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IN THE COMPETITION
APPEAL
TRIBUNAL

Case No.: 1382/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 18 May 2026

Before

Hodge Malek KC
(Chair)
Hugh Kelly
Carole Begent

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Consumers' Association

Class Representative

v

Qualcomm Incorporated

Defendant

A P P E A R A N C E S

Rob Williams KC and Jamie Carpenter KC (instructed by Hausfeld & Co. LLP on behalf of Consumers' Association)

David Bailey KC and Alexandra Breckenridge (instructed by Norton Rose Fulbright LLP and Quinn Emanuel Urquhart & Sullivan LLP on behalf of Qualcomm Incorporated)

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(10.30 am)

(In public)

Opening remarks by THE CHAIRMAN

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

At the end of the day, there will be a written ruling which will be available on the website.

Discussion re claims, notification, offer

THE CHAIRMAN: There are certain things in the material before the Tribunal which are covered by legal privilege, and so, anything that is said about that material today doesn't waive the underlying privilege in such material.

The parties are seeking confidentiality in relation to a significant amount of the material before the Tribunal. The Tribunal considers that if the settlement is approved, that the confidentiality in that material, by and large, should go. It's very important that the

1 public, and in particular the 29 million represented
2 persons, can fully understand why this case is being
3 settled on terms that there is no payment going to the
4 class.

5 The issues for today are: one, whether the drop
6 hands is a fair and reasonable outcome in all the
7 circumstances and has not been driven by, let's say,
8 competing interests between stakeholders and parties,
9 and is in the best interests of the class; two, is
10 whether or not, as now defined, the claim that has been
11 waived by the settlement agreement is sufficiently
12 within the scope of the proceedings, as certified, and
13 does not give up claims which should not be effectively
14 waived as part of the settlement. I can see that the
15 parties have put forward material on that; and then the
16 third issue is whether or not the Tribunal is going to
17 be willing to approve settlements which require steps to
18 be taken by the parties prior to the settlement
19 agreement being approved or considered by the Tribunal.

20 I think I have made it pretty clear in
21 correspondence before the hearing that whatever has
22 happened in this case by that statement being put on the
23 website as part of the compromise between the parties
24 should never happen again before this Tribunal. If this
25 happens again, the settlement will be rejected and

1 appropriate steps will be taken.

2 I can understand a ball has been dropped, both
3 parties have thought this was the right thing to do at
4 the end of the day, but it is not the right thing. You
5 cannot agree to take steps which pre-empt the decision
6 of the Tribunal. We are being asked to approve
7 an agreement which contains clause 5. Clause 5 should
8 not be implemented prior to the agreement being
9 approved. Simple as that.

10 On the issue of claim, the Tribunal is now satisfied
11 that the wording that has now been provided -- but, can
12 we look at clause 8? Does that not need changing as
13 well?

14 MR WILLIAMS: I think we need to do a re-review. I think we
15 have picked up at least one other reference which would
16 need tidying up. I haven't done introductions, sorry.

17 THE CHAIRMAN: That's fine. I think everyone is known.

18 Just do the formal introduction for the record.

19 MR WILLIAMS: I appear for Which? with Mr Carpenter KC, who
20 is here to deal with any specific questions you have in
21 relation to the insurance issues. Mr Bailey KC and
22 Ms Breckenridge appear for Qualcomm today.

23 THE CHAIRMAN: That's fine.

24 Do you want to tell me what the changes are, then?

25 MR WILLIAMS: I think we have picked up -- sorry, we haven't

1 had a chance to discuss this, so perhaps we need to have
2 a discussion about it offline, but we have picked up
3 recital H as well, which is in a similar vein.

4 I will say for completeness, there is also
5 clause 3.1, which is no admission. It's not clear that
6 falls into the same category, because that is not --
7 that is a no admission clause. It's not purporting to
8 affect the scope of the --

9 THE CHAIRMAN: I agree. The (inaudible) one is fine.

10 Yes, that's fine. So, really, you have amended 4.1.

11 MR WILLIAMS: And then we did pick up the consequential
12 amend in one other paragraph, I think. There is one.

13 THE CHAIRMAN: Yes, there is definitely a claim which is
14 important.

15 MR WILLIAMS: Yes, in 6.3(b), there was another "or any
16 other member of the Class", but we didn't pick up the
17 one in clause 8 and we didn't pick up the one in the
18 recital in our haste to get you the revised language on
19 Friday.

20 THE CHAIRMAN: That's fine. So, if we can have -- we will
21 probably have a break, anyway, but, at the break, if you
22 can agree all the amendments, because, if we can approve
23 it, we might as well approve it today and you all have
24 finality.

25 MR WILLIAMS: Of course.

1 THE CHAIRMAN: Do you want to say anything more about
2 clause 5? Because (overspeaking) --

3 MR WILLIAMS: I don't want to persuade you of anything that
4 you are already persuaded of, sir. All I would say is
5 you have seen from our skeleton that our position as to
6 how one construed the language as it stood before, and
7 in particular the "insofar as it is legally able to"
8 language, was that it effectively brought one back to
9 the same position as the clause as it has been redrafted,
10 but we entirely accept that this language is much more
11 explicit and we can see why the Tribunal is happier with
12 this language than with the previous language.

13 THE CHAIRMAN: Yes, but talking about the notification of
14 the settlement point -- let's move on to that; yes?

15 MR WILLIAMS: Yes.

16 THE CHAIRMAN: On that, when I look at the correspondence
17 between the parties and how it developed, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

but the fundamental issue that
24 concerns me, irrespective of the contents and their
25 objections, is that you were giving effect to

1 a provision of the contract prior to it being approved
2 by the Tribunal. That is the first objection.

3 The second objection is that you have a Tribunal
4 which has not yet delivered its ruling on the merits
5 and, although it is a professional Tribunal, so you can
6 expect them not necessarily to be influenced, it's not
7 a great start and it's not good to put that out in the
8 public domain when we deliberately have
9 compartmentalised this process from the process at
10 trial. You know, you have a separate panel. We can see
11 everything, that's fine, and we can take an assessment
12 as to whether the terms are fair and reasonable. But it
13 does not need to go into the public domain for everyone
14 to read.

15 Secondly, what it does is it weakens your room to
16 manoeuvre if the settlement is not approved, because
17 it's going to be very hard to win and put a plausible
18 case, even on appeal, if, in fact, that has gone out.
19 I think that is probably one of the reasons why it's
20 there. But, you know, I just think that -- look, we all
21 make mistakes in life and I am not going to hold it
22 against anyone here. This has been done in good faith,
23 but it's just that I am not going to approve this.
24 Whatever we say about the settlement agreement, I will
25 specifically say we do not approve clause 5 having -- at

1 least in relation to it being put into effect prior to
2 the settlement being approved. Is there anything else
3 you would like to say on that?

4 MR WILLIAMS: I think I should just explain the position
5 from our perspective. I am certainly not going to try
6 and persuade you, sir, that clauses of this nature ought
7 to be accepted in principle. That is entirely a matter
8 for the Tribunal. We have given a full account in our
9 evidence and --

10 THE CHAIRMAN: I can understand why you got there. Don't
11 worry, I do understand why you got there.

12 MR WILLIAMS: Yes. I should emphasise that when Which?
13 agreed to that provision of the settlement agreement, it
14 did so having considered whether the language appeared
15 to prejudge this process and you have seen what we say
16 about that. Because the language says it is
17 an agreement that is subject to approval process and we
18 require the permission of the Tribunal, the view that
19 was taken --

20 THE CHAIRMAN: Yes but it is circular, because, you know,
21 the agreement does require the approval of the Tribunal
22 and you would have needed the approval of the Tribunal
23 to agree clause 5. You need our approval to agree
24 clause 5.

25 When this came in, had I had enough time to have

1 stopped it, I would have stopped it, but I didn't have
2 time because it was like a trigger that it goes on the
3 website a day after it has been lodged with the
4 Tribunal.

5 MR WILLIAMS: Yes. You have seen the way it developed
6 between the parties, sir, and I am not going to say
7 anything about that in open court, but you have seen
8 that.

9 There is one thing I will say, in case it is
10 relevant to the Tribunal's consideration. It is not
11 controversial to say that some sort of statement about
12 the outcome of the agreement needed to be published in
13 advance of this hearing so that members of the class
14 could comment on it. Obviously, that process is catered
15 for through the directions order and through the
16 (overspeaking) --

17 THE CHAIRMAN: It does. Through the normal route.

18 MR WILLIAMS: -- to the directions order. That's right.

19 There was an acute question in this case which -- where
20 the settlement doesn't involve payment of any damages as
21 to why Which? had entered into a settlement on that
22 basis, and the reason, as the Tribunal has seen, is the
23 view that was taken in relation to the prospects of
24 succeeding after the trial. I think Which? had in mind
25 that it was important to be able to convey to consumers,

1 who would see the outcome of the settlement and see it
2 didn't result in any level of recovery, that that was
3 the view it had formed. Of course, if we had come to
4 this hearing without having made the statement, I would
5 have been making submissions which would have
6 effectively announced that to the class at this hearing.
7 So, in one sense, what the statement did was bring
8 forward that process.

9 In saying that, I am not trying to persuade you that
10 the statement was appropriate in the circumstances.
11 I entirely hear what you say about it. But Which? was
12 very conscious it had brought these proceedings on
13 behalf of the class, class members would inevitably be
14 disappointed with the outcome and they felt that it was
15 necessary to explain what had led to these
16 circumstances.

17 Now, with hindsight, perhaps a different process
18 should have been followed.

19 THE CHAIRMAN: Hindsight is a wonderful thing, isn't it?

20 MR WILLIAMS: With hindsight, perhaps a different process
21 should have been followed whereby we came to the
22 Tribunal and said, "Look, we have this concern. The
23 settlement doesn't result in recovery for the class.
24 All they know is that is the outcome. We would like to
25 be able to say something about it".

1 THE CHAIRMAN: No, if you had asked, that is completely
2 different and that is -- look, that is one of the -- we
3 are very flexible and that is why, for example, on the
4 question of having an independent expert view on the
5 case, you haven't done it. But if I felt, at the end of
6 the day, I needed it, when I review the papers when they
7 come in, I would have sent out a letter saying, "Can you
8 please get an opinion covering X, Y and Z". It is the
9 same with that. You know, there is an issue. Someone
10 should have realised that, actually, this may not find
11 favour with the Tribunal. You could have written in and
12 then we would have resolved it one way or another.

13 What I don't like is the impression that you say,
14 "Here is our application, deal with it on paper, and by
15 the way you can see there is a trigger on the website as
16 of tomorrow". You know, that is not what should happen
17 when a settlement is being approved. It is not a mere
18 formality. These things matter, and they do matter
19 because you are bringing these proceedings in the public
20 interest for a large amount of people, and any
21 settlement requires proper scrutiny.

22 It may be that you both thought, both sides thought,
23 "Well, it is a no-brainer, of course the Tribunal is
24 going to approve it", but then it doesn't necessarily
25 follow, because you can see already that we would not

1 have approved the settlement on two respects: firstly,
2 the waiver, we would not have approved that; and,
3 secondly, in relation to clause 5, we would not have
4 approved clause 5 insofar as it makes that requirement
5 prior to that being considered by the Tribunal.

6 MR WILLIAMS: Sir --

7 THE CHAIRMAN: It's my job -- it's our job here to shake the
8 tree. And you can see from the helpful letters we have
9 from four or so represented persons that people want us
10 to shake the tree and, you know, that is what we have to
11 do.

12 Let's see if the defence have anything else to say.

13 MR WILLIAMS: Can I just say one more thing, sir, which is
14 Ms Averty did say in her statement that we certainly
15 didn't intend any discourtesy and if --

16 THE CHAIRMAN: Look, I have very thick skin. You don't need
17 to worry about it. Whatever happens, I am quite
18 understanding and I don't take things personally. It's
19 just that, in life, as you say, hindsight is a great
20 thing and it's just that it hasn't worked out in a way
21 that the Tribunal is happy with. It doesn't mean anyone
22 is going to be criticised, it is just that is how things
23 are. We are all learning in a relatively new
24 jurisdiction and, as and when the jurisprudence comes
25 forward, you will know that, for example, releases are

1 going to be looked at pretty carefully where there is
2 a non payment, and also any steps which pre-empt
3 a decision of the Tribunal is also going to be -- every
4 hearing I have dealt with on these raise new issues, and
5 your one does raise new issues, not least because it is
6 a drop hands settlement.

7 Let's see what the Defendant wants to say on that.

8 MR BAILEY: May it please the Tribunal. We, like the
9 Class Representative, did not mean any disrespect or
10 discourtesy --

11 THE CHAIRMAN: No, of course not.

12 MR BAILEY: -- in the way in which this statement was
13 published and when it was published. Could I just
14 briefly show you the evidence, so far as Qualcomm is
15 concerned, as to why it was thought that the statement
16 was appropriate? I hear loud and clear that the
17 Tribunal, in future, will expect that it is asked before
18 any such step is taken.

19 THE CHAIRMAN: That's the main point, yes.

20 MR BAILEY: There are just three short points I would
21 like to make and I can do it by reference to Ms Thomas'
22 10th witness statement, which is in the core bundle. It
23 is at tab 9 and one can pick it up at page 136.
24 [Core/9/136].

25 The first point that Ms Thomas makes in paragraph 20

1 is really an endorsement of what my learned friend has
2 just said, in terms of it was thought to be extremely
3 important, particularly from my client's perspective,
4 having defended this litigation for over 5 years, that
5 when a settlement is announced, the class should be
6 under no illusion that there will be any payment of any
7 money, but, moreover, as to why that would be the case.
8 That was critically, from my client's perspective,
9 important. Ms Thomas explains why that is so important
10 in the circumstances of this case in paragraph 21. She
11 makes two points there.

12 THE CHAIRMAN: Yes.

13 MR BAILEY: The first of those is that she talks
14 about the need for transparency to the class, to avoid
15 any confusion. Sir, you referred to the representations
16 made by four individual class members. In my respectful
17 submission, what those illustrate is, actually, there
18 was bound to be a degree of confusion and
19 misunderstanding on the part of individuals who haven't
20 necessarily lived and breathed the trial over five
21 weeks, that they would expect or feel entitled to
22 a payment of damages. So the reason for the statement
23 was to explain why, from the Class Representative's
24 perspective, it considered that the claim was likely to
25 fail.

1 It's right, as my learned friend mentions, that the
2 statement was amended in its final form so that it
3 expressly referred to the fact that all of this was
4 contingent upon the Tribunal's approval. But the final
5 thing, sir, is on page 137. The end of paragraph 21.
6 Ms Thomas makes an additional point which is that, as,
7 of course, a global company, we are facing similar
8 proceedings in several other jurisdictions: the
9 United States, Canada and Israel.

10 I am instructed that when the settlement was
11 announced, the claimants in those other jurisdictions
12 were then contacting my client about the nature and
13 implications of that settlement. That is one of the
14 reasons why it was thought to be so important to ensure
15 there was clarity as to why the proposed settlement had
16 been made.

17 I do hear that, as, sir, you point out, in the future,
18 settling parties should approach the Tribunal before any
19 such steps were taken. That is just to explain sort of
20 the background as to why things were done.

21 THE CHAIRMAN: I have read the statement, but it is always
22 good to remind me what is in there.

23 MR BAILEY: I am grateful.

24 THE CHAIRMAN: And I should put that in the ruling so
25 everyone can see. Look, I am not suggesting that what

1 was done was done in bad faith. I am not suggesting
2 that. I think it is just a mistake that was done and
3 that is it.

4 So that is that one. I think we have dealt with
5 claims.

6 MR WILLIAMS: As far as claims is concerned, sir, we were
7 handed a Canadian authority.

8 THE CHAIRMAN: I am just going to say that is why it is
9 important that the Tribunal does have power to reject
10 a settlement if, in fact, the claim settled is too wide.
11 That's all I am saying. I don't think it
12 takes you very far, it is just an illustration of the
13 power that we were going to exercise, had we not amended
14 the agreement.

15 MR BAILEY: Sir, if I may -- and I am very grateful
16 to have this authority drawn to our attention. In my
17 submission, it is, of course, a very different case, in
18 terms of it didn't go to trial and the judge in that
19 case couldn't evaluate the chance of success on the
20 merits and there were no submissions made in relation to
21 abuse of process and there was this distinction drawn by
22 the Ontarian court between the release of existing
23 claims against the defendant, which would be fair and
24 reasonable, which now finds expression in the revised
25 settlement agreement as opposed to a release of future

1 unknown claims. So, in my submission, this case is
2 different because it went to trial once they have seen
3 the merits and now agree, following that, that the claim
4 is likely to fail.

5 THE CHAIRMAN: Yes, okay. That's fine.

6 Mr Williams, the next question is whether or not it
7 is fair and reasonable to settle on a drop-hands basis.
8 We have to form our own view on the merits, having
9 looked at all the material that you sent us, ranging
10 from the pleadings, what happened at trial, and the --
11 let's say the opinions that have been produced from both
12 sides. Where the crunch comes is when you look at how
13 strong the case is at the end of trial, because I can
14 see, when you look on paper, you look at the pleading,
15 you can say, "Well, that looks like a viable case, it
16 should go to trial". Cases have their ups and downs and
17 generally, in my experience, the cases that fight,
18 whether it is in a commercial court or this court, is
19 where there are significantly differing views of the
20 strength of the case going into trial between the
21 parties, because, generally, if both sides are on the
22 same page as to the actual merits, prudent parties tend
23 to settle and, even if you are a defendant and you say,
24 "Well, look, this case has got a 30 per cent prospect of
25 success, it doesn't mean I pay zero. Because I am

1 facing a case for £480 million and, if I can get out of
2 this, let's say, for 10 per cent of that, that is a good
3 deal for me because I get certainty".

4 We have all had cases where, going into trial, you
5 think you are going to win, and even during the trial
6 you think it's going to win, it has gone well, and then
7 the judgment comes out and you have lost. So even your
8 own reading of a judge can be varied.

9 What I am trying to figure out in my own mind is
10 that, when it came to settling this case, did this case
11 have no value at the point that you settled, in the
12 sense that no real value, other than, obviously, to the
13 Defendant to give up potentially £44 million of what
14 they say is recoverable costs. They are being
15 realistic, they realise that there is some prospect of
16 losing and they are willing to pay £44 million, which is
17 roughly 10 per cent of the claim.

18 Now, if -- the question really is how strong was the
19 case perceived to be on your side, such that it was the
20 right thing to say, "We are just going to call it quits
21 now. I have the letter from the other side, they say
22 drop hands", or should you have gone and said,
23 "Actually, we will settle for another figure because the
24 figure can go down", and, if you had done that, would
25 there be any prospect of the Defendant actually paying

1 some real money? If you look at the Merricks case, on the
2 Merricks case, when you look at the judgments and the way
3 the case was going and looking at the evidence when it
4 came before the Tribunal, you could see that that case
5 was likely to fail, but, nevertheless, it was worth the
6 defendants paying £200 million to get rid of the case.
7 You may say, well, that is a drop in the ocean relative
8 to the £14 billion certified.

9 But, on this one, should you have had another shot
10 at this and, if so, would that have led to an offer of
11 real money?

12 Now, it could be -- and I don't really have enough
13 of a feeling -- that the bunker on the Defendant's side
14 was such that, by the time you get to their letter
15 saying drop hands, there was no willingness to say,
16 "Look, this is it. They are either going to say we are
17 going to accept, drop hands, or we are just going to
18 roll the dice and see what happens. In which case, if
19 we lose, we lose, but that's a risk we are willing to
20 take". Sometimes, when you get to a stage in settlement
21 negotiations, you come to the "sod off" period where you
22 just say, "I am not prepared to pay these guys any money
23 at all and that is my last offer and even if they ask
24 for 3s 4d, I am not going to pay them a penny". I don't
25 have -- having read all the stuff that I have, I still

1 don't necessarily have the feeling as to whether this
2 claim had any value over and above the drop hands.

3 Having looked at the material, the view I think we
4 have taken is that this case, by the time you had sat
5 down at the end of trial, had no realistic prospect of
6 success.

7 If I had thought that you had a significant prospect
8 of success, then it would be very difficult to approve
9 this settlement, but there comes a point where you feel
10 that the case is -- I don't want to put it
11 pejoratively -- sufficiently weak that it doesn't have
12 a huge amount of plausibility. If I thought it had
13 a reasonable prospect of success, I don't think I would
14 be inclined to approve a drop hands, knowing that merely
15 because a case is more likely than not to lose, it does
16 not mean that it is in the best interests of the class
17 that you shouldn't try and get more money and even take
18 it to judgment, even if the judgment has
19 a 30/35% prospect of success.

20 The feeling I get on this one is, particularly on
21 the question of abuse and all the problems you have on
22 the evidential side that basically manifested itself at
23 trial, that the prospect of success was no longer
24 realistic. I know that is a very, very long question,
25 but I think if the parties can try and, I suppose,

1 educate us and make us comfortable about where we are,
2 that would be very helpful.

3 I have said all this because I want both of you to
4 help me as much as possible, and the Tribunal as much as
5 possible, on that real crunch issue of, did this case
6 have a value over and above the amount of this
7 settlement? Clearly, the case had some value in the
8 eyes of the Defendant, because they were willing to give
9 up those costs, but did it have any more value than
10 that?

11 MR WILLIAMS: I think I can answer all those questions, sir,
12 the question is, can I answer them in this forum, in
13 open, and even in the presence of Qualcomm, because, as
14 you say, the settlement hasn't been approved yet.

15 THE CHAIRMAN: No, it hasn't.

16 MR WILLIAMS: And I really don't want to trespass on the
17 subject matter of the privileged advice in front of our
18 opponents.

19 THE CHAIRMAN: Well, what we can do, then, is we can cut the
20 link, just have your side of the team here, and you can
21 address us just like when you have a settlement when
22 there is a trust involved, or an infant involved, you
23 don't have the other party and the public are not there,
24 then, obviously, whatever comes out of it, then we can
25 agree what I can say openly in public and put that to

1 the Defendant. I am sure the Defendant will probably
2 want to have the same opportunity, because it may be
3 that, when we deal with the question of whether or not
4 this case had any value over and above the drop hands,
5 counsel will want to say things to me that are
6 privileged. So I think what we will do, subject to what
7 both sides say, is we will hear you on this issue in
8 private and then I will hear the other side in private,
9 and then we will agree with both of you, as we go along,
10 as to what we can repeat in open court.

11 So, if we can cut the link and then if Qualcomm's
12 team can leave for a while. I don't think it is going
13 to be more than about 15 minutes or so. Then, if the
14 public at the back can go and you satisfy yourself that
15 the only people here are your legal team.

16

17 MR BAILEY: Sir, I had prepared to address you on the
18 just and reasonable nature of the drop hands principally
19 by reference to submissions and evidence that wouldn't
20 be privileged and wouldn't be confidential because I had
21 in mind that you need to write a judgment and it
22 wouldn't be helpful simply for me to refer to matters
23 canvassed in the opinion.

24 THE CHAIRMAN: They have all been read.

25 MR BAILEY: Indeed, but I have no objection to

1 proceeding in that way. The only thing I would say is
2 that we weren't intending to sort of travail the
3 negotiations as such.

4 THE CHAIRMAN: No, I understand that. It is a very basic
5 question when it comes to this. You will be about five
6 minutes. What you need to say in public, you can say in
7 public, that's fine. The fundamental question is the
8 one that --

9 MR BAILEY: About the value of the case over and
10 above a drop hands.

11 THE CHAIRMAN: Correct. That may be privileged as to where
12 we are.

13 MR WILLIAMS: I also have some submissions to make about the
14 legal framework. I mean, you have them in our skeleton,
15 perhaps you don't need to hear me on that?

16 THE CHAIRMAN: No, the legal framework, I think the legal
17 framework is relatively clear. I understand the legal
18 framework, but what you have said in there is all fairly
19 basic stuff. You don't need to think that I am going to
20 miss anything on that.

21 MR WILLIAMS: It's not so much that you are going to miss
22 anything, of course, sir. It is this point about
23 a settlement being in the interests of the class when it
24 doesn't result in a direct benefit to the class. Now,
25 we have dealt with that in -- because the class doesn't

1 get paid damages and they are not a beneficiary of
2 the --

3 THE CHAIRMAN: Of course.

4 MR WILLIAMS: But it's as to costs, we --

5 THE CHAIRMAN: We are looking at this carefully. When you
6 have a settlement where the class is not getting
7 anything, you need to scrutinise it probably even more
8 than when there is real money coming in. I understand
9 that. I understand that there is this issue of the
10 conflict or potential conflicts, and obviously we can
11 address that in detail, but I don't think it is as acute
12 as normally when you have a drop hands, because the
13 Tribunal in this case is able to form its own view as to
14 the likely outcome, and the view taken, certainly on the
15 question of abuse, is that, by the time this trial
16 ended, you had no realistic prospect of success. It
17 would be a much harder exercise if I took the view that,
18 actually, this case has pretty good, strong legs and
19 that you have a 30% chance. If I thought you
20 had a 30% chance, this would be a very difficult
21 hearing. But it's not. I don't think the chances are
22 there. I think your chances, if I had to put a figure
23 on it, is probably about 10 to 15% chance, and
24 that is where -- that is a pretty low chance and that is
25 where, probably, that case is. When you look at the

1 chance -- you know, it's not just, what would this
2 Tribunal have done because there are always appeals that
3 could come and an appeal court may take a different
4 view, I once had a trial where I won, got indemnity
5 costs and, on appeal, the other side weren't even called
6 on, and then you just think, well, what has happened?
7 I thought I had won, and won convincingly first time
8 around. On appeal, I have lost and the other side were
9 barely called upon. Litigation is so uncertain. But
10 even taking into account that, I don't think this is
11 worth more than 15%. That is the reality at the
12 end of this trial. But going into the trial, I can see
13 you had a significantly higher prospect of success and
14 that is why you went into the trial. But, by the time
15 it comes to trial, at the end of the trial, you know,
16 the leaves have fallen.

17 So let's just hear from Mr Williams for maybe
18 15 minutes and then we will come back.

19 We will rise for five minutes.

20 (11.07 am)

21 (A short break)

22 (11.12 am)

23 [In private discussion with THE CLASS REPRESENTATIVE]

24 (11.41 am)

25 [In private discussion with THE DEFENDANT]

1 (12.08 pm)

2 (In public)

3 THE CHAIRMAN: Having heard the points being made in private
4 by both sides, the Tribunal can take a view that this is
5 a settlement that should be approved. Where we go from
6 here is that I would like to flush out with the parties
7 the extent to which we can refer to the figures of the
8 Class Representative, so that -- the amount of the
9 cover, the costs of the cover, all the costs of the
10 parties. Because I cannot see why class members and the
11 public should not know all those figures.

12 MR WILLIAMS: The cost --

13 THE CHAIRMAN: It would have been relevant, had the
14 settlement not been approved, I understand that.

15 MR WILLIAMS: The costs, if you are talking about
16 inter partes costs, then I agree, sir. I think, in
17 terms of the premia that are payable under the policies,
18 that is current pricing information and we would at
19 least like to -- I mean, that is the insurer's pricing
20 information. It is not for us to waive confidentiality
21 in that.

22 THE CHAIRMAN: Well, I can override it because I think that
23 the public should know where we are and I think that
24 things like the premium is important because, when you
25 are looking at the interests of all the different

1 stakeholders, which I have to bear in mind and we have
2 to come to a view that this has not driven
3 settlement against the interests of the class members
4 because of the interests of the stakeholders. I have to
5 look at everyone's position to come to a view as to
6 whether this is a settlement that is reasonable.

7 I have said this on previous occasions, when we have
8 these settlements, whilst I do say that it has to be
9 overwhelmingly in the interests of the class members, it
10 doesn't mean everyone else gets ignored, because you
11 have an interest that the collective settlement
12 regime -- well, collective proceedings regime survives.
13 If you don't have funders and insurers and lawyers who
14 are willing to act on these cases, it doesn't survive.
15 So everyone is being looked at, because I don't simply
16 look at the class members in this particular case, but
17 all class members have an interest in regimes that --

18 MR WILLIAMS: I was only going to ask, sir, whether we can
19 write to you after the hearing with the insurers'
20 position as to the confidentiality of those numbers.
21 The Tribunal will have to take a view at the end of the
22 day, but, at the moment, those numbers do have
23 a sensitivity beyond the parties.

24 THE CHAIRMAN: Okay.

25 MR WILLIAMS: There are different --

1 THE CHAIRMAN: What we will do is that I will give a ruling
2 that starts off on the principles. The background is
3 going to refer to a lot of figures and the terms of the
4 offers and all that sort of stuff, and there may well be
5 blanking out on that. So the oral judgment I will give
6 now will cover things which hopefully are not going to
7 be controversial and I won't give orally, let's say, the
8 controversial bits, but my preference is that, given
9 that the case is settled, the interest of the parties in
10 maintaining, for example, WP has gone really, but
11 I can't force you to waive WP.

12 MR WILLIAMS: The only point I was making, sir, was about
13 that third party confidential information. I wasn't --

14 THE CHAIRMAN: Okay.

15 MR BAILEY: Sir, may I very briefly make just one
16 submission? It just concerns the statement you have
17 just made about the approach the Tribunal would take,
18 taking into account all the circumstances and the
19 interests of all parties.

20 THE CHAIRMAN: I am looking at everyone, yes.

21 MR BAILEY: Indeed. The only reason for standing up
22 is that, in the Merricks judgment, a similar submission
23 was made by Innsworth, the funder, and the Tribunal
24 rejected that submission and said instead the focus of
25 the statutory test was on the class members.

1 THE CHAIRMAN: It is.

2 MR BAILEY: My only point, and you have it from
3 paragraph 25 of my skeleton, is that we say that that,
4 of course, is not the exclusive consideration and that
5 it should properly take account of the Defendant's
6 interests, which, as you say, sir, you are going to do.

7 THE CHAIRMAN: We have Evans.

8 MR BAILEY: We do have Evans, and Evans postdates
9 Merricks in that respect, but I just wanted to make you
10 aware, sir, that the Tribunal had said the focus was on
11 the class members, but we say --

12 THE CHAIRMAN: I am a party to that judgment, so I know what
13 was said last time. Look, what the position is, is that
14 we look at the interests of the class members as very
15 high up in the scale of things. It does not mean we
16 ignore everyone else and I think that, by ignoring
17 everyone else, you could end up having problems like the
18 Evans situation and, of course, Evans is pretty clear
19 guidance that if a claim gets to the stage of being
20 unmeritorious, then that comes in as a consideration.

21 MR BAILEY: I am very grateful.

22 THE CHAIRMAN: I have looked at your submissions on that,
23 I thought they were fine.

24 MR BAILEY: Thank you.

25 (12.14 pm)

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(Judgment given)

(2.47 pm)

THE CHAIRMAN: Shall we now look at the order?

MR WILLIAMS: Yes, sir. We think that we have identified the one respect in which it needs updating, because it refers to the -- sorry, you may have a range of points on the order. But the one point on which it needs updating is that the settlement agreement is obviously defined with reference to the agreement which was entered into in February. That will need to be --

THE CHAIRMAN: It is going to have to be updated.

MR WILLIAMS: -- updated, and then that carried through the order.

THE CHAIRMAN: We won't make the order until you file the revised version. I don't know if you are able to give me all the changes now?

MR WILLIAMS: Well, we haven't drafted it in, but if you look at tab 18 of the core bundle, sir.

THE CHAIRMAN: Yes.

MR WILLIAMS: At the top of 619.

THE CHAIRMAN: Yes.

MR WILLIAMS: It says:

"Upon the Class Representative and the Defendant entering into a collective settlement..."

And then it refers to the settlement agreement.

1 THE CHAIRMAN: Yes.

2 MR WILLIAMS: That is then carried through, for example, in
3 provision 1 and provision 2. We are going to need to
4 update that recital --

5 THE CHAIRMAN: Yes, okay.

6 MR WILLIAMS: -- and then carry that revised definition
7 through the order.

8 THE CHAIRMAN: Yes.

9 MR WILLIAMS: So we haven't drafted it in but that's what it
10 will do.

11 THE CHAIRMAN: Okay.

12 MR WILLIAMS: I don't think there is anything else
13 consequential, unless Mr Bailey --

14 MR BAILEY: The other recital on that same page, if
15 one goes down, obviously the Tribunal didn't consider it
16 appropriate to look at it on the papers, so we would
17 obviously need to just amend that as well. So we can
18 just reflect, essentially, the course of events up until
19 your ruling this afternoon, sir.

20 THE CHAIRMAN: Yes. And 5 is -- one month is fine. The
21 same with 6.

22 (Pause)

23 Then, do I have to approve the way you are going to
24 publicise it?

25 MR WILLIAMS: Yes.

1 MR BAILEY: Yes.

2 MR WILLIAMS: You touched on that matter in your --

3 THE CHAIRMAN: We have.

4 MR WILLIAMS: Yes.

5 MR BAILEY: On page 621, in paragraph 8, you will see

6 there that the direction of the Tribunal is to the Class

7 Representative to publicise --

8 THE CHAIRMAN: We will change that.

9 MR BAILEY: Indeed. So there is the notice. Also

10 whether you are happy that 7 days is --

11 THE CHAIRMAN: The way it is going to be publicised is, it

12 is going to be on their website, it is going to be on

13 the CAT website, and they will have to notify anyone who

14 has given their details as following an interest. For

15 example, the easiest one is you have those four people

16 who have written in, clearly they need to be engaged and

17 all of that. No doubt you will draw their attention to

18 the written ruling when it comes out.

19 MR WILLIAMS: Yes. I mean, I think I had assumed, although

20 it is an assumption, that those individuals fell within

21 the subset of people who had registered for updates.

22 THE CHAIRMAN: Exactly.

23 MR WILLIAMS: But perhaps --

24 THE CHAIRMAN: Whoever is registered for updates should be

25 given the update.

1 MR WILLIAMS: I agree. I was simply making the point that
2 if, by any chance, the four members who have made
3 representations happen not to be, then we should make
4 sure they are told as well.

5 THE CHAIRMAN: Yes okay.

6 I think we have covered everything, haven't we?

7 With all these cases, there is lessons to be
8 learned, but they will all be in the written ruling.

9 It was necessary to have an oral hearing. I think
10 in future, unless it is really really straightforward,
11 I think we should always have a hearing, even if it is
12 only like a three or four hour hearing. Ideally, we
13 want any hearings to be resolved in one day, so you have
14 all the argument and a ruling in the same day. It is in
15 no one's interests if a case is going to settle to be
16 prolonged. So the judgment may be a bit rough and ready
17 but it is better than waiting a month or something.

18 MR WILLIAMS: We were certainly grateful, on our side, to
19 have the chance to hear the Tribunal's concerns well in
20 advance of the hearing, and address them before the
21 hearing.

22 THE CHAIRMAN: Yes. I think that is the way -- you probably
23 know me well enough but, apart from trials, which is
24 completely different, most of the advocacy is being done
25 in the written submissions and all the evidence. You

1 can be fairly confident that I have read that, and at
2 the hearing I tend to focus simply on the points that
3 really matter. If I didn't think the advocates were
4 sufficiently experienced, I wouldn't do it that way. It
5 is fine to do it that way with you and Mr Bailey, but
6 I do know it wouldn't be fair with other people to be
7 thrown in the lion's den. But you are both capable of
8 answering any questions thrown at you. Even if it is
9 not great, it is the most efficient way to get the right
10 result. I think both of you, and obviously the teams
11 behind because there is a lot of work being put into the
12 bundles; the bundles are in perfect condition.

13 What I propose we do is that we will send the draft
14 to both of you, you will determine who should be able to
15 see it in order to come back with any comments.
16 Obviously, you can give it to your solicitors and that
17 sort of stuff, but try to ensure that the proposed
18 redactions are as few as possible. If you do want
19 a redaction, try and explain why it is being redacted.
20 Where the draft deals with something that is, let's say,
21 potentially LPP to you, we will not send that to the
22 other side and vice versa, but if something slips
23 through, obviously you can exercise your judgment and
24 say, well, I will blank it out further before it goes to
25 my solicitors and my team. I am just trying to get the

1 right balance. Otherwise, these things take a long time
2 with different drafts and stuff. You may see stuff that
3 you shouldn't see, and vice versa, but you can decide
4 what goes back --

5 MR WILLIAMS: It won't go any further. I understand.

6 THE CHAIRMAN: Yes, exactly.

7 MR WILLIAMS: I am grateful. Thank you very much.

8 THE CHAIRMAN: And timing, we will no doubt have the ruling
9 done pretty quickly, so I would want comments back
10 within maybe three days of that.

11 MR WILLIAMS: I am sorry?

12 THE CHAIRMAN: Three days after you get the draft --

13 MR WILLIAMS: I see.

14 THE CHAIRMAN: -- I would want the comments back. That way
15 we can get the judgment on the website early next week.

16 MR WILLIAMS: I am grateful. We will get a revised order to
17 you, you know, imminently.

18 THE CHAIRMAN: Yes. And then the revised agreement, you are
19 going to amend and sign up presumably? Because I think
20 we know what the amendments are. So just sign it up and
21 then that will be the agreement that is being approved
22 under the order.

23 Thank you very much.

24 (2.55 pm)

25 (The hearing concluded)

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