IN THE COMPETITION APPEAL TRIBUNAL

Case No.: 1404/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 15th April 2026

Before:
The Honourable Mr Justice Butcher
Professor Rachael Mulheron KC
Professor Anthony Neuberger
(Sitting as a Tribunal in England and Wales)

BETWEEN:

David Courtney Boyle

Class Representative

v

Govia Thameslink Railway Limited
The Go-Ahead Group Limited;
Keolis (UK) Limited

Defendants

A P P E A R AN C E S

George McDonald (instructed by Maitland Walker LLP) on behalf of the Estate of David Courtney Boyle

Paul Harris KC and Ms Clíodhna Kelleher (instructed by Freshfields LLP) on behalf of the Defendants

Laurence Page (instructed by Linklaters LLP) on behalf of Secretary of State for Transport

Alexander Hutton KC (instructed by Willkie Farr & Gallagher (UK) LLP) on behalf of Mr Walter Hugh Merricks CBE

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Wednesday, 15 April 2026

(10.31 am)

THE CHAIR: Well, good morning everybody. I know that some people are joining us live stream on the CAT's website. So I must start with the customary warning. An official recording is being made and an authorised transcript produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings, and breach of that provision is punishable as contempt of court. Yes.

Submissions by MR McDONALD

MR McDONALD: Yes. I appear on behalf of the estate for the late Mr Boyle, the Class Representative. My learned friend, Mr Harris King's Counsel, at the far end appears with Ms Kelleher for the Defendants. In the middle, you have Mr Page who appears for the Intervener.

The Tribunal has hopefully received draft orders from us and the Defendants, together with skeleton argument from all parties. You've also been rather inundated with bundles and updates to the bundles and I apologise for that, but hopefully you have those.

For our purposes, as you know, we ask for a stay until 24 July 2026 to finalise the funding and insurance arrangements and then make an authorisation application. Now, what you may have seen from the skeleton arguments is there's something of ships passing in the night. We had proceeded on the basis that this was a directions hearing -- and I'll come on to why that's the case in a moment -- whereas the Defendants seem to have proceeded on the basis that this is a decertification hearing or something of that nature. To support that position, they seek to rely on an array of factors, many of which occurred prior to the passing of Mr Boyle.

Our position is that this should remain a directions hearing, and that questions of decertification should not be entertained at this hearing. Just to make that point good about why we say that the purpose of this hearing is directions, I'm just going to take you to the Chair's direction when this issue was previously canvassed.

You may recall that on 30 January 2026, the Defendants did ask for decertification. We responded saying, "No, that would be inappropriate. We'd like some more time." The hearing was listed and then there was correspondence with the Tribunal about what the purpose of this very hearing was. The Chair's direction we can find in the correspondence bundle at 390. (Pause)

Sorry, correspondence bundle 2, I should say. Tab 119. It records:

"I write further to the correspondence from the parties and Mr Merricks regarding the listing of a hearing in the Proceedings.

"The Chair, the Honourable Mr Justice Butcher, has read the correspondence from the parties (and Mr Merricks) and he is of the view that the hearing should address directions for the Proceedings going forward, not the substantive applications for a revocation and/or a discontinuance (or the costs orders which would follow if such applications were successful). However, the Chair considers that it would be appropriate to address at the hearing any applications for costs that there might be against Mr Merricks, so that his position is definitively settled."

And we have Mr Merricks this afternoon; the cost issues are being dealt with this afternoon. So in light of this, we prepared on the basis that, as directed, we were going to be addressing directions going forward, not the substantive applications for revocation and/or discontinuance.

In preparing on that basis, we have not, for example, adduced extensive evidence which we might have wanted to do, and some points we certainly would have wanted to do. We do not have the leading counsel who has been involved throughout the

proceedings in attendance to deal with the criticisms that have been made with the conduct to date, and the issues raised about the overlap, for example, between -- well, the alleged overlap; we say there isn't any -- this and the Gutmann proceedings.

The first we learned that decertification was positively being pursued was in receipt of the skeleton argument on Friday afternoon. Prior to that, we had not even received any comments on the draft order that we had circulated proposing directions going forwards.

So we were, and we say that it would be unfair for us to be, ambushed by the application that is effectively made through the skeleton argument we received on Friday.

THE CHAIR: There is a potential issue there, though, that on any view, direction for the proceedings going forward must envisage whether and how long there should be any stay for. And if there was going to be no stay, or no extension to the stay, then that might have implications in relation to decertification.

MR McDONALD: So there are two distinct issues. The first is: had the Defendants turned up today or in preparation for today, saying, "We want directions to a decertification hearing, so we could have a hearing listed in whenever it can be listed, and directions for evidence and skeleton arguments and the like and preparation".

That's one thing. That's directions going forwards. But what they're effectively trying to do is to shoehorn their substantive application into this hearing today.

THE CHAIR: What about an answer to my question? Supposing they had just said there should be no further stay?

MR McDONALD: Well, it would depend on the reasons they were giving for there to be no further stay, because if it was to say, well --

THE CHAIR: They would be bound, even if they were just saying that, to say

something about what has happened in this case in the past, wouldn't they?

MR McDONALD: But if that is right, then in terms of the direction that was given by the Tribunal, it would effectively mean that the substantive decertification issue was in fact being heard today, and there would be no distinction between the directions going forwards and the decertification that they are seeking.

It's not intended to be any criticism at all, but it would mean that that direction would collapse upon itself, because both the directions going forward and the substantive application would be heard together.

THE CHAIR: But it wouldn't be a substantive application to decertify; it would be, "There should be no further stay".

MR McDONALD: I mean, to say there is -- in terms of the direction given, that we're looking at directions going forwards. I envisage that some directions will be given to go forward, whether that is to be a hearing as to whether this is the end of the matter, or whether it's --

THE CHAIR: You must have contemplated that it would deal with the question of: what would be the length of the stay?

MR McDONALD: Yes, but not whether there should be no stay and therefore decertification should automatically follow, which is --

THE CHAIR: It was being said that of course we will grant a further stay, but only a question of length.

MR McDONALD: Well --

THE CHAIR: Certainly, that was not the intention, to say, "We will grant a further stay".

MR McDONALD: My Lord, we weren't presuming that a further stay would be granted, but we were anticipating that directions would be given until some substantive event. That substantive event could either be the listing of an authorisation application, or a timetable for us to make an authorisation application, or for determining the

decertification application. That's why I distinguish between the directions to some substantive hearing.

Remember, that this hearing was listed for half a day in circumstances where the Defendants had said they would need a day, or we would need a day, for the certification application itself. We say that it cannot have been envisaged that all of these factors which are now being relied upon would be canvassed before you in the half a day which had been allowed together with Mr Merricks' costs applications, or the costs applications against Mr Merricks.

THE CHAIR: But in any assessment of how long a stay should be, one would be looking at what had happened in the past.

MR McDONALD: You would --

THE CHAIR: I'm sorry. I've made that point already, but ...

MR McDONALD: It may be that I'm seeking to distinguish between the near past and the long past, in the sense that since Mr Boyle passed away, steps were first taken by Mr Merricks to try to seek authorisation, and then steps are being taken by Maitland Walker, as instructed by the estate, to seek certification.

I fully agree that you can look at what's happened in that period to decide whether any further extension should be granted. And I can fully agree that you may want to take into account, if factors beforehand are said to be relevant to how long should be granted, then perhaps they should be taken into account. But what we object to is a full-scale attack based on things which have happened many years previously, which are now being aired in this hearing, which was not designed for this purpose, given the length allowed for it and given the directions given.

I've made those points, but I will address you with another fundamental difficulty with the Defendants' approach now, which is that -- doing the best I can to get on top of the issues raised -- it is apparent that all of these issues raised were considered by

the Tribunal at the CMC in March 2025 and in their judgment of May 2025. Now, I don't know if the Tribunal has had an opportunity to read that judgment, but --

THE CHAIR: Yes, certainly I read it yesterday.

MR McDONALD: I'm grateful, because I'm going to take you through it in some detail. What we'll see from that judgment is that the very same issues which are raised in the Defendants' skeleton argument were considered on that day, in that judgment, and the Tribunal said, "These are not sufficient to decertify".

So what the Defendants are trying to do is rehash the same arguments and having a second bite at the cherry of decertification. So I'm going to take you through it.

THE CHAIR: Just before you do that, I think on behalf of all of us, we fully understand that what is listed for today is a directions hearing; that what we are most concerned with is whether, and to what extent, there should be a continuation of the stay. Any argument, to the extent that it's necessary, will be focused on that and on what further directions may follow.

Just before we go any further, though, I note Professor Neuberger has a point as to the position in which we find ourselves, which I think it's sensible to canvass at this juncture.

PROFESSOR NEUBERGER: Thank you. I was just wondering at what stage it became clear that the late Mr Boyle was facing serious medical problems which would necessitate or would be likely to lead to the need to change class representative?

MR McDONALD: I'll have to take instructions on that.

PROFESSOR NEUBERGER: Okay.

MR McDONALD: My understanding from what I've read is that there was a fall which led to his untimely death. I don't know if that was a product of existing medical conditions or if it was entirely unexpected, but I will take instructions on that.

PROFESSOR NEUBERGER: Thank you.

THE CHAIR: One thing which we have been troubled by is that the Tribunal and these proceedings find themselves in this position, and we want to have comfort that this is not a situation which could have been avoided with reasonable liaison, not only between the parties, but with the Tribunal.

MR McDONALD: Yes. I can understand that, and I'll take instructions on the position with Mr Boyle. It hasn't been suggested anywhere to date that there was anything that we should have been aware of, but I will canvass that position with those behind me. I wasn't involved at that stage of the proceedings, so I don't know myself.

Would you like me to take five minutes to answer that question now, or should I --

THE CHAIR: Yes, perhaps if you take five minutes to answer that, we'll come back in five minutes.

The Defendants will have noted what I have just said in relation to the directions, and I will be -- to the extent that I need to -- elaborating on that.

(10.45 am)

(A short break)

(10.50 am)

THE CHAIR: Yes.

MR McDONALD: Sir, I have some information for you. I can't pretend it's sort of a complete account, but from what I've gathered in those five minutes Mr Boyle was first diagnosed with Parkinson's during the proceedings. We believe that's around 2023/2024. The Tribunal was aware of it at the last hearing in March 2025. It did not affect his mental capabilities, but did affect his physical condition. His death was sadly caused when he fell down the stairs at home, hit his head and died very, very shortly thereafter. And I'm told he was 67 when he passed away.

THE CHAIR: Thank you very much. (Pause)

PROFESSOR NEUBERGER: Thank you.

MR McDONALD: Turning now to the judgment in 2025. We can find that from the authorities bundle page 76. It starts at page 76. (Pause)

I'm going to take you first to page 89, and paragraph 47.

THE CHAIR: Sorry, page ...

MR McDONALD: Page 89.

THE CHAIR: 89, yes. Paragraph 47.

MR McDONALD: Paragraph 47. The Tribunal may have gathered that, near the start of the proceedings, the Tribunal had directed that there'd be an expert-led disclosure process.

THE CHAIR: Yes.

MR McDONALD: You'll see this is discussed at paragraph 47, where the Tribunal held:

"With the benefit of hindsight, it appears to us that, however well intentioned, the expert-led process would in this case may well have led to an increase in the cost of the disclosure process." [as read]

THE CHAIR: Yes.

MR McDONALD: "However, we've been unable to conclude on the evidence before us that the CR [the class representative] was to blame for that." [as read]

Now, just pausing there, if you're reading my learned friend's skeleton, you would assume that we were entirely to blame for the extra costs that have been incurred in these proceedings, whereas the Tribunal in 2025, last year, held that that's not the case in respect of the expert-led process.

Then it goes on to say:

"We do not think that much weight can be placed on the remark made by the Chair during one of the many CMCs about the use of a blunderbuss." [as read]

Now, stopping there again. From the Defendants' skeleton, they quote this, saying

that this somehow casts us in bad light. But it goes on to say:

"The comment was made during an informal discussion and not advanced as a representative or considered ruling or settled view. The Chair was looking for a practical way of completing the process of disclosure, and was not making specific rulings about the admissibility or otherwise of particular requests." [as read]

Now, I will come back to this theme as we go through this judgment, but I'm afraid there is -- I'm afraid to say -- something of smoke and mirrors about what the Defendants are saying. Because they raise all of these complaints, but they did not identify in their skeleton that they've already been considered -- and we'll see this occur repeatedly -- in this judgment.

THE CHAIR: This judgment considers these points, you say, but we must take into account this history, as described in this judgment, in making any decisions we make today, mustn't we?

MR McDONALD: So we were saying that, for reasons I'll come on to, it's either of no relevance or of little relevance in terms of going forward. The reason for that -- and we'll see this in this judgment -- is that the Tribunal, having heard all of these things, then decided, "We're going to look forward, we're listing Trial 1A, as it's being called, which is a relatively short hearing dealing with the regulatory issues". And it was intended to be listed for ten days, but there's no order from the Tribunal yet because it was superseded by Mr Boyle's passing.

It was intended to be listed for ten days in January 2026. They held that our case had been substantially put forward, so all that was envisaged was that the Defendants would put their case forward and we may reply, et cetera, in the normal way. Then we'd have a relatively short hearing, in the context of these types of proceedings.

THE CHAIR: So you say that the general delay up to the point of Mr Boyle's death is maybe of some, but is of limited relevance to the directions which we have to give

today?

MR McDONALD: Exactly. Our position is that at the time of Mr Boyle's death, those issues have been considered and dealt with in this judgment. The Tribunal has said, "Going forwards, this is what we want to happen".

There had just been a split trial between liability and quantum, which would have been a larger beast to deal with on liability. They narrowed the scope of that, so that for the trial in what was then January 2026, you wouldn't need the extensive economic expert evidence, for example, which can take a long time.

So they said, "Look, this is what's going to happen going forwards". Now, since Mr Boyle's death, nothing has happened in terms of the substance of the proceedings. There have been attempts made to find different class representatives, and funding and ATE insurance and the like, but in terms of the substantive proceedings, nothing has happened.

THE CHAIR: Would you at least agree with this: that it is very important that there should be some sort of certainty in relation to these proceedings, which have now been going on for so long and have already cost so much.

MR McDONALD: We are not trying to shy away from the fact that things have to progress quickly, and there needs to be --

THE CHAIR: They have to progress quickly or not at all.

MR McDONALD: Yes. There's a debate which we might come on to later about whether there should be an unless order.

THE CHAIR: Well, let me make it quite clear at this juncture that what we have in mind at the moment is that there will be an extension of the stay. It will be on unless terms. That is our provisional view.

What we would be likely to be assisted by is clear thought to be given as to what should be the terms of that unless order. I don't mean date, I mean what needs to be

brought forward in order to comply with the unless order.

If that unless order were satisfied, then there would be, I assume, a hearing for exactly what would be part of what I would hope we would be assisted by: either substitution or some sort of replacement, at which there would have to be a consideration of whether there should be decertification, which would depend in part on what it was that had been forthcoming --

MR McDONALD: Yes.

THE CHAIR: -- by way of application. It would also possibly raise a series of wider considerations. And it would also have to deal, as we see it, with certain legal issues which have been troubling us, which Professor Mulheron can identify.

PROFESSOR MULHERON: Thank you, Mr Chairman. Just two points that I wondered if perhaps we will need some assistance with in due course. The first is what I would call the cause of action point. I just wonder, legally speaking, what actually happened to this collective proceedings at the point of Mr Boyle's death on 19 June 2025.

If one thinks of it in two parts, there is his, if you like, personal cause of action, and presumably that vested in his estate under section 1(1) of the Law Reform (Miscellaneous Provisions) Act of 1934. Query that in his witness statement of 9 June 2021 at two occasions, Mr Boyle explicitly waived any entitlement to damages, so query whether that vested cause of action is for the benefit of the estate.

But leaving that to one side, the second part, of course, of his action is the representative capacity in which he was bringing the action. I think it would be helpful to have some submissions in due course as to whether that representative part of his action is a cause of action at all under section 1(1), and an enquiry also as to whether, if he is bringing that action in a representative capacity, whether that's for the benefit of the estate, given that any damages which are ordered or that may be settled will be

for the benefit of the class. So I think that would be an important point.

The second point is the substitution point. The CAT's role under rule 85 is quite clear, I think, that in relation to any variation of a CPO which would include a substitution of a class representative, we are being asked to exercise powers under rule 85(1) and rule 85(3). In doing so, it seems that the CAT is obliged under rule 85(2) to take into account whether, under sub-rule (a):

"... the criteria for certification of claims as set out in rule 79 still apply ..."

So that seems to, on that wording, re-invoke another certification-type consideration, which I think particularly would invoke the consideration in rule 79(2)(b) as to whether the cost-benefit of this action is still met in favour of that.

So those are the two issues, what I would call the cause of action issue and the substitution issue, which I think are important going forward.

MR McDONALD: That's very helpful. I could try to give brief answers now, but I think it would be better to leave it for the next hearing. I mean, I expect -- there may be a debate -- I don't know -- but there may be a debate as to the extent that you, as it were, open (inaudible) to consider the existing certification hearing. Whether you can do that completely afresh, whether it's just based on new evidence. It may be a debate for the next hearing.

On the vesting point -- again, it's a legal issue which can be addressed at the right time -- I mean, the Law Reform Act does refer to cause of action vested in the deceased shall be transferred to the estate. So there might be a question about: well, does "vested in" include causes of action brought in a representative capacity as well as causes of action -- because it might be a slightly odd use of language to just describe cause of action to be vested in someone who has just an ordinary cause of action. We might be saying it goes broader than that. Those are things for another day, but we take that on board and we will address them more fully.

THE CHAIR: As we see it at the moment, if we made the sort of order which I have canvassed, it would be, as it were, without prejudice to that argument. It's not saying that you're right about it, but it's not saying you're wrong about it.

MR McDONALD: Yes, understood. I'm not intending to address you at length on it any more today, because it might be quite a knotty issue. Both of them might be quite knotty issues. But we take that on board.

I mean, what we had envisaged in terms of going forwards is that -- we can talk about dates, obviously, but we'd make any application by 24 July of this year. A hearing would then be listed, and we were even considering whether a hearing could be listed today, if needs be. At that hearing, any authorisation application would be considered as well as any decertification application that the Defendants may make, or the one that they putatively made in January of this year. So they could be dealt with together, and then if one of them fell away, then the hearing could remain for the decertification application, so that there wouldn't be a long delay before that were heard. It may be -- I'm not making any promises -- but it may be that's the sort of thing that could be dealt with on the papers, because if we don't have anyone who's seeking to be authorised, then it may be that the certification doesn't cause any problems if no one else comes forward.

So that's what we envisaged, and hopefully that would give the certainty that the Tribunal was anticipating: that there would be a fixed hearing. We can either, as it were, list it now or after we make the application. At that hearing, we would either have authorisation and replacement -- if you call it that -- or it would be decertified -- and we then have directions to the Trial 1A, assuming that's the way that the Tribunal still wanted to deal with it going forwards, if there was a replacement class representative.

THE CHAIR: Just for the purposes of being explicit, what are the minimum

requirements that you say would have to be met to satisfy there having been an application for authorisation?

MR McDONALD: We perhaps look at it slightly differently in the sense that -- and I will answer that question, I'm not trying to avoid it -- but the authorisation application will be made with funding and insurance in place, we envisage, because class representatives or putative class representatives wouldn't embark on an authorisation application without having funding and insurance. It would be a very risky thing for a class representative to do.

So we fully envisage that any authorisation we make will be backed by funding and insurance. So I hope that answers the question; when we apply for authorisation, it's -- I mean, it may not have all of the same requirements as a certification application, because setting out the case and things like that have already been done, but it would identify the proposed class representative, Dr Peyer. It would identify the funding and insurance arrangements in the normal way that a certification application would. Then we would proceed in the normal way.

So it would be akin to a certification application when you're looking, I suppose, at the authorisation condition, rather than so much at the substantive merits of the application of the underlying claim. I mean by that, not the merits of the application, but the claim itself. Not that that's a given, but that that would already be in place, so it will perhaps require less explanation.

THE CHAIR: So if we were to make the sort of order that I have been canvassing, it would merely say that unless you make an application for authorisation by 24 July, there would be decertification, for example, if it was on unless terms, but say nothing about what you had to have put in place by way of ATE or funding. Because, essentially, you say, the application wouldn't be made without those things being dealt with, and the precise adequacy of those arrangements would be a matter which would

be canvassed at the certification of the substitution authorisation here.

MR McDONALD: Exactly. I mean, I would have concerns if the requirement was to say things like "adequate ATE" or "adequate funding", because then we may get into debate about inadequacy, which it could then be said, "Well, that triggers the unless order." So the problem one faces sometimes with unless orders, is that if the requirements aren't defined in specific terms without using subjective requirements like "adequate" and so on, you can then get into difficulties with --

THE CHAIR: That is the point which I have very well in mind. The unless order must be in clear terms.

MR McDONALD: Yes. So that's why we would oppose to the use of, to put it frankly, adjectives in the order. It would require us to make the authorisation application, and then in the normal way, we'd have a debate about whether our funding structures and arrangements and ATE are adequate at the hearing. I'll just turn my back in case I've missed anything, but that's what I envisage would happen.

THE CHAIR: Yes.

MR McDONALD: So that's how we would envisage it proceeding. Would it be helpful if I ... (Pause)

THE CHAIR: Yes. Well, I think what we would find most useful now is to hear from the Defendants.

Submissions by MR HARRIS

MR HARRIS: Yes, I wonder if I could shortcut matters in this sense.

THE CHAIR: Yes.

MR HARRIS: We do apply for an unless order. I can address you in due course on whether there should be a few bells and whistles in there, but the debate possibly for the remainder of today, since it's a directions hearing, is whether there should be an

unless order or not, your provisional --

THE CHAIR: Provisionally, we are with you on that.

MR HARRIS: Agreed, so I therefore respectfully suggest that if my learned friend is going to argue against it, he should, and I should reply if and to the extent necessary. So that would be item 1 for directions.

Item 2 is the amount of time. We respectfully contend -- and this is our firm position -- that the Tribunal should direct today a hearing of at least one day in July. We should do it today, so that we can ascertain respective availabilities. That hearing should be either the authorisation application, which I say should be subject to an unless order, or it should be, if necessary, a decertification application.

THE CHAIR: Sorry, the hearing should be either ...?

MR HARRIS: Either the authorisation application, if it's made pursuant to the unless order. Or if no such application is made pursuant to the unless order, then it could be, if necessary, a decertification application, although we've just heard my learned friend rightly say that, frankly, at least from his instructing solicitors'/client's perspective, if they don't make an authorisation application, then the case just falls away automatically.

So it might not be necessary to have that day, but what we're worried about --

THE CHAIR: I'm not going to stop you. I want you to go on with that thought, but I just want to understand if we made an unless order, that unless there was an application, there would be decertification, then that second part doesn't really arise, does it?

MR HARRIS: Agreed, so it therefore hinges upon the precise wording of the unless order (overspeaking) --

THE CHAIR: (Overspeaking) --

MR HARRIS: -- unless the authorisation application is made, the proceedings be decertified. We agree. But it may be that --

THE CHAIR: In a way, that's the -- we haven't heard the opposition to -- well, we haven't heard any opposition to an unless order and we haven't heard anything substantive about what the terms of that should be. But if that were the order made, then that second part wouldn't arise (inaudible), but it would -- what you are saying, then, is that there should be a date fixed for the authorisation application, if it's been --

MR HARRIS: Exactly, and --

THE CHAIR: Sorry, go on with what you were saying before I interrupted you.

MR HARRIS: Thank you. Not at all.

The risk of not setting out a date now and not choosing July for a day is that people will try to corral diaries and we apprehend that it would have to be the full Tribunal as well as obviously both parties and the Intervener. The later one leaves that, the more difficult it is to achieve. So we say a day in July to be set down as soon as possible after this hearing.

The corollary, of course, is that my learned friend would then not have the slightly over, I think three months, that he wants for his stay. Because inevitably, the authorisation application would have to be made by the end of June, such that if it is made by, say, the end of June, there is at least a short-ish period for the Defendants to respond, leading to the possible hearing of that application on the date in July.

So it would give -- here we are, mid-April. One could give two months to mid-June, or if one were feeling generous, one could give two and a little bit months towards the back end of June, but it couldn't go any longer than that.

So those are, as I see it, the areas for debate in this case management hearing: should it be an unless --

THE CHAIR: Unless order and date.

MR HARRIS: And date. I'm happy to develop either of those, but I just thought it was worth making those points now, because one might be able to short circuit a great deal

of the rest of the hearing.

THE CHAIR: I agree. Thank you.

MR HARRIS: Thank you.

THE CHAIR: Unless order.

Submissions by MR McDONALD

MR McDONALD: So I've taken instructions on an unless order. If we can have until 24 July, we do not oppose it being made as an unless order. The reason I come with a caveat as to dates is that if you give us a shorter period of time, we say you are making an unless order that we can't realistically comply with. In circumstances where an unless order is one of the -- it's been called one of the strongest orders in the court's armoury. With very serious consequences from the proceedings, we say that the counterbalance to that must be that we're given adequate time to try to comply with it. You can't have both an unrealistic time with an unless order.

THE CHAIR: The trouble with that in those circumstances, is that it gives rise almost invariably to an application for relief.

MR McDONALD: Exactly. We will be saying, "We told you at this hearing we needed longer. We do need longer, but look how much progress we've made." We'll probably all be back here saying, "Can we have longer? Can we not have longer?", with very similar arguments.

So we say it's better to give us the time that we ask for, which we think is a realistic assessment, and as the price of that, you can make it into an unless order which we don't object to if you're giving us the time we need.

THE CHAIR: And the terms of the unless order are that there will be decertification.

MR McDONALD: Yes. (Pause)

THE CHAIR: Yes. So that's that: dates.

What really is the -- I mean, you want some clarity in relation to these proceedings. Speaking for myself at the moment, I don't blame you for that. But what is the real significance of July?

Submissions by MR HARRIS

MR HARRIS: The significance of July -- so there are two points and I'll address that one first -- is that in the real world, there is a high chance that, unless the date for the actual hearing is July, it almost certainly won't be until well into the autumn. I appreciate that the Tribunal doesn't have fixed terms like the court.

THE CHAIR: No, September would be an option, for example.

MR HARRIS: September, if available for everyone.

THE CHAIR: If we're all available.

MR HARRIS: But my experience, having practised in this court for 30 years, is that quite often it is not the case that when one says, "Oh, don't worry. We won't do it in July", in practice, people don't do things typically, especially major things in August, for obvious reasons. Then people don't actually get the availabilities in September, and it ends up being well into the autumn term. The danger with that, of course, is that there may not be a fully completed or a fully adequate application for authorisation/substitution that's made on my learned friend's date of 24 July, but instead it will roll on a little bit, and lo and behold, come late August or September, it'll be said, "Ah, we've now got a bit better funding..." or something has being added to it. It's quite hard to then draw a line.

So it rolls on for months and months, and then the actual application, the supposed line in the sand turns out to be a lot more fuzzy. It's quite difficult, we would respectfully contend. Let's say my learned friend's team did come in later in August or in September, or at any rate, at least in good time before a hearing in, say, October,

November and said, "Oh, look, actually I've amended my litigation funding agreement" or, "I've got a better insurer" or, "I've changed the details". It's quite difficult for the Tribunal to then say, "Well, hang on a minute. Your date was in July. I'm going to ignore everything else".

In other words, there's a constant roll-on, and that's what we object to. We say that after the amount of time -- this is going to be my second point -- that has already been had, there should be a very definitive line in the sand, and the best way to achieve that is to make sure that the hearing is in July and doesn't roll on.

The second point is, let's be quite clear, in my learned friend's skeleton for today, the refrain is: we've essentially only had two months or two and a little bit months in order to get everything up and running. It is said the Willkie Farr & Gallagher stay extended till 30 January, and we've picked up "from a standing start", is the phrase. "From a standing start, look how much we've done in two months and two weeks." But that's completely, in my respectful submission, the wrong prism of analysis. Let me just remind the Tribunal, poor Mr Boyle died on 19 June 2025. The first stay kicked in on 23 July 2025. So that was a period of more than a month in which Maitland Walker, acting, we are told, on behalf of the estate, had the ability to try to find a new class representative and the new required ATE, or updated ATE and funding. So that was just over a month.

They then had -- that's to say, Maitland Walker, acting for whoever they act for -- another three months because Mr Bronfentrinker tells us in his first witness statement that Willkie Farr & Gallagher did not take over until 23 October. So that was a period in which Maitland Walker had a further three months to get their act in gear. So that's, so far, over four months that they had to rectify all of these problems.

They didn't do it in that over-four-month period. Then on top of that four-month period, if one disregards the period between 23 October and 30 January, when Willkie Farr

& Gallagher became the solicitors on the record for the putative replacement CR, Maitland Walker have had another two and a half months. So they've had all of February, and all of March and half of April. So when one adds that all together, that is over six and a half months that Maitland Walker have had in order to put together an authorisation application with all of the necessary facets.

What I am suggesting -- and this, we suggest, is a further indulgence or generosity on the part of the Defendants -- is that they can have, provided it's in the form of an unless order, another two months or maybe two months and a little bit, i.e., from today until mid or mid-to-late-ish June at the most. But if they were to have another two or two and a half months, that's going to, in total, have given them either eight and a half or the best part of nine months to get their act in gear. That is, in our respectful submission, more than enough.

I contrast it with: Willkie Farr & Gallagher, when they were seeking to act on behalf of Mr Merricks, they had a period of three months and one week from a complete standing start, not like Maitland Walker who have never been from a standing start. Complete and utter standing start, and they say, and I paraphrase, they scoured the market. They employed a specialist broker. They had experienced funders. They say all of those things, they scoured, they almost didn't leave any stone unturned, and yet they couldn't find the necessary ATE insurance.

So what I'm saying is if you give an unless order that takes them till mid or maybe late June, that will have given them eight and a half to nine months in circumstances where we know that somebody who's experienced in this field can scour the market in just over three months and not come up trumps. They should not, against that background, be given the further indulgence of 24 July, bearing in mind that it will then inevitably mean that any hearing slips out into the autumn. So that's my submission.

THE CHAIR: Now, obviously, I'm not giving any encouragement to this as a way of

doing things, but if you're right that even if a deadline for authorisation were met in name, but then by the time of any hearing had been modified by further information -- if that's something which could happen, with your timetable, if we said that the application had to be made at some point in June, and the hearing was fixed for not before 24 July, then if there were any such modification -- I'm not encouraging it -- it would at least be capable of being taken into account by the date that has been fixed.

MR HARRIS: Possibly, sir, save for this point: if there's, in practice, a rolling beyond the date of the unless order, by which date the application should have been made --

THE CHAIR: Yes.

MR HARRIS: -- and I say complete, it will be increasingly difficult for both the Defendants, the Intervener and, importantly, the Tribunal to actually then deal with the application. We say there should be a complete line in the sand.

If you're against me on the dates, and inevitably, therefore, any hearing gets set down for after the summer vacation, we would respectfully contend that one of the provisions of the order should be that once the application is in, that's it. No further dribbling.

THE CHAIR: That it will be the only application which is considered at the authorisation hearing.

MR HARRIS: That's right. Again, if you're against me on the difference between a sort of mid-to-late June with a July hearing, and it's going to roll over beyond the summer, it should not only be a complete line in the sand, in my respectful submission, but it should be that as soon as possible after today, a day with everybody's availability is found in September.

THE CHAIR: I understand. Well, you've made that very clear.

MR HARRIS: Yes, thank you. That's the case management. You may not want this, but I would, if invited, have something to say about Professor Neuberger's inquiry regarding the health of Mr Boyle.

THE CHAIR: I think you should say that now.

MR HARRIS: I'm grateful. What, in particular, Professor Neuberger may recall, is that it was becoming increasingly clear at the beginning of 2025 onwards that Mr Boyle was in a poor state of health. You may recall from earlier hearings that the former president of the Tribunal made an enquiry at one of the CMCs as to Mr Boyle's nonattendance, and that was never satisfactorily answered.

Then, at one of the hearings before then Mr Justice Miles, we also inquired about Mr Boyle's nonattendance, and that we had not been able to ascertain his virtual attendance; there was no record of any virtual attendance, either. You may also recall, Professor Neuberger, that there was an occasion upon which Mr Boyle did attend a hearing in a neck brace on account of what was then public knowledge that he had, regrettably obviously, advanced Parkinson's disease.

The neck brace, as we apprehended it, was on account of the fact that that led to a risk of falling, hence the need to have protection for his neck and his head. We wrote -- I will happily provide copies of this should the Tribunal want to see it -- a letter in, I think it was early January 2025, making enquiries about the state of Mr Boyle's health, what medical input had been provided, if any, and largely the questions were left unanswered.

We were in particular told, "No, he hasn't", and I don't want to misphrase this, but my understanding was that we were told that there hadn't been a specific medical diagnosis, let alone an up-to-date one so as to address specifically Mr Boyle's continuing mental/physical capacity to carry on dealing with the case. This was in early January 2025.

Then most regrettably, of course, Mr Boyle died. But the death, which has just been reconfirmed, was as a result of a fall, which was very clearly in the contemplation of the Class Representative for some considerable period prior to that. So I thought, in

light of your enquiry, that it was worth bringing that matter to your attention. Should you wish to see our letter of enquiry and the letter of response, we can obviously produce them. There may be a short break for the shorthand writer. Traditionally it's now-ish, we'll happily try to get them printed out over a short break.

THE CHAIR: I think that would be very helpful, Mr Harris. Thank you, Mr Harris.

MR HARRIS: Thank you.

PROFESSOR MULHERON: Yes, thank you. Thank you very much. Yes. What do you say that you haven't already said about dates?

MR McDONALD: So dates. To pick up on the points that were raised. I'm not going to repeat what I was saying about the price of an unless order must be that we're given adequate time to comply.

The point's made whether you need a definitive line. Now the definitive line applied doesn't prefer one date over another. We accept that there will be a date by which we need to make the application. So the definitive line is still there.

The second point seemed to recreate the history and say, well, Maitland Walker have already had however long we've had. It's important to put that in context. In that initial period, we carried out a selection process for a class representative. Mr Merricks was then selected as the class representative. The funders at that stage still seem to be in place. The next step would have been to have gone out to go and get further ATE assurance if it's needed, but the ATE insurance is still in place anyway.

So in terms of the previous timetable, a lot of progress has already been made or didn't need to be made because a lot of the building blocks were already in place. And so that's why when Willkie took over, they didn't have as much to do as we did from January, because we needed to find a new funder. Finding the new funder is the most laborious part of the process, because you need to engage with them, they need to carry out due diligence, which is ongoing. Then you need to agree the terms of their

funding agreement. The class representative needs to be advised on the terms of their funding agreement to ensure the interest of the class. The Tribunal may well be aware of the number of authorities emanating from the Tribunal about the terms of funding agreements; it's not the most straightforward process.

So that's why time is needed, because a new funder has to come on board. That wasn't required before, because Willkie and Mr Merricks were still being funded by LCM. So that's why it's taken longer here, and that's why we need until July. So you can't just say, "Well, they've had this period, that period"; different circumstances persisted in those periods.

The third point to make is that what we haven't heard from my learned friend is any prejudice or any particular prejudice that has been suffered by the Defendants in that one month period between June and July. Now, I accept, of course, that delay of itself is not a good thing, but the Defendants have not pointed to anything that they say would cause any detriment that they would suffer between June and July.

Compare that with the detriment we could possibly suffer: suppose we're almost there, but we haven't quite signed the funding agreement by the end of June. Then this could lead to automatic decertification, which would prejudice the class, the many, many thousands of class members -- I think it's a million class members -- from being able to pursue their claim, all for the sake of a month.

We say, when you weigh those two potential prejudices -- the unidentified prejudice suffered by the Defendants being that mere month delay -- against the possible consequences if we can't meet that date, we say there should only be one winner, and that we should get the time that we asked for as being a reasonable time period. We're not asking for many months, we're just asking until July. I would invite you to order that date.

THE CHAIR: And Mr Harris' point that if that is what is being ordered, that the

application made is the one which should be considered. I don't paraphrase it well, but what he says is: you've got to put in the application which you will be pursuing by 24 July.

MR McDONALD: I don't have an objection in principle, but there might be an issue about what "the application" means in this context. Just to give you an example of what I'm concerned about: as I mentioned earlier, there are often back and forths about the terms of a funding agreement, or the terms of an ATE policy and the anti-avoidance enforcement. Are they adequate to cover the Defendants' costs?

THE CHAIR: Yes.

MR McDONALD: Are there terms which shouldn't be in there? And often what happens is they're negotiated out with the funder or the insurer, and they don't feature. But I don't want it to be said that just because we've amended some of the terms of the funding agreement or the ATE policies, somehow that's a new application.

THE CHAIR: Well, it may be that some sort of adjective is going to have to be put in at that point, but that is a point which I would actually ask you to discuss before we hear further argument in relation to it.

What we'll do now is we will have a transcript break. The documents which you mentioned, if possible, could be provided to us during this period. I think you will have seen what it is likely that we have in mind. If any sensible discussion can take place, perhaps this is an opportunity to do it.

Is there anything that the Intervener would like to say about any of this before we have this break?

Submissions by MR PAGE

MR PAGE: On the two narrow points coming before the Tribunal, on whether or not there is an unless order, we are content with what is being proposed and we can see

the eminent sense in that. I will in due course have something to say about the soft edges of that, and the concerns that the Secretary of State has about the type of package which should be presented to the Tribunal for the purpose of any application in due course, though we see that as being matters for the Tribunal's judgment rather than matters that go into the order, because it's about the content that can --

THE CHAIR: Can only, you say, then be dealt with at this hearing, as it were?

MR PAGE: Precisely, sir. It's all about generating, at the end of this hearing, a judgment which provides maximalist guidance to Dr Peyer, so that he is as clear as possible about the target he needs to be aiming at when going off and negotiating with a funder and an ATE insurer. If I may, I'll come back to that in due course.

THE CHAIR: I think that probably is something which it is helpful for you to say, but let's do that after this short break.

MR PAGE: On the question of timing, I envisage that there may well be some debate between the parties, and perhaps in my role as *amicus*, if I may, just to flag up that it is very rare -- and certainly I have never seen it -- that an application for a CPO that is made on day 1 is precisely what the Tribunal is asked to order by the date of the hearing. There is almost always an iterative process.

Precisely what I understand Mr Harris KC to be contending for is that if a longer period of time is allowed now for the application, that is on the basis that what is put forward is a best and final application, rather than the process. It often happens with class representatives that there is an element of: they get as far as they can get with a funder and an ATE insurer, then they put matters forward to a defendant, who then raises objections, and that then is used as a negotiating point between the class representative and the funder to further refine those terms.

That type of process, as I say, is perfectly normal in this forum, but is precisely what is being hoped -- as I understand it -- to be avoided here if we go for a later date, so

that everyone should know where they stand by whatever the date is, if it is the end of July. The alternative, as I understand is being put forward, is an earlier date of mid-June that does provide a window for some refinement in the dialogue between the parties. But that still then means that, by the time we get to the end of July, we have real clarity on what it is that the Tribunal is being asked to order.

PROFESSOR MULHERON: And are you making a submission as to which of those -- or are you being studiously neutral in relation to --

MR PAGE: All I'm doing at this stage is flagging up that there is perhaps an even greater tension that might appear to be the case between the parties from what's been said so far on the difference in content and what might happen between what I'm going to call a "best and final" style application, and an application which is iterated over time.

But I've got no statement as to what I say the Tribunal should be doing about that.

PROFESSOR MULHERON: I understand.

MR PAGE: I'll get instructions to see if that changes or not.

PROFESSOR MULHERON: Yes. Thank you. Yes.

THE CHAIR: Mr Harris, that is a significant point, isn't it, that if we were to go with your best and final and it can't be changed, is that actually going to be practicable?

Submissions by MR HARRIS

MR HARRIS: Yes, absolutely. Partly it goes to the question of whether you give a yet further two to two and a half month stay, or a more than three month stay. If you were minded to do the longer stay, then it would be incumbent, in my submission, for the proposed replacement class representative, acting via Maitland Walker, to do any liaison with us that they see fit prior to the final deadline.

So for instance they could come up with, in say two months, a proposed litigation

funding agreement or a proposed ATE cover. And if they're worried that it's not going to pass muster before the Tribunal, after the final date, and the Defendants will oppose it, it would be open to them, should they see fit, to liaise with the Defendants beforehand, and seek to ascertain what problems we have.

But what they can't be allowed to have is the longer period and then an iterative period in which there's the toing and froing. That's exactly what we need to guard against in these circumstances.

What I respectfully say is it absolutely has to be the line in the sand. Whatever you put in, that's it, no more, full stop. I respectfully contend that in the way of these things, were you to order them to do that by mid-to-end of June, for the reasons I've previously given, they would end up doing it. We all know how it really works: if you're ordered to do it, especially against the background of an unless order, you get on and you do it.

The funders are probably either here today, or the prospective funders, or they're listening in, or they can see the transcript. If you make that clear, that's what they'll do, if they're going to do it at all. Same with the ATE insurers.

Apart from that point -- I hope that's addressed you on that --

THE CHAIR: Yes, thank you.

MR HARRIS: Can I just spend 60 seconds on the alleged absence of a submission by me about prejudice? That's not right at all; we've identified the prejudice in our skeleton argument. Just to re-identify it in 60 seconds, it's not a question of whether there's an additional amount of prejudice from one more month, i.e., between, say, 23 June and 23 July. What we're already offering today is two to two and a half months from today, on top of the six and a half months that Maitland Walker has already had.

The question here is whether they should have eight months in total, which gives rise

to the prejudice I'm about to enumerate, or whether they should have nine months in total, which necessarily extends the prejudice. That's the correct prism of analysis. The prejudice includes -- and this is a material development in the last week that we face with every day, let alone month, let alone months of further continuation of this case -- cost prejudice. We're going to hear about that this afternoon. We're going to hear, I don't know where the Tribunal will be, that my side has incurred hundreds of thousands of pounds worth of, we say, perfectly reasonable and justifiable costs during the last stay period in which Willkie Farr & Gallagher were putatively in charge. If there is another two and a half month, let alone three and a half month stay from today, inevitably there are going to be some further costs on the part of the Defendants. Hopefully, there'll be nowhere near the unreasonable sum that we say we were forced to incur by dint of Mr Merricks' behaviour, but that's for this afternoon. But there will be some. They'll be even greater if my learned friend seeks to have an iterative process with "as prior to" 23 July, there's inevitably there's going to be some. For every extra day of stay, there is greater costs. The material development today is that at least up until last week, this case has always had a funder, so that at least we can always come to the Tribunal and say, "Well, even if your ATE insurance isn't good enough, at least there's a commercial funder there against whom we can seek the money. We may not get it, but we can at least seek it". But what about today? There's no funder at all. Maitland Walker doesn't have a funder. That's one of the problems. So for every further day, week, let alone month or months of stay after today, the prejudice to us is even greater than it has ever been. "Who is going to pay?", I ask rhetorically. Our costs between now and whether it be 23 June or end of June, let alone 24 July, when it turns out that we've been put to further recoverable costs, who is going to pay it? That by itself should militate strongly, in my respectful submission, against extending the stay well into July, on top of the

other points that I've given about dates.

Then, more minor, but just to finish off, there is the obvious continuing business uncertainty to this business. I don't seek to over-elevate that, but every day that this goes on, this is a contingent liability, potentially referable to our balance sheet. It shouldn't be allowed to extend even further than we say we have generously suggested.

Then on top of that, I won't develop it, but you can see in our skeleton, there's the ratcheting up point of the funder's return. So I don't seek --

THE CHAIR: That's the point which you made.

MR HARRIS: Yes. Thank you. Those are my points.

THE CHAIR: I kept on promising to break, and we'll now have it.

MR HARRIS: Thank you.

(11.45 am)

(A short break)

(12.09 pm)

THE CHAIR: Yes.

Submissions by MR PAGE

MR PAGE: Just before short adjournment, you asked whether or not the Intervener has a preference as to the various positions being put forward. As we understand it, there are three options being tabled to the Tribunal now. The first is a deadline of mid or late June that would then allow for some iteration before a hearing in July. The second is a best and final proposal by end of July. The third is Mr McDonald's proposal for an application being made by the end of July, and then some iteration through to a hearing in the autumn.

From the Intervener's perspective, we do have a preference, and that stems from the

nationalisation programme, which is ongoing at the moment. Our preference is that we would be content with either -- well, we would like this to be resolved in July, put it that way. Whether that means we have a hearing in July or whether that means there is a best and final offer on the table by July so everyone at least knows fully where they stand, that does put more than simply a line in the sand before we go into the summer. Our preference would be this be fully resolved by then. If in fact there has to be a hearing after the summer vacation, then so be it.

The reason why we don't want matters sitting around for too long is because it's the end of May 2026 when the business that GTR is running on this franchise is scheduled to go into public ownership. On that date --

THE CHAIR: On the 26th?

MR PAGE: No, excuse me. The end of May 2026, the end of May this year. From then onwards, all of the data, all of the staff will be coming into -- will be publicly owned. There will then be a series of practical difficulties, or complications in the management of this claim. The more that we can front load before the transfer happens -- and of course, we won't know the exact date of transfer until it actually happens, so until the target date, end of May. But I'm not here to give any final statement to the Tribunal as to when the actual date may be.

But once that happens, it'll be more complicated. There is a taxpayer interest in the process which we are now engaged in to be front loaded as much as possible, so that everyone knows where we stand. Clearly, if the case is put back on a footing and there is to be a trial, that will happen later down the line after this franchise is in public ownership, and we will deal with that. But this interstitial period, we have an interest in it being as short as possible and ideally being resolved before the summer.

THE CHAIR: Yes. Thank you.

Yes.

Submissions by MR McDONALD

MR McDONALD: May it please the Tribunal. There were a couple of points I just wanted to pick up on in respect of the new assertions on prejudice by both the Intervener and the Defendants.

But dealing with the Defendants, they say there's no funder, there's no cost protection. That ignores the normal route of cost protection, which is to go against the ATE insurance, which is still in place. So that's not a good point.

It's also difficult to see how the Defendants will be incurring --

THE CHAIR: I thought there were questions as to the adequacy of the ATE (overspeaking) now.

MR McDONALD: Well, the Defendants raise questions, but they haven't told us what their overall costs are. So there's no way in which we can validate whether there are. All they've said to us is it's more than 8 million. But at their hourly rates, they would never recover anything close to their actual cost anyway, and they haven't told us what their actual costs are. So it's very difficult to give any weight to that assertion.

The second point is that it's difficult to see what costs the Defendants will be incurring in an additional month, because the work is being done on our side: we are preparing the application. If we have until July, then we'll put it in in July, and that's when their work begins.

THE CHAIR: Except that you will have to liaise with them to some extent in advance.

MR McDONALD: Well, I mean, Mr -- it's been proposed that we would have some sort of negotiation process in respect of the funding agreement. I think that's what's been suggested about how we have to liaise with them in advance. If that's the work that they're talking about, it's a very unusual way of going about it: having a sort of tripartite negotiation between the Defendants, the funders and the class --

THE CHAIR: I don't think they were saying it would be a tripartite negotiation. But if there's going to be an objection -- for example, let's say in relation to the terms of the ATE insurance, the sooner you know about that, the better. And try and deal with it, isn't it?

MR McDONALD: Well, understood, but my understanding of the proposal being made is that that process would take place in July. But even if we issued the application in June, you'd have the same process take place afterwards, because all we would get then is the same points being raised by the Defendants. So it doesn't make any difference to the costs they're incurring, whether it's June or July, because from their perspective, they still have to raise the same points.

So that's what I was trying to make clear, is that it's difficult to see how that's an extra prejudice.

THE CHAIR: No, I understand.

MR McDONALD: Then in terms of the iterative process generally, what I'm guarding against is that in pretty much all collective actions, there are comments raised about the funding agreements and the ATE insurance. It is, I'm afraid, very commonplace. Now, often those don't make their way to the Tribunal, because they're resolved beforehand. So it may be that there's a distinction between no iteration in the sense of the nature of the authorisation application doesn't change, and there's a carve-out in terms of amendments to the funding agreements and ATE insurance.

But I don't want it to be said that there can be no amendment at all to the funding agreements and ATE insurance, because that's just unrealistic and it's going to lead to more arguments about whether the amendments we make are material or just effectively de minimis-type amendments, and whether we're permitted to make them. I would suggest that's a recipe for disaster.

I mean, we're not intending to change the substance of the authorisation application

at all. It's merely responsive changes that we would be making to anything that's raised. So we say that there should be allowed some sort of iterative process in the normal way, because it would just cause more problems than it's worth to give a blanket "no" for anything, any developments afterwards, in circumstances when we can't expressly predict what those will be.

The last point was a point raised by the Intervener about their preference. Now, as I understand it, their concern is that the -- I may have understood it wrong, but the Defendants are going to public ownership at the end of May. Again, I'm not quite sure how that leads to a preference for one option rather than the other, because the two options are either near the end of June or near the end of July, so the same problems have been faced. It seemed to be suggested that the longer you leave it after the end of May, that causes even greater problems. But from a practical perspective, it's difficult to see how one month in terms -- I don't know what they're referring to. Is it storing documents or recording them electronically? But it's difficult to see how that could be a material factor in circumstances where they'll have to be stored anyway for these proceedings, so why does an extra month make a difference?

There's one point. You've been sent the letters. I'm not going to address you at length on the letters, we just disagree with the suggestion that we didn't respond to the questions asked. We responded to all but three of the questions, and when the questions were put before the Tribunal in March last year, the Tribunal -- and it's in the judgment at paragraph 100 -- records that:

"Many of the questions relate to earlier stages in the proceedings. We are also satisfied that some of them would require the disclosure of privileged communications ..."

So the Tribunal didn't think there was anything wrong with our answers to the questions that had been posed. So again, we do balk at the suggestion that we

haven't acted co-operatively in respect of those questions.

THE CHAIR: Right, thank you.

Yes. Mr Harris, you look anxious to say (inaudible).

Submissions by MR HARRIS

MR HARRIS: Sir, just three brief things. The letters, the particularly pertinent response, bearing in mind Professor Neuberger's query, is the response from Maitland Walker, dated 24 January 2025, page 3, paragraph 17(h). Notwithstanding that we wrote and enquired as to medical input as to the prognosis, we were told there's been no medical professional confirmation -- Mr Boyle's own view, no medical professional has contradicted it.

So insofar as the question was directed at, "Have you been responsible in ascertaining what is likely to happen?", which sadly did then happen, the answer is, in our submission, no, they weren't responsible; no medical input. So that's all I have to say about those.

But briefly on the prejudice points, they are wrong. As to the ATE insurance, it was submitted to you just now that we haven't informed Maitland Walker, let alone the Tribunal, what our costs are. But in our skeleton last week, we identify at paragraph 41 that we've so far spent £14 million, and that's against the background of, of course, Maitland Walker prior to and excluding the cost of today, having spent over £15.45 million.

But the other problems that my learned friend doesn't raise is -- so that was to address the point that you put to my learned friend, but the other problem that we identify in our skeleton argument is this ATE coverage may be fictional in any event, because we're now talking about costs, including of today, let alone the costs going forward for the next three months that aren't being incurred by Mr Boyle at all. Poor Mr Boyle

passed away last year, and yet costs are consistently being racked up. There is a serious question mark that my learned friend just ignores about whether an insurance policy, leaving aside that it's too low, but even if it weren't too low, can sensibly and does sensibly cover costs that are being incurred, essentially by a firm of solicitors and not Mr Boyle, because he's passed away. So that's the last thing that I have to say about that.

Then my learned friend made a point about: oh, the costs in the extra month -- such as there are of what we've been calling iteration between his side and my side over funding and what have you -- they are going to be incurred whether before my deadline of June or just after the deadline of June and up until the deadline of July. Do you remember that point, sir? He was saying they're going to have to be incurred anyway, so what difference does it make?

THE CHAIR: Yes.

MR HARRIS: It makes a massive difference for this reason: as soon as an authorisation application is in fact issued, it has to be backed by a funder. When it fails, on our submission, as it will, I have recourse to the funder against failure of the application. That's what's happened in every CPO to date.

So that's if costs are incurred for iterating after the application has been issued. But in sharp contrast, if the iteration costs are incurred prior to the application having been issued, then on the face of it, they may not be backed by the funder. Indeed, that's the argument we're going to have this afternoon, albeit for a different firm of solicitors. So there is a critical, prejudicial difference between the one situation and the other.

In the one situation, post issue of the application, I have recourse to a professional commercial funder. In the other situation, costs are being incurred without the backing of the funder. No funder on the record, and then who do I look to? That was my retort. So that's the difference.

THE CHAIR: Now, just on your second point about the ATE coverage, I'm not sure I've fully understood. The ATE coverage essentially covers your costs, so how does the position in relation to Mr Boyle and Maitland Walker affect that, which was, as I understood, your point?

MR HARRIS: If I'm on the same point as you, sir, perhaps I didn't explain myself. The suggestion --

THE CHAIR: Well, no, I probably failed to understand what you were saying.

MR HARRIS: As I understood the suggestion just now, it was there's no prejudice for the costs going forward for the next little while, while Maitland Walker tries to get its act in gear because, any costs that are incurred by the Defendants, they have recourse against the ATE insurance cover that's still in place. That's the submission.

I made two points. One, it's too low. We'll leave that aside. But in any event, the ATE coverage that currently exists is in the name of Mr Boyle, and it was for costs that he caused the Defendants to incur.

THE CHAIR: That's the point which I think I was asking about.

MR HARRIS: Yes.

THE CHAIR: So you say that the critical point is whether it covers costs which are caused to be incurred by someone other than Mr Boyle.

MR HARRIS: Yes, particularly when Mr Boyle, who is the insured person under the policy, sadly died. So there's a question mark that's never been answered. We've squarely put this to Maitland Walker: is it the case that the insurance policy covers costs that you are causing to be incurred after the insured person is, in fact, dead? To us, it seems highly doubtful. That's my point.

THE CHAIR: Well, it would depend very simply on what it says.

MR HARRIS: Maybe. Thank you.

THE CHAIR: Right. Thank you.

Now, does anyone else want to say anything else? (Pause)

(12.24 pm)

Ruling (submitted to the Tribunal for approval)

(12.27 pm)

THE CHAIR: Now, does anyone want to say anything about that?

MR McDONALD: The only query I have is whether it's envisaged that there'd be a timetable for a response to the application --

THE CHAIR: Well, we haven't heard anything about that yet. I assumed that there would be a timetable for that, but I would obviously need to hear all parties in relation to that.

MR McDONALD: It may be something that the parties could, first of all, discuss between themselves, (inaudible) we could come up with a sensible proposal for the interim period between the application and the hearing.

THE CHAIR: Yes. Mr Harris, do you want to say anything or do you want to discuss it?

MR HARRIS: I'm sure that we can have a sensible discussion about timetabling and steps for responses in leading up to a hearing, but I have a slightly different point, which is to pick up on Professor Mulheron's point on rule 85(2)(a) in particular.

We respectfully agree completely, that in deciding whether to vary -- which is what ex hypothesi this application would seek to do -- a CPO, the Tribunal shall take account of all the relevant circumstances, including in particular (a), whether the criteria for certification of the claim set out in rule 79 still apply. I only raise that now, unless there -- I don't want there to be any confusion about at least our stance. That involves, to the extent relevant in certification hearings, an assessment of the merits. I appreciate there's lots of law on quite what those merits -- quite what the test is and

what have you. But there have been material developments that you'll have seen in our skeleton and as referred to by my learned friend, Mr Page. Since certification of this case and this ex hypothesi further authorisation application, most particularly the Gutmann trains case, which was so very similar, and yet failed on all counts.

So I don't want to say any more than that, but for our part, we are certainly expecting this application not just to address a replacement of person A with person B in how suitable person B is said to be, including by reference to funding and ATE, but also expecting all the criteria for certification of claims set out in rule 79 to still apply.

THE CHAIR: I will only say in relation to that that we believe that the two-day hearing should be adequate to cover all arguments, including those which you can make pursuant to that rule.

MR HARRIS: I'm grateful. I'll keep the last and final point very, very short. It is of course possible that if the unless order is not met and there's then the automatic decertification, there will be lots of costs to argue --

THE CHAIR: It would be sensible then for the two-day hearing to be used for costs.

MR HARRIS: I'm most grateful. That's what's going to suggest. As necessary.

THE CHAIR: As necessary.

Right. So what would be very helpful is if the parties could put their heads together as to the terms of an order. I mean, ideally, I would hope that the terms of the order could be finalised today so that we can sign off on it before we leave the building. That may not be possible, but that would be extremely helpful.

Does that conclude this morning's business?

MR PAGE: From the Intervener's perspective, sir.

THE CHAIR: You said you wanted to let Maitland Walker effectively know that the bar which you see as being set, you said?

MR PAGE: Correct, yes. So in terms of what we would hope to see in a rule 85 application in due course, there has been flagged up in the correspondence and the skeleton argument some concerns about ATE insurance. Now, I understand that the Tribunal may be surprised to hear that the Intervener is so interested in costs issues in the case, but that is a function of our very unusual role as an intervener in this case. We have a direct interest in costs, in that we have made two costs applications which in aggregate amount to about £1 million. One of those we have already been awarded, a very small sum of just over £10,000, linked to the change of expert from Dr Harvey to Dr Davis. The second, which remains on foot for determination at the end of the proceedings, concerns the costs thrown away as a result of the expert-led disclosure process, whereby we were ordered to disclose 20,000 documents in addition to those we had voluntarily given, of which only 20 were then used by Dr Davis in his report. We incurred £1 million worth of cost, which we say the public purse should not have to bear.

So we have those historical costs which are already on foot. In addition to that, we have historical costs for which we have not yet applied, but we have given a very strong indication that we do intend to apply for those costs if the claim is unsuccessful, whilst reserving our position ultimately as to what we will do on that. But that indication has already been recorded in the 1 May 2025 judgment by the Tribunal, which was the second judgment by Mr Justice Miles and colleagues. Paragraph 51 records our indication at that time that we will be seeking our costs of the claim.

So historically, we have costs. Future costs also may well be incurred. We are likely to play a central role in what has been called “Trial 1A” by the Tribunal, because that's all going to be about the regulatory regime and the extent to which GTR complied with the regulatory regime. We will therefore be giving evidence, including our own

witnesses, as to the regulatory regime. We have already indicated it will be two to three witnesses who have been called for that, and we may well have questions and certainly submissions for the Tribunal, too. So depending on the outcome of Trial 1A, we may also put in a cross application. That leaves aside, then, costs which may flow onwards in later stages of the case if it does progress further than that.

That's our direct cost interest in the claim. We also have an indirect cost interest in these proceedings because, due to the intense regulatory structure in which this area operates, we, the taxpayer, have a potential liability to pay the costs of GTR at the end of this case, depending on all sorts of issues in terms of the final outcome of proceedings. Therefore, the taxpayer is concerned about the historical costs incurred by GTR and the extent to which the ATE insurance is sufficient to cover those, at least in theory. Then also the adequacy of forward-looking ATE insurance because, again, it is possible that the burden might ultimately fall on the taxpayer to cover any shortfall there.

So those are our concerns. The debate between GTR and Maitland Walker and Mr Boyle about their costs is being dealt with by them, and I need not trespass on that territory. The debate as to ATE insurance for the Secretary of State's costs is something that I do wish to flag briefly to the Tribunal now, so you can be aware at this stage that we are extremely unhappy at the position we currently find ourselves in, of the high level of uncertainty about whether or not there is any possible costs insurance available for us should we be ordered on costs.

The relevant section to take you to: first of all, Mr Bronfentrinker's witness statement in core bundle number 1, tab 3. (Pause)

MR McDONALD: I apologise for interjecting. I'm just wondering whether there's a way of cutting through this. The Intervener has raised concerns about whether they can recover their costs. Now, there's a big issue between us and the Intervener about

whether, as a matter of principle, they should be able to recover their costs. What would be helpful going forward is if the Intervener could set out the costs they've incurred in different aspects of the proceedings, and which ones they say that they think in principle they should be able to recover. That is something that we can take into account when we're looking at the ATE insurance that we may need for the application.

Now, we certainly don't concede that they're entitled to them, but I'm just trying to work out a way forward on this, which is that if they tell us what they're seeking in numbers terms, overall, that's something we can take into account and we can progress from there.

MR PAGE: I will, if I may, come back to that point. But I think it is still useful just to flag up why we have the concerns we have. So core bundle number 1, tab 3, pagination 265. I'm looking at the pagination bottom right-hand corner of the page.

THE CHAIR: 265, yes.

MR PAGE: 265, paragraph 50 at the bottom of that page, the penultimate sentence before the page turns. (Pause)

And the remainder of the paragraph on page 266, please. (Pause)

THE CHAIR: Yes.

MR PAGE: So there was a concern by Mr Merricks that ATE insurance was inadequate. This was then explained further in the letter by Mr Merricks to Maitland Walker, which is at page 292 of your bundle, just a few pages on in the same tab.

THE CHAIR: 292?

MR PAGE: 292. Bottom paragraph, second sentence.

"However, I find it extraordinary that you have omitted ..."

THE CHAIR: Sorry, which ...

MR PAGE: Excuse me, page 292.

THE CHAIR: Oh, "I find it extraordinary", yes.

MR PAGE: Yes. So there is a suggestion being made there by Mr Merricks that these liabilities had not been flagged up to Mr Boyle. I should say, out of fairness, that there is a response to that by Maitland Walker at page 297, paragraph 9. (Pause)

Though with respect, that is a somewhat generic statement by them that doesn't give any specific assurances as to what precisely Mr Boyle was being told. Linklaters, acting for the Intervener, then wrote to Maitland Walker seeking clarity on precisely what arrangements are in place. The relevant correspondence -- one more bundle for you to turn up, the second correspondence bundle. (Pause)

Tab 140.

THE CHAIR: 140? Yes.

MR PAGE: Paragraphs 3 to 6 of that letter essentially give a bit of archaeology and explain that since October 2022, we've been concerned about costs, and asking what arrangements are in place. (Pause)

Then the response to that came from Maitland Walker, tab 149, internal pagination 461. Paragraph 2 appears to confirm what Mr Bronfentrinker had been saying in his witness statement. Second sentence there of that paragraph effectively says: "everything had been scrutinised at certification and has remained unchanged since."

The point that was made further on in the letter is, effectively, that insurance isn't needed because the class representative will win the argument as to whether or not it's paid for costs. But of course, that entirely misses the point that ATE insurance is there if you don't win the argument as to who should pay for costs, and indeed, the outcome of a claim.

So we are legitimately extremely concerned about the adequacy of historical cost

coverage here, and we would hope that any application that is now brought forward by Dr Peyer or anyone else is as clear as can be about how the historical position will be dealt with, and how indeed the future position will be dealt with.

We can try to the best of our ability to provide some information in correspondence, but of course we're not able to give future-looking cost estimates because we don't yet know what Dr Peyer proposes to do with the proceedings; we don't know some very basic facts. For example, will he carry on instructing Dr Davis? Will Dr Davis accept still to be instructed? Will he be content to pursue Trial 1A, or will he be applying for a variation as to the directions as to what should happen?

There are all sorts of uncertainties, and it is, I'm afraid not good enough to ask --

THE CHAIR: (Inaudible) no real difficulty in your providing an estimate of your cost if those were answered, "Yes". In other words, if he did continue to instruct, and if he did continue with the Trial 1A, 1B structure, or whatever it's been called.

MR PAGE: Yes.

THE CHAIR: So as ever, of course, I take your point that you can't provide cost budgets for things which aren't presently ordered or envisaged.

MR PAGE: Precisely. So we can set out a series of assumptions in a letter, and then, dealing within those assumptions, provide cost estimates.

THE CHAIR: Yes.

MR PAGE: Though inevitably there then can be a debate about the safety of those assumptions and how much insurance should be provided on the back of that. But we will do our best.

THE CHAIR: Yes.

MR PAGE: But I think it is fair for me to flag to the Tribunal the reasons why we have such concern in this area, and perhaps give you a flavour as to some of the debate that's been going on underneath the surface in these proceedings. That is, of course,

before we get to the question of merit, which the Tribunal may think is striking that no one has remotely talked about the merits of this case. In fact, I came here this morning expecting to address you in somewhat a bit of detail about that and the future direction of it, but I don't think that would be necessarily appropriate right now. Though I remain, of course --

THE CHAIR: You still want to say something about it?

MR PAGE: (Overspeaking) In fact, I think it's better for me not to say anything about it beyond --

THE CHAIR: I don't think it's necessary for you to do so.

MR PAGE: No, but we do have concerns about the merits of this claim.

THE CHAIR: Yes.

Submissions by MR McDONALD

MR McDONALD: So just in terms of the Intervener's costs, you wouldn't ordinarily cater for the potential for a costs order against an intervener, because the normal rule is they don't get their costs. So it would be a considerable expense which would ordinarily be wasted. Indeed, when the Intervener applied to intervene, they said, "Oh, of course we're not going to be seeking our costs".

They've subsequently changed their tune and started to seek costs against us. However, they didn't raise any issues with the ATE policies, and we know from the Gutmann cost judgment that the onus is on the Defendants and we'd say the Intervener to raise issues with the adequacy of the ATE policies if they're going to be claiming for more. They haven't done so until very recently.

So what we are suggesting as a way forward, without prejudice to our position that they shouldn't be able to recover any of their costs at all, is for them to provide a cost to date, which they haven't provided. You would ordinarily think, if you're saying, "Oh,

you haven't got enough ATE cover", the first thing you'd do is set out what costs you've incurred and think you might be claiming from us. They haven't done that.

What we want them to do is set out their historic costs which they say that they're going to be entitled to, and that may not be all of their costs, because a large chunk of their costs might fall within what they would describe as "normal intervener's costs" and therefore irrecoverable.

So they should set out what their costs have been incurred are, what they say that we should be liable for if the Defendants win overall. They should also then give a budget going forward. Now, budgets are always beset with uncertainty -- that's the nature of a budget -- but we would happily be happy for them to produce it on the basis that Trial 1A would happen as envisaged.

Dr Peyer would, at least substantially, adopt everything that's happened so far. And that Trial 1A would happen as envisaged. They can clearly produce that sort of budget -- one would have thought they would have done it for internal purposes -- because the Secretary of State will no doubt have wanted to know what the future costs of the proceedings would have been.

We would ask them to provide that. We will then consider it. I'm not committing to getting ATE insurance for everything they ask for. We will consider it, and we can have an argument at the two-day hearing, if needs be, about whether the cover we've got is adequate for the Intervener, whether we need more or whether we don't need any at all. But that's how I suggest we proceed from here.

THE CHAIR: Yes. I'm not, in fact, sure that Mr Page was suggesting anything very different from that. What he was doing is, as I really understood it, was laying down a marker as to what he expects to be included in any application, and which may be the subject of the debate at the hearing. That's what I understood, clearly.

MR PAGE: Understood. It may be that (overspeaking).

THE CHAIR: And he has said that he will provide both an indication of what costs he says are recoverable, as I understood it, and an estimate on the basis of what would happen if the presently-envisaged steps in the proceedings took place.

MR McDONALD: What would be helpful, because there may be arguments about different categories of costs and their recoverability, is if they were broken down in a sort of phased budget, as it were. Because you can well see that the arguments about disclosure, which is particularly focused on, might be different to the arguments about attendance at CMCs, or something like that. That would be helpful.

THE CHAIR: Well, I'm not going to make an order.

MR McDONALD: Understood.

THE CHAIR: I would expect the Intervener to want to provide as helpful a piece of documentation as it can.

MR McDONALD: I'm grateful.

PROFESSOR MULHERON: Can I just ask just, for practicality, you took us, I think, to the second witness statement of Mr Bronfentrinker. At paragraph 50, the point was being made by Mr Bronfentrinker was that we discovered the Intervener was not covered by the existing ATE policy, as they had never been added after they had been granted permission to intervene. Could you just clarify the practicalities? Would the intention be that the Intervener is added to any policy that might be put before the CAT for the purposes of the application due on 24 July? What are the practicalities of this unusual circumstance?

MR McDONALD: So I understand the position with the ATE policy is -- I don't think we have it in the bundles -- but it covered adverse costs payable to the Defendants -- capital D. Defendants, capital D, is a defined term being, as you'd expect, the Defendants. It may be that it can be as simple as defining "the Defendants" to include the Intervener or anyone else that a cost order may be made in favour of.

It might be as simple as that sort of solution.

PROFESSOR MULHERON: Yes, it's an unusual situation, isn't it? I'm just drawing again attention to what may lie ahead under rule 85. We have to look at of course that for authorisation, 78(ii)(d) requires that the representative claimant will be able to pay the defendants' recoverable costs if ordered to do so. Again --

MR McDONALD: Not the intervener's.

PROFESSOR MULHERON: Indeed, as it's an unusual circumstance where this hasn't been contemplated by the rules, but I just flag it up.

MR McDONALD: Yes, you may have added an extra argument to our bow for the next hearing, but this isn't entirely unprecedented because where you have carriage disputes, you can have an issue about whether the cost of carriage are covered by a policy. And so you will then often amend the policy to include the cost of the competing claim, so that it's covered under the policy. Although there are now cases saying that normally there's no orders to costs, but historically, that would happen. So it's not completely out of the normal situation that we're dealing with here.

PROFESSOR MULHERON: Thank you.

THE CHAIR: Anything else for this morning? All right. Well, thank you all very much. We will see some of you at 2.00 pm in relation to costs.

(12.51 pm)

(The short adjournment)

(2.00 pm)

THE CHAIR: Yes.

MR HARRIS: Sir, members of the Tribunal, we have, in addition to the front bench, at my far left, Mr Hutton King's Counsel, who appears on behalf of Mr Merricks, instructed by Willkie Farr & Gallagher.

Subject to the Tribunal's counter-indication, our proposal is that Mr McDonald and

I would spend just shy of an hour opening the two costs applications against Mr Hutton's client, but leave a few moments for Mr Page to make a single point relevant to the costs applications on behalf of the Intervener. That will take an hour, then there would be an hour for Mr Hutton to respond to both the applications. That would leave a short period for replies as necessary. I'm entirely, of course, in your hands.

THE CHAIR: We'll see how we go.

MR HARRIS: I'm most grateful. With no further ado, apart from the strange noises ... (audio distortion)

Very good.

Submissions by MR HARRIS

MR HARRIS: My costs application is to be found in core bundle 1, tab 1, so you have it to hand. The cost schedules for which I seek an order against Mr Merricks as funded by LCM, they're to be found also in tab 1 starting at page 19. You will have seen from the skeletons it comes to some £223,000.

Just by way of overview, there are three types of costs. You will have picked this up very clearly, I hope from the skeleton and the application. Type 1 is the costs that were previously reserved by this Tribunal in respect of the confidentiality ring order application. I will henceforth refer to that as the CRO application. That's type number 1. We say they're very straightforward.

Type 2 is the cost associated with the need for repeated enquiries by my clients, the Defendants, as to the funding and insurance status of Mr Merricks during this interim period prior to issuing an authorisation application. So that's category 2.

Category number 3 is: we say there were, in addition to categories one and two, a series of unreasonable and disproportionate activities by Mr Merricks and those he instructed in the prosecution of the intended authorisation application. That's the third

category, and I pursue them all.

Unless you have any other questions about law for me, I have only one to address and it won't take me long. The point is taken against me by Mr Hutton in his skeleton that Mr Merricks is not the "real party" for costs purposes, and that's by reference to some case law.

I'm just going to turn up the case of Turvill where that phrase appears in just a moment. But it's important that, when we turn it up, you will immediately see three things. First is that Turvill is not a "rule book", so this apparent requirement to be a "real party" is in fact not a requirement. That's my learned friend's point: he says, "Well, you're not a real party, so you can't have any costs" but it's not even a requirement.

Secondly, the case itself says in terms -- and we are about to see this -- there is a danger of overcomplicating costs applications of this type, non-party costs applications, by excessive reference to authorities. Well, with great respect, that's what we have in my learned friend's response: overcomplication by excessive reference to authorities.

And thirdly, what it says is, and I'm quoting here:

"The only immutable principle is that the discretion must be exercised justly."

I shall be focusing my submissions as to why we do get costs on that immutable principle, the justice of the matter.

So true to form, if one could just turn up -- this is the only authority to which I will draw the Tribunal's attention -- bundle 1 of the authorities, AB1, tab 15. If you turn to tab 15, you'll see the Turvill authority from 2016 in the Court of Appeal. There's only two or three paragraphs I'd like to show you. Beginning on bundle page 227, do you see paragraph 25, the bottom of the right hand page of the bundle.

THE CHAIR: Paragraph 25.

MR HARRIS: That's right, and they cite here the Court of Appeal from a previous

Court of Appeal case. The first indented citation is number 11:

"There is a danger that the exercise of the jurisdiction to order a non-party to proceedings to pay the costs of these proceedings becomes over-complicated by reference to authority."

I rely upon that.

Over the top of the page, first line, "Section 51" -- I appreciate that's a reference to the Supreme Court Act, which is ever so strictly not in play here, but nevertheless -- "confers a discretion not confined by specific limitations". I rely upon that.

The same point about overcomplication by authority is in the second line of the paragraph 26 citation, where the Court of Appeal cites from Deutsche Bank so I don't need to repeat that. But five lines down, there's a line that reads:

"Thus, the Privy Council has explained that an order of this kind is 'exceptional' only in the sense that it is outside the ordinary run of cases ..." .

Well, so there's no --

THE CHAIR: As most cases involve cost orders against parties.

MR HARRIS: Precisely, and that's exactly why I'm only going to refer you to this one case. It doesn't benefit anybody to be comparing our case with some other case in detail. But since my learned friend takes the point about "real party", I'll just dispose of that, if I may quickly. It's the next paragraph, 27:

"The authorities illustrate 'the variety of circumstances in which the court is likely to be called upon to exercise the discretion' and 'the kind of considerations upon which the court will focus' but are not to be treated as providing 'a rulebook'. The kinds of considerations illustrated ..."

Just pausing there. So this point about real party, which is item number 1 below, it's just a consideration; it's not exhaustive; it's just from an authority; it's not a rule book.

But in any event, even if it were, we still comply with it because it says:

"Whether the non-party funds the proceedings and substantially also controls ... and is the 'real party' to them."

Well, of course, Mr Merricks is a non-party who, for the purposes of this costs application, was funding the proceedings in this interim period where Willkie Farr and Gallagher and he were calling the shots as to what goes on in the proceedings. He was funding them via LCM.

So the first part, and I simply don't understand this, all that is said on the other side as to this first part of subparagraph 1 is, "No, you're not". No reasoning, no explanation. Self-evidently, Mr Merricks was a non-party funding the proceedings. He had the benefit of the backer of a commercial funder, namely LCM, so that bit's satisfied. I don't say that he is particularly to benefit from them in a personal sense, but LCM plainly would and intended to try to benefit from them in the commercial sense.

In any event, the other requirement or non-rulebook suggestion or, if you like, consideration is "substantially controlled". Well, of course, Mr Merricks did substantially control what was going on in the interim period when he had the benefit of the stay that allowed him to take steps with a view to putting forward an authorisation, as you would say.

THE CHAIR: It's difficult to see who else was substantially controlling that part of the proceedings.

MR HARRIS: Precisely, sir. Then number 4 -- I don't rely on 2 and 3:

"Whether the non-party causes costs to be incurred."

Well, plainly he did. Indeed, the argument today is to what extent, not whether, he caused.

That's all I have to say in relation to that case and the law. But it's just worth noting that, as regards did he cause costs, it is conceded by my learned friend Mr Hutton on

behalf of Mr Merricks that, at least as regards the CRO application category 1, Mr Merricks did cause the Defendants to incur costs. His defence there is a different one: it's, "Oh, well, that was all the fault of Maitland Walker", not that the Defendants weren't properly caused to incur costs.

So, to the extent it's even relevant, we are a "real party" in the Turvill sense and, at least as regards the CRO, that can't seriously be and hasn't seriously been contested.

That leads me on briefly and quickly to the CRO -- this is extremely straightforward category 1 in my respectful submission. The CRO application -- I don't need to turn it up; it's a lengthy several pages of letter -- it was a formal application. It was a formal application against the Defendants amongst others to do X, Y, and Z, and then the application was abandoned and withdrawn.

Now, in the ordinary run of cases, that would be an open and shut costs order in our favour. Those costs were specifically reserved by this Tribunal to be argued about on another day. Well, this is that day. It's very straightforward.

The only point, really, as regards the Defendants that's now taken against this part of my application is that, "Well, after the application for the CRO was made by Mr Merricks, Willkie Farr and Gallagher, you, the Defendants told us, the applicant, that there wasn't much confidential information; it only consisted of some parts of some expert reports and some disclosure from the Defendants". And the submission is made -- it's of course a false submission, but the submission is made -- that "when we learned that, oh, we promptly withdrew the application" and then somehow it should follow that there should be no costs order.

Well, of course it doesn't follow -- it's a non-sequitur even on its own terms were it factually accurate -- that if you promptly withdraw an application, you shouldn't have a costs order against you. The costs that you caused to be incurred by the respondent to the application have by that stage been incurred. So it doesn't follow logically, but

in any event, it's wrong on the facts. It's not the case that the application was withdrawn simply because the Defendants said something new and different to Mr Merricks and his team after the application was issued because, when one turns up the CRO -- and we've cited this specifically in the skeleton, so I don't propose to spend time drawing up the documents -- the CRO specifically asks for the expert reports and the underlying disclosure and specifically states that it is confidential and specifically says that they want it because it's relevant to their proposed authorisation application. So it's simply wrong on the facts that they somehow learned after that application from us that there wasn't much confidential information. They knew that before and they specifically asked for it. All that has happened is that Mr Merricks and his team changed their mind. Well, that's good. I'm glad they changed their mind because it would have been even greater costs if they hadn't changed their mind. But it doesn't mean that somehow this is an excuse to a very straightforward application. So that's all I have to say on that.

THE CHAIR: I suppose you might also say that if you're going to make an application of that sort, you should ask the Defendants what might be involved.

MR HARRIS: There are lots of different ways of putting it like that and we agree with all of them. But ultimately, no matter what is said in response to this part of the application, the application was made; it should never have been made; it was withdrawn; it incurred costs: they're not our fault. The applicant should pay for them. I accept there's a potential question mark about the quantum -- I'll come to quantum later -- but as a matter of principle, it's open and shut, in my respectful submission.

The second category is equally, in my submission, open and shut. That is the category of costs that we incurred by having to write letter after letter, including to the Tribunal, about what turns out to have been the lack of costs and insurance coverage for this interim stay position when Willkie Farr and Gallagher/Mr Merricks were causing all

these costs to be incurred.

This is very straightforward. We say that we had a legitimate entitlement as a defendant, when somebody new steps forward, wants to try to take over, then causes a whole series of costly events, it's perfectly legitimate for us right then and there to say, "Well, hang on a minute, who are you, what is your funding and what is your insurance position?"

Now, the obvious course would have been for in response -- first of all, the obvious course would have been the very first letter saying, "Oh, we've now taken over. By the way, Defendants, don't worry, we've got cost coverage or here's some undertaking or LCM, the funder, will foot the bill if so ordered in due course." That's what they should have done in the very first letter.

But when we write a letter saying, "Well, hang on a minute, what's the costs position, what's the coverage position?" At that point, they should have written back saying, "Yes, don't worry, here's an undertaking, here's a funder, here's ..." Then we would have not written a single letter.

Of course, the proof of that is in the pudding, because only last week or possibly the end of the previous week, in the face of the application and the impending hearing, lo and behold, that's what we finally got. But we had had to write umpteen letters before that and draw it to the Tribunal's attention. That should have been done right at the beginning: none of these costs would have been incurred. But instead, we had to write and ask, write and ask, draw it to the Tribunal's attention.

We even had to then make enquiries of the solicitors of the funder because, as you'll have seen, the more granular dispute about whether the Tribunal was misled by the terms of Mr Bronfentrinker's witness statement.

But the basic point is very simple: they didn't provide any assurance; they didn't provide any coverage. They basically said, "None of your business". Indeed, the

words that are now used are "premature and unnecessary".

It wasn't premature because you've seen that we have been forced to incur a lot of costs. (Audio distortion) Merricks, should there be a cost order against him, you don't need to appear, LCM. As I said, at the risk of repetition, had that been given when it should have been given months earlier, none of that cost would have been necessary; it was all incurred.

And it wasn't premature: it is plainly of relevance to the Defendants to know that, in the face of a proposed new substitute class representative, there will be costs coverage for two things. The most important one is for the period when they are contemplating bringing the application. Also, in due course, had they brought the application, they would have had to satisfy the Defendants/the Tribunal that they had cost coverage and insurance coverage for the application itself because, had they failed, then they probably would have had to pay the costs of the application.

But what was said is, "Oh, it's all premature because you'll learn all of this when we issue the application". But of course we were saying, "Well, hang on a minute, you might not issue an application. So what about all the costs that are being incurred, even then?" Lo and behold, that's what happened.

So we were proved right all along. We were told it's premature for you to know anything about the cost coverage, because all will be dealt with in the application, and we were saying, "Well, what if you don't make an application?" That's what's happened, and yet, we weren't given the confirmations that we reasonably required prior to only a week or so ago.

So it's a very simple point. All of the costs associated with us reasonably asking for that information are to be paid to us by Mr Merricks as funded by LCM. It's not like he's going to be out of pocket; I'll come back to that point on the underlying justice of what's going on here today.

Just as a -- unless you invite me to do so, I don't propose to go into granular detail about the point about Mr Bronfentrinker's witness statement being, in our submission, misleading. You've seen that on the paper. He denies it. He's now put in yet another witness statement, which we say is completely irrelevant about that topic. You can see for yourself.

What happened was: he said that LCM is principally liable for any cost, and we said, "Whoa, really?" So we wrote to LCM and lo and behold, LCM write back saying, "No, no, that's not what's going on. We will be principally liable if so ordered, which we don't think we should be, and if there's no ATE insurance, which we hope to get, if we make an application that is then denied". And we were like, well, that doesn't make the point. Our whole point is: what about the costs incurred for the period before you make an application if you then decide not to make one? In other words, what we're arguing about today. So it was, in our respectful submission, misleading. It should never have been put. But there we go. The basic point remains the same, whether or not one has to dwell upon that piece of granular detail. So that's category number 2.

Category number 3 is the other unreasonable and disproportionate costs caused by the some 68 letters that were written during this three-month one-week period of interim deciding what they're going to do. I will develop that very briefly in just a moment, but I just want to, on this category 3 topic, address one of the points that's taken against me on, if you like, a level of principle about this third category.

It is said in my learned friend's skeleton: "Well, of course, you've got to show causation. You haven't showed causation, so you shouldn't have anything." With respect, that's misconceived. What we have said is that we're happy to give a 5 per cent or reasonable discount to reflect the costs that would have been incurred in any event by any reasonable proposed new class representative acting proportionately.

Let me just identify for you what those costs would have been, and they are minimal.

There would have been one letter saying, "Dear Defendants, we are now the new solicitors on the record for the new proposed class representative"; "Dear Defendants, we propose to issue our new authorisation/substitution application on such and such a date, whenever, X months down the track"; and "Dear Defendants, by the way, you don't have to worry because insofar as you incur costs, we'll pay for them or at least we have somebody who's capable of being the respondent to a costs order".

Then we would have had to write one letter and one letter only saying, "Dear Tribunal, they've asked for a three-month stay and we agree". But that's not what happened at all. Beyond that minimal sort of 5 per cent costs, there were then 66 other letters, and they included what I describe as disproportionate and excessive, all manner of (audio distortion) which I've already dealt with.

But they included other things like, for instance, (audio distortion) this Tribunal (audio distortion) defended (audio distortion) it gave rise to all manner of other issues that were germane to the proposed authorisation application. Let me give you some examples. We learned -- which we wouldn't have learned had the Tribunal not had the foresight to insist on us being shown the correspondence -- number 1, that there was a bone of genuine question ...

THE CHAIR: Contention, perhaps? A bone of contention.

MR HARRIS: Do you want me to continue?

THE CHAIR: Well, I think ideally I'd prefer not to have the bleeping noise.

(2.25 pm)

(A short break)

(2.52 pm)

THE CHAIR: Well, I'm sorry about the delay and it's not necessarily guaranteed that there won't be the noise going on, but I'm afraid we've just got to go on. I mean, it's essential that we finish.

MR HARRIS: May I politely enquire whether the Tribunal still intends to finish at 4.30 (overspeaking)?

THE CHAIR: We may need to go on a bit longer, but we can't go on beyond 5.00, certainly.

MR HARRIS: I understand.

So where I'd reached was I dealt with the CRO part, category 1, with the costs of the so-called prematurity enquiries, category 2. I was just dealing with the point that's taken against me on causation. I explained that we give a discount -- if that's the right term -- for 5 per cent to explain what anybody would have had to incur. That'll be relevant to a submission I make later on about the so-called adverse incentives or perverse incentives that my learned friend takes. I'll come back to that. But what I was explaining was that within this third category, beyond the 5 per cent, there are a whole series of examples of excessive and disproportionate correspondence and issues that arose that we had to deal with, caused us costs, and those are the ones that we claim.

I was just about to enumerate the three examples, and they are as follows.

We learned, once the 100 pages of heavily redacted correspondence was disclosed to us, that there was a dispute, or at any rate, a relevant issue that was contentious regarding how Mr Merricks even got selected. Now, the details don't matter, but it's germane because had Mr Merricks pursued his authorisation application, that would have been a live issue, as we know from the many other cases in this Tribunal. For example, the Christine Riefacase, but not limited to hers, there are genuine issues about how people get appointed, what knowledge they have, what involvement they have, what decisions they take. So that was a live issue we had to inquire about. It caused us costs.

A second example is that there was a dispute, again relevant --

THE CHAIR: I suppose one question is why did you have to inquire about it then?

MR HARRIS: Well, because it was relevant to how the issue was going to be framed in the proposed authorisation application, and in particular, because you will have seen now that all the correspondence has been disclosed, that Willkie Farr and Gallagher's/Mr Merricks' position was that that is irrelevant, it should be redacted and should be excluded from consideration at the authorisation application stage.

In fact, that leads me on to my second example of where we legitimately incurred real costs. That satellite dispute then took so much, if you like, a force of its own that we, the Defendants, were even threatened with an injunction application. So the reference to that is -- you don't need to turn it up -- correspondence bundle, tab 83, page 263, paragraph 7.

That was the solicitors, Hogan Lovells for LCM, the funder, saying, "Oh, well, you've now been told this stuff, but it's not only irrelevant, it's highly confidential. If you don't give it back and redact it and purge your files, we want an injunction." We obviously had to deal with that. Of course, it's not ever been irrelevant. It would have been relevant for the reasons I just gave to the authorisation application. So that's a second example.

I'm not going to give every example, but a third example is we learnt from the disclosure of that material within this category 3 of the disputes that had arisen between on the one hand, Maitland Walker, and on the other hand, LCM, about historical fees. The allegation is made by Maitland Walker that over £1 million worth of fees have not been being paid by the funder, which at that stage was proposed to remain in place.

Of course, that's relevant to the Defendants and to any threatened proposed authorisation application. It's relevant for the obvious reason, that if LCM weren't even paying their existing solicitors on the record, then there was a question mark about their future funding if there had been a proposed authorisation application.

Anyway, there are other examples. I plainly don't have time to go into all of them, but they are examples of this third category: why and how we had to get involved.

The other problem, before I move on to the next topic on this causation point that's taken against me, is that to go into any further detail on any of those issues requires precisely the sort of detailed dissection of page after page after page of correspondence, 68 letters, hundreds of pages, that is relevant to a detailed assessment, but not a summary assessment. We've always said that there should be a detailed assessment with some interim payments. It's my learned friend who says, "Oh, no, no, no. You have to show causation and it has to be detailed and granular." We say that's misconceived. That's for details which he doesn't want --

THE CHAIR: Your position is clearly, there should be a detailed assessment --

MR HARRIS: Absolutely.

THE CHAIR: -- carried out by a costs judge.

MR HARRIS: Absolutely. That's exactly right, and in the interim, there should be payment.

THE CHAIR: Payment on account.

MR HARRIS: Payment on account, in the usual way. We set out what we want in that regard in the paperwork.

The next point that's taken against me, I'm obviously going to rush through these in light of the time and the hiatus that we just had. It is said essentially, "Oh, no, no, no. You could have just sat back and waited for all of this. Why did you actually do anything during the interim period?"

That, of course, doesn't apply to the CRO, category 1, or to the so-called prematurity of enquiries in my submission about costs, costs coverage. But on this remaining category 3, "Why didn't you just sit back and wait?" Let me tell you why. First of all, there was a carve-out from the stay, so it wasn't a full stay. The point is taken against

me, "Oh, the case was stayed. So why did you do anything?" It was a carve-out from the stay. It was precisely because, in my respectful submission, the Tribunal recognised that the Defendants, amongst other people, had a real and ongoing role to play in case management, even during the stay.

Second point. During the stay, the Defendants were respondents to an actual application: the CRO. So we plainly couldn't sit back and wait.

Point number 3. The Tribunal quite properly recognised the ongoing role of the Defendants during the stay by ordering disclosure to the Defendants of what was, back then, 100 pages of inter partes correspondence that the Defendants hadn't seen. It's, of course, a lot bigger now.

Point number 4, I made before. We were threatened with an urgent application for an injunction, and indeed for damages. So we couldn't sit back and wait.

Point number 5. We have, as I mentioned this morning, we had an ongoing contingent liability on our balance sheet, which is relevant to the ongoing operations of the business.

So for those three reasons at least, we couldn't sit back and do nothing, which seems to be one of the key responses on this part of the application.

Nearly finished, before I concede the territory to others on the applicant's side. I said I'd deal with the immutable principle of justice. What is the justice of this matter? They say that the indemnity -- that's to say, the Willkie Farr and Gallagher's/Mr Merricks' team through Mr Hutton -- say the indemnity from the funder, LCM, is irrelevant. Why are you even mentioning LCM? They're not here today, the Tribunal directed that they shouldn't come today, and the rest of it. But it is extremely relevant. It is the most relevant factor that goes to the justice of the case.

Mr Merricks, in his intervention period of three months and one week, was fully and commercially funded throughout. As we pointed out in our skeleton -- I hope in

a manner that comes across at least clearly -- the entire episode of Mr Merricks' involvement was simply from the perspective of LCM; a continuation of their commercial business.

So it is accepted that they were potentially a respondent to costs orders -- at least if ATE insurance didn't stretch that far -- in the period prior to Mr Boyle's death. It is accepted by LCM that they would have been a proper respondent to a costs application had the authorisation application been made and then failed.

They're both quite proper acceptances. Yet somehow it is said that in the interregnum period, between the first one that I gave and the second one that I gave, up until seven or so days ago, it was said, "Oh, no, no, no, they're not our responsibility on any view of the world." Right? But that's plainly not just. From LCM's perspective, the funder with the money, this has always been speculative commercial business throughout the entire period, including that three months and one week when Willkie Farr and Gallagher/Mr Merricks were trying to intervene.

From that perspective -- and we're only arguing here about costs. From the costs perspective, the most relevant fact is that they were always funding. Always funding. It's just a continuation of business as usual, from their perspective. What we say is that that's why -- I don't know why it's generated so much hot air -- that's why we said carefully in our skeleton, our costs skeleton at paragraph 18, and I quote:

"... for costs purposes, the funded Mr. Merricks remains little more than the alter ego of LCM ..."

I stand by that, 100 per cent. It says, carefully, for cost purposes, not for any other purpose. We're arguing here today about costs. For costs purposes, that is exactly right. He's always had a full indemnity.

I move up. Mr Merricks, of course, as a direct result, he's never been exposed personally to any adverse costs order; he's got full indemnity. But what about my

clients? We're not a commercial funder. We're not engaged in this as speculative commercial business for reward. We're not a volunteer, unlike Mr Merricks, unlike Willkie Farr and Gallagher, unlike LCM, unlike the ATE insurers. We are simply the recipient of what we say is thoroughly misconceived litigation that's costing us a fortune. "Where's the justice?", I ask rhetorically, in circumstances where, if you're with me, that there has been excessive and disproportionate unreasonable costs, where's the justice in my client's being made nevertheless to foot that bill in circumstances where the person who's caused the costs doesn't pay anything?

THE CHAIR: Mr Harris, can I just think aloud a little bit in relation to the point you're just making? If a point is being made that the application at the moment is only against Mr Merricks and the position of LCM has been deferred (inaudible). If that is a point which is seriously being pursued, is a course to say, "Well, the third party costs application against LCM can be dealt with on paper" at the same time as we make any decision in relation to costs. I'm just thinking aloud here, because that isn't exactly what anyone is asking for, but I just wanted to canvass it with you.

MR HARRIS: We don't propose that, and for this reason: it's now been made completely clear that, albeit only from seven or maybe ten days ago, there's a full indemnity from LCM. That's why in our skeleton, we call it Mr Merricks-as funded-by LCM, and that's why we --

THE CHAIR: Yes.

MR HARRIS: Because it now doesn't make any difference.

THE CHAIR: Yes.

MR HARRIS: We know where the money's coming from, we know why it's coming from there, and we know that if you agree with any part of my application, Mr Merricks won't be footing any part of this personally. So it doesn't matter now. It's (inaudible). We don't need to do it on the papers. You don't need to do it later. They don't need

to be here.

THE CHAIR: No, but as I understand it, the argument put against you is: no, Mr Merricks has to be considered, as it were, on his own. He was acting from public-spirited motives, and therefore the costs as against him have to be considered on that merit, on that basis. We can't consider today the role of LCM, because they're not here.

I was just canvassing that if that is a point which is seriously pursued, the way that I've just suggested would cater for that. But I understand what you're saying: that that's all pretty unrealistic anyway.

MR HARRIS: It is. The way I put it is this with respect, my Lord: it's not a serious point. It can be disregarded. It's not serious, and you have everything that you need today, including on the papers. I do understand, though, that if the Tribunal had any reservations, then, for the sake of good order, it could well say, "I've heard what you say, my learned friend for Walter Merricks, and we will take into account on the papers the further points that relate to LCM after this hearing is over." I say you don't need to.

It's abundantly clear from our costs application from day 1 that it was joint and several against LCM and that for costs purposes, they weren't to be distinguished. Whether one calls it alter ego for costs purposes or -- it doesn't make any difference. So you don't need to.

I'm just going to finish off on two quick points. I preface them with saying this: in light in particular of the hiatus with the technical difficulties, I'm not going to deal in opening my application with any issue of quantum. I do have responses to all of that. I'll hear what's said, and I'll reply shortly. Needless to say, I don't agree with any of it, and we've explained why in the skeleton.

But two other quick things on principle. It is said that it is a wrong incentive -- I said I'd

come back to this point -- to other PCRs, proposed class representatives, if you were to make any order against Mr Merricks today, even though he's fully commercially funded. It's said (inaudible) the wrong incentive. He was public-spirited, et cetera, et cetera.

But no, with great respect, that's completely back to front. As I said before, we recognise that if it had been a reasonable, non-excessive, proportionate attempt to intervene, for which we've given a discount, so to speak, of 5 per cent, we wouldn't have been seeking any orders, save the CRO and the point about the so-called prematurity. Because we accept that if it's purely public-spirited and it's done in a perfectly proportionate, reasonable way, there's inevitably two letters, of which we'd have to write at least one.

But that's not what's happened here. Indeed, the incentive is completely the wrong way around. If you don't make a cost order, if you don't make a cost order, you'll be giving free rein to other people in the same position as Mr Merricks to try to intervene in an excessive, disproportionate and unreasonable manner.

The incentive, in my respectful submission, that you need to lay down by making the orders that I seek, is so that if and when this happens again or something similar happens again, people will know: you can't just try to muscle your way into a proceedings. Multi-hundreds of millions of pounds worth of proceedings, in all manner of complexity, and do so in this scattergun manner, with 68 letters in the course of a month or so. And then all kinds of, in my respectful submission, misconceived things like, "Oh, there needs to be an injunction to redact certain sorts of information", et cetera, et cetera; the points I made before. So it would be the wrong incentive to not, bearing in mind the 5 per cent discount.

Then the last point, subject to any replies on quantum in particular on things like hourly rates and who did what in which month, is that it is said in my learned friend's materials

for this application, that Mr Merricks is simply doing so in a purely public-spirited manner, and that should be -- in fact, that's his major point: you shouldn't give any cost orders against him, because look how public-spirited he is. But as you know, it's more complicated than that.

In previous litigation, where Mr Merricks acted as a class representative, it's a matter of public record that he was getting paid personally. I don't seek to place too much emphasis upon this, but it's not fair to say that it's purely public-spirited. That's why the language used on this part of the response is very careful. It says that Mr Merricks won't make any "substantial personal benefit", but of course we don't know what benefit he would make, because that's not been revealed. We've essentially been told, "It's none of your business." We say it is part of our business if you're going to take the point that there shouldn't be any costs order because he's doing this for public-spirited means.

Last but not least, we know as a matter of public record that Mr Merricks was charging on a previous case. We also know -- I don't need to turn it up, but the reference is supplementary core bundle, tab 5 -- that there's a recent article in the Global Competition Review, a respected periodical for these purposes, in which Mr Merricks is at least reported as having said that it's no business of the Tribunal even to inquire into the rates that are charged between a class representative and a commercial funder, and that those rates should reflect the "heavy responsibilities" that are taken on by a class representative, and it is at least relevant to take into account that many class representatives get paid a great deal in their other day jobs, and they're specialists.

Now, I don't put it any higher than I need to, which is simply that against the background of those materials which are in evidence before this Tribunal, it's not a correct characterisation for Mr Merricks simply to say, "Oh, don't worry, I'm a pure

public-spirited person, and therefore there shouldn't be any costs application made against me or order made against me."

Unless I can assist further, in light of the time, I'm going to stop there.

THE CHAIR: Right. Thank you very much.

MR HARRIS: I'm grateful.

THE CHAIR: Yes.

Submissions by MR McDONALD

MR McDONALD: Members of the Tribunal, I'm going to try to be relatively brief, and partly because I can largely adopt the submissions made by Mr Harris in respect of the test that he took you to and the points that he made about the public-spirited nature of Mr Merricks' intervention.

There are some points I want to make which are a bit more peculiar to my client. I think I have five points, but one of the points which I do particularly want to endorse is that we don't see this as a classic non-party costs order situation. There are two main reasons for that.

The first is that applications were made by Mr Merricks. They were made in a rather informal way, but they were made, both in terms of the confidentiality ring and the documents. Now, the normal approach where nonparties put their head above the parapet and make applications, is that for the purpose of the applications at least, which includes the work leading up to those applications, they are treated as a party.

The second point to make. This is something I referred to in my skeleton, but has been strengthened by what has been said on Mr Merricks' behalf. Mr Merricks says, well, he should be looked at as if he was a pre-action litigant. Now, as a pre-action litigant, what he did was approach us and say, "I want this", an array of documents. He then made an application for documents.

Now, there are well-established rules relating to the costs of pre-action applications for documents and similarly for documents applied for from a non-party. I'm going to take you to this. The general rule is in CPR 46.1, and the same applies to Norwich Pharmacal applications. The leading case on it, and the appropriate test, is Gorbachev v Guriev. And we can find that in the supplemental authorities bundle, tab 18. (Pause)

It starts at page 374. Conveniently, the relevant rule is set out in paragraph 1, which is on page 376. (Pause)

You'll see from paragraph 1 that the issue in this case was whether the jurisdiction dispute leading up to the pre-action disclosure application itself was itself covered by the rule. But the rule, you'll see in paragraph 1, it records:

"The judge ordered the Trustees to pay the costs, applying the general rule in ... 44.2 ... The Trustees argue that he should have applied the general principle for third party disclosure applications, reflected in CPR r 46.1, which is that a successful applicant should pay the third party's costs of applications unless the third party has behaved unreasonably."

Then it sets out CPR 46 in paragraph 2, and it provides, in various circumstances -- those two circumstances are pre-action disclosure applications and applications against a third party:

"[But] The general rule is that the court will award the person against whom the order is sought that person's costs -- (a) of the application ..."

Now, the costs of the application include the costs leading up to it; it's not just the hearing:

"... and (b) of complying with any order made on the application."

Now the Tribunal has already made an order in respect of compliance, because we've been paid 15,000 in respect to the production of the documents. But we say that the

same should apply in terms of the costs of the application itself.

The relevant principles are set out in paragraph 27, which is at page 383. Paragraph 27 says:

"... authorities suggest that the same costs principles should apply to applicants for disclosure under ... 46.1 as to Norwich Pharmacal applications ..."

Norwich Pharmacal aren't expressly covered by this, but the common law position is at the same costs rules apply to them:

"... and other applications against innocent third parties. The principles are that:

"(1) it is reasonable for an innocent third party to seek to protect private information by resisting a court order;

"(2) as between an innocent claimant and an innocent third party it is more unjust for the third party to bear the costs than the claimant, because it is the claimant who is invoking the legal process to obtain a benefit, and the fact that the benefit is one which he is legally entitled is not enough to justify an innocent third party having to be out of pocket;

"(3) in general the costs should be recovered from the wrongdoer, not the innocent third party, which the third party has no means to achieve [and that envisages that Mr Merricks, had he pursued his application, could have sought it from the defendant]

"(4) the principle does not treat a third party as entitled to do no more than adopt a neutral position before it is at risk of having to bear or pay the costs of resisting the application; active opposition, albeit unsuccessful, is not of itself unreasonable behaviour or sufficient to deprive the third party of the benefit of the general principle that the applicant should pay its costs ..."

THE CHAIR: The point in (3) is that the innocent third party gets the order against the applicant, and the applicant can seek the costs against the wrongdoer.

MR McDONALD: Correct.

THE CHAIR: So that it will ultimately go to the wrongdoer.

MR McDONALD: Correct.

THE CHAIR: Whereas if the third party, the innocent third party, has had to bear the costs themselves, they will never get the costs from the wrongdoer and the wrongdoer will get away with it.

MR McDONALD: Yes, but applying that position here, we say, being the estate, we were the innocent third party. Had Mr Merricks been ordered to pay our costs and then continued with his claim, or had applied to, authorised and been successful, he would have sought to recover those costs at the end of the day from the Defendants. So that's how it applies with analogy to the present case.

THE CHAIR: Sorry, you were saying about (4).

MR McDONALD: "(4) the principle does not treat a third party as entitled to do no more than adopt a neutral position before it is risk of having to bear or pay the costs of resisting the application; active opposition, albeit unsuccessful, is not of itself unreasonable behaviour or sufficient to deprive the third party of benefit of the general principle that the applicant should pay its costs;

"(5) if it is reasonable for the third party to resist disclosure, it is entitled to decide on what basis to do so, and with what evidence, without losing its costs protection, provided that it does [not] take an unreasonable course which unnecessarily increases the costs;

"(6) there may be cases which require a different order but that will not usually be the case (a) where the third party had a genuine doubt whether the applicant was entitled to disclosure; or (b) where the third party was under a legal obligation not to disclose; or (c) where the legal position was not clear; or (d) where the third party [should] be subject to legal proceedings or might suffer damage if it gave voluntary disclosure; or (e) where disclosure would or might infringe a legitimate ..."

THE CHAIR: This is a rather different situation, isn't it? I mean, this is where the innocent third party has nothing to do with the litigation.

MR McDONALD: I understand. I'm not saying it's entirely distinct, but remember that this also applies -- CPR 46.1 also applies to pre-action disclosure against defendants. So it's not just dealing with entirely nonparties. We would say that our position was not that different, because we were there in circumstances where Mr Merricks had taken over the running and we were being asked to do various things. We weren't ourselves positively seeking to be authorised. We were responding to the requests that were being made at us. So we say we should be treated as a similar position as in these authorities.

Just looking at some of the factors taken into account. As I'll show you in a minute, we were originally asked for the whole case file just to be transferred over to Mr Merricks, which was what sparked off the dispute in the first place about the document.

Now, we obviously couldn't do that because of confidentiality and privilege, which are the very factors -- legal obligations to others, doubt about whether we could provide them -- which are referred to by the Court of Appeal in Gorbachev. Indeed, in some ways, you could look at the confidentiality ring issue in a similar light, because that was a mechanism to get documents. That's why they were asking to be in the ring, they say. So again, you could say, "Well, it's all part and parcel of their application, effectively for pre-action disclosure or disclosure from us, an innocent third party." But it applies with great force to the documents category that we seek.

Now second, just to make good about the way that Mr Merricks approached this -- and I said a moment ago that he asked for the full case file -- I don't think this is in dispute, but I'm just going to take you to one or two pieces of correspondence, not too many. If we can look at page 143 of the bundle, the correspondence bundle 1. (Pause)

Starts at 143, but this is a letter from Willkie Farr on behalf of Mr Merricks. But the relevant part I'm going to go to is 147. (Pause)

Now, I've only gone to this because it's coming from the horse's mouth. We view this as a rather simplified and an overall inaccurate description, but it's at least common ground. So, "Mr Merricks' and this firm's original requests", this is at paragraph 11(ii) at the bottom of 147.

THE CHAIR: Yes.

MR McDONALD: "Mr Merricks and this firm's original requests were for the full 'case file' but following Maitland Walker's refusal to provide the client file and taking a pragmatic approach ... narrowed his request."

Now, what had actually happened is he still asked for core documents, and we refer to this in the evidence. I won't take you through all the correspondence. He actually asked for core documents (inaudible), but he just failed to explain and refused to explain when we asked what "core documents" meant. So when he actually applied to the Tribunal, he dropped his request for core documents and narrowed it even further to more limited documents.

Now, what is notable about this letter is if we look at paragraph 12 at the end on the next page -- because we had raised issues with confidentiality for the obvious reasons that there was a confidentiality ring in this case. But at page 149, the last sentence on paragraph 12:

"Mr Merricks will separately write to the parties and the Tribunal about amendments to the confidentiality ring to enable his advisors to be included to the extent that there is confidential information that he requires to make the Application."

So it was Mr Merricks saying, "I need to be in the confidentiality ring". This is something that he had positively raised with us earlier, and that's at page 101. (Pause)

If you look at the first main paragraph on this page:

"As for the suggestion in Your Letter that the file cannot be transferred at [this] time [when] neither Mr Merricks nor the relevant solicitors at this firm have been added to the Confidentiality Ring, this is an issue that will be resolved imminently by our requesting that the solicitors from this firm be treated as being subject to the terms of the Confidentiality Ring pending the determination of the application by Mr Merricks to be authorised ... following which there will be need to amendments to the Confidentiality Ring."

So again, it's Mr Merricks saying, "This is what I'm going to do."

So faced with these positive assertions about the steps that he was going to take, we said, "That's fine, we'll give you the documents. But to save money, we'll give them to you after you've got into the confidentiality ring, if that's what you're going to do." Because then we didn't have to review and redact, which would take longer and be more expensive.

So we don't really see how it can be said that we somehow made Mr Merricks make the application, or insisted or required, or however many different ways it's put, for him to do so. In any event, when a party makes an application, that's their decision. You can't just land it at another party's door just because they've previously said, "Okay, well, if you do get in the ring, we'll act in a certain way." That was his decision.

Just picking up now, moving on to my next point. If we go back -- I'm sorry, we're going back to the previous letter, but it's 145. (Pause)

This is the letter we were looking at. This is the application to the Tribunal. At paragraph 6 on page 145, Mr Merricks says:

"Maitland Walker has informed Mr Merricks that it has fees and disbursements of over £1.2 million owing for the period between January 2025 and until now (the 'Outstanding Sum') ..."

Mr Merricks then addresses this at length to the bottom of this page, and then over the

next page.

Now, remarkably, having told the Tribunal all about this in his position, he then said this is all confidential. Because the Tribunal may recall that Mr Merricks hadn't copied in the Intervener and the Defendants to his application to the Tribunal, which is slightly unusual in itself. The Tribunal understandably said, "Well, they need to see the documents that you've referred to." Having made that direction, you would have thought that Mr Merricks and his solicitors would take a sensible approach to redactions.

Now, my learned friend, Mr Harris, has alluded to this already, but I'm just going to take you to an example, because it is worth looking at.

Now, it may not be apparent on your documents, but can I just check, if you turn to page 109, is there any yellow on the page?

THE CHAIR: 109?

MR McDONALD: 109.

PROFESSOR MULHERON: Yes.

MR McDONALD: There is, there is. I'm grateful. Mine are in black and white, so I don't have yellow, but I have copies if no one has yellow on their page. (Pause)

So what the yellow shows -- and this is just an example; there were -- I can give you the number. There were 107 pages in this bundle. So this is just one example. The redactions were made by Mr Merricks. I just want to flick through what they are.

THE CHAIR: Sorry, this was after the Tribunal said, "You should see the documents." So the Defendants and --

MR McDONALD: And the Intervener, yes.

THE CHAIR: Yes, should see the documents. This is the letter as was then redacted.

MR McDONALD: Exactly.

THE CHAIR: Yes.

MR McDONALD: Exactly. So Mr Merricks' team -- it's fair to say we made some very limited redactions ourselves. None to this letter, but we made some very limited redactions.

THE CHAIR: Yes.

MR McDONALD: But Mr Merricks' team made a huge swathe of redactions to these letters. This letter, all of the redactions are theirs, which is one of the reasons why I chose it for simplicity.

So looking at Mr Merricks' redactions, so the first one just redacts, "until all your invoices have been paid".

The next paragraph refers to their argument, which is:

"... proceeds on the continued misconceived position that you are entitled to withhold the Documents requested ... unless he takes on the obligation to have your fees paid, even though ..."

Now, just bear in mind that Mr Merricks can't have thought this was confidential because he'd told the Tribunal about it. Also, it's difficult to see how Mr Merricks had any confidentiality in respect of a dispute between LCM and the estate about sums due under the funding agreement. So Mr Merricks certainly has no confidentiality to protect.

Then we look at the bottom:

"... nor has he incurred or been responsible ..."

So this is just saying, "Mr Merricks hasn't incurred or been responsible for any of your fees." How is that confidential?

Then over the page, again you've got further redactions about fees. Then in the middle paragraph, there are four questions asked by Mr Merricks of us. Four questions asked:

"To ensure there is no misunderstanding ... can you please confirm the following:

"i. Whether Ms Burns has taken out a grant of probate [and so on] ..."

Now, how can their questions of us be confidential?

Then half way down, there's a bizarre one where we had raised arguments about the existence of a lien and authorities, and they've just quoted our arguments on the law. How is that redacted? Why is that confidential?

Then over the page, you have further things about the existence -- sorry, they then set out their arguments about liens. And so on and so forth. It goes on, and you may want to just look at the rest of it, but I just use it as an illustration of what happened.

To put the numbers of the redactions in context -- this was actually referred to, I think either in the Defendants' or in the Intervener's letters subsequently. I'll give you the numbers. They were 107 pages long. 45 pages have been redacted in their entirety, so provided to the Tribunal, but when provided to the Defendants, redacted in their entirety. There were redactions made to all but 15 of the remaining pages, so that 92 of the 107 pages were fully or partially redacted.

Now, I'm not going to take you through the correspondence, but obviously this led to a spat about the level of redactions made and so on. It's just an illustration of the approach being taken. I think my learned friend described it as a scattergun approach, and it was. It was a scattergun approach. We see this from all the letters. Very lengthy letters raising very detailed points and serious accusations flying around; an over-redaction here.

Another point that they said was confidential was we had written to the Tribunal and we said we're worried about LCM's financial position, because look at their public accounts. The Tribunal then received a letter saying Maitland Walker should never have referred to LCM's financial positions; it was inappropriate for them to do so. But that financial position was publicly available. It had been considered by this Tribunal in another case, where the financial standing of LCM was under the scrutiny on

a certification application. So again, it's another illustration of: they were taking points which are just wholly unreasonable.

THE CHAIR: Why shouldn't the Tribunal know about that? What was the reason given?

MR McDONALD: Well, you'll have to ask Mr Hutton, but I mean, I can -- you can --

MR HUTTON: It wasn't the Tribunal wasn't to know about that. I think it was the Defendants that weren't to know about that.

MR McDONALD: But again --

THE CHAIR: But why should the Tribunal know about it and not the Defendants?

MR McDONALD: So I mean, it may be that -- hold, I might be able to find the letter, if you bear with me. (Pause)

Yes. At paragraph 9, it's on page 227.

THE CHAIR: Of this bundle?

MR McDONALD: Of this bundle. This is just one example. There may be other ones, but this was a letter from Willkie Farr to the Tribunal. Another lengthy letter. At paragraph 9, it talks about confidential information, and then if you see about five lines down.

THE CHAIR: Yes.

MR McDONALD: "The MW Letter does not stop there, as it goes on to make an inappropriate and unsubstantiated allegation that the litigation funder is not meeting its payment obligations because it is in serious financial difficulties ... This final allegation, is very serious ... albeit the allegation is misconceived and not correct -- is something that MW has chosen to raise the first time ... with the other [party] in copy. In a similar way, in paragraph 4 of MW's Letter of [the 18th], MW continues with its complete disregard of confidentiality and the interests of the class, by disclosing confidential information ..."

Then if you look at over the page, paragraph 10:

"Mr Merricks raises these matters for two reasons:

"a. Firstly, to identify the confidentiality breaches ..."

So we were being accused of breaching some form of confidentiality. I don't know who to, but obviously it wasn't owed to Mr Merricks.

"... and to inform the Tribunal and the other parties in the face of MW's refusal to remedy [these alleged] breaches, that Mr Merricks will as quickly as possible prepare non-confidential versions of the relevant correspondence ..."

You know, normal solicitors correspondence you may have -- and I appreciate sometimes things can get heated -- but you can have a much more reasonable approach to this. Even if you were just saying, "Oh, we think this is confidential", we could then have a discussion about it. But what was done here is they were using a hammer to crack a nut by going to the Tribunal with lengthy letters, making wholly unjustified points about what was and wasn't confidential, and threatening various actions, causing responses from us, causing the Defendants to respond. This is indicative of the scattergun approach.

Now I'm just going to briefly address you on the indemnity principle point. Now, these weren't afforded much weight in my learned friend's skeleton argument. I've addressed them in our skeleton argument in some detail. You can find that, if you don't have it ...

THE CHAIR: You say the certificate is sufficient --

MR McDONALD: Yes.

THE CHAIR: -- unless disproved.

MR McDONALD: Exactly, and nothing has been raised which disproves that. There's no evidence of anything against that, and the legal points that have been raised, we say don't go to really the contractual liability owed to the solicitors. Mr Maitland-

Walker, in his 11th statement, has said they are contractually liable -- that's confirmed by the certification anyway -- and it doesn't depend on any order made by the Tribunal in terms of taking over as class representative, anything of that nature.

So we say there's no need to look behind it, and we are where we are. There's no genuine issue raised, no proper justification. If this was enough to put an indemnity principle in doubt, then this Tribunal and the High Court will be inundated with issues like this on any summary assessment or application for an order for costs.

Then the last point to make is that even if you were satisfied that there was some issue, that's an issue that could be dealt with by detailed assessment. I should say that we are happy either way with summary or detailed assessment. We don't have a strong preference. We can see the benefits of detailed assessment, as Mr Harris says, because it enables the costs judge to go through all of this correspondence and look at the time spent, whereas for good reason, this Tribunal wouldn't have gone through it all with a fine-tooth comb, I'm expecting. So there might be some benefit of that, but we'd be happy with a summary assessment as well to save time and cost.

Then this brings me on to my seventh point. I think it's my last point. My numbering might be slightly off there. So maybe my (overspeaking) --

THE CHAIR: The next point.

MR McDONALD: The next point. Final point. We learned more about this from Mr Merricks' statement that he adduced last night. Now Mr Merricks, it appears, did not obtain his own funding. Rather, what he did was he took over, but without telling us the funding that Mr Boyle had obtained. Now, what that means is that he was making my client incur costs, and at the same time exhausting the funding agreement which provided funding for Mr Boyle and then the estate in relation to the proceedings. Now, it's worth looking at this from Ms Burns' perspective, and we say it shines light on Mr Merricks' claim to be acting in a public-spirited way or on behalf of class

representatives generally. So Ms Burns had tragically lost her husband and was having to deal with the fallout of that, not only personally, but also having to deal with the consequences in terms of these proceedings and also wrapping up the estate, because she was an executor.

Now, in those circumstances, you might have thought that Mr Merricks would want to make sure that there was funding available for Ms Burns to take whatever steps she considered necessary or were being asked of her solicitors or the estate's solicitors in respect to documents. You would have thought that Mr Merricks would want funding to be available for that.

Now, rather than saying, "Oh, I'm going to ensure I'm going to ring fence money to enable you to comply with our requests, to enable you to be properly advised by solicitors and so on", rather than doing that, he was himself using the very money under the funding agreements which should have been available to Ms Burns, and we're told it's now all gone. So in those circumstances, and for the reasons I've previously given, we say it is just that Mr Merricks and in effect, LCM, be ordered to pay Ms Burns' - the estate's costs of responding to matters that Mr Merricks was asking the estate's solicitors to do.

When you look at the overall justice of the position, we say it's important that estates of class representatives shouldn't just be left in the lurch to fend for themselves at what is undoubtedly a tragic time.

So other than that -- and I'll have some submissions on quantum, but I will address those in reply as well. So with that, I think I'll hand -- I think Mr Page wanted to say something briefly.

THE CHAIR: Yes.

Submissions by MR PAGE

MR PAGE: Sir, we do not make an application for costs, but there has been one small issue bubbling away in the correspondence and then picked up by Mr Hutton in paragraph 6 of his witness statement. Essentially, it's been said that our decision not to apply for our costs is a useful guide for the Tribunal from which inferences can be drawn about the appropriate order which should be made in respect of the applications being pursued by, in particular, the Defendants and, to a certain extent, Maitland Walker.

Whilst we endorse entirely the categorisation of our position as being, in Mr Hutton's words, sensible, reasonable and realistic, we do not accept that any inference can be drawn as to why we've taken that position beyond the very particular circumstances of our intervention. As an intervener, ordinarily we would not be entitled to recover costs. During the relevant period, we did incur some costs, but they were not of the same order of magnitude as, in particular, GTR. Any application we made would need to unpick: the pure cost of our intervention; the cost of the case dealing with Mr Boyle's death -- this mimics the 5 per cent credit that GTR offered up themselves -- ; and then in addition, the recoverable costs attributable to Mr Merricks and his involvement.

Taking that in the round, a proportionality view was taken that it would not be appropriate to put before the Tribunal our own application today. We take that position without prejudice to our broader position, whereby we reserve our right to bring a costs application at some juncture in these proceedings at the appropriate time.

THE CHAIR: Yes.

Submissions by MR HUTTON

MR HUTTON: Members of the Tribunal. May I start by making it clear who I represent today? I represent Mr Merricks who sits behind me. I don't represent LCM. I've not received any instructions from LCM; my instructions have come from Mr Merricks.

There is an eliding of the two together, certainly in Mr Harris' submissions, but I don't accept that that is right. My submission is that the application against Mr Merricks should be viewed on the merits of Mr Merricks' position. In relation to LCM, if the Tribunal was minded to go down the route that you, sir, the Chair, suggested, I would -- and I don't wear an LCM hat -- but on their behalf for these purposes, I would submit that that wouldn't be right. They must be heard. They must be represented if there's going to be an order.

THE CHAIR: You're really saying that we need to hear from them as opposed to Mr Merricks?

MR HUTTON: Yes, I am, because they have their own interests. They haven't given me any instructions to deal with the application against them, because that was not listed specifically for today.

THE CHAIR: It was not listed for today when I was told that there was going to be an indemnity.

MR HUTTON: Yes.

THE CHAIR: I hadn't perhaps foreseen that the argument would be: well, Mr Merricks isn't liable and LCM won't be liable either. But we can't deal with that second part.

MR HUTTON: No. I mean, LCM's liability is not a matter for today, in my submission. I mean, normally the position is, where a third party funder stands behind someone, the third party funder would be liable if the client is liable themselves, and then because the client doesn't have the money but they have a funder that's enabled them to bring the claim, then the funder would, in effect, step in and pay that bill, which is our situation.

In terms of an application separately against LCM personally, that has not been listed today. There may be different arguments that LCM want to raise about that. Clearly, if Mr Merricks is liable for at least some of these costs, then LCM will pay them. That's

the position.

THE CHAIR: Right.

MR HUTTON: So, you know, in terms of points that Mr Harris made about threats for injunctions and correspondence with Hogan Lovells on behalf of LCM, that is nothing to do with me. That is not Mr Merricks. LCM instructed their own solicitors in relation to those matters. I don't have any instructions at all about that. My instructions come from Mr Merricks.

In terms of that, the approach of Mr Harris, certainly in his skeleton, was to say that Mr Merricks was simply the alter ego or the spokesman, effectively. The puppet -- he didn't quite use that term -- but the puppet of LCM. That is not accepted. I'm sure the Tribunal will be aware that Mr Merricks is a well-known champion of consumer rights. He's been involved obviously in one of the first cases of the collective proceedings regime in the Mastercard case for many years. He's highly experienced and highly respected, and he is well-known, I have to say, in those proceedings for having fallen out with his funder in Merricks v Mastercard, and there's been litigation between them. So the suggestion that he's a mere puppet or spokesman --

THE CHAIR: But Mr Merricks presumably would never have got involved in any of this if there wasn't a funder.

MR HUTTON: Yes, absolutely. I'm sure that --

THE CHAIR: And he wouldn't have been involved at all unless he was confident that the funder would indemnify him in relation to any costs.

MR HUTTON: I imagine that is so, absolutely. I imagine that his intention was to obtain After the Event insurance and then the After the Event insurer would be liable for those, but unfortunately he was unable to obtain After the Event insurance, and therefore the funder will indemnify him instead.

But it is important, I submit, to recognise at the outset what Mr Merricks' role in these

collective proceedings has been. He has never been the authorised class representative. But not only that, he never even made an application to become the authorised class representative. He was, as it's been described, in an interregnum where he was put forward possibly as the person who was going to make the authorisation application once he had an opportunity to review the papers, to take advice and to try and get appropriate funding and ATE insurance. That's all he did, and at the end of that process, he was unable to get that ATE insurance, and therefore he was unable, properly, to make an application under rule 78 for authorisation by the Tribunal.

So his role is very far removed. Now, I accept that he had a significant role for a period, but he was never acting on behalf of the class. He was only ever considering an application for him to be authorised, which application was never made. So he is genuinely a non-party, and there seems to be an approach on the other side to say, "Well, effectively he was a party", but he was genuinely not a party to this litigation.

In relation to that, when the late class representative unfortunately died last summer, he stepped into the breach, because somebody needed to. Without a class representative, you cannot take these proceedings forward. The Tribunal will be very aware that previous tribunals have made it quite clear the heavy burden that lies on class representatives and the Christine Riefa case has been referred to obviously as the classic example of that. He didn't know anything about the case. So he comes into the case not knowing anything about it. I mean, I'm sure he's read something about it, but he certainly didn't know the details of the case and the details of the expert evidence and the details of precisely how the case was put. He had to get up to speed and take a view as to whether he could take the case forward. He is not unlike -- this goes back to my learned friend's submissions -- he's not unlike somebody who steps in at the outset before proceedings have been issued and investigates whether there's

a claim, corresponds with the defendant, and in the end takes a view, "Actually, there's no claim here."

Now, in those circumstances, of course, there could be no costs order against him because there have never been any proceedings issued. In fact, he stepped in at a time where there had already been proceedings issued and already been a collective proceedings order. But, you know, that just happened to be the facts when he stepped forward. All he did was properly try to get the documents in order to ascertain whether he could take the case forward or not. Quite properly, at the end of that process, he decided he couldn't because he couldn't satisfy the (overspeaking).

THE CHAIR: Also, justice of that is that the Defendants, if they've been put to expense, should whistle for that money.

MR HUTTON: Yes, it is unfortunate, but Mr Merricks tried to do the right thing by stepping into the breach (overspeaking).

THE CHAIR: But it was Mr Merricks actions which caused that expenditure. Why should they bear that?

MR HUTTON: Yes. Well, because Mr Merricks -- I mean, apart from the CRO application, which was a very limited application, we can come to. Apart from that, Mr Merricks never positively asserted to the Tribunal a case which then failed. He never got to the position of making that application, so he's never failed in an application. If he'd failed on an authorisation application --

THE CHAIR: He didn't even make the application.

MR HUTTON: No, he didn't. No. Because he couldn't get the ATE.

THE CHAIR: Because it was so poor in a sense that he didn't make it.

MR HUTTON: Yes, but one has got to bear in mind the context: that he comes into it, steps into the breach without knowing what the merits are. He doesn't know what the merits are until he investigates them. So he's put forward, he's selected by a process,

and he then investigates the (overspeaking).

THE CHAIR: The justice of that is that someone who is speculating as to what the merits are and puts the Defendants to expense makes them bear it at their own cost.

MR HUTTON: Well, he acts on behalf of a class. The class needs a representative --

THE CHAIR: Well, he doesn't act on behalf of a class, as you have said.

MR HUTTON: Yes, he's seeking to act. I quite accept that. He's seeking to act on behalf of the class. That's why he stepped forward in the first place. A class needs a class representative, and he says, "Well, I'll give it a try, but obviously I need to see what the merits are of the case, whether I can get suitable ATE", and he doesn't get it. But he's never made an application to say, "I should be authorised", and the Tribunal has said, "No, actually, you fail on the criteria in rule 78." He's never done that. So in my submission, he's had a very limited role.

In terms of non-party costs orders, effectively, a lot of the argument that's put forward -- I mean, it's put forward on two bases.

One is effectively because he stepped forward and we incurred costs as a result of it, he should pay them. We say it isn't as simple as that, because he's a non-party, so you have to go through the non-party route to do that.

Secondly, he's behaved unreasonably and we've incurred costs as a result of that. But we don't accept he's behaved unreasonably, and I can come to that. But if you did find that he had behaved unreasonably, then you would need to find what costs were caused by that unreasonable conduct, because they've simply just claimed effectively all their costs in relation to his involvement in the case. All of it can't be down to unreasonableness, we would suggest. We say none of it was, but certainly not all of it.

A lot of the costs have been generated, the reality is because he didn't instruct Maitland Walker in the case. I accept that. If he'd instructed Maitland Walker in the

case, then the costs of obtaining the documents, et cetera, would have been certainly much less than they were. But he didn't instruct Maitland Walker in the case and chose to instruct Willkie Farr for the reasons that he took a view that these proceedings had been going for a number of years, that there were a number of difficulties which have been highlighted this morning, obviously, and in the skeleton arguments on behalf of the Defendants and the Intervener as to the progress of the action over the last four or five years. So his decision to instruct new solicitors can't be condemned as an unreasonable decision. But inevitably, that meant --

THE CHAIR: It may not be unreasonable from his point of view --

MR HUTTON: Yes.

THE CHAIR: -- but he is taking a step which is calculated to lead to the Defendants, for example, incurring greater costs than they would otherwise.

MR HUTTON: Yes, but --

THE CHAIR: You say -- I repeat myself -- you say, "Well, that's just tough. They have to bear all of that."

MR HUTTON: You used the word "calculated", too. I don't think there was ever any intention of doing (inaudible), but it was a consequence of (overspeaking).

THE CHAIR: Well, highly likely to. Highly likely to.

MR HUTTON: I accept that, but in the circumstances of this case where it's been running for a number of years, it was a perfectly reasonable decision of his to instruct new solicitors.

THE CHAIR: From whose point of view?

MR HUTTON: From his own point of view, absolutely, and from the class' (overspeaking).

THE CHAIR: And the Defendants' point of view?

MR HUTTON: Sorry?

THE CHAIR: And the Defendants' point of view?

MR HUTTON: Well, the Defendants have been the most critical of all of Maitland Walker and how they've conducted this case. Maybe things might have been different with a different firm. So yes, they have been highly critical of Maitland Walker. So from their point of view, you know, they might have been more pleased with a different (inaudible).

Mr Merricks comes in, not having access to the documents. He has to get access to the documents and he has to ascertain the funding and ATE position. Now, in relation to the funding, he was appointed as a result of a process that involved the consultative committee, which had only actually come into existence earlier in 2025. Maitland Walker were involved, and the funder was involved. Therefore, the funder was happy to fund him to take the case forward.

In relation to the ATE, he came across two difficulties. The first was that the policy was obviously in Mr Boyle's name, and the difficulty was whether that ATE could be transferred across. He wasn't to know that when he was appointed the prospective class representative, but that was a difficulty because the question arose as to whether there needed to be a grant of probate for that to happen.

Then secondly -- and this, I think, has been aired this morning -- the policy had a limit of £8 million and Mr Merricks and his solicitors, Willkie Farr, took the view that that was likely to be insufficient and therefore they needed to increase that ATE or find more ATE, because the ATE insurer, Litica, was not prepared to increase that limit. So therefore he went and found, through the funders, they engaged a broker for that purpose. As a result of that, an extension was granted, I think in December until the end of January.

So, we say all of that was entirely reasonable on Mr Merricks' part. He was acting responsibly. He's an experienced class representative. He wanted to make sure that

a proper application could be made for him to be authorised if it came to that.

In relation to the legal position and the law, could I just take you to a couple of authorities on that? Firstly is the case of Dymocks which appears in the authorities bundle at tab 10. (Pause)

It's tab 10. The relevant passage is paragraph 25 at page 154 of the bundle.

THE CHAIR: Yes.

MR HUTTON: This is the much quoted summary of the position in relation to non-party costs orders. Obviously, I accept -- this was Lord Brown -- I accept that the categories of non-party costs orders are not closed, but there are certain categories where non-party costs orders will often be made. At paragraph 25, the summary of the position from Lord Brown is:

"Although costs orders against non-parties are to be regarded as 'exceptional', exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense."

So just pausing there, that focuses on whether other people are pursuing the litigation in effect through clients and/or other people are funding them, and those other people are non-parties.

"The ultimate question in any such 'exceptional' case is whether in all the circumstances it is just to make [an] order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of considerations in play, some militating [for] an order, [and] some against.

"(2) Generally speaking the discretion will not be exercised against 'pure funders' ... [and quotes from Hamilton v Al Fayed] ... '[people] with no interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business ... [usually, they will not have a non-party costs order.]

"(3) Where, however, the non-party not merely funds the proceedings ..."

Now pausing there, Mr Harris said that Mr Merricks was funding the proceedings. He's not funding the proceedings. Someone else is: LCM. This is an application against Mr Merricks, not against the funder. So Mr Merricks is not funding the proceedings. He has another third party body that is funding the proceedings. So that should be directed against the third party funder.

"... but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs." Now pausing there, he was not in control of this litigation. He was only ever in the position of a prospective applicant to be in control of the proceedings by becoming the authorised class representative. So he did not control these proceedings. Then was he --

THE CHAIR: Who was in control of the proceedings in relation to the steps which he took --

MR HUTTON: Well --

THE CHAIR: -- which involved the Defendants in expense?

MR HUTTON: So there was an interregnum period where the litigation was not being controlled by anyone, in reality. We were waiting for an application to be made. The position I --

THE CHAIR: (Inaudible) might say that that was rather -- was an example of a situation which hadn't been sort of canvassed in the authorities.

MR HUTTON: Well, I accept that it's unusual. Of course I accept it's unusual. I mean, this collective proceedings regime with a class representative is an unusual situation.

THE CHAIR: The whole thing is unusual.

MR HUTTON: Yes, I accept that.

THE CHAIR: This is an unusual category within an unusual category.

MR HUTTON: Yes. It's not part of my submission, as Mr Harris was suggesting, that

unless you fit into these categories, you can't make an order. I don't make that --

THE CHAIR: No, you've already very fairly said that.

MR HUTTON: Absolutely.

"...~or [it is] at any rate to benefit from [the proceedings] ..."

Well, apart from the remuneration for his work as the class representative -- I don't know what he's being paid, but I know Mr Boyle was paid very little, in fact, for his involvement. I suspect it's not a huge sum. But he was not to benefit from the damages, and that's really what this is directed at: benefiting from the damages. He wasn't going to get any of the damages. So he doesn't fit into that. The non-party in these cases -- going back to Lord Brown -- the non-party in these proceedings is not so much facilitating access to justice by the party funded, as himself gaining access to justice for his own purposes. He himself is the real party to the litigation.

Now, Mr Merricks was clearly not gaining access to justice for his own purposes. I mean, this is classically the director of an insolvent firm who's hoping to get money themselves or whatever. That is not Mr Merricks he's seeking to be authorised, at some stage -- he hasn't made that application -- but seeking to be authorised as the class representative on behalf of others. He is not gaining access for his own purposes, and so he's not, we would suggest, the real party.

It then goes on to discuss examples of where there are real parties. We say he's not doing so.

So he is, we would submit, in an unusual category. He's not controlling the litigation. He's not the real party to the litigation, because he's not seeking to gain access for his own purposes.

I will just refer to them briefly, but examples are given of when non-party costs orders are made at paragraph 22 in my skeleton. These are examples, each of them, where the non-party was seeking either to benefit personally from the litigation or was guilty

of impropriety or bad faith. No allegation is made against Mr Merricks of impropriety or bad faith.

THE CHAIR: No.

MR HUTTON: So just (inaudible) about a director or shareholder and Lord Justice Coulson made it clear that in that situation, you either have to benefit personally or be guilty of impropriety or bad faith. That was not our case. In Turvill, which my learned friend, Mr Harris, referred to, there the third party was guilty of serious impropriety and had taken steps to ensure that the other side was deprived of any realistic opportunity of recovering their costs. That is very different to us.

Excalibur is the classic commercial third party funder, where the claim had failed, and that therefore the funder should pay, in effect, the costs that the claimant would have paid if they had any money.

Myatt v National Coal Board is a case where a solicitor was appealing effectively through the name of the client, because his conditional fee agreement had been rendered unenforceable and therefore he was going to be paid nothing.

There's the credit hire example at 22.5 in Tescher recently, where the credit hire company, where somebody has an accident and engages a credit hire company who hire your vehicle for a large amount of money on the basis that you'll take a claim against the tortfeasor and they'll get paid, they are the real beneficiary of the litigation.

One example which doesn't fit into those categories is an order against an expert, Robinson v Liverpool University NHS Trust and there, Mr Justice Sweeting concluded that although there were grounds to criticise the expert, this was not an exceptional case and did not involve a flagrant or reckless disregard of an expert's duty to the court.

So you can see that the test for a non-party costs order is generally quite a high one, which befits the exceptional epithet(?). Again, in XYZ, that's in relation to an insurer.

Just take you to that case, which is at tab 16 of the bundle.

So that was a case where an insurer had been conducting the litigation on behalf of the Defendants, some of whom were insured by that insurance.

THE CHAIR: Did you say tab 16?

MR HUTTON: Tab 16, yes. Page 233.

THE CHAIR: Travelers v XYZ.

MR HUTTON: Travelers, exactly. XYZ.

The insurer had been effectively, it was alleged, running the litigation on behalf of those insured clients properly, but also in relation to uninsured people who were not insured by them. The question was whether an order should be made against the insurer for a non-party costs order in relation to the uninsured Defendants. Ultimately, it was held in the Supreme Court that there shouldn't be such an order.

But in relation to that, paragraph 36, the word "intermeddling" has been used, I think by both my learned friends in their skeletons, that we have intermeddled in this litigation -- Mr Merricks has. That wouldn't be right. Paragraph 36, in the judgment I think of Lord -- oh, it was a judgment of the court in Travelers. At paragraph 36, it refers to Lord Justice --

THE CHAIR: (Inaudible) the judgment of Lord Briggs, isn't it?

MR HUTTON: Oh, is it? Yes. You're quite right. I'm sorry. Yes, it's Lord Briggs, with whom Lady Black and Lord Kitchin agreed. At paragraph 36, it says this:

"Drawing upon the general principles about the section 51 jurisdiction, Phillips LJ identified two separate bases upon which a liability insurer might [be] exposed to a non-party costs order ... The first ... [might] be labelled intermeddling."

And then quotes from Murphy v Young's Brewery, which referred in itself to Giles v Thompson in the House of Lords, where Lord Mustill said that the test was:

"there is wanton and officious intermeddling with the disputes of others in which the

meddler has no interest whatever, and ... the assistance he renders to one or the party is without justification or excuse."

Now, that's clearly not the sort of language that would apply to Mr Merricks' involvement, stepping forward as a prospective class representative on behalf of the class. It has every justification or excuse, and therefore intermeddling is, in our submission, inappropriate.

In relation to the principle about -- I think I'll move on. So, what is the basis of the application? So one, we say, costs follow the event, well, we dispute that. We say there has to be something more than costs following the event.

In relation to the unreasonable conduct that's alleged, can I take the court to various documents? I'm conscious of the time, of course. But if we can see -- so Mr Merricks' position was he had to get hold of the relevant documents in order to make an assessment as to whether to make an authorisation application. In the correspondence bundle at page 85, which -- so this is Mr Bronfentrinker, my instructing solicitor's email to Maitland Walker.

THE CHAIR: Sorry, correspondence ...?

MR HUTTON: Correspondence bundle, I think 1.

THE CHAIR: Yes. Page?

MR HUTTON: Page 85.

THE CHAIR: Yes.

MR HUTTON: So this is an email to Maitland Walker. I think it's the first one from Willkie Farr. Mr Merricks has just said that he's instructing them. What is requested there in the second paragraph, second sentence:

"To that end, we would kindly request that you arrange for us to be provided with all core documents, including ... documents filed with the Tribunal [and then there's a discussion about timing]."

Now, that does raise the question of what "all core documents" means, I accept, but that is a -- Mr Bronfentrinker doesn't know precisely what all the core documents are, because he hasn't seen any of the documents. So it wasn't the case that he was seeking everything. He just said "the core documents".

The position of Maitland Walker, on the next tab, page 86. Actually -- so it's dated 27 October, the same date, but if one goes to paragraph 16 in that letter at the bottom of page 88.

Although it's after that, it's responding to a letter that Mr Merricks himself sent originally. I don't think we need to look that up. But at paragraph 16, it says this -- this is Maitland Walker's position:

"However, we must make our position clear: we will not be able to release any files, documents or materials relating to this matter until all of our fees and disbursements set out in paragraph 17 have been paid in full."

So these are fees that they say were due from LCM. The fees, at paragraph 17, which need to be paid immediately are, at 17.1, over £1 million outstanding. Secondly:

"Fees at the discounted rate from 1 October to today which will be invoiced ..."

Thirdly:

"This firm's reasonable fees incurred at discounted rates that will be incurred in the transfer of this matter to WFG [Willkie Farr], which we estimate at £75,000 plus VAT."

So that was their position. They required all that before they would send a single document of any kind to Mr Merricks. So that's the obstacle that he faced when he approached Willkie Farr. That was unrealistic and obstructive. Firstly, obviously, it wasn't in Mr Merricks' control to pay £1 million. That was a matter for the funder, not for him. Secondly, in relation to the outstanding fees, they were only outstanding from a certain period. So surely, all documents before then would not have been subject to a lien. But what he was being told was, "Unless £1 million, plus these other things,

including £75,000 copying charges would be paid, you will not get a single document." So that was the origin, we say, of the dispute about documents in this case. Because eventually, a lot of documents were produced from Maitland Walker, and the £1 million was not paid. So their position in relation to that was clearly unreasonable and a serious obstacle.

THE CHAIR: So you say all the costs which are referable or incurred as a result of Maitland Walker's stance in relation to their fees are not costs which on any view Mr Merricks should bear, because they were, as it were, discrete from what his attempt was, which was to see what the action was about and whether he could become the class representative.

MR HUTTON: I'm not going to take the Tribunal through all the correspondence, but there was a lengthy debate about the effect of a solicitor's lien and whether, you know --

THE CHAIR: Yes.

MR HUTTON: None of that would have been generated if they'd taken a reasonable stance to provide us -- even with documents that have been provided to the Tribunal, their position was: not a single thing will be handed over until that's paid.

THE CHAIR: Yes.

MR HUTTON: So then, moving on, at tab 34, page 94, there's a partly redacted email from Maitland Walker to Willkie Farr in which they say that the letter that we've just been looking at, the 27 October letter:

"... he has asked that we communicate with you ..."

There's an error in it -- it says on the first line -- and it says that £90,000 is now in respect of the work of the file transfer. So it's gone up from £75,000 to £90,000 just for the copying costs of the transfer of the documents.

Then at page 105 in that bundle, so tab 38. (Pause)

That's a letter from Maitland Walker to Willkie Farr, dated 29 October. If one goes to the third page on page 107, they say this in relation to confidentiality:

"We note your comments regarding the Confidentiality Ring. For the avoidance of doubt, our firm has never suggested that confidentiality issues could not ultimately be resolved. As we have stated, once our outstanding fees [have been] settled [so they've not backed down on that] we will of course facilitate the transfer of any confidential materials to those within your firm who are formally admitted to the Confidentiality Ring. Our point was simply that your client's requests, as set out in [Mr Merricks letter of 23 October], sought the wholesale transfer of the 'Casefile' without ... reference to, or proposals concerning, the preservation or privilege or confidentiality."

Now, pausing there, they seize on Mr Merricks' letter, but Mr Merricks is not a lawyer, to be fair. He asked for the case file to be transferred across, but his instructing solicitor's said, "No, we need the core documents and all those documents that have been filed with the Tribunal." So Willkie Farr had been specific as to what they wanted. Now, I accept there may be an issue as to what the core documents are, but he's certainly not -- Willkie Farr had not asked for the whole case file to be transferred across.

I'm told that Mr Merricks is a lawyer, but he was not acting in the legal capacity; he was represented by Willkie Farr, and Willkie Farr had made their position clear in that letter.

Now, eventually this is not resolved. So at tab 46, there is a letter from Willkie Farr to the Tribunal in relation to documents. Because Maitland Walker was still, we would say, being obstructive about releasing documents. There's a letter at tab 46, page 143, where my instructing solicitors write to the Tribunal. At the end of that letter, paragraph 12 on page 149, it says this:

"Mr Merricks respectfully requests the Tribunal to exercise its powers ... to give directions requiring Maitland Walker to provide non-confidential copies of: (i) all the documents filed with the Tribunal within its possession ... [and] (ii) all correspondence with the Tribunal; and (iii) all inter partes correspondence [and then suggests dates for that to be provided]."

So that, we would submit, is an entirely reasonable request which they had been refusing: all documents filed with the Tribunal in its possession, all correspondence with the Tribunal, and all inter partes correspondence. Not on the basis that £1 million in fees is going to be paid.

Maitland Walker then respond to that at tab 49, page 155, in which they say, at page 156, paragraph 7:

"Given Mr Merricks' change in position, [I think that's a reference to Mr Merricks' original letter compared to Willkie Farr's letter] and the narrower set of documents now sought, we propose the following solution ..."

So they, at 7(a), will provide the documents at paragraph 12.1 that we've looked at, they will provide the documents at paragraph 12.2, and they will provide the documents at paragraph 12.3, with specific dates.

But then paragraph 8 says:

"Our proposal at paragraph 6 above is subject to the following conditions:

"a. The exclusion of documents created after 1 January 2025 [because fees were outstanding after that date] ...

"b. All documents ..."

So they'd back down to some extent. They'd accepted that documents that were created before the fees were outstanding could be disclosed.

"b. All documents being provided to [Willkie Farr] once they are in the Confidentiality Ring so that we do not have to go to the disproportionate expense of reviewing and

redacting the documents for [the] confidentiality ring information; and

"c. Payment of reasonable fees ..."

So it's them who say that they will only provide these on condition that we, Willkie Farr, become members of the confidentiality ring. They say that will be much more proportionate, because they then won't have to redact confidentiality matters.

So as a consequence of that, at tab 50, page 168 to 169. On page 168, an email from Willkie Farr, we then write to the Defendants at this stage. They've not been involved in any of this correspondence up to this date. You'll have comments on their costs in October, because they haven't received any of this correspondence, apart from notification that Mr Merricks and Willkie Farr have taken over.

CRO application on page 168:

"As you aware, Mr Merricks will be making an application to the Tribunal to be authorised as the replacement class representative ... Mr Merricks is in communication with the solicitors for the late Mr Boyle about getting access to ... documentation that he requires ... Maitland Walker has agreed to provide documents, but it has stated that some documents may have confidential information in them and if there is no non-confidential version, then they cannot provide the document. It is unclear to Mr Merricks how many of the documents that he requires for the Application may be impacted in this way. However, to ensure that he is not prejudiced and further delayed in preparing his application, Mr Merricks' advisors need to be added to the Confidentiality Ring. We understand that the Confidentiality Ring was established for the parties in the Proceedings [et cetera] ..."

So it's as a result of Maitland Walker's position that their conditions, indeed that they called it, that they would only provide the documents if Willkie Farr were added to the confidentiality ring. So we raise that in an email to the Defendants. The Defendants respond at tab 51, page 170. We can see Freshfields' letter to Willkie Farr of

10 November.

Paragraph 2, confidentiality ring, they point out that:

"... the CRO states that only 'a Relevant Adviser' of a party ... may be admitted by consent. Mr Merricks is not ... a party to the Proceedings. The position is unchanged ..."

So they say that Mr Merricks can't be joined to the confidentiality ring, and note that Mr Boyle was never admitted himself when he was the class representative.

"4. In any event, it is unclear why access to our clients' confidential material is required in order to prepare an application to act as a replacement Class Representative. Indeed, a prospective class representative would, in the ordinary course, not be entitled to access confidential materials belonging to a defendant ... prior to that authorisation."

So they don't agree. The only objections they have to us joining the confidentiality ring is: one, Mr Merricks shouldn't be anyway; and two, Willkie Farr shouldn't be until, there has been authorisation. Prior to authorisation. So that's their position. They do not make the point that at this stage, actually we don't need those documents because they're very limited. That only comes later. So as a result of that, we then apply, on 11 November at tab 53 to the Tribunal. To join the confidentiality ring at paragraph 2:

"Maitland Walker has now agreed to provide Mr Merricks the documents he considers are the minimum necessary to prepare the Authorisation Application, albeit in respect of any documents containing confidential information and, where there is no pre-existing non-confidential version, then Maitland Walker requires Mr Merricks' legal advisors to be added to the confidentiality ring ..."

That was correct. It was a condition of them providing those documents, that Willkie Farr joined the confidentiality ring. So that is a correct statement. That's the letter that we write to the Tribunal on the 11th.

Then on 13 November, at tab 60, page 190. The Tribunal responds to all this, and at 190 says, second paragraph:

"The Tribunal is not prepared to make the orders sought by Mr Merricks [so those are the disclosure orders] without at least providing the interested parties (including Maitland Walker, and the solicitors for the Defendants and the Intervener) an opportunity, should they wish to avail themselves ... of making representations ... The circumstances of this case are unprecedented. [But] they do grant the extension of time ..."

Then following that at, tab 66, page 200 in this bundle, Freshfields make submissions in relation to the confidentiality ring. They are a total of four pages, and at paragraph 5(a)(i) on page 202, they say this:

"The Defendants do not consider access to the documents within the Confidentiality Ring to be required for Mr Merricks' Authorisation Application. The documents in the Confidentiality Ring consist only of certain documents forming part of the Defendants' disclosure and documents produced on ... behalf of Mr Boyle containing information taken from/referring to [the] confidential disclosure [for example, some of Mr Davis'report]. None of the documents filed, as opposed to disclosed, by the Defendants contains any confidential [information]. Mr Merricks has not put forward any reason ... why he needs access ... within the Confidentiality Ring ..."

Then they point out at (ii) their legitimate commercial interests.

But for the first time, Freshfields make clear that it's not just, "Well, we haven't been authorised yet, therefore you shouldn't join the ring", it's that actually, "You don't need the documents in the confidentiality ring. They're very limited and you don't need them for your authorisation application." As a consequence of that, we withdraw our CRO application on 20 November, so three days later, at tab 74, page -- this is the letter to the Tribunal. Specifically page 229, paragraphs 13 and 14, where we say, at

paragraph 13 on page 229:

"Accordingly, it is now clear that, other than the Defendants' disclosure and Dr Davis' expert reports containing references to that disclosure, there is no other confidential information. Moreover, the Defendants' description of the limited scope of confidential documents raises serious questions about MW's [Maitland Walker's] assertion [and their assertion that it would cost £50,000 plus VAT. At one point it was, I think, £90,000.]"

Paragraph 14:

"Given the nature of the confidential information, the Defendants' position is that Mr Merricks should not require access ..."

Then effectively we accept that, and then, about five lines up from the bottom of paragraph 14:

"It is most unfortunate that MW did not make it clear from the outset that there were not going to be any relevant confidential documents, so that Mr Merricks did not need to be included in the Confidentiality Ring, and that this did not need to be a condition of Mr Merricks obtaining documents, then much of the correspondence and the CRO Application could have been avoided entirely."

So the reality was that the confidentiality ring was prompted by Maitland Walker, making it a condition of providing the documents that we join the confidentiality ring; Willkie Farr join it. We didn't know, we couldn't have known the extent of the documentation in the confidentiality ring and whether there were documents in there that we needed for the purposes of assessing the authorisation application.

But we took the prompt from Maitland Walker, because they said it was a condition. As a result of that, we raise it with the Defendants, the Defendants' only objection to it is, "You haven't got authorisation yet". We then raise it with the Tribunal, citing Maitland Walker's position. At that point, the Tribunal then says, "We'll have

submissions on it". Freshfields then put in the submissions, and for the first time, they say it's actually very limited; it's limited to these things, Dr Davis' (overspeaking).

THE CHAIR: But Freshfields' letter of 10 November was saying Mr Boyle was never admitted to the confidentiality ring, and he didn't require admission to that for the purposes of making decisions in the course of these proceedings, and in any event, it's unclear why access to our client's confidential material is required in order to prepare an application. Class representatives would, in the ordinary course, not be entitled to access confidential --

MR HUTTON: Well --

THE CHAIR: I mean, although they're not making exactly the point that you're making, they are saying, "Well, you don't need this stuff".

MR HUTTON: No, their point was that Mr Boyle personally -- because we'd asked for Mr Merricks personally, as well as various people for Willkie Farr, to be added to the confidentiality ring. Their response to that was, "Well, Mr Boyle personally never needed to be (inaudible) it". But Maitland Walker were part of the confidentiality ring, and they were telling us, "You need to be part of the confidentiality ring in order to get the relevant documents." Indeed, it's a condition of us handing them over, because it's --

THE CHAIR: No, I am drawing a distinction in my question between Maitland Walker's position and the Defendants' position.

MR HUTTON: Yes. Now, I'm not necessarily blaming the Defendants for not being more fulsome in their original letter. I'm just saying, from our point of view, that's what we were told. We didn't know exactly what was in there, and it wasn't until Freshfields set their position out in full in their submissions on 17 November that we found out, actually, we don't need to be part of this. As a result of that, we then drop it.

THE CHAIR: Yes, I see. Yes.

MR HUTTON: Yes. (Pause)

Just to make one more point on that. In relation to Maitland Walker's position at tab 74(sic), 24 November, so this is the day before the Tribunal issue their order. So this is a letter from Maitland Walker to the Tribunal.

THE CHAIR: Do you mean tab 76?

MR HUTTON: Tab 76, sorry. That's quite right. On page 235.

At paragraph 4.3 of that letter, they say:

"We immediately provided the CR's file documents pursuant to ... the CAT guide ... [and then they say] (a) we could not provide confidential documents to Mr Merricks ... as they are not in the Confidentiality Ring; and (b) Mr Merricks/WFG should be responsible for our reasonable fees. In respect of those fees, having estimated them at £65,000 - £75,000 pounds plus VAT ... if we were required to undertake the laborious exercise of combing through extensive correspondence and ... [redacting] references ... in the Confidentiality Ring, we revised our estimate for providing the non-confidential (inaudible) documents ... down to £15,000 ..."

So originally, they were saying that it would be £75,000 plus VAT, and then the Tribunal's order was made, effectively in very similar terms to the ones that we had asked, at tab 82, page 259.

At page 260, they order that Maitland Walker should provide to Mr Merricks the categories of documents that we sought. In relation to the costs of the exercise at paragraph 3, they allow Maitland Walker up to a maximum of £15,000 plus VAT, which is the amount that has been paid in relation to those. So having previously quoted both £75,000 and indeed £90,000 for that exercise, eventually the Tribunal gave them £15,000 maximum.

So that's the position in relation to the documents. We say it would be unfair for us, certainly to have to pay costs of that, because we were taken along the road by

Maitland Walker in relation to the confidentiality ring. As soon as we realised that actually, we don't need to, we withdrew the application very, very shortly.

In relation to the funding position and the letters about that -- I'm conscious, of course, it's 4.39. Can I just deal very briefly with that? The Defendants asked us about funding, it's true, from 14 November 2025. We said that it was premature because we had made an application for authorisation.

The position was, though, that in Mr Bronfentrinker's first witness statement, which is in the core bundle at page 273, the position was made clear in relation to this matter. I wish to address the question, because it seemed to be a suggestion of Mr Harris that Mr Bronfentrinker was in some way misleading the court about what happened in relation to this. If that is alleged, it is most vehemently denied.

At paragraph 17 on page 283, Mr Bronfentrinker said:

"As ATE insurance is required in order for Mr Merricks ..."

So this is a witness statement seeking an extension of the stay until the end of January.

"As ATE insurance is required in order for Mr Merricks to satisfy Rule 78(2)(d), he has no alternative but to make the Stay Application and ... a further extension of the stay ... until 30 January ... in order to allow the time he considers he will be required to secure ATE insurance. In the meantime, insofar as there is any adverse costs exposure to Mr Merricks from the Defendants and Intervener, LCM is principally liable as Mr Merricks' funder, albeit it will look to offset that liability with the ATE policy that is now being explored. This is a similar arrangement I have seen [in relation to other proceedings]."

So he was confirming, and he says, "In the meantime", so during this period specifically, insofar as there is any adverse costs exposure to Mr Merricks from the Defendants, LCM is principally liable. That should have put the debate to bed about

who was going to pay these, because Mr Bronfentrinker was saying, in a witness statement, with a statement of truth, that LCM were liable in relation to any adverse costs order that may be made.

Now, the Defendants weren't happy with that. If one goes back to -- I'm sorry to flip around -- but goes back to the first correspondence bundle, and tab 101, page 336 of that. So this is a letter from Freshfields for the Defendants to Hogan Lovells, who are the solicitors for LCM. At paragraph 6, they said this on 337.

THE CHAIR: 337?

MR HUTTON: Correspondence bundle.

THE CHAIR: Oh, the correspondence bundle.

MR HUTTON: Sorry, I had (inaudible) left bundles. I'm sorry. (Pause)

THE CHAIR: Yes.

MR HARRIS: I'm so sorry not to interrupt --

MR HUTTON: Not at all.

MR HARRIS: Ever so sorry, Mr Hutton, but I'm just mindful that we -- I do have some short points in reply. I wonder if it could perhaps be the case that Mr Hutton finishes by 4.45, because Mr McDonald also has some short points of reply, and we have to be done by 5.00. This point is, of course, fully ventilated in the written argument, this particular point. With all the references.

MR HUTTON: Yes. Well, that gives me two minutes.

MR HARRIS: Yes, exactly.

MR HUTTON: I will do my absolute best to comply with that, but I do have to make this point. At paragraph 6:

"Finally, in light of the statement in Bronfentrinker 1 [that's the paragraph we just looked at] that LCM is liable for adverse costs exposure, please provide your client's express confirmation that it will cover the costs incurred by the Defendants and the

Intervener for the period from the death of the late CR to the expiry of the stay of these Proceedings on 30 January ..."

So the question is: LCM is liable for adverse costs -- sorry, express confirmation that it will cover the costs incurred by the Defendants.

Now, the response to that from Hogan Lovells -- and again, I don't act for LCM; Hogan Lovells do not instruct me, but this has been relied upon -- at tab 103 on page 341. Paragraph 5, right at the bottom of 341:

"Third, your client's interpretation of Mr Bronfentrinker's witness statement ... is clearly incorrect. Paragraph 17 of Bronfentrinker 1, which you cite at footnote 2 of your Second Letter, does not, as you assert, impose liability on LCM for your clients' costs."

Now pausing there, there may be a lack of meeting of minds here as to what they're talking about. What Hogan Lovells appear to be saying is, "We do not agree that the funder has agreed to be liable for these costs. It does not impose liability on LCM." The question was whether they would cover those. They say no, it does not impose liability, but:

"Rather, it is a reference to adverse cost exposure of Mr Merricks at this stage [so there is an adverse costs exposure] as a third party seeking to be authorised. Insofar as he could bear any adverse costs should that application fail, and as a third party the starting position is that he would not ordinarily be liable for adverse costs, then LCM will in the first instance bear any such liability (pending ... ATE ...)."

So actually, what LCM's solicitors were saying was effectively confirming what Mr Bronfentrinker had said is that, "If there's a costs order, we will cover it." That's what Mr Bronfentrinker had said. It's said that there's some kind of inconsistency in the position between those two positions. We do not accept that. All they were saying is, "We don't agree that liability has been accepted already for your costs, but if there's a costs order, then we will cover it." That is not any different to Mr Bronfentrinker's

statement in paragraph 17.

That then is confirmed in the letter to the Tribunal by LCM. Mr Harris referred to it as being last week. In fact, it was 23 March. At tab 139, page 437, where they confirm -- and this is the basis of the Tribunal's order -- that the application against them not be heard today, but be put off. They confirm at page 438. In the middle of that page, there's a paragraph beginning, "Given the way things progressed". If we move down to the last four lines:

"... we can confirm to the Tribunal that LCM will indemnify Mr Merricks in respect of any adverse costs liability he may be ordered to pay ..."

We say the position was clear absolutely throughout: was that they were accepting in principle that they would be liable for any costs order made, but they weren't accepting that a costs order had been made yet, and they weren't accepting that it would necessarily be made.

So the position was confirmed to them. They should have been happy with that. They seem to have a different interpretation of what Hogan Lovells say, but in my submission, it is clear that was always the position that LCM (inaudible).

Even if they hadn't confirmed it, as a third party funder of Mr Merricks, they were always going to be found liable to pay if Mr Merricks was found liable to pay. It's inevitable, as a third party funder: if my client is liable, then they will be found liable because they have been funding it. So they had the assurance that, in effect, their costs were covered by LCM, and they had that right back in December.

Sir, I haven't had time to address quantum. In relation to the indemnity principle point, I don't wish to detain the court. We were sceptical of the position that the estate would take on a liability for £172,000 worth of costs, but I accept that the solicitors have confirmed that is the position, which we find surprising, but that's what they've said. Why should the estate be agreeing to pay £172,000 of costs in relation to these

matters? But what is clear is in terms of the overall merits of the position, or kind of the jury question of who's going to pay, we find it most unlikely, we would submit, that Ms Burns and the estate will actually ever have to pay that money, even if you didn't order a non-party costs order in favour of Maitland Walker/the estate. Because we can't believe that they would actually turn around to Ms Burns and to the estate and say, "Right, you have to pay £172,000 of costs." So that may not be strictly a breach of the indemnity principle, but in terms of the merits, that that needs to be borne in mind.

THE CHAIR: I think it's often the case that the indemnity principle is satisfied, even though that party will never actually have to bear the full sum.

MR HUTTON: Yes, theoretically they're liable, but in practice it's not going to happen. I won't address quantum because I haven't got time. If you want to go down that road (overspeaking).

THE CHAIR: Well, I'm going to have to say something -- we're going to have to deal with quantum. We'll come to that after I've heard the replies.

MR HUTTON: Yes.

THE CHAIR: Yes.

Submissions by MR HARRIS

MR HARRIS: I'm most grateful. I'll confine my reply to no more than five minutes, given Mr McDonald also wants to reply.

The last point, very simple: I rely upon the principle of res ipsa loquitur. You were looking at tab 103, the letter from Hogan Lovells. Of course, the critical words that my learned friend doesn't dwell upon for obvious reasons are in the third line of page 342, "should that application fail". That's always been my point. They were saying, "We won't pay unless our funded client makes an application that fails." And that's always

been inadequate(?). The only time it changed was at the end of March after we'd made our costs application. That's my first point.

My second point is that as regards the costs of the CRO application, first of all, the court rightly identified that on 10 November, prior to the application being made, my instructing solicitors had pointed out that we couldn't understand why the confidential information was being sought. You've already taken that point. That was at correspondence bundle, tab 51. But what my learned friend just completely ignored, notwithstanding the fact that I made the position very clear in my opening and in my written arguments, is at tab 53. If we could just turn up tab 53. So this is the application for the addition to the CRO ring.

My learned friend just completely ignores the point, so I'll show it to you. It's tab 53 page 175, at paragraph 6(b), at the bottom right hand side of the page. So this is well into the text of the application itself. What my learned friend's instructing solicitors wrote is, five lines up from the bottom:

"By way of example only, understanding the scope of the disputed issues as they have crystallised, with reference to the expert reports and underlying disclosure relied upon in those expert reports will, at minimum, inform matters such as the litigation budget that Mr Merricks requires and his litigation plan."

In other words, they had specifically said at this point, "Oh, we need that confidential information, the very things that are confidential, in order to proceed with our authorisation application." Then they just changed their mind. It's got nothing at all to do with what the Defendants told them. All the Defendants told them the next day was, "Yes, the stuff that you want that is confidential exists and is confidential", but then they just changed their mind. My learned friend didn't address it, and the reason he didn't address it is because he doesn't have an answer. That's dispositive of that part of my costs application.

Final points: my learned friend's instructing solicitors submitted a new witness statement late last night. You dealt with it, sir, members of the Tribunal, in your email of last night. If you need the reference to your email, it's correspondence bundle, tab 177, page 527, you said, and I quote:

"The Tribunal is not yet willing to give Mr Merricks permission to file a short supplementary witness statement. Mr Merricks does file a further witness statement [which of course he did]. The Tribunal will consider it de bene esse and decide whether there should be permission and as to the implications of resolution (inaudible)" [as read]

Well, my learned friend hasn't even applied to admit it. It should be rejected. It's completely irrelevant. It addresses a case that's never been made. That should be rejected, and there should be a costs order in our favour because of course, I and my junior and those instructed me, we all had to read it. I'm not suggesting for a minute that that's an enormous amount of costs, but it's thoroughly wasted costs. He's not even applied to have it admitted, and it was irrelevant.

The pre-penultimate point is you will have seen in our application that we apply for an interim payment. That's still our stance. We say it should go to detail.

Last but not least, on the question of hourly rates, you will have seen the references in our skeleton to other recent Tribunal cases in which although some magic circle hourly rates have been criticised as being too high, in several of those cases, including from the president of this Tribunal, the stance has been taken that at least 30 per cent above the guideline hourly rates, especially for complex litigation -- and everybody acknowledges that this is complex and indeed unprecedented. So as a bare minimum, it should be, in my respectful submission, you should proceed for interim payment terms on the basis that the hourly rates from my instructing solicitors should be 30 per cent above hourly rates. Then it should go to detailed assessment as to

whether it should be more than that, though I do note in one recent case, the discount was only to bring it down to 60 per cent above the guideline hourly rates.

Unless I can assist further, those are my short reply points.

THE CHAIR: Right, thank you.

Yes.

Submissions by MR McDONALD

MR McDONALD: I'll try to be fairly brief.

So firstly, Mr Hutton concentrated on the provision of documents in relation to my client and Maitland Walker. Now, the provision of documents falls squarely within the test that I took you to in Gorbachev. Therefore, the presumption, we say, is that we should recover our costs and Mr Merricks has to go some(?) to persuade you that we've behaved so unreasonably as to not get our costs.

Relevant factors are things like we're entitled, if there's any doubt, to resist the application, we're entitled to rely on (inaudible) to others and other legal rights and so on. I took you through those factors, and we say they all apply here.

There's an additional factor, which is that by participating in these proceedings, Mr Merricks has caused those costs to be incurred, like he has caused the Defendants to incur costs. It was his choice to participate, and why should we, having been put to those costs, be the ones to bear them?

Then I just want to correct some factual errors made in the run through the correspondence. So the first point is to take you to page 84. This is the letter that Mr Hutton said, "Oh, we don't need to go to this one." That's at 84, correspondence bundle 1.

So this is Mr Merricks' letter to us, which we were responding to in the letter that Mr Hutton did take you to. (Pause)

This is Mr Merricks' letter, and it's the third paragraph down where he says:

"You need to be paid what you are owed, and I hope that can happen rapidly. However, given that time is running out for me to apply to the Tribunal to authorise, I would expect that you immediately now hand over all the core files and materials that Willkie will require to prepare that application. Once your outstanding fees are paid, I would then expect the remainder of the files to be passed over without delay."

So understandably, we responded saying, "Well, no, pay us first and then we'll give you everything." That's not an unreasonable position to take in circumstances where Mr Merricks is saying, "We should be paid." It was really just a timing point about whether we should be paid first or paid halfway through the process.

What you also see, as a reference to core materials and documents, in -- so firstly, it was accepted later that this was a request for the whole client file, albeit in stages. Now, the core files and documents persisted throughout. Then if you turn to page -- well, persisted until the application to the Tribunal, because if you turn to page 120. This is a letter from us, just to orientate you, from 30 October 2025. So this was before the application was made to the Tribunal.

At paragraph 10 -- so if you look at 119 first, sorry:

"Given the various statements and refinements set out in WFG 29 [October] Letter that apply to your request for documents, we are now going to treat the request for 'Documents' set out ... as a request for [these things]:

"... ('Court documents');

"... ('Filed documents'); and

"... ('Inter Partes Correspondence')"

The next page, "Core Documents":

"With regard to the Core Documents, we requested in paragraph 25 of [our] MW 27 [October] Letter that you provide a list of documents you consider fall within this

category. As we have not yet received any clarification from you, we are unable to progress this request until such time as you identify the specific documents you have in mind."

No response to that request, just the application to the Tribunal where they dropped the request for core documents, which had persisted throughout from Mr Merricks' first letter. So that just went from their application.

"Filed Documents":

"In relation to the Filed Documents, and acknowledging the potential entitlement of your client as a non-party under paragraph 9.66 of the ... CAT guide ... (notwithstanding that this has not previously been advanced ...), we will provide copies of all documents filed by our firm with the Tribunal in the Proceedings up to 31 December [2022]. These will be supplied by 1pm [et cetera, et cetera] ..."

Now, we then provided those documents. So Mr Hutton said we didn't provide anything, that's untrue. We provided these documents by 3 November.

Now, "Inter Partes Correspondence", we said:

"We consider that our lien extends to Inter Partes Correspondence which will not be provided for [the] reasons [you] set out."

And we had raised issues about confidentiality and lien(?). Now just picking up on the lien for one moment, there is nothing improper about a solicitor relying on their lien. As we saw from the Gorbachev case, legal rights of parties, they're entitled to be respected. It is not being said that we could never have relied on that lien.

Now, one other reason why we were reluctant to provide our whole files, as had initially been requested, is that there was a dispute with LCM about the fees. Now, had we provided all of our files to Mr Merricks and LCM, no doubt that would have either provided material to LCM or they would have seen privileged information about the dispute with LCM.

This wasn't just a misplaced worry, because since all this, LCM has brought proceedings against the estate relating to the fees. So that's what's happened since. So we were fully justified in being worried about the approach with LCM.

Now turning to 160, much was made about the conditions to our proposal in -- so 156 is where we set out our conditions. Now, what we were saying here -- so 156 is where we made our proposal -- we were responding to the application that had been made in circumstances where Mr Merricks had told us he was going to apply for the confidentiality ring. We had given ourselves relatively tight timetables -- 10 November, 11 November, 13 November -- to provide documents. We wouldn't have had time to do all the review and redaction process that was being requested if he wasn't in the confidentiality ring. We were also worried about the costs of doing so.

So we had proposed, "Yes, we'll do this by these dates", but at (b) we said:

"All documents being provided to WFG once they are in the Confidentiality Ring so that we do not have to go to the disproportionate expense ..."

We weren't saying, "We will never provide them if you're not in the confidentiality ring". We were seeking a pragmatic solution. It obviously does not justify Mr Merricks then going off to say, "Well, oh, Maitland Walker, in their proposal as a solution, said that it would be better to wait until (inaudible) the confidentiality ring", to then go off and make their own application on grounds that we hadn't supervised or approved or anything of that nature, and in circumstances where they had never asked us, "Do we need to be in the confidentiality ring?". They just demanded all these documents.

Now, it's also worth picking up page 160. Because at 160, we explained, at paragraph 34:

"The WFG 3 [November] letter is a substantial change from Mr Merricks' previous position, because he no longer seeks the file of documents or 'core documents'. Moreover, Mr Merricks had not specifically asked for category (ii) previously [that was

correspondence with the Tribunal]

"Despite the scattergun approach, which (together with LCM's non-payment of fees) has prevented a sensible discussion to day, we are prepared to provide the documents sought and our client has confirmed that we may do so."

So we accepted that we could provide them. This is the same letter that we're looking at.

"However:

"This will be a laborious exercise. The correspondence itself runs to around 600 letters and thousands more emails. We [will] also need to check the documents for confidentiality purposes (or privilege);

"We will need more time to carry it out;

"We cannot provide confidential documents to Mr Merricks/WFG as they are not in the confidentiality ring. It would not be feasible in the time available to redact the documents; and

"The reasonable costs of this exercise should be paid by Mr Merricks ...

"If Mr Merricks/LCM are not prepared to confirm our remuneration then it remains open for them to get at least the documents referred to at paragraph 12(i) of the ... Letter from the Defendants and Intervener ..."

Because Mr Merricks could always have asked the Defendants and Intervener for the things they had filed, and they have a specific provision under the rules to do that.

Then we said it'd be subject to our lien, et cetera. But we then said:

"The large number of files over Proceedings of this length necessitated a large budget estimate, especially if redactions were to be required. If we were required to review and redact all the documents, then a sizable sum ... would have to be appropriate. Now that WFG have finally narrowed their document requests and are seeking to be added to confidentiality ring, it appears that redactions will not be required. Our costs

should therefore be closer to £15,000 ..."

So it was perfectly open to Mr Merricks to say, "Well, look, I know you've proposed this and I understand where you're coming from with the redactions, but actually we just think you should just redact it. We don't need to make an application to be in the confidentiality ring." He decided not to do that and now seeks to blame us for everything that happened subsequently.

THE CHAIR: Right. It's now 5.05.

MR McDONALD: Oh, okay.

I'm just going to -- I may not need to make my last point, but there we go.

Oh, the only last point that I just make is it was suggested that there are no confidential documents. Just for your note, I'd direct you to what we say at paragraph 4.6 on page 237. We don't need to go there now. We just set out that, in fact, there are quite a lot of confidential documents which we would have had to review. It was suggested that somehow we were saying that there were confidential documents when there weren't, but we set out on page 237 that there are, in fact, quite a large number of documents that we would have needed to review.

THE CHAIR: Right. (Pause)

So in relation to quantum, we haven't heard any oral submissions. Do we need any further written submissions in relation to quantum? (Pause)

Right, well, thank you all very much. Unless there's anything else which anyone feels they need to say, we will reserve our judgment, as it were, on costs.

MR HUTTON: Just in relation to -- sorry to cut across you. In relation to quantum, we have set out in the skeleton and in our response document at paragraphs 56 to 81, some fairly detailed submissions.

THE CHAIR: Indeed.

MR HUTTON: And our skeleton from paragraph 37 onwards.

THE CHAIR: Indeed, yes.

MR McDONALD: Albeit we've only addressed it briefly in our skeleton, we wouldn't request further submissions on the quantum either. We don't think further costs need to be incurred in written submissions on quantum, so we'll be happy for you to deal with our quantum without further materials.

THE CHAIR: Right.

MR HARRIS: Sir, likewise for us. If you want the reference to the case in which the hourly rates have been 30 per cent higher than the guidelines, the president of this Tribunal has done it in Riefa v Apple last year. That's authorities bundle, tab 26, paragraph 29. It refers back to another case, somewhat ironically, one of Mr Merricks' other earlier cases in which the same approach was taken: 30 per cent above the guideline rates for interim assessment purposes.

THE CHAIR: Yes.

MR HARRIS: Other than that, I have nothing further. Thank you.

THE CHAIR: Well, thank you all very much. As I said, we will reserve the decision on costs. We will produce a written judgment, and we will probably circulate that to the parties in draft.

The order from this morning, how are we getting on with that?

MS KELLEHER: Yes, so the Defendants have prepared a version of the draft order and it's currently with Mr McDonald, as I understand it, and we'll circulate it to the Intervener too (inaudible). Other than that, I don't think there's any further update on that.

MR McDONALD: We received it, I think ten minutes before we came in this afternoon, so I confess I haven't had an opportunity to look at that direction, but we'll do it as promptly as possible.

THE CHAIR: Right, well, just to say I want that finalised just as soon as possible.

(5.10 pm)

(The court adjourned)

Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
…	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?