IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1282/7/7/18
1289/7/7/18

Victoria House,
Bloomsbury Place,
London WC1A 2EB

12 December 2018

Before:

THE HONOURABLE MR JUSTICE ROTH
(President)
DR WILLIAM BISHOP
PROFESSOR STEPHEN WILKS

(Sitting as a Tribunal in England and Wales)

BETWEEN:

UK TRUCKS CLAIM LIMITED
Applicant / Proposed Class Representative

- v -

FIAT CHRYSLER AUTOMOBILES N.V. AND OTHERS
Respondents / Proposed Defendants

- and -

DAF TRUCKS N.V. AND OTHERS
Proposed Interveners

AND BETWEEN

ROAD HAULAGE ASSOCIATION LIMITED
Applicant / Proposed Class Representative

- v -

MAN SE AND OTHERS
Respondents / Proposed Defendants

- and -

DAIMLER AG AND ANOTHER Proposed Interveners

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CASE MANAGEMENT CONFERENCE

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A P P E A R AN C E S

Mr Rhodri Thompson QC, Mr Adam Aldred and Mr Doug Cochran (instructed by Weightmans LLP) appeared on behalf of UK Trucks Claim Limited.

Mr James Flynn QC, Mr David Went and Miss Emma Mockford (instructed by Addleshaw Goddard LLP and Backhouse Jones) appeared on behalf of Road Haulage Association Limited.

Ms Kelyn Bacon QC and Mr Tony Singla (instructed by Herbert Smith Freehills LLP) appeared on behalf of the Iveco Respondents / Proposed Defendants in Cases 1282 and 1289.

Mr Rob Williams and Mr David Gregory (instructed by Travers Smith LLP) appeared on behalf of the DAF Respondents / Proposed Defendants in Case 1289 and Proposed Interveners in Case 1282.

Mr Paul Harris QC, Mr Nicholas Bacon QC, Mr Ben Rayment, Mr Michael Armitage and Mr Jamie Carpenter (instructed by Quinn Emanuel Urquhart & Sullivan LLP) appeared on behalf of the Daimler Respondent / Proposed Defendant in Case 1282 and Proposed Intervener in Case 1289.

Mr Daniel Jowell QC and Mr Tom Pascoe (instructed by Slaughter and May) appeared on behalf of the MAN Respondents / Proposed Defendants in Case 1289 and Proposed Intervener in Case 1282.

Mr Mark Hoskins QC and Miss Sarah Abram (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Volvo/Renault Proposed Intervener in Cases 1282 and 1289.

THE PRESIDENT: Good morning. We think there is no need for introductions at the outset. We have got a list of representatives. What I would ask, please, is when you first rise to speak, would you please identify who you are and who you are representing. That is for the benefit of all the members of the Tribunal and also the transcriber. We will have a break at about 11.45 for the benefit of the transcribers.

We have received the skeletons from all of you, which we mostly appreciated. We did not appreciate the skeleton from Daimler, which was quite unnecessarily lengthy. Several of you have referred, including Daimler, to the Tribunal's Guide to Proceedings, which is quite specific that no skeleton should be more than 20 pages in length. We shall in future in these proceedings be placing a page maximum on skeleton arguments so we do not have this problem again.

The first matter is the forum for both applications. It has been suggested that it should be in England and Wales, and so far as we can see no one is objecting to that. If anyone wants to object, speak now. Well, we shall make that order.

Secondly, it is suggested that the two applications, the substantive hearing, they should be heard together. There are obviously different issues on class representatives and funding, but there is much overlap in the grounds concerning common issues and suitability for a CPO. So again, that seemed to command general consent, and unless someone wishes to argue against it we shall order that they be heard together. For the reasons I have just mentioned, the evidence in one shall be admissible in the others, so those respondents who want to say that by reason of the way they sell their trucks, or whatever, it is not suitable for a common action and put in evidence directed to that, that evidence can stand in both, and they do not have to do it twice.

We wanted to make clear at the outset, in view of what is said in one of the skeletons, that we do not, as presently viewing the matter, see that there is a necessity to choose as between these two CPOs. Obviously we have not begun to form a view as to whether either of them should be approved, and it is perfectly possible that, for other reasons, one is approved and the other is not, but there is nothing that we see as a matter of law that means that there can only be one of these two CPOs that proceeds. There is nothing in the statute to that effect. The rules indicate that the Tribunal may have to consider which class representative is the most suitable, but that is explained in the guide in terms of the situation where there are two applications for opt-out proceedings. Clearly, the same claimant cannot claim twice in two different actions, and if there are two opt-out proceedings for the same or overlapping classes then the Tribunal would have to decide which could proceed, if either. But where

you have two opt-in proceedings, for example, then a claimant that believes it has suffered loss could decide, "I want to join the proceedings brought by X", or, "I prefer to join the proceedings brought by Y", and it is a matter for the individual claimant, and there is not then any need for the Tribunal to decide which should proceed. Equally, it seems to us, as indeed indicated I think in Mr Thompson's skeleton argument where he sets out - Mr Thompson and his colleagues, I should say - the various alternative possibilities where one proceedings is opt-out and the other is opt-in, clearly if a claimant opts in to the opt-in proceedings, it must be taken to be deemed to opt-out of the class in other proceedings. Subject only to that, there is nothing, as a matter of law or logic, why the two cannot proceed in just the same way as if there were, say, 100 different companies that say they suffered loss as a result of the competition infringement. They could all sue together with the same solicitors and counsel, or 50 could choose to instruct one team and 50 could bring another case with a quite separate representation, or 50 could go with one and 30 could go with another and 20 could go with a third and there would be three proceedings. The concern of the Tribunal would be, just as it is in the non-collective cases that, as you all know, have been brought as a result of this cartel, that they are managed effectively and efficiently to avoid unnecessary duplication and to seek to achieve consistent results. So that is the way we are approaching it at the moment. Unless we are told by either of the claimants or the class representatives that they are really only prepared to proceed on the basis that they are the only show in town, as it were, that they are the exclusive collective proceedings in this matter, if that is the position then we may have to consider that. It would be helpful - Mr Thompson, you have indeed set out these alternatives and have expressly acknowledged that it is possible for there to be two collective proceedings. Are you going to wish to argue at the substantive hearing of the applications that there should be only one?

MR THOMPSON: No. Just for the record, this is Rhodri Thompson on behalf of the UK Claim.

THE PRESIDENT: Thank you.

MR THOMPSON: No, I think it is inherent in the end of our skeleton argument and our annex C, where we refer to the recent precedent from Australia, that it is essentially a matter of case management exactly of the kind that the Tribunal has just explained as to whether or not this is an appropriate case for a collective claim and, if so, whether more than one or only one. It is in the details of our claim form - I put it into a one sheet form which may be of assistance to the Tribunal - just looking at the scale of the claims. I do not know if it would be helpful just to hand that up and----

THE PRESIDENT: I am not addressing at the moment the question of whether it should be opt-in or opt-out----

MR THOMPSON: No, indeed. Sir.

THE PRESIDENT: -- it is just the question of whether there is any difficulty about having two----

MR THOMPSON: No, the simple answer is no, so I will sit down again.

THE PRESIDENT: Yes, and Mr Flynn, again if you can please introduce yourself?

MR FLYNN: James Flynn for the Road Haulage Association. Sir, I think what you have said as a matter of law is correct, and we do not dissent from that. I have no instructions to the effect that the RHA would only be prepared to proceed on the only show in town basis, and I think this will play out at the CPO application hearing, which you have just ordered will be heard together. I do not think I have anything I can usefully add at this stage.

THE PRESIDENT: Thank you. That is very helpful. I do not think this is a matter particularly for the respondents, but unless any respondent wishes to say that there is some inherent objection to having two CPOs. Mr Jowell?

MR JOWELL: Mr Jowell for MAN. I think that we would certainly like to reserve our position to take instructions and have a possibility to consider whether there is any objection that can be taken to two actions, particularly two actions of the same type, so two opt-in proceedings covering the same class does seem to us provisionally to raise certainly some difficulties as a matter of case management. Indeed, it is in some ways to reconcile with the provision in the rules that does envisage that the Tribunal will seek to decide which representative is more appropriate.

THE PRESIDENT: Yes.

MR JOWELL: But, as I said, we would like an opportunity to consider that and certainly to reserve our position either for a future hearing or possibly for the main hearing.

THE PRESIDENT: Yes. We would like to know as soon as possible because as far as case management is concerned we do not see a difficulty. Indeed, there is much greater difficulty for the Tribunal if it is satisfied that both are appropriate - this is clearly not a case where we have a sort of maverick class representative, both are, on their face, respectable and have instructed experienced solicitors and counsel, and so on - if we then have to choose rather than individual hauliers choosing whom they want to bring their case. It seems much more appropriate to us that it should be the claimant that chooses, not the Tribunal.

MR JOWELL: We hear what you say, Mr President, and obviously we will take that into consideration. The contrary argument would be that there is an oddity, there is some oddity in saying that the same class of people will be represented at the same hearing by two separate sets of representatives, and so we would like an opportunity to consider it.

THE PRESIDENT: Yes, you certainly can consider it, and we are not ruling on it, but it will affect the shape of the hearing clearly because certain matters become relevant that might not be.

MR JOWELL: We agree.

MR HOSKINS: Sir, can I ask you - sorry, Mark Hoskins for Volvo/Renault. We would also like to reserve our position, but your response to Mr Jowell was that you would like to know as soon as possible what his position is, which begs the question, do you want to direct us to do something by a certain time? Otherwise it may not come up until we all meet again at the hearing of the CPO applications, which may be later than you had envisaged.

THE PRESIDENT: Yes. That is certainly later than we envisage, and skeletons for that are later than we envisage. What we want to know is whether, as a matter of principle, you see any objection to that. Clearly you are objecting no doubt to both the applications as such, but there are two overlapping classes. I think that certainly is proposed, not the same. How soon could you provide that?

MR HOSKINS: May I suggest that one natural place in the timetable would be when the responses went in to the CPO application, which we are coming to, and it then depends whether you would want something separate and earlier than that. That would be a natural time in the proceedings at which everyone could pin their colours to the mast.

THE PRESIDENT: Yes, I think it can be left until the responses, which is probably the next step. The next thing we wanted to turn to is the application by parties who are not named as respondents and potential defendants to intervene or object, which you have all addressed. I think it is important to distinguish the CPO applications from the collective proceedings that would then continue if they were authorised. At this stage, we see what is said about rule 16, the normal intervention rule. It does seem to us that rule 76(10)(c) is the more applicable provision, and I think DAF took that view in its skeleton argument and they are correct. But the difference is rather technical because we are clear that those who seek to intervene, the other truck manufacturers who were addressees of the decision, are parties who are interested on the basis that if a CPO were granted, they are likely to become Part 20 defendants, so they should be entitled to object if they want to. Their objections can be accompanied by witness evidence and they can be heard by counsel at the hearing of the

CPO applications, which is, I think, the main concern. To do that effectively they should be served with the CPO applications and the evidence relied on.

We are not so clear that they are really entitled to be heard on the suitability of the class representative, because that is not something on which it seems to us they should have a distinct position. The opposition to the class representative will come from the respondents to the application. The distinct position, each of those who have applied to either object or intervene, has been on the basis, as each of you has emphasised, that you want to make non-duplicative submissions. That, as we understand it, is because of the distinct position of the individual manufacturers in the way they sell, price, market, and so on, their trucks. The question of the suitability of the class representative funding, and so on, is something that concerns directly and immediately the respondents, and we do not see there is any distinct position of potential Part 20 defendants. So it would be on that basis that we think it should be by way of objection under rule 76(10)(c), and not at this stage as interveners under rule 16.

If the CPO were to be granted and either you will be joined as a Part 20 defendant or, if not, you might want to intervene under rule 16, I can see that, but that is the way it seemed to us it is appropriate to proceed at this point. We do not see that it really prejudices anyone, but that is our initial view. Mr Hoskins?

MR HOSKINS: Sir, I have volunteered to take the lead on this issue. Our primary concern and immediate concern is obviously being properly represented and able to put our position at the hearing of the CPO applications.

Sir, you are absolutely right, in so far as there is anything between us and the two claimants, it goes to what happens next. I just raise this practical issue, or really two practical issues. One is if one or either or both of the CPO applications is granted, then clearly we should be able to participate immediately. We should not be required to wait for, for example, a contribution claim to be made, because one does not know exactly when that is going to happen. There is also a problem in the sense that if we are sitting waiting and no Part 20 comes and we make an application to intervene, then it will take some time to determine that.

Sir, I just raise that as a practical issue, because clearly if it is accepted, as it is accepted, that people in the position of Volvo and the others have an interest in appearing at the hearing of the CPO application, that interest becomes even greater in protecting their position once a CPO is made. Therefore, there should not be any prejudice in terms of timing of things happening and people saying, "That is all very well, you are not yet a Part

20 contribution party, you have not yet been joined". That is a practical issue, and that is one of the advantages of dealing with this under rule 16 today, rather than under rule 76(10)(c).

I think that is probably the main practical issue. I do not want to take up your time, we have got a lot to get through, but if you have a concern about how one would achieve bridging the two potential gaps I have identified which will inevitably arise, I can address you then on why we say rule 16 rather than rule 76(10)(c). I guess there is just the housekeeping----

THE PRESIDENT: I think in your skeleton you said it was. Was it not you who said that it was rule 76(10)(c)?

MR HOSKINS: No, no, I am Volvo, we are firm adherents to rule 16.

THE PRESIDENT: I am so sorry. No, it was Mr Williams.

MR HOSKINS: Yes, that is right. The other lesser housekeeping issue is, the parties have given you full submissions on intervention, by which I do not mean the dispute between what happens at the hearing on the CPO application, but you have actually had submissions on the issues which go to intervention, which are sufficiency of interest, discretion, terms and conditions. Now, the focus on terms and conditions has been on any terms and conditions for the CPO application hearing. Clearly, if a CPO is granted, if the Tribunal wanted to impose any extra terms and conditions at that stage, it could do so.

So the only real issues in terms of intervention are sufficiency of interest, which is not apparently contested, and discretion. You have seen our position which is that, given what is at stake, the many millions of pounds potentially at stake for each of the potential interveners, and joint and several liability on top of that, then discretion can only be one way. So, therefore, one asks the question, what is to be gained by putting off the decision on intervention? The Tribunal can take it today. It has had the submissions. It will solve the practical problem I have and it will also avoid you having to listen to me make the application again, and indeed reading everyone saying the same thing again when we re-make the application. So there is actually a real practical advantage to it.

What has not been made clear by either of the claimant groups is what is the downside to determining intervention now, because they accept practically we should appear at the hearing of the CPO application. If they have any concerns once the CPO application is granted, that can be dealt with then as it arises. As things currently stand, beyond the procedural point, which I can address you on if you wish, about whether rule 76(10)(c) is a specific provision and 16 is not, beyond that there is no practical disadvantage to the claimants that has been identified from dealing with intervention now.

I could make more detailed submissions, but I do urge upon the Tribunal, we are all here, we have all made the submissions, this is ripe for decision. It avoids the procedural gap I identified, and that is why we submit that the intervention should just be decided now, and that is the best for everyone. It will save time and money for everyone.

THE PRESIDENT: Yes. I think, just on the practical question, that is a little bit really of a red herring. The rules provide that a defendant will make its additional claim with the defence.

MR. HOSKINS: I do not think it is required, Sir, with respect. It is without permission, but then you can make the application later.

THE PRESIDENT: You can make it later, yes.

MR HOSKINS: You can make the application later, but you need permission.

THE PRESIDENT: You need permission.

MR HOSKINS: That is why I say it is not required by the rules. We will not know instantly, because parties, the current respondents, may, for whatever reason, not put it in with their defence.

Equally, the defence will come of course some time after the CPO application has been heard. There is an interest in us being parties at that stage, because you will want to give us, no doubt, directions as to what we should do in terms of defensive documents, if I can put it like that. So there is, even on the basis you put it to me, the likelihood that contribution claims will be brought in the defence and there will still be a gap. I anticipate you would want to make directions in relation to what we can do prior to any contribution claim being brought in the defence.

THE PRESIDENT: There may be, if no contribution claim is brought by anyone, questions in those circumstances as to whether you should be entitled to intervene. We just do not know. The applications to intervene have been put on the basis very much that there are going to be Part 20 claims against you, which I think everyone thinks is highly likely. If there are not, then one might want to reconsider whether you should intervene. We just do not know at the moment. In terms of the timing, yes, you have made the submissions. We have them. All that is needed is a letter saying, "We would like to intervene pursuant to rule 16 for the reasons set out in the submissions addressed at the CMC on 12 December." So I do not think there is any added cost, and it is something that might well be dealt with on the papers without any hearing.

The procedural point is really that if you are objecting then the objection can be, as I indicated, very much on the basis of that part of the CPO application that concerns you, and not on the funding side, which does not immediately concern you and if you are never

an additional defendant will never concern you. It limits it. If you are an intervener normally you are a full party to the action in every respect. So that is why we incline to that view, but, as I say, I do not think the practical difference that you are concerned about of timing is a real concern in this case. But we do have slight concerns about the scope that is opened up if you are a party at this stage. So that is why we incline to that view.

MR HOSKINS: Sir, we are not seeking to make submissions that we are different from some of the other potential interveners in relation to funding, etc. That is not actually Volvo/ Renault's position. So we are not in that position.

I hope this is helpful, because I am just trying to make sure we are not in any disadvantaged position, and that is why I think it is important to air it with you.

The only final element is in terms of what we would be permitted to do in terms of objection, because it may well be, as you would imagine in the way submissions go, that there may be submissions that go, "we object to both CPOs being made but if they are made we have the following observations on what should happen next", and as long as we are permitted to do that as well, rather than just simply turning up and saying, "no, no, no", I think all our concerns would be avoided. I cannot see any reason as a matter of law, practice or good housekeeping why we should be constrained to simply turning up and saying, "no, no, no", if there are other things we want to say beyond that.

THE PRESIDENT: I do not think we would take such a technical approach. Is there someone else who wants to address us on that? Yes, Mr. Jowell?

MR JOWELL: Yes. We are in a slightly different position from Volvo, in that Volvo is an intervener, or a proposed intervener, in both applications. We are a respondent in one and an intervener, or proposed intervener, in the other, in UKTC, and in that regard we are in a similar position to that of also DAF and Daimler. There are two specific points that we would like to just raise with the Tribunal based upon the Tribunal's initial indications. The first is, I think it was suggested by you, Mr President, that we would be confined in our submissions on matters of suitability purely to making submissions in relation to that proposed CPO representative to which we are the respondent. So in our case we would be confined to making submissions on suitability as regards RHA where we are a respondent, but we would not be able to make submissions as to the suitability of UKTC.

That does concern us somewhat, because it is tied in to a degree with the previous issue that you raised. If I could just remind the Tribunal - I am sure you have it well in mind - of the rules and of rule 78 of the Tribunal rules, which is authorities bundle 3, tab 62, p.45. 78(2) says:

"In determining whether it is just and reasonable for the applicant to act as the class representative, the Tribunal shall consider whether that person -

(c) if there is more than applicant seeking approval to act as the class representative in respect of the same claims, would be the most suitable;"

that must be "which would be the most suitable". So the rules do enjoin the Tribunal, oblige the Tribunal to consider it as a comparative exercise.

So, in our submission, it is not possible really, when we make our submissions, to entirely divorce the suitability of one representative from the suitability of the other representatives. It was also suggested I think that we would not have an interest in the suitability of the other representative. Let us suppose that we had concerns over the funding position of UKTC - I am just raising this hypothetically----

THE PRESIDENT: Yes.

MR JOWELL: -- but we did not have concerns over the funding position of the RHA representative, it would then be of concern to us if the Tribunal decided that UKTC was to go forward and RHA was not to go forward, for example, because, even as an intervener, we might well be entitled to seek our costs in due course from UKTC if the claim subsequently failed. Certainly, if you have joint and several liability in normal High Court proceedings and therefore it is entirely to be expected that a Part 20 claim is brought, one would then expect the Part 20 defendant to be able to seek its costs from the claimant. I am not necessarily saying that the same would apply in the CAT, but the CAT might well take the same approach, that it is appropriate.

THE PRESIDENT: Yes.

MR JOWELL: And if that is the case we could then find ourselves with a claimant that is unable to pay our costs. So we do have a stake in the outcome in that regard, and the rules do render this a comparative exercise, in our submission.

THE PRESIDENT: This goes back, as you said quite rightly, to the previous point, whether one interprets that as meaning that in every case, including to opt-ins, or whether one interprets as in the guide, namely that it is really directed to opt-outs.

MR JOWELL: I see that, but I make two----

THE PRESIDENT: I understand what you say, that if we have to make a choice then that may be relevant to you.

MR JOWELL: Yes, and indeed, even irrespective of that point, even if I am wrong entirely about that, that has no application in this case, nevertheless the Tribunal will be considering the suitability of the other claimant, of UKTC in our case. We have a real interest in that, and

therefore we say we should be given the opportunity to make representations. Our hands should not be tied in the way proposed. That is just the first point that I wanted to make. The second point is we gratefully adopt Mr Hoskins' submissions as to why we should be granted permission to intervene. If the Tribunal is not with us on that and would prefer that we simply make submissions effectively as an interested party, then we would say that it is important that it is clarified that not only are all interveners to be served with all documents that have been provided to the respondents to date, but also that those interested parties should be served with future documents that are provided in the other action going forward, because we do not want to find ourselves in a position when we get responsive submissions from UKTC that somehow we are excluded from having those documents.

THE PRESIDENT: Yes.

MR JOWELL: We would say that once one decides that there will be a single hearing of both of these applications together, it is not just desirable, it is necessary, that everybody in the room has all availability to the same documents, and that should be made very clear.

I just wish to add those two brief points, if I may.

THE PRESIDENT: Yes. Mr Williams?

MR WILLIAMS: Sir, Rob Williams for DAF. We agree with the submissions that Mr. Jowell has made, and we wanted to add two points to that. In relation to the question of suitability as it relates to potential interveners, specific issues may arise which relate to the position of non-defendant parties. To give an example of that, the UKTC ATE cover, as we understand it, relates to the costs of the defendants and does not extend beyond that. So it would not extend to the costs of potential interveners or Part 20 defendants. So distinct issues may arise in relation to the funding and the coverage of the funding in relation to interveners as opposed to defendants, and it would be appropriate for interveners or non-defendant parties to be able to take those points on their own behalf.

The second point is a more practical point. The Tribunal will have seen from our skeleton argument that it is our intention to instruct Mr Bacon to deal with funding issues on behalf of DAF as well as on behalf of Daimler. We are concerned about a practical position where Mr Bacon is instructed in relation to funding issues, for example, in relation to RHA on behalf of DAF, but is not a position to make representations on behalf of DAF in relation to the same issues in UKTC, because that may create complications, and it may put him in a difficult position in terms of his ability to take instructions from both parties on those issues.

If and when Mr Bacon comes to address the Tribunal in relation to the funding aspects of

UKTC's applications, he should be in a position to do that in relation to both of his clients if the joint instruction proceeds.

THE PRESIDENT: You are suggesting the submission would be different if he is speaking only for Daimler. On the UKTC application, if Mr Bacon was speaking on funding for Daimler, you are saying it would be a different submission if he was also speaking for DAF?

MR WILLIAMS: To give an example, the point I have just made----

THE PRESIDENT: That is a separate point. That is not about who the counsel is, that is to say that you have a point on funding that is distinct?

MR WILLIAMS: Yes.

THE PRESIDENT: I understand that. I do not quite understand the difficulty for counsel. If they have two clients and they speak for one on one case and the other on the other. You could not jointly instruct him if there was a conflict between you, clearly. The fact that you are jointly instructing Mr Bacon means that on that issue there is no conflict of interest between you.

MR WILLIAMS: No, there would not be a conflict of interest. In preparation for this hearing, as the Tribunal has seen, Mr Bacon took the view that he could not represent DAF at this hearing in circumstances where he did not have access to the same material on behalf of Daimler as he would have had to have on behalf of DAF. It is practical difficulties of that sort that we think could arise if Mr Bacon was instructed by DAF but his jurisdiction to make representations was confined to wearing one hat but not wearing the other hat.

THE PRESIDENT: Yes, thank you. Mr Harris?

MR. HARRIS: Sir, Mr Harris on behalf of Daimler with an apology for the length of the skeleton. It was intended to be helpful, but that has backfired and we have learnt that lesson.

We have two brief additional points. The real issue for Mr Bacon is the last issue that Mr Williams raises, which is he cannot act jointly where he would be having access to confidential separate information to which Daimler does not have access. That is what prevents the joint instruction and that is why he is not jointly instructed today, because of, subject to what happens later on today with regard to applications for access to, for example, RHA funding documents.

THE PRESIDENT: Yes.

MR. HARRIS: That is the problem, and what we say, we just echo the practical point----

THE PRESIDENT: I think, just to cut you off, I am sorry to interrupt you, we have not heard from RHA on this, but what we indicated was, to exercise your right to object if you are

objectors not interveners, you should be served with all with the papers. You would be served in the capacity as an objector in the RHA case with the RHA papers and can therefore provide them to Mr Bacon in his capacity as your client's counsel. I see that, as of today, he has that problem but I think that problem should evaporate.

MR. HARRIS: Understood. Sir, the second point is a slightly different one: we adopt with gratitude the submissions of Mr Jowell about rule 78(2)(d), and with great respect we see that as an important point of principle that would have to be addressed by the Tribunal. If the Tribunal is to take the stance that the 78(2)(c) applies only in the context of opt-outs per the guide, but not, *prima facie*, per the rules, then we would like that to be recognised in a ruling. Partly the reason for that, Sir, again with the greatest of respect, is that the guidance, as we know, is not binding. It does obviously have the status of a practice direction but this is a nascent jurisdiction, as you have made plain, and it has recently been commented on in the guidance in the Court of Appeal as not being correct in at least one respect - a different respect, I accept. We certainly have prepared, alongside the other respondent OEMs on the basis that 78(2)(c) is directly in issue here, notwithstanding the fact that one application is for opt-out or opt-in and the other one is only for opt-in. I cannot add any more. I hope that is of assistance.

THE PRESIDENT: Yes. Mr Thompson?

MR THOMPSON: Yes, Sir. I think I do not need to say very much because I very much agreed with the Tribunal's summary at the start, and in so far as one can detect a difference between the, I think they like to be called OEMs, but I am tempted to call them the admitted cartelists, but anyway the five between us, that we thought that the DAF position was the correct one. Our concern is purely a practical one about what directions should be given, and again we very much adopt the opening remarks because our concern is essentially duplication and wasted costs, and we were very concerned by the nature and length of the Daimler submissions and in particular the central section, which I think was beyond the page limits of the Tribunal on an issue where Daimler was not even a party, namely the dispute with RHA about confidentiality. So if that issue is addressed in practical terms, we see no real weight in any of the points that have been made by the powerful team in the middle, and we would be perfectly happy to discuss the practical arrangements to address those concerns, which appear to us to be essentially matters that the Tribunal can very well deal with, given its broad case management powers. So I do not think we need to say any more. I do not know if Mr Flynn takes a more black letter position than I do.

THE PRESIDENT: Just to be clear though, you will be required to serve your application on the parties that have clearly indicated their wish to object?

MR THOMPSON: Yes, but I think the reality is they have had that application since the beginning of June, so----

THE PRESIDENT: They may not have had confidential parts of it, and there may be further issues on that, but whatever is served on the respondents - that is to say Iveco and Daimler, I think in your case - will also have to be served on MAN, DAF and Volvo.

MR THOMPSON: Yes, we understand that, but Herbert Smith took it upon themselves to give it all to them in June, so I do not think it is an issue, and we have no problem. We have some very minor confidentiality issues, which, as I understand it, are not in dispute. In so far as we need to set up a confidentiality ring to deal with any issues that may arise in relation to RHA we would be very happy to co-operate, so we are pretty relaxed about the whole thing.

THE PRESIDENT: Mr Flynn?

MR FLYNN: Sir, to start with, I suppose I would encourage the Tribunal to stick to its guns because the position you outlined in relation to the applications to intervene is pretty well precisely what we argued for in our skeleton arguments. We do not think the practical issues that Mr Hoskins raises are real ones at all. If a CPO application is granted in our favour, of course the first thing that will happen is that there will be a period within which remaining claims can be made, so there will be a delay at that stage and plenty of time for case management for the prospective handling of the substantive proceedings. We just do not think there is any difficulty there at all.

As you have pointed out, the applications are made on the basis that what was called Part 20, so I think it would be in rule 28----

THE PRESIDENT: Yes.

MR FLYNN: -- would be most likely to be made, and no doubt they are. If they are not made, the intervention applications can be renewed if the parties are so advised. The guidance suggests that they would not normally be appropriate for interventions in damages actions, but we can see how that goes at the time.

In relation to directions for service - the rules provide a sensible procedure for those who wish to object who are not the proposed defendants, and it seems to us they should have the same - not a worse and not a better - status than anyone else who might wish to object like the potential class members who are expressly named in the rules. That does seem to us to be the appropriate procedure.

THE PRESIDENT: Just to be clear, does that mean, as you indicated, you say we should stick to our view, that the RHA would indeed have to serve its claim form and evidence on those who are not respondents, but who have indicated now they are objecting, or wish to object?

MR FLYNN: Yes. Obviously there will be a question as to confidentiality as no doubt we will come to, but, yes, they should, in principle, be entitled to see what it is that they may wish to object to. So we do not have a difficulty with that.

THE PRESIDENT: You are not arguing against that.

MR FLYNN: In relation to service though, I will say this: there is a need for discipline and direction from the Tribunal on this point. As Mr Thompson has already indicated, in fact, all the would be interveners have seen everything. The Tribunal may be as surprised as we are to learn, after some extensive correspondence culminating I think only this morning, that two of the respondents, two of our proposed defendants have given between them I think everything that the Tribunal has both to Volvo and to Daimler and also it would appear to Scania, who is not manifestly of any interest in this.

THE PRESIDENT: We need not go over that at the moment. You are content that they should - as you say they are entitled to see what they wish to object to.

MR FLYNN: In a way they have already got it. The Tribunal can make such directions as are appropriate, but I do say that in future - Mr Jowell made the point that might need to be on a continuing basis, but that is to those people who are parties to these proceedings. For example, to take Scania as an example, at the moment they are not.

THE PRESIDENT: Scania is not at the moment seeking to object, and therefore the position does not arise with Scania, but the people who are here----

MR FLYNN: They have everything. That is my----

THE PRESIDENT: -- and who have sought to intervene and/or have made clear that if they cannot intervene they wish to object, those are the people upon whom we can direct service should be made. If there were someone in the class who wanted to object we might have to consider service on them.

MR FLYNN: Yes.

THE PRESIDENT: Although it may be that you have already provided that they can inspect the documents I think at your solicitors' offices.

MR FLYNN: Exactly.

THE PRESIDENT: So it may not arise.

MR FLYNN: With provisions on that.

THE PRESIDENT: Very well. Thank you.

MR FLYNN: One other point, Sir, and that is really for clarification: I think what you said was that the non-party objectors, if I can put it that way, would not have *locus* in the proceedings to contest the suitability of the representative.

THE PRESIDENT: That was an initial indication, but we have heard argument on that.

MR FLYNN: Indeed, and that is what I think it is necessary to explore, because it does seem to me, whatever the exercise the Tribunal is required to carry out and however comparative that may be, that does not mean that every single would-be defendant and objector or interested party has to be in a position to make full submissions to you on that point. The Tribunal will have the responses of the respondents, it will have the objections of the objectors, and, in my submission, it will be in a very good position to make any comparative exercise that it needs to make. It does not need to hear it five times over, and not every objector needs to be enabled to make full submissions on that point, particularly, if I may say so, one that has already indicated in its skeleton argument that its position is that neither is suitable. So there is no comparison as to which is the more suitable. That is where we are on that.

I think those would be my additional remarks to what you have already heard.

MR HOSKINS: Sir, I think I have a right to the last word, at least from this side of the bench, you always have the last word. Just very briefly, I would like to say in relation to the legal issue of whether rule 76(10)(c) is a specific provision which ousts rule 16 in these circumstances, I would like to reserve our position. I did come prepared to tell you that that is wrong as a matter of law. We are absolutely prepared to be practical. As long as - and I think it is, given the exchange, Sir, that you and I had, and having heard everyone else's submissions - as long as it is understood that we are in no worse position for the purposes of the hearing of the CPO applications under rule 76(10)(c) than we would be under rule 16, I am quite happy with that. There is no point in us all burning at the stake if there is actually no practical difference.

I think the only final issue, though I do not think it is one in practice, is whether we are copied in on correspondence relating to the CPO hearing, but I understand that is actually the practice that UKTC and RHA are copying us in any event, and as long as that also continues. That is the only other potential prejudice I could think of.

THE PRESIDENT: I see. Given the volume of correspondence, I thought you might prefer not to be copied in on it!

MR HOSKINS: I did expressly ask my solicitors whether they wanted me to raise that point.

THE PRESIDENT: I think, rather than withdrawing to consider that now - if we need to hear from everyone in response, I would hope that you can co-ordinate a bit----

MR. HARRIS: Can I just make two very short post-script points? They are non-duplicative.

THE PRESIDENT: Yes.

MR. HARRIS: A correction, the first one: Mr Flynn said twice, as I wrote it down, that the proposed intervening parties have already seen everything. That is, of course, not the position. So just a correction there.

THE PRESIDENT: Yes.

MR. HARRIS: Then at the risk of outstaying my welcome, it is this important point of principle. Were it to be the decision of the Tribunal that, as a matter of principle and/or on the construction of the rules, the non-main parties, the proposed interveners, cannot comment at the CPO stage on the suitability of funding of the action in which they are proposing to intervene, may we please, with great respect, have a reasoned ruling on that, because we do regard it as extremely important, not least of all because, as you will appreciate, there are billions of pounds at stake here and the underlying proposed damages, as well as many, many millions of costs.

Then the last thing is simply Mr Flynn referred to everybody wanting to come in and make "full" submissions, but that is not the point. The point would be, if we are allowed to comment on the suitability of an action in which we are not a main defendant, we would expressly be doing that on a non-duplicative basis, because the main defendants would obviously be taking the lion's share of that work.

THE PRESIDENT: Yes.

MR. HARRIS: Thank you.

THE PRESIDENT: What I was about to say is, rather than rising now, we will rise at about 11.45 and consider it then, and move on to the next item. We will give our ruling when we come back. The next item that we have got concerns the UKTC application. We see, Mr Thompson, that it is put as opt-out or alternatively opt-in. What concerns us at the moment is that the litigation funding agreement that you have exhibited on a very transparent basis, which is commendable, is only for opt-in proceedings. All we have, so far as we can see, is a witness statement from Mr Perrin who says, "Well, if the Tribunal authorises opt-out, we will amend it accordingly". It is no simple amendment, because a funding agreement for opt-out is a very different creature from a funding agreement for opt-in because of the strictures imposed by s.47(c)(v) of the Act. Indeed, you will no doubt have read the *Merricks* case where half the argument was on the basis that the funding

arrangement for what was there to be an opt-out did not satisfy s.47(c)(v), so we cannot assume simply that there will be some amended litigation funding agreement. Indeed I think the priorities agreement that Mr Perrin addresses just does not work for opt-out proceedings. So we are concerned about that.

If you want to pursue the application as being for opt-out proceedings in the alternative, we will need to see a litigation funding agreement for opt-out proceedings, and you will have to produce it and serve it on everyone, and so on, because we will have to satisfy ourselves that it is in place.

It is very much a matter for you and your clients. If you want to confine yourself to opt-in then everything is there, but if you want to put the alternative, then we need to see, just as we would need to see for opt-in, that there is litigation funding in place. There is no difficulty about having two agreements in the alternative, condition precedent, that if the Tribunal approves opt-in, this is how funding will take place; if it approves opt-out, that is how funding will take place. It is a wholly different model for the funder.

MR THOMPSON: Yes. I obviously hear what the Tribunal says, and we have discussed this, as you can imagine, at some length, and I think it will appear from the nature of our submissions, and indeed the expert evidence of Dr Lilico, that, once properly formulated, we see significant advantages in an opt-out, and one of the things I was going to say about the general shape of the claim is that when you look at the class of potential claimants, the Tribunal may have in mind the individual claimants that it has seen to date. But the class of potential claimants, over half of them are one-man bands with one truck. So that could be upwards of 40,000 claimants, and so that is an important aspect of it.

It is addressed in Mr Perrin's statement, but obviously not in terms that the Tribunal is happy with. I suspect that rather than my trying to answer your concerns on the hoof now, it would be better for me to speak to Mr Perrin, who is in court and will have heard this, and perhaps I can make an informed response to that important question later on in the day. If we need to put in another witness statement or a further document, then I am sure we would do that in accordance with the direction of the Tribunal.

THE PRESIDENT: There is no question about it, we need to see a litigation funding agreement for opt-out proceedings, because we have to satisfy ourselves as a Tribunal that the class representative has secured adequate funds to bring opt-out proceedings before we can approve it.

MR THOMPSON: I obviously have----

THE PRESIDENT: If you are pursuing that, we clearly will need to see it.

MR THOMPSON: Indeed.

THE PRESIDENT: I am not going to in any way expect you to answer this now on your feet, but if at some point during the day, perhaps after lunch, you can tell the Tribunal and indeed the respondents whether you are pursuing the opt-out alternative for the reasons you have mentioned, and, if so, when a litigation funding agreement can be produced with a supplemental witness statement. It can be a short supplemental witness statement. It is the agreement that I think one needs to see.

MR THOMPSON: Indeed. I apologise that I have not come prepared, but it was not raised by anyone, I think, in advance, so I am afraid I have not got the answer at my fingertips. The point that is in my mind is that there was an economic viability condition in relation to the opt-in class, but if it is opt-out then obviously very different considerations arise in relation to economic viability. I think that was thought to be a positive thing from the point of view of the funders, but in terms of what agreement has been reached I would need to take instructions from Mr Perrin.

THE PRESIDENT: You need to discuss it.

MR THOMPSON: It does not look like we will finish this morning, although one lives in hope, and so I can certainly provide an answer. The short answer is that we are pursuing an opt-out claim.

THE PRESIDENT: Well, you need to discuss it with Mr Perrin and, as I say, let us know when you can produce an agreement which will need some, no doubt, negotiation because the way the funder gets remunerated is so different in opt-out because of the statutory constraints that have been imposed. You can address that later in the day. No, we clearly will not finish, we never expected to finish before lunch. Thank you very much, we will leave that with you.

MR THOMPSON: Sir, have you got another question?

THE PRESIDENT: No, that is the point we wished to raise because it is a very important one.

MR HARRIS: May I raise one point that is----

THE PRESIDENT: Yes.

MR HARRIS: -- which is that if it is to be proposed that a new funding agreement will be disclosed to the respondents, obviously we are going to consider that and we would like to know when it will arrive and then that should be built into any subsequent timetabling.

THE PRESIDENT: Oh, yes, we have that fully in mind, and that is why we have asked the question.

The next matter we wanted to address concerns the RHA and the question of redactions and confidentiality, which I have to say, Mr Flynn, rather concerns us. It is not really a question, as such, of disclosure. There has been an application with various material exhibited or attached. As we understand it, there has been a non-confidential version that has been served on everyone. There are then some documents that have a confidential version that has been served within what is a confidentiality ring that has been set up with the respondents to the RHA claim, and we have got those documents highlighted. We have not looked at the non-served documents - that is to say that we have not, as a Tribunal, seen anything that the respondents have not seen, albeit in a confidentiality ring, because we do not think that it is right for us to do so.

Our concern, if I can explain it before you deal with the matter, is this: there is great relevance in the litigation funding agreement as I have just ventilated with Mr Thompson, and in the ATE cover in particular. If one looks at the rules and then the guide, under rule 78 on p.45, concerning the authorisation of the class representative, we have, under sub-rule (2), to be satisfied whether the class representative would fairly and adequately act in the interests of the class members, and that is developed in sub-rule (3), namely that the question includes in (c) whether the proposed class representative has prepared a plan for the collective proceedings that satisfactorily includes, and then (iii) any estimate of and details of arrangements as to costs, fees or disbursements which the Tribunal orders that the proposed class representative shall provide … You have done a costs budget, and indeed the guide explains that a litigation plan should normally include a costs budget, but it is something we have to consider. If we have to consider it, the respondents must be able to address us on it. Similarly, if one goes back to rule 78(2)(b), that the class representative does not have a material interest that is in conflict with the interests of the class members, that includes looking at the way the action is being funded as to whether the funder can control, through termination provisions, for example, or exercising control over settlement in a way that seems unreasonable, to put the representative, respectable though clearly the RHA is, giving it a financial obligation that puts it in conflict with the interests of class members. Then of course there is 78(2)(d), the ability to pay the defendant's costs.

So all of those are matters we have to be satisfied about and consider. That means looking at that material and if we are to look at the material, it seems to us quite clear that the respondents must be able to address us on the material. If we are in a situation that we have to consider between the two claims, as some might seek to argue, and it becomes relevant, but even if we do not for example if we say that both might be certified and approved, there

then become two alternatives for class members and they will need to know enough to make an informed choice. We do not see how we can be satisfied of this without seeing the agreement and the policy. There might be some limited redactions on grounds of confidentiality, but the problem we have is that when we look at the bundle we have looked at, namely the bundle of documents that has been provided to the respondents with the confidential passages marked up, there is so much redacted that we cannot see really how we can even embark on a discussion of that. We cannot in some cases even see the nature of what is redacted, even if some of the detail might justifiably be withheld, but even headings are redacted so we do not even know what we are looking at. It puts us in an impossible position.

One thing we clearly need to know, for example, as a result of the matters I have just put to you is what are the total committed funds by your funder. It may or may not be relevant to know what its percentage contingency remuneration is. It may be that you can say it is confidential, but the amount of funding you have is something we most certainly need to know, and we note that has been redacted even in the shared confidential material.

So we really do not know how to proceed on that. We could hear some argument on it today regarding, for example, the ATE policy, and whether the premiums need to be disclosed or not. Some of the respondents say that the premiums are relevant. We are not at the moment convinced of that at all. We think the level of cover is important, and the premium may well not be.

On the other matters, and particularly, as I say, the litigation funding agreement, the costs budgets, we cannot begin to have a proper discussion of what might be redacted and what might not, because you have taken such a blanket approach. We think that it indeed may be more appropriate that you go away and reconsider your position and produce a rather less redacted version, possibly within a confidentiality ring and one can then have, if necessary, a further hearing in January to look at it, but it would be a very time consuming, and really very unsatisfactory exercise today when we do not even know really what is the substance of the redactions.

MR FLYNN: Sir, first, may I say that I am grateful for the indications, and also grateful for the indication as to what the Tribunal has seen, and, of course, that does immediately put the Tribunal in one form of difficulty, and a different form of difficulty would be seen behind the redactions, as it were. I hear entirely what you say about that.

I think, if I can summarise the position we have taken in our skeleton argument, it is essentially one where we are looking for directions from the Tribunal as to what is and is

not relevant. On one side we hear everything should be disclosed and it can all be out in public, and, in our submission, that is too sweeping, it is not required by the rules, and in some respects it is contrary to principle. Nevertheless, we fully recognise there are some issues on which the Tribunal does require to be satisfied before it can possibly make a ruling on the suitability of the RHA and the arrangements it has put in place.

We fully recognise that and, as we say in our skeleton, where an issue is germane, crucial to the Tribunal's determination, that, of course, leans in favour of disclosure, possibly subject to appropriate conditions, to the respondents, so that you can have a proper argument about it.

Obviously in terms of the ATE cover, the figure is out there, and it may be that not much more needs to be said about that, given the indications that the Tribunal gave in relation to the similar issue in the *Merricks* case where the question was whether £10 million could possibly be sufficient and you essentially said that can be kept under review. Obviously we are in a different ball-park.

I hear entirely what you say about total committed funding, and it may well be that the sensible thing is for us to take what has fallen from the Tribunal and put that into shape for a hearing or for determination by the Tribunal however it thinks best, and that can be done shortly, which would be a further - as you know, I think the bits that are in green in your bundle are matters we felt we could disclose without crossing our red lines, if I can misuse that phrase. I think we can go away and provide some further meat and possibly, in the light of your indications, further green ink, as it were, further green highlighting.

THE PRESIDENT: We can give you a little bit of guidance. If you take the bundle we are working off, which is the bundle that has gone in the confidentiality ring, which is A2, I think----

MR FLYNN: Recognising, as Mr Harris correctly said, this is what he has not got.

THE PRESIDENT: There is no need to go into camera. The first document is the ATE policy, and I think there are no redactions in the substantive policy, but there is in the schedule on pp.15 and 16. This goes to the point I made that we cannot really see what is redacted, because even the definitions - what I mean is the left hand column. It does not need rocket science to work out that one of the things there must be paid premium, and another of the things must be the third and contingent premium, because in the body of the policy it says, "as defined in the schedule", but we need to see the left hand column before one can form a view as to whether one is justified in the substance being withheld.

So that is one example. Then, coming on, we do, I think, slightly struggle to see why on pp.26 and 27 what is said to be confidential really is confidential. It may not be very material, but we are not attracted by matters having to be put into a confidentiality ring when there is no good reason for it. That is the point on that.

I will just give you these points because I do not think we can have a full debate on it. That is on the policy. As I say, we might need to hear argument in due course as to whether the premium should be disclosed or not. I can understand the position on the premium.

MR FLYNN: I am grateful.

THE PRESIDENT: When we come to the litigation funding agreement, tab 2, p.3, again the matters that are disclosed only in a confidentiality ring I struggle to see what is confidential about them. They seem quite basic to the operation of the agreement and nothing particularly confidential, but we do get then these very substantial redactions, and in particular of course on pp.14 and 15 we do not know what clause 10 is even about, and we do not know what clause 12 is even about. So one cannot really have a discussion as to whether you might be entitled to redact it or not without any further understanding.

The termination provisions on p.19, clause 16, which are disclosed as confidential, we think are so important to the question of the way litigation funding works that they should not be treated as confidential, and they are matters that can be ventilated in open court.

We do note, and it may be that is what is in 10 or 12, that we cannot see from this document as it is here what is the right of Therium, and what are the rights of the RHA in the event of settlement offers? That is a very important consideration when we look at litigation funding to make sure that, as it were, RHA's position and therefore the class members' position is protected, and Therium cannot, as it were, force you to take a settlement which is not in the best interests of the class. You may well, and probably have, covered that, or your clients have covered that, but we need to satisfy ourselves that it has been done. Maybe it has been done through the dispute resolution provision, I do not know, but it is not apparent at the moment from the document we have got.

I hope that gives you guidance, plus, as I say, the costs budget is something, in order to be satisfied that the funding you have got is adequate, one has to relate that to the costs budget. Costs budgets are ordered by this Tribunal in a lot of cases, not the majority because of our jurisdiction, of course in the High Court even more. They are not normally regarded as confidential.

MR FLYNN: Indeed, Sir, but of course the rule makes specific provision, as you have quoted, for that to be such as the Tribunal may order.

THE PRESIDENT: Yes.

MR FLYNN: It may be the Tribunal says, produce what you have got and there we are.

THE PRESIDENT: You have got a costs budget, but it has not been, as it were, made open.

MR FLYNN: No.

THE PRESIDENT: Maybe there are bits of the project plan that need to be redacted, but it is hard to suppose that the entire document needs to be redacted. So I do not think we can sensibly take it further today, but again I would like to leave you, as we have left Mr Thompson on a very different issue, and you will have no doubt have noted that although you say all these things, or your funder says they are commercially terribly sensitive, they are in the same market as the funder to UKTC, and UKTC has had no difficulty disclosing most of the equivalent material, as did the funder in the *Merricks* case.

MR FLYNN: I do note that, Sir, and I take due notice of it. We raised the issue of undue tactical advantage, and I could not comment on the wisdom of a strategy of disclosing everything.

THE PRESIDENT: I see that, but this is a very special form of proceedings for which your clients get various benefits.

MR FLYNN: Yes.

THE PRESIDENT: But there is, as it were, a price to pay to get those benefits.

MR FLYNN: There is, as we say in our skeleton, which is, of course, a price that you would not normally pay in ordinary litigation. We fully recognise that.

THE PRESIDENT: What I would like you to do, please, again for when we return after lunch, is to indicate when you could put in, produce, a very much less redacted set of documents that could be served on everyone, including the objectors, with some greater consideration of whether these matters need to be confidential at all.

MR FLYNN: May I just make one very small point for the Tribunal's information and for my friends: there is appended to Mr Burnett's witness statement the litigation plan, and that is open. So that is a----

THE PRESIDENT: That is not the same document, I think, as the project plan.

MR FLYNN: It is not the same document, but in terms of what the rules require, that is the litigation plan, and they have got it.

THE PRESIDENT: We are not clear to what extent the project plan is materially different, because of course we have not seen it.

MR FLYNN: That is something we shall enlighten the Tribunal on. Thank you.

MR THOMPSON: Just before the Tribunal rises, I am sure it is a matter they have got very much in mind, but curiously we are in the most disadvantageous position of all. We saw these not

very informative documents, at least as far as I am concerned, this morning, and that was the first RHA document we had seen, apart from correspondence, and so we are actually almost completely in the dark as to RHA's case.

THE PRESIDENT: I think the basic point that we made when talking about potential intervention is that all the documents that are before the Tribunal at the hearing of the substantive applications must be provided to all participants, and I use that neutral word. We will take ten minutes and we will consider the intervention point.

(Short break)

THE PRESIDENT: We have considered the short submissions that we heard regarding the question of intervention in these applications for approval of collective proceedings. We did not hear extensive argument, and we do not think it is necessary or appropriate to decide whether rule 16 of the Tribunal rules of 2015 properly applies in a situation where the proceedings cannot continue unless and until a collective proceedings order is made. We are satisfied that in this case it would be more appropriate for those with an interest wishing to object to the grant of a collective proceedings order on either of these applications to be heard as parties with an interest wishing to object under rule 76(10)(c), but having regard to the submissions we have heard, we think there should be no restriction on the scope of the observations they wish to make so long as there is no duplication and they are distinct from the submissions and argument addressed by the respondents to the respective applications. Thus, what we envisage in due course when we come to look at a timetable, is that the responses from the respondents to the applications will be timed to come first, and the objections from these third parties would come a suitable period afterwards so they could consider the responses and see what additional points they wish to place before the Tribunal.

The only matter to stress, as made clear during the submissions, is that all documents that are served on respondents, or by the respondents, should be served on the objecting parties and on the parties in the other application.

The next point to turn to are various clarifications that have been sought. Can we raise one matter first. We think we have understood it correctly, but just to make sure regarding both applications, each of the two applicants have suggested various possible sub-classes in slightly different ways, but, as we understand it, neither is seeking to, at least in the first instance, say that trucks that were manufactured by a manufacturer who was not an addressee of the decision, the loss on that purchase or lease, or whatever it is, is different from the loss on a truck that was manufactured by one of the manufacturers that is an

addressee in the decision - in other words, that the umbrella price loss is to be calculated differently from a cartel price loss, if I can put it that way. That was our understanding of the way it is put, but we may not have got it correct. Is that right, Mr Thompson?

MR THOMPSON: I turn to the left and looked at Dr Lilico, and he nods, so I am going to take that as agreement, Sir.

THE PRESIDENT: That is helpful, thank you very much. Is that the RHA position as well?

MR FLYNN: I apologise, Sir, I think I might need you to repeat your understanding.

THE PRESIDENT: You are all claiming for all trucks purchased whether they are manufactured by an addressee of the decision----

MR FLYNN: Correct.

THE PRESIDENT: -- or anyone else?

MR FLYNN: Correct.

THE PRESIDENT: That is true of both claims, and that is on the basis of what is referred to often as umbrella pricing, namely even though the manufacturer was not in the cartel, it affected the market price because the cartel affected directly so much of the market. That is the theory. What we wanted to just clarify is whether it is said that trucks that are manufactured by someone outside the cartel - in other words, where there is a loss because of umbrella pricing, that is to be calculated differently from the loss on a truck manufactured by someone who was in the cartel. Is that clear?

MR FLYNN: Now I understand the point, and I would need to look at our expert methodology report and----

THE PRESIDENT: Yes. I was looking at the way you have defined sub-classes, because if it was it would normally be a different sub-class to get a common measure.

MR FLYNN: Yes.

THE PRESIDENT: So that is where we are working off.

MR FLYNN: I take the point, I----

THE PRESIDENT: Are you able to - is anyone able to help us on that straight away?

MR FLYNN: I will take instructions on the point, because what I do not want to do is----

THE PRESIDENT: Are you able to do that immediately, or do you need time to do that?

MR FLYNN: I am probably able to do it immediately unless required for other business in front of the Tribunal, Sir.

THE PRESIDENT: I think it might assist when we move on to something else, so if you could we will let you do that.

MR FLYNN: Then I will see that it is done immediately.

(There was a pause in the recording)

THE PRESIDENT: Mr Flynn?

MR FLYNN: As I understand the position, our expert would use the same methodology for establishing the overcharge, whether it is an addressee of the decision or another manufacturer. The intensity or the amount of the overcharge might depend on the identity of the manufacturer when you do the maths, if I can put it that way, but it is the same starting point. It is the same regression methodology, as I understand it.

THE PRESIDENT: Yes, thank you.

MR FLYNN: I hope that is helpful.

MR THOMPSON: I do not know whether I should add, but there is a passage in Dr Lilico's report about umbrella effects and the mechanism depending on whether it is a differentiated or non-differentiated market. I am not departing from that, but subject to that point it is all treated as part of the same class. That is para.3.3.5, pp.58 to 59 of the second bundle.

THE PRESIDENT: 3.5, thank you.

MR THOMPSON: 3.3.5.

THE PRESIDENT: Thank you. Then I think there have been some requests for clarification. I think MAN - is that right, Mr Jowell, you have raised the position of Scania.

MR JOWELL: Yes. Sir, we seek an order from the Tribunal that RHA should clarify whether it alleges that Scania participated in any infringing conduct and, if so, on what basis it makes such an allegation. When we say "on what basis", we mean is the RHA, in so far as the RHA is claiming damages in respect of Scania trucks, purchases of Scania trucks, we wish to understand whether it is bringing a follow-on claim based upon a decision and, if so, which decision, whether that is the 2016 settlement decision or the 2017 Scania decision; or alternatively, whether it is bringing a stand-alone claim based upon Scania's alleged participation.

We say that it is important that this clarification is provided for essentially two reasons: first of all, because if it is being alleged that Scania was a participant and the allegation is made on a stand-alone basis, then we will wish to argue that such a claim is time barred under the Tribunal's rules. If, on the other hand, it is alleged that Scania participated and that is on a follow-on basis based upon the Scania decision then such an allegation is premature and the Tribunal's permission would be required.

So on either basis, if it is alleged that Scania participated then we would wish to bring an application summarily to dismiss that aspect of the claim, and we would hope to bring that application on at the same time as the CPO application.

I should add a further point, which is this: that if Scania is not alleged to be a participant, and instead purchasers of Scania trucks are alleged to be umbrella claimants of the type that was just being discussed, then that too is relevant for the CPO, because of course they say, the two claimants say that umbrella purchases can be approached on the same basis as other purchases, but that is likely to be an issue at the CPO hearing, whether it is indeed possible to define a single class that includes both individuals who purchased from the addressees, and also individuals who purchased from others who were outside of the infringement. That is particularly important here where I think it is common ground that this is a market with a very high degree of product differentiation and therefore there certainly cannot be any assumption that umbrella pricing would be the same as infringers' pricing.

So it is important to know, for the Tribunal to know, what is the size and content of that section of the proposed class that are umbrella claims. Does it include Scania or not?

I could take you on an interesting journey through the rules, but I think that it is sufficient, or I hope it is sufficient, for the present purposes simply to refer to one authority as to the legislative background, which you will find in bundle 2 at tab 30, which is the *Pride* decision. If I could ask you to turn up para.110, which is on p.40 of the judgment, and if I could read to you what is said in para.110:

> "The importance of this does not rest simply on the fact that the Claim Form expressly states that this is a follow-on claim. The transitional limitation provisions applicable to sect 47B CA permit a follow-on claim to be made from a decision which became final no more than two years before the new provisions came into force (i.e. 1 October 2015), or a stand alone claim where the acts complained of arose no more than two years before the same date: rule 119(2)-(4) of the CAT Rules 2015."

Then it goes on to say:

> "Although Pride challenged that on human rights and EU law grounds … that is why this claim is in time as a follow-on claim. But as Mr de la Mare rightly stated, it would not be possible for these proceedings to be brought as a hybrid, part follow-on/part stand alone claim, alleging also further infringements, since the latter allegations would be out of time. That may seem harsh in this particular case, but the degree to which collective proceedings could stretch back before 1 October 2015 is of wider significance and the transitional rule represents a policy decision by the Government, endorsed by Parliament."

I can take you through the rules if you like, but in summary, therefore, the position is that, based on the law as stated in this judgment, a stand-alone claim had to have taken place no more than two years before the provisions came into force on 1 October 2015. A follow-on claim can, of course, be brought after that; but the follow-on claim, one has to wait under the Tribunal's rules for that to become final, and that means all appeals are spent, unless permission of the Tribunal is sought and obtained.

THE PRESIDENT: If permission was sought, would you say there are grounds to refuse it?

MR JOWELL: Yes, we would oppose in those circumstances.

THE PRESIDENT: Because?

MR JOWELL: On the basis that - we need to come to that in due course, but if permission were granted it would certainly delay any resolution of these proceedings.

THE PRESIDENT: It would delay a trial.

MR JOWELL: Yes.

THE PRESIDENT: It does not delay steps up to trial.

MR JOWELL: No, indeed, but it would delay the resolution of any trial.

THE PRESIDENT: A trial is, on any view, a very long way off.

MR JOWELL: Yes. If they make such an application, they make such an application, but no such application has been made and, as I will show you, at the present time they expressly disavow any claim based upon the Scania decision.

THE PRESIDENT: You say it is either too late or it is too early?

MR JOWELL: Yes, that is the position, or they have to - I will come to what they can do in a moment. There are many options open to them, but they have to decide. What they cannot do is, if you like, slip in an allegation that Scania is a participant without clarifying that they are doing that, and without clarifying the basis on which they make that allegation. That is our only point, we just want to understand what it is they are doing.

If I could ask you to take up their application, and if we go to para.1 of it, we see that they state in para.1 that it is based on the settlement decision of the European Commission - that is in para.1. You will, of course, be aware that the settlement decision contains no findings of infringement by Scania.

Then in para.2 they say this:

> "The claims it is proposed to combine in the collective proceedings are so-called follow-on claims."

So they expressly state that it is a follow-on claim. They are not suggesting there at least that it is a stand-alone claim.

Then they say that the decision in question is final as none of the addressees, the settling cartelists, has sought to appeal it.

Then they go on to further describe the decision in para.3.

THE PRESIDENT: It is para.4, is it not?

MR JOWELL: Then in para.4, which is an unacceptably ambiguous paragraph, they say that although the European Commission issued a separate decision, which found that Scania, and then they say "together with the settling cartelists (the 'cartelists')", and by that they seem to be saying, therefore, that the definition of cartelists includes Scania and the settling cartelists. They then say:

> "The proposed class representative does not at this stage intend to treat it as an infringement decision for the purposes of s.47A, while reserving its position. The Scania decision, which is the subject of an appeal by Scania, and so not yet final, is awaiting publication by the European Commission."

So whilst defining Scania as a cartelist, and mentioning the Scania decision, they also disavow any follow-on based on the Scania decision.

THE PRESIDENT: Yes, and the infringement is the infringement in the settlement, not the other----

MR JOWELL: Yes.

THE PRESIDENT: So the claim based on infringement is a claim following on from that infringement?

MR JOWELL: Indeed, and if one goes to the back of the tab, one sees the definition of "cartelists". Forgive me, it is tab 2, p.1. One sees "cartelists include Scania".

THE PRESIDENT: Yes, that is the same definition.

MR JOWELL: That is the same definition, indeed, and it clarifies----

THE PRESIDENT: Which you have in para.4.

MR JOWELL: If one then goes forward to para.69, we see again they say:

> "Although the proposed class representative does not at this stage intend to treat the Scania decision as an infringement decision for the purposes of s.47A, this Tribunal cannot take a decision running counter to the Scania decision, pursuant to Article 16, unless and until that decision is set aside."

Then in----

THE PRESIDENT: Just pausing there, that is simply stating what is provided for by Article 16, is it not?

MR JOWELL: Well, I am not sure what point they are trying to make.

THE PRESIDENT: Article 16, the fact that the Tribunal cannot take a decision running counter to the Scania decision - is that not what Article 16 says?

MR JOWELL: Yes, but what is the import of that?

THE PRESIDENT: The statement is correct, is it not?

MR JOWELL: The statement is correct, but the question is, what is the import of this in circumstances where they are not bringing a claim based upon the Scania decision. They say they are not bringing a follow-on claim based on Scania, and yet they are saying, "but nevertheless the Tribunal is bound by it". I am not sure what the import of that is said to mean.

Then in 72 they say:

> "As a consequence of the infringement the prices charged to the proposed class members were at all material times higher than they would have been. This relates to all relevant trucks regardless of manufacturer. This is because as a result of the existence of the infringement relevant trucks not manufactured by the cartelists or companies belonging to the cartelists, relevant trucks manufactured by third parties were not subject to real price competition."

Those trucks were similarly inflated, they allege, and they refer to umbrella pricing, but note that umbrella claimants are those not manufactured by the cartelists, so the allegation is that Scania is one of the cartelists is not to be treated on the basis of umbrella pricing.

So the claim is completely unclear because on the one hand they say they disavow a follow-on claim based on the Scania decision, but they nevertheless invite the Tribunal to make a finding, or base itself on an assumption that Scania is a cartelist, and that people purchasing from Scania are purchasing from cartelists and not as umbrellas.

Now, we called them out on this ambiguity in correspondence and the responses are summarised in our skeleton argument. They rather ironically accused us of seeking to muddy the waters. We say that of course there are acceptable ways for them to proceed. They can now say, "No, no, we wish to bring a claim based on the Scania decision and we wish the permission of the Tribunal to do so". That is one option for them, and we will then have to consider whether to object to that and what the consequences of that will be.

They can also say, "No, no, you have misunderstood, we are seeking to allege that Scania sales are to be regarded as umbrella sales", and if they do that, of course, they would have to amend that part of the pleading that I have showed you; or they can disavow any claim for Scania based on purchases of people that bought from Scania Trucks and wait for the Scania appeals to finish. So there are various options available to them, but what they

cannot do, in our respectful submission, is to seek to sail between the Scylla of a follow-on claim and the Charybdis of a stand-alone claim. This is a position that, in our respectful submission, calls out for clarification.

THE PRESIDENT: Yes, thank you. I do not think that arises, Mr Jowell, as regards the UKTC claim?

MR JOWELL: No, it does not, I agree.

THE PRESIDENT: Mr Flynn?

MR FLYNN: Sir, Mr Jowell has taken you to the opening parts of our claim which make it, in my submission, perfectly clear that this is a follow-on claim in relation to the settlement decision, which is not addressed to Scania, and that is the basis of our claim, and we have said that in correspondence. I have now said it in open court. We do not understand their difficulty with this point. We have defined Scania as a cartelist, including the addressees, but referring to the Scania decision, and the Scania decision is there and, as you have noted, Sir, our statement in respect of it is a correct statement, but we disavow any intention at this moment. We do not think we have pursued, and we certainly have not applied for the Tribunal's permission to pursue, a claim against Scania. That position might change. Who knows what will happen with that Scania appeal, but as matters currently stand our claim is in respect of the infringement, as defined, recorded in the settlement decision against the parties we have called the "Settling cartelists".

I do not think I can be clearer than that. If the language in any part of the claim makes Mr Jowell worry that we are trying to slip anything in, I say now in open court we are not. Scania was not part of the infringement in respect of which these proceedings are brought. So pricing of Scania trucks will have to be treated as a matter separate from the infringement.

Normally, when one talks about umbrella pricing, and I am not really sure how much of a term of art or particularly a term of economics it is, but what it means is prices in the market go up because of the cartel, even the prices of people who are not party to the cartel. In the particular circumstances of this case, it may be that Scania sits somewhere in the middle, because although it is not party to the cartel that is being sued on, it has been found to be party to the cartel recorded in the Scania decision, which of course we know very little about. Whether that is umbrella or next to umbrella, or they were closer to the umbrella than anyone else, I really submit is a matter to be explored in due course. Mr Jowell's concerns are, we think, gainsaid by the terms of the application, and I hope clarified and laid to rest in what I have said this morning, or this afternoon, as it now is.

THE PRESIDENT: I think you have made it very clear, there is no stand-alone claim based on Scania pricing. Perhaps the only slight ambiguity is in para.72. If we look at that paragraph, which was one that Mr Jowell mentioned----

MR FLYNN: Yes, it is.

THE PRESIDENT: -- where it says, "As a consequence of the infringement", and the infringement is, of course, that by the addressees of the decision, not Scania, as you have defined it:

> "The prices charged to proposed class members for purchasing or leasing relevant trucks were at all material times higher than they would otherwise have been. This relates to all relevant trucks regardless of manufacturer. This is because as a result of the existence and direct anti-competitive effect of the infringement on relevant trucks not manufactured by the cartelists or companies belonging to the cartelists, relevant trucks manufactured by third parties were not subject to real price competition."

I think the slight ambiguity is when you refer back to the infringement which does not include Scania, then when you refer to cartelists in the next connected sentence it does include Scania, there is a slight difficulty in following exactly what you are saying.

MR FLYNN: I take the point. This is a pleading, not a statute. It is clear what the basis of our claim is. If anyone wants to write in settling cartelists on their copy now they should feel welcome to do that. If the Tribunal wishes us to amend to insert the word, then I seek its permission to do so, but we really do not think there is any real ambiguity in this matter.

THE PRESIDENT: Just to be clear, because I think you have defined the term "settling cartelists" in para.2.

MR FLYNN: Yes.

THE PRESIDENT: And you say you are content for para.72, for the sixth line to read, "not manufactured by the settling cartelists or companies belonging to the settling cartelists"?

MR FLYNN: Yes.

THE PRESIDENT: Yes. One can make that amendment.

MR FLYNN: I think that is the high point of Mr Jowell's case.

THE PRESIDENT: And again two lines down "trucks not manufactured by the settling cartelists". Of course, if the Scania decision, if the appeal is dismissed, you can apply to amend and whatever in due course.

MR FLYNN: Yes.

THE PRESIDENT: Well, Mr Jowell, does that resolve the ambiguity? It is not a stand-alone claim?

MR JOWELL: Yes.

THE PRESIDENT: Scania trucks will be treated as subject to umbrella pricing.

MR JOWELL: That is very helpful. I think they should go a little further, because they should not be referring in this document and their application to Scania as a cartelist at all. It is inappropriate to----

THE PRESIDENT: Why is it inappropriate when the Commission has taken a decision that they are?

MR JOWELL: Because they are not relying on that decision, and that decision is under appeal.

THE PRESIDENT: It may be under appeal, but at the moment it is binding on this court.

I cannot see that there is anything inappropriate. You can say it does not take the matter further, or it does. It may or may not do. It is a fact, it is out there, as Mr Flynn says.

I cannot see any basis on which you could strike it out, and they have made it clear, and you are on notice, they reserve their right that they might in future seek to amend, and it is helpful that you should know that.

MR JOWELL: We are grateful for that clarification. It should also extend I think to para.6 of their application, where again they draw a distinction. They say:

> "As a consequence of the infringement the prices paid by the proposed class members for new and pre-owned relevant trucks (both those manufactured by the cartelists and those manufactured by the …)"

that should be by the "settling cartelists" again.

MR FLYNN: Might I suggest that is not correct.

THE PRESIDENT: Let Mr Jowell finish.

MR FLYNN: Let him find the other example.

MR JOWELL: What they cannot do, in our respectful submission, is say, "We are not relying on that decision, we know it is under appeal, but we are nevertheless going to treat it as binding, this Tribunal as bound by it, and rely on that, actively rely on that". Just say that Scania is a cartelist. That is trying to have your cake and eat it.

I think they have accepted that, for the purposes of any overcharge, Scania falls into the umbrella camp, and we are grateful for that. That is a change to their previous position. With respect it is, because that is not what para.72 says.

THE PRESIDENT: Whether it is a change or not - these proceedings are at the very outset, you have not even had permission to continue them, so whether it is a change or not really does

not matter. What is important is to be clear as to actually what case RHA seeks to advance. You have raised the point about para.6. Is there any other paragraph you want to - I think those----

MR JOWELL: The only other point is that----

THE PRESIDENT: To be fair you did not highlight para.6 when you took us through it.

MR JOWELL: That is fair. The only other point is that their expert, Dr Davis, also treats Scania as a cartelist, I think that is included. Again, we say that is not appropriate. You must regard Scania----

THE PRESIDENT: Well, if he is not making the distinction, and that is why I asked Mr Flynn, as no doubt you appreciated, before we got into this whether the umbrella price is necessarily a different price in the approach of his expert or his client's expert. So it may not hugely matter. We can get into that at the hearing. What we need to know is what the main case is.

MR JOWELL: Yes, but the expert should be approaching the matter on the basis that Scania falls into the umbrella category and not into the infringer category.

THE PRESIDENT: He should approach it consistently with the claim

MR JOWELL: With the claim, indeed. So those are the only further points that I would make.

THE PRESIDENT: So Mr Flynn, para.6?

MR FLYNN: Well, I mean, just to say what the phrase in brackets means is "all trucks".

THE PRESIDENT: Well, it does.

MR FLYNN: It does.

THE PRESIDENT: You may say that it actually does not matter because of the way you describe, and it is simply a clarification.

MR FLYNN: It comes to the same thing, it is 45 and 55 or 55 and 45, so if people want to write in "settling cartelists" there it comes to the same thing, but the sentence is----

THE PRESIDENT: You can say "settling cartelists, Scania and those manufacturers", it is all the same thing, is it not?

MR FLYNN: Exactly, it is the totality, and that is all it means.

THE PRESIDENT: Yes. Well, you will keep Mr Jowell happy if you say "settling cartelists".

MR FLYNN: Well, I endeavour to do that on most occasions!

THE PRESIDENT: Let us make that amendment. Is there anything else on this particular Scania issue? You have made it clear, it seems to us, that you reserve your right to potentially seek to amend in due course, depending on what happens in Scania's appeal.

MR THOMPSON: Sir, can I just make one observation which actually derives again from Dr Lilico, who was paying good attention and when it was said to be common ground that

there was a high degree of product differentiation his ears pricked up. I do not know how far the Tribunal has looked at the expert reports but the position that Dr Lilico takes is that the level of product differentiation is relevant to the likely cartel percentage, and he has given evidence in relation to high, low and no product differentiation, but as of now it is a question of data and evidence as to the level of product differentiation in this market, and it is certainly not common ground that it is high.

THE PRESIDENT: Yes. Thank you for making that point.

MR JOWELL: Mr President, there is one further matter on which we seek further information. I do not know if it is convenient to deal with that now?

THE PRESIDENT: Yes, is that the figures, the breakdown figures?

MR JOWELL: The figures, indeed.

THE PRESIDENT: Yes, that was indeed the next matter we can probably cover.

MR JOWELL: In RHA's skeleton, you will have noticed that at para.2 they have provided an update of those claimants who have been signed up and registered in relation to their collective proceedings.

THE PRESIDENT: Yes, let us just get it in front of us. That is the RHA skeleton argument?

MR JOWELL: Yes.

THE PRESIDENT: Is it para.2?

MR JOWELL: Paragraph 2, yes. You will see that they provide a breakdown by the number of relevant trucks in their fleet and then giving the number of class members and the percentage of the total and the total trucks. That is all useful information, but we think it would greatly assist the Tribunal if there were to be a further breakdown of these figures for the purposes of the CPO application itself, certainly well in advance of that. In particular, MAN for its part would like to know how many of these trucks were purchased in the UK and how many from other Member States in Europe, how many were used or pre-owned trucks as compared to new trucks, and also we would like to know the year of the purchase of the relevant trucks.

This information is likely to be of great assistance because it is going to give an indication of the class composition. Of course, one of the issues at the CPO application is likely to be the extent to which it is appropriate or indeed possible to lump together into a single class purchases of very different types, purchases from different countries, purchases of new and used trucks, and purchases in the run-off period, a very, very long proposed run-off period of some eight years in the RHA case, as opposed to purchases during the infringement period and at different times in the infringement period. So we say it is going to greatly

assist the Tribunal to have a sense of the numbers in each of these classes, because it is going to affect also questions of proportionality.

THE PRESIDENT: When you say the year of purchase, it is really how many during the infringement period, how many during the run-off period, it is not year by year?

MR JOWELL: No, that is the crucial information, although year by year would also be - it is fairly important. There is going to be data used, and so on, in relation to----

THE PRESIDENT: There is going to be a lot of data if the proceedings go ahead, but at this stage----

MR JOWELL: Yes.

THE PRESIDENT: One of the problems is, this is only - it is not a very reliable indication of what might happen because this is only sign-up to date, and of course if the proceedings are authorised then there is a period set by the Tribunal in which people can opt in and the whole picture might completely change.

MR JOWELL: It might, I accept that. I think it still would be useful and it would give a good indication, I would have thought, given the level of the publicity that the RHA has already put out about this claim, the prospects of it changing enormously I think are fairly low, and I think it would be useful to give an indication of the size.

What we would suggest - we assume this data must be available, and the RHA must surely be asking registrants for this type of data, and indeed no doubt there will be other things that they would be asking them for that would possibly be useful to know. We would suggest that it should come in at least a few weeks before, nearly four weeks before we have to put in our responsive submissions, so that we can have an opportunity to put in any comments on it. Then probably it would be useful to have it much closer to the hearing as well on an updated basis, maybe a----

THE PRESIDENT: Well, if it is not----

MR JOWELL: If it is not too inconvenient. We think that would assist the Tribunal and indeed everyone. That is our request. I do not think I can assist further.

THE PRESIDENT: Mr Hoskins, I think Volvo makes the same request - is that right?

MR HOSKINS: We pursued this in correspondence, but we agreed Mr Jowell would take the lead in oral submissions, and we adopt his submissions.

THE PRESIDENT: Yes. Mr Flynn, I think it is put, perhaps a bit more realistically now, on the basis that it is not year by year, it is as between infringement period and run-off period. That is what being requested, as refined, which is rather less onerous.

MR FLYNN: Indeed, that is possibly slightly less onerous. Firstly, as you say, Sir, this is a snapshot, this is where we are today. It changes the whole time. It has changed since we put the skeleton in.

Secondly, the issues that are raised, and Mr Jowell mentions, as to what you can put in any particular class, these are matters of principle which flow from class definition that we propose. A lot of the total information, and probably broken down by years, and all that sort of thing, is available in public sources. So it is not as if we are the only people who can give a sense of where the class might go if the application is granted. Mr Jowell speculates, I think, that the position is not likely to change very much if the application is granted.

I can speculate that it will change considerably based on indications that the RHA has. There is certainly no reason to think that it would not change dramatically, and within that the mix, if you like, of different possible elements of claim. We are not sure actually how useful the information from any particular snapshot period would be, nor do we necessarily have all the information based on the signing up or registering process that we have undertaken to date. We do not necessarily have information in the granular detail that the proposed defendants and non-parties would apparently like. We can, I think, analyse the data to provide a broad split between new and second-hand or pre-owned trucks, as they seem to be called. We can, I think, find something out about the extent of, as it were, non-UK purchases. We are reliant, of course, on people registering through the website and providing the information that we ask for, so there would have to be some caveats around any sort of split that we provide. I think those elements we can do.

I am not immediately clear, but I can ask, whether it would be possible to provide the "When did you buy the truck?" answer. That I will just need to check. As you say, Sir, at least it is not a year by year per truck figure that is being asked for.

I am not sure that we would be able to provide the answer to the question, "Basically, when did you buy your truck?"

THE PRESIDENT: Mr Jowell, do you want to say anything else?

MR JOWELL: Briefly. I am slightly puzzled, because it is said that this is all provisional information, and therefore cannot be useful, which then rather begs the question, why did they put it out in their skeleton argument? If it is useful to tell us, to give us an indication of the size of the claimants, it is equally useful to give us information as to which countries the claims are brought in, whether it is new or used and when.

THE PRESIDENT: I think they are asked or encouraged by the guide to provide an indication of the numbers of the class. That is why they put it in.

MR JOWELL: That would explain the total number, but not the breakdown. The breakdown is important because really assessing class composition is part of the process of assessing the suitability for certification processes. Of course, we can debate in due course just how representative that is going to be. That may depend on how many have eventually signed up, but we think it is likely to be useful information for the Tribunal to see. It is particularly relevant, for example, which countries, what sort of numbers - if there are two trucks bought in Lithuania, for example, and they eventually get to a position where they want to certify a sub-class for Lithuanian purchases of truck, one would really need to consider the proportionality of that.

THE PRESIDENT: Yes.

MR JOWELL: So we stand by our request.

THE PRESIDENT: (After a pause) I think, Mr Flynn, as you said you can provide the information of the split between new and pre-owned, that would be useful bearing in mind it is only the position to date and that it may change. Similarly, if you can provide the position of non-UK purchases, if broken down by country is available.

MR FLYNN: Yes.

THE PRESIDENT: If not, just the UK, but perhaps by country. I think it is suggested that there might need to be different measures for different countries.

MR FLYNN: Yes, and I take the two trucks of Lithuania point. We will have to do some digging to answer that.

THE PRESIDENT: We do not think it is relevant to ask you to provide information on the number in the infringement period. We think the number in the run-off is clearly going to be substantial, given the length of that period, and so there will be large numbers eventually in both, and knowing what they are precisely is not going to help, even as a guide.

MR FLYNN: Yes.

THE PRESIDENT: The other two we think might, bearing in mind also the differences between your application and the UKTC application. When would be a reasonable time to provide that? Obviously it can be updated .

MR FLYNN: Either the current information can be interrogated and we can give that, or we can do it at a later stage closer to - Mr Jowell was suggesting close to when they have to put in their responses.

THE PRESIDENT: Yes, I think that make more sense.

MR FLYNN: That probably makes sense and gives us----

THE PRESIDENT: That is when they will want to look at it. We will fix a time for that when we come to look at the date for responses.

MR FLYNN: Yes, working back from the responses.

THE PRESIDENT: Thank you.

MR HARRIS: Sir, may I address you shortly on this topic?

THE PRESIDENT: Yes.

MR HARRIS: You will appreciate that there are applicable law issues in the defence time period pre-2009 and post, and we respectfully invite the Tribunal perhaps to reflect over the short adjournment about whether or not it would be possible for Mr Flynn to provide some indicative split between pre-2009 and post, because, of course, the question of common issues, commonality of approach as between the sets of claimants, may in part be driven by the applicable law - for instance, limitation period, for instance, evidential burdens and----

THE PRESIDENT: This applies to non-UK trucks presumably, the 2009, not to the UK trucks?

MR HARRIS: Yes, precisely. Sir, I am sorry to raise it at this stage, but the difficulty of having no such breakdown is that then the Tribunal will not have a proper perception when the points of applicable law are raised at the CPO hearing as to quite their gravity and scope, whereas with some indicative - it is a relatively simple request, pre-2009, can you give us an indication of those, and everything else is post-2009, and we----

THE PRESIDENT: This is just for the foreign trucks, non-UK trucks?

MR HARRIS: Just the foreign, that is right, for where there might be a different applicable law, correct.

THE PRESIDENT: Mr Flynn, is that something that would be difficult?

MR FLYNN: Yes, it is. I just do not think that is data that we have, and I am not clear what the relevance of that to the CPO application is, as opposed to how the proceedings would then unfold if----

THE PRESIDENT: I think it would be that if there is a limitation issue, they might need to split the class.

MR FLYNN: I understand the point. I am not sure that we are going to be able to say pre-2009, post 2009. We will look into it.

THE PRESIDENT: You look into it. We will not make an order. It is obviously something we need to look at, but I suspect it will not depend on precise numbers in any event.

I think we will now rise until ten past two, and when we come back we hope to get from UKTC indications of how long it needs to consider the question of a litigation funding agreement and from RHA how long to serve different documents. We then have to deal

with some disclosure applications made by UKTC very recently, but I think we can deal with them, and then look at an overall timetable. There may be other issues.

MR HARRIS: My Lord, just on clarifications, in our skeleton at para.163 on p.64 and 65, there was the issue of whether or not there are going to be any amendments to the lists of common issues, and if you were to have regard to those two short pages over the short adjournment that would put you entirely in the picture with the relevant cross-references.

THE PRESIDENT: So that is - can you give us the references?

MR HARRIS: It is the Daimler skeleton, pp.64 and 65, whether or not there are to be amended lists of common issues from either or both claimants.

THE PRESIDENT: Yes, thank you very much.

MR HARRIS: Thank you.

THE PRESIDENT: So ten past two.

(Adjourned for a short time)

THE PRESIDENT: Yes, Mr Thompson?

MR THOMPSON: Yes, Sir, my first point I think is my homework over the short adjournment, which was to speak to Mr Perrin. I think he thought, given the season of the year and the need possibly to do some drafting but also to get some approvals, it was realistic to ask for three weeks into the new year, so that would take us to 25 January. Inevitably, that will have some knock-on effects on the timetable that was discussed. That seemed to us to be realistic.

THE PRESIDENT: That would be the date by which you would be able serve----

MR THOMPSON: I think, in reality, we would serve a supplemental witness statement with an appropriate attachment.

THE PRESIDENT: Yes. As you say, it obviously will have a knock-on effect, but, subject to that, does anyone wish to say anything about that date? Very well, 25 January.

MR THOMPSON: There is a risk it may lead to a break out of harmony about dates, which I guess is not a problem.

I think the next item was disclosure.

THE PRESIDENT: No, that was the homework for you, but the homework for Mr Flynn was different.

MR FLYNN: Next Friday, December 21st, Friday of next week, I should say.

THE PRESIDENT: That is to produce a revised bundle?

MR FLYNN: Yes, we will produce a revised document with a submission to you.

THE PRESIDENT: Yes, and served on all the parties. What we might need to think about to give people time to consider it, and obviously that is just before the Christmas break, is whether we might need a hearing in January to resolve that matter and consider objections or argument about redactions. That could be heard - that does not need a full Tribunal, and we have discussed this amongst ourselves, my colleagues are content that it should be heard by me, as Chairman, alone, which makes listing a bit easier obviously from our side. It would be a question of how many of the respondents actually need to appear on that, whether they can delegate the submissions to a few of them, or whether they all wish to turn up, but perhaps we will leave that, we will not try and fix that in court, but leave it to be raised with the Registry by the usual channels. But I would have thought, if you get it on 21 December, some time in the second half of January may be appropriate with let us say a day, but I would have thought half a day should be sufficient.

Yes, Ms Bacon?

MS BACON: Yes, I am Kelyn Bacon for Iveco. I am instructed that I think it would be helpful to have a date in the diary in reserve in the same way that you have for the individual actions for other issues that may arise then. If we only get the revised funding documents on 21st, and then people are away over Christmas, it might take some time into the new year before we can get a date in the diary.

THE PRESIDENT: I am not suggesting we do not get a date until they arrive, I am just saying that rather than try and get a date while we are in court, it can be left to later this week, tomorrow and Friday, if you can liaise with the Registry, and we will suggest some dates when I am available so that we can find a date. It may not need the attendance of Mr Thompson, for example.

MR BACON: Nicholas Bacon, no relation, but a great pleasure nevertheless.

THE PRESIDENT: And appearing for?

MR BACON: For Daimler. Sir, just to flag up - I was not given an opportunity and did not seek to do so - and address you very, very briefly on the indications you gave as regards some of the redacting.

THE PRESIDENT: Yes.

MR BACON: So far as the premium price is concerned, I just wanted to lay the ground to say that any message that may have gone out to Mr Flynn and his clients, that is not something he really ought to be disclosing, is not something we accept by any means, not least because the Tribunal, in considering the suitability of one scheme over the other or just a scheme on a unitary basis, will want to know, we would have thought, the costs ingredients of the

overall costs exposure to the claimants on the one hand and the potential respondents on the other. Knowing, for example, that the total funding covers, for example, the ATE premium, necessarily requires the Tribunal to understand what the ATE premium price is. There is nothing, we would say, confidential about the price of a premium. We do not seek disclosure of how the premium may have been arrived at by underwriters of course, but that is a very different matter to the price, which is a commonly known, I would submit, cost that can clearly be revealed.

THE PRESIDENT: Mr Bacon, when you say exposure of the defendants, is the ATE premium recoverable as part of costs?

MR BACON: No, it is not part of - it depends, if we go the opt-out route, then we have the potential for the funding costs to be recoverable, as you know from the *Merricks* case, because it is a cost or a fee or expense, you might recall.

THE PRESIDENT: Yes.

MR BACON: So there there is----

THE PRESIDENT: RHA is not---

MR BACON: RHA, it would not be recoverable between the parties.

THE PRESIDENT: It is not the----

MR BACON: No, but it is to ensure that the sums that are available to pay our costs out of the funding package are sufficient, taking into account the ingredients which the funding package covers on the claimants' own side.

THE PRESIDENT: That may depend on whether the funds available to pay your costs----

MR BACON: Right, as well as their own. You noted in the course of the dialogue you had, which was helpful, that, for example, the priorities agreement is completely redacted. It is a hopeless situation of not only knowing what are the various ingredients within the priorities agreement itself, but one would need to know what the amounts were in order to determine what claimants are going to end up with at the end of the day if they are successful. That is at least how we see it.

THE PRESIDENT: Yes.

MR BACON: I just wanted to----

THE PRESIDENT: I was not ruling on that question----

MR BACON: No, I understand that.

THE PRESIDENT: -- I was just saying that, as you well know, there are some authorities on disclosure of ATE cover, and various judges have said things about premiums.

MR BACON: Yes, we are in a different world here.

THE PRESIDENT: I appreciate that.

MR BACON: It is pretty unique. As we have discovered in the past, it is a unique regime which requires an examination of these matters at the outset, unlike any other regime. That is where I wanted to leave it.

THE PRESIDENT: Yes, thank you. I am sure that has been taken on board by those advising the RHA and we may need, depending on what position they take, to go into it more fully at a later date.

It is agreed that we will fix a date in, we hope, late January for a hearing, unless of course everything is agreed, on the potential redactions/confidentiality in documents produced by the RHA, and that date is to be fixed by, let us say, by the end of this week.

I think then the next thing is the point that Mr Harris reminded us of just before lunch, namely the point raised in the Daimler skeleton argument at pp.64 and 65 to do with common issues, where, as I understand it, Mr Harris, what you want is to really be clear that, at least at this point, no one is seeking to amend the list of common issues - is that right?

MR HARRIS: Precisely. If both claimants and proposed claimants say, no amendments coming, that is the end of the matter, but it is quite serious, if there is to be an amendment on such a fundamental issue, without repeating what is in those two pages of skeleton argument, it goes to fundamental matters and would require permission, and of course it bears upon timetabling.

THE PRESIDENT: Yes.

MR HARRIS: If it is not a point, great; but if it is, it needs to be addressed.

THE PRESIDENT: Yes. Obviously, you cannot tie your hands for the indefinite future, but as things stand today, Mr Thompson, because you had raised this and then said not being pursued, is it right you are not, as things stand, proposing to amend the common issues?

MR THOMPSON: Yes, that is correct. I think we put a precaution in in case we were directed by the Tribunal, as we have been in relation to the opt-out funding arrangements, or if some issue was raised, but so far as we are aware nothing has been raised, and clearly we will wait and see what the respondents say about the case more generally. So at the moment there is nothing outstanding on our side.

THE PRESIDENT: Yes. Mr Flynn?

MR FLYNN: We had not proposed it and we have nothing to raise.

THE PRESIDENT: Yes, thank you very much. Then we come indeed to disclosure applications. Before embarking on that, you will no doubt have seen what is said in the Tribunal guide

about disclosure and collective proceedings applications, namely at para.6.28, that we do not encourage requests for disclosure, and in particular we were concerned not to go down the, if I can put it that way, the practice that has developed in the United States where there is very extensive discovery lasting months before class action certification proceedings, and that is not a model we want to follow in this country.

I think UKTC is seeking three very specific matters, as we understood it. The first is what is described as judgment settlement agreements or tolling agreements, the second is the confidential version of Commission decision, and the third is the confidential version of an OFT decision, no doubt within a confidentiality ring.

Just taking those in order, Mr Thompson, judgment settlement agreements or tolling agreements, if a claimant sues several defendants they frequently may agree between themselves how they are going to conduct matters and who will take the lead, how they might share costs. You do not normally get disclosure of those matters, do you?

MR THOMPSON: I think it is necessary to distinguish between two things.

THE PRESIDENT: Yes.

MR THOMPSON: One, which is something which we have actively promoted in correspondence where, given the multiplicity of actual or potential respondents and the calibre of their respective legal teams and the concern over costs and duplication, we have been enthusiastic advocates of Iveco in particular, who is the one party that is party to everything, taking the lead in correspondence, and there has been obviously been a degree of co-operation between the respondent side of the fence to date about who should take the lead on particular issues, and we have no problem with that all. Indeed, we think that is a good idea.

There is one slight query as to why MAN took it on itself to raise the Scania issue, and why Scania did not raise it, or what happened, but that is a different question.

THE PRESIDENT: MAN is under the ownership as Scania, so that may have some bearing on it.

MR THOMPSON: That may be the simple answer, I have no idea. If that is the answer, that is fine. I only say it because I think Scania was separately represented in some of the earlier individual cases.

The other question is whether there is an arrangement between the parties which is not simply about the management of litigation, which actually goes to the substance of the issues and allocation of responsibility and matters of that kind. We exhibited a fairly lengthy and detailed article by an American academic where the pros and cons of such arrangements are looked at, and the question of whether or not such arrangements are or

should be in whole or in part either privileged from disclosure or indeed whether they have beneficial or adverse effects. Obviously at the limit they could form a form of secondary cartel and it would be a curious arrangement whereby the Competition Appeal Tribunal was unaware of, as it were, a secondary cartel between the participants to a cartel in a damages claim. So there obviously is an issue as to how that works. In particular - I do not think I want to take up time now - at p.810 in Mr Leslie's article, there is a discussion about whether or not agreements of that kind are or should be privileged.

However, having said that, I have obviously read the submissions that have been put in by the respondents, and, as in other respects, I think Mr Hoskins has put the matter most succinctly, and he has effectively said that any such issue is premature because it does not affect his interests, the issue that we have looked at this morning, and it does not affect the quality of UKTC as a potential CPO claimant. So to that extent, I think it is probably correct that now is not the time for this issue to be determined, but it is a matter that was raised in correspondence and which we put down, as it were, as a marker, but I am not pressing now, and I take on board the point that the Tribunal has made in terms of disclosure at this stage. So I do not think I want to say any more about that now.

So far as the Commission decision goes and the OFT decision, that, in my submission, is in a different category. They are regulatory decisions which are relevant to price setting of this product in the United Kingdom - the Commission decision as part of the overall decision, and the OFT decision specific to the UK.

THE PRESIDENT: Can I interrupt you because it may help? I can fully see why, if the CPO is granted, the Commission decision would be very relevant, although I have to say, having, unlike my two colleagues, gone into this in the non-collective proceedings, but you can see from the non-confidential version the redactions in that decision actually do not relate much to the conduct of the cartel. There are no redactions from the text. The only redactions are footnote references to documents in that section, which is the key section, telling you in very brief terms how it works. Notwithstanding that, I can see that it may be very relevant, if the proceedings go ahead, but as far as this stage is concerned, namely whether they should be authorised, I do struggle to see how it becomes relevant to know which documents on the Commission file were the source of that statement made in the text, which is all you get. We can see what the Commission found, and you have reminded us of it in your CPO application, and the nature of the co-ordination. There will no doubt be argument about what is a binding finding and what is not, but you have all the information there. I am

not sure how it is going to really be relevant to the question of whether there are common issues or not.

MR THOMPSON: Sir, obviously you are at an advantage certainly over me in terms of knowing what is in or not in these things. The reason why I have----

THE PRESIDENT: I do not know about the OFT one, I should say, it is only the Commission's.

MR THOMPSON: The reason I have raised it now is for two - well, I think broadly they come under the category of equality of arms, but it is clear that the respondents are intending to make substantial submissions both in terms of evidence and expert evidence, and one sees that, for example, for annex B to the Daimler skeleton, para.25 of the Iveco skeleton, the MAN skeleton, 11 to 12, Volvo skeleton, 23, and their various applications as interveners where they make a great deal of their expertise about this market and how they are going to put forward evidence about how it operates, presumably to try and cast doubt on the merits of our claim. It does not seem to us that that is appropriate if there are regulatory findings of which they are aware which are available to them but not available to us. It is obviously in the end a matter of balance and proportionality, but it does not seem that there is any great burden on five admitted cartelists disclosing into a confidentiality regime the terms of the decision which they have accepted.

Likewise, in the case of Daimler, we do not see any great burden on them cranking up their photocopier and showing us what the basis for the OFT decision was, which we have seen. It is not like we are asking them to make any investigation, we are simply asking them to disclose the materials on the basis of which they were found to have infringed the competition rules, first of all in the UK and in the EU. We really do not see that is a very onerous requirement, and we see it a matter of proportionate and balanced application. That is far as we put our case.

THE PRESIDENT: I do not think it is a question of burden. I fully accept what you say, it is not a burden upon them at all. Do you have with you a copy of the non-confidential Commission decision?

MR THOMPSON: Yes, it is at tab 1 of our secondary bundle.

THE PRESIDENT: The key part of that decision is sections 3 and 4, starting on p.12, "Description of the conduct", and to some extent section, "Legal assessment", because that includes 4.3 on p.19, restriction of competition and effect on trade. As you can see, nothing in that text is redacted. The footnotes are just a lot of references to documents in the Commission file. It does not tell you any more than the decision itself, to get a confidential version. It is really a question of what is relevant and necessary for this stage of the

proceedings. That is why I struggle to see how that in any way can assist you. If any respondent seeks to say, "Ah, but the statement in para.58 is not supported by the underlying information", then you can quite legitimately say, "Well, you cannot say that if you will not show us the underlying information." The statements are there for you to rely on in the recitals, in the decision and for the purpose of a CPO application I think the Tribunal will assume that the evidence the Commission relied on presumably supported them. That is what happened, as found by the Commission. Whether it is binding or not is another question, but it is certainly there for you to say, "We can make our application on that basis".

MR THOMPSON: Certainly if these confidential items, although it is difficult to see why they are particularly confidential if they are simply references to documents without disclosing the content of them----

THE PRESIDENT: I think some of them may be a reference to a leniency submission, or something.

MR THOMPSON: I think we were particularly thinking about p.9 of the decision where recitals 26 to 29 - this is material which looks very similar to the type of material that we are promised from the respondents in their evidence or expert evidence, and it is given by reference to various unspecified references. We do not know what they are. We do not know whether there is data set out, we do not know whether any of these respondents provided that data, and we will have Dr Lilico available for cross-examination by respondents who may or may not make points which are fair summaries, but on the face of it these three full stops do not give us much confidence that we will be able to respond. For example, there is a long footnote here setting out the position of Daimler.

THE PRESIDENT: As I say, if anyone seeks to say this is not correct, that is not a matter, it seems to me, and I have not discussed it yet with my colleagues, that can be held against you on a CPO application. That is a matter for trial. You are entitled to proceed on the basis that you have, at the very least, a strong arguable case about what the Commission says is correct. Even if it is not binding on us, it must be strongly arguable.

MR THOMPSON: I think the point I was getting at is if what they put in evidence is at least questionably inconsistent with whatever is in these undivulged footnotes, for example, we are in no position to judge the matter.

THE PRESIDENT: Well, we would not be judging the matter. We are not deciding it, we are just looking at whether, on the facts set out by the commission, can you bring a collective case with common issues relating to damages?

MR THOMPSON: That may raise a question about the nature of the respondents' promised material. If, in fact, they produce a lot of irrelevant stuff then I agree it does not really matter.

THE PRESIDENT: They will be dealing with effect on prices no doubt in many ways, but, as I say, the statements here, if those are particular paragraphs you are concerned about, are you content to leave it like this: we do not decide on your application at this point, but when you have received the responses, if you want to renew an application by reference to particular paragraphs in the decision, because you feel that is inconsistent with what is being said and you want to therefore explore, you can renew the application in a very specific way?

MR THOMPSON: Yes, I think that would be fine. I think the same issue probably arises in relation to the OFT decision, although that is a different case. I think we are not so much looking at the redaction as looking at the underlying material that Daimler appears to have put to the OFT at the time.

THE PRESIDENT: I thought you were just asking for disclosure of the unredacted material, or have I misread that?

MR THOMPSON: In relation to the OFT decision we referred to a number of footnotes which referred to specific material originating from Daimler, and, as the Tribunal has said, it is not really particularly burdensome for them. It is just a question of whether they are required to produce it or not. Similar issues arise, but we have referred in our skeleton to a number of specific footnotes, I think 185 to 190.

THE PRESIDENT: Sorry, can you give me the reference?

MR THOMPSON: It is in the authorities bundle, tab 1.

THE PRESIDENT: I should say I have not read this decision.

MR THOMPSON: If one turns to pp.49 to 50 there is descriptive passage about Mercedes truck pricing, commission and bonus structure, and specific reference to a number of responses from Mercedes and various model papers.

THE PRESIDENT: Yes, and what is it you are actually asking for disclosure of?

MR THOMPSON: We are actually asking for disclosure of the matters referred to in the footnotes, which are the margin model paper and the response. The reason why is this is obviously one of the actual respondents to this case, and it is the period within the cartel period, and it is a description of the operation of the UK market. So on one view it is very obviously relevant material, and, for all I know, this may be the very thing that Mr Harris's client is going to put forward as his evidence.

THE PRESIDENT: You see, we will not be deciding these matters on the CPO application. They have explained in the text how the bonus scheme works, so you have seen that; the way they price and, on that basis, you can put your argument saying that this is suitable or there is nothing there that in any way renders a common issue or a collective proceedings for similar issues inappropriate. I do not know if Daimler will seek to say, "This is not correct", but if they do, on any view we will say, "Clearly you have an arguable case that it is correct", and that is all we are concerned about at this stage. We are not going to decide it. The detail they gave of how it all works will be very relevant for your clients and Dr Lilico when they come to work on the actual case. Again, I am not quite clear how it is relevant to the exercise of deciding whether there should or should not be a CPO.

MR THOMPSON: The Tribunal may think this is all premature, but then of course that rather begs the question as to why the meat in this particular sandwich was making so much about how much they would be able to contribute to the CPO hearing. They all said they were going to produce their useful evidence about how this market operates.

THE PRESIDENT: Yes.

MR THOMPSON: If that is going to be so useful then, in my submission, this material would also be useful as a constraint, which is all that is available to us as claimants at this stage, and to ensure a degree of equality of arms between the parties. If the Tribunal says to me, "Well, why do you not worry about this if indeed they produce anything useful by way of expert and factual evidence, and if they do not then you do not worry, and if they do you can come back", then I think I would be content to proceed on that basis.

THE PRESIDENT: Let me just consult with my colleagues.

(The Tribunal conferred)

THE PRESIDENT: We think we are going to leave it so that you can come back after you have seen the responses and make a specific application then. It will be much more focused. You say you are content with that. You will be able to say, "Look at what X has said, we really need to this", or not.

MR THOMPSON: I am content with that and I am very grateful for that indication.

Can I just raise one other disclosure application, which I think was implicitly dealt with before the short adjournment, which is, as I think I indicated, the only RHA material we have seen is the redacted material appended to Mr Bronfentrinker's witness statement, but I think it is implicit in what the Tribunal said this morning that in so far as more is disclosed it should be disclosed to us as well as to everybody else, and, subject to the Tribunal's

direction, there should now be exchange of the CPO forms between the parties, but if I have misunderstood that then we do maintain that.

THE PRESIDENT: No, you have understand it correctly.

MR THOMPSON: I am grateful.

THE PRESIDENT: That is the position.

MR HARRIS: Sir, may I just make a few remarks about this now. We have essentially a series of withdrawn applications. They will be short because I----

THE PRESIDENT: The first is not pursued, and the next two are, as it were, adjourned with liberty to restore, if so advised.

MR HARRIS: Thank you, and I will keep this very brief. As regards the not pursued JSA application, can I just take you to one letter which otherwise you might not see, because what you said, Sir, on behalf of the Tribunal reflects exactly what was said in the UKTC supplemental bundle in a letter from my solicitors at p.250 of the bundle.

THE PRESIDENT: I am sure it is reassuring to me to know that your solicitors have said it, but is it relevant?

MR HARRIS: It is relevant for this reason: as we understand it, this application is not pursued because it is not appropriate to have been made now, and there have been serious costs implications of that now withdrawn application.

THE PRESIDENT: Are you making an application for costs?

MR HARRIS: Sir, what at least I am saying is, if that is not something the Tribunal wishes to deal with in terms now, then those costs must be specifically reserved. To give you one example, the article to which my learned friend Mr Thompson referred is a 2009 Duke Law Journal article, which dwarfs the length of even my own skeleton argument! I had the rather dubious pleasure, and speaking simply for myself, of reading that article on a train on Sunday. On my side of the fence, and I certainly know the same goes for Iveco, we have had to gear up to deal with an application, including by reference to that entire article, which we say is fundamentally not on point, and that is against the background of all of us having written some letters saying this is wrong and not appropriate at this juncture for the very reasons that the Tribunal then said to Mr Thompson.

THE PRESIDENT: Yes.

MR HARRIS: Can I put it like that: as a minimum, we want those costs to be the subject of a specific determination, and if that is not going to be done today can they be reserved? It could be dealt with on paper, I accept that.

THE PRESIDENT: Well, you are asking for your costs is what you are saying - yes, of the first matter and the costs incurred while you are on the train of reading the Duke Law Journal!

MR HARRIS: That is right, and rather a long time for the 90 odd page article, and then it did not end there because one has had to follow up with US jurisprudence, because it is essentially a US article. Then it said that all manner of analogies with this jurisdiction and that jurisdiction, and there is a price tag associated with that. We say it was all misconceived and pointed out, including at this letter at p.250. So, essentially, yes, that is a costs application.

It leads on to another practical point, which is as you will----

THE PRESIDENT: What do we do about the costs of Mr Thompson reading your overlong skeleton argument?

MR HARRIS: Well, with great respect, Sir, we do not accept overlong, including for the reason that you will have appreciated that, because we have instructed specialist costs counsel, our skeleton dealt in depth with the application which effectively has now succeeded, given the way the Tribunal has dealt with it, about disclosure to us of RHA funding information, etc, etc, and it was because we dealt with - I accept at length, but because we dealt with it, it did not have to be dealt with by any of the other respondents, so their skeletons were correspondingly shorter. With respect, we would say that that is a fine example of co-operating and non-duplication.

Sir, I do take the point that some of the other aspects may be overlong. We have taken that lesson on board, but it would be a little unfair - indeed, we should be to some extent commended for having taken one issue off the plate of everybody else so you did not have to read it elsewhere.

Be that as it may, these are specific points associated with the JSA disclosure applications not pursued, but there is another practical point, which may I just address you on briefly, which is that you will have seen that all the OEMs have essentially complained about the eleventh hour nature of the application and its lack of particularisation, and it is more the latter point that I just want to draw to the Tribunal's attention. If this application at any stage is going to be reopened - that is to say for the Commission decision or against my client the OFT decision - then, with great respect we say that it cannot be done like it has been done for today, absent an application and absent evidence, absent proper focus and with wholesale non-reference to the relevant test in the guide.

Sir, on my third practical point, can I just invite your attention back, and with great respect to Mr Thompson, to 6.28 of the guide. Mr Thompson has been addressing these matters as

if it is a question of relevance alone. Actually, that is not what the guide says. 6.28 of the guide - you, helpfully, Sir, reminded Mr Thompson and his team that the Tribunal does not encourage requests for disclosure as part of the application for a CPO at all, but what it goes on to say is that there has to be a specific and limited application for disclosure or the supply of information, where that is necessary in order to determine the claims at the CPO stage, and I paraphrase. What we have consistently said in correspondence, and then in the skeleton, is that there has been no attempt whatsoever to address at any stage in this non-application, just the reference in the skeleton argument and in certain cases just the draft order, that test of "necessary" for the CPO issues - "necessary" - and what we say is, given that, with great respect, we say lamentable failure and at the eleventh hour, it will not be good enough for this to be revisited on the basis of, for instance, a letter, "we reignite our application". We will say, what application, by reference to what evidence and how does that address questions of necessity and relevance?

THE PRESIDENT: Hang on, you have complained that this application was drawn to your attention quite late, and I saw a date somewhere of 4 December - is that right?

MR HARRIS: Yes, that is right.

THE PRESIDENT: So we are talking about costs between 4 December and today.

MR HARRIS: That is as regards the Commission decision and the OFT decision.

THE PRESIDENT: I see, not the first one?

MR HARRIS: Not the first one.

THE PRESIDENT: Yes, so you are saying that you should have your costs of dealing with the application. In so far as the applications for the second and third item have been stood out, it seems to me it is a matter which only arose on 4 December, and should be dealt with next time if they are then pursued or, if they are not pursued, when that becomes clear. So it is really the first point----

MR HARRIS: Yes, Sir, the way I put it as regards the second issue, which is, if they are to be revisited at any stage, can the Tribunal make it clear that that needs to be done properly, with a proper application, with proper evidence focusing on the right test, because, *inter alia*, it has given rise to greater costs on our part in dealing with it, albeit in the days since it first arose, because we have been trying to guess what the application is, and that is not right.

THE PRESIDENT: Yes, okay. You have made your point. Mr Thompson, what Mr Harris is seeking is the costs of the application for the judgment settlement agreement, which has

been withdrawn or is not being pursued, which he says was inappropriate. What do you want to say about that?

MR THOMPSON: Well, I give him good marks for aggression, but otherwise it seems to be a general waste of time. There have been applications made on both sides, some of which have been successful and some of which unsuccessful, but we have not been hopping up and down claiming costs in relation to them. In particular, the point that Mr Harris sought to justify, in my submission, there is no justification at all for him to come before the Tribunal with five counsel for basically a directions hearing, albeit in a major case, and where his material is obviously duplicative in that DAF in particular addressed the issue of confidentiality in a good deal more proportionate way than Mr Harris's client, and it appears that that would have been entirely successful without the welcome but completely unnecessary attendance of Mr Bacon. So if we are going to get into this sort of pointless application, then obviously things can be said on both sides.

So far as this actual case goes, what he is talking about is correspondence and an academic article, and Mr Harris claims to have spent a long time reading it on the train. If one was going to go down to that degree of minutiae about the length of documents that were appended to different people's skeletons as authority, and how long it took to read them, I think that would be a complete waste of the Tribunal's time and, in my submission, there is no basis for any particular order to be made in relation to this particular application.

I should make it clear that we do regard this as a serious issue at the level of policy, which is very clearly illustrated by the present case where you have admitted cartelists defending a very substantial action for damages, and the very policy issues that Mr Leslie identifies in relation to the US do arise in this jurisdiction and could potentially be highly relevant. So I do not make any apology for raising the issue, although I accept that at this stage it is not necessary to make a ruling on it.

So my short point is that, however aggressive, it was not a necessary thing for Mr Harris to engage in a costs dispute in the middle of this relatively complicated hearing on issues of substance.

THE PRESIDENT: Yes, thank you. Do you want to respond, Mr Harris?

MR HARRIS: Sir, as I understand it, that is simply, "I might have a counter-application for costs". It does not respond, with respect, to the substance of the application that I have made.

THE PRESIDENT: Yes.

MR HARRIS: It is, of course, a very significant issue of principle, and it was dealt with very seriously by Daimler, and it, of course, is not limited to me, and there was a great deal more that went on behind the scenes.

Sir, whilst that arises for the Tribunal, there are two more points arising out of Mr Thompson's submissions, which I would just like to put a quick marker down about. It is not correct that, either as regards the Commission decision or as regards the OFT decision against only my own client, that is a photocopying exercise. There is a serious proportionality question here.

So, to take them very briefly in order, what is sought is disclosure of the Commission decision that was made available under confidential Commission terms to my client, and a separate decision, a different Commission decision, made available to Ms Bacon's client, who is not the same as mine, none of which have been the subject of a leniency review or a Pergan review or, more probably appositely of all, a confidentiality review, or a relevance review for the terms of the UKTC application. This is all against the background of my learned friend Mr Thompson's clients knowing very well that there is already a *Royal Mail* version of the Commission decision that has been gone through for those purposes with the input of all of the OEMs and thereafter there have been other inputs, as you know, in the other individual actions.

Sir, the application that was presented, but has now been adjourned, was for a different decision, and that does involve quite a considerable amount of work and as the Tribunal's judgment yesterday, para.15 on the translations and confidentiality ring order, makes very clear that in those circumstances it is obligatory to invite the Commission to have regard to what is sought to be disclosed. None of that has been dealt with at all, and it is a burdensome exercise.

Similar considerations, they are not identical, I accept, relate to the OFT decision because we would have to go - this applies only, of course, to my client - to both that decision and the documents that are sought and assess at least their relevance to the UKTC application and questions of confidentiality bearing in mind that that is also a regulator's decision, and there are important public interest considerations regarding the disclosure of that, which was made available to us on a confidential basis, and third party confidentiality. At the moment, I do not know, but it is not the case emphatically that I would simply be, if this application were ever renewed and then granted, turning on a photocopier and putting something through the top loader.

THE PRESIDENT: Yes.

MR HARRIS: Sir, I just want to put down that marker.

THE PRESIDENT: No, I understand.

MR HARRIS: There were plenty of other points if I had been opposing any actual application. I am going to skip over all of them, but just deal with one last point, which is Mr Thompson's double refrain that, well, the OEMs have said they are going to put in some factual information. Of course, what the Tribunal knows, but Mr Thompson has not focused upon, is that under the *Pro-Sys* test at the CPO hearing this Tribunal will have to assess both his methodology and that of Mr Flynn, including on the basis whether, and I quote, "it is grounded in fact". That is, of course, part of the Supreme Court analysis in *Pro-Sys* in the Supreme Court of Canada. That is why, of course, the OEMs will be putting in non-duplicative evidence of fact, amongst other things.

THE PRESIDENT: Yes.

MR HARRIS: I just wanted to make that point clear.

THE PRESIDENT: Yes, thank you.

(The Tribunal conferred)

THE PRESIDENT: We refuse the application for costs of the disclosure sought of judgment settlement agreements and tolling agreements. We think this is a long CMC with a whole host of matters and issues which engage different parties in different ways. It is not appropriate to start making specific narrow orders for costs on particular issues that have not been successful or, more particularly in this case, as very sensibly counsel for UKTC has not pursued the application. It might be different if we had spent two hours of extensive argument on that matter but in the way it has been dealt with. Of course we recognise it will have caused some work for the respondent's counsel, but that is in the nature of complex cases that various matters will arise that cause work on particular aspects. We do not think it is appropriate to start making narrow targeted orders for costs all the time. That would simply provoke a proliferation of particular applications. So we will make no special order.

On the other matter, Mr Thompson, you have heard what has been said. If you do wish, after the responses have been served, to make an application for anything out of the Commission decision or the OFT decision, whether it is done by letter or by an application notice, it is important that you specify specifically what matters are said to be relevant and why to the CPO hearing as opposed to the substantive case which, of course, will involve much wider disclosure if it proceeds.

MR THOMPSON: Yes, indeed, and to the extent I have caused inconvenience to the Tribunal or to the other parties, we will bear that matter very much in mind, although I will endeavour to make an application short and proportionate to the issue.

THE PRESIDENT: Yes, thank you. If there are no other matters that people have to raise, and we may have overlooked something, we would then turn to timetabling next steps with a view to thinking ahead to the substantive hearing of the two applications. If we, as it were, work backwards, but bearing in mind all that has to be done, we do think that a hearing of four to five days is realistic, certainly viewing matters at this stage. There are two substantive applications, there is a significant number of respondents and interested parties. We do not in this Tribunal, unlike the High Court, include in the listing pre-reading. I, of course, recognise that we have to do pre-reading but it is not part of our listing, so that would be a hearing of four to five days. We think we should, therefore, allow a week. We also think it sensible, as several of the parties have suggested, that there should be a pre-trial review, in effect, or pre-hearing review, at some point when all the written material has been submitted when we can take stock of how that hearing should be timetabled and at that point we will know whether we need four days or five days, but we should block out a week, in other words.

MS BACON: Sir, can I just raise one thing on that pre-hearing review? We obviously do not seek to dissuade you from putting something in the diary. We were not sure whether it would inevitably be necessary to have that hearing. We are very conscious of the expense of getting all of the parties together. If it were the case that most matters could be resolved in correspondence, would it be possible for us to then suggest a vacation of that hearing or to decide outstanding matters on the papers?

THE PRESIDENT: Absolutely.

MS BACON: Yes, I am grateful.

THE PRESIDENT: I think, simply because of the difficulties of listing and the number of, I am sure, very busy counsel that have to find a date, it is better to get a date and then vacate it, which I am always happy to do, rather than scrabble to find a date at a few weeks' notice. We know, as a result of what we heard after the lunch adjournment, that the CFA in the UKTC claim will come on 25 January, which the other parties then need time to consider, and we are also going to have a hearing in January potentially on redactions of the RHA claim. That means that time for responses really has to be a reasonable time after that. Looking at all else that needs to be done, including then the statements by the objectors and replies, we think that a hearing in early June is reasonable, and we have to say that, quite

understandably, both applicants have taken some time to put their application together. I say "understandably", because these are complex applications with complex funding materials behind them, and more funding material still to come, but we do not think a delay, if it can be described as delay, but in any event the additional time between March, as has been suggested, and early June should cause any prejudice to anyone.

Again, it may be easiest to fix a date through the usual channels outside of court. We would only say that, from the Tribunal's perspective, the first full week in June, 3 to 7 June, is a week that all the Tribunal members can do. So if that is a week that is available to everyone's counsel, or at least leading counsel - it may be that we cannot accommodate every single counsel, there has to be some give and take - that is a week that we would suggest, and perhaps you would go away and consider if you are available that week. If not, if may have to be a bit later than that because there are difficulties in May.

On that basis, working back from that, if one had responses then it could indeed be some time in March, with the statements of the objectors to come by 14 or 21 days after that, and replies a period after that. It is a question of just how one wants to fit that in. I would have thought responses should be early March, or even late February, to get everything in.

MS BACON: Sir, on the basis of the timetable that you have just sketched out, I was going to submit, and I would maintain, that we would like our suggested dates, because our suggested dates work to exactly that timetable.

THE PRESIDENT: Yes. They are in your skeleton, are they not?

MS BACON: Yes, they are at para.22 of our skeleton argument, and, as you can see, those led precisely to the----

THE PRESIDENT: Give us a moment to turn it up. That is Iveco skeleton, p.6.

MS BACON: Page 6, yes. As you will see from (g), we have suggested that the hearing should take place on the first available date after 30 May, which is essentially the date that you have just mentioned, and our timetable was designed to a hearing around that date. As you will be aware, we are the only respondent to both applications. We have got a lot to do, including responding to two lots of new funding documents.

THE PRESIDENT: Yes. I am not sure, (f) under that paragraph----

MS BACON: That might be subsumed with (d), because----

THE PRESIDENT: (d), yes, I think so. I do not think we need (f), but otherwise - our only concern about that timetable, we would like to curtail it a little bit so that there is time for a----

MS BACON: For a pre-trial review.

THE PRESIDENT: Exactly, in May.

MS BACON: I think you have suggested that the objectors' submissions and evidence could be filed 14 or 21 days after the defendants. If we work from 29 March, 14 days would take us to 12 April----

MR HOSKINS: I think, before I get squeezed, we are going to ask for 21 - it is give and take, if you give us more time we are less likely to have to duplicate, we will do a better job if we have 21.

THE PRESIDENT: Yes.

MS BACON: Yes, of course Mr Hoskins' clients are not in the position of being the respondents to both of those applications.

THE PRESIDENT: I see that, but, Ms Bacon, you have had them, and you have been working on them for some time. I appreciate there is some more to come on the funding side, but that is only one part of it. 22 March seems to me reasonable for your responses. That is a considerable time away.

MS BACON: There is a concern behind me because at the moment we do not actually know the nature of the beast that we are faced with by UKTC. We are going to get that clarity in January.

THE PRESIDENT: Well, you do not know the funding agreement, but you know the nature of the common issues and everything.

MS BACON: At the moment we do not know if it is going to be an opt-out.

THE PRESIDENT: We are told that it is.

MS BACON: We can live with 22 March.

THE PRESIDENT: Yes, I would have thought you could. Then 12 April, and then for replies by the applicants, if you get 12 April, could you not do 28 April for replies, Mr Flynn? When is Easter?

MR FLYNN: You are asking yourself the question I was asking too.

THE PRESIDENT: Yes, I was trying to check when Easter is. Easter is----

MR HOSKINS: We think it is Sunday, 21 April, Sir.

THE PRESIDENT: Yes, it is. 21 April is Easter.

MR FLYNN: That time would cut across Easter, Sir. The reply burden, the extent of it will depend very much on how much we are facing by way of expert report in the responses and the statements from objectors. That is sounding very tight, Sir, in circumstances where - and I will be told if I am wrong - no respondent has made any specific application in respect of numbers or fields or experts. They simply say they want to file expert evidence with the

commendable exception of Mr Hoskins, who does not. So we could have a vast amount to read and respond to, and all of that, of course, would fall on our single expert. That is a concern.

THE PRESIDENT: It will not be, as in a trial, a sort of battle of experts in terms of which methodology is correct. The only question is whether - as reference has been made to the *Pro-Sys* case, whether the methodology you have put forward is one that appears workable for the purposes of proceedings.

MR FLYNN: Indeed, Sir, but we are likely to face----

THE PRESIDENT: So it is less of a burden than it would be at trial. If we said 3 May, which is a Friday, for your replies to the 12 April, that gives you quite a bit of time.

MR FLYNN: That is plainly an improvement, thank you.

THE PRESIDENT: Then we would be able to schedule something in the first part of May. I think that would work. We have got those dates then, 22 March, working off Ms Bacon's skeleton, para.22 - responses 22 March, the objectors' submissions and evidence by 12 April, replies from the applicants and any responsive evidence by 3 May, the hearing on the first available date after 3 June, on or after, with five days.

As regards the advertisement, it is a little difficult to determine that before we have resolved the litigation funding arrangement, and perhaps less so the disclosure, because, as I understand it, the RHA is making those documents available, but at its solicitors' offices - is that right, for potential claimants?

MR FLYNN: I believe that is right, Sir, yes, through us.

THE PRESIDENT: Yes, so a claimant can go and look at them. Shall we perhaps look at the proposed advertisement, which is commendably agreed between you?

MR FLYNN: Yes. I was simply going to say, I think you have mentioned possibly a PTR ahead of the main hearing, which I do not think came into your----

THE PRESIDENT: I said that it will be in mid-May.

MR FLYNN: That is fine, might it be sensible to pencil one in through the usual channels?

THE PRESIDENT: Yes, it would, but I am not going to specify a date, to be agreed. That is to be pencilled in with the potential of vacating it; and secondly, a hearing in January before the Chairman alone to deal with your documents, also to be fixed through the usual channels. You said you are supplying them on Friday, so it can be in early January, the second week or whatever.

MR HARRIS: Sir, just before we leave the timetable, may I make four short points?

THE PRESIDENT: Sure.

MR HARRIS: The first one is item (c) of Ms Bacon, 22(c), the proposed defendants to file their responses to the CPO applications now by 22 March: would I be right in respectfully assuming that it would be acceptable for Daimler to file a joint document dealing with the UKTC where it is a named respondent as well as any non-duplicative submissions it has to make as regards RHA, notwithstanding that there is a period of time for anyone else who is a non-defendant to RHA or the other one to make submissions? The reason for that is because we have given this quite some thought, and we think it will actually be more cost-effective for us to do it in one document rather than to split bits out and put it into a separate document, but we will obviously only do that having liaised in advance of the deadline with the other OEMs.

THE PRESIDENT: Yes, that seems very sensible.

MR HARRIS: I am grateful. The second short point is, as we had understood 22(f), it was in there because there were potentially other interested parties, which is why is I use that phrase "other interested parties", who are not OEMs. We had understood that there was a short gap between all the OEMs with all their resource putting in their responses and objections, and what have you, and potentially a class member or somebody who is not a class member who would rather like to get - or whatever, somebody else. We simply draw to the Tribunal's attention that that is now conflated, and it would mean that somebody who is a completely non - nobody here - would not have the advantage of, for example, seeing what the OEMs have done before deciding whether or not they have something else to say.

THE PRESIDENT: Well, they would have until 12 April.

MR HARRIS: That is my point, they would - oh, I see, so it would just be a gap between 22 March and 12 April?

THE PRESIDENT: Correct.

MR HARRIS: I am grateful. In that case----

THE PRESIDENT: It is not obviously the proposed interveners, because they are not interveners, it is objections from anybody seeking to object, which includes the OEMs here, but may, as you point out, be someone we do not know.

MR HARRIS: I am very grateful. The third point is, I think all the OEMs have taken the position that the five days for the hearing is on the basis that I think you have just adverted to, which is it is not a battle of the experts. Part of our understanding in that regard is that although there may be various types of evidence, the only expert who is going to be potentially examined live is, of course, the applicants' expert, because it is an applicant focused process. Provided that is a common and shared understanding, that seems like a very

sensible time estimate. The same would go for any factual evidence that would need to be put in, for example, by the OEMs or, for that matter, the proposed claimants. We were not anticipating that any part of the hearing would involve live evidence, let alone cross-examination of witnesses of fact, notwithstanding that facts need to be before the Tribunal.

THE PRESIDENT: That has been the approach hitherto. One has to always caution that by saying, as has been pointed out, this is still a novel jurisdiction where we are, as it were, learning from case to case. If anything emerges where someone says, "I would really like to ask questions of that witness", I am not saying, no, they cannot. They may have an uphill battle to persuade the Tribunal that that is appropriate, but that is something we would look at at the pre-hearing review. We just do not know how this case will pan out. Each of these cases is very different, and certainly this case is wholly different from the two previous ones, each of which was different from the other, not just in the way that every case is different, as judges always say, but there is something unique about these proceedings so far when we have only had two. I do not say it is impossible, but I say it is extremely unlikely and certainly I would not expect that the respondents' experts would, as it were, have to go in the witness box and be cross-examined. That would seem to me inappropriate.

MR HARRIS: Sir, I am grateful. Perhaps we can leave it on the basis that there is a shared understanding that were there to be an application, for example, to have some other cross-examination, then that would be treated on its merits at the time and it might have an implication on the time estimate.

THE PRESIDENT: It could mean that we have to revisit it, but I would hope very much that five days is sufficient, and we are not really concerned to resolve factual disputes in a major way at a CPO hearing.

MR HARRIS: That takes me to the last point, very short. I anticipate there may be this PTR, we are going to get a date in the diary. Am I right in thinking that one of the matters that might be addressed at the PTR is whether funding issues that are relatively discrete might be at a certain point of hearing so as to obviate the need for attendance of additional counsel for the entire hearing?

THE PRESIDENT: Absolutely.

MR HARRIS: As per *Merricks*.

THE PRESIDENT: And similarly, attendance of experts, if there are economists, may not be needed at the funding stage.

MR HARRIS: I am very grateful. Thank you.

THE PRESIDENT: Can we then turn - sorry, Mr Jowell?

MR JOWELL: One further point on the timetable, we need a date by which RHA is to provide the information that the Tribunal ordered this morning, possibly two dates.

THE PRESIDENT: I thought we had - the information on the breakdown?

MR JOWELL: On the breakdown.

THE PRESIDENT: You are quite right, yes.

MR JOWELL: We would propose 1 March being about three weeks before the defendants are to put in their responses, and then perhaps an update by the time of the PTR. That would seem sensible.

THE PRESIDENT: I think it might be sensible to tie it in with the advertisement. Let us look at the dates when the advertisement is going to go out, because that might attract responses. You are content to wait until 1 March, which seems sensible, and that gives you plenty of time, Mr Flynn, to do the information you have got.

Yes, thank you, Mr Jowell, I had overlooked that.

MR JOWELL: Thank you.

THE PRESIDENT: Can we then turn to the advertisement, which is a joint product. We have got it in various places. It is appended to both the UKTC's skeleton argument and RHA skeleton argument. Mr Thompson, have you put in two different versions?

MR THOMPSON: Well, I think it was agreed between us that, depending on whose notice it was, it would simply be who goes first.

THE PRESIDENT: I see.

MR THOMPSON: They are effectively the same, as far as I can see. For example, the title of the first one, Road Haulage Association comes first, in the title of the second one we come first, but I do not think that is a hugely contentious aspect.

THE PRESIDENT: Oh, I see, that is it. Two matters: one is under the fourth bullet, a very small point, the major difference between the two CPO applications is that, if we take it on the first one attached to your skeleton----

MR THOMPSON: I have got a number 252 at the bottom.

THE PRESIDENT: Yes, 252 which actually refers to the RHA claim first, the major difference between the two is that the RHA, I think it should say, "RHA's collective claim would require any claimant (inaudible) opting in by contrast would automatically unless they choose to opt-out", but I think there should be that same addition of "collective" comes on the one which is 254 in the third line, so we would have the UKTC's collective claim and the RHA's collective claim, but I think there should be another paragraph saying that one matter to be considered at the hearing of the CPO applications is whether - I note in the next

paragraph - the UKTC's collective claim should proceed only on an opt-in basis. That bullet, you can put in the one below, determine whether either or both. It is just something drawing the reader's attention to the possibility, as you have indeed put it in your application, that it might, because otherwise for the reader it puts it as the UKTC's claim is either opt-out or nothing, and that is actually not the position, it could be opt-in.

MR THOMPSON: Yes, I am grateful for that correction.

THE PRESIDENT: That needs a little bit of drafting. We have got the dates, or we will have, for the hearings over the next few days. You have set out, both applicants, how it is going to be publicised. Otherwise, the notice seems to us to be fine. The only question is by when it should be produced, but the details on your website, I do not know what will be put on the website, but if it is going to include the litigation funding agreement, or access to the litigation funding agreement, obviously this can only come out after you have produced the new litigation funding agreement. So that rather affects the timing. It looks like it is late January, does it not?

MR THOMPSON: Yes, if we are going to produce our evidence on 25 January, then maybe we should aim for 1 February - would that be a suitable date?

THE PRESIDENT: Let us just think. Yes, given the time for anyone to object is 12 April, I think 1 February gives them ample time.

MR THOMPSON: Yes. That would be four months before the hearing and would give them a clear two months.

THE PRESIDENT: 1 February.

MR THOMPSON: So we will undertake to re-draft that and send through to the Tribunal as soon as possible some proposed wording agreed with Mr Flynn, if that is acceptable.

THE PRESIDENT: Yes.

MR THOMPSON: I should add that, perhaps not particularly originally, our website I think is going to be called uktrucksclaim.co.uk. I think it was given some other name in Mr Kaye's witness statement, but I think that is perhaps not surprising now.

THE PRESIDENT: I do not think anyone will quarrel with that claim. On that basis, Mr Jowell, would it be sensible then for the figures for breakdown, that you are given them on 8 March, rather than 1 March? It will give you a more up to date figure.

MR JOWELL: I think that is right. We could do it that way or we could also put in a date for a further update.

THE PRESIDENT: Well----

MR JOWELL: The Tribunal is not attracted to that.

THE PRESIDENT: No, it is not going to be a precise figure because it is clearly going to be a moving feast. It will give you some general indication and it will capture an initial response to the advertisement.

MR JOWELL: We might want to revisit that at the PTR if it turns out that there has been a flood of claims between 8 March and the PTR.

THE PRESIDENT: Yes, you will be free to do that.

MR HARRIS: Sir, can I just say on the order, I think junior counsel in the room have had some difficulty in drawing up the order from the last hearing. Can I just make it clear, can the order reflect that if Mr Flynn's client is able to provide the date split pre, I think 11 January 2009, then he does so, or that there be best endeavours to do so, just so that we are clear what goes into the order after today's hearing? If he cannot do it, so be it, but I would not want it to be left in a vacuum.

THE PRESIDENT: I think we said that we will not order, but he has heard the request, and if they are able to do it, they may do, but we are not going to make an order and get into argument of what is "best endeavours".

MS BACON: Sir, I hesitate to interrupt, I just did not want to move on from that point without making a few very small comments on the notice.

THE PRESIDENT: Yes.

MS BACON: They are points of detail, but I just thought I should cover them all.

THE PRESIDENT: Yes.

MS BACON: On looking at the version on p.252, the first hollow bullet----

THE PRESIDENT: The first hollow bullet, yes, the proposed class?

MS BACON: The first hollow bullet, the proposed class, yes, I am not sure that that sentence is quite accurate, especially when juxtaposed with the first sentence of the second hollow bullet, because actually there are a number of exclusions from UKTC's claims, which make it closer to the scope of RHA's claim than those two sentences might suggest. I am not going to suggest alternative wording on my feet, but I just would like to put down a marker that that is not a comprehensive description of the class.

THE PRESIDENT: This is the UKTC class description?

MS BACON: Yes, as in it does not reflect the fact that the class is drawn rather more narrowly than that because of the definition of what is included and also the definition of what is excluded. I just raise that so that perhaps when Mr Thompson is thinking about the re-drafting of the solid bullet underneath that, he can give some thought to the definition of the UKTC class in that for completeness.

The other small point, and it is a consistency point, you will see from the last bullet on the page that it says that the hearing is set to determine whether either or both of the proposed collective claims should go ahead. I think, for consistency, the bullet over the page should reflect that, and should say, "Any person with sufficient interest can provide written objections to either or both of the CPO applications", just to make clear that they do not stand or fall together.

THE PRESIDENT: Yes, to either or both.

MS BACON: Those are just points of detail, but I thought it right to raise now rather than in a couple of months' time.

THE PRESIDENT: Yes.

MS BACON: While I am on my feet, has the Tribunal in mind setting some dates for skeleton arguments?

THE PRESIDENT: For?

MS BACON: For the main hearing?

THE PRESIDENT: Yes, it certainly will, and for lodging bundles, and so on, but that is something we would deal with at the pre-hearing review.

MS BACON: That is why I raise it now, because if we have a pre-hearing review in May, and we have the start date of a hearing on 3 June, there may not be much clear water between the date of the pre-hearing review and the date on which skeleton arguments are due. There have been some suggestions that skeleton arguments should be exchanged by all parties two weeks before the hearing. My suggestion was going to be, and perhaps we should deal with it now so we all know what we are working to, that we should have sequential exchange given the length of the hearing and the number of parties involved, and that we should have sequential exchange with the applicants going first two weeks before the hearing, as they have suggested, followed then by all of the OEMs together one week before the hearing. That would necessarily work back from the hearing date.

If the hearing date is the week of 3 June, that would mean skeleton arguments from the applicants on the 20th and the OEMs on the 27th, which would be the first day of the vacation, the Whit vacation. If, obviously, the hearing were later in June then that would be affected. As you will see from that, the pre-trial review would come too hard on that for it to be workable for the parties not to know the date until then.

THE PRESIDENT: Mr Flynn?

MR FLYNN: Sir, we propose that they should be exchanged and the numbers of parties involved, it seems to me is actually a very good reason why they should be exchanged, and not we

should get five or six, or however many it may be, a week before the hearing. It seems to us that it is better that the parties state their position in good time before the hearing and we can prepare on that basis.

THE PRESIDENT: Yes. Yes, Mr Thompson?

MR THOMPSON: Yes, just on Ms Bacon's helpful drafting suggestions, I think it may be that on the first hollow bullet, all we can probably put is something like "subject to limited exclusions", and then refer people to the detail, because I think otherwise it will become pretty----

THE PRESIDENT: Yes, Ms Bacon is nodding at that.

MR THOMPSON: Yes, and I think, given the suggestion that the Tribunal has already made, it is probably appropriate to add at the bottom, "whether either or both can go ahead and, if so, on what basis", because presumably that would be implicit.

So far as timing goes for skeletons, I am getting slightly lost on timing, but I think we have still got the applicants' replies and responsive evidence due on 10 May.

THE PRESIDENT: I think one question is should there be sequential or mutual exchange of skeletons? Ms Bacon has proposed sequential and Mr Flynn says they should be mutual.

MR THOMPSON: Yes. I was actually addressing a slightly more radical question as to if our replies and our skeletons are getting very close together, whether it would be more sensible for us to just put in one or the other, and this timetable would be for the evidence but for us just to have one round of submissions, especially if ours was going to be ahead of everybody else's. One sees it sometimes in Tribunal cases, you put in a hefty reply and a fortnight later you have to put in a skeleton and it is a bit of a waste of paper, but I do not know whether the Tribunal thinks we need two rounds of reply and a skeleton and, if not, which it would prefer. That is an alternative possibility, but we will have quite a number of pleadings flying in May if we produce a reply and then two weeks later produce a skeleton.

MR HOSKINS: Sir, there is a potential problem with that, depending on whether you go sequential or exchange, because we need to know what UKTC is actually saying on the back of its evidence. It is not enough just to get the evidence cold without actually having what----

THE PRESIDENT: Yes, I think----

MR HOSKINS: I am not against, but just----

MR THOMPSON: I agree. I think, if we were going to go that way then it would be a sequential exchange because we would be putting our case and then they would be responding to it.

THE PRESIDENT: Just give us a moment.

(The Tribunal conferred)

THE PRESIDENT: Our concern, Mr Thompson, is that is fine in terms of replies, but if it is really likely on an application of this sort that there will be responsive evidence as opposed to just submission, as it were, then that is something a bit different from a skeleton. If you are happy to put that in that much earlier, that is fine. That is my only hesitation. Otherwise, we are quite attracted by the idea that the reply should be the submission as well, and we do not, as you say, get yet another round of paper. You could----

MR THOMPSON: It may be that we should undertake to exercise restraint in relation to our reply and just go for Mr Flynn's suggestion of mutual exchange once all the evidence is in on a date to be agreed. I do not know whether the Tribunal would like it more than a week in advance, but we are running out of time if we are going to have a PTR and a month between the reply and the - we are not going to have much time to get the skeletons in.

THE PRESIDENT: I think for skeletons, part of the difficulty is we do not actually know when the hearing will be, but if it were to be on 3 June then I think to have skeletons by 24 May would be sufficient. I do not see any particular reason why they should be sequential in this case. The 24 May could be a date for skeletons, or it can be postponed if 3 June is not actually the hearing - in other words, about ten days before the hearing for skeletons.

MR THOMPSON: Yes, I am grateful. It really is a matter for Mr Hoskins, but I think, as things stand, he is the only person here who is not actually a party, so will he be serving his skeleton at the same time as everybody else? Likewise, I think he is the only----

THE PRESIDENT: He is not a respondent to either application.

MR THOMPSON: Yes, so I think he is the only one who is not dealing with the - if Mr Harris's approach is adopted, presumably that will apply also to Mr Williams and to Mr Jowell in terms of their substantive responses, if I understand it - is that right?

MR WILLIAMS: Sir, as I understood it, that was an option for Daimler to put in one round of evidence, but you were not directing everyone to approach the matter in that way?

THE PRESIDENT: I was not ordering Daimler to do that, but they can do that and you can do the same. It is not a requirement. I would have thought the sensible thing is it is the same date for everybody's skeletons, and we do not start dividing it up. It becomes too much micro-management.

MR THOMPSON: Yes, I have no objection to that.

THE PRESIDENT: If we say ten days before the hearing on the basis that it is a five day hearing, so it is going to start on a Monday, we hope, either 3 June or potentially later, so it will be the Friday of two weeks before that.

MR THOMPSON: So we get a clear week?

THE PRESIDENT: So we have a completely clear week.

MR HARRIS: Sir, may I draw a provision of the *Merricks'* order just to your attention so that you know how it was dealt with? Under the heading "Publicity" at para.8(a) of the *Merricks'* order post the *Merricks* CMC there was a debate about the publication of the notice. The Tribunal ordered that the publicity notice be amended so as to "make known the categories of persons that are excluded from the definition of the proposed class" in accordance with a previous provision. The reason for that was there was a debate about how it was important that people who were really only ever going to look at the notice would appreciate that there were material exclusions from the category, as opposed to they could look at it themselves when it was thought, well, really, they are not going to do that. I think the debate was really - the claimant was saying they can go and look it up, and the Tribunal was saying, no, it should be set out, and it was the latter that prevailed.

I have no particular forceful or other submissions to make about it, but I thought it right to draw it to your attention.

THE PRESIDENT: Thank you. Just looking at the exclusions, if we look at them separately, Mr Thompson, your exclusions are - you have got the definition of the class and the exclusions are where?

MR HARRIS: They are in his draft order, my Lord, they are quite material.

THE PRESIDENT: In the draft order, thank you.

MR THOMPSON: It is either in the draft order or in the - it is in the proceedings which is at tab 10.

MR HARRIS: It is tab 10 of the UKTC bundle on p.204, there is a long series of exclusions.

THE PRESIDENT: Yes, I see you have excluded the members of the Tribunal Panel, although I am not sure----

MR THOMPSON: I know some judges are enthusiastic about railways but I am not aware that there are many truckers among the judiciary!

THE PRESIDENT: I am not sure my colleagues and I have purchased many trucks! I think the only significant exclusions are the first few. It may be that the bullet, looking back on p.252, the first hollow bullet, should say "purchased or leased other than by way of hire purchase or by operating lease". It may be that there should be an additional hollow bullet, because I think I am right in saying - Mr Flynn will correct me if I am wrong - that the dealers are excluded in both collective proceeding applications - that is to say people who purchased trucks in their dealership for resale. I think you have excluded them as well.

MR FLYNN: We have excluded all persons whose primary business is to sell or to lease new or pre-owned relevant trucks.

THE PRESIDENT: Yes. It is any lessor - so in the bullet it is purchased or leased other than by way of hire purchase, and I think there might be a third hollow bullet saying that both claims exclude from the proposed group of persons authorised dealers, or some language that reflects the fact that commercial sellers of trucks are excluded.

MR THOMPSON: Given that we have got until 1 February to perfect this, can we have a think about it, because I also see at (l) that there is an exclusion of military trucks, used trucks, and, for example, third party additional bodywork after sales, other services and warranties.

THE PRESIDENT: Sorry, this at (l) in?

MR THOMPSON: In the definition of "trucks", it makes it clear that we are not claiming in relation to military or used trucks. That is why I was going to put it in rather general terms, but, given the warning that Mr Harris has given, I think it may need a little bit of thought as to how far we can----

THE PRESIDENT: I am sure that between you, your legal teams and your juniors, you can come up with wording that basically what is being said will reflect the significant exclusions that will be of interest to the sort of people who will read the notice, and you do not have to deal with exclusions of the legal team, the Tribunal, and so on.

MR THOMPSON: It gives the cartelists the assurance that we will not be calling in the Army.

THE PRESIDENT: Can we leave you to do that, but if you could submit the final draft to the Tribunal just for approval, obviously copied to the respondents. Just one moment.

(The Tribunal conferred)

THE PRESIDENT: We will draw up the order resulting from this hearing which will avoid some of the problems we had on another occasion.

Is there anything else other than to say it seems to us appropriate that costs should be in the applications?

MR THOMPSON: Only what I said before, that obviously I would agree with that approach, and I do not think there is anything else from us at this stage?

THE PRESIDENT: Anybody else. Thank you all very much.