, yes?

18 MS FORD: Well, it is relevant to the risk which the parties are taking into account in
19 settling because that is a trial which in itself could be heavy, it could involve --

20 THE CHAIR: But it's probably going to be somewhere between 40 and 47.5 per cent.
21 It's not one of those ones where you're going to lose everything. You're still going to
22 get a substantial amount, it's just whether it's 40 on the basis of a figure within that
23 likely range.

24 MS FORD: Yes, but in order to get there, we have to have another trial. We have
25 more expert evidence, we have more factual evidence. We incur further costs.

26 THE CHAIR: Well, you may settle it. You don't know.

1 MS FORD: This is one of the, we would say, ongoing and material risks that
2 necessarily needs to be factored into account because it's not simply about where we
3 come out. It's the cost of getting there.

4 The other relevant factor to take into account is the likelihood that there could
5 conceivably be appeals from the trial judgment, and/or also from the shares of liability
6 judgment.

7 THE CHAIR: Yes.

8 MS FORD: Now this is a matter in relation to which, given the complexity of those
9 things that were dealt with at trial, it is entirely reasonable to factor in a risk that there
10 might well be appeals. The consequence of that is both the substantive costs. There
11 is a risk that any recovery could be overturned on appeal, and, in any event, there will
12 be the costs of defending the matter on appeal, and the delay in recovering at the end
13 of it. That is a further factor which is relevant to take into account in terms of the
14 ongoing litigation risk.

15 THE CHAIR: (Overspeaking) of uncertainty. Yes.

16 MS FORD: So, that in a nutshell, is where we are on the merits. I don't know if my
17 learned friends from the Defendants have anything further to add on that particular
18 point?

19 THE CHAIR: Does anyone want to say anything about the merits or -- yes.

20
21 Submissions by PROFESSOR BAILEY

22 PROF BAILEY: May it please the Tribunal, we take from the Tribunal your strong
23 provisional view that there's a strong case. But, as the Tribunal will have seen, there
24 was extensive, hotly contested industry expert, economic expert and factual evidence
25 of which the parties were at large. And so the point to which I wanted to draw your
26 attention, apart from the one thing we can agree on, is that we disagree quite strongly

1 about the import of that evidence, is that, of course, where the trial Tribunal ultimately
2 comes out could make a profound difference to the aggregate award of damages.

3 So you put it that substantial damages may be paid, but the key question, in my
4 submission, is how much? And so you have seen in Ms Wessel's fourth witness
5 statement that she gives some illustrative scenarios of where my learned friend has
6 addressed you on if the Class Representative wins on everything.

7 THE CHAIR: There are other scenarios, I understand.

8 PROF BAILEY: There are some other scenarios and, of course, if one moves as we
9 set out both in the application and the evidence to the scenario where if the trial
10 Tribunal accepted the Defendant's evidence, that then moves you into what the parties
11 referred to as scenario 3, and you will have seen there that the aggregate award is
12 considerably lower than the £215 million. We've set that out in the application. It's
13 closer to, sort of, £86 million for all Defendants.

14 THE CHAIR: And then you look at 40 per cent of that.

15 PROF BAILEY: And then you see that actually the settlement sum, when one looks
16 at it either purely in terms of the Guaranteed and Additional Damages Sum, or
17 everyone looks at it as the total settlement sum, is a substantial recovery. So I just
18 want to draw that to the Tribunal's attention, and I really recommend paragraph 42 that
19 gives you a feel for --

20 THE CHAIR: Let's have a look at it. Show me the --

21 PROF BAILEY: That is to be found in the core bundle, volume B, tab 6, and it's at
22 page 155.

23 As the Tribunal will have read what Ms Wessel does, is she sets out MOL's side of the
24 story. And, of course, the Class Representative disagrees with that. But what she's
25 trying to do is just to sort of illustrate -- and you see there's a table. Do you have that,
26 sir?

1 THE CHAIR: Got it.

2 PROF BAILEY: So you can see there's a set of issues in the left-hand column, and
3 each of those issues had a potentially profound impact on the ultimate outcome. So
4 the run-off period, although the parties were in dispute as to whether that lasted for
5 two years after the cartel ended or four years, the monetary value of that ran into tens
6 of millions of pounds, depending on who was right about it.

7 You can see that -- if you cast an eye across, you can see "Run-off period, 4 years",
8 that was the Class Representative's primary case. Our primary case in closing was
9 one of two years.

10 Now there are various other, sort of, permutations that need to be taken into account,
11 but you can see if you cast an eye on the bold at the bottom rows, what the potential
12 scenarios might be in terms of how the award -- all of those figures, I would respectfully
13 suggest, are substantial amounts, but they, of course, are questions of degree, and
14 quite a large degree.

15 Now, of course, we're all crystal-ball gazing as to what the trial tribunal may have done,
16 but I would urge a degree of caution, if I may, sir, that, of course, you will have read,
17 no doubt, conscientiously all of the evidence that's been put into the settlement
18 bundles, because this Tribunal panel didn't hear the evidence and hasn't given us an
19 opportunity to address you on the submissions that both sides made. And so, of
20 course, as you have said in your previous --

21 THE CHAIR: Well, you put a lot of submissions already.

22 PROF BAILEY: We did. There were extensive submissions and extensive evidence,
23 and all of that was pending. My only concern is that one doesn't too readily rush to
24 just simply say, well, there's a strong case, substantial damages, therefore, the
25 proposed settlement isn't one that is just and reasonable. In fact, the solicitors for both
26 sides --

1 THE CHAIR: I haven't said that though, have I?

2 PROF BAILEY: You haven't said --

3 THE CHAIR: I'm just shaking the tree, trying to see where we are.

4 PROF BAILEY: And I'm embracing that shaking tree --

5 THE CHAIR: What the concern is why Ford wanted to settle a strong case. Now, she

6 hasn't answered the second half yet. She's done the first half and she's saying there's

7 an element of uncertainty, but what I want to understand is what's the significance in

8 money terms and who gets what, the difference between going to trial and doing this

9 settlement. Once I have that, then we can move on. But I think it's good -- look, there

10 are a number of areas like, you know, run off effects and all that sort of stuff, and

11 looking at the interest rate, you can have an argument about that. All those will affect

12 what the ultimate figures are going to be, and I can see the ultimate figures going to

13 be a range. I understand that point.

14 What I probably need most help on is what is the significance of having a settlement

15 now and the consequence of not approving, because if we don't approve it, a judgment

16 is going to be handed down -- I don't know if it's been finalised yet, but if it has been,

17 you'll get a judgment whenever it's ready -- and what is going to be the real practical

18 difference? Why is she pushing for a settlement now? Once we have an answer to

19 that, then everything, hopefully, will flow from that.

20 PROF BAILEY: Sir, the only reason for standing up was to sort of just help you to see.

21 THE CHAIR: No, that's really helpful, looking at the figures at the table. I agree.

22 PROF BAILEY: Looking at the figures in the table, you can see that these are the

23 major battlegrounds. And what Ms Wessel explains on page 155 is that when you

24 start to not simply embrace that the Class Representative will win hands down on

25 everything.

26 THE CHAIR: No, they're not going to win hands down on everything.

1 PROF BAILEY: Then, and in particular, one of the other major battlegrounds was the
2 correct methodology for assessing upstream pass-on. My learned friend quite rightly
3 addressed you on the primary case put forward by the Class Representative's expert,
4 which is called scenario 1, but you'll see that the rate of pass-on and the approach, if
5 our evidence had been accepted, produces a material difference to the aggregate
6 damages value. It goes from 215 down to £53.2 million.

7 THE CHAIR: That's a huge --

8 PROF BAILEY: That is a huge issue. And then if you add the run-off in, it goes down
9 even further to £11.6 million.

10 And then you can see we've set out the, actually on a conservative basis, we put
11 a share of liability at 50 per cent here for what we would therefore be potentially liable
12 to pay.

13 Now we're not saying that these are definitive figures, and, we of course, with various
14 permutations could come up with all different sorts of outcomes. But we would urge
15 the Tribunal that this does show that there is a spectrum of possibilities. My learned
16 friend, quite rightly, said there is litigation uncertainty for both sides --

17 THE CHAIR: There is, yes.

18 PROF BAILEY: -- and this sort of illustrates that. And so we wouldn't want just simply
19 to take the £215 million as the gold standard, as the only metric. These outcomes
20 illustrate that, actually, the settlement sum --

21 THE CHAIR: I fully agree about the £215 million, and that we're not going to proceed
22 on the basis that they are necessarily going to get a headline figure of 215. I think
23 we're not going to proceed on that basis. You can see how they get to it. You can
24 see how you can plausibly argue for it. But whether they would get it or not is doubtful.
25 I think that they wouldn't get that full amount. I think it's going to be less than that.
26 Yes.

1 PROF BAILEY: Yes, sir.

2 THE CHAIR: Yes. You can come back later.

3 Let me just get to the bottom of the second issue, which is related to the merits, as to
4 why Ford is saying, "Let's settle here, now."

5 You've told me about the uncertainties, but I do need to understand what's the
6 difference between settling now on these terms and getting a judgment, and seeing
7 where the money would go in different directions?

8 Because what I don't want to happen is it to be suggested later that this settlement
9 being driven by the interests of the stakeholders. I'm not suggesting that, but I do
10 need to have clear submissions on that key point. And I don't know if you want to have
11 a break now or whatever, but it's a very important matter of public interest that the
12 public can be satisfied that this settlement, on what I consider to be a strong case, is
13 being driven by an outcome which is in the best interests of the class and the regime,
14 and not an outcome that's been done in the best interests of let's say, the stakeholders.
15 You've seen my previous decisions on this. We're just trying to get something that is
16 credible and right, so people can have confidence in these class actions. If I was the
17 Defendant, I'd be very happy to have this settlement, and I can understand from their
18 own point of view why they're doing it. I just need to understand where it's coming
19 from. From your point of view.

20
21 Submissions by MS FORD

22 MS FORD: Sir, I can show you the evidence of Mr McLaren, the Class
23 Representative.

24 THE CHAIR: Yes, of course, let's have a look.

25 MS FORD: He considers that this is a just and reasonable settlement in the interests
26 of the class.

1 THE CHAIR: Okay.

2 MS FORD: Those are his priorities. His witness statement is behind tab B1. It starts
3 at page 38, and there is a very emphatic statement starting at paragraph 11 on
4 page 41.

5 Says very clearly in paragraph 11:

6 "For the reasons set out below, I firmly believe that the terms of the Proposed
7 Settlement are just and reasonable."

8 THE CHAIR: Yes.

9 MS FORD: He makes the point in paragraph 13.

10 "As the trial has now concluded, I am confident that I have sufficient information to
11 assess the reasonableness of the Proposed Settlement to the Class Members. In
12 particular, I know how the parties' respective positions played out during trial, based
13 on the factual and expert evidence tested in cross-examination."

14 THE CHAIR: But what I'm looking for -- I understand why he says it's reasonable and
15 it's in your opinion, this and the skeleton argument, all that. I understand all of that.
16 But what I want help on is the issue of what's the difference between having this
17 settlement in terms of everyone, including all the stakeholders, and if we say, well,
18 we're not going to approve the settlement, we think it should go to judgment, what's
19 the difference for everyone if we go to trial -- and, well, we've gone to trial, we get this
20 judgment, because you're asking us to approve a settlement at a very late stage. The
21 degree of uncertainty is much, much less than when, for example, we approved the
22 first settlement, and this is a strong claim.

23 So it's really important that we get to the bottom of what could be alleged to be the
24 drivers for a settlement where if you didn't make this application there will be
25 a judgment for a substantial sum. What's the difference for everyone? That's what
26 I'm trying to get help on. And if you want to have a break before -- if we want to have

1 our break now, because this is the thing that concerns me the most, is to get that bit
2 right.

3 I'm not saying it's a concern at the end of the day, but it's something that we have to
4 address in our ruling as to where the outcomes would be for the different stakeholders,
5 depending on whether we approve the settlement or not. For the obvious reason,
6 I don't want anyone to say later that this settlement was approved, it was really done
7 in the interests of the stakeholders. So that's what I'm looking for.

8 MS FORD: Understood. I'm just considering which passages of the evidence might
9 best address it.

10 THE CHAIR: No, but you can do it by way of submissions. But look, we'll have a break
11 now.

12 We'll come back at 11.40 am, and then you can start thinking about some of the other
13 issues, and then in the afternoon we'll give our ruling on where we are. But I don't
14 think there's going to be a huge amount of assistance to come from the intervening
15 parties on whether or not this settlement should be approved.

16 I think where I need their help on is, in particular, in relation to the second part is if we
17 are going to approve the payment out of any CFD amounts, is it nothing? Well, is it
18 going to be the full amount they're claiming or something else? And if it's something
19 else, then I want to be taken through the schedule. We'll go through the schedule item
20 by item, and then I can say which items we're comfortable with that should be paid
21 now. And this way the funder will get back a significant proportion of what it's already
22 paid out, but at the same time giving us flexibility for next time around once we've got
23 a proper idea as to what is going to come out of the thing.

24 So I think what we'll do is, we'll deal with this issue next. We'll then deal with the issue
25 of the likely take-up, the questions I've written in the letter you got today. Then you
26 can do what you wanted to do at the beginning, which is to take us through the various

1 criteria. Then we can give a ruling on that. And then a separate ruling on what
2 happens to the £20 million as of today, which I think the interested parties should
3 probably take the running on that.

4 But I think we've got plenty of time to do it all today, and I'm sorry again, you've got
5 the short straw of having me, but I know you can take it. And it's always the same
6 issue, but you plan everything, you know what you're going to say till one minute after
7 you've stood up.

8 Okay. I'll rise from there.

9 (11.26 am)

10 (A short break)

11 (11.46 am)

12 THE CHAIR: Okay. So we're looking at what's driving this and what if there's no
13 settlement. So what's driving this, and what's the difference for each stakeholder
14 between accepting this settlement and you rolling the dice and receiving the judgment.

15 MS FORD: Yes. And I understand the concern that the Tribunal is putting to me that
16 it is the interest of the stakeholders that is driving the settlement and not the interests
17 of the class.

18 THE CHAIR: I'm not saying that, I'm just saying we need to be satisfied that's not the
19 case.

20 MS FORD: Absolutely. And I can make the submission, without waiving privilege,
21 that that is not the case.

22 THE CHAIR: You have to explain why that's right.

23 MS FORD: What is driving the settlement from the Class Representative's perspective
24 is the Class Representative's assessment of risk.

25 Now, we hear what the Tribunal says in terms of it being a strong case, and in some
26 respects it's very gratifying to hear it. But we have not seen the trial Tribunal's

1 judgment. We do not know. We cannot be sure. And that is what is driving the
2 decisions that are being taken.

3 And one can pose the question, well, what happens if we roll the dice and we lose?
4 We could end up with a sum which is less than the deal that we have achieved with
5 the class. That is what we are weighing up.

6 THE CHAIR: But what I want to understand is what will happen if we roll the dice and
7 the figure is higher. I just want to see what the difference in practical terms for each
8 of the stakeholders is going to be, so I can understand -- I can deal with any argument
9 on what's driving the settlement. Because at the end of the day, when you look at the
10 figures, you take out, let's say, the cost fees and disbursements, and you treat it
11 saying, well, what is the damages figure going to be if you go to trial, and what's the
12 difference between that and what you're settling for? You know, the percentages are
13 not that great relative to the sort of ranges that we could end up with in this case.

14 MS FORD: At the highest level of generality, if the Class Representative were to roll
15 the dice and achieve more, in many respects, one could say that that would leave
16 more available for the stakeholders in the sense that when the Tribunal is weighing up
17 what is fair and reasonable to make available to the class, and what is fair and
18 reasonable to make available in respect of cost, fees and disbursements, one would
19 expect that the bigger the pot, the more in absolute terms the Tribunal might be
20 prepared to offer to stakeholders. So, in that respect, it's evidently not a stakeholder
21 interest, which is driving a cautious decision to assess the risk and take a firm figure
22 now.

23 There is a dynamic that is addressed in Mr Campbell's statement that I should draw
24 the Tribunal's attention to as well. This is paragraph 62 of his statement tab B4,
25 page 117.

26 THE CHAIR: Yes.

1 MS FORD: And it's in particular -- he's setting out in paragraph 62 the position in
2 respect of costs, fees and disbursements:

3 "For the purpose of the table above, I have assumed the Funder's Fee is paid before
4 distribution, in which case the lower fee is payable, but I recognise that it is greater
5 than the total sums earmarked for costs, fees and disbursements, therefore, it's likely
6 that at least a proportion will be paid after distribution. If the Funder's Fee was paid
7 entirely from undistributed damages, the total costs, fees and disbursements owed by
8 the Class Representative would increase by £5 million ... If the Funder's Outlay
9 exceeds £12,000,000 (if the Class Representative incurs around £600,000 or more),
10 the Funder's Fee increases to between £45,000,000 and £50,000,000."

11 So in fact there is a -- if the proceedings were to continue and further costs were to be
12 incurred, in fact, the funder on the contractual position would then incur a greater
13 funder's fee. So there is that dynamic. (Pause)

14 THE CHAIR: Okay.

15 MS FORD: But I do reiterate my submission that what we are weighing up is the
16 possibility that we could get more on the one hand, with the possibility that we could
17 get less. And the decision has been taken that, having pursued this litigation for
18 six years, having achieved what we consider to be a good deal for the class, it is
19 preferable to seek finality now rather than have the litigation continue for another
20 number of years and to roll the dice.

21 THE CHAIR: Should we look at the next issue, which is that on the different scenarios
22 on levels of take-up, have we got that calculation that we've requested?

23 MS FORD: Yes. So I can address two issues the Tribunal has raised in its letter of
24 this morning.

25 THE CHAIR: Yes. Have you got a piece of paper for me or is it --

26 MS FORD: I'm looking at the Tribunal's letter, sir.

1 THE CHAIR: I've got that. Yes. I know what's in there.

2 MS FORD: I'm afraid given that we received it this morning, I haven't yet put it on
3 paper, and we can confirm what I'm about to say --

4 THE CHAIR: Yes, okay.

5 MS FORD: -- but it may be that the answer is not too complex in this sense. The
6 Tribunal is asking for each of the following take-up figures, a range from £2 million to
7 £50 million, which settlement pots will those figures come from, and the order.

8 There are £34 million worth of guaranteed damages across the totality of the
9 settlements. So the figures for any sum up to £34 million, the answer will be that will
10 come from the Guaranteed Damages Sum. (Pause)

11 There is then an additional amount of, in total, £20.75 million from the sums in the
12 various settlements that are described as either additional damages or deferred
13 damages. The class has first priority over those sums, and so that takes us up to in
14 excess of the top figure the Tribunal's identified, £50 million. And so, anything in
15 excess of £34 million and up to £50 million will then come from the Additional
16 Damages Sums.

17 So the assumptions the Tribunal has asked us to address can be accommodated
18 within the structure of the total settlements that have been achieved.

19 THE CHAIR: Okay, but you'll provide something in writing that answers that question.

20 MS FORD: I can certainly put in writing essentially what I explained to the Tribunal,
21 yes.

22 THE CHAIR: Does that precisely answer the question that's been ...

23 MS FORD: I had hoped it did. This is for the Tribunal, if there's a concern.

24 THE CHAIR: Okay. Deal with the second question, then.

25 MS FORD: In relation to estimated range of individual recoveries --

26 THE CHAIR: Well, no, it's not individual. What I'm looking for is: what is the range of

1 likely take up in pound signs? I understand that for each vehicle you could justify
2 maybe £5 each. I understand that bit. What I want to know is: all the research you've
3 done, what is your predicted range of the amounts that's going to be claimed? We
4 had this in Gutmann. We were given a particular range, which proved to be, let's say,
5 somewhat optimistic. The Tribunal at the time said it thought it was unlikely.

6 On this one, I do want to have a range that you say is a reasonable range for the
7 amount that you predict. Having done all the work you've done so far, and you have
8 done quite a lot of work, what is that figure. Then I can understand where we are.
9 I know that it's been a bit fudged in the evidence, but there's no more time for that.
10 You are a very highly resourced team. You've got the experts. You must, in your own
11 minds, have a view as to what that range is going to be, the likely take-up amount in
12 pounds, shillings and pence that is going to be taken-up.

13 MS FORD: The Tribunal is right that there is a flat rate figure of compensation per
14 vehicle. The relevant figure for that -- I'm taking it from Mr Campbell's statement 84(f),
15 and his footnote 59 -- it's £3.59 per vehicle. The way in which that is derived is by
16 dividing the total recovery from the proceedings, on the assumption that this settlement
17 is approved -- so £92,750,000 among the estimated 25 million vehicles. Sorry, the
18 approximately 25 million vehicles that were registered over the entirety of the relevant
19 period. That is a flat rate amount.

20 There are at least two important unknowns about that figure. The first is: we do not
21 know what is the average number of vehicles purchased by individual purchasers. So
22 if, across the class, individual purchasers primarily purchased a single vehicle over the
23 relevant period, then one would expect their claim -- calculated on that flat rate
24 basis -- would simply be the £3.59. If across the class they potentially purchased more
25 than one vehicle over the relevant period, then their claim on a per vehicle basis would
26 be correspondingly higher. That's per individual class member.

1 That's the one of the first important moving parts. But the second important moving
2 part is that Mr McLaren is very concerned to maximise take-up. So he is not
3 necessarily intending to proceed on the basis of that flat rate claim per vehicle,
4 because he is also investigating: what would the relevant overall claim value have to
5 be in order to maximise the number of consumers that do come forward to try and
6 claim their entitlement?

7 THE CHAIR: Yes.

8 MS FORD: That second aspect has been informed by the research that we have
9 done.

10 To give the Tribunal a brief summary of what we have done to date: the Tribunal will
11 have seen from the evidence that there is a two-stage survey process. Phase 1 has
12 been completed already, and the fieldwork in respect of it was done between 5 and
13 12 November 2025. What that was aiming to do was to understand the awareness of
14 the case at the time, which was before even the announcement of the most recent
15 settlement, and absent any further steps by the Class Representative, how likely the
16 class might be to come forward and submit a claim in respect of the settlements. The
17 intention is that the outcome and the learnings from that process will then feed into
18 what we've termed Phase 2, and Phase 2 is intended to test the messaging and the
19 communications channels, and to confirm how to approach distribution with the
20 express intention of maximising the take-up.

21 THE CHAIR: Yes.

22 MS FORD: Phase 1 has been done. It comprised two surveys. There is one targeting
23 consumers in the class, and one targeting fleet managers. It looked both at whether
24 those consumers described themselves as willing to claim, and whether they were
25 behaviourally likely to claim. "Behaviourally likely to claim" was assessed by reference
26 to whether, for example, they had previously applied for a refund or they'd previously

1 made an insurance claim, so they were behaviourally likely to engage in the sort of
2 claim conduct.

3 It presented two measures of awareness on the part of the class. The first was what
4 they termed "self-reported awareness". That was essentially whether the respondents
5 to the survey described themselves as aware of these proceedings.

6 There was then a measure which has been described as "adjusted awareness". The
7 function of adjusted awareness was to try and adjust for the phenomenon of over-claim
8 bias. The survey describes over-claim bias as being a cognitive bias in which a person
9 claims knowledge, familiarity, or expertise that they don't have in reality. The way in
10 which it was addressed in the context of the survey that was done was to ask the
11 respondents about a fictitious claim that didn't actually exist. If they indicated that they
12 were aware of the fictitious claim, then their claim that they were also aware of these
13 proceedings was treated with a greater degree of scepticism, because -- essentially
14 their self-reported awareness was discounted, and so the adjusted awareness figures
15 that have come out of that exercise are deliberately designed to reflect conservative
16 assumptions.

17 What the survey did in that context was present the respondents with a series of
18 possible potential figures for the total amount of compensation. For consumers, they
19 asked them about £5, £45 or £100, and for fleet managers, they asked them about
20 £500, £5,000 or £25,000. Those were not per vehicle compensation amounts. Those
21 were deliberately potential overall claim amounts.

22 The results are summarised in Mr Mansfield's statement at paragraphs 23 to 24.

23 (Pause)

24 Page 171 in the bundle. (Pause)

25 You will see there paragraph 23, summarising consumer take-up.

26 THE CHAIR: It was very interesting when I looked at that, because there is just a huge

1 | discrepancy between A and B.

2 | MS FORD: A being consumers bought or --

3 | THE CHAIR: When you look at -- when looking at the self-reported awareness
4 | segment, the consumer take-up varies. Then when looking at the adjusted awareness
5 | segment, you come to pretty drastically different figures.

6 | MS FORD: Sir, yes. That's why we've said that that is really a very conservative
7 | figure, because it has been discounted insofar as those respondents also indicated
8 | that they were familiar with the fictitious claim.

9 | THE CHAIR: When you look at it, they are pretty low percentages.

10 | MS FORD: They are. They are the starting point. We've been very careful to
11 | emphasise that there are all sorts of reasons why these may be low now, and it is not
12 | the intention that they remain.

13 | THE CHAIR: Yes. Then fleet managers is paragraph 24.

14 | MS FORD: Yes.

15 | THE CHAIR: Yes. These are pretty stark figures. What I wasn't really clear about is:
16 | where does that take us in money terms, and what the realistic range is. If we look at
17 | the 23(b) and the 24(b), what are you likely to come up with? It's not as simple as this,
18 | because when you look at it, I can see how you can justify easily £5 per vehicle, and
19 | you've covered all that in your evidence. If it's £5 per vehicle, if you've got six vehicles,
20 | then that's £30. But are people really going to make claims for that sort of sum? When
21 | you look at Gutmann, the answer is not an encouraging one.

22 | What in a way saves this, if it can save it, is the fleet position. But then again, I need
23 | to have a feel for what -- if you're looking at £5 a vehicle, what is the likely range for
24 | how much is going to be paid out? I do want to finish, before I give a ruling, to know
25 | what that range is in pounds terms.

26 | MS FORD: The complexity that you've identified is exactly why we consider this to be

1 essentially an ongoing exercise. We're not in a position to offer that sort of information
2 at the moment. What we do know from the survey is that there is a tipping point
3 beyond which increasing the claim value isn't going to materially increase take-up
4 rates. We know for consumers, for example, that that tipping point is going to be
5 somewhere between the £5 and the £45, but we don't know where that might be.

6 So the next step is going to be to try to ascertain the optimal point which will maximise
7 take-up value. That then needs to be correlated with information about how many
8 vehicles these consumers purchased, because the optimal point may be reached if
9 they all purchased, say, two or three cars in the period. It may not be reached if they
10 only purchased a single car, and that's another moving part that needs to be taken
11 into account in terms of the assumption about what is the amount we're going to --

12 THE CHAIR: (Overspeaking) say to them, "Look, we'll give you £5 per car", many
13 people will say, "Well, look, I can't remember which cars. I can't even think of the
14 registration number of a car that I had. I had a number of cars. I'm just not going to
15 bother". You know, that that's the problem with these cases.

16 MS FORD: Yes, you're quite right that there's another moving part. There are
17 a number more, but one of the other ones is how onerous is the perceived claims
18 process. That's another factor that the Class Representative is going to have to --

19 THE CHAIR: In *Gutmann*, they tried to make it as least -- when I first looked at their
20 plan, it was going to be quite onerous. At the end of it, we got it to something that was
21 more user-friendly. But even with a more user-friendly, there wasn't a great appetite
22 to take-up, in which case you get to the end of it and you say, "Well, if this is the
23 take-up, whose benefit are these proceedings really going to be for?" The only thing
24 that saved *Gutmann* is the charity point. It's probably going to be the same here,
25 except I hope that the take-up in pounds terms is going to be significantly more than
26 in that case.

1 But what I'm not hearing from your side is a figure, which you say is a range. You're
2 not even giving me a range of what you say is going to come out of it, in which case,
3 when it comes to the funders asking for money out of the CFD, I could be quite reticent,
4 because I'll say, "Well, look, I don't want to have another *Gutmann* and find that you
5 get all this money, and then I find that actually the proceedings at the end of the day
6 are not a real success". I do want to have some sort of range, and I can't believe, with
7 clients as sophisticated as yours, you haven't come up with a view as to "Actually, we
8 think if you're going to have £5 per vehicle, we think that the range is A to B". It could
9 be a big range, but it's not particularly satisfactory that we're coming to this stage
10 where you're not willing to even give me what the range is going to be.

11 MS FORD: Sir, if one takes the £5 per vehicle, then the present state of the information
12 is that one gets a percentage take-up rate, depending on whether we look at the
13 adjusted awareness or the self-appointed awareness. So it would be 6.8 per cent on
14 self-reported awareness, and it would be considerably lower on the basis of adjusted.

15 THE CHAIR: Yes. If you can put that in pounds terms, then that would be quite helpful.

16 MS FORD: We can certainly calculate that, but it does come with a very important
17 caveat, because the intention is that that is not the end of the inquiry. The intention is
18 to try and ascertain what would be the optimal amount to maximise that take-up rate,
19 which involves feeding in an assessment of where the tipping point is.

20 THE CHAIR: What you can say is looking at the figures here on a £5 per vehicle, we
21 think the range is A to B, but what you are going to do is try and make sure that it's
22 higher in the range if possible. But the Tribunal does want to have a feel for what that
23 range is. I know it's difficult. Of course it's difficult, but we've got experience of being
24 in this scenario before. When it comes later down the line -- in a future case when it
25 comes to certification -- you may find that the Tribunal wants to know a lot more about
26 likely take-up and distribution, because if you're going to spend all this money, you

1 may say "Is it worth it?" if that's all that's going to be taken up by class members at the
2 end of the day.

3 MS FORD: It's certainly our intention in being reticent in giving these figures, that we
4 want to do the further work to make sure that where we come out in terms of the
5 compensation per class member is optimised to maximise take-up. That is the basis
6 of the hesitation of saying, "Well, let's assume it's £5", because the study does indicate
7 that the tipping point is higher than £5, but might not be as high as £45.

8 So at some point there is an optimal amount. It will need to be factored in with the
9 onerousness of the claims process, the messaging, all the other moving parts, to try
10 and achieve a level that balances factors such as flat compensation; factors such as
11 how many vehicles that class member bought; with factors such as whether that class
12 member is prepared to engage in the process of claiming.

13 So that is why --

14 THE CHAIR: I do not see any realistic possibility that the claims when they come in,
15 however you do it, are going to take you above the guaranteed sums.

16 MS FORD: Well --

17 THE CHAIR: I may be too pessimistic. I don't see that happening. That's why it was
18 so important to have that clause 3.8, because then, you know, I do think that when
19 you're looking at likely scenarios, the least likely scenario is you're going to have
20 a breakthrough beyond the guaranteed sums by class members.

21 MS FORD: Well, sir, if that happens to be the case, in our submission --

22 THE CHAIR: Well, no, but am I right or wrong? You've got to have a feel as to whether
23 the Tribunal is right or likely to be right in that assessment.

24 MS FORD: The information we have is the take-up rates, what I would describe as
25 cold take-up rates, so they are before all the effort that is planned to actually increase
26 them. But I would make this point, which is that if it happens to be the case that we

1 do not exceed the guaranteed sums, then that is still quite an important, relevant
2 distinction between this proposed settlement and the situation in Gutmann, because
3 Mr McLaren has been very clear from the outset that he is setting aside material
4 amounts as a guaranteed payment, he hasn't done it at the encouragement of the
5 Tribunal. He has done it in the way he has chosen to structure the settlement. So he
6 has from the outset indicated his intention to make a very substantial sum guaranteed
7 available to the class. We do say that that is a material distinction.

8 THE CHAIR: Well, I'm not sure, because you can say I've got a guaranteed
9 amount -- I think it's, is it £35 million, that odd figure, guaranteed amount of £35 million.

10 That all sounds great. But I, for my part, I don't think there's any likelihood that claims
11 by class members will break through that barrier. That's where I am at the moment.
12 If you're saying I've got that wrong, you can give me arguments as to why you say I've
13 got that wrong. But if you are saying that you're looking at take-up rates way in excess
14 of what's indicated by the evidence that you just looked at in paragraphs 23 and 24.

15 It's not a problem. We just need to make an informed decision. Now, I understand
16 the funders are going to be paid, the lawyers are going to be paid. I'm not hostile.
17 I just want to know on what basis we're approving and what, when you look at the
18 crystal ball, where we are. But if you ask Malek if he's going to look at the crystal ball,
19 I will come up with a figure way below the Guaranteed Sum. I may be right and I may
20 be wrong, but that's my assessment at the moment.

21 MS FORD: Well, sir, what we can do is come up with some figures based on some
22 assumptions, and they will very much be assumptions, and they are likely to draw on
23 the indicative figures that came from the Thorndon report. But it is important to
24 emphasise that those figures were not picked on any informed basis based on their
25 relationship to the merits of this particular case, or --

26 THE CHAIR: That's the problem.

1 MS FORD: They are high level.

2 THE CHAIR: It's all very theoretical.

3 MS FORD: They are high level figures designed as the first step in the process of
4 trying to ascertain how to maximise take-up. So there is no particular magic in the £5,
5 £45, £100 figure that has been used, save that we are attempting to take the first stage
6 of getting to what is the right figure. We can provide some assumptions on that very
7 caveated basis.

8 THE CHAIR: Where all this is going to come to is that (1) it will come to the
9 assessment at the end of the day as to whether the proceedings are a success overall,
10 in Gutmann terms, and I know you're doing your best because of the charity
11 provisions. And (2) is how comfortable we are as a Tribunal to release funds out of
12 the £20 million, effectively for the funders and the ATE insurers. But I think we will
13 hear that later on.

14 But I think the point that you all understand, is that whatever we -- even if we approve
15 the settlement today, and we're likely to approve it today, let's be honest. But if we
16 are going to approve this, all this is going to be revisited in a lot more detail further
17 down the line. If we approve it today, you shouldn't assume that tells you anything
18 about where we come out finally on overall success.

19 MS FORD: Sir, that is fully understood. Our submission on the success question, in
20 our submission, is the fact that £34 million is guaranteed to go to the class.

21 THE CHAIR: I accept that, as with Gutmann, that was success at this stage. But then
22 sometimes you look at a beautiful looking apple and once you bite it, it's not as good
23 as it looks. And so this may look like a nice looking apple, but once we bite it, when it
24 comes to the distribution stage, we may find it's not as pretty as it looks.

25 MS FORD: Well, sir, given that the sums are guaranteed, even if, with the best will in
26 the world, the actual take-up rates end up being low -- and that's obviously not the

1 basis on which the Class Representative is proceeding at all -- but if that were to be
2 the case, nevertheless there will be a minimum distribution of £34 million either directly
3 to the class or to charity.

4 THE CHAIR: I understand.

5 MS FORD: So we do say that that addresses, in our submission, that concern.

6 THE CHAIR: Well, what we're trying to do perhaps, in a too gentle way, is encourage
7 the best possible effort when it comes to distribution. I can see that you've got
8 a number of ideas which are pretty good. I thought getting Martin Lewis involved is
9 a really sensible idea. Some of the things you've come up with I hadn't thought of
10 before, and I thought that's one of the really good proposals which may help get it out
11 there. But, anyway, you've probably done as much as you can. So if you can come
12 up with a figure when we come back, over the luncheon adjournment, but probably I'll
13 give the ruling on that bit before we get to the second bit, which is the bit involving the
14 funders in the early afternoon. So the idea is that you'll take me through the criterion
15 I wanted to do initially, and then we'll have a ruling after lunch, then we go on to phase
16 two, which is to look at the £20 million with the assistance of counsel for the
17 interveners.

18 When it comes to the distribution plan, when you look at the numbers for some of
19 these fleet people, you know anyone where it's more than, let's say, 5000, I would
20 hope that when you ask us to approve the distribution plan, that they would have
21 already been approached and discussed, so we know that, yes, they're happy with
22 what's going on, and yes, they will be making claims. Because I think, as I said, the
23 fleet is a really useful area to go down. And so if we can get further with, with the fleet
24 side, then --

25 MS FORD: Sir, yes. The only dynamic that we are conscious of in relation to that is
26 that it is preferable to communicate on a single occasion, if possible, rather than on

1 multiple occasions.

2 THE CHAIR: And keep going back, yes. I know.

3 MS FORD: So if the distribution plan and the final terms remain to be approved by the
4 Tribunal, there is potentially a risk that we approach people with insufficient
5 information because it has to be caveated by reference to, subject to the Tribunal's
6 approval.

7 THE CHAIR: What you may find is that let's say you approach ten and you get ten
8 engaged. They could even help you design exactly how you're going to do it, and give
9 some input and ideas as to what works and what doesn't work. We just want as much
10 help from anyone who might be able to help us. If these are the major potential class
11 members who are going to be asking for money, you may want to test it with them and
12 speak to them about: are you going to make a claim? What's easier for you? What's
13 going to help you, and what's not going to help you make claims?

14 What we're trying to do is encourage you as much as possible to get to where you said
15 you want to be, which is get maximum take-up. And I think that the fleet is a pretty
16 important aspect of this case, and it could make a big difference as to whether or not
17 this is a take-up rate of, you know, £1 million or whatever, and one where you're talking
18 about maybe ten or in excess of ten. I don't, I don't know where we are on that, but
19 a lot will depend on the fleets. But where I am at the moment, I think it is most
20 unlikely -- and I'd love to be proved wrong -- that you're going to hit anywhere near the
21 top of the guaranteed sum. That's where I am, and it's on that basis that I will approve
22 it. If I'm proved wrong, then that's brilliant. That's really good.

23 MS FORD: So I can say that we are absolutely ad idem with the Tribunal in terms of
24 the conviction that we will do our absolute best to get the distribution as high as
25 possible.

26 THE CHAIR: Yes, yes, of course.

1 MS FORD: Indeed, that is the purpose of phase 2 of our survey, to do that inquiry that
2 the Tribunal has indicated to try and ask people, well: what would help; what would be
3 the optimum circumstances to facilitate claiming; what messaging do we need to get
4 it out there. The questions the Tribunal is posing. That is absolutely the exercise that
5 we propose to do.

6 THE CHAIR: Up until now there has been very little engagement. There's not, let's
7 be frank, there's not a huge number of people who've registered on the site. But it
8 may all be different depending on how everything's presented, advertising and stuff.
9 In Gutmann, they did make a big effort on advertising. You know, you could see it on
10 the Tube and stuff like that. But despite that, we only got, you know, 216,000.

11 My concern on this one is when you're talking about the individuals, take-up rate is not
12 going to be high. Whatever you can do is appreciated. But I think on the fleet side,
13 it's a different ballgame, and I think on the fleet side, you should be able to get a decent
14 amount of take-up if you work with them. There's not a huge number of the really large
15 ones, but that can make a huge difference between, as I said, £1 million or maybe
16 £10 million in claims, actual claims by class members.

17 Okay, so should we go to the next job, which is you're going to take me through the
18 criterion.

19 MS FORD: It may be that we can go fairly quickly because much of it has been
20 canvassed to some extent already.

21 THE CHAIR: Yes.

22 MS FORD: Rule 94(9)(a) is concerned with the amount in terms of the settlement,
23 "including related provisions as to payment of costs, fees and disbursements". Would
24 the Tribunal be assisted by working through the terms of the settlement, or is the
25 Tribunal sufficiently familiar?

26 THE CHAIR: I don't think we're going to be assisted on that.

1 MS FORD: I'm grateful. In that case, I would simply make two points. The first is that
2 the Tribunal will be familiar with the structure and the approach that we've taken,
3 because it is largely driven and essentially the same structure and approach that we
4 took in relation to the "K" Line --

5 THE CHAIR: And that's why it makes it so easy, this hearing.

6 MS FORD: Sir, yes.

7 THE CHAIR: Yes.

8 MS FORD: The other point that I would emphasise is that we have sought to
9 incorporate into this agreement the clarificatory changes that the Tribunal suggested
10 last time round.

11 THE CHAIR: Yes. You've learned, yes.

12 MS FORD: We have.

13 THE CHAIR: Yes, clause 3.8, isn't it?

14 MS FORD: The Tribunal has my overall submission that the terms of that settlement
15 are just and reasonable, and we've largely traversed the reasons why we say so.

16 THE CHAIR: The number of persons likely to be entitled to a share of the settlement,
17 you said the number in the millions, but it's hard to know exactly what it is. You've got
18 25 million vehicles, haven't you?

19 MS FORD: So that's exactly the issue. We know how many vehicles are within the
20 class. We do not know how many vehicles were purchased by each individual class
21 member, and so we can't at this stage be categorical about the actual size of the class.

22 THE CHAIR: Yes, I understand, we had that position last time. Yes.

23 MS FORD: Sir, yes.

24 "Likelihood of judgment being obtained in a collective proceeding for an amount
25 significantly in excess of the amount of the settlement."

26 Again, we've largely traversed this point.

1 THE CHAIR: We've had this debate.

2 MS FORD: For the Tribunal's note, that has been expressly addressed in the evidence
3 in Mr Campbell's statement at paragraph 116 and Ms Wessel's statement in
4 paragraph 51.

5 THE CHAIR: Yes. Okay.

6 MS FORD: "94(9)(d) the likely duration and cost of the collective proceedings if they
7 proceed to trial."

8 THE CHAIR: We've done that already.

9 MS FORD: We have also traversed that.

10 94(9)(e): "... opinion by an independent expert ..." We've done that.

11 THE CHAIR: We don't need one on this.

12 It's interesting because what is appropriate depends on the facts of the case, and the
13 way we're dealing with these things actually helps, because you put in your application,
14 we then go through the application, all the papers, and then if we -- on the facts of this
15 case, I did consider, do we need an independent expert? I'm sure if I felt that was
16 needed, you would have got one and we would have had it. So you actually saved
17 money by doing it the way you did it and you flagged it out as an issue, so I thought
18 that was very helpful. So I agree with the approach that, on the facts of this case, we
19 do not need an independent expert. I need to cover that in the ruling, yes.

20 MS FORD: "(f) [is] the views of any represented person ..."

21 THE CHAIR: I've got a lot of views. Yes. Okay.

22 MS FORD: "(g) the provisions regarding the disposition of any unclaimed balance of
23 the settlement ..."

24 Again, I think this has largely been traversed, but just to nail it down:

25 "Guaranteed Damages Sum of 20 million. Any unclaimed balance would be paid to
26 charity instead. The Additional Damages Sum of 12.5 million. If a surplus remains at

1 the end of the distribution process, then the Class Representative may seek the
2 Tribunal's permission to use the remaining balance to pay CFDs. If that were to be
3 refused, as the Tribunal asks at the beginning, then it's governed by clause 3.8 of the
4 settlement agreement." [as read]

5 THE CHAIR: That's very good, yes.

6 MS FORD: And just to draw to the Tribunal's attention, unlike in previous settlements,
7 there is no reversion of any surplus from the Additional Damages Sum, under the
8 proposed settlement. So that is a relevant distinction between this and previous
9 settlements. (Pause)

10 THE CHAIR: Yes.

11 MS FORD: For the Tribunal's note, again, the rationale for that is Mr McLaren's
12 statement, paragraphs 27 and 35. (Pause)

13 THE CHAIR: And then we've got all the other things like the form of notice, et cetera,
14 haven't we.

15 MS FORD: So yes, that's rule 94(4). I can go through those as well if that's -- I'd been
16 doing the 94(9) which are the ones that the Tribunal takes into account for the
17 purposes of deciding whether it's just and reasonable, but I can also --

18 THE CHAIR: Well, I'm happy with your information on that.

19 MS FORD: I'm grateful.

20 THE CHAIR: And then the other issue is this whole question of the CFD sum.

21 MS FORD: Sir, yes, I have an application to make in respect of that.

22 THE CHAIR: We'll deal with that separately in the afternoon.

23 Does anyone want to say anything else on the issues we've covered this morning?

24 Okay. So if you can give us that table that we asked for, come up if you can with
25 a rough range of likely amount to be claimed. I know for the reasons you've given, it's
26 actually a pretty difficult task, so you may need to have a bigger range than normal,

1 but if we can have rough figure for that.

2 So we'll come back at 2.00 pm. And if that letter is ready before 2.00 pm, that would
3 be helpful, because then I can incorporate that in the ruling that we give.

4 MS FORD: We'll do our best.

5 THE CHAIR: Thank you very much.

6 (12.30 pm)

7 (The short adjournment)

8 (2.08 pm)

9
10 Ruling (submitted to the Tribunal for approval)

11 (2.38 pm)

12 THE CHAIR: So that's where we are on the first issue for today. We now want to hear
13 counsel for the funder to go through where we are on the £20 million because, as
14 I understand, at the end of the day, if any part of the sum for CFD, the £20 million is
15 approved today, it's going to go to the funder, in effect, to reimburse what you've paid
16 out already, or at least a significant part of that will.

17
18 Submissions by MR MALLALIEU

19 MR MALLALIEU: Well, that's correct that a significant part of it will go to repay the
20 whole, the outlay, that has been spent to bring this case to this point and to the success
21 it's achieved so far. So yes, that's absolutely --

22 THE CHAIR: Which is the best document to work from?

23 MR MALLALIEU: Well, sir, the there is an updated version of the two annexes that
24 were produced with Mr Mansfield's witness statement, which I understand is at
25 page 44H of the updated correspondence bundle.

26 THE CHAIR: I'll be lucky if I've got it there.

1 MR MALLALIEU: It may have been provided to the Tribunal separately.

2 THE CHAIR: I was looking at it a minute ago, but I've got this schedule, so --

3 MR MALLALIEU: So it looks as though you have the letter there, which should have --

4 THE CHAIR: Let me get something else out.

5 MR MALLALIEU: -- annex 1 and annex 2.

6 THE CHAIR: Yes. Don't worry. (Pause)

7 I've got Friel statement as well, which is quite helpful on this then.

8 Just trying to look where else have I got a similar table to this?

9 MR MALLALIEU: There is a table in our skeleton argument.

10 THE CHAIR: Is that where I was working from?

11 MR MALLALIEU: Page 5 of our skeleton argument, which is --

12 THE CHAIR: What page in the bundle?

13 MR MALLALIEU: That is at . . .

14 THE CHAIR: Oh, yes. I've marked all of that. Yes, yes. Okay. Let me just quickly

15 read something.

16 MR MALLALIEU: It's page 899 onwards of the core bundle, and the table should be

17 at page 904 within that.

18 So that's the table which essentially repeats what's set out in Friel 4, which sets out

19 the calculation of the funders' contractual entitlement in light of the success that's been

20 achieved.

21 THE CHAIR: Okay.

22 Should we just go through them one by one and then we'll see where we are?

23 MS FORD: Sir, yes, there are, if I may just take a brief moment of the Tribunal's time,

24 just a couple of very short points that we would want to make in the run up to that, and

25 then we can dive in, so to speak, into the schedule.

26 THE CHAIR: Yes, that's a good idea.

1 MR MALLALIEU: So the first is just following off the judgment that's been given today
2 approving the settlement, is that from the perspective of Woodsford as a funder, of
3 course, we fully support the Class Representative's application for approval of the
4 settlement, as we've supported the Class Representative and his legal team
5 throughout this case to get to this point.

6 We do say that we also fully support the approach that's been taken by the Class
7 Representative to ensure, as far as is possible, that what's been achieved in this case
8 can be regarded as a success. And, in that regard, we do in particular highlight the
9 steps that have been taken by the Class Representative to deal with the issues that
10 have cropped up in previous cases.

11 So this Tribunal will know the *Gutmann* case only too well, and there have been
12 references to it today but of course the situation here --

13 THE CHAIR: But we don't want another *Gutmann*, you know that.

14 MR MALLALIEU: We don't want another *Gutmann*.

15 THE CHAIR: Looking at it, this is not going to be a *Gutmann*, I really hope it's not
16 going to be. *Gutmann* was disappointing for everyone. But where I am on that at the
17 moment is, until I see what the distribution plan is and the take-up, I can't form a view.
18 You know, I'm hoping I can form a positive view, but I really can't at the moment.
19 I don't want to take that risk. That's why, when it comes to the CFD sum, I'm happy to
20 give you certain of the items, but other items I'll look at next time round.

21 MR MALLALIEU: Well, sir, I see that. And of course, what underpins the application
22 for the CFD sum is, of course, the CFD sum that is being applied for is, of course, only
23 the £20 million MN settlement --

24 THE CHAIR: I understand that you've got the other settlements. Yes, I understand
25 that.

26 MR MALLALIEU: -- and it represents only, presently, less than a third of the fees and

1 expenses that the Class Representative has incurred in his duties acting on behalf of
2 the class members to get the case to this point.

3 THE CHAIR: But a lot of that is uplifts for the lawyers, the funders, the ATE insurers
4 and all that. Where we are on that, I'm parking that for now until I can give a proper
5 ruling on success. I'm hoping that all the work that's been done at the moment and
6 will be done, that we will have a significant sum that's been taken up by class
7 members, but even if we don't, we've still got the charity point.

8 But I'm not convinced at the moment that I know what the likely range is in pounds,
9 shillings and pence, as to what is going to be taken up by class members. And that
10 funders need to appreciate -- and perhaps it's unfortunate it comes at this stage -- that
11 the best case is to back is where you can be confident at the beginning that not only
12 are you going to get damages, which is fine, but that there will be ways to distribute
13 a significant proportion of that damages, because if you don't, you're going to have
14 a Gutmann situation.

15 MR MALLALIEU: Well sir, just coming back to that point, and I fully appreciate, of
16 course, the concerns that the Tribunal has --

17 THE CHAIR: But it's not just me. I don't live in a goldfish bowl. This is a concern. If
18 you look at these things, it's a widespread concern, and I want the collective
19 proceedings regime to work for the benefit of class members and the public.

20 I also appreciate that funders and ATE insurers and the lawyers play a critical role in
21 all of this. I don't like, or don't want outcomes where anyone, let's say, is short
22 changed, because that's a short-sighted approach, because if you do that, you're
23 going to lose one of the legs of the three-legged chair that you know about. I don't
24 want that to happen. And, hopefully, what will come out today will be a great
25 encouragement for the CR and those preparing the distribution plan and advising
26 them, is to come back with something that is significant in terms of payment out to

1 class members. If that happens, then you'll probably have a fairly easy ride next time
2 round.

3 MR MALLALIEU: Sir, I'm all for an easy ride, even if it's on the next occasion and not
4 this.

5 THE CHAIR: Ms Ford never gets an easy ride, you know that. You may do.

6 MR MALLALIEU: Well, sir, as I say, we fully appreciate all that, and, in fact, the point
7 I was going to make was that the aim of ensuring that damages that are achieved are
8 distributed to the class members is one we support as much as everybody else in this
9 room.

10 THE CHAIR: I think so, and I've said this in the past. Having looked at Woodsford on
11 a number of cases, I have a high regard for Woodsford. I think they're a very good,
12 professional outfit, and they're pretty responsible, and they're flexible. So, you're not
13 on any sort of blacklist of Malek. You have an element of goodwill already, but that's
14 only the goodwill because the way I can see that you've been conducting things, and
15 I do read the correspondence behind the scenes. You can see what's going on.
16 You're very professional outfit.

17 MR MALLALIEU: Well, sir, I'm grateful also for that indication.

18 The only point I wanted to make, therefore, in relation to this was just to stress two
19 things, really.

20 The first is, of course, that we are in very early stages in terms of outcomes in this
21 jurisdiction and the issues of distribution. And we all hope, I think, in this room,
22 certainly on this side of this room, that as time goes on, and in particular as public
23 perception becomes used to the idea of awards in cases of this kind, that that will see
24 a general uptake in distribution.

25 The second point that we say that goes with that is just really to emphasise our
26 support, which we have given to the class rep in relation to this, in finding creative

1 ways, encouraged by this tribunal in *Gutmann* and other cases, to deal with how
2 a case can be made to be a success if there is a poor distribution. In that regard, of
3 course, in this case, we do emphasise the point that you will recall only too well.

4 In *Gutmann*, of course, there was the poor distribution, and then there was the
5 question of how to deal with that by way of encouraging the parties to consider
6 a payment to charity out of the sums that were available, and we were in the opposite
7 end of that approach here. The Class Representative here has sought to cater for that
8 as best he can by very substantial sums of money being ring-fenced by the funders
9 undertaking and agreeing that they will not seek at all to recover any costs, fees and
10 disbursements out of those very substantial sums, and if they don't go to the class
11 members, they will go to the charity so that they can be for the benefit of the class
12 members in a wider sense.

13 So whilst we take on board the point that the full measure of success in the sense of
14 who is the prime beneficiary, is it the class members or is it the charity cannot be seen
15 at this stage, we do say that this case can be seen as a success because of those
16 careful steps that the Class Representative has taken to ensure that there will be
17 substantial sums one way or the other for the benefit of the class members.

18 THE CHAIR: Look, I'm nearly in agreement with everything you said there. You've
19 still got the qualification that Malek would like to see what happens at the next stage.
20 I hope you're right, but let's see what comes out of the next stage.

21 I've said enough about what I think may happen, and it's really the job of everyone to
22 make sure that we get as good take up as possible. If we do, then everyone's going
23 to be happy, I would have thought, and it's a very positive outcome for the collective
24 proceedings regime.

25 MR MALLALIEU: Sir, thank you, and I appreciate you're very keen to get to the
26 schedule, so I'll get there very shortly.

1 THE CHAIR: Not that keen, but yes. It's the most boring part of the hearing.

2 MR MALLALIEU: The second point I just wanted to make: the issue was raised as to
3 the risk of a perception that either the settlement that was being promoted or the
4 overall benefit of that settlement could be seen to be in the interest of the stakeholders
5 and not the class members.

6 THE CHAIR: I've dealt with that in the ruling. I've accepted that, on the facts of this
7 case, that's not -- I've accepted the submission by Ford on that, and, of course, it was
8 something that I had to go through, because if I hadn't, that may be on other people's
9 minds. But I've looked at it, I've shaken the tree. I'm satisfied that this is a settlement
10 where everyone's trying to do the best for everyone, and that this is not a case where
11 the parties are out to just, sort of, enrich themselves, not really caring how much comes
12 out of it. But the final test on that is at the next stage. I'm not going to express
13 a concluded view on success until I see the results of the distribution.

14 MR MALLALIEU: Sir, no, again, you've made that point and you've heard my
15 submissions in relation to it. But again, the point is we have joined with the Class
16 Representative here in taking steps which we weren't obliged to take to reach
17 a position that allowed the Class Representative to put forward this settlement
18 whereby there are these guaranteed --

19 THE CHAIR: That's one of the reasons I have a positive impression of Woodsford,
20 because I can see what you've done, and that without the co-operation of you and the
21 ATE insurers, of course. This is a settlement which probably would never have got
22 past the post. But you are flexible, you're learning what's happened, and to a certain
23 extent, we're all learning, and that's to be commended.

24 MR MALLALIEU: Thank you, sir. And then, coming very shortly to the schedule, the
25 third and final point, of course, which follows from that, and it's an obvious point, and
26 it's one that, if necessary, I could emphasise by reference to judgments from this

1 Tribunal and others is that, of course, we would not be in this position at all were it not
2 for the support generally of the funders and the insurers.

3 I'm not inviting you to turn it up now, but you will have seen references in the witness
4 statements you've been provided with to the witness statement of Ms Hollway, where
5 she goes back to the time when funding was originally provided and, indeed, insurance
6 was provided. The steps that were taken to obtain that, the difficulties that were faced,
7 particularly given that this has taken six years. So we were again in very early days
8 of this regime at the time.

9 And, of course, the short point is -- a point this Tribunal is very alive to, and indeed so
10 you've already alluded to it -- that where class representatives seek to bring a claim of
11 this kind -- where they go to the market, they test the market, they obtain the funding
12 and the insurance to support it -- that funding and insurance will only be available on
13 future occasions if, in the successful cases -- and we do say these are one way or the
14 other -- the appropriate reasonable contractual payments that flow from providing
15 those funding and insurance are made available if there are the funds available to do
16 so, and there are the funds available to do so.

17 THE CHAIR: Insofar as there are funds, and I accept there's not unlimited funds, the
18 encouragement, public interest is that those funds are invested in cases where there
19 will be substantial beneficial outcomes for class members, and that if funders, as
20 a result of all of this, are reluctant to fund certain types of cases where they say, "Well,
21 this isn't a follow on case, it's got too much risk, I'm going to leave that", they say "Each
22 person is not going to get more than £3.04 on something that happened 15 years ago,
23 I can't imagine there's going to be a huge take up on that". If you're not going to be
24 funding cases like that, that's perfectly reasonable.

25 What you may find as funders is, is that one reaction to the type of Gutmann scenario
26 is you become more selective in which collective proceedings you fund, and you pick

1 ones where you can see that they're going to be more positive outcomes, class
2 members, or that you get the CR to do more research on distribution and likely
3 outcomes at the very beginning, as a condition of you providing long-term funding.

4 MR MALLALIEU: Well, sir, again, this is a learning curve, certainly, for everybody.
5 We are still in the very early stages. And, of course, I make the point again that this
6 agreement was entered into six years ago. It was one of the earliest claims that had
7 been brought under --

8 THE CHAIR: I'm not criticising what happened six years ago, because we didn't have
9 the lessons of the other end. You know, six years ago, proceedings were being
10 certified without the experience of what happens at the end. We're now getting
11 experience at the end, and we'll probably have -- all of us will have a better view as to
12 what's needed at the front end, what are the best cases for you to fund, and not -- you
13 know, you may find a case where you've got to follow on with real people to make
14 claims, and the best ones to go for. And you may find that ones where there's only
15 a very small amount per class member that happened years and years ago, although
16 superficially attractive, may not be as attractive as a claim in that first category. But
17 it's lessons for everyone.

18 And within this whole learning lesson, I think Woodsford is at the top of the game in
19 a sense that you're learning and you're helping the Tribunal and everyone to get to
20 a sensible outcome, not just for this case, but for future cases.

21 MR MALLALIEU: Well, sir, on that point, the only final point I would make on that is
22 that, of course, the prism we say, through which the consideration of the cost, fees
23 and disbursements should be looked at is, of course, a prism which takes into account
24 everything that's happened over the six years.

25 The fact that we were asked to provide funding in relation to this claim, the fact that it
26 was hoped and thought at that time that it would be a successful claim, the fact that

1 we say it has been a successful claim and that we have provided everything that was
2 asked of us and take this claim to the point that we've been we've arrived at. So, yes,
3 there are hopefully lessons to be learned for the future.

4 But, of course, we have invested in this case. We've invested in this case in a way
5 which has brought it to the recovery of very substantial amounts from Defendants, and
6 that is, we say, the prism through which consideration of our expenditure should be
7 considered.

8 THE CHAIR: Yes, that's right. And if we can look at page 902, and the letter.

9 So we can see that -- there's a slight difference in figures, that's fine. And that -- as
10 I understand it, you've recovered costs of £1.4 million-odd.

11 MR MALLALIEU: Correct.

12 THE CHAIR: What I want to understand is there's a figure earlier somewhere about
13 an adverse cost order of about 200 or whatever. Where's that reference?

14 MR MALLALIEU: If you're in annex 1, that is at row N of the table. And in terms of
15 the adverse costs themselves --

16 THE CHAIR: What I'm trying to understand is that they paid out 200,000?

17 MR MALLALIEU: Correct.

18 THE CHAIR: Did they get that back later or they never got that back?

19 MR MALLALIEU: No, they haven't got that back. They are seeking that back now,
20 and they're entitled to it back.

21 THE CHAIR: Okay, we've dealt with that one now already. So I can just take that one.
22 Okay?

23 Now, as regards solicitors' fees, I don't have enough information. I need to work on it
24 properly as to whether or not the solicitors' fees are reasonable and the ones that
25 I should approve. That's really the next stage. But what I am satisfied is that the
26 minimum amount is going to be caught within the solicitor's fees non deferred. It may

1 be I'm going to revisit that later and take it into account. But, at this stage, I'm happy
2 to tick A. Okay, so we can tick A. Then I'll just say the ones I'm happy with, and then
3 we'll come back.

4 Counsel's fees. That's fine. Expert fees and factual witness costs: that sum doesn't
5 seem surprising at all, given the size and the complexity of the expert evidence.
6 I would have thought most of that's the expert evidence, so we can tick that one. H
7 we can tick. CR's costs seem entirely reasonable. It's probably even lower than
8 I thought it would be for six years of work, so I can tick that one. "Other costs", can
9 you address me on that? The other "Other costs"; the "ATE insurance deposit
10 premiums", I can tick that. And then the others. At the moment, I need your help on
11 what, if at all, we should be awarding it payment of any of that. If someone could add
12 up the ones we've ticked, I'd like to know what that figure is. So someone could add
13 up A, D, G, H, I, L and N, and give me a rough figure. We'll have a break before I give
14 a ruling, but if that can all be done so we know what we're talking about.

15 MR MALLALIEU: Of course.

16 THE CHAIR: Then, when we get a figure, if we deduct from that figure the recovered
17 costs of 1.43, and we'll see what that is. Then, it may be that we'll end up with a round
18 figure, but, as I understand it, it's down to your clients; your clients will receive this
19 money, it's already paid out.

20 MR MALLALIEU: The items that you've identified are items that have been paid out
21 by (overspeaking).

22 THE CHAIR: Exactly. So when it comes back in, the CR will send it to you.

23 MR MALLALIEU: In relation to those items, yes.

24 THE CHAIR: Those items, yes. That's fine. So those items are fine, so if you can
25 help me with J and K, or if your junior wants to help me, that's fine because I'm always
26 happy to hear different voices.

1 MR MALLALIEU: It's all right. I can seek to obtain more detail. I don't have a great
2 deal of detail at the moment about what is in J and, indeed K.

3 As I understand it, it relates to litigation support fees and costs. So matters such as
4 the e-disclosure costs, the translation costs, the carrier costs, and the disbursements.

5 THE CHAIR: When you come back, when we come back, see if you can find any
6 references to a more detailed breakdown in the evidence and stuff. But, certainly you
7 should have something in relation to that, even if it's sort of 500 on a contingency
8 basis. But if I can have a rough idea what the classes are, how they break up, then
9 I can either say if we're happy with it, the full amount, or if we're not quite sure, it'll be
10 a percentage of that amount. And then on, what about K, is that the same?

11 MR MALLALIEU: That is the same. We'll seek to obtain any further information to
12 assist you with that.

13 THE CHAIR: Yes, that's good, okay.

14 MR MALLALIEU: So that will then leave the -- if we deal with J and K, that will cover
15 the items of "Funder's Outlay".

16 THE CHAIR: And how much will that be, roughly?

17 MR MALLALIEU: That I think will be in the region of about £10 million pounds. 11.3
18 roughly.

19 THE CHAIR: Okay.

20 MR MALLALIEU: I'm grateful. So about 11.3 with J and K.

21 THE CHAIR: 11.3, including J and K.

22 MR MALLALIEU: Yes. And that's before you deduct then the recovered costs. Sorry,
23 not including J and K. So the total --

24 THE CHAIR: Not including?

25 MR MALLALIEU: Not including J and K. So the total outlay is 11.8-odd. J and K, as
26 you can see, are just over half a million; five seven (overspeaking).

1 THE CHAIR: Yes, so total outlay is 11 point (overspeaking).

2 MR MALLALIEU: So it's about 11.3.

3 THE CHAIR: Yes. So if J and K are added in, that will come to just short of 12.

4 Where we are is, of the three scenarios, we're in the third scenario, okay, that we dealt
5 with in the morning. Scenario 1, you get the full amount scenario 2, you get zero;
6 scenario 3 you'll get whatever you get on this type of analysis. So I'm not inclined,
7 and I've spoken to my colleagues on this, to give you £20 million today, for the reasons
8 I've given earlier. But I am inclined to cover what you've actually paid out already.
9 Then, when it comes further down the line, you can come back and apply for more.
10 Because when we get the distribution plan, you may write in and say, actually, now
11 you've got the distribution plan, you can be more confident, give us a bit more, or
12 whatever it is in relation to the CFD amounts. But the final CFD amount will not be
13 determined until we've got the amount of claims; we know the claims.

14 MR MALLALIEU: Obviously the indication is useful, to know what the Tribunal is
15 thinking, but it perhaps won't come as a surprise if I seek to push back.

16 THE CHAIR: Of course, it doesn't come as a surprise, no, of course not.

17 MR MALLALIEU: What we would say is we invite the Tribunal to bear in mind what is
18 being sought here today, which is the £20 million and what that goes to. So, the
19 £20 million would allow for, first of all, reimbursement of what is actually being laid out,
20 the whole that my client has spent.

21 THE CHAIR: I'm more than happy to (inaudible).

22 MR MALLALIEU: I'm grateful for that, subject to the point about J and K, which we'll
23 come back to you on.

24 THE CHAIR: Exactly.

25 MR MALLALIEU: What it would also allow then is a contribution, and no more than
26 a modest contribution, to matters such as the deferred solicitors' fees, solicitors'

1 success fees, the deferred counsel's fees.

2 THE CHAIR: The only problem with those is that if -- I need to be satisfied that overall
3 the sums being claimed by the lawyers are reasonable. The mere fact that they've got
4 a contractual entitlement or whatever to whatever the fees are isn't conclusive. If, in
5 fact, and the rates that they're claiming, if you look at the base rates, they probably
6 are above the guideline rates. So these things I want to look at in detail. I do not want
7 to have a situation whereby I approve all of this, and then that's the end of it. All the
8 lawyers have been paid and they say, thank you very much, we've been paid. There's
9 nothing you can do, and that's the end of it. So I'm not keen to give you, in respect of
10 lawyers, anything other than the ones I've indicated for now.

11 MR MALLALIEU: Sir, if I may, we understand the Tribunal's caution because it doesn't
12 want to fetter its ability, in due course, to properly scrutinise the costs, fees and
13 disbursements.

14 THE CHAIR: Yes, and I want to do that later.

15 MR MALLALIEU: Whether overall, they are reasonable. What we do say is that the
16 amounts that are being sought over and above the outlay, which would come out of
17 this £20 million, are in fact very modest. So without wishing to pick on anybody, and
18 it just so happens that they're at the top of the table, so Scott+Scott are the ones I'll
19 look at in terms of the deferred fees and the uplift. So those total, as you will see, the
20 solicitors' deferred fees, because of the solicitors' willingness to be involved in backing
21 a case of this kind on a deferred fee basis, you will see the substantial difference
22 between their non-deferred fees and then the deferred fees and the uplift.

23 THE CHAIR: They take the biggest risk in this case.

24 MR MALLALIEU: Well they have -- well I wouldn't --

25 THE CHAIR: Apart from you obviously, you take a complete risk. But, let's be honest.
26 When I looked at this first time around, I was pretty satisfied that you weren't backing

1 a dead horse. I think it was -- you've always had a strong case on the merits. This is
2 a follow-on case. It was really a question of how much it was going to be worth. But
3 the guys who took a very major risk were Scott+Scott.

4 MR MALLALIEU: Well said. It won't surprise you that I don't dispute the idea that
5 Scott+Scott took a substantial risk. But that, of course, won't stop me from making the
6 point that --

7 THE CHAIR: No, you can make the point.

8 MR MALLALIEU: -- my client took a very substantial risk in this case, particularly given
9 the infancy, the very early days. If we look at Ms Hollway's witness statement, you will
10 see what she says about the difficulties she had in finding funding. The funder that
11 she spent considerable time with, who then withdrew because they thought it was not
12 a viable case; the absence of other funders in the market. The difficulties, of course,
13 we're talking even at pre-PACCAR days in relation to the very early infancy days of
14 this market.

15 But, anyway, it's not any part of my role here to try and differentiate between the risks
16 the different stakeholders took. My point is that if we look at the solicitors' fees, for
17 example, you can see that the amount that would be paid by way of recruitment of our
18 outlay in relation to the solicitor's fees is actually a very small part of the total solicitors'
19 fees that are now payable, once you take into account their deferred fees and their
20 uplift. The point that follows from that is that if the £20 million was to be paid, that
21 would allow part, but only a small part, of those solicitors' deferred fees to be paid to
22 the solicitors. They wouldn't in fact receive anything in relation to their uplift. They
23 would receive part of their deferred fees, that is all. And that would very much leave
24 the Tribunal in the position that on the next occasion it could be satisfied it still would
25 have an adequate ability to scrutinise the totality of those fees, to be satisfied that they
26 were reasonable.

1 The same point applies if we look at counsel's fees and uplift, and the same point
2 applies if we look at the funder's fee. You can see at the bottom of that table the
3 funder's fee that is payable. But, of course, if the £20 million is allowed, it is only a very
4 small fraction, a very, very modest part, which wouldn't remotely recognise
5 a commercial rate of return in a successful case which would be applied. So the
6 fundamental point I'm seeking to make is that I fully understand the Tribunal is
7 concerned that it doesn't want to fetter its ability in due course. But we do say when
8 you look at these figures, and you see what will be paid out of the £20 million, if the
9 £20 million is made available to the Class Representative to do so, that will leave
10 a huge amount of room for this Tribunal to say, in fact -- and we don't think it should
11 say -- but were it to say in due course, we think, for example, the solicitors' total fees
12 are too high; we think counsel's fees are too high in total; or we think the funder's fee
13 is too high in total, there will be a huge amount of room, even in a successful case of
14 this kind, for the Tribunal to exercise that scrutiny, despite it having allowed the
15 payment out of the £20 million at this stage.

16 The other point we do make, sir, is that to not allow the £20 million to be paid out at
17 this stage, in a case where success has been achieved against all the Defendants, all
18 the Defendants have agreed to pay substantial sums in damages, all the Defendants
19 have agreed to pay substantial sums by way of costs; the message that will be sent in
20 that situation: that funders, other stakeholders, insurers -- and I haven't even touched
21 on the ATE insurance premium, if they were not at that point to receive at least
22 a reasonable amount in terms of their entitlement, that is something that is likely to
23 have a significant chilling effect on the approach taken by such stakeholders, not just
24 funders, not just insurers, but indeed solicitors and counsel in cases, to their
25 willingness to engage in such cases.

26 THE CHAIR: The problem with that argument is it is not as if I'm saying you can't have

1 it. If I was saying you can't have it, I can understand that. But if we look at the ATE
2 insurers, I'm saying, now you can have £1.988 million. You'll get back the adverse
3 costs. That's a significant sum in any event. As regards the rest, we'll come back to
4 it later. I'm not saying they're not going to get it. That's where I am at the moment.
5 I'm not making any decision about what you get on success, because that's really an
6 issue I want to deal with next time round. Also, just for the solicitors' own position,
7 lawyers' position, next time round, I'll expect a more detailed analysis of the rates
8 they're charging, the hours they've done, how those rates fit in with the guideline rates,
9 why they say it's appropriate for the Tribunal to approve those rates. So what I've got
10 at the moment is not enough. If they'd done more, then maybe I'd be more
11 sympathetic. But I do understand where you're coming from.

12 MR MALLALIEU: Sir, of course nobody is asking the Tribunal on this occasion to
13 approve £61 million worth of (overspeaking).

14 THE CHAIR: I know. Of course you are not.

15 MR MALLALIEU: That's not what we're here for. We're here to see --

16 THE CHAIR: I was talking about the lawyers at the moment.

17 MR MALLALIEU: Well, indeed, nobody on the solicitors' side is here to ask the
18 Tribunal to approve £14 million of costs or whatever it is the total of those three figures
19 at the top of that table add up to. All the Class Representative is asking for, which
20 I am seeking to support, is payment of £20 million pounds, which will allow repayment
21 of the money that has actually been spent, the money that has gone out from the
22 funder in terms of the non-deferred fees and the non-contingent aspects such as
23 experts' fees.

24 Then a contribution towards the balance, in light of the fact that the claims have ended,
25 in the sense of: the damages have been agreed, the claims with the Defendants have
26 settled and we await distribution, that there have been substantial damages paid. The

1 fundamental point -- because I can understand the concern the Tribunal has, but we
2 say it's a concern that the Tribunal doesn't need to have -- because allowing that
3 modest contribution is not going to prevent this Tribunal exercising the scrutiny it wants
4 to exercise over the totality of the costs, fees and disbursements in due course.

5 The secondary point I would just make in relation to that is: we fully appreciate the
6 Tribunal's indication that of course this is not the final sum, and you're not saying "You
7 can't have it". You're just saying "not yet", at least in relation to some of it. But of
8 course, passage of time is an important factor in and of itself. It is a factor that is an
9 integral and indeed critical part in the consideration of whether funding is going to be
10 provided for a case, for example. It's --

11 THE CHAIR: We will get to a landing on everything. This in 2026. We will. They will
12 do the draft distribution plan. We will come back with any comments on it. We then
13 have a hearing on it. We then will know how much is coming in, and then we deal with
14 it. So I don't think it -- and the context, as you say, it's already gone on for six years.
15 I don't think it's that important for people other than the funder to get more than what
16 I've already indicated is a fair minimum.

17 I'm happy to hear what further points you'd like to make, but we'll hear that in about
18 ten minutes, when you give me the breakdown of J and K, because I've already said
19 that we're going to give you the other ones I've ticked. J and K, I've just got an arrow
20 against those ones, subject to you satisfying me of that. Either you will satisfy me, in
21 which case I'll take them, or they're somewhere in between where I'll recognise clearly
22 most of it's going to be justifiable, so I'll give you most of it.

23 But as regards the rest, I'm still not comfortable in awarding more than this. You've
24 got to realise that this is an action brought on behalf of consumers, normal people.
25 For them, these are vast sums. On the one hand, you were talking about £5 per
26 vehicle. On the other hand, you talk about these sums as if they're small change.

1 These are very substantial sums for anyone. As a judge, I understand, for example,
2 why the expert fees are the level they have, because I've seen the sort of detail and
3 all the work that they've done. It is a massive job. I can see that. I can see how it's
4 reached that sum. But I think we have to be careful about asking for it at this stage.
5 We'll take our break now and see where we are.

6 (3.17 pm)

7 (A short break)

8 (3.39 pm)

9 THE CHAIR: Before we look at J and K, when I look at the fee, I can see the point
10 you're making about B, because Scott+Scott have taken (a) a huge risk, but (b) their
11 deferred fees are so much more than the solicitor's fees that have been paid. So we're
12 inclined to say that of the deferred fees, they get £2 million, and so that £2 million will
13 go to Scott and Scott. So when the CR has paid whatever the figure is we agree,
14 £2 million will go to Scott and Scott. We will, of course, deduct the £1.4 million of fees
15 that have already been paid from the overall figure. But we're getting closer to an
16 overall figure.

17 If we can deal with J and K, so we know which we are happy with, and then we can
18 move on to any further submissions.

19 MR MALLALIEU: Sir, thank you. I'll come directly to J and K.

20 Just in relation to that, I'm grateful for that indication. Of course, what I'm seeking to
21 assist the Tribunal with is arriving at, by reference to these documents, an overall
22 figure which it feels comfortable to award to the CR in response to his application for
23 the costs that he seeks. Sorry, sir.

24 THE CHAIR: The thing we're doing now is the first stage before we get to that. We're
25 still working through that, and it's 3.40.

26 MR MALLALIEU: Sir, thank you. Coming then directly to J and K, and then I'll come

1 to just another few short points.

2 You should, I hope, also have, behind annex 1, annex 2, which looks a bit more like
3 a sort of more conventional billing cost schedule.

4 THE CHAIR: Yes.

5 MR MALLALIEU: Just to deal with that very briefly, this breaks down into a number of
6 parts. You can see the first page, "Costs incurred by Scott & Scott". That is the
7 solicitors' fees not including uplifts, not including success fees.

8 THE CHAIR: Yes.

9 MR MALLALIEU: Then on the next page, that trips over into counsels' fees, which is
10 the same basis, so counsels' non-deferred and deferred fees, but not success fee.

11 Then to come to J, K and the other matters, you then have a heading of
12 "Disbursements incurred". Sir, if you have that, first, ATE insurance fees £1,988,000.

13 That is the ATE insurance deposit premiums, which are L.

14 THE CHAIR: (Overspeaking) Yes.

15 MR MALLALIEU: We then come to the next, and unfortunately -- slightly unhelpfully
16 now we're in the position we're in -- they haven't all been given an identification letter
17 next to them, but we can see fairly quickly what they are. So the next item I'm going
18 to come to is K, because that's the item described in annex 1 as "Other costs incurred
19 by the funder in relation to the action".

20 THE CHAIR: Yes, that's why I was a bit confused.

21 MR MALLALIEU: That is the penultimate entry on that page.

22 THE CHAIR: Which one?

23 MR MALLALIEU: Mr Marven. It's Mr Marven. So the penultimate entry on that page
24 that you should have there, sir, under "Disbursement", should be "Fees of Robert
25 Marven KC".

26 THE CHAIR: Yes.

1 MR MALLALIEU: Do you see that? Without intending any disrespect to him,
2 Mr Marven is K, for want of a better explanation.

3 THE CHAIR: Is that all that --

4 MR MALLALIEU: Sir, of course, that's not for today. Mr Marven wants me to make
5 that clear. Mr Marven has been before this Tribunal on two previous occasions.

6 THE CHAIR: There's no problem in agreeing Mr Marven's fees. (Overspeaking)

7 MR MALLALIEU: Well, I'm sure that's music to Mr Marven's ears, if nothing else.

8 THE CHAIR: (Overspeaking) Yes.

9 MR MALLALIEU: That is the costs incurred by the funder in respect of the two
10 previous hearings, for the benefit of Mr Marven's representation.

11 THE CHAIR: That's absolutely fine. Yes.

12 MR MALLALIEU: So in relation to the rest of that, it's a little bit more difficult to pick
13 out.

14 THE CHAIR: We're looking at J then, aren't we?

15 MR MALLALIEU: If we look at J -- so if you come over onto the next page, which
16 continues the disbursements, and they're a little bit mixed together. As we come down
17 the page, you'll see some names that are probably familiar, such as Neil Cunningham,
18 Palmer Automotive, et cetera. They are experts and witnesses, so they form part of
19 G. But most of the other entries on this page -- so for example, fees of KLDDiscovery,
20 100 and odd thousand pounds; fees of Opus 2; fees of Transperfect; fees of
21 Martin Walsh Cherer; courtroom hire fees; et cetera, et cetera -- they are the items
22 that make up the block figure of J.

23 THE CHAIR: The whole of that page is J?

24 MR MALLALIEU: No, sir, not the whole of that page, because we have to take
25 out -- and unfortunately, they're not separately identified -- but that page comprises of
26 sums in relation to what is in item G, so experts and fees and factual witness costs,

1 and J.

2 THE CHAIR: Okay. Hold that thought. I'm inclined just to give you now £300,000
3 rather than doing a proper estimate, because I want to do this properly. We're not
4 going to be able to do it now.

5 So on J, it will be £300,000, but obviously next time round, you can try and top it up.
6 I know it sounds -- for you it's small change, but for members of the public, that is
7 a significant sum.

8 MR MALLALIEU: Well, sir, I'll just make one point in relation to that. Of course, the
9 first point is, and I heard the point from the Tribunal before the adjournment. But of
10 course, it is a necessary part of bringing cases of this kind that there are substantial
11 costs involved. They can't be brought without those substantial costs.

12 THE CHAIR: When it comes to the distribution plan, you can write a letter, you break
13 down the £500,000, explain them all, then we'll look at it, and if we're happy with it, we
14 approve it. We are not talking about waiting a year. What I am saying is: I'm
15 comfortable today, on the basis of looking at this and what you've said, to give you
16 £300,000. If you're happy with that, then you're happy with it. If you're not, then you're
17 not, but then (overspeaking).

18 MR MALLALIEU: Well, sir, unsurprisingly, I'm not happy with it, but I appreciate that
19 there may be a limited return in my expressing my dissatisfaction.

20 THE CHAIR: No, but what I'm saying is, the things I can understand and appreciate,
21 like K, straight away, happy with that. It's an entirely reasonable figure for him. When
22 I look at, for example -- when you look at Jon Lawrence's fees, I've seen his opinions
23 that he's filed earlier on in the proceedings, and I can see that's a reasonable fee.
24 I can see that. But all the others are going to take me a bit more time than we have
25 today to do it properly, and we are expected to vet these things properly. But I'm sure
26 next time round, you'll be able to put something in more detail saying, "Well, you

1 approved £300,000. Here is the rest," and then we can look at them one by one.

2 MR MALLALIEU: Sir, I see that. But again, the point I would make is that in respect
3 of this schedule you have in front of you, in terms of the items that make up J, for
4 example, by far the biggest parts are the fees of KLDISCOVERY and of Opus 2, which --

5 THE CHAIR: (Overspeaking) taken that into account, giving you £300,000.

6 MR MALLALIEU: -- which themselves add up to more than £300,000. The sum that
7 you've allowed, or the sum that you've indicated you're prepared to allow to be paid
8 out to the Class Representative in this regard, is --

9 THE CHAIR: (Overspeaking) look, KLDISCOVERY and Opus 2. You're saying -- all right.
10 I'll make it £400,000, and that makes sense. I clearly understand those, and I can see
11 that that's reasonable. I can understand Lawrence's fees, because I've looked at his
12 opinions, so I can honestly say I've vetted that. I'm satisfied with it. But what everyone
13 has to understand is we do have responsibility to satisfy ourselves for every entry, and
14 it's not a rubber stamp. Although these sums seem to you to be relatively modest
15 sums, that may not be the view of the general public. We do have to do this exercise
16 properly, and I will do it properly.

17 MR MALLALIEU: Sir, I fully appreciate that.

18 THE CHAIR: It's going to £400,000 for J, for now.

19 MR MALLALIEU: Again, the only point I'd make in relation to that, of course, is that
20 the question of what are the reasonable costs that are to be paid out to reflect the
21 costs that the Class Representative has incurred to reach this point is, of course, a test
22 that that's not decided by reference to what the public might think of these costs.

23 THE CHAIR: We do have a duty as the Tribunal to satisfy ourselves as to every entry.
24 That's part of our job. And if members of the public thought that we would just say,
25 "£500,000 or whatever is fine", without inquiring into more detail as to what they were,
26 they're not going to be particularly happy, and nor am I.

1 The things I'm satisfied with, I've given you examples. It's easy for me, for example,
2 to say, Mr Lawrence's fees because I've read his opinions and I've seen the amount
3 of work he's put into it, and when I see the amount he's charged for it, it's perfectly
4 reasonable. And it's the same with category K, you know.

5 MR MALLALIEU: Sir, thank you. Can I just then -- I'm acutely aware of the time and
6 also of the points that -- Mr Marven will have some points he wants to make and he
7 must have time to do that. Can I just then come back briefly to where I left off before
8 the short adjournment.

9 So coming back to annex 1, the schedule at the front. The points that I would wish to
10 make are firstly, of course, that -- and again, I appreciate this is repetition, I'll do it very
11 quickly --

12 THE CHAIR: As long as (overspeaking).

13 MR MALLALIEU: All that is being sought here, as I've made the point, is
14 a contribution, a modest contribution, towards the totality of these costs. The totality
15 of the payment that is sought is less than a third of the costs that the Class
16 Representative has incurred in this case. It leaves an awful lot -- more than adequate,
17 we say -- of room for this Tribunal to exercise its jurisdiction.

18 So, for example, if we were to just look at the funder's fee, the funder's fee that is
19 contractually payable and accepted to be payable by the Class Representative is just
20 short of just over £26.5 million. If the £20 million is paid, roughly 20 per cent of that is
21 all that is payable, which -- and we can pick this up if necessary from the witness
22 statement of Mr Friel, which you've indicated you've seen --

23 THE CHAIR: I've seen that, yes.

24 MR MALLALIEU: -- would amount to a return which would not even remotely provide
25 for the economic funding of litigation of this kind.

26 So, in our submission, the prospect that the Tribunal -- even taking into account the

1 level of distribution that's achieved -- will ever be in a position where it says that,
2 essentially, no return at all can ever be paid in this case --

3 THE CHAIR: I'm not saying that. I'm saying that I'm going to make that determination
4 next time round, or the time after, maybe. But it's what we're doing, and what you're
5 asking for, is a payment of substantial sums of money, and it is substantial. And the
6 Tribunal's got the duty to vet costs, fees and disbursements, and we're not doing that
7 on a rubber-stamp basis. You know, that's how it is.

8 MR MALLALIEU: Sir, I'm not inviting that -- of course, I'm not inviting you to rubber
9 stamp the £26 million funder's fee. I'm inviting the Tribunal to be satisfied that by
10 allowing a payment to be made, which would allow for roughly 20 per cent of that fee,
11 or 20 per cent of the other success fees to be paid, the Tribunal can be satisfied that
12 there is no proper basis on which that amount would never be payable, and that it has
13 then the adequate scrutiny to scrutinise what further amounts are payable at an
14 appropriate stage.

15 The only other point I would add to that, sir, is of course, we appreciate the nature of
16 the application is we were only seeking a contribution. Nobody approached
17 today -- and the Tribunal hasn't, and nobody else has -- on the basis that this is a final
18 approval of the total sums payable. That's not why anybody is here. But delay is
19 a very substantial factor in the viability of funding arrangements and the provision of
20 ATE insurance.

21 A delay of "only a year", to use an expression, can mean the difference when funders
22 are considering funding cases of whether they will fund the case or not, and it can
23 mean a substantial difference to the return that they would seek to charge if they
24 choose to fund that case.

25 THE CHAIR: I'm not imposing any delay on the extent to which you've had outlay and
26 were satisfied now that that's proper. I'm not giving you any delay on that. The delay,

1 as you like to call it, is a delay in coming to a view as to what are the appropriate fees,
2 bearing in mind the overall success of the proceedings. So I am sympathetic, that's
3 why I'm willing to give you the sums that we're talking about now.

4 But in the context of the case has been going on for six years, we're much happier to
5 look at all these issues again at a later stage, and I envisage everything will be
6 resolved in the course of this year, because it's down to the CR as to how long before
7 he comes up with a distribution plan. At that stage, you can ask for more money.
8 I may or may not give it to you, but it depends on where we are and how clear it is
9 about the take-up rates, but you certainly will have a decision when it comes to when
10 we know what the take-up is. Once we have the take-up, we all know where we are.

11 MR MALLALIEU: Well, sir, you have my point, I know.

12 THE CHAIR: I do.

13 MR MALLALIEU: Delaying until post distribution is not.

14 THE CHAIR: It's not what you want, but in life, you don't always get what you want.

15 MR MALLALIEU: Before Mr Marven gets to his feet, may I make one final point,
16 then --

17 THE CHAIR: You can.

18 MR MALLALIEU: -- just for the purposes of the Tribunal.

19 It is simply to clarify that what is being sought today is a sum to be paid to the Class
20 Representative, that he can apply for his cost, fees and disbursements. It is agreed,
21 as I understand it, between all on this side, that that sum, once paid, will then flow in
22 accordance with the agreements between all of the stakeholders as to how that sum
23 is applied.

24 THE CHAIR: Well, I may need to hear from the CR people representing Scott+Scott,
25 because I do envisage that in accordance with I've said that £2 million go to
26 Scott+Scott, because I'm doing it on a more, in a way, more precise basis. So I expect

1 there'll be a direction now.

2 Scott and Scott get £2 million and then, whatever the other figures are, knowing that
3 everything else is going to flow back to you.

4 MR MALLALIEU: Well, sir, I --

5 THE CHAIR: But Scott+Scott are really holding, from what you've said -- you
6 persuaded me that they are holding a huge amount of responsibility and they're very
7 substantially out of pocket because of the large gap between the paid fees and the
8 deferred fees, which is a very large sum of money. And if we want to encourage the
9 best lawyers to take on cases like this -- we do -- we don't want them to be out of
10 pocket so substantially. This is a very, very large amount of the costs which haven't
11 been paid.

12 MR MALLALIEU: Well, sir, I see that. And, of course, the basis on which it has been
13 approached is that the Tribunal has looked at these figures and has satisfied itself that
14 the sum it is going to allow by way of a total sum to the Class Rep is essentially
15 a minimum below which it is unlikely ever to go, and therefore it can safely award that
16 sum, and that is that we understand it is the basis on which it's being awarded. I'll wait
17 to hear what Ms Ford may have to say. And then, of course, Mr Marven.

18 THE CHAIR: Let's see if Ms Ford says anything on that point.

19
20 Submissions by MS FORD

21 MS FORD: Sir, the contractual position has been explained in Mr Campbell's
22 statement, paragraph 69. So absent any direction from the Tribunal's to contrary
23 effect, this is our understanding of how --

24 THE CHAIR: What page is it?

25 MS FORD: It's page 119.

26 THE CHAIR: Yes.

1 MS FORD: This is essentially his understanding, and it's obviously expressed in
2 respect to the entirety of the £20 million. But this is his understanding of how, if that
3 sum were awarded --

4 THE CHAIR: That's if the entirety of the £20 million is awarded?

5 MS FORD: Yes. But that is the way in which that would then be applied.

6 THE CHAIR: So you're saying, if I try and do what I wanted to do, you won't get the
7 £2 million? Your solicitors will not get the £2 million?

8 MS FORD: It will be applied in accordance with this structure. (Pause)

9 THE CHAIR: We're not really envisaging paying out this. This is all on the premise
10 that you're going to get the full CFD sum of £20 million.

11 MS FORD: Well, that is the basis of the figures.

12 THE CHAIR: Yes, that's basically the figures.

13 MS FORD: But the structure and, essentially, the waterfall is his understanding of the
14 contractual position. That's what he's saying -- at the beginning of 69:

15 "I understand from the contractual agreements, and from discussions with the
16 Funder ..."

17 So that's the evidence on what would happen, essentially, to the payment that's
18 directed.

19 THE CHAIR: At the end of the day, we looked at this in Gutmann, about the impact of
20 the waterfall provisions, and that was always subject to the jurisdiction of the Tribunal.

21 All I'm saying is, my expectation is that, of the sums that we award, Scott+Scott get
22 £2 million. That's what I expect, because at the points being made by the funder, that
23 Scott+Scott are holding a very large sum in deferred fees, and it would not be fair for
24 them to have that left over for much longer, because they have taken an enormous
25 amount of risk on this case, and it's deferred fees, and, at the end of the day, without
26 that, these proceedings have gone nowhere, because they were taking a big chunk of

1 the burden on this case. That's what I expect.

2 But it's between you to sort it out amongst yourselves, but that's what the Tribunal
3 would hope would happen. But we're not I'm not going to give a binding ruling on that.
4 This is what I hope will happen. And no doubt Scott+Scott will talk to the funders and,
5 amongst themselves, they'll agree what they're both happy with. I don't want to cause
6 any rift at all between the funders and Scott+Scott. That's the last thing that I want.
7 I want them to continue to work in the way they clearly have been working on this case,
8 but I do think a fair outcome is what I've outlined.

9 ATE insurers.

10
11 Submissions by MR MARVEN

12 MR MARVEN: I shall endeavour to focus briefly on things that are exclusive to us.

13 THE CHAIR: Yes, just exclusive to you. That's right.

14 MR MARVEN: Sir, really I'm looking at on the table letter M, the £8 million.

15 THE CHAIR: Yes. So I've agreed N and L. I'm not going to give you £8 million today.

16 MR MARVEN: You're certainly not, because there's only a maximum of £20 million in
17 the pot --

18 THE CHAIR: Yes.

19 MR MARVEN: -- and so you've just seen the waterfall. We would share on the basis
20 of that evidence pro rata.

21 So just as Mr Mallalieu was saying he's not asking for everything the funders are
22 contractually entitled to, obviously, on behalf of the insurers, I'm not asking for the full
23 contractual premium because the maximum totality -- and, of course, I've heard the
24 Tribunal's indications -- is £20 million against a grand total in the table of £60 million.

25 So firstly, headline points for the insurers. One is that the whole of the premium,
26 including the deferred element, was the result of a competitive process, and given the

1 pressures of time, it's all in the written submissions of the evidence, so I won't take
2 any time on that. But Mr Simon Ruffle, the broker, says, in essence, in his evidence,
3 that there were five insurers who offered heads of terms, and we were, in his
4 assessment, the most competitive.

5 So it's a competitive premium in a heavily regulated industry. And again, I won't take
6 time on this, but we're Prudential Authority regulated, we're Financial Conduct
7 Authority regulated, and that regulation includes regular audits as to appropriate
8 pricing mechanisms. So it's already so it's a competitive process. It's a regulated
9 industry.

10 So deferred premium -- and if I can just give you the net of IPT figure because, in my
11 submission, that's the fair way to look at it, because the IPT is just tax, it's not money
12 that we will keep. The deferred premium is £7,150,000. That is about 80 per cent of
13 the total premium. So the initial premium that you've indicated -- I don't need to
14 address you on -- is only 20 per cent, so the great bulk of the premium is deferred.
15 And that is a good thing, in my submission, as we explained in our evidence. It means
16 that it's only incurred as the costs increase if there's an early settlement. The class
17 get the benefit of that. And so this is perhaps my first point of controversy. The --

18 THE CHAIR: Can we just break it down?

19 PROF BAILEY: Yes.

20 THE CHAIR: What's the figure for "deferred" and what's the figure for "contingent"?

21 MR MARVEN: "Deferred" and "contingent" are synonymous. The deferred and
22 contingent --

23 THE CHAIR: It's exactly the same?

24 MR MARVEN: Yes, they are the same thing. There's an initial premium, which the
25 funders have already paid us.

26 THE CHAIR: Yes.

1 MR MARVEN: That's the one you've indicated, I don't need to address you on. But
2 net of IPT it would be £1,775,000.

3 THE CHAIR: Yes, but what's deferred is contingent upon success?

4 MR MARVEN: Yes. I mean, it's deferred and contingent because it's contingent on
5 success. Under the definition of "success" in the policy, that's clearly met because an
6 agreement or award constitutes success. I can give you the reference.

7 THE CHAIR: No, I know that's a standard form.

8 MR MARVEN: So the initial premium that's been paid is £1,775,000 net of IPT. That's
9 why it's slightly lower than the figure in the table.

10 The deferred premium, again net of IPT, is £7,150,000, which is about 80 per cent of
11 the total.

12 THE CHAIR: Yes, got that.

13 MR MARVEN: So, in my submission, we should have something towards that
14 80 per cent.

15 The first point I want to emphasise is the deferred premium isn't profit. It's contingent,
16 but it's earned and it goes, as premiums go with insurers, towards the basket of risks
17 they face overall.

18 The second point to make is that it is the bulk of the premium.

19 The third point to make is that one would want to encourage contingent and deferred
20 premiums to be as high as possible, and the initial deposit premium to be as low as
21 possible, that is in the interests of the class or of the insured in any litigation, because
22 it means it's only payable on success and it's staged, so it's only payable if certain
23 milestones are met.

24 But the converse to that position is, respectfully, if there's resistance to the deferred
25 premium, what overall is a matter of common sense that's going to incentivise insurers
26 to do is to increase the initial premium and to reduce the deferred premium. That isn't

1 something one would want to do because that is payable in any event, it will bump up
2 the cost of funding because it's the funder who, in practice, pays it at the outset, and
3 so one should encourage deferred premiums.

4 But one shouldn't look at deferred premiums as some kind of bonus or profit. They're
5 an integral part of the cost. The back-of-the-envelope calculation is that for an overall
6 premium of £8,925,000, that's net of IPT, cover has been provided of £15 million. On
7 the face of it, that's quite a low what's called an "online rate", the ratio of the premium
8 to the cover. I set out in my written submissions, and I won't go through it all, but it's
9 significantly lower than the premiums that have been allowed in litigation. I'm going to
10 come back to that briefly.

11 But on the face of it, and given the risk that we're facing -- and I know I appreciate this
12 is a simplification -- if you have if an insurer who insures two cases, its exposure on
13 each case is, let us say £1 million, and where the premium is recoverable, it wouldn't
14 be surprising if the premium is equal to the level of exposure, because the insurer will
15 pay out on one case and not get premium, and on the other case it will get premium
16 but not have to pay out, and that's before one looks at profit, dare I say, the cost of
17 regulation and everything else. So, on a back-of-an-envelope approach, it's a modest
18 premium overall.

19 THE CHAIR: It all depends on how you look at it, because if you -- I know if you look
20 at the merits as they look today, you'd say, well, it's fairly safe. You're not likely to pay
21 much or anything. But if you look at it at six years ago when you took on the risk, it
22 may not have been so apparent.

23 MR MARVEN: But it did, I'm sure.

24 THE CHAIR: Yes.

25 MR MARVEN: We say in our evidence, in general terms, the things we're talking
26 about. And, of course, it's not just one risk. We could have failed at the certification

1 stage. The risk there would have been lower, but, of course, the premium then would
2 have been lower, because we wouldn't have got to the further tranches of the premium.
3 And I wanted to come to this, the uptake -- I make no bones about the fact, and it's
4 apparent from our evidence when we list the factors we did take into account, that
5 class uptake was not one of them. But, of course, that doesn't bear on the risk that
6 the -- whatever the uptake will be, and we will all have to see on that, that doesn't bear
7 on the risk that the insurer was addressing, which is the risk of adverse costs,
8 exposure. On the evidence, this was the best insurance available.

9 There were really only two alternatives, whatever will transpire to be the uptake. One
10 is that this action proceeded on the basis of this insurance, and the other is that it didn't
11 proceed at all. No one is suggesting that that would have been the better alternative.
12 Indeed, if that had been the view then of the Tribunal that heard the collective
13 proceedings application, presumably certification wouldn't have been given. So, I do
14 say that the insurer ought to be paid as much of the deferred premium as is possible
15 within the £20 million --

16 THE CHAIR: Has anyone looked at what the maths are as of now? Has anyone done
17 the calculation of, leaving aside M, the ones we've approved, the £2 million for B,
18 taking away the £1.4 million? What have we got?

19 MR MARVEN: Sir, just to check. Did you say leaving aside M, i.e. the £8 million
20 premium that's being discussed at the moment?

21 THE CHAIR: Yes. We take out M. The bits that I've approved already, and you take
22 out the £1.4 million costs which were paid by the other side.

23 What figure have we got, roughly?

24 MR MARVEN: £12,374,000-odd.

25 THE CHAIR: Okay, so that's fine. So it's £12 million, yes?

26 MR MARVEN: £12,374,167.41.

1 THE CHAIR: That's fine. Thanks very much.
2 And then, let me just ...
3 MR MARVEN: Sir, that's subject to verification. That's just checking that that's what
4 we understand it to be at this stage.
5 THE CHAIR: We're getting towards the end of the day.
6 So having taken into account what you said today and in the skeleton will add another
7 £2 million, which comes in under M.
8 MR MARVEN: I'm grateful for that. I mean, it's my --
9 THE CHAIR: I know you want more, but --
10 MR MARVEN: Obviously, I'm only speaking to one part of it. But I'm saying if, to be
11 strictly correct about it, that the sum that the Tribunal awards today should be on the
12 basis that that £8 million odd is fully payable.
13 THE CHAIR: I'm not going to give you that.
14 MR MARVEN: Sir, I recognise that, but that's my submission.
15 THE CHAIR: I agree, but what we're going to do is allocate £2 million for that, so we're
16 going to be roughly -- or exactly, depending whether the figures are
17 right -- £14,374,167.41, which is significantly higher than what I was thinking of at the
18 beginning of the day. So everyone has made a difference in moving the dial, but I think
19 that's where we are.
20 MR MARVEN: If I can just have a moment.
21 THE CHAIR: Yes, of course you can. Yes, of course you can.
22 MR MALLALIEU: Sir, whilst Mr Marven's doing that, we are just checking the maths.
23 The figure may differ slightly --
24 THE CHAIR: If it changes, if you write in and say --
25 MR MALLALIEU: We'll confirm the final figure, but that is where we think it is. But if
26 the final figure that goes in the order slightly differs, it's a question of arithmetic rather

1 | than anything else.

2 | THE CHAIR: What you could do is new table, updated table with the amount that's

3 | been approved.

4 | MR MALLALIEU: We will do that for you, sir.

5 | THE CHAIR: Then we'll know what we have, and that could be appended to the

6 | judgment, or something.

7 | MR MALLALIEU: Thank you.

8 | MR MARVEN: Sir, just very briefly just so I've completed my submission.

9 | THE CHAIR: Yes, of course you can complete it.

10 | MR MARVEN: I'm grateful for the indication.

11 | I wanted to address the issue of timing. Our risk was obviously written on the basis

12 | that the contingent was payable on success, and that's the basis on which it was --

13 | THE CHAIR: It wasn't decided on success.

14 | MR MARVEN: Well, it was underwritten on the basis that it was payable on success

15 | as the policy defined it.

16 | THE CHAIR: As the policy defined it --

17 | MR MARVEN: Those were our parameters.

18 | THE CHAIR: You've got, I understand, a contractual entitlement to the full amount.

19 | We went through this issue before in Gutmann. You have the contractual amount.

20 | That doesn't mean that's the amount you're going to get, but it could be. But let's see

21 | where we are when we deal with this in more detail next time around.

22 | What we're trying to do today -- the normal rough and ready basis, to get the

23 | settlement approved, everyone knows where they are. You have a short ruling. Then

24 | later on, we come to look at the figures in a lot more detail. That's where we are.

25 | MR MARVEN: Sir, I hear that, respectfully.

26 | So far as the insurers are concerned, although, I dare say, we could put in a longer

1 statement if we're allowed to do so, in my submission, the Tribunal basically has
2 everything it needs. It has the evidence that the premium was competitive.

3 And the final thing I haven't mentioned, it's in the skeletons, the authorities from the
4 courts, when premiums were recoverable *inter partes* about, respectfully, judges not
5 being equipped to second guess decisions of underwriters unless there's really
6 something that needs to be called out.

7 So you have all that, and that really isn't going to in any significant way be improved
8 upon other than --

9 THE CHAIR: But the issue (audio distortion) is even if we accept that these
10 proceedings are a success on every level, we still got to see how much is in the pot
11 and distribute it, because it may well be, at the end of the day that the
12 entitlements -- I haven't got to the figures -- are more than what is available at the end
13 of the day, and so we will need to look at the ATE insurance again, and I would hope
14 that when it comes to the final approval that we have counsel for the ATE insurers as
15 well as the funders, so we can bottom out the final bit, which is always a more
16 complicated exercise. But I do envisage that, you know, we may well have CFDs
17 which are in excess of what's available. We just don't know.

18 MR MARVEN: That may well be.

19 THE CHAIR: I just don't know.

20 MR MARVEN: My suspicion at the moment really goes to, respectfully, the submission
21 the Tribunal that the £20 million figure CFD, today's figure, if you like, shouldn't be cut
22 down.

23 THE CHAIR: Yes, I understand.

24 MR MARVEN: But I mean, so far as the insurance is concerned, the Tribunal has
25 what it needs. It has the evidence and the legal principles I've mentioned. The only
26 final point I would make is that although, of course, I've listened carefully to what the

1 Tribunal has said about success, not as it's defined by the policy, but as the Tribunal
2 perceives the action overall, it wouldn't, in my submission, and I may or may not have
3 to make this submission again, be right or fair to the insurer to reduce the payment
4 appropriated to it on the basis of level of uptake. That's not something, quite
5 understandably, that the insurer priced into its premium. If it had done, I daresay it
6 would have been a higher premium. It would undoubtedly have been an additional
7 risk. And it's not really something over which the insurer has control. Furthermore, as
8 I say, whatever the level of uptake eventually turns out to be, there are really only two
9 scenarios. There's the one we're in today and the insurance costs what it costs in
10 a competitive market. But the only other scenario is that this action didn't proceed.
11 But there's no alternative universe in which the action either proceeded with a lower
12 premium or proceeded with a higher uptake than whatever it turns out to be.

13 THE CHAIR: But we are where we are. Okay.

14 MR MALLALIEU: Sir, if I may, I'm going to try the Tribunal's patience, just very briefly,
15 and it will be very briefly.

16 THE CHAIR: 4:17pm, yes.

17 MR MALLALIEU: Sir, in light of the decisions the Tribunal has made as to how it's
18 approaching the CFD sum, and the sum that it's allowed, in my submission, part of
19 that is that the Tribunal has recognised, at least in relation to the solicitors' fees, that
20 we've reached an appropriate stage where at least some recognition can be given to
21 the risk that that stakeholder has taken in this litigation. In my submission, that's an
22 entirely proper recognition. We are at a stage where some recognition can be given
23 to the risk that the stakeholders have taken. Indeed, that could be said to a certain
24 extent in relation to the sum that's been allowed by reference to the ATE insurance
25 premium.

26 Where that takes me, though, is that both counsel and my client, the funders, have

1 also taken very substantial risks. Yet, in the approach to the CFD sum that's being
2 allowed, there has been no allowance made at all to reflect the reward that will be due
3 to them by reference to that risk. Not, if I may put it this way, not a penny in respect
4 of recognising that reward. We say it is inevitable, the Tribunal can be satisfied now
5 that it is inevitable that something and something substantial will be payable in respect
6 of that reward, just as it is with the solicitors. With the greatest respect, we say that
7 the Tribunal's approach in considering the reasonable CFD sum, with the greatest
8 respect, it is missing a fundamental point if it does not reflect that at least some
9 payment is going to be due in respect of that risk.

10
11 Ruling (submitted to the Tribunal for approval)

12
13 THE CHAIR: The Tribunal thank the counsel today for all the work they've done. This
14 has been a long, drawn-out proceedings. There are lessons to be learned, no doubt,
15 at the certification stage, particularly in focusing on whether or not there is going to be
16 a significant amount of claims actually by class members. But this was six years ago
17 when the CPO was granted, when the Tribunal did not have the experience that it now
18 has, when cases are coming towards their end and settlements are being approved.
19 Is there anything else?

20 MS FORD: There is a short point to draw to the Tribunal's attention, in relation to the
21 form of the collective settlement approval order.

22 THE CHAIR: Well, let's have a look at that. Yes.

23 MS FORD: It's behind tab 2, starting at page 23 in the bundle.

24 THE CHAIR: Yes.

25 MS FORD: The Tribunal will have seen that there is a provision in green text.
26 Paragraph 7, green text and square brackets.

1 THE CHAIR: Yes. Let me have a look. Okay.

2 MS FORD: The reason it is in green is explained on the front page of the order, on
3 page 23. (Pause)

4 THE CHAIR: Yes.

5 MS FORD: We have felt that it would be appropriate to draw the Tribunal's attention
6 to this because of the concern that a provision which essentially envisages a degree
7 of automatic dismissal of the proceedings might have consequences for the Tribunal's
8 ongoing supervisory jurisdiction.

9 THE CHAIR: Yes. I'm not going to order that now. I think it's just too much of a risk,
10 and it is 4.30, and we can always come back to that further down the line. I'm not
11 saying it's not right, but I will come back to that further down the line.

12 MR MCGURK: I was going to address you on that, sir, but I've heard what you've just
13 said. But if I can be permitted 30 seconds of indulgence --

14 THE CHAIR: Yes, of course you can. Yes. Just give me some context.

15 MR MCGURK: We hadn't previously had an objection from my learned friend. We
16 are not seeking, through this order, automatic dismissal. The provision is for the Class
17 Representative to procure the dismissal of the collective proceedings against the MN
18 Defendants.

19 THE CHAIR: Yes. It's a question of when. That's the issue.

20 MR MCGURK: Yes, but it's not envisaged before distribution substantively takes
21 place.

22 I note also, more recently, that Mr Justice Ross in the Merricks CSAO made a crisper
23 order in providing that the collective proceedings against the defendants in that case
24 should be discontinued upon the terms of the collective settlement, except for the
25 purpose of enforcing those terms and this order. My learned friend will tell you, quite
26 rightly, that was post-distribution.

1 THE CHAIR: It was, yes. (Overspeaking)

2 MR MCGURK: We're not looking for anything as exacting as that at this stage, and
3 we don't see any reason why, in the interests of securing finality and certainty in this
4 litigation, that the Class Representative can't commit to procuring the dismissal of
5 those claims once distribution is behind them. So we do invite the Tribunal to
6 reconsider its preliminary view on that paragraph 7.

7 THE CHAIR: Okay. That's refused.

8 When we get to the actual order for the distribution of CFDs and (inaudible), we will
9 come back to this. I'm not saying you're right. I'm not saying you're wrong. I would
10 just rather – on such an important issue, I don't really want to get wrong. I don't want
11 someone later on to say, "You can't do what you want to do further down the line", but
12 it's clear you've got a concern. I understand what that concern is, and it's just today
13 at 4.30 is not a great time to get to the bottom of it.

14 Okay. Anything else anyone wants to raise? Sorry, it's all a rush, but there's a lot to
15 get through in a day, and I don't really want to go into a second day, because I can
16 see how many people are here and every day costs a lot of money, which would
17 otherwise go to more useful, let's say, places.

18 Okay. Thank you very much.

19 (4.31 pm)

20 (The hearing was adjourned)

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22