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4 record.

5 Case No: 1437/7/7/22, 1529/7/7/22, 1530/7/7/22, 1531/7/7/22, 1592/7/7/23

6
7 **IN THE COMPETITION**
8 **APPEAL TRIBUNAL**
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10
11 Salisbury Square House
12 8 Salisbury Square
13 London EC4Y 8AP

14 Wednesday 10th June 2026

15
16 Before:

17
18 The Honourable Mrs Justice Bacon
19 Mr Hugh Kelly
20 Ms Paula Riedel
21 (Sitting as a Tribunal in England and Wales)

22
23 BETWEEN:

24
25 **Elisabetta Sciallis**

26 **Proposed Class Representative**

27
28 And

- 29
30 (1) **Fender Musical Instruments Europe Limited and Another**
31 (2) **Korg (UK) Limited and Korg Inc.**
32 (3) **Roland Europe Group Limited and Roland Corporation**
33 (4) **Yamaha Music Europe GmbH and Yamaha Corporation**
34 (5) **Casio Electronics Co. Limited**

35
36 **Proposed Defendants**
37

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

39 David Cavender KC on behalf of Elisabetta Sciallis (Instructed by Pogust Goodhead)

40
41 Sarah Ford KC on behalf of Fender Musical Instruments Europe Limited and Roland Europe
42 Group Limited and Roland Corporation and Yamaha Music Europe GmbH and Yamaha
43 Corporation (Instructed by Gibson, Dunn & Crutcher UK LLP, Herbert Smith Freehills
44 Kramer LLP& Dentons UK and Middle East LLP)

45 Aqeel Kadri on behalf of Korg (UK) Limited and Korg Inc. (Instructed by Osborne Clarke
46 LLP)

Wednesday, 10 June 2026

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(10.30 am)

(Proceedings delayed)

(10.32 am)

Housekeeping

MRS JUSTICE BACON: Good morning. Some of you are joining us on live stream on our website, so I will start with the usual warning. An official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings, and breach of that provision is punishable as a contempt of court.

Mr Cavender.

MR CAVENDER: Good morning. There are two matters on the agenda for today: one is my application to withdraw these proceedings; and the second is, dealing with matters of costs, in particular whether the costs and withdrawal should be the usual order on withdrawal, which is standard basis of assessment, or whether there should be costs assessed on an indemnity basis.

MRS JUSTICE BACON: Yes.

MR CAVENDER: What I propose to do, if that's okay with the tribunal, is to make my application to withdraw and explain the circumstances in which that arose, and then leave my learned friend to make her application for indemnity costs and then reply to that.

MRS JUSTICE BACON: Yes, is the application for withdrawal opposed?

UNIDENTIFIED SPEAKER: No, my Lady.

1 MRS JUSTICE BACON: All right. I think it's maybe helpful for you to explain to the
2 tribunal what has happened in fairly short order, but it's not opposed, so it will just be
3 for our note.

4 MR CAVENDER: My Lady, it is for your note, but also to get a sense of the context
5 in which this occurred, because that then reflects on to --

6 MRS JUSTICE BACON: Yes.

7 MR CAVENDER: -- points my learned friend doubtless will make about indemnity
8 costs.

9 MRS JUSTICE BACON: Yes, of course.

10

11 Submissions by MR CAVENDER

12 MR CAVENDER: The application for withdrawal, you'll see in your bundle 3, tab 5 at
13 page 26, a letter from Pogust Goodhead dated 3 June. What that does is set
14 out -- you've no doubt read it -- the context of the withdrawal, particularly in relation
15 to paragraphs 2 and 3.

16 The reason, at paragraph 3, for the withdrawal:

17 "... despite sustained efforts over a prolonged period to secure replacement funding,
18 no secured or sufficiently advanced funding solution has ultimately materialised
19 within the timeframe now required by the Tribunal. The PCR's position, as set out in
20 her evidence attached, is that the outcome reflects current conditions in the funding
21 market for CAT opt-out collective proceedings rather than any lack of confidence in
22 the merits ..."

23 MRS JUSTICE BACON: Yes, well, it's not really clear from this, what the exact
24 timeline was. Can you take us through, with some precision, what was going on
25 from the time that you initially served your proceedings through until 2026, in terms
26 of when your original funder withdrew and when you were then progressing

1 discussions with alternative funders? Because at the moment, I don't have a clear
2 idea of what was going on. We know from the evidence that was initially filed that
3 there were discussions with -- I think the name is not confidential, is it, the original
4 funder?

5 MR CAVENDER: I don't believe so.

6 MRS JUSTICE BACON: North Wall. So North Wall was the original funder. Was
7 that the original funder who was contemplated at the time for all of the original
8 funding agreements?

9 MR CAVENDER: It was --

10 MRS JUSTICE BACON: It was all the original CPO applications?

11 MR CAVENDER: It was indeed.

12 MRS JUSTICE BACON: We've then got a witness statement for Fender, for
13 example, that Ms Sciallis was entering into an LFA with North Wall. When we get to
14 Casio, by that point, had North Wall dropped out of the picture? When exactly did
15 North Wall confirm that it wasn't going to fund the proceedings?

16 MR CAVENDER: There's no evidence about that, my Lady. I'm not able to assist
17 you other than ...

18 MRS JUSTICE BACON: Well, what --

19 MR CAVENDER: From the evidence, you've got witness statements from the PCR,
20 haven't you, about this, as to this timeline. I can't improve on that. If you remember,
21 there's a schedule to her witness statement put in for the CMC, which details all the
22 various insurers she's approached.

23 MRS JUSTICE BACON: Okay, but there's no dates given there. She was instructed
24 to put in a witness statement addressing, we had hoped in some detail, what had
25 been going on.

26 MR CAVENDER: My Lady, that's actually wrong, if you recall, because we had

1 a debate about whether the evidence has to look backwards, and you
2 directed -- I had this debate -- that you required that; you only needed evidence
3 going forwards as to what the funding position was, so that's what was done.

4 MRS JUSTICE BACON: Right. But she does put in her evidence -- I'm just looking
5 at it here. Just looking at her witness statements. (Pause)

6 Yes -- the current arrangements and the steps taken to secure them.

7 MR CAVENDER: If you remember, my Lady, we had an express debate about this,
8 because I was concerned that someone would want as to go back over all the years,
9 et cetera, and the time and trouble that would take, and it was accepted that was not
10 necessary, so that --

11 MRS JUSTICE BACON: No, but she does give evidence as to the sustained and
12 extensive efforts by her legal representatives. What she doesn't say is the extent of
13 those in terms of the time period.

14 MR CAVENDER: Well, she deals with it as a whole and lists, in the schedule to that
15 witness statement, all the very many efforts that she's been to seek funding. Vis
16 a vis the new period, where this tribunal did ask for evidence, she's put it in. You've
17 seen that updated in her witness statement attached.

18 MRS JUSTICE BACON: For example, in paragraph 13:

19 "Continuous, extensive and sustained efforts over a prolonged period."

20 But she doesn't explain what is meant by that period, which is effectively what I'm
21 asking for. I don't know how long those efforts have been going on for.

22 MR CAVENDER: I think it's clear from her evidence that throughout the whole
23 period, there was no stop; there was no sort of pause in that; it was continuous. If
24 you go to page 21, you'll see in the schedule all the various funding entities, many of
25 whom are familiar, some aren't, whom she has gone to.

26 MRS JUSTICE BACON: Well, it's not clear. With respect, Mr Cavender, she just

1 asserts that she's made continuous, extensive and sustained efforts over
2 a prolonged period. Then she said those efforts commenced following the
3 withdrawal of the original funder. But it's notable that no dates at all are given, so
4 I don't actually know over what period she was trying to get funding. It could be that
5 the original funder withdrew at a fairly early stage and then there was a hiatus. It
6 could be actually that the original funder withdrew and immediately, there were
7 efforts to put in place further funding. But the witness statement makes assertions,
8 but no dates are given to validate those.

9 MR CAVENDER: My Lady, I'm not sure that's entirely fair, because we know, as
10 I set out in my skeleton, that in relation to the first four claims, the North Wall letter
11 was appended, and it was said that it's expected that that funding be put in place,
12 and the insurance contract will be disclosed in due course. By the following year, the
13 time of Casio, that was no longer said.

14 MRS JUSTICE BACON: Are you inviting the tribunal to infer from that that
15 North Wall had dropped out of the picture between the two?

16 MR CAVENDER: Yes.

17 MRS JUSTICE BACON: All right, that's an inference that you invite the tribunal to
18 withdraw?

19 MR CAVENDER: My Lady, yes.

20 MRS JUSTICE BACON: Right. (Pause)

21 MR CAVENDER: And I say so in my skeleton, if you recall. (Pause)

22 MRS JUSTICE BACON: What's the paragraph?

23 MR CAVENDER: Paragraph 17, my Lady. I set out in paragraph 15 and 16 the
24 chronology. At 17, I say:

25 "By the time of the CPA application against Casio on 31 May 2023 the position had
26 changed ... no longer any mention of the ... funding from North Wall."

1 MRS JUSTICE BACON: Yes. You are expressly inviting us to draw from that the
2 inference that, because there was no longer any mention of funding from North Wall,
3 the North Wall arrangements had fallen away by 31 May 2023?

4 MR CAVENDER: Exactly. If you look at the North Wall letter -- and I'm sure you've
5 looked at it -- that had Casio on it as a proposed defendant. It was a global funding
6 package that actually included them, even though at that date, proceedings hadn't
7 been issued against them. (Pause)

8 MRS JUSTICE BACON: I see. Are you therefore inviting us to infer, from the
9 combination of that and what is said in the witness statement, that from some point
10 prior to May 2023 up until shortly before this hearing, efforts were made over that
11 period to get alternative funding?

12 MR CAVENDER: Indeed.

13 MRS JUSTICE BACON: Throughout that period?

14 MR CAVENDER: Throughout that period.

15 MRS JUSTICE BACON: Right. (Pause)

16 Now, the next question, I think, which is important, is: was the fact that, from before
17 the Casio application onwards, there wasn't a funding agreement, was that ever
18 communicated to the proposed defendants?

19 MR CAVENDER: Communicated ... but they certainly knew that was the case, and
20 I can show you the correspondence where they joined the dots, effectively, that I've
21 just outlined to you.

22 MRS JUSTICE BACON: Yes, that would be helpful.

23 MR CAVENDER: So if we go to bundle 3, tab 13.

24 MRS JUSTICE BACON: Yes.

25 MR CAVENDER: Page 58, this is from Herbert Smith Freehills on behalf of Roland.
26 We can see at paragraph 2 there, referring to the application:

1 "Based on the Claim Form ... it appears that your client does not yet have either
2 litigation funding in place for her own costs or provision for Roland's recoverable
3 costs."
4 It goes through the evidence, "intends to enter", "will be entered into". So there's no
5 doubt from March 2023 that HSF knew.
6 Same for Dentons in relation to Yamaha, if you go to tab 10. (Pause)
7 Page 52. (Pause)
8 Again, they are of the view that it's not clear from the claim documents, saying,
9 requirement, et cetera, confirmation of costs, "provide a copy of litigation funding
10 agreement" that of course was never provided.
11 From very early on, the defendants knew that there was no funding in place. Of
12 course, this was shortly before May 2023, the Casio application, when, as see, there
13 was no mention of North Wall.
14 If we go to the core bundle and look at what was said on the application for Casio.
15 Core, tab 9, page 257. (Pause)
16 This is paragraph 37 and 38:
17 "I am making arrangements for ... third-party funding for fees and disbursement.
18 Copies of the relevant arrangement(s) ... in due course.
19 "... [to provide an] overall budget ... used across the five proposed collective
20 proceedings."
21 Bottom of that page, talking about "synergies" across the collective proceedings, and
22 then referring, at the top of page 258 -- this is new, it's not in the earlier
23 four -- referring to the letter from the tribunal in February, that it would list a joint case
24 management conference and look to collectively manage the proceedings.
25 MRS JUSTICE BACON: But what about paragraph 27(b):
26 "... I consider I have the skills necessary to take on the role of class rep and to act

1 fairly and adequately in the interest of the Proposed Class. I consider that this as
2 further demonstrated by:

3 "(b) -- The funding arrangements that my legal representatives have put in place."

4 MR CAVENDER: Yes, that isn't the best drafting. I mean, at this date, the funding
5 arrangement was the ATE policy, I think that's -- but it's clear from the rest of -- even
6 if you took that in isolation and read it with paragraph 37, it's clear that no litigation
7 funding had been put in place at the date of the application. (Pause)

8 So either that's a reference to ATE or it's just a drafting error and a carryover from
9 the earlier four drafts, a mistake. But when you read the evidence as a whole and
10 look at paragraph 37, you're left in no doubt that there was no litigation funding in
11 place at that date. (Pause)

12 MRS JUSTICE BACON: Well, let me just go back to paragraph 37. "I am making
13 arrangements". So it's obviously not concluded; that doesn't give any hint of the fact
14 that, in fact, there was no agreement for funding at all.

15 MR CAVENDER: If you're making arrangements, my Lady, with respect, that is only
16 consistent with: you don't have an agreement. Your arrangements aren't at a stage
17 where you can say there's even an agreement in principle. It means you are in
18 discussions with funders, effectively. It's another way of putting the same point.
19 What it isn't saying is that funding is in place.

20 MRS JUSTICE BACON: So that's the position on funding. What about ATE cover?

21 MR CAVENDER: We had that last time, my Lady, if you remember; there was
22 a discussion about that. We put the unredacted ATE policies into the confidentiality
23 ring.

24 MRS JUSTICE BACON: There are still some redactions in bundle 3. Is there
25 a different version that is in the confidentiality ring?

26 MR CAVENDER: One in bundle 3 -- what page is that, my Lady? I put it separate.

1 (Pause)

2 I think that's just because of the correspondence. Yes, that was just the one that

3 was sent at that time, with all the redactions in it. Looking at page -- I have one

4 version of that at bundle 3, tab 42, page 189 and following.

5 MRS JUSTICE BACON: Is that the --

6 MR CAVENDER: That's the redacted version.

7 MRS JUSTICE BACON: Yes. Where is the least redacted version?

8 MR CAVENDER: It's obviously part of the confidentiality club. I don't think it's in the

9 bundle.

10 MRS JUSTICE BACON: We haven't been sent it?

11 MR CAVENDER: Haven't been sent it in the bundle, my Lady, no.

12 MRS JUSTICE BACON: Where is the least redacted version that is in the bundle?

13 MR CAVENDER: There are only two versions that exist in the bundle.

14 MRS JUSTICE BACON: Which of those is the least redacted version?

15 MR CAVENDER: The only ones in the bundle are the redacted versions.

16 MRS JUSTICE BACON: Okay, and they are identical?

17 MR CAVENDER: I haven't searched them. So I didn't realise this was going to be

18 an issue, but I would have thought so. These are the ones that were sent to various

19 people when they asked for them at the time; that's why they're attached to letters.

20 MRS JUSTICE BACON: Right.

21 MR CAVENDER: Since then, as you know, the parties have been ordered and have

22 set up a confidentiality club where the largely unredacted policies exist, but they've

23 not been put in the bundle.

24 MRS JUSTICE BACON: Right. Is there any dispute about whether the ATE cover is

25 valid and will cover the proposed defendants' costs?

26 MR CAVENDER: That's a big question, because obviously the policy operates in

1 accordance with its terms.

2 MRS JUSTICE BACON: Right.

3 MR CAVENDER: One of which is amount, for instance.

4 MRS JUSTICE BACON: One of which --

5 MR CAVENDER: Is the amount of cover.

6 MRS JUSTICE BACON: Yes, alright. Leaving aside, then, the question of the
7 defendants' costs -- which we haven't seen, because the cost schedules haven't
8 been provided -- is there any debate, dispute, or any doubt about whether the ATE
9 cover will pay up, in respect of the costs that are ordered? Subject of course to the
10 ceiling amount.

11 MR CAVENDER: It's an impossible question for me to answer, isn't it? The insurer's
12 claim will be made on indemnity, in the usual way. There's been no debate or
13 discussion about that.

14 MRS JUSTICE BACON: No. So there has been no discussion between you as to
15 whether these policies are valid?

16 MR CAVENDER: With us and whom, my Lady?

17 MRS JUSTICE BACON: Between you and the defendants.

18 MR CAVENDER: No.

19 MRS JUSTICE BACON: No? All right.

20 MR CAVENDER: The ATE cover was put in place at the beginning.

21 MRS JUSTICE BACON: Yes, and the defendants have seen the entirely unredacted
22 versions in the confidentiality bundles, but we haven't --

23 MR CAVENDER: I say entirely, apart from personal details.

24 MRS JUSTICE BACON: Right.

25 MR CAVENDER: There's been no push-back saying "We want this or that
26 unredacted". There has been a point raised that had it of continued, they would want

1 a direct right to go against insurers --

2 MRS JUSTICE BACON: Right.

3 MR CAVENDER: -- and if you remember, the evidence says, well, we're open to
4 discussions about that.

5 MRS JUSTICE BACON: Okay.

6 MR CAVENDER: But beyond that, there hasn't been any debate about it, I'm aware
7 of.

8 MS FORD: My Lady, our position is in paragraph 14 of our skeleton. I draw
9 attention, in particular, to the evidence that PCR has put in about the absence of
10 anti-avoidance enforcement. (Pause)

11 MRS JUSTICE BACON: But does that -- I mean, are you saying that that would bite
12 now, now that there is an application to withdraw?

13 MS FORD: Not in a position to say.

14 MRS JUSTICE BACON: Right. So is the position that: you've seen almost
15 unredacted versions of the ATE cover; you will be making claims on that.

16 MS FORD: Yes.

17 MRS JUSTICE BACON: You're not coming to us and saying, "There's a clear
18 reason why those policies are not going to pay up."

19 MS FORD: I'm not in a position to say either way, in relation to that.

20 MRS JUSTICE BACON: No? All right. Okay, thank you very much. So that's what
21 we know about the ATE.

22 MR CAVENDER: My Lady, going on then with, I'd say --

23 MRS JUSTICE BACON: One moment. (Pause)

24 There's some reference to the litigation funding agreement in the ATE, at least on
25 the one that we've seen. Obviously, we haven't seen the completely unredacted
26 version. Are the ATE agreements contingent on there being a litigation funding

1 agreement in place?

2 MR CAVENDER: They anticipated, and as you say they refer to that. They were put
3 in place at the time the ATE cover was put in place. There was no final funding
4 agreement. But we've seen there was a letter from North Wall containing
5 a non-binding promise that they would put one in place, seems to be the position.

6 MRS JUSTICE BACON: A non-binding promise that what?

7 MR CAVENDER: The funding agreement would follow, ie the North Wall letter that
8 you've seen was attached to all of the applications. (Pause)

9 Should we remind you of the terms of that? So it's in core bundle 2, it's behind
10 tab 11 at page 282. (Pause)

11 MRS JUSTICE BACON: "North Wall ... has agreed to enter into a litigation funding
12 agreement ..."

13 But ultimately that then fell away because North Wall didn't conclude the funding
14 agreement.

15 MR CAVENDER: You'll notice, as I said, number five on that list is Casio.

16 MRS JUSTICE BACON: Yes.

17 MR CAVENDER: So this wasn't mentioned in relation to Casio, following year. It
18 was obvious that this funding had fallen away.

19 MRS JUSTICE BACON: Right. So you say for the first four applications, this
20 North Wall letter was exhibited, and that wasn't then exhibited for Casio?

21 MR CAVENDER: Correct.

22 MRS JUSTICE BACON: I see. Not sure that answers my question as to whether
23 the ATE agreements were contingent on there being funding, because what is said
24 at the moment by Ms Sciallis is that although she hasn't ever secured funding, she
25 does have ATE cover, but if that ATE cover is itself contingent on there being
26 funding, that would be a real problem for the defendants if they were to claim under

1 it.

2 MR CAVENDER: But it doesn't -- we can all look at the policy ourselves, and see
3 what it says.

4 MRS JUSTICE BACON: But we can't, because we haven't got a properly
5 unredacted version.

6 MR CAVENDER: No one so far has said that.

7 MRS JUSTICE BACON: Right. (Pause)

8 MR CAVENDER: And what I can say is that the ATE insurers -- as far as I'm
9 instructed, we were aware -- knew of the position, knew obviously the North Wall
10 letter, knew of the position and gave ATE in the terms that they did.

11 MRS JUSTICE BACON: But that begs the question: if they gave ATE in terms that
12 are contingent on there being funding in place, that doesn't help the defendants if
13 funding ultimately has come to nothing.

14 MR CAVENDER: The policy doesn't say that; if you read the policy, there's no term
15 that says --

16 MRS JUSTICE BACON: I see. So that's really the answer to the question: that as
17 far as you're aware, there's not any term that makes the cover contingent on funding
18 being in place.

19 MR CAVENDER: Correct. (Pause)

20 Let's put it another way: it seems that the ATE insurers took the risk that funding
21 might not be put in place; that's another way of putting that point.

22 MRS JUSTICE BACON: Yes, that was what my questions were getting at. (Pause)
23 All right.

24 MR CAVENDER: So we were looking at the letter, bundle 3, tab 5, page 26, which
25 sets out the reasons for this withdrawal application.

26 MRS JUSTICE BACON: Yes.

1 MR CAVENDER: Attached to that came with it a witness statement of the PCR,
2 which you see on page 31 and following, which updates the earlier witness
3 statement as to the attempts that had been made more recently in order to obtain
4 funding.

5 MRS JUSTICE BACON: Yes.

6 MR CAVENDER: And she sets out some of the background, and at paragraph 8
7 recites the problems with the delay in the proceedings generally, caused in large part
8 by the attempt to serve the Casio foreign defendants in Japan, you recall, with
9 numerous extensions of time because of the difficulties serving under the
10 convention, extensions ranging to the end of November 2025, the costs said to
11 be -- to translate the documents, would be more than £40,000, and that despite the
12 fact an order of this tribunal -- that that didn't have to be done -- the Casio foreign
13 defendant insisted on their rights, so to speak, that everything be translated, which
14 caused obviously further delay, which is all very well, but if people are going to say,
15 well, that delay was caused by the claimants, then it's rather difficult when there's
16 behaviour of that type, and the order I referred to, for your note, is core bundle,
17 tab 37, 455, where the tribunal ordered that not all these documents had to be
18 translated, as far as the tribunal concerned.

19 Then staying with witness statement, if you would go to paragraph 11, she recites
20 under the heading "Original Funding Position", a summary of basically what I've
21 been saying to you in oral submissions. (Pause)

22 MRS JUSTICE BACON: Yes.

23 MR CAVENDER: Paragraph 12, and then paragraph 13 and following set out the
24 position, my Lady, since the CMC really, ie the forward looking part, and as you
25 recall one of the things that was sought to be done wasn't just funding, it was also
26 representation, was an issue, and as you may well know, different firms have

1 different relationships with funders; don't quite have a line of funding, they have an
2 arrangement or understanding and it was thought bringing Edwin Coe into the mix
3 with their own relationships with funders may unlock some funding, and we set that
4 out at paragraph 15. (Pause)

5 And so Edwin Coe were effectively taking the lead in seeking funding and
6 representation during this period, as is clear by the evidence, and that continued until
7 the day before the application to withdraw was made.

8 In paragraph 18, you see the evidence:

9 "Since the departure of the original funder, I remained willing to pursue any realistic
10 route by which proper funding could be secured."

11 Then, under the heading "Why Funding Was Not Secured", if you read those
12 paragraphs, the net effect is: it wasn't because of any case-specific failings, any
13 weakness -- this is, after all, a follow-on action from the CMA -- it was effectively
14 a hardening in the market and the way they look at opt-out proceedings and
15 the -- I guess their commercial view as to the profitability of them. That's not
16 something to be laid at the door of the PCR, in my respectful submission.

17 And then under "Present Position", paragraph 22 and following, she sets out the
18 present position. What is interesting, if you look at the letter from Edwin Coe,
19 paragraph 39 and 40 attached to that witness statement -- this was a day before
20 2 June, this letter -- this is their final update, the final chance to get any kind of
21 funding in place prior to this agreement. PCR took the view that it was incumbent
22 upon her to try, on behalf of the claimant groups, to secure funding she possibly
23 could. Edwin Coe were taking the lead. Pogust were obviously seeking updates the
24 whole time, seeking to put pressure on them, and this was the final, final offering.

25 So they've got some interest, but at a budget which Edwin Coe thought was
26 impossible. Co-funding is not an option, would require substantial restructuring, and

1 in the end this is all, of course, at the very last minute as much as could be achieved.

2 MRS JUSTICE BACON: Yes.

3 MR CAVENDER: PCR took the view that wouldn't be good enough to come to this
4 court and say, "Can we have more time on this hope", because as your Ladyship
5 made clear to me at the CMC, we have a limited amount of time, gave us a limited
6 time, we did our best with it. And -- but once this letter was received, she received
7 legal advice which was acted on and the application withdrawal was put in.

8 So that is, if you like, drawing behind the curtain as to what happened.

9 MRS JUSTICE BACON: Right. Thank you.

10 MS RIEDEL: I've now lost the reference, so forgive me, but for service on Casio
11 Japan, you said it was exceptionally difficult.

12 MR CAVENDER: Yes.

13 MS RIEDEL: Can you just give a little bit more colour as to, apart from the
14 translation issues which sort of did (inaudible) at the end, could you give a little bit
15 more colour as to what created all the difficulties and the time delays?

16 MR CAVENDER: I can. The best way I can do it, actually, is refer you to a letter
17 where my instructors set that out in detail. Let me get that, and I can walk you
18 through it. But essentially, service under the convention is a long drawn out,
19 complicated process and it involves the Japanese embassy and a period of months.
20 Once they get all the documents, all translated, et cetera, it's a very long, tortuous
21 process, and that's the same for any of the convention countries. Some are worse
22 than others. But let me get you a copy of that letter. (Pause)

23 Yes. So if you go to bundle 2, tab 19, page 364, this is a letter to the registrar in May
24 2025. This was for the final extension to December 2025. What it does, explains, if
25 we go to paragraph 7 and following the background, and then at paragraph 11 starts
26 with the first extension application. Do you see that? It says all the detail relating to

1 that, and then, paragraph 17, the second extension application. Then paragraph 22
2 and following, the third one. Then paragraph 27 and following, the fourth.
3 By way of example on the fourth, to give some colour to this answer, paragraph 32:
4 "On 6 May ... my firm called the Japanese Embassy in London for further clarification
5 and was informed that the District Court in Tokyo had previously written to the
6 Second Proposed Defendant, requesting confirmation of the preferred method of
7 service by 5 Marc ... The Second Preferred Defendant had failed to respond by the
8 required date and service was thus deemed to have been rejected."
9 So you get into this bureaucratic situation, when obviously, Casio UK had been
10 served, and this is, in a sense, procedural game playing. I mean, they're entitled to
11 do it by strict reason of the law. You may think it's not in accordance with rule 4 on
12 cooperation, and I've referred you to the order of this court that said all the
13 translations didn't have to be done, but nonetheless, they insisted that they did. So
14 that is, in that context of litigation, game playing, is how I would put it neutrally.
15 So, that's the application for withdrawal. The letter that did so, the circumstances
16 that occurred, the evidence in support in particular (audio distortion).
17 MR KELLY: (Audio distortion) understanding whether or not the ATE insurers were
18 informed when North Wall withdrew their funding agreement?
19 MR CAVENDER: Whether they were what? Sorry.
20 MR KELLY: Whether they were told North Wall had withdrawn --
21 MR CAVENDER: You mean when they had --
22 MR KELLY: Yes.
23 MR CAVENDER: -- were they informed of that fact?
24 MR KELLY: Yes.
25 MR CAVENDER: I'll take instructions. (Pause)
26 They clearly have been informed, but I'm not -- can't (inaudible) precisely when that

1 was.

2 MR KELLY: They didn't respond, saying, "Well, that invalidates the policy" at all?

3 MR CAVENDER: No.

4 MR KELLY: Thank you.

5 MRS JUSTICE BACON: All right. So, I think you were concluding your application
6 to withdraw. Was there anything else that you needed to say about that?

7 MR CAVENDER: A couple of things. Obviously, under rule 44, on withdrawal, the
8 tribunal can make any consequential order it thinks fit. That's rule 44, and obviously,
9 you're aware of that.

10 The PCR makes an application to withdraw and accepts that she's responsible to
11 pay the potential defendants reasonable costs to be assessed on the standard basis.
12 She said that in her letter; she accepts that. That reflects the standard approach on
13 withdrawal set out in the CPR. I refer to paragraph 44.9(1)(c). I don't think that
14 found its way into the bundle, but I have a paper copy here. I see you have White
15 Books there. I have a single copy and a couple of White Books there.

16 MRS JUSTICE BACON: So CPR rule 44?

17 MR CAVENDER: 44.9(1)(c). It says cost cases, where cost orders are deemed to
18 have been made, subject to ... (1)(c):
19 "... 38.6 (defendant's right to cost where claimant discontinues)"

20 MRS JUSTICE BACON: Oh, I see. Yes.

21 MR CAVENDER: "a costs order would be deemed to be made on the standard
22 basis ..."

23 So, just pausing and thinking about what that means, looked at from the perspective
24 of the rules, and in my submission, this tribunal should follow that general approach,
25 given it has no rules itself dealing with it, is there's nothing intrinsically unreasonable
26 in bringing an action and then withdrawing it, ie that would normally be visited with

1 standard costs, because that is the usual rule I've just shown you.

2 That's important just to sit with that for a moment, understand what that means:

3 there's nothing wrong with bringing an action and then discontinuing it in terms of
4 looking at -- that that isn't unreasonable to a high degree, it's not high --

5 MRS JUSTICE BACON: But I think it is said that therein lies the unreasonableness.

6 MR CAVENDER: Well, my Lady, we'll see what's said, but it is said that there is
7 unreasonableness up to -- to a high degree from withdrawing in these
8 circumstances. So what I'm saying is the starting point is there's nothing
9 unreasonable about withdrawing proceedings.

10 MRS JUSTICE BACON: Yes.

11 MR CAVENDER: So that's the starting point. You have to look at something
12 particular about the way it was withdrawn, or something in the action or something,
13 which gets you anywhere near the test of high degree of unreasonableness. That's
14 the starting point here.

15 We're going to say that there's nothing here that can sensibly be said is
16 unreasonable to a high degree from continuing to seek to obtain funding because
17 that's the net effect of what's being said here.

18 MRS JUSTICE BACON: I think this is moving on to the cost application, so it
19 probably is best, if we're moving on to that, for Ms Ford to make that application, and
20 then you can respond to what is said, rather than anticipating.

21 MR CAVENDER: My Lady, yes. Can I make two other points before we do, moving
22 on from that, not on that.

23 The other point is to have regard to the amount of costs we're talking about here.

24 Now, they've not put cost schedules in, but the costs here are very substantial. The
25 only bit of evidence we've got, if you go to bundle 3, tab 29, page 164, in relation to
26 Dentons and Yamaha, it seems as at December 2023, paragraph 2 of this letter,

1 Pogust, my instructing solicitors, have been told that Yamaha expected their likely
2 cost to amount to 1 million or more. So that's before the CMC, before any of the
3 recent involvement.

4 MRS JUSTICE BACON: But that's the expected outlay up to and including the CPO
5 hearing. We're nowhere near that. I don't read that as saying that that's what they
6 had already spent.

7 MR CAVENDER: No. That's a fair point. But the costs, in any event, are likely to be
8 very substantial and so the indemnity principle is likely to be important, and we can
9 go through that later, but as you'll know, that has two aspects: one is that it changes
10 the burden and puts the burden on the paying party to show the costs incurred are
11 unreasonable; and secondly, it disapplies the proportionality principle. So where
12 costs are very high, where the defendants have done very little, no defendant has
13 put anything of that kind. If they do indeed have cost schedules in the millions, then
14 the indemnity principle may be quite important.

15 Then the final point is, if the costs are of that substantial amount, in the circumstance
16 where not a lot of work seems to have been done, objectively at least, in terms of
17 involvement, defences, things of that kind, the tribunal can, under rule 104(6),
18 appoint a cost judge to go through them, someone whose, obviously, job it is
19 professionally to go through cost schedules, rather than, I think as my learned friend
20 anticipates, people putting in cost schedules and lawyers making submissions about
21 them. That might be all very well if it's kind of a normal case and the costs issues
22 are quite straightforward.

23 But here, if the costs are as substantial as it seems likely they are, then in my
24 submission, it may well be appropriate to send those costs to a cost judge. Maybe
25 you need to await that decision until we see the cost schedules, but at this stage,
26 I put a marker down that it seems to us that that may well be the more appropriate

1 course.

2 My Lady, unless I can assist you or members of the tribunal more, I'm going to sit
3 down and let my friend make her application for indemnity costs.

4 MRS JUSTICE BACON: Yes. All right, I'll hear from Ms Ford.

5

6 Submissions by MS FORD

7 MS FORD: Madam, members of the tribunal, I'm going to start with the applicable
8 principles, because there is a certain amount of common ground, but at the very
9 least, some differences of emphasis that require to be addressed. The leading case
10 is the judgment of the Court of Appeal in *Excelsior*, which is in the authorities
11 bundle behind tab 3. You can start, please, at page 27 within the bundle.

12 If you look at paragraph 30 within this judgment, which is where Lord Woolf is citing
13 from a case called *Kiam v MGN*, and this is a paragraph that Mr Cavender has cited
14 in his own skeleton, paragraph 28.

15 This is the origin of the wording that Mr Cavender has just adopted orally as well, the
16 "unreasonable to a high degree", "not merely wrong", "misguided in hindsight".

17 It's important to appreciate that this was a case concerning a failure to accept
18 a reasonable payment into court, and that is the context in which one sees

19 "unreasonable to a high degree". Further on in this judgment, we see both

20 Lord Woolf and Lord Justice Waller explaining that the "unreasonable to a high
21 degree" wording reflected the context of the case.

22 If we look, for example, at paragraph 31 within this judgment, this is Lord Woolf
23 saying:

24 "In the context of that case I see that those paragraphs set out the need for there to
25 be something more than merely a non-acceptance of a payment into court, or an
26 offer of payment, by a defendant before it is appropriate to make an indemnity order

1 for costs. Insofar as that is the intent of those paragraphs, I have no difficulty with
2 them."

3 If we then move on to paragraph 32, this is where he sets out what is the test for
4 indemnity costs. We can draw two points out of it; the first is the one made in the
5 first sentence. He is given two examples where "unreasonable to a high degree" is
6 not the relevant test. He says:

7 "I take those two examples only for the purpose of illustrating the fact that there is an
8 infinite variety of situations which can come before the courts and which justify the
9 making of an indemnity order."

10 That is the first point. And the second point, the relevant test at the end of this
11 paragraph:

12 "... before an indemnity order can be made, there must be some conduct or some
13 circumstance which takes the case out of the norm. That is the critical requirement."

14 We see the same point being made in the judgment of Lord Justice Waller,
15 paragraph 38, about nine lines down in his paragraph. He is also seeking to explain
16 what is said in the context of the Kiam case that Mr Cavender has cited, and he
17 says:

18 "[Lord Justice] Simon Brown was concerned to stress that where all that was relied
19 upon is the failure to accept a reasonable offer, it will be to a high degree of
20 unreasonableness before an award of indemnity costs should be made. But his
21 language is not apposite to all circumstances, as my Lord has pointed out."

22 He goes on to endorse, then, at paragraph 39:

23 "The question will always be: is there something in the conduct of the action or the
24 circumstances of the case which takes the case out of the norm in a way which
25 justifies an order for indemnity costs?"

26 That is the applicable test. We can then look, please, at Three Rivers, which is in

1 | this bundle, tab 4, starting at [30].

2 | This is a first instance judgment of Mr Justice Tomlinson, but he is essentially
3 | summarising the principles that come out of the cases that followed Excelsior. He
4 | starts, at 41, saying he has:

5 | "... already referred to the guidance given by Lord Woolf in the Excelsior case as to
6 | the circumstances in which an indemnity order may be appropriate."

7 | And he says:

8 | "... where there is some conduct or some circumstance which takes the case out of
9 | the norm."

10 | Then what he goes on to do is give a summary of the applicable principles he
11 | derives from the cases. The element that we draw particular attention to is
12 | paragraph 25, subparagraph (3) on the next page. He says there:

13 | "Insofar as the conduct of the unsuccessful claimant is relied on as a ground for
14 | ordering indemnity costs, the test is not conduct attracting moral condemnation,
15 | which is an a fortiori ground, but rather unreasonableness."

16 | The third and final authority to refer to is the case of Hosking, which Mr Cavender
17 | has cited as an example of an application for indemnity costs in the context of
18 | discontinuance. That's tab 6 of the bundle, starting at page [129]. The paragraphs
19 | my learned friend has cited are paragraphs 42 and 43.

20 | What the tribunal will see in particular in paragraph 43 is that Mr Justice Hildyard is
21 | giving a non-exhaustive list of the factors which might lead to indemnity costs in the
22 | context of a discontinuance. It is clear that it is non-exhaustive because:

23 | "The cases cited show that amongst the factors which might lead to an indemnity
24 | basis of costs are ..."

25 | Then he goes on to list various factors.

26 | The submission is made on behalf of the PCR in my learned friend's skeleton, in

1 paragraph 32, that the conduct that the proposed defendants criticise in this case
2 doesn't rely on any of the factors set out in Hosking or anything akin to that. That is
3 the submission that's made. In response, I would simply reiterate what we saw in
4 the judgment of Lord Woolf in Excelsior, that it's clear an infinite variety of situations
5 might justify indemnity costs. The fact that the circumstances we rely on in this case
6 don't feature in Mr Justice Hildyard's expressly non-exhaustive list doesn't, in our
7 submission, assist the PCR one way or the other.

8 We rely on three factors that we say take the circumstances of this case outside the
9 norm. The first factor is the PCR's decision to issue proceedings before she had
10 obtained funding. The tribunal will be familiar with the applicable principles
11 concerning the importance of funding in the context of connective proceedings;
12 we've summarised those in our skeleton, paragraphs 4 to 8.

13 The particular point we emphasise for these purposes is that it was made abundantly
14 clear from the outset of this regime, and at the very least, by the time the PCR
15 issued the present proceedings in 2022 and 2023, that having adequate funding in
16 place was an essential part of the PCR's ability to conduct proceedings effectively on
17 behalf of class members. We can see that from, for example, the CAT Guide, which
18 is in the authorities bundle tab 11, starting at page 458. (Pause)

19 The tribunal should have there paragraph 6.33. This, of course dates back to 2015,
20 so the very outset of the regime. What was explained in the Guide was that the
21 authorisation condition requires the tribunal to consider the "proposed class
22 representative's financial resources", and it was spelled out there that that included
23 not only whether the proposed class representative would be able to pay the
24 defendant's recoverable costs if ordered to do so, but also the proposed class
25 representative's ability to fund its own costs of bringing the collective proceedings.
26 That was made clear from the very outset. It was then a theme which was drawn out

1 in the tribunal's own authorities and judgments.

2 The example that we have cited, which again predates the point at which the PCR
3 issued these proceedings, is the Trucks judgment, which is in the authorities bundle,
4 tab 7. (Pause)

5 If the tribunal looks at the front page of the judgment, page 153, we can see this was
6 a judgment which was handed down in October 2019, so well before the dates of
7 commencement of these proceedings.

8 MRS JUSTICE BACON: Is paragraph 50 the best you can do as to the tribunal's
9 comments in its own judgments as to whether funding needs to be in place at the
10 start?

11 MS FORD: That is the example that we put in the authorities bundle. I can show the
12 tribunal that there were also cross-references to other authorities in some of the
13 correspondence that was drawn to the attention of the PCR, when the defendant
14 started saying, "Well, please, can you be clear about what your funding
15 arrangements are?" Certainly for the purposes of the authorities bundle, this is the
16 authority that we've identified.

17 MRS JUSTICE BACON: What other authorities were cited?

18 MS FORD: I think from recollection there was Coll v Alphabet and one other that
19 has been cited in correspondence. I'm afraid we don't have them in the bundle.

20 But we do say, in my submission, 52 does make --

21 MRS JUSTICE BACON: Where are those references?

22 MS FORD: Perhaps I can pick them up when we come to the correspondence, it's
23 a point that was put to them.

24 This, in my submission, does make the point express in the sense that the tribunal
25 here is saying the concern is for potential class members:

26 "The Tribunal seeks to be satisfied that appropriate and adequate arrangements

1 have been made by the proposed class representative to fund the claim it wishes to
2 bring, so that class members will have the benefit of effectively conducted
3 proceedings."

4 In my submission, that really does hammer home that this is not an optional extra;
5 it's something that is in the interests of the class the PCR is purporting to represent.
6 So we say that issuing proceedings without having ensured that adequate funding
7 was in place was itself conduct that was outside the norm, and that was something
8 that was abundantly evident to the PCR from the state of the applicable authorities at
9 the time. It's not something that was merely evident with the benefit of hindsight.

10 MRS JUSTICE BACON: Yes. Well, the only authorities you've referred to so far
11 have been the CAT Guide and the Trucks claim.

12 MS FORD: Madam, yes, we do say that it's evident from those authorities at the
13 very least.

14 MRS JUSTICE BACON: All right.

15 MS FORD: That's the first factor, issuing without funding properly in place.

16 The second factor that we say takes this case outside of the norm is the lack of
17 transparency in the PCR's conduct. It's a lack of transparency to the proposed
18 defendants and a lack of transparency to the tribunal.

19 Looking at exactly what the proposed defendants and the tribunal were told and
20 when, we know the first proceedings in time were the Fender proceedings. If we
21 start with the PCR's evidence in those, which was dated 21 March 2022, this is core
22 bundle 2, tab 6 at page 205. (Pause)

23 As at 21 March 2022, we see the formulation:

24 "In order to fund the Proposed Connected Proceedings, I am entering into a litigation
25 funding agreement with North Wall Capital. I am currently finalising the terms of the
26 litigation funding agreement with North Wall Capital and will be able to provide the

1 Tribunal and Proposed Defendants a non-confidential copy of the agreement in due
2 course."

3 You've been shown paragraph 11 of Sciallis 3, which says, "Well, my funding
4 position was set out openly in my first witness statement. I've explained that I was
5 entering into a litigation funding arrangement with North Wall Capital and that the
6 terms were being finalised", but then we see five months later, the evidence in the
7 court proceedings, 26 August 2022. This is core bundle tab 10, page 277. (Pause)
8 Paragraph 38. There's a slight variation. It says "I will be entering into", rather than
9 "I am". It now mentions all the proposed proceedings at the end of the paragraph,
10 but it's essentially adopting the same formulation five months later.

11 Then on the same date, 26 August 2022, tab 7, page 221 in the bundle. (Pause)
12 Paragraph 39, this is the Roland proceedings. We see there again, essentially the
13 same formulation. What you do not see is a relevant update; there is no explanation
14 of the fact that this putative funding agreement that's being referred to -- that was
15 supposedly in the course of being finalised back in March 2022 -- hasn't yet been
16 concluded as at August 2022.

17 Then in the Yamaha proceedings on 15 September 2022, that's at tab 8 in the
18 bundle, page 238. (Pause)

19 The tribunal should have there paragraph 39 of the evidence of the Yamaha
20 proceedings. Again, same formulation: no update; no explanation of the fact that
21 roughly six months have now gone past and there's still no funding agreement.

22 We then have the Casio proceedings, which was 31 May 2023. That's behind tab 9
23 of the bundle, page 257. (Pause)

24 This is the one that, as the tribunal knows, we see a different formulation, as at
25 31 May 2023, where she's saying:
26 "In order to fund the Proposed Collective Proceedings, I am making arrangements

1 for the provisions of third-party funding for fees and disbursements. Copies of the
2 relevant agreement(s) will be provided in due course."

3 There is now no mention of North Wall Capital, and so the PCR has invited the
4 tribunal today to infer that from at least this point in time, the PCR was aware that the
5 prospect of funding from North Wall Capital had fallen away.

6 You've been shown paragraph 12 of the PCR's evidence in Sciallis 3. That gives
7 evidence that the fact that she didn't repeat her reference to North Wall Capital
8 demonstrated that there was no concealment of the position as it had developed.

9 That's the evidence that's given in paragraph 12 of Sciallis 3.

10 We take issue with that characterisation. Simply not mentioning North Wall Capital
11 anymore is very far from a full and candid explanation of the position. What this
12 evidence doesn't convey at all is that some 14 months after the first set of
13 proceedings had been issued, in the hope that funding would be put in place, that
14 envisaged funding had now fallen away. That state of affairs is not conveyed at all in
15 this evidence.

16 The tribunal might recall that up until the last CMC, the PCR's position was that she
17 wasn't prepared to provide the proposed defendants with copies of each other's CPO
18 applications until the tribunal had formally ordered joint management of the proposed
19 collective proceedings.

20 So, insofar as it's being suggested that the proposed defendants were supposed to
21 compare the differing formulations that had been adopted in the first four sets of
22 proceedings with the formulation that's now presented in the Casio proceedings, and
23 from that understand that there had been some relevant change in the
24 circumstances, no individual proposed defendant had access to the others
25 documents, so it wasn't possible to conduct that comparison and reach that
26 conclusion.

1 And nor, in our submission, does the change in formulation explain what was said
2 a few pages back -- to which the tribunal was already drawn attention -- at
3 paragraph 27, subparagraph (b), where the proposed class representative is making
4 reference to the funding arrangements that my legal representatives have put in
5 place. That is, in our submission, a statement which is very difficult to reconcile with
6 what we now understand to be the case, which is that the funding arrangements that
7 had originally been in contemplation with North Wall Capital had fallen away, and no
8 other funding arrangements had yet been put in place.

9 MRS JUSTICE BACON: Why didn't the proposed defendants bring matters to
10 a head much earlier, by asking for a hearing of the type that the tribunal ultimately
11 listed for today?

12 MS FORD: My Lady, the proposed defendants repeatedly asked questions, made
13 express enquiries, and we were not given a straight answer and I can show the
14 tribunal some examples of that, including one of the letters that my learned friend
15 has already shown the tribunal. So if we start in the correspondence bundle, tab 10,
16 page 52, this is the Dentons letter that Mr Cavender has already shown the tribunal,
17 and under the heading "Costs and funding", it says:

18 "The legal costs position and funding arrangements are not clear from the Claim
19 documents."

20 It goes on to say:

21 "It is a requirement for collective proceedings that the claimant representative has an
22 effective litigation plan which includes an adequate funding agreement, a clear
23 means of running the case, and a plan to return damages to class members."

24 Just pausing there, the tribunal has my submission that the state of the authorities on
25 the point was clear, and this is a point now being put by the proposed
26 defendants -- or one of the proposed defendants -- to the PCR, that you are required

1 to have adequate funding in place.

2 MRS JUSTICE BACON: What was the authority? Because there's none cited there.

3 MS FORD: There's a subsequent letter where they cited; I showed the tribunal. But
4 here you see, (iii), there's an express request:

5 "... please provide a copy of the Litigation Funding Agreement, again as we need to
6 be able to assess whether the arrangements are capable of providing any benefits to
7 consumers."

8 And just while we're in this document, if the tribunal goes over the page, we can see
9 there's also a request to provide copies of the other four claim forms.

10 No response was initially received to that letter, so chasers were sent on 22 March,
11 so this is tab 12 at page 56. And this is the letter that I said is citing authorities.

12 Paragraph 1.1 makes the point that "funding arrangements are not clear". 1.2 refers
13 to "6.33 of the CAT's Guide", and it then says:

14 "The CAT reiterated this in its rulings of 21 December 2021 and 3 February 2022 in
15 Kent v Apple and Coll v Alphabet."

16 So those are the authorities that are being put to the PCR, saying you need to show
17 that you've got funding in place.

18 Another chaser was then sent on 5 May, so that's tab 18, page 68. (Pause)

19 Tribunal will see there cross reference to the previous letters:

20 "... in which we requested critical information from you and your client relating to the
21 Claim, including in respect of your client's funding and fee arrangements."

22 We finally received a response to these requests on 30 May 2023. So this is
23 page 108 in the bundle behind tab 20. And this is a letter 30 May --

24 MRS JUSTICE BACON: Page?

25 MS FORD: Page 108. So just pausing to note the date, 30 May is the day before
26 the date of the evidence in the Casio proceedings, which is the date when we're

1 invited to infer from the change in the formulation of the evidence that the PCR was
2 aware that the North Wall Capital agreement had fallen through. So this is one day
3 before that.

4 And if the tribunal goes over the page to the heading "Litigation funding agreement"
5 on page 109, what we are told is:

6 "Our client is in the process of altering her arrangements for the funding of this
7 matter. We are also conscious of the pending decision in the appeal heard on
8 16 February 2023 [in PACCAR] which may affect the enforceability of litigation
9 funding arrangements.

10 "In the circumstances, we consider it is appropriate for any amendments to our
11 client's proposed funding agreements to be finalised after that decision is handed
12 down, and for disclosure of the relevant LFA to take place after that."

13 Now, in our submission, the references here to altering the arrangements for funding
14 and to amendments in the light of PACCAR, hardly convey the truth of the position in
15 circumstances that we now know that there were no arrangements for funding in
16 place at all at that time. (Pause)

17 We go then, please, to tab 22, page 113. There's a letter of 8 September 2023. And
18 paragraph 3(a) within this letter, over the page, asks the PCR:

19 "Now that the PACCAR judgment has been handed down, please confirm ... what
20 the revised funding arrangements are ..."

21 And the response to that is then at tab 23, page 115, and the answer that's given:

22 "In response to paragraph 3(a) ... [is] we note that the PACCAR Judgment was
23 handed down less than 2 months ago and as such we are still in the process of
24 considering the implications of this decision on the enforceability of any litigation
25 funding agreement."

26 So again, the answer that's being given in response to these enquiries is focusing on

1 the implications of PACCAR, and it's very much failing to mention the more
2 fundamental problem, which was that the PCR did not actually have any funding in
3 place at all.

4 We then look at tab 24, page 117. (Pause)

5 This is a letter of 13 October 2023. And over the page at heading "4. Disclosure of
6 Funding Arrangements", enquiries are made again on behalf, in this case, of the
7 Yamaha defendants.

8 And then the response to that, 20 October, which is at tab 25, page 120,
9 paragraph 3. What we're told is:

10 "As you rightly note at paragraph 3.2 of your 13 October letter, the adequacy of any
11 costs coverage will be one of the issues that the certification hearing as and when
12 this occurs. The same is the case for funding arrangements. We respectfully
13 suggest that, if your clients still have concerns in respect of the insurance coverage
14 or funding when responding to the CPO application, then that would be the correct
15 moment to raise them."

16 And they even go on to say:

17 "We do not deem it appropriate that the Tribunal's time and resources should be
18 diverted by such matters at this stage of the litigation when there are proper
19 procedures in place for dealing with funding and insurance coverage at the
20 appropriate juncture in proposed collective proceedings."

21 So the response when we kept pressing this issue is to say, "We think that this is an
22 inappropriate waste of the tribunal's resources, talking about it now; it needs to be
23 dealt with at the CPO hearing".

24 This pattern continues -- I won't try the tribunal's patience much further -- but for
25 example, 17 November in tab 28, 1 December, tab 29, 21 December, tab 30, and so
26 on, and similar patterns in respect of the other defendants, those defendants.

1 And as late as 27 February 2026 -- so this is in the run up to the first CMC -- the
2 PCR was still making reference to "amended funding arrangements". So if we look
3 at tab 51 in the correspondence bundle, page 247. This is a letter in response to
4 a request for clarification about the matters on the agenda for the CMC. And there's
5 a heading "Amendments to the CPO application", paragraph 4, it's saying:

6 "The proposed amendments to the CPO applications will relate largely to the matters
7 arising from the effluxion of time since the CPO applications were filed."

8 And if we go over the page:

9 "Those [amendments] will include, but are not limited to --

10 "(ii) Amendments to the various applications to reflect the PCR's amended funding
11 arrangements, including updated witness evidence from the PCR."

12 Now, given that we know there were no funding arrangements, it is difficult to
13 understand what the reference to "amended funding arrangements" is intended to
14 mean. But certainly the impression that is given is that there are -- there were, in
15 fact, funding arrangements, which we now know wasn't the case.

16 MRS JUSTICE BACON: When was the first that you knew that no funding had ever
17 been put in place?

18 MS FORD: The first point at which we received confirmation from the PCR was the
19 PCR's skeleton argument for the first CMC. So that was 12 March 2026, so some
20 four years after the first set of proceedings had been issued. Now, of course,
21 Mr Cavender has made a submission: "oh, well, they knew -- look, they were asking
22 us about it". But whenever we were asked about it, we were not given a straight
23 answer. The first time it was confirmed that funding wasn't in place was the skeleton
24 argument for the CMC.

25 MRS JUSTICE BACON: Yes. (Pause)

26 MS FORD: Now, at the same time as this was going on, the PCR was also making

1 applications for permission to serve out of the jurisdiction in respect of which -- as
2 the tribunal is aware -- there is an obligation of full and frank disclosure. Now, the
3 position, as it has been put at this hearing, is that at the very latest, by the date of the
4 evidence in the Casio proceedings -- so by 31 May 2023 -- the PCR was aware that
5 the North Wall Capital agreement, which was the proposed source of funding in the
6 first four proceedings, had fallen away. The fact that the proposed source of funding
7 had fallen away is, in our submission, very clearly a matter that would engage the
8 duty of full and frank disclosure, and it should have been drawn to the tribunal's
9 attention.

10 If we look, please, in the core bundle, bundle 2 behind tab 14, starting at page 328.
11 There is an application dated 6 April 2023, so this is shortly before the filing of the
12 Casio proceedings, and this is an application for an extension of time to serve out in
13 the Roland and Yamaha proceedings and no mention is made in that application of
14 a material change in the funding position as compared to the position as set out in
15 the evidence in support of the CPO.

16 Then, if we go on, please, to tab 15 within this bundle, starting at page 337, there is
17 another application for an extension of time to serve out. This is dated
18 26 September 2023, so this is after the filing of the Casio proceedings. On any view,
19 by this time, the position on the North Wall funding agreement was known, and
20 again, in support of this application for an extension of time to serve out, no mention
21 is made of the material change in the funding position as compared to the position as
22 set out in the evidence in support of the CPO.

23 MRS JUSTICE BACON: What do you specifically rely on for the duty of full and
24 frank disclosure in relation to the application to serve out?

25 MS FORD: We have not cited authority for the proposition; I perhaps mistakenly had
26 assumed that it was an uncontroversial proposition, that there was a full and frank

1 disclosure on the duty to serve out. We can certainly provide the tribunal with
2 authority.

3 MRS JUSTICE BACON: Yes. Well, I mean, I think we ought to just have a note of
4 it. I should say we are not intending to give an ex tempore judgment at this hearing,
5 so we can have a note of it for our consideration after. But I think it's important to
6 bottom it out, because you're saying that that duty was not complied with and
7 Mr Cavender will want to respond to that, but I think that in considering that, we'll
8 need to set out a position quite carefully, because you rest your submission on an
9 allegation that they misled the tribunal, effectively by failing to comply with the duty to
10 disclose all relevant factors in those applications.

11 MS FORD: We could provide the authority for that.

12 MRS JUSTICE BACON: So you say that there's no mention of funding shortly
13 before the point at which Mr Cavender says it should have been clear that the
14 North Wall agreement had fallen away, and in any event, by the time of the next
15 application, which was sometime in -- do you say September?

16 MS FORD: It was 26 September.

17 MRS JUSTICE BACON: Yes.

18 MS FORD: Tab 15, page 337.

19 MRS JUSTICE BACON: Yes.

20 MS FORD: They were then applications for extension of time to serve out in respect
21 of Casio, and for the tribunal's note they were 11 January 2024. That's page 346 in
22 the bundle. 16 May 2024, page 352. 12 September 2024, page 357. And
23 19 May 2025, page 364 in the bundle. Again, in relation to each of those
24 applications for extension of time, no attention was drawn to what we say is the very
25 material fact that funding which had been promised had yet to materialise.

26 MS RIEDEL: Do you draw any distinction with Casio, given that the original claim

1 form didn't specify funding, or, you know, that there was a funding arrangement with
2 North Wall? Is there any distinction between that, that point you're making for Casio
3 and the other ones?

4 MS FORD: It's certainly right that there was a different formulation. I make two
5 submissions in response. The first is that insofar as that different formulation was
6 supposedly intended, or is relied upon as making the position clear, we say it was
7 insufficient to do that because it required -- first of all, it should have been a full and
8 candid explanation of the absence of funding for the 14 months running up to the
9 Casio application. Secondly, it rather assumed that one was conducting a minute
10 comparison of all five of the proceedings together, in order to ascertain that there
11 was any relevant distinction in the formulation in the first place, and so that didn't
12 suffice to make things clear. That's the first point: the mere change in the
13 formulation was not sufficient to make things clear.

14 Secondly, in relation to Casio, as the time goes on, there remains a problem,
15 because these are applications that are being made from 2024 up until May 2025, in
16 circumstances where funding still isn't in place. The PCR has throughout indicated
17 that she considers these to be, essentially, five proceedings, all to be case managed
18 together, and Mr Cavender made the submission earlier that the funding package
19 that was sought to be put in place was one looking at these proceedings as a whole.
20 When one looks at the proceedings as a whole, the failure to make things clear is, in
21 our submission, absolutely evident. So the second factor we rely on, taking these
22 cases outside the norm, is this fundamental lack of transparency in respect of the full
23 funding position.

24 The third and final factor that we place reliance on is the contents of the PCR's
25 evidence in Sciallis 3, concerning why she says she didn't withdraw the proceedings
26 earlier.

1 MRS JUSTICE BACON: But before you get on to that, should we have a short
2 break? We are intending to finish the hearing before lunch. We weren't intending to
3 set aside the whole day just to consider costs, so I'm assuming your remaining
4 submissions will be relatively concise, then Mr Cavender can respond.

5 MS FORD: Madam, that's right. Third and final point, which I can take relatively
6 quickly, and then, those are the matters we rely on.

7 MRS JUSTICE BACON: All right, let's have a five-minute break.

8 (11.54 am)

9 (A short break)

10 (12.06 pm)

11 MS FORD: Madam, in response to the tribunal's question about authority on the
12 duty of full and frank disclosure, my attention has been drawn to the fact that counsel
13 for Casio, in his written submissions, has footnoted some authority on the
14 proposition. This is in the skeleton bundle, tab 4, page 36. So this is paragraph 20
15 of Casio's written submissions. Footnote 2 sets out the relevant authorities in cites
16 Brink's-Mat, Ennis v Apple and Gunn and ors. At least Brink's-Mat and Ennis v
17 Apple are in the authorities bundle, although I hadn't prepared to address the tribunal
18 on them (audio distortion).

19 I was coming to the third point that we rely on as taking these matters outside the
20 norm, and the tribunal has already been shown some of the evidence that was put in
21 on behalf of the PCR, addressing why, in the absence of secured funding, she didn't
22 take steps to withdraw the proceedings earlier. But in our submission, the contents
23 of that evidence are somewhat surprising.

24 If I could ask the tribunal to turn up, please, bundle 3, tab 5, starting at page 32. The
25 tribunal has been shown paragraphs 7 and 8, which are the paragraphs where the
26 PCR refers to the difficulties she encountered in effecting service on the foreign

1 Casio defendant. Then, looking at paragraph 9, which immediately follows those,
2 the PCR's evidence is:

3 "... the procedural focus--particularly in relation to service out in Casio--meant that
4 there was no immediate certification requirement necessitating that the funding
5 position be finally resolved at that stage. It was only once those procedural matters
6 had largely been worked through, and the Tribunal listed the joint management
7 conference and then the Preliminary Hearing to consider funding, insurance and
8 representation, that the question of replacement funding became an immediate
9 threshold issue requiring resolution within a short timetable."

10 Now, in our submission, this evidence discloses a fundamental misconception,
11 because it is not right that the question of funding becomes an immediate threshold
12 issue only when the tribunal lists the CMC and essentially forces the PCR to confront
13 the issue. It was an important element of the authorisation condition and should
14 have been in place from the outset.

15 What this paragraph suggests, in our submission, is that the PCR took the view that
16 she was at liberty to keep these proceedings on foot, even though she had failed to
17 secure adequate funding until the point where she couldn't avoid addressing the
18 issue any longer because the tribunal had listed a CMC to focus on it. That, in our
19 submission, is an approach which in itself is inconsistent with the statutory regime
20 and is unfair to the proposed defendants.

21 We say it's an approach which is particularly problematic given the lack of
22 transparency about funding that I've already shown the tribunal, because what that
23 meant was that the true position did not immediately come to light. So consequently,
24 the tribunal wasn't put in a position that it could, by listing a CMC, actually shine
25 a light on this issue and make funding an immediate threshold issue from the
26 perspective of the PCR. It wasn't put in a position where it could do that for a period

1 of some four years.

2 In our submission, there's a similar point that comes through at paragraph 18 in this
3 evidence, and this is the PCR's evidence about why she didn't consider it
4 appropriate to withdraw. Starting in line 4, she says:

5 "... I did not consider it appropriate to withdraw the Proceedings at an earlier stage
6 while there remained a realistic possibility that replacement funding might yet be
7 secured, for instance a funder showed willingness to co-fund the claim. Rather,
8 I continued, with my legal representatives, to pursue those avenues so as to give the
9 Proceedings the best available opportunity of continuing on a properly funded basis.
10 It's only now, in the light of the absence of any concluded funding arrangement within
11 the timeframe required by the Tribunal's directions and the proximity of the
12 Preliminary Hearing, that I have been advised, and have concluded that the
13 Proceedings can no longer properly be continued as currently constituted."

14 In our submission, this evidence discloses a similar misconception, because it
15 assumes that it is a matter solely within the discretion of the PCR whether and for
16 how long proposed collective proceedings should be kept on foot, despite the fact
17 that there is no funding. It's very clear from this paragraph that what has brought the
18 issue to a head was the tribunal's directions, but had the PCR been appropriately
19 transparent about the circumstances earlier, then it's a matter over which the tribunal
20 could properly have exercised case management oversight and scrutiny at a much
21 earlier stage, including, in doing that exercise, taking into account fairness to the
22 proposed defendants.

23 So, in our submission, the evidence that that's given in Sciallis 3 doesn't provide any
24 reassurance that these proceedings have in fact been conducted appropriately, and
25 if anything, in our submission, they suggest that the PCR considered it was
26 permissible to maintain unfunded proceedings on foot for as long as possible until

1 the tribunal's directions gave her no other choice. That, in our submission, is simply
2 not an appropriate approach. That is the third factor that we say, in our submission,
3 takes these matters outside the norm.

4 MRS JUSTICE BACON: Thank you very much. Is that your submission on
5 (inaudible).

6 MS FORD: Madam, those are our submissions.

7 MRS JUSTICE BACON: Mr Cavender.

8 MR KADRI: My Lady, I may just be able to assist with the authority on full
9 disclosure. I credit Mr Bates in absentia. Gunn v Diaz. It's at tab 5 of the authorities
10 bundle. It begins at page 97, but the passages we rely on start from page 112, and
11 what it's dealing with in terms is a situation where an application is made for an
12 extension of time to serve out, and what the court's saying in terms is that it's not
13 sufficient to address only the reasons for the extension, but if there are matters that
14 are material that have changed since the original application was made, they should
15 be disclosed to the court. That is just --

16 MRS JUSTICE BACON: I'm just trying to get the relevant (inaudible). It's in the
17 authorities --

18 MR KADRI: Tab 5 of the authorities bundle. The relevant part starts at page 112.

19 MRS JUSTICE BACON: Paragraph?

20 MR KADRI: We're starting at paragraph 53.

21 MRS JUSTICE BACON: I see.

22 MR KADRI: And it carries on for a few pages, but I would highlight 54 and 56, but
23 I'm sure the tribunal will take a closer look at that authority. But it may be of
24 assistance.

25 MRS JUSTICE BACON: Thank you very much. I'm just making note of that.

26 (Pause)

1 Yes. We'll review those passages. Thank you very much.

2 Mr Cavender.

3

4 Reply submissions by MR CAVENDER

5 MR CAVENDER: So the starting point is what is the law in relation to indemnity
6 costs, and as my learned friend has suggested, is a difference in emphasis between
7 us. If we can take up Excelsior again, it's authorities bundle, tab 3.

8 MRS JUSTICE BACON: Yes.

9 MR CAVENDER: The difference between us is, before we get --

10 MRS JUSTICE BACON: Page number?

11 MR CAVENDER: Page number? It's tab 3.

12 MRS JUSTICE BACON: I'm working off a PDF, so I need the page number.

13 MR CAVENDER: Starting at page 25.

14 So the first thing is to make good the point I made by reference to paragraph 15 as
15 to what the difference in indemnity costs are. If you read the paragraph you'll see
16 them, as opposed to standard costs, so we know what the significance of this is.

17 "First, the differences are as to the onus which is on a party to establish that the cost
18 were reasonable. In the case of a standard order, the onus is on the party whose
19 favour the order has been made. In the case of indemnity order, the onus of
20 showing the costs [et cetera]."

21 MRS JUSTICE BACON: (Audio distortion)

22 MR CAVENDER: Yes, exactly. So that sets that out.

23 In paragraph 30 of the judgment, which is page 27, we have the reference to Kiam
24 and Lord Justice Simon Brown, as he was, and he talks about moral condemnation
25 not being required, but to be so unreasonable to justify an order for indemnity costs,

26 "With that I respectfully agree". It's unreasonable to a high degree, not merely wrong

1 or misguided in hindsight.

2 In my submission, that is the test. True it is it was in this case in relation to

3 a settlement offer, and true it is, at paragraph 32, my learned friend says the bullet

4 point is, "Does that take it out of the norm?" But the critical question nonetheless is,

5 "Is the conduct unreasonable to a high degree in my submission?"

6 Similarly, paragraph 39, over the page, at 29:

7 "The question will always be: is there something the conduct of the action or the

8 circumstances of the case which takes the case out of the norm in a way [that]

9 justifies an order for indemnity costs?"

10 Which is a rolled up way of putting the point. So indemnity costs are unusual.

11 MRS JUSTICE BACON: But in paragraph 38:

12 "That conduct ... cannot be categorised as unreasonable, never mind unreasonable

13 to a high degree. But the case might well be one outside "the norm", thus justifying

14 an order for indemnity costs."

15 What's being said there is there might be a justification for indemnity costs on the

16 basis that the conduct was outside the norm, even if conduct could not be

17 categorised as unreasonable at all; never mind unreasonable to a high degree.

18 Earlier on, it says that the language used is not apposite to all circumstances. I'm

19 not sure that you can draw out at 38 that the test is unreasonable to a high degree;

20 that test is expressly not followed.

21 MR CAVENDER: Well, let's see how it's interpreted later then, particularly in relation

22 to withdrawal. So look at Hosking v Apax at tab 6, where we get further reflections of

23 this debate. That's tab 6, starts at page 129 in the electronic bundle. In relation to

24 this, start at 135 and look at paragraph 33. You see there summarised the

25 circumstances which are contended to generate indemnity costs.

26 "Liquidators' ... always, if not hopeless speculative, weak, optimistic and thin;

1 "... claim pursued in such circumstances and with such limited prospects, particularly
2 one based on allegations of commercial impropriety, which was discontinued without
3 explanation after four days of trial, [et cetera]."
4 So quite serious and unusual circumstances. It might be, say, highly unreasonable
5 and certainly outside the normal run of litigation.
6 In terms of the law, if we go over at page 136, under the heading, "The approach and
7 determine the basis of costs". (Pause)
8 We see reference to Excalibur Ventures v Texas. And over the page 137,
9 Balmoral Group v Borealis, where Christopher Clarke, the quote is at the bottom of
10 that page.
11 MRS JUSTICE BACON: Okay.
12 MR CAVENDER: Page 137 in the middle:
13 "Unreasonableness in the conduct of the proceedings and the raising of particular
14 allegations, or in the manner raising them may suffice. So, may the pursuit of
15 speculative claim involving a high risk of failure or the making of allegations of
16 dishonesty, [et cetera]."
17 Then this is the bit, my Lady, underneath that:
18 "However, as Mr Shivji emphasised, by reference to paragraph 8 of the decision in
19 Noorani, conduct must be unreasonable 'to a high degree' to attract indemnity costs."
20 So he seems there to be applying the test that I have been advocating from
21 Excelsior:
22 "'Unreasonable' insistence does not mean merely wrong or misguided in hindsight."
23 Then, at 42:
24 "The emphasis ... on whether the behaviour of the paying party ... [can] take it out of
25 the norm."
26 That's, if you like, the wrapped-up version of that. If it is unreasonable to a high

1 degree, then that will take it out of the norm. Then 43:
2 "The cases cited show that amongst the factors which might lead to an indemnity
3 basis of costs are (1) the making of serious allegations ... unwarranted, [et cetera]."
4 And then 45, this is the only case -- because discontinuance is slightly different,
5 obviously, to some of the other cases you've looked at.
6 "Discontinuance connotes (in the absence of agreed terms or particular different
7 explanation) [how] the discontinuing party no longer considers its claim to be worth
8 pursuing, or it can no longer afford to pursue it. However, whether that is
9 a cost/benefit analysis, or because of funding difficulties, or changed ... priorities, the
10 Court is unlikely to be in a position to know or determine. Discontinuance does not
11 necessarily connote an acceptance that the case was, is or has become hopeless;
12 and a fair assessment of the merits will be difficult, if not impossible, at least if there
13 remains any real issue by the date of discontinuance."
14 Then at 49, you can see the point being made about the normal rule is standard.
15 Then under "Hallmarks of the case falling 'outside the norm'", paragraph 50 and
16 following ... (Pause)
17 Then at 53, Three Rivers that my learned friends referred to, is referred to. At 54:
18 "That sharpens focus on why this claim, which has pursued all the way and yet
19 suddenly dropped after four days of trial without apparent reason beyond the fact of
20 failed negotiations, was pursued until then, and whether there are factors relating to
21 the way it was so pursued which take it 'out of the norm'.
22 The other point to bear in mind, my learned friend takes you to Three Rivers, which
23 of course is one of the authorities in this area. But that was a case, of course, that
24 had gone to trial; there had been an adjudication there. So when you look at the
25 various factors relied upon, that is in a case where there had been a trial and the
26 court had given judgment. So it's not a withdrawal case. (Pause)

1 When you go through the factors my learned friend refers to, none of them begin to
2 relate -- which is on page 42 of the bundle behind tab 4.

3 My learned friend alights on number 3, I think, insofar as the conduct of the
4 unsuccessful claimant, she said. But we're not an unsuccessful claimant; this isn't
5 somewhere where a claim with poor prospects has been taken to court and lost.

6 This is a case where the prospects remain unaltered. There are good prospects.

7 This is a follow-on claim following quite damning findings by the CMA. So we're not
8 in that position.

9 MRS JUSTICE BACON: You've withdrawn because you're aware that that there
10 wouldn't be good prospects on getting certification if you haven't got funding?

11 MR CAVENDER: Correct. That's a fair way of putting it.

12 MRS JUSTICE BACON: So in terms of the claim, you know, that, you know that
13 your claim would not succeed, because it wouldn't get through the certification
14 phase.

15 MR CAVENDER: Yes.

16 MRS JUSTICE BACON: So when you say good prospects, I mean, you must be
17 referring then to: if you did have funding, you say that there would be good
18 prospects. But as at this current moment in time, the claim is being withdrawn
19 because you know that it's hopeless, because it wouldn't get certification.

20 MR CAVENDER: Yes, but the point being made by Mr Justice Hildyard in the
21 withdrawal case is: where a claim at inception is hopeless and obviously hopeless --

22 MRS JUSTICE BACON: I see.

23 MR CAVENDER: -- and that's then withdrawn. We're not in that situation. The
24 reason this claim is being withdrawn is because of the funding.

25 When you look at the kind of factors referred to, in any of these cases,

26 Hosking v Apax -- although my learned friend says, "Well, they say they're not

1 exhaustive", but nothing anywhere near the things set out by Mr Justice Hildyard in
2 that paragraph, or akin to.

3 Now, the law tends to develop by increments, by reference and by parallels. In this
4 case, there is nothing, in my submission, which gets anywhere near a claim for an
5 indemnity costs basis, applying those principles. (Pause)

6 So what are the grounds of unreasonableness? The first is, it seems, commencing
7 the proceedings without funding. (Pause)

8 Now, the first thing is, as regards four of the five proposed defendants -- as I set out
9 in my skeleton at paragraphs 15 and 16 -- there had been a promise of funding by
10 North Wall, and I've shown you the letter. That was the position disclosed by the
11 PCR. The exception of those proceedings.

12 In relation to Casio, as we've discussed, the position was different, but the true
13 position was disclosed, that there was no funding and that she was seeking funding.
14 (Pause)

15 Now, in my submission, what my learned friend does is seek to say that because
16 there has to be funding by the time of the CPO hearing -- which clearly there
17 does -- that therefore, there must be funding at inception. There's no rule or practice
18 direction that says that. She hasn't shown you the rules or in the practice anything
19 that supports her position on this. But what she seeks to do, with respect, is allied
20 the position that applies as at the date of the CPO application, the determination of it,
21 and the inception of proceedings.

22 If you go to rule 78, heading "Authorisation of the class representative". (Pause)

23 Those are the requirements that the court or this tribunal determines at the CPO
24 hearing. What my learned friend seeks to do is backdate that, elide that, and say,

25 "Well, that also applies on the date you issue proceedings". There's no warrant

26 within that rule for that; there's nothing in the practice that says that; and even in the

1 Trucks case, that extract that she relies upon, the judge was dealing with position at
2 the CPO application. You can't, in my submission, sensibly elide a test that applies
3 at the date of the CPO application itself -- its determination -- with the position when
4 you issue proceedings.

5 If you look at rule 75, "Manner of commencing proceedings under 47B of the Act", it
6 sets out in huge detail what needs to be set out and what documents need to be
7 attached. For instance, if you go to rule 75 and go to (5):

8 "There shall be annexed to the collective proceedings claim form copy --

9 "(a) a copy of any infringement decision ...

10 "(b) a draft proceedings order; and.

11 "(c) a draft of the notice referred to in rule 81."

12 No reference here to "there needs to be the funding arrangement attached", or in
13 place. (Pause)

14 The other point about this is, given that the position was made clear at the outset
15 that there was a promise of funding in relation to four of them, and a seeking of
16 funding of the fifth, at what stage is it said to be unreasonable to continue seeking
17 funding? Because the way this works, indemnity costs normally visit themselves on
18 certain behaviour, normally from a certain point in time. So I ask rhetorically: at what
19 stage was the PCR behaving unreasonably to the relevant degree to attract
20 indemnity costs by seeking to do the things she was obliged to do to take the thing
21 forward, which was to seek funding?

22 To put it another way, let's assume the case -- looking at whether indemnity cost is
23 appropriate in these kind of circumstances -- where there had been funding at the
24 outset; North Wall had in fact incepted the policy, and it did so for Casio. Then
25 six months to a year later, for reasons of finance, for reasons of the way they think
26 this jurisdiction's going in terms of profitability, they withdraw funding. Perfectly

1 possible.

2 Now, under the normal rule, standard costs would be appropriate. Why, therefore, is
3 it any different in the case where you seek funding but don't in fact get it? The result
4 is the same in both occasions: there is no funding. That strongly suggests, in my
5 submission, that this whole business of making the getting of funding a feature or an
6 engine for indemnity costs flawed.

7 Unless they can show there is some practice direction or rule we've broken in
8 relation to not having funding at inception, in my submission, the first of their three
9 grounds doesn't get off the ground.

10 Now, the second ground --

11 MS RIEDEL: (Inaudible). I think you said, in relation to rule 75, that it doesn't set out
12 that you have to provide that litigation funding has been put in place at the time of
13 the application, the claim form.

14 75(3)(e) says there does have to be:

15 "... a summary of the basis on which it is contended that the criteria for certification
16 approval in rule 79 are satisfied."

17 MR CAVENDER: Yes.

18 MS RIEDEL: Does that not cover the point? Does that not effectively imply that
19 statements about litigation funding need to be made?

20 MR CAVENDER: Well, the statement was made. The statement that was made
21 about it is that they have a non-binding promise, and they hope to put that in place.
22 That complies with that requirement.

23 MRS JUSTICE BACON: Picking up on that, do you say that the non-binding
24 promise was sufficient for the criteria at certification stage to be met? Because
25 a little while ago, you said that there clearly did need to be funding by the time of the
26 CPO hearing. So you accept that by certification, the criteria in rule 78 and rule 79

1 did have to be met.

2 MR CAVENDER: Yes, but by that stage it would have to be. But the question is
3 whether, at inception, the non-binding promise -- let me put it this way: neither the
4 tribunal nor the proposed defendants took issue with that at the time, but somehow
5 there was some requirement that had not been fulfilled at inception to get the thing
6 off the ground and in fact the tribunal, as you know, gave reasoned orders that there
7 was a serious issue to be tried, et cetera, having reviewed the claims.

8 If there was -- if you like -- a necessary precondition to the bringing of proceedings
9 have not been met, then you'd have thought that the other side or the tribunal would
10 have said so at the time, certainly when granting reasoned orders, that --

11 MRS JUSTICE BACON: That's a deflection from Ms Riedel's question, which is that
12 under Rule 75, you have to provide a summary of the basis on which it's contended
13 that the criteria for certification and approval in Rule 79 "are" satisfied, not "will be"
14 satisfied.

15 Now, you've just accepted that Rule 79 would have required, at the certification
16 stage, funding to be in place. Now, if that's the case, then rule 75(3)(e) requires an
17 explanation of funding -- of why it is contended that funding is in place at that time.

18 It's not "will be" satisfied. So implicitly, that brings within it the criteria for certification
19 in Rule 79, which you accept include the fact that there is a funding arrangement.

20 MR CAVENDER: No, I see the point you make, but the way I say this works -- and
21 the way it worked here was -- you have to have measures in place which, by the time
22 of the certification stage, you'll be able to say satisfy the criteria. And they did that,
23 because they attached the letter from North Wall, which was -- you can see the
24 document, you can argue about precisely its terms, but it wasn't capable of being
25 binding in the event. But it does on its terms say we will provide funding. (Pause)

26 If you look at the Trucks case my learned friend showed you, what the judge clearly

1 says -- tab 7, paragraph 52, page 175, his mind there is addressed to -- this is
2 obviously at the CPO hearing itself --

3 MRS JUSTICE BACON: Sorry, what bundle are we looking at?

4 MR CAVENDER: This is the authorities bundle, the Trucks case my learned friend
5 took you to, in support of this. Authorities bundle, tab 7, page 175 in the electronic.
6 This was dealing obviously with the CPO application itself, where it says:

7 "It is important to bear in mind that the Tribunal's concern in this regard is for the
8 potential class members. The Tribunal seeks to be satisfied that appropriate and
9 adequate arrangements have been made by the proposed class representative ..."

10 Now, that is at the stage of the CPO hearing itself; that's what the judge is referring
11 to here.

12 MRS JUSTICE BACON: Yes, so that really highlights the point that's made by
13 Ms Riedel, because if you accept that at the stage of certification it's necessary in
14 order for the requirements in Rule 78 and 79 to be met, that there is funding, that
15 a statement of why it is contended that there is a suitable funding arrangement is
16 part of what has to be filed in Rule 75.

17 MR CAVENDER: But that was done. Let's test it in this way: let's assume that the
18 application is made, the North Wall letter is attached, you have the CPO hearing say
19 six months hence, and after three months you file and serve the North Wall funding
20 agreement and it's accepted; would anyone say that you had not complied with the
21 rules in that situation? In my submission, that would be a very wooden approach to
22 the interpretation of procedural rules.

23 MRS JUSTICE BACON: Turn it around: what about Casio when you didn't have
24 a promise?

25 MR CAVENDER: Say again, my Lady.

26 MRS JUSTICE BACON: What about Casio when you didn't have a promise?

1 MR CAVENDER: Well, that's true; that is a different situation.

2 MRS JUSTICE BACON: Are you saying that the requirement of Rule 75(3)(e) was
3 complied with in the case of Casio?

4 MR CAVENDER: Well, what they did do was to serve a litigation plan, but they didn't
5 serve anything about how they intended to deal with the funding requirement other
6 than they were looking for it; I have to accept that.

7 MRS JUSTICE BACON: Do you want to continue your submission, because we do
8 need to finish by lunchtime.

9 MR CAVENDER: My Lady, yes. So that was the first of the three.

10 The second was lack of transparency. Now I think with respect to my learned friend,
11 she over-eggs the pudding a bit here. It is true that that correspondence was
12 opaque at the very least. But as I showed you the letters, particularly the one from
13 Herbert Smith in early 2023, it didn't have any effect; they knew there was no
14 funding. I've shown you the letter, they say you have got no funding. They recited
15 the portions saying proposed funding, changes to funding, they said: "We haven't got
16 any funding", which --

17 MRS JUSTICE BACON: Even so, what they took from it or didn't take from it, are
18 you telling the tribunal that you think that that's an appropriate way for the solicitors --

19 MR CAVENDER: No.

20 MRS JUSTICE BACON: So do you accept that it wasn't appropriate then for the
21 solicitors to respond in the way that they did?

22 MR CAVENDER: Well, I've admitted, I've said, that it was opaque and wasn't
23 clear -- a clear response to what the position really was. But I also say that these
24 defendants could easily, very quickly, have said, "Right, there is no funding here, you
25 haven't produced evidence of funding, we're going to apply to have a preliminary
26 hearing as to whether you're in a position to even proceed to a CPO hearing".

1 Which did eventually happen and nothing changed.

2 MRS JUSTICE BACON: Well, they didn't apply for it; we listed it.

3 MR CAVENDER: You did, but these proposed defendants could have done
4 that years before. What they were getting in correspondence was soft-soaping at
5 best and opaqueness in relation to the issue at worst. Herbert Smith in their letter
6 clearly -- in 20 January 2023 -- called it out and said, "You haven't got funding, what
7 are your proposals?" And you never got an answer to that, so how can
8 Roland -- Herbert Smith's clients -- really say that they were somehow misled by this
9 lack of transparency? They can't, which leads you to think that maybe the position is
10 different in relation to different defendants.

11 But the short point is that these defendants were told the correct position at
12 inception. Thereafter, they asked, understandably, for more information and they
13 didn't get it. It was well within their right to bring that to a head should they wish to
14 do so, but they never did. (Pause)

15 And when you look at the opaque letters, they're hardly convincing. It's hardly -- it's
16 just a manner, an opaque way, of keeping the thing going while they seek funding.
17 Now, in relation to as part of this, is the service out point and the application for time.
18 Now, this only applies, firstly, to two of the defendants. Doesn't apply to all five; it
19 only applies to Yamaha and Casio and in relation to their foreign entities. It doesn't
20 apply to them all. So my learned friend throws this in as a ground for indemnity
21 costs against all, but it only applies to two of the potential defendants and only then
22 only to -- as I understand it -- the foreign ones.

23 In relation to that, Casio -- there was no incorrect information needed updating there.
24 In Casio, what the evidence said was that we are looking for funding and we will give
25 you the funding agreement in due course when we obtain it. That was the position in
26 relation to -- was the position at inception. It was also the position when they applied

1 for an extension. So there, I don't accept that it was necessary, if you'd like, to
2 update the court how you were getting on, because they'd never said they'd got it.
3 In relation to Yamaha, I can't say that. In relation to Yamaha, it's plain that the
4 position had altered. The evidence that was put forward initially was no longer true
5 and accurate and did require updating, and it wasn't.
6 Now, in relation to the third factor, you have to look at the evidence put in by the
7 PCR in context, the two witness statements, not, if you like, jump on one particular
8 paragraph, as my learned friend seeks to do, and say, "Oh, haha, look, this is
9 someone that is proceeding in a way that should attract indemnity costs". When you
10 read both statements together, what she's saying is, firstly --
11 MRS JUSTICE BACON: The third statement which we were shown, and you're
12 asking us to look at --
13 MR CAVENDER: The second one as well.
14 MRS JUSTICE BACON: Just remind us where that is in the bundle.
15 MR CAVENDER: So that's in bundle 3, page 12. You have to really read the two
16 together.
17 MRS JUSTICE BACON: Right.
18 MR CAVENDER: The first one talks about the funding position throughout and if you
19 recall, that was the one that was put in as a result of the CMC order your Ladyship
20 made. And what she sets out is that funding had been sought throughout the period.
21 There was no hiatus, there was no stopping, there was no difference and she sets
22 out, by way of appendix, all the people that have been approached.
23 Now in the third statement -- so that's the position.
24 MRS JUSTICE BACON: Sorry -- so I'm just struggling with the reference. Core
25 bundle?
26 MR CAVENDER: Yes. The second statement it isn't core, my Lady, it's bundle 3.

1 MRS JUSTICE BACON: Oh, correspondence.

2 MR CAVENDER: Correspondence. Yes, sorry. My mistake. So correspondence
3 bundle, page 12. That's her second statement. That was in response to the CMC
4 order your Ladyship made. And that deals with the seeking of funding throughout
5 the period. (Pause)

6 There's no suggestion in there that there was any hiatus or stopping or anything of
7 that kind. Now, what the third statement seeks to do is to explain how it came to be
8 that she was left in the position she was in relation to withdrawing these proceedings
9 so the tribunal wouldn't think, "Well, you know, we'd like to look behind the curtain
10 and see what went on here", say, since the CMC, and that's what that does.

11 So it's not right to draw from that, as my learned friend does when she goes to
12 paragraphs 9 and 10, and says, "Well, in some way, the PCR was sort of gaming the
13 system". I mean, what she was doing was seeking to find funding throughout. She
14 was making clear that the proceedings couldn't go forward until they're properly
15 constituted, ie until the foreign defendants had been served. You couldn't have
16 a CMC until then. So all she's doing is making the point that that was going to be -- if
17 you like -- the hard edge, when she would have had to have achieved funding.

18 That's all she said. She's not saying, well -- she sat on her hands until that, or until
19 the CMC was to be listed and you shouldn't, in my submission, read the evidence in
20 that way.

21 So the third factor, similarly, doesn't bear any kind of analysis. What you
22 get -- I mean, you must, my Lady, have done lots of indemnity costs claims. There's
23 nothing about this that has the feel of indemnity costs. Yes, things were done which
24 weren't great in some regards. Yes, the funding took far too long to get despite all
25 the efforts. That is true, and that calls the withdrawal of the action, and the PCR has
26 to pay the costs of that under the normal rules.

1 There's nothing, in my submission, in this case, that takes this out of the norm of cut
2 and thrust commercial, or competition matters, to unreasonable to such a degree as
3 to justify indemnity costs. Indemnity costs should be reserved for cases that really
4 do deserve it, where there is clearly bad behaviour, noncompliance with the rules,
5 making of allegations against people, publication, et cetera, and then withdrawn.
6 The kind of things you see in the cases. Not here. If you like, my learned friend
7 going through witness statements and trying to alight on paragraphs and saying,
8 well, this shows the wrong approach was taken by the PCR.
9 The fact that she has to do that, in my submission, shows that this is not a case for
10 indemnity costs. Indemnity cost cases should come out at you and shout at you, and
11 there's really no doubt here this is an attempt to confect one out of various bits. I've
12 accepted there are various bits that weren't perfect, but that doesn't suggest
13 indemnity costs, in my respectful submission.
14 Also, my learned friend puts, as she has to do, on behalf of all the defendants, as if
15 they're a single entity. They are not. They've all had different experiences. They
16 had different states of knowledge at different times, as we've seen in the
17 correspondence, but her submissions make no allowance for that at all.
18 The other point that's striking here is that the effect of the withdrawal of these
19 proceedings on these defendants is not prejudicial. What it is, is that it means that
20 the conduct that the CMA has found to be unlawful and damaged very many people
21 in this sector will now never be compensated. They will no longer face a claim by
22 any of these individuals.
23 MRS JUSTICE BACON: Is that because that time has now run out?
24 MR CAVENDER: I'm sorry, my Lady?
25 MRS JUSTICE BACON: Is that because time has run out for anyone to bring a new
26 claim?

1 MR CAVENDER: Well, I'm not sure if that's right. That wasn't the point I made.
2 That may be true as well, but it is more in terms of the practicality: these claims are
3 going to go away now and they're not going to face, in all likelihood -- I can check the
4 limitation position -- but in all likelihood, these claims.
5 So for them to get their costs on a standard basis, fair enough, that's a normal rule.
6 But to say that by reason of not being able to get funding, essentially, they should
7 get indemnity costs, in my submission, looked at in the round, would not be just, and
8 it's the factor the tribunal should have regard to, because it's obviously a highly
9 discretionary matter as to whether -- toward indemnity costs or the standard basis.
10 That is one of the circumstances of the case that the court or the tribunal should
11 have regard to.
12 The other point the tribunal may have regard to is what effect, if indemnity costs
13 were awarded -- whether this would indeed have a chilling effect on the people who
14 bring other claims, where there are difficulties about funding, how they can't even get
15 the claim off the ground without secured, definite funding before they even issue the
16 applications.
17 So, in my submission, if my example --
18 MRS JUSTICE BACON: (Inaudible) point to any other cases before the tribunal in
19 which the tribunal has found that it's all right to bring a claim without having funding
20 in place?
21 MR CAVENDER: Well, isn't it -- no, I don't. I'm not saying it's all right.
22 MRS JUSTICE BACON: But you're saying there's going to be a chilling effect.
23 I mean, is there this sort of bunch of claims queueing up --
24 MR CAVENDER: No.
25 MRS JUSTICE BACON: -- that would only be pursued if they can be put in without
26 funding having been secured?

1 MR CAVENDER: No. No, I'm not saying that. What I'm saying is, if the rules will be
2 visited in this manner on a PCR who brings the claim for the promise of funding, it
3 doesn't come good, they try and get funding, they then withdraw after Edwin Coe
4 and all the efforts, unless it's said that she tried too long -- my learned friend doesn't
5 say that, but somehow there was some time on that -- she should have given up
6 earlier, or something.

7 MRS JUSTICE BACON: Are you saying that the time -- the limits and the rules don't
8 allow claimants sufficient time to get funding agreements before they file their
9 claims?

10 MR CAVENDER: I'm not saying that, no.

11 MRS JUSTICE BACON: So why would there be a chilling effect, then? Because if
12 the requirement were to get funding before in order to satisfy the requirements of
13 rule 75 apart from others, then why would that create a chilling effect? You just go
14 away and sort out your funding before you file the claim.

15 MR CAVENDER: Well, if you can, then obviously you can. But what it does do is
16 show that the tribunal is going to enforce the rules in that way, and all indemnity
17 costs, in a situation where that's not done.

18 But go back to my example, my Lady, where I said, "Let's assume funding was
19 incepted here and lasted for a year or two, and then the funders got cold feet and
20 withdrew". Can it seriously be suggested that that would be a cause for indemnity
21 costs? Because the standard rule is that if you withdraw proceedings, absent an
22 Apax Mr Justice Hildyard type factor, absent that, standard costs are appropriate.

23 MRS JUSTICE BACON: That's obviously not the case here.

24 MR CAVENDER: But the question is, what are the Apax type factors here? They're
25 not any of the ones listed in the case or akin to that. What my learned friend has
26 tried to do is create others, put them together and say, "Well, this is sufficient."

1 As regards to the first, the lack of funding, you have my submissions on whether
2 that's a legal requirement or not.

3 MRS JUSTICE BACON: Yes, all right, we've had your submissions on the three
4 issues.

5 MR CAVENDER: But even if it is, my Lady, the fact is the defendants knew that and
6 the tribunal knew it, and gave a reasoned order saying that these claims were
7 admissible effectively and there's a serious issue to be tried.

8 So to visit indemnity costs on the PCR in those circumstances would be, in my
9 submission, surprising.

10 MS RIEDEL: Could I -- I'm not sure if you are going to address this still, but maybe,
11 given your last remark, this is an apposite time to bring it up. When you were
12 addressing transparency and you said, well, basically, there's only two cases of
13 transparency, any others -- where it comes into play, Casio and Yamaha. You talked
14 about transparency to the defendants; you didn't address the question which was
15 also raised by the other side of transparency to this court, to this tribunal, particularly
16 at the point of applications for extensions of time and for service out.

17 In a way, it's sort of irrelevant that it was only one party or two parties or five parties,
18 because transparency to the court is a sort of absolute. So, how would you respond
19 to that claim on their side?

20 MR CAVENDER: Well, I have done. If you remember, I said that relation to Casio --

21 MS RIEDEL: Yes. No, no, no. Casio, I heard.

22 MR CAVENDER: Yes.

23 MS RIEDEL: Yamaha, you just said: it's true, we weren't transparent.

24 MR CAVENDER: I did. I accepted that.

25 MS RIEDEL: So, does that mean that you consider there was a breach of duty
26 towards the tribunal?

1 MR CAVENDER: Well, there would be a breach of the duty of a full and frank
2 disclosure when making an application that sets apart in relation to an extension of
3 time for service out in relation to that matter.
4 But that would not ordinarily mean you get indemnity costs for all time, for all the
5 actions. You might get, you know, penalised for that step or a period after that, that's
6 related to it. For instance, you know, the costs of service out, say: you might get
7 penalised in relation to those and they might be on indemnity basis, but it's not
8 normally a reason to give indemnity costs against all for all time. My learned friend
9 hasn't tried to grade this in any way.
10 There's not an all or nothing in relation to all, or all time. What you often get is, you
11 get a bit of bad behaviour at a certain time and the court will say, well, you know, the
12 costs of that should be on indemnity basis afterwards, or after that period of time
13 after you've done that, the costs after that, we'd be on an indemnity basis. It's not, if
14 you like, one -- it's not a yin or yang at all, the way it's been put.
15 So, unless the tribunal have any other questions for me, those are my submissions
16 this is the case it's not sufficiently out of the norm and should be therefore costs on
17 the standard basis.

18 MRS JUSTICE BACON: All right. Thank you very much.

19 Ms Ford, rather than us breaking and coming back can you do reply submissions in
20 a few minutes?

21 MS FORD: My Lady, I can. (Inaudible) short.

22

23 Reply submissions by MS FORD

24 On the question of the legal test, Mr Cavender's submission appears to be that there
25 are a particular category of cases called "withdrawal cases," and that in the context
26 of withdrawal cases, only the sorts of factors identified by Mr Justice Hildyard are

1 relevant, and any other factors simply don't hit the mark. In our submission, that is
2 wrong as a matter of law. The authorities make very clear that there are an infinite
3 number of possibilities, and we rely on the ones we've identified.

4 In terms of the first point we identified, commencing proceedings without funding, it is
5 a very surprising submission to have heard that it is okay for a PCR to commence
6 proceedings without having satisfied the requirements of the rules regarding the
7 authorisation condition, and that one simply has to demonstrate the satisfaction of
8 those conditions only by the time of the CPO hearing. Insofar as there is no
9 authority directly on the point that, in my submission, is only because no other PCR
10 has seen fit to take that view of the rules. In my submission, it's incorrect on the face
11 of the rules, for the reasons the tribunal put to my learned friend. In addition to
12 subparagraph (e) of rule 75.3, subparagraph (d) is also relevant, a summary of the
13 basis on which the proposed class representative seeks to be authorised to act in
14 that capacity in accordance with rule 78.

15 MRS JUSTICE BACON: Yes.

16 MS FORD: In terms of the position on the lack of transparency, in my submission,
17 the concessions that my learned friend made when asked by the tribunal ought, on
18 their own, to be sufficient, without more to justify an award of indemnity costs.

19 I understood him to have conceded that the approach in correspondence wasn't
20 appropriate. He certainly said it was opaque, it wasn't clear, and that the responses
21 that were given to the defendant's legitimate enquiries were hardly convincing.

22 In those circumstances, it lies ill in the PCR's mouth to say that they should not be
23 penalised in costs, because the defendants should have applied to force the issue
24 earlier. The implication of that, taken to its extreme, is that the more outrageous the
25 lack of transparency on the part of the PCR, the less that PCR is liable to be
26 exposed to indemnity costs, because it suggests the defendant should have made

1 an application earlier, and in my submission, that cannot be right. Concessions that
2 my learned friend rightly made in themselves justify an indemnity costs award.

3 On the question of service out, there's simply a factual correction to be made, which
4 is that it was suggested it only applies to Yamaha and Casio. It also applies to the
5 Roland proposed defendants. The first two applications behind tabs 14 and 15 of
6 the core bundle that I showed the tribunal apply both to Yamaha and to Roland.

7 Finally, the tribunal has my submissions as to what essentially is the misconception
8 that underlies the PCR's third statement. My submission was characterised as being
9 that the PCR has sat on her hands, but the tribunal will appreciate that that's not the
10 submission that I made in respect of PCR's evidence. The submission I made was
11 that she is mistakenly proceeding on the basis that it is permissible to unilaterally
12 take the view that proceedings should be kept on foot, absent funding, until
13 essentially forced to confront the issue by the tribunal putting in a CMC. That is, in
14 our submission, the inappropriate approach, which is disclosed in the contents of
15 statement 3.

16 Finally, in response to the submission that there might be a chilling effect to the
17 extent that PCRs have difficulties in incurring funding. In my submission, I make the
18 opposite submission, which is that it is appropriate that PCRs should take care not to
19 bring proceedings in circumstances where they cannot demonstrate that they've
20 satisfied the requirements of the rules, and they do not have funding in place.

21 MS RIEDEL: Thank you very much.

22
23 Discussion re timetable

24 MRS JUSTICE BACON: All right. Now, we're going to reserve judgment. What we
25 need to do is just to set out a process for cost schedules to be provided. Given that
26 we have intended to reserve judgment, I didn't want to put the parties to the trouble

1 of doing it in haste before the hearing, but we can now give directions for that.

2 What I would suggest is that we set a date for the provision of cost schedules and
3 very brief submissions to follow then, on those cost schedules. Let's just look at
4 some dates and you can tell me when you think you could do this by.

5 I had in mind around a week for the provision of cost schedules, does that give you
6 enough time?

7 MS FORD: Yes, we can do that.

8 MRS JUSTICE BACON: Right. And then Mr Cavender, that would then be the 17th.
9 And then very brief submissions from you if you are disputing costs, making clear if
10 those submissions differ according to whether costs are ordered on the standard or
11 the indemnity basis.

12 MR CAVENDER: So we're doing this in advance of knowing the answer to that?

13 MRS JUSTICE BACON: Yes, because what I propose is that our judgment will wrap
14 up everything, rather than having two judgments, or a judgment and a reasoned
15 order on costs. We'll just deal with everything in the judgment.

16 Is there anything wrong with you just putting in written submissions, on the costs by,
17 say, the 24th, with brief responsive submissions by the proposed defendants, the
18 following week? And then we'll deal with everything in the judgment.

19 MR CAVENDER: So my submissions are by the 24 June, is that --

20 MRS JUSTICE BACON: Yes. Then responsive submissions by the defendants, I'll
21 say, perhaps 30 June. Those submissions should be extremely brief. I think I'm
22 going to have to set page limits; something like no more than five pages on each
23 side. Five pages from you is to any cost that you dispute, as I've said, indicating
24 whether your submissions are different depending on whether it's standard or
25 indemnity. And then responsive submissions from the proposed defendants.

26 Ah, that doesn't deal with the fact that there are numerous of the proposed

1 defendants and there are going to be different cost schedules ...

2 MS FORD: Yes, and different parties submitting those (inaudible) because there will
3 be more (inaudible) circumstances.

4 MRS JUSTICE BACON: Yes. Are you going to be submitting a single cost schedule
5 for the three that you represent?

6 MS FORD: My understanding is no, we've been jointly represented for the purposes
7 of this issue of principle, but the parties will produce their own cost schedules.

8 MRS JUSTICE BACON: Right. In which case, given that we've got five potential
9 cost schedules, what about if I said something like ten pages for Mr Cavender and
10 then two for each of the proposed defendants?

11 MS FORD: May I take instructions?

12 MRS JUSTICE BACON: Yes.

13 MS FORD: The only request we would make, my Lady, is there be liberty to apply.
14 For example, it may be that particular issue is taken with the costs of a particular
15 party, and the entirety of the ten page submission is addressing those costs, in which
16 case confining that particular party to two pages in order to respond might not be
17 appropriate. So it may be that it --

18 MRS JUSTICE BACON: Yes.

19 MS FORD: -- liberty to apply might accommodate unforeseen circumstances.

20 MRS JUSTICE BACON: Yes, all right. I'm just giving these directions now. We
21 won't have an order, because we'll have an order at the conclusion when we've
22 given judgment. So provisionally, then, ten pages from Mr Cavender, and
23 provisionally two pages for each of the defendants, but if it turns out that that's not
24 going to be sufficient because for the reasons that you've given -- that Mr Cavender
25 places particular weight on certain defendants, which needs to be responded
26 to -- then you can come back.

1 MR KADRI: My Lady, is that 30 June?

2 MRS JUSTICE BACON: I suggested 30 June; do you need until 1 July?

3 MR KADRI: No, I'm just clarifying.

4 MRS JUSTICE BACON: No, I would suggest 30 June, because I'm not envisaging
5 that these will be lengthy documents. I'm also hoping that we would be able to get
6 the judgment out quite quickly, which is why I don't want this procedure to be very
7 protracted.

8 Right. (Pause)

9 Right, is there anything else that we need to deal with by way of directions? No. All
10 right.

11 Thank you very much to everyone who's made submissions and for those who've
12 helped behind the scenes, and for the helpful letters that we've got as well. That
13 includes Mr Bates's skeleton argument, even though Mr Bates isn't here today, so
14 perhaps that could be passed on. It's all been very helpful to us. You'll be sent the
15 draft judgment in due course.

16 (1.10 pm)

17 (The court adjourned)

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