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Case No.: 1282/7/7/18, 1289/7/7/18

IN THE COMPETITION
APPEAL TRIBUNAL

Victoria House,
Bloomsbury Place,
London WC1A 2EB

6 June 2019

Before:

The Honourable Mr Justice Roth, Dr William Bishop, Professor Stephen Wilks

(Sitting as a Tribunal in England and Wales)

BETWEEN:

UK Trucks Claim Limited

v

Fiat Chrysler Automobiles N.V. and Others

and

Road Haulage Association Limited

v

Man SE and Others

*Transcribed by **Opus 2 International Ltd.**
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Hearing– Day 3

Thursday, 6 June 2019

(10.30 am)

THE PRESIDENT: Before you start, Mr. Kirby, we have had a letter, Mr. Thompson, as I think you will be aware, from a firm of solicitors not involved in these proceedings, requesting a copy of the skeleton argument filed on behalf of your client which, as we understand it, has been refused, and they are asking us, therefore, to make an order in that regard.

It is not clear at all why it was refused. There is nothing confidential in it.

MR THOMPSON: I am not personally aware of this matter at all.

THE PRESIDENT: You are not. It has been copied to your solicitors and we will give you an opportunity to take instructions. They say that --

MR THOMPSON: Could I ask about the date, sir?

THE PRESIDENT: The letter is dated today and there is a letter to your solicitors of yesterday which is enclosed to a Mr. Feunteun.

MR THOMPSON: Mr. Feunteun, yes. He has carriage of this case.

THE PRESIDENT: He will be aware of it and they say that there was a telephone conversation at the Tribunal yesterday. There was an oral conversation yesterday

1 when it was requested.

2 MR THOMPSON: I will investigate the matter. I know that
3 the press were asking and we were reluctant to hand it
4 out to the press but I do not know about the solicitors'
5 firm. I do not know who they are or who they act for.

6 THE PRESIDENT: As you know, the default position is that
7 skeleton arguments, unless there is something
8 confidential in them, are to be made available and there
9 is quite a lot of authority now on that aspect, unless
10 there is good reason.

11 MR THOMPSON: I think the implications of your question,
12 sir, are fairly clear.

13 THE PRESIDENT: I leave you to take instructions.

14 MR THOMPSON: I hope it can be sorted out without them
15 troubling the Tribunal any more.

16 THE PRESIDENT: I hope so. We leave you to come back on
17 that.

18 MR THOMPSON: I am sorry if it led to any delay.

19 THE PRESIDENT: Yes.

20 The other matter is we have had also, as Mr. Kirby
21 will know, a letter also dated today from the solicitors
22 to the RHA confirming that agreement has been reached to
23 make various amendments and modifications to the
24 litigation funding agreement with Therium. Mr. Bacon,
25 I take it you have seen a copy.

1 MR BACON: I saw it literally a minute before you appeared
2 before us, so I am just literally reading it now.

3 THE PRESIDENT: We only just got it.

4 MR BACON: I have got it and we are looking at it and we
5 will hopefully respond in my reply.

6 THE PRESIDENT: Yes. Yes, Mr. Kirby.

7 Submissions by MR. KIRBY (continued)

8 MR KIRBY: Sir, can I just deal with that letter on one
9 particular point, and this is one of the reasons why it
10 has literally been last minute. It refers to using
11 "best endeavours". The reason for that is that the
12 London company Therium Capital Management Limited
13 effectively manages on behalf of the Jersey companies,
14 and the decision has to be formally made by the Jersey
15 company and so the London company cannot give an
16 undertaking that it will amend. It will and has advised
17 the Jersey company to amend and we fully anticipate that
18 will have been done by Monday at the very latest but it
19 has to be dealt with by the board of the Jersey company.

20 Similarly, and perhaps a little more slowly, bearing
21 in mind it is primarily a voluntary organisation, the
22 RHA itself has to approve any amendment to the funding
23 agreement at board level and so there will have to be
24 some form of board decision taken either electronically
25 or on the telephone next week. But bearing in mind it

1 is more favourable to the RHA than the existing one it
2 is very difficult to see why the RHA would not agree,
3 and senior people at Therium have approved the proposed
4 amendments, so again, it is difficult to see why the
5 board would not then approve it.

6 But if there was any concern about the use of the
7 words "best endeavours" that was the reason, first year
8 at law school, no, probably first year at professional
9 exams do not give an undertaking that you yourself
10 cannot comply with, so that undertaking will therefore
11 have to be to use "best endeavours" because the decision
12 itself will be taken in Jersey.

13 THE PRESIDENT: Yes. We can of course make our judgment if
14 we decide that the objection is not accepted to the
15 funding arrangements, but that is conditional upon these
16 amendments being made.

17 MR KIRBY: Yes. Subject to any comments that my learned
18 friend Mr. Bacon makes in due course, we would certainly
19 hope to be in a position to provide an amended funding
20 agreement by the end of next week.

21 THE PRESIDENT: Yes.

22 MR BACON: If I may, just to give an indication, we would be
23 unhappy with leaving matters as they are with -- despite
24 the reasons given for the best endeavours test. Either,
25 as you say, sir, there should be a direction following

1 a judgment that requires it or there should be a date by
2 which it is agreed to be provided and that is the
3 submissions. I have just noticed there is a reference
4 to clause 28 and clause 29. I do not think that can be
5 right. My agreement ends at clause 28 and not 29. That
6 is a small point. Can you take instructions on a date
7 by which it will be provided?

8 THE PRESIDENT: I think the position is that they cannot
9 guarantee that it will be done because the person who
10 has to give the guarantee has not taken the decision.

11 MR BACON: They cannot guarantee now.

12 THE PRESIDENT: But the position is, as I have indicated, if
13 we give -- if we were to accede otherwise to Mr. Kirby's
14 submissions, and obviously we have not decided yet.

15 MR BACON: No.

16 THE PRESIDENT: It can be on the basis that we are only
17 prepared to authorise if these amendments are made. And
18 in which case if they are not made they do not get the
19 authorisations, so that achieves --

20 MR BACON: We are perfectly content with that.

21 MR KIRBY: Just in terms of timing I do not propose to be
22 very long. I certainly would hope to finish by about
23 11.15.

24 THE PRESIDENT: Thank you.

25 MR KIRBY: Having dealt with that remaining issue with

1 regard to the LFA, can I just return briefly to the
2 question of common issues or individual issues as this
3 is a matter which has been raised by my learned friend.

4 Whilst of course there is the possibility of
5 individual issues arising, we have considered that the
6 matters identified can in fact be dealt with on a common
7 basis. We also say that we have taken that into account
8 when preparing our litigation plan and indeed our
9 budget. RHA never conceded that pass on interest and
10 tax needed to be dealt with on an individual basis. On
11 the contrary, we said that we would consider that each
12 of those issues can be dealt with on a common basis,
13 that it was premature at the CPO stage to seek to have
14 the Tribunal determine whether these issues are common.

15 Our position on that was clearly set out in the
16 collective proceedings claim form which is at
17 divider 20. I do not think there is any need to --

18 THE PRESIDENT: I think the only issue for present purposes
19 is how you budget it.

20 MR KIRBY: We have. Mr. Meyerhoff makes clear that these
21 matters have been taken into account but there is of
22 course, a point that I made repeatedly probably too
23 often yesterday and will again this morning, I will
24 emphasise the fact that these are flexible and dynamic
25 proceedings and at such time as directions are given and

1 when the claimants have been certified you will in due
2 course be certifying the claims on the basis that the
3 claims raise common issues and at that point obviously
4 there will be some consideration as to what those common
5 issues are.

6 THE PRESIDENT: More specifically, has the RHA budget been
7 prepared on the basis that pass on, in particular pass
8 on but also interest and tax are --

9 MR KIRBY: Yes, is the short answer.

10 THE PRESIDENT: Thank you.

11 MR KIRBY: Can I move on, or possibly in reality move back
12 because I dealt with it mainly yesterday but there was
13 one case I should have dealt with: security for costs
14 cases. The point obviously that I was making yesterday
15 and repeat is that when there is consideration as to
16 whether ATE is acceptable as a means of security for
17 costs, it is often against the background of claims that
18 involve allegations of fraud and of that nature. My
19 learned friend Mr. Bacon referred to the case of
20 *Lewis Thermal* which is in the authorities bundle at
21 divider 9. Can I take you to paragraph 35 where
22 Mrs. Justice O'Farrell gives her reasons as to why the
23 ATE insurance policy does not provide adequate security.
24 Can I take you then down to her third reason at
25 paragraph 37 where she says:

1 "There is the potential for the insurer to avoid the
2 policy where there has been any fraudulent, false or
3 misleading representation. It is my considered view
4 that where a claim, as in this case, raises serious
5 allegations of fraud by way of fraudulent
6 misrepresentation, which are stated in terms by the
7 defendant to be unjustified, it is very likely that
8 there will be allegations of dishonesty made against the
9 witnesses on both sides. In those circumstances it is
10 not beyond the realm of possibility that a finding might
11 be made that one of the witnesses has misled the court
12 in its evidence. If that were the case, it would give
13 rise to an argument by the insurer that there was
14 a misleading representation entitling it to avoid
15 liability under 8.15."

16 As I say, my learned friend referred to that
17 authority. I refer to other authorities to make the
18 point that I have just made which is that in order for
19 there to be any real risk of avoidance it is far more
20 likely in a case that involves allegations of fraud or
21 dishonesty.

22 THE PRESIDENT: Yes.

23 MR KIRBY: Whilst you have that authority open, can I move
24 on to the fourth reason in the following paragraph
25 because it brings me on to the next point that I wish to

1 deal with.

2 THE PRESIDENT: Yes.

3 MR KIRBY: Which is namely the question of the exclusion of
4 the Contracts (Rights of Third Parties) Act 1999 and you
5 will see at paragraph 38 in that decision it refers to
6 clause 13.6:

7 "Provides in terms that the insurance does not
8 confer or any create any right enforceable under the
9 Contracts (Rights of Third Parties) Act 1999. As
10 a result of this the defendant does not have a direct
11 right of claim against the insurer in respect of its
12 costs. As such it is dependent on the claimant putting
13 forward an appropriate claim to the insurer in respect
14 of the defendant's costs. In the absence of such
15 a claim which, as Mr. Hickey has reminded the court,
16 would be by a dormant company with no activity or assets
17 whose only purpose is to pursue this litigation. Then
18 the defendant would be left without a remedy against the
19 insurer."

20 Just on those last points can I draw attention to
21 the fact of course that the RHA is by no means a dormant
22 company. It has and has for decades had activities and
23 will continue to perform those activities and its only
24 purpose -- it is not a company whose only purpose is to
25 pursue this litigation.

1 Obviously in that regard there is a distinction
2 between the RHA and UKTC.

3 The point made by my learned friend was that with
4 any rights under the Contracts (Rights of Third Parties)
5 Act 1999 being excluded, in the event that the RHA
6 became insolvent then what would the defendants do?
7 There is a complete answer to that point which is that
8 the defendants would be able to rely on the Third
9 Parties (Rights Against Insurers) Act of 2010. I have
10 brought along copies of that and also of an authority
11 where it is mentioned in passing, Harlequin Property.
12 (Handed)

13 The Act was introduced precisely for the reason that
14 where an insured becomes insolvent and a relevant person
15 had a claim against or entitlement against that insured
16 person, where the insured person has become insolvent,
17 the relevant person would then have a claim against the
18 insurer.

19 There are limitations on that right. The most
20 important limitation for present purposes, and the
21 reason why it has only been referred to, so far as my
22 researches overnight were concerned, in two authorities
23 and then dismissed, is because it does not apply where
24 the relevant person is, for instance, a company
25 registered outside of the UK, or rather outside England

1 and Wales and Northern Ireland.

2 THE PRESIDENT: Does it say where the insured is?

3 MR KIRBY: Yes, where the insured is --

4 THE PRESIDENT: Not insurer.

5 MR KIRBY: No, sorry, if I said it the wrong way round.

6 THE PRESIDENT: No, you did not.

7 MR KIRBY: So where the insured is an offshore company, then
8 the Act does not assist the person who may have a claim
9 against the insured.

10 Of course, many security for costs applications are
11 within the context of a foreign company, and indeed that
12 was the position in the Harlequin case which I have
13 handed up. I should add that the Third Parties (Rights
14 Against Insurers) Act, whilst the current Act came into
15 force in full on 1 August 2016, there was in fact
16 a prior Act, namely the Third Parties (Rights Against
17 Insurers) Act 1930, so it is not exactly a new point.

18 It is dealt with at paragraph 31 of the judgment in
19 Harlequin and says:

20 "If there are such insolvency proceedings in SVG
21 ..."

22 And that refers to St Vincent and the Grenadines,
23 I think. Yes. Paragraph 4. So:

24 "If there are insolvency proceedings in St Vincent
25 and the Grenadines, the defendant's position might be

1 significantly compromised. That is because:

2 "(a) In the United Kingdom prior to the Third
3 Parties (Rights against Insurers) Act ... the proceeds
4 of any insurance policy covering the liability which the
5 insured had incurred to a third party were payable to
6 the insurer's insolvency practitioner. Once paid over,
7 they form part of the insured's assets and were
8 distributed as such to his general creditors. The third
9 party whose loss had triggered the claim against the
10 insurer was likely only to recover a small dividend as
11 one of those creditors."

12 That appeared to be the concern raised on behalf of
13 the OEMs. It then deals at (b) with how the 1930 Act
14 sought to deal with that. And then at (c):

15 "On that basis, the defendant might find that any
16 sums due under the ATE policy which would otherwise have
17 constituted its security have been paid out to the
18 claimant's insolvency practitioner and the defendant
19 would have no greater claim on the money than any of the
20 (numerous) creditors of the claimant companies.

21 "(d) The claimant might be protected if the
22 Contracts (Rights of Third Parties) Act applied, but as
23 noted ... it has been expressly excluded by the words of
24 the ATE policy".

25 We accept it has here also.

1 Then at (e):

2 "The Third Parties (Rights against Insurers) Act
3 2010 is not yet in force ..."

4 This decision being made in 2015, or certainly the
5 report is 2015 -- yes, 25 April 2015. As I indicated
6 the Act came into full force on 1 August 2016.

7 THE PRESIDENT: Yes.

8 MR KIRBY: "... and would in any event only apply where the
9 insured has been declared bankrupt or wound up in the
10 United Kingdom which, as a result of the decision of Mr.
11 Nicholas Strauss Queen's Counsel noted above, is not
12 this case."

13 Whereas clearly in the very unlikely event that the
14 RHA was wound up, it is an English company and would be
15 wound up within this jurisdiction.

16 We say that that is a complete answer to that point.

17 THE PRESIDENT: But the same would apply, I appreciate they
18 are not your client, to UKTC.

19 MR KIRBY: No, it would not. UKTC has the problem that the
20 insured is Yarcombe.

21 THE PRESIDENT: Of course the insured is Yarcombe.

22 MR KIRBY: And Yarcombe is, as I understand it, a Guernsey
23 company and therefore not in the United Kingdom.

24 THE PRESIDENT: I had forgotten that.

25 MR KIRBY: So that is the distinction between the RHA and

1 the UKTC.

2 Just again in passing on ATE. I think it was
3 suggested that there was no evidence as to the insurers.
4 Their status as A rated insurers is referred to in the
5 litigation plan at divider 24 in the first bundle. It
6 is just said in passing that they are all A rated.
7 I will take you to it if necessary. I would say,
8 because obviously that litigation plan was prepared at
9 least a year ago, if not considerably more, we did check
10 yesterday afternoon as clearly things can change, but
11 whilst it is not in evidence, as I say, having checked
12 they all remain A rated.

13 THE PRESIDENT: Yes. I do not think any point is really
14 being taken about the standing of the insurers.

15 MR KIRBY: I think it was in the written representations,
16 but if no point is taken I will move on.

17 Can I then move on to the question of the level of
18 costs. Our position is that we have prepared a careful
19 budget and litigation plan and so far as the legal costs
20 are concerned we say that £20 million is sufficient.

21 In the course of time, will it be? Will it be an
22 overestimate? Will it be an underestimate? One might
23 say, "Who knows?". Because there may be developments
24 that render it either insufficient or over-sufficient.
25 But we say that it is a careful budget that has taken

1 into account all of the matters that we consider can be
2 dealt with on a common basis, including pass on.

3 So far as the level of adverse costs is concerned,
4 we do say, as I said yesterday, that there has to be
5 considerable caution when considering the figures put
6 forward by the OEMs, and that this is one piece of
7 litigation in a whole raft of litigation in various
8 jurisdictions arising out of the Commission's decision.
9 I hope you will be pleased to know that I do not propose
10 to go through the OEMs' figures as if this was
11 a detailed assessment, nor indeed as if it was a full
12 budgeting exercise. The reason for that is because it
13 is impossible to do so. The fact that the costs of
14 these proceedings are only a small part of the overall
15 litigation in various jurisdictions is something
16 referred to in fairness by Mr. Bronfentrinker in his
17 third witness statement.

18 It is perhaps worth turning that up at file 2,
19 divider 43. Mr. Bronfentrinker at paragraph 15 sets out
20 the team that one of these defendants has working on it,
21 namely two partners, two senior associates, two
22 associates, one junior associate, a counsel team of
23 four, and refers to the German firm that is representing
24 Daimler throughout the Commission's investigation and
25 that has a coordinating role and how that firm has an

1 important role in assisting Quinn Emanuel.

2 As I say, in fairness to Mr. Bronfentrinker, he does
3 say within paragraph 17, 17(iii) that "it would
4 therefore not be appropriate, in my opinion, to allocate
5 the entire costs of the e-disclosure provider to the
6 collective proceedings" and he says over the next page
7 in the last sentence, it is only apportioning 25% of
8 that figure to the collective proceedings.

9 If it is just the eDisclosure provider then that
10 might make some sense, but if you go to the budget
11 itself on page 1307 there is a very substantial figure
12 given with regard to disclosure of just under
13 £8.25 million, and we would suggest and we just use this
14 by way of example, that in addition to the eDisclosure
15 provider there must be a significant overlap with those
16 who are actually carrying out the disclosure exercise
17 with regard to the other proceedings also.

18 THE PRESIDENT: Just pausing there. The £2 million in that
19 column, as you understand it, and we appreciate this is
20 not your document, that is 25% of the eDisclosure costs.
21 Is that what is being -- is that the way you understand
22 it?

23 MR KIRBY: If that is the effect of the evidence that only
24 25% of that has been allowed and that, therefore, their
25 total cost is £8 million, the eDisclosure provider. If

1 of course the suggestion is that the whole of disclosure
2 is something that only a percentage should be allowed
3 and only 25% would be allowed, then we would be up to
4 £33 million, if the figure was only 25% of the whole of
5 the disclosure exercise.

6 As I say, in our submission it is not possible to do
7 a proper analysis of these figures, nor possibly
8 helpful, when there clearly must be, we say, not just in
9 relation to an eDisclosure provider but in relation to
10 expert evidence, in relation to the general approach, in
11 relation to the issues themselves, there must be very
12 significant overlap between these proceedings and the
13 numerous -- and there are numerous -- other proceedings
14 both here and in Germany, Netherlands and Spain.

15 Obviously, at this stage Daimler is not actually
16 a party to the proceedings. I recognise that it could
17 end up being a party but at the moment it is not even
18 a party to the proceedings.

19 So far as the adverse costs provision is concerned,
20 we do submit that £20 million is a lot of money, and
21 that once the CPO has been made, assuming that in due
22 course one is made, it will at that stage become clear
23 who the parties will be. Once a CPO has been made it is
24 open to a party to apply for security for costs in the
25 normal way, and no doubt at that stage the Tribunal

1 would be very concerned as to whether such an
2 application was being used in order to stifle the claim.
3 No doubt any subsequent application would be made at
4 that time on its merits as they appear at that time, and
5 at a time when this Tribunal will have been involved in
6 rigorous case management of the proceedings.

7 We do also say, and have said in evidence, that if
8 there is a serious suggestion that all of these truck
9 manufacturers are all going to incur costs of
10 £20-£25 million, that this is going to be a case where
11 certainly the Tribunal should be invited in due course
12 to consider either costs management or indeed costs
13 capping.

14 Can I just make one point in relation to UKTC,
15 because obviously there are competing applications here
16 and in relation to their funding of the matter.

17 Our understanding, and I think it is in the
18 evidence, is that Weightmans are acting under a CFA.
19 That is not a document that is in evidence, and
20 obviously if they are carrying millions of pounds of WIP
21 under a CFA that is a very significant factor, we would
22 say, when considering the competing applications.
23 Obviously we do not know at what stage, if at all,
24 Weightmans are entitled to stop or entitled to move from
25 a CFA to some other form of funded arrangement. As to

1 be contrasted with those instructing me who are being
2 paid under the litigation funding agreement by Therium.

3 My final point is to note that my learned friend
4 sought to rely on or place reliance on paragraph 57 of
5 this Tribunal's decision in *Merricks* and that is in
6 file 1 of the authorities bundle at divider 13. My
7 learned friend I think cited the --

8 THE PRESIDENT: This is not in the funding part of the
9 analysis I think, was it? Or was it general?

10 MR KIRBY: Sorry, sir, are you saying --

11 THE PRESIDENT: I think these observations in paragraph 57,
12 while obviously in general terms correct benefit and
13 burden and so on, form part of the analysis of the
14 certification of the claims not part of the judgment
15 concerning authorisation of the class representative.

16 MR KIRBY: Yes, I would entirely agree with that, but my
17 learned friend sought to rely on it, and all I was going
18 to do with a limited amount of trepidation was to draw
19 attention to the fact that that was a particular
20 paragraph which the Court of Appeal said did not set out
21 the correct approach and that is in paragraph 53 of the
22 Court of Appeal's decision which is in the next divider,
23 divider 15. At paragraph 53 it is said --

24 THE PRESIDENT: But their point was the particular care
25 needed.

1 MR KIRBY: Yes. What we seek to emphasise is a point that
2 was made yesterday, and which we say also comes from
3 paragraph 53 in the Canadian authorities referred to,
4 that this is a dynamic and flexible process and that
5 that should apply to the consideration of the cost and
6 funding as well as the more substantive issues. This
7 is, as the Court of Appeal emphasised, there is
8 a continuing process of certification under which a CPO
9 may be varied or revoked at any time.

10 THE PRESIDENT: I think on that point, although the Court of
11 Appeal did not seem to agree with much of what we said,
12 paragraph 131 of the CAT judgment does make that point
13 in the context that we are considering now --

14 MR KIRBY: Yes.

15 THE PRESIDENT: -- namely the funding.

16 MR KIRBY: Yes.

17 THE PRESIDENT: On the very point there being made that
18 £10 million was likely to be inadequate and I suspect it
19 may have been there Mr. Bacon's persuasive submissions
20 that we should look at this on a dynamic basis.

21 MR KIRBY: Indeed. I was very tempted to actually simply
22 repeat, having seen the transcript of Mr. Bacon's
23 submissions, on the basis that if they were persuasive
24 last time no doubt they would be persuasive this time
25 and simply substitute the word RHA for *Merricks* but

1 I thought even for me that was a joke too far.

2 THE PRESIDENT: That would be mischievous, I think.

3 MR KIRBY: In fact, I do not know whether my learned friend
4 noted yesterday there was a section of my submissions
5 which was largely based on his submissions.

6 THE PRESIDENT: We have all been there, yes.

7 MR KIRBY: I said I would finish by quarter past. It is 11
8 past, if there are any points on which I can
9 particularly assist then obviously I am happy to do so.

10 THE PRESIDENT: No, thank you very much.

11 Yes, Mr. Thompson.

12 Submissions by MR. THOMPSON

13 MR THOMPSON: I was proposing I think broadly to follow the
14 same structure as Mr. Kirby, and hopefully to avoid
15 duplication, but first of all to address the correct
16 approach; secondly, the structure of UKTC's funding
17 arrangements which Mr. Bacon sought to cast doubt on;
18 thirdly, the own costs coverage; and fourthly, the
19 adverse costs coverage. I think there is some
20 uncertainty about whether Mr. Bacon is seeking £60 to
21 £65 million worth of coverage, or £120 to £130 million
22 worth of coverage, but on either view it is
23 a significant sum.

24 Just by way of preliminary, the Tribunal will be
25 aware that we have made a number of changes both to the

1 ATE and the LFA, litigation funding agreements, in
2 response to various concerns raised. We would invite
3 the Tribunal to find that that has been a constructive
4 approach and, as I think was mentioned in discussion
5 with Mr. Flynn at the very first hearing, this is a very
6 unusual process in litigation for scrutinising
7 commercial documents which would not normally be made
8 available at such an early stage. We have sought to
9 address, as it were, drafting points that have been
10 picked up as best we can, and another one was raised
11 yesterday in relation to the terms of the third addendum
12 to the first litigation funding agreement, which is at
13 bundle 1, tab 9. At least as far as I was concerned
14 that was a new point but it is a valid point so far as
15 it goes.

16 I am not taking it up by way of criticism because we
17 had ourselves written to Mr. Bacon and his clients the
18 previous night. As I understand it, the point that is
19 made is at page 183 where the Tribunal will recall that
20 we had accepted that paragraph 5 of schedule 1 of the
21 LFA at the bottom should be aligned to the opt out
22 amendments and we have put that in the letter, if the
23 Tribunal recalls, but I think the point that Mr. Bacon
24 was making is that that does not sit with clause 6
25 immediately above it.

1 THE PRESIDENT: Yes.

2 MR THOMPSON: Because clause 6.3 refers to the amended
3 version and clause 6.2 makes no reference to adverse
4 costs.

5 So overnight it seemed to us that the obvious and
6 straightforward solution was to delete clause 6.3 and
7 add the words "and adverse costs" after "claimant's
8 legal costs". That seems to address that point and
9 I apologise that we had not picked that up.

10 THE PRESIDENT: Just to be clear, clause 6.3 delete and --

11 MR THOMPSON: We have made copies which I can make
12 available.

13 THE PRESIDENT: Yes, that would be helpful.

14 MR THOMPSON: It is a very straightforward change, but if
15 I could hand up three copies for the Tribunal and pass
16 them along the row. (Handed)

17 I think that is a necessary consequential amendment.

18 The other point is simply to draw attention to
19 the -- it arises out of the next tab, tab 10, which sets
20 out the original version of the ATE agreement.

21 THE PRESIDENT: Yes.

22 MR THOMPSON: And there was some, what I think the late
23 lamented Roy Jenkins used to call disobliging remarks
24 made about the drafting of the ATE agreement, and in
25 particular the fact that there is no reference to the

1 claimant in the original version and no definition of
2 claimant, and, for example, the positive outcome is
3 defined as the recovery by the insured at the conclusion
4 of the dispute. So there is simply a drafting muddle
5 there.

6 That was addressed in the version that now appears
7 in bundle 3, tab 52 and we had hoped to provide
8 a marked-up version of that but unfortunately the
9 version we had was not complete in some respects, so
10 I will just do it by way of submission.

11 THE PRESIDENT: This is bundle 3, tab 52.

12 MR THOMPSON: Yes. This is the amended but current version
13 of the ATE agreement and it is a pretty straightforward
14 point. If one looks on page 1583 you see that the
15 paragraph 4 now reads "Claimant".

16 THE PRESIDENT: Yes.

17 MR THOMPSON: "UK Trucks Claim Limited". The reference to
18 Penframe has dropped out and the positive outcome is the
19 recovery by the claimant, and there are a number of
20 amendments of insured to claimant and there is
21 a definition of claimant at a newly inserted clause 14.3
22 on page 1592.

23 In my submission that addresses many, if not all of
24 the points that Mr. Bacon raised and was an important
25 change and a correction which was made and explained in

1 Mr. Perrin's third witness statement. That's just by
2 way of clarification.

3 THE PRESIDENT: Although --

4 MR THOMPSON: Can I leave the more fundamental challenge to
5 the structure. I will come to that in a moment.

6 THE PRESIDENT: Yes. There are still some oddities.

7 Clause~14.22 Own solicitors' fees means all professional
8 fees payable by the insured to the representative.
9 Representative, I think, is Weightmans and it is not
10 Yarcombe who was incurring the fees of Weightmans; it is
11 the claimant. I have not gone through this clause by
12 clause, but there are some remaining infelicities, if we
13 put it that way, perhaps in the drafting. How
14 significant they are I do not know.

15 MR THOMPSON: Yes. If it is essentially the
16 insured/claimant point but if there are infelicities
17 then I think it is inadvertent cock-ups rather than
18 matters which cannot be rectified.

19 THE PRESIDENT: Yes, I do not think the late Roy Jenkins
20 would quite use that expression.

21 MR THOMPSON: I do not know. Maybe after a fine claret. We
22 will see.

23 Infelicities of expression, perhaps I should say.

24 Can I turn to the correct approach, which certainly
25 the President is very familiar with, and has been

1 addressed by Mr. Bacon and Mr. Kirby so I will take it
2 as shortly as I may, but it starts with the Tribunal
3 rules which are at tab 41 of the second authorities
4 bundle. If one turns to rule 78, just by way of five
5 short points on the rules, we would say first of all
6 that rule 78(2) is subordinate to rule 78(1)(b) which
7 requires the Tribunal only to exercise its authorisation
8 power if it considered that it is just and reasonable.
9 That is, as it were, the prohibition, that the Tribunal
10 cannot authorise unless it thinks that is the case.

11 But then rule 78(3) is -- sorry, I should say 78(2)
12 is what I would call a multifactorial assessment of
13 suitability within that context.

14 Rule 78(3) is subordinate to rule 78(2)(a) and is
15 also a multifactorial assessment of ability to represent
16 the class fairly, based on all the circumstances, and
17 setting out the factors to be taken into account for the
18 purposes of rule 78(2)(a).

19 Then rules 78(2)(d) and 78(3)(c)(iii) are therefore
20 not freestanding tests but they form part of the overall
21 assessment to be undertaken pursuant to rule 78(2).

22 THE PRESIDENT: Yes, rule 78(2) -- sorry, pursuant to
23 rule 78(1)(b), you mean.

24 MR THOMPSON: Yes, rule 78(1)(b) is obviously the governing
25 expression and then (2) specifies a number of

1 considerations that must be taken into account, but in
2 my submission does not limit the considerations
3 necessarily. And then for the purposes of rule 78(2)(a)
4 there are a number of factors which are inclusively
5 defined but the Tribunal is specifically required to
6 take into account all the circumstances. So that is
7 a particularly broad assessment.

8 Then in terms of the overall picture both Mr. Bacon
9 and our Mr. Kirby referred you to rule 59, the ongoing
10 power of the, or right of the defendants to a collective
11 case to apply for security for costs under rule 59(4)(a)
12 and (5)(f), but there is another very important
13 provision rule 85(1) and (2)(b) where the Tribunal has
14 a broader discretion to vary or revoke, either on its
15 own initiative or on the application of the class
16 representative, or a represented person or a defendant,
17 and rule 85(2)(b) mirrors the rule 78 test because the
18 variation and revocation power arises, the Tribunal
19 takes account of all the relevant circumstances
20 including in particular (b):

21 "Whether the class representative continues to
22 satisfy the criteria for authorisation set out in
23 rule 78, and, if not, whether a suitable alternative
24 class representative can be authorised."

25 So there is an ongoing supervisory role which the

1 Tribunal can exercise either of its own initiative or in
2 particular on application by one or more of the
3 defendants. That is, in my submission, a relevant
4 factor to be borne in mind and obviously one the
5 Tribunal and the Court of Appeal were well aware of in
6 *Merricks*.

7 THE PRESIDENT: Yes.

8 MR THOMPSON: Following on from that, we would say that the
9 correct approach is that the assessment of funding
10 issues is part of a wider assessment of suitability and
11 that the assessment is not a final one. In particular,
12 in relation to the budget, although the guidance to the
13 rules requires a provision of a cost budget to the end
14 of trial, the purpose of this exercise is to assist the
15 Tribunal in deciding whether to make a CPO at all. It
16 is not a budget for cost management purposes, as there
17 have been no directions for the conduct of the
18 litigation from the Tribunal at this stage, for example,
19 in relation to cost management or even cost capping, and
20 the exercise, or rather the guidance, also recognises
21 that this is necessarily a contingent assessment in the
22 sense that it does not constrain the jurisdiction of the
23 Tribunal to determine the appropriate procedures, and it
24 notes that if a CPO is made the plan may be subject to
25 revision as the litigation proceeds.

1 That is at paragraph 6.30 of the guidance.

2 We also note more generally, and this has been
3 a feature of the Tribunal ever since it was created at
4 the start of this century, that the Tribunal has very
5 broad powers and deliberately broad powers of case
6 management, for example, in rule 4 and rule 88, and that
7 in particular paragraph 6.7 recognises that collective
8 proceedings require intensive case management by the
9 Tribunal, and the more general point at paragraph 7.1
10 about the way in which the Tribunal exercises its powers
11 of case management to ensure cases are dealt with at
12 proportionate cost. We can obviously look at those
13 provisions if it would be helpful but I think it is
14 fairly familiar stuff.

15 THE PRESIDENT: Yes.

16 MR THOMPSON: I would also say, and this is perhaps worth
17 looking at, because we have not looked at it yet and it
18 is obviously an important document, that all this was
19 recognised by the UKTC in its claim form as early
20 as May 2018 which one finds at bundle 1, tab 1. In
21 particular, at page 36 and following, under the heading
22 "The defendant's recoverable costs" there is a summary
23 of Mr. Perrin's evidence and then at paragraph 89 we say
24 this:

25 "This of course requires a degree of transparency

1 regarding the defendant's costs in order to ensure that
2 the ATE insurance adequately covers whatever costs are
3 incurred. As is explained in paragraph 153 below, UKTC
4 will seek a costs management order regarding costs
5 budgeting and ensure the efficient progression of the
6 case by all parties."

7 That is picked up at paragraph 153 right at the end
8 on page 62:

9 "UKTC will seek an order for costs management in due
10 course so as to ensure it has in place sufficient levels
11 of ATE insurance to cover adverse costs and ensure the
12 efficient progression of the case by all parties."

13 I will not go to it but the burden of the first
14 witness statement of Roger Kaye on behalf of UKTC is to
15 explain the way in which UKTC has been set up and his
16 own personal commitment to delivering a good outcome on
17 behalf of members of the proposed class.

18 Just picking up on the point that Mr. Kirby ended up
19 with, I was actually going to refer to a different
20 passage in the *Merricks* judgment which Mr. Bacon
21 appeared to rely on both in his skeleton and in his oral
22 submissions. For the Tribunal's note, that was pages 11
23 to 12 of the transcript yesterday. That is
24 paragraph 121 of the *Merricks* judgment, which is at
25 tab 13. Certainly the President will recall that there

1 was a relatively technical problem with the funding
2 agreement Mr. Bacon put forward in that case in that it
3 was held that there was no actual obligation that could
4 form the basis for an order under the original drafting
5 and so it had to be amended in the terms set out in
6 paragraph 123.

7 I think the passage that Mr. Bacon relied on was
8 a reference to "at the very least a realistic
9 possibility of the lack of funding".

10 In my submission that is a very different situation
11 from any of the criticisms made here. The passage to
12 which Mr. Bacon referred concerned a finding that the
13 Tribunal might have no power to award the funder's fee
14 at all at the end of the case, and if that were right
15 there was a realistic risk that the whole funding
16 arrangements might collapse, that there might be no
17 effective funding agreement. We say that has no real
18 resonance with the types of criticism made by Mr. Bacon
19 yesterday.

20 If I could pick up a number of the factors that we
21 say are relevant under 78(2) and 78(3). Mr. Bacon
22 objected to reference to the "merits of the case", and
23 we accept that is probably best considered in the wider
24 context of the overall application. However, we would
25 say it was a relevant circumstance to bear in mind that

1 this is a follow on, not a standalone claim against
2 members of a cartel who had admitted their participation
3 to the European Commission, and in the case of MAN was
4 an immunity applicant as long ago as 2010.

5 Secondly, and it is a point that the Tribunal made
6 in argument, the scale and multiplicity of costs on
7 which Mr. Bacon relies reflects the scope of the cartel
8 itself. So it has the perverse implication that the
9 more members of the cartel there are and the more
10 complicated it is, the more difficult it will be for
11 anyone to claim damages against the members of the
12 cartel.

13 Then turning to this particular case, the Tribunal
14 will have in mind, and indeed it is a matter that the
15 representative for DAF pointed out himself at the last
16 hearing, the cartelists have in reality been well aware
17 of this case for years, and they will obviously have
18 undertaken extensive documentary recovery exercises for
19 the purposes of the EU and UK investigations and
20 litigation. The Tribunal will recall that the immunity
21 application was made in September 2010. The statement
22 of objections was issued in November 2014, and the
23 Commission decision was issued in July 2016. And
24 Mr. Beard told the Tribunal at the last hearing that
25 this case follows on from a detailed investigation where

1 there was an extensive gathering of documents and
2 preservation of documents much earlier than might
3 otherwise have been the case in such litigation.

4 That was at the last hearing, page 25, lines 18
5 to 20.

6 That is not all, because at the UK level which is
7 relevant to my client's case, the Tribunal will recall
8 that there was an extensive investigation by the Office
9 of Fair Trading in the Mercedes Benz decision which
10 reached its conclusion in March 2013.

11 Turning to the litigation position, including in
12 this Tribunal, the Tribunal will be very well aware that
13 there are a number of major individual claims that will
14 compel these very defendants, or proposed defendants,
15 respondents, objectors, whatever you call them, not only
16 to undertake document recovery but also, and very
17 importantly, to undertake extensive legal and economic
18 analysis of the prospective arguments available to them,
19 for example on pass on, and the likelihood of any of
20 them succeeding.

21 Those major individual claims are, as the Tribunal
22 knows, more advanced than the present case which is
23 still, as it were, in the starting blocks, so there is
24 in fact a likelihood that some of the main points of
25 legal and economic principle will be resolved in those

1 cases rather than these ones, particularly in the case
2 if as currently appears to be the possibility, the CPO
3 process in this case is stayed for an extended period by
4 the *Merricks* appeal.

5 The further factor is that there is a significant
6 overlap between these two cases. If both applications
7 are approved, there are likely to be some significant
8 economies both on issues of principle and, for example,
9 on disclosure. I will come to that in a moment in
10 slightly more detail.

11 Overall, and I would invite the Tribunal to cast
12 a fairly beady eye on the numbers thrown around by
13 Mr. Bacon yesterday, and you may recall a submission
14 I made last time, that the Tribunal might want to bear
15 in mind that we already have over 200 members of the
16 confidentiality ring with few if any confidential
17 documents in it.

18 We would say there is an inevitable concern, that
19 Mr. Kirby put very tactfully, that the respondents and
20 objectors are in reality seeking to put off the
21 inevitable, and the Tribunal should be very cautious
22 about permitting self-serving arguments about the very
23 high cost estimates as a way of delaying this case, the
24 reality of which will increase the burden and strain of
25 ATE insurance and own costs cover on the claimants, and

1 put pressure on the applicants even before the CPO
2 process has been concluded, let alone taken forward in
3 any material sense.

4 Then the two final points about the nature of
5 Calunius and its position, that the reality is that
6 Calunius, and, for that matter, Therium, are premier
7 league funders who have been founder members of the
8 Association of Litigation Funding since the beginning,
9 and indeed Mr. Perrin is chair of the Association of
10 Litigation Funding, and on any view they have already
11 committed significant funds to these claims. We say
12 that it would be contrary not only to their clear
13 commitments under the ALF code, but also their
14 commercial interests, were they to walk away from these
15 important claims at this early stage or indeed at any
16 stage while there was a realistic prospect of them
17 succeeding.

18 THE PRESIDENT: Calunius, we saw from something is no longer
19 seeking business in this market; is that right?

20 MR THOMPSON: I think the position is that one of the funds
21 that it is running has been closed, so that fund is no
22 longer seeking business, but Mr. Perrin addresses it in
23 his witness statement, and the burden of that is that
24 there are ample funds to support this litigation.

25 THE PRESIDENT: Yes, it is not that they have not got enough

1 money at the moment. They do, and the group, from what
2 he says, but in terms of commercial reputation I thought
3 that it was Calunius as a whole that was no longer
4 involved. But maybe I misunderstood. You say
5 Mr. Perrin addresses this.

6 MR BACON: I do not think he does.

7 THE PRESIDENT: Can you take us to where --

8 MR THOMPSON: I am sorry, it is not a point that had been
9 picked up, but I --

10 THE PRESIDENT: It was raised, I think, in Mr. Bacon's
11 skeleton argument. It is just based on press reports.
12 It is not that there is any other evidence.

13 MR THOMPSON: Yes.

14 THE PRESIDENT: You can come back to it later.

15 MR THOMPSON: If I can come back to it.

16 THE PRESIDENT: Why do you not come back to it later. It is
17 better to do that.

18 MR THOMPSON: The last point I was going to make, and it
19 picks up another point arising from the observations of
20 Mr. Kirby, and it is correct that Weightmans is on
21 a full contingency fee but -- conditional fee, I am
22 sorry. I am less frequently in funding disputes than
23 other people, so Ms. Ayling will pick me up if I use the
24 wrong language, and that means not only is Weightmans
25 also standing behind this claim to a significant degree,

1 but it also means that were there to be problems with
2 Calunius as a funder, Weightmans' part of its
3 professional obligations would be to secure alternative
4 funding. So there is that other element here which --
5 Mr. Kirby put it one way and I would put the other.

6 Turning to the respondents' and objectors' own
7 evidence. Mr. Kirby has partly taken the Tribunal to
8 this already, so I can take this relatively quickly.

9 THE PRESIDENT: Yes.

10 MR THOMPSON: We would say that their evidence recognises
11 three highly material points. First of all, and this is
12 a point that Mr. Kirby has addressed, it is impossible
13 to estimate the likely costs with any certainty at this
14 stage, not least because the shape of the proceedings
15 has yet to be determined. That is reflected in the
16 approach of Iveco and Herbert Smith, Mr. Farrell, which
17 has not even attempted to budget for all stages, and
18 also because the budgets give a wide variety of figures
19 for the same phase across different budgets. Indeed,
20 Mr. Bacon recognised that in his skeleton argument at
21 paragraphs 25 and 26 and also in the final paragraph,
22 and we would say that does not sit at all well with his
23 basic suggestion at paragraph 13 that we should
24 effectively be red carded on funding at this stage. He
25 was notably more tentative in his oral submissions than

1 in some of his written submissions.

2 THE PRESIDENT: I think what is said is that is absolutely
3 right and that is recognised, but even on a cautious
4 view certainly £12 million, and Mr. Bacon says
5 £20 million for litigation on this scale, five or likely
6 to be five parties on the other side, one can see it is
7 not adequate. That is how they put their case. You
8 have made various points about, as it were, economies of
9 scale because of the other litigation and overlap, and
10 scepticism with which we should look at the figures, but
11 I think that is how it is put.

12 MR THOMPSON: I understand that and I will come to that
13 point in a moment.

14 The second point which in our submission they do
15 recognise is that there is duplication both with the RHA
16 and individual claims and that contrary to their
17 submission on funding, that is likely to lead to savings
18 and efficiencies rather than additional costs.

19 A third point and Mr. Kirby very gently pointed out
20 that these are in a sense competing applications
21 although they have a degree of commonality, there is
22 a point which is fairly clear in the evidence,
23 particularly from the defendants and objectors, that the
24 RHA application is likely to involve significantly
25 higher costs for a series of reasons. That is not

1 a hostile point against the RHA, but it is material to
2 the submissions about the adequacy of UKTC's costs
3 provisions, both in relation to its own costs and
4 adverse costs as against those of the RHA.

5 If I can just give the Tribunal the references on
6 the first two points, uncertainties and duplication.
7 Mr. Farrell at bundle 2, tab 41, pages 1234 to 1235,
8 recognises there are likely to be efficiency savings
9 such that the cost of defending both would be less than
10 the combined cost of Iveco defending each claim
11 separately. If the Tribunal wants to look at it, that
12 is fine. That is tab 41.

13 THE PRESIDENT: What paragraphs?

14 MR THOMPSON: There is a little section -- it is under the
15 heading "C. Inability to provide cost estimate for
16 entire proceedings". Paragraph 11 makes the general
17 point about how difficult it all is. Then paragraphs 15
18 and 16 makes the point about it is unclear whether the
19 collective proceedings proceed ahead of or follow behind
20 the individual claims. It is not possible to make
21 a firm assumption over whether issues will arise first
22 in a collective or individual claim.

23 Then paragraph 16, the passage I was quoting from
24 was in the middle:

25 "There would also likely be efficiency savings

1 between them such that the costs of defending both
2 proceedings would be less than the combined costs of
3 Iveco defending each claim separately."

4 And then he reinforces the uncertainty point. So in
5 my submission he is both recognising uncertainty and
6 recognising efficiencies potentially arising from
7 duplication.

8 Mr. Daimler -- I am sorry, Mr. Bronfentrinker on
9 behalf of Daimler, I think Mr. Kirby has already --
10 I would not claim that Mr. Bronfentrinker has undue
11 association with Daimler, but there we are.

12 THE PRESIDENT: It might fall that way by now.

13 MR THOMPSON: I am sure he is allowed to do something else
14 sometimes. It is at pages 1298 to 1299. The
15 introductory wording to paragraph 12, Mr. Bronfentrinker
16 refers to the great deal of uncertainty regarding how
17 any collective proceedings progress, therefore the
18 amount of costs and disbursements that would be
19 incurred. Then he identifies a number of variables,
20 including at viii the reference to multiple claims and
21 uncertainties about case management.

22 Then at the end:

23 "It may be that the work for the individual claims
24 overlaps with work required for a collective
25 proceedings, such that there will be efficiencies and

1 costs savings across the proceedings."

2 He says that is difficult to estimate.

3 Then there is a specific point on eDisclosure which
4 Mr. Kirby referred to which is at pages 1301 to 1302, so
5 I will not repeat that.

6 THE PRESIDENT: Yes.

7 MR THOMPSON: In relation to DAF, one finds that at 38 to
8 39. First of all --

9 THE PRESIDENT: Sorry. 38 --

10 MR THOMPSON: Tab 38 is the response and I would simply
11 refer you on the level of uncertainty just how uncertain
12 this entire exercise is. Page 1126, paragraph 162.
13 Having made various points in the previous paragraphs
14 about a lack of plan in relation to damages, paragraph
15 162 says this:

16 "Even if determining these three issues in respect
17 of a single PCM cost £2,000, (an implausibly low
18 figure), this would require more than £15 million in
19 additional funding, given the proposed class size
20 reported as at 4 March 2019."

21 THE PRESIDENT: Sorry, PCM is? Potential class member,
22 I think.

23 MR THOMPSON: Yes, that is right.

24 So this point is simply multiplying 7,707 by 2,000,
25 but that is a completely arbitrary exercise. We don't

1 know how many claimants there are going to be, and
2 nobody has any idea how much things are going to cost.
3 So that just gives an indication of the degree of
4 uncertainty we are dealing with here.

5 So far as the issue of overlap is concerned, Mr.
6 Jenkin at tab 39, recognises this at paragraph 37,
7 page 1144. He assumes some level of overlap with the
8 extant individual proceedings and therefore that "fewer
9 hours would be required than I would otherwise expect".

10 So he says he has taken that into account, but as
11 I have already submitted there are obviously a lot more
12 issues of overlap that may arise depending on how these
13 cases progress in due course.

14 So far as the likely cost of UKTC, as against those
15 of RHA, probably the most convenient place to see that
16 is in tabs 37 and 38, the submissions of, or the
17 response of the MAN and the DAF respondents.

18 In tab 37, paragraph 45 at page 1029, you see
19 a number of points under 45(a) through to (e). First of
20 all, the length of the relevant period, 21.5 years
21 including a proposed nine year run-off. So that
22 compares to the relatively short run-off period
23 suggested by Dr. Lilico of 1 year.

24 Secondly, the class definition includes trucks
25 acquired outside the UK and therefore on different

1 national markets. That is obviously a very significant
2 potential expansion of the complexity, and compares to
3 the fact that UKTC has deliberately focused only on the
4 UK, so effectively single regulatory data sources -- and
5 in English.

6 Thirdly, the reference to new and used trucks also
7 adds complexity. I think it is fair to say that the
8 umbrella claimants and different finance methods, those
9 would also apply to our claim.

10 Then if one turns to the DAF response it also
11 identifies a number of points at paragraphs 32 to 34,
12 pages 1087 to 1088, starting at paragraph 31, the
13 reference to the emissions issue. Then the EEA trucks,
14 and then the run-off period, and again, in these
15 respects this goes beyond the scope of the UKTC claim.
16 That is reflected in the witness statement of Mr. Jenkin
17 at tab 38, pages 1087 -- page 1143 where certainly, at
18 this stage, the allocation set out at paragraph 26 is
19 70% to RHA and 30% to UKTC.

20 If one just looks at the individual evidence,
21 Mr. Bronfentrinker makes the points about both used
22 trucks and geographic scope in his witness statement at
23 tab 43. At page 1298 at the bottom there is reference
24 to increased costs arising from used trucks.

25 At paragraph 12.ii there is reference to the

1 additional costs from foreign trucks, and so the more
2 national markets the higher the cost. The same point is
3 made by Mr. Farrell at tab 41.

4 THE PRESIDENT: Of course Mr. Bronfentrinker also makes the
5 point that if it is opt out, he says the costs -- the
6 complexity would be larger.

7 MR THOMPSON: In my submission that cuts both ways because
8 one of the major costs of opt in is putting together the
9 team and the marketing costs of assembling the
10 claimants, and of assessing whether or not they are
11 rogues or not, to put it perhaps in an un-Roy Jenkins
12 way. But the validity of the claims, there has to be at
13 least some exercise done.

14 THE PRESIDENT: Yes.

15 MR THOMPSON: Whereas opt out, certainly on the approach
16 approved by the Court of Appeal, would potentially be
17 considerably less complicated at all stages.

18 The issue of -- Mr. Farrell addresses the point of
19 geographic scope at paragraph 12, page 1234. He makes
20 the point:

21 "The greater the number of jurisdictions other than
22 the UK that are included in this claim, the greater the
23 costs associated with any disclosure and evidence will
24 be."

25 At tab 39, page 1141, Mr. Jenkin refers to the need

1 for an emission technology expert at paragraph 18(d).

2 Again, that arises from the scope of the RHA claim.

3 As the President has already put to me, I do not
4 want to put this too high because other issues will need
5 to be addressed at the main hearing, and in light of the
6 outcome of the *Merricks* appeal. For example, RHA's
7 overall approach leads to a very much higher anticipated
8 expert cost, I think £6 million as against £1.5 million.
9 So that depends to a significant degree on the
10 methodology for calculation of quantum and whether or
11 not a top-down approach is appropriate.

12 THE PRESIDENT: Yes.

13 MR THOMPSON: Obviously there are elements of the breadth of
14 the claim in relation to used trucks and foreign trucks
15 which will lead to additional costs in any event.

16 Then there is the point about opt in and opt out and
17 how the two should be exercised.

18 Can I now turn to what I think was the main target
19 of Mr. Bacon's complaints yesterday at least.

20 Does the Tribunal want to take a break now?

21 THE PRESIDENT: We do need to take a break. I was waiting
22 for a natural -- for you to conclude that section. So
23 that seems the right time to do it. We have gone on
24 a bit longer than usual. We will take our break now and
25 come back in 10 minutes.

1 (11.57 am)

2 (A short break)

3 (12.10 pm)

4 MR THOMPSON: Sir, just two points arising. I understand
5 that the issue about the skeleton argument is at least
6 in the process of being resolved and I do not think --
7 I am not quite sure how it has arisen but we have no
8 objection to providing our skeleton to the solicitors
9 concerned.

10 THE PRESIDENT: Thank you.

11 MR THOMPSON: The other question, the status of Calunius.
12 One possibility is that Mr. Perrin is here and so if
13 there is any question the Tribunal wants to ask he could
14 answer it, but the basic position, as I understand it,
15 is that -- and it is reflected in his first witness
16 statement -- Calunius operates by a number of funds and
17 the relevant fund in this case is the Calunius GP3 fund
18 and that that fund is fully committed to this
19 litigation.

20 What has happened, and which gives rise to the
21 query, is that that fund is not taking on new claims,
22 and, at least for the moment, there is no fourth fund.

23 THE PRESIDENT: There is no, sorry?

24 MR THOMPSON: There is no fourth fund, and whether there is
25 a fourth fund in the twinkling of people's eyes, I do

1 not know, but I suspect it may be that there will not be
2 a fourth fund. But that does not affect the funding of
3 this litigation which was always within the third fund
4 and remains within the third fund.

5 THE PRESIDENT: Yes, when you say, just so I understand it,
6 Calunius operates through a number of funds, is it not
7 through the GP3 fund but through any of its other funds,
8 is it still taking on new business? In other words,
9 open to approaches to fund further litigation and
10 agreeing to fund further litigation --

11 MR THOMPSON: I think at the moment it is not.

12 THE PRESIDENT: -- of another kind, or has it said it is not
13 going to -- at the moment that it has decided it is not
14 going to?

15 MR THOMPSON: Yes. I think the position is no, but
16 I cannot -- I am sorry if I inadvertently misled --
17 I thought it was addressed specifically in the witness
18 evidence but I think the point has been made out is that
19 is not the witness evidence. So the specific
20 explanation of the position in relation to this
21 litigation is in the Perrin first statement which is
22 that this is fully backed by the third fund and the
23 third fund is not taking on any new claims.

24 THE PRESIDENT: Is the Calunius group taking on any new
25 claims through any of its funds?

1 MR THOMPSON: I do not think so.

2 THE PRESIDENT: That was the point that I was going to.

3 DR. BISHOP: Then, Mr. Thompson, what are the implications
4 of that for your argument that the reputation of the
5 funder would be affected and his future business would
6 be damaged if he failed to support a costs order? If
7 Calunius is exiting this business, then the reputation
8 point has no bite, does it?

9 MR THOMPSON: No, I accept that. The future reputation
10 insofar as -- although there are obviously other claims
11 in the field which Calunius is still operating, but in
12 terms of seeking out new business I think that must
13 follow, but I think there is still the point, which both
14 Mr. Kirby made and which I have made, is that from
15 a commercial point of view it makes very little sense to
16 put up large sums of money for a viable claim and then
17 just pour that money down the pan.

18 THE PRESIDENT: Yes, you will never get your return.

19 MR THOMPSON: For as long as it is a viable claim it would
20 be senseless to pull out.

21 THE PRESIDENT: Yes.

22 MR THOMPSON: The core of Mr. Bacon's submissions yesterday,
23 as I understood it, whether flattering to my client or
24 whatever, was an assault on the SPV structure used by
25 Calunius whereby UKTC contracts with Yarcombe, a related

1 company to Calunius, and Yarcombe contracts with
2 ATE insurers.

3 Mr. Bacon sought to portray this as an unusual and
4 even possibly -- at some points he seemed to indicate
5 even a suspicious arrangement designed to lessen the
6 protections available both to the UKTC and to the
7 respondents and objectors. I think he went so far as to
8 say that Daimler would never be party to such an
9 arrangement.

10 We would say that these were highly tendentious and
11 inappropriate submissions to be made, particularly in
12 respect of two extremely senior and distinguished
13 witnesses who provided a number of witness statements
14 explaining the situation, and where Mr. Bacon at no
15 point evinced any intention to cross-examine either of
16 them.

17 We would say a good starting point is the ALF code
18 itself which is at the back of the authorities
19 bundles 2, as far as I am concerned.

20 PROFESSOR WILKS: Mr. Thompson, could I just ask, is

21 Yarcombe a signatory and somehow signed up to that code?

22 MR THOMPSON: If I show you the code it may become clear.

23 Paragraph 1 explains what the code is and paragraph 2,
24 paragraphs 2.1 and 2.2 set out two possibilities where:

25 "A litigation funder either "has access to funds

1 immediately within its control including within
2 a corporate parent or subsidiary ..."

3 So the fund is subsidiary.

4 "... or acts as the exclusive investment adviser to
5 an entity or entities having access to funds immediately
6 within its or their control, including within
7 a corporate parent or subsidiary associate entity."

8 So there are two recognised structures. And then
9 the role is to fund the resolution of relevant disputes:

10 "Where the funds are invested pursuant to an LFA to
11 enable a party to a dispute to meet the costs, including
12 pre-action costs of the resolution of relevant
13 disputes."

14 Then the passage we looked at on Tuesday in relation
15 to DBAs concerning a share of the proceeds. Then
16 paragraph 3:

17 "A funder shall be deemed to have adopted the code
18 in respect of funding the resolution of relevant
19 disputes."

20 At paragraph 4:

21 "A funder shall accept responsibility to the
22 Association for compliance with the code by a funder's
23 subsidiary or associated entity. By so doing a funder
24 shall not accept legal responsibility to a funded party
25 which shall be a matter governed, if at all, by the

1 provisions of the LFA."

2 So the position here is, as explained by Mr. Perrin
3 in his first statement, that Yarcombe, the party to the
4 contract with UKTC, falls within the scope of the
5 obligations of Calunius as the relevant member of the
6 ALF. I think that is the simplest way of explaining it.
7 So Mr. Perrin as chair of Calunius, and for that matter
8 the chair of the ALF, is undertaking that Yarcombe will
9 act in accordance with the ALF code and that Calunius is
10 behind it. That is the --

11 PROFESSOR WILKS: Yarcombe is a member by virtue of being
12 part of the Calunius group. Is that it?

13 MR THOMPSON: Effectively it should be regarded as an
14 associated entity, I think, in terms of the code.

15 THE PRESIDENT: Can we just clarify that. If we look at Mr.
16 Perrin's first witness statement which is bundle 1,
17 tab 6. We think, Mr. Thompson, I think you were due to
18 finish at 12.30. We think that realistically this will
19 last, your submissions, because we have to get into the
20 detail of these agreements, until 1. Then we'll hear
21 from Mr. Bacon from 2 to 3 and we will stop at 3, so you
22 need that extra time.

23 MR THOMPSON: I am grateful.

24 THE PRESIDENT: We do need some detailed points made on
25 these agreements.

1 Mr. Perrin's first witness statement, tab 6, he says
2 Calunius is Calunius Capital LLP, and Calunius is
3 a funder member of the Association and subscribes to the
4 code.

5 Then in paragraph 8 he says:

6 "The corporate director is Calunius GP3."

7 It is not quite clear what is the relationship of
8 Calunius GP3 Limited to Calunius Capital LLP, whether it
9 is a subsidiary or not. Then it says it has chosen to
10 fund through another company, Yarcombe Limited, which is
11 controlled by GP3.

12 So Calunius obviously is not the -- I do not think
13 Yarcombe is said to be Calunius LLP's subsidiary and
14 I am not sure it is said that Calunius LLP acts as the
15 investment adviser to Yarcombe. We have a personal
16 undertaking that Calunius -- so we have a personal
17 undertaking from Mr. Perrin that Calunius LLP,
18 subscribing to the code, will use its best endeavours to
19 ensure that Yarcombe will comply with the code. That is
20 a little bit indirect and it is a personal undertaking
21 from Mr. Perrin. Mr. Perrin, who I am sure has the best
22 intentions and is a man of undoubted integrity, but it
23 could well be that in two years time he decides actually
24 he wants to work elsewhere, particularly if Calunius is
25 not taking on new business, one could not base this on,

1 and he is no longer part of the picture.

2 It is not an undertaking on behalf of Calunius, it
3 is a personal undertaking. (Pause)

4 One would expect that if Yarcombe is under the
5 control of Calunius, Calunius can simply give an
6 undertaking: we will ensure that Yarcombe will comply
7 with the code. Why (a) is it best endeavours, and (b)
8 is it personal to Mr. Perrin?

9 MR THOMPSON: I think, as I understand it, he is giving it
10 in his capacity as the chair of both the ALF and of
11 Calunius.

12 THE PRESIDENT: He cannot give it -- the ALF cannot force
13 anything that way, but as I say, he is giving it
14 personally. He is not saying, "I undertake on behalf of
15 Calunius", and as we all know, undertakings, because of
16 their seriousness are drafted with some care, and he is
17 similarly saying "best endeavours", whereas if Calunius
18 controls Yarcombe, there should not be a problem. You
19 would not have best endeavours.

20 MR THOMPSON: In my submission there is not a problem in
21 that it is a standard structure under the ALF code as
22 reflected in paragraph 2.2 in that the funder here and
23 it is paragraph 5, states:

24 "Calunius acts as the sole investment adviser to the
25 three Calunius litigation risk funds, (the "Calunius

1 funds"), and also to funding vehicles associated with
2 the Calunius funds."

3 If that compares that to paragraph 2.2 of the code:

4 "The litigation funder "acts as the exclusive"
5 investment adviser to an entity or entities having
6 access to funds immediately within its or their control
7 including with a corporate parent or subsidiary".

8 So in my submission Calunius is responsible for
9 Yarcombe within the scope of paragraph 2.2 and also
10 paragraph 4.

11 THE PRESIDENT: Then why cannot Calunius simply undertake
12 that Yarcombe will comply with the code?

13 MR THOMPSON: I do not want to take up time but I suspect
14 the position is going to be similar to the issue
15 discussed with Mr. Kirby, that if that is what the
16 Tribunal requires then I cannot give that undertaking
17 personally.

18 THE PRESIDENT: I think we would like to know if that is
19 going to be forthcoming and if Mr. Perrin is, you said,
20 in the Tribunal, and is chairman of Calunius, he might
21 need his board approval but at least he can explain to
22 you that he thinks that is not going to be any problem.

23 MR THOMPSON: I do not want to take up time but if the
24 Tribunal has questions for Calunius and Mr. Perrin is
25 here --

1 THE PRESIDENT: We do not want to hear oral evidence. It is
2 a very simple point. You can take instructions if you
3 want to do it over lunch, but if you come back and tell
4 us at 2 o'clock that you have spoken to Mr. Perrin and
5 your instructions are that Calunius, he expects that as
6 chairman of Calunius there will not be a problem,
7 Calunius giving an undertaking that Yarcombe will comply
8 with the code for the duration of these proceedings, we
9 will accept that. We do not need to hear him as a sworn
10 witness.

11 MR THOMPSON: I think my only concern with this whole line
12 of reasoning is that -- or questioning -- is that the
13 Association of Litigation Funding has been in existence
14 for the best part of a decade, and I have some
15 difficulty in thinking that this exercise could ever
16 lead to, as it were, a restructuring of the Association
17 of Litigation Funding, and I do not, standing here, know
18 what implications there might be either for Calunius
19 here or any other member of the group. I go on the
20 basis of the code.

21 THE PRESIDENT: Usually the funder is simply a member, in
22 which case no problem. And if Calunius LLP was funding
23 it, no problem. If they want to structure it
24 a different way for their own reasons, maybe fiscal
25 reasons and so on, we need not get into that. We are

1 simply concerned that the person who is contractually
2 the funder is being -- is -- we have assurance that it
3 will comply with the code which we have through an
4 assurance coming from a member of the ALF. At the
5 moment we do not have that. I would not have thought
6 that is something that in any way interferes with the
7 operation of the ALF. It seems to me, although I know
8 less about litigation funding than some others in this
9 room, exactly what the ALF is designed to achieve.

10 MR THOMPSON: Yes. I will obviously take instructions in
11 the light of that. I think the point that I would make
12 and Mr. Bacon clearly knows a great deal about
13 litigation funding, and although he made criticisms of
14 this structure he did not in any way suggest that there
15 was an inconsistency between the structure used by
16 Calunius in this litigation and the code.

17 THE PRESIDENT: I think he did make a point about the
18 personal undertaking, that it is only a personal
19 undertaking from Mr. Perrin. He very specifically made
20 that point.

21 MR THOMPSON: I don't think he said the structure was
22 inconsistent with the code.

23 THE PRESIDENT: He said we do not have an adequate
24 assurance. That was the point he made.

25 MR THOMPSON: I understand the point he was making but, in

1 my submission, this structure is entirely in accordance
2 with the code.

3 THE PRESIDENT: He can come back to it in reply if
4 necessary. Yes.

5 MR THOMPSON: Our broader point was that Mr. Perrin as
6 chairman of Calunius and of the Association of
7 Litigation Funders vouched for the structure in his
8 first statement, but I will not go back over that, and
9 that Mr. Kaye explained and vouched for UKTC in his
10 witness evidence, in particular his first witness
11 statement which is at bundle 1, tab 2, paragraphs 9 to
12 22. I do not think it is necessary to turn that up.

13 Our overall position is that there is an air of
14 unreality about these criticisms, given Mr. Perrin's and
15 Mr. Kaye's status and standing.

16 THE PRESIDENT: There is no criticism of the structure of
17 UKTC as such. It is said that it has no assets and it
18 is an SPV just for these proceedings. And that --

19 MR THOMPSON: Can I come to that in a moment?

20 THE PRESIDENT: Yes.

21 MR THOMPSON: The UKTC legal team comprises experienced
22 counsel instructed by a respected legal firm which is
23 itself supporting the litigation to a degree, given the
24 terms of its funding.

25 THE PRESIDENT: Yes.

1 MR THOMPSON: We say that there is simply no basis for the
2 suggested doubts that either UKTC, Calunius or Yarcombe
3 might not perform their contractual obligations in
4 accordance with their terms and the directions of the
5 Tribunal. We also say, and insofar as this structure
6 might at some point in the future give rise to concern,
7 UKTC and Calunius will of course be happy to discuss
8 what further assurances the Tribunal might consider
9 necessary, for example, under rule 85(2) (b).

10 THE PRESIDENT: We have to consider at least some of this
11 now, of course.

12 MR THOMPSON: Yes, obviously if that is the position we will
13 address them now.

14 So far as the structure itself is concerned,
15 Mr. Bacon drew an adverse comparison between the ATE
16 structure used by Therium and RHA, whereby RHA and
17 individual claimants enter into insurance policies
18 directly and where Therium itself accepts no direct
19 liability for adverse costs under the LFA, and the
20 approach used by Calunius and Yarcombe, that they accept
21 liability both for the UKTC's own costs and for adverse
22 costs, and they therefore enter into ATE insurance to
23 obtain an indemnity against their own direct adverse
24 costs liability.

25 However, we submit that the Tribunal needs to

1 understand that there are significant advantages and
2 protections built into this structure. And it is not
3 clear to what extent this is pursued, but we would say
4 the insurers in the background, as it were, are robust,
5 and there was evidence given, Mr. Perrin's third witness
6 statement, paragraph 13, about the standard of the
7 individual insurers.

8 THE PRESIDENT: Yes.

9 MR THOMPSON: So far as the structure goes, we say that by
10 Calunius/Yarcombe accepting direct liability under the
11 LFAs the risk of non-performance by the insurer falls on
12 Calunius/Yarcombe rather than UKTC. Likewise, any risks
13 of avoidance of ATE cover are based on breaches by
14 Calunius / Yarcombe, not by UKTC or individual
15 claimants, and Calunius Yarcombe has a direct obligation
16 under the LFA to make good the obligations under those,
17 including in relation to adverse costs.

18 THE PRESIDENT: Can you explain just why it is done that
19 way, and why, given that the adverse costs order would
20 be against your client and not against Yarcombe, the
21 insurance is not taken out by your client?

22 MR THOMPSON: It is because -- I was just coming to it -- it
23 is a direct relationship between the funder and UKTC
24 whereby the funder has a liability for adverse costs.
25 Whereas, Therium has no direct liability for adverse

1 costs, simply for --

2 THE PRESIDENT: But if the funder does not have any
3 liability for adverse costs under an order of the
4 Tribunal, we could potentially make an order against
5 a funder, as you know there is quite a bit of authority
6 now on that, but in the normal way the adverse costs
7 order is against the party to the litigation, and the
8 party to the litigation, being the one at immediate
9 risk, would take out the policy. But that has not been
10 done here and we just wondered -- maybe you cannot help
11 us -- why it has been done that way?

12 MR THOMPSON: I was coming to it. It is, as it were, an
13 integrated structure whereby the LFAs impose obligations
14 on UKTC and its legal representatives in relation to the
15 conduct of the litigation and that forms -- and so the
16 obligations accepted by Yarcombe under the LFA and the
17 ATE agreement form a coherent whole and that is why
18 there is cross-references between the two.

19 THE PRESIDENT: Suppose Yarcombe were to become insolvent
20 because of -- or GP3 were to become insolvent, UKTC has
21 no claim on the policy.

22 MR THOMPSON: But the protection that -- the concern that is
23 raised in relation to the insurer insolvency,
24 effectively UKTC has protection from Calunius as well as
25 from the insurers.

1 THE PRESIDENT: How?

2 MR THOMPSON: Because Calunius is directly liable under the
3 LFA for --

4 THE PRESIDENT: No, only Yarcombe. Yarcombe is liable, but
5 if Yarcombe --

6 MR THOMPSON: Subject to the point --

7 THE PRESIDENT: I was saying if Yarcombe becomes insolvent
8 that is not much use.

9 MR THOMPSON: Yes. That is true of the own costs as well.
10 Calunius stands behind Yarcombe and --

11 THE PRESIDENT: We are not concerned about the own costs.
12 First of all, we are more directly concerned about the
13 adverse costs at this point, we are looking at because
14 the insurance cover is for the adverse costs. You might
15 have been funded through the litigation by Yarcombe and
16 then there was a trial and things do not work out as you
17 expect and you lose, and at that point there is an
18 adverse costs order.

19 MR THOMPSON: Yes.

20 THE PRESIDENT: That by then -- by then Yarcombe and GP3
21 have become insolvent. The insurer has not. The
22 insurer is of good standing. No question about that.
23 But it does not help anyone because UKTC cannot claim on
24 the policy. As I understand it from Mr. Kirby, you will
25 correct me if I am wrong, there is no protection under

1 the statute because the insured is not a UK company,
2 whereas there would be that protection if your client
3 had the policy. So where is the comfort that we can
4 feel in those circumstances?

5 MR THOMPSON: The point I was making is that whereas the
6 full weight falls on the insurers under the Therium
7 structure and the full weight -- and the weight of
8 compliance falls on RHA and the individual claimants
9 under the ATE structure used by Therium, under the
10 Calunius structure the weight of compliance with the ATE
11 policy falls on Yarcombe and there is a direct liability
12 of Yarcombe for the adverse costs which does not
13 correspond to any liability on the part of Therium for
14 the adverse costs, so it is a different structure.

15 THE PRESIDENT: It is obviously a different structure and we
16 are not, as it were, wanting to necessarily draw
17 comparisons. We are just trying to understand your
18 structure and whether it gives adequate protection, and
19 it concerned me, as I say, that it is not your client
20 that has the protection of the cover, it is an offshore
21 entity and an offshore entity belonging to a group that
22 it seems at the moment is not seeking more business in
23 this field.

24 MR THOMPSON: Can I just show you the litigation funding
25 agreement to make good the point that I am trying to

1 make which is --

2 THE PRESIDENT: We have to make sure we look at the right
3 one. It is the one, is it --

4 MR THOMPSON: It is in original form and, subject to the
5 amendments which I do not think are material on this
6 issue, at bundle 1, tab 7. It is at page 149. Clauses
7 2.5 and 2.6. So there is a direct obligation on the
8 funder in relation to the claimant's legal costs and
9 disclosed legal costs under clause 2.5, and then in
10 clause 2.6 the funder agrees to pay the adverse costs.
11 So -- and that does not correspond to anything in the
12 Therium agreement, so there is a direct obligation and
13 therefore backed by the code --

14 THE PRESIDENT: An obligation to you, yes, to pay the
15 adverse costs from Yarcombe.

16 MR THOMPSON: Yes. So the funder is stepping further into
17 this litigation and taking responsibility for the
18 adverse costs.

19 THE PRESIDENT: Yes.

20 MR THOMPSON: And therefore insures against it.

21 THE PRESIDENT: Yes.

22 MR THOMPSON: So whereas in the Therium structure the full
23 weight in relation to adverse costs falls on the
24 insurer, in this structure the initial weight falls on
25 the funder subject to an indemnity from the insurers.

1 THE PRESIDENT: Yes, but the funder, as we understand it, is
2 an SPV set up for this case so it is not that the funder
3 has significant assets. The funder is totally dependent
4 to meet that liability on the ATE cover.

5 MR THOMPSON: In contractual terms that is correct.

6 THE PRESIDENT: In commercial terms.

7 MR THOMPSON: In terms of the code which underlies this area
8 of practice for the reasons we discussed on Tuesday, the
9 funder, Calunius, is in the frame to support this. So,
10 effectively, Yarcombe has a double indemnity, you might
11 say, it is protected from default by Calunius under the
12 code and it is protected in commercial terms by the
13 ATE insurers. So that is the way it works.

14 What is being put to me is that the Tribunal has
15 some concerns about it.

16 THE PRESIDENT: Yes. The concerns are the concerns that
17 were voiced in argument and in the skeletons and we are
18 trying to understand your response to them.

19 MR THOMPSON: That is the response and that is in my
20 submission entirely in accordance with the funding code
21 and there is in reality nothing behind this in terms of
22 criticism.

23 The counterpoint of this is the obligation of the
24 claimant and its representatives under clauses 3 and 4
25 which follow, which puts significant obligations on the

1 claimant and its representatives to perform their side
2 of the bargain, as it were. It is in that context that
3 the obligations under the ATE agreement which Mr. Bacon
4 criticised, I think, as slapdash, that is the basis for
5 them, in that --

6 THE PRESIDENT: The right ATE policy to look at is, you will
7 correct me if I get this -- is not the one at tab 10, it
8 is the one in --

9 MR THOMPSON: In bundle 3, tab 52.

10 THE PRESIDENT: Bundle 3, yes. So that is superseded.
11 Bundle 3, tab 52; is that right?

12 MR THOMPSON: Tab 52 is the current opt in one.

13 THE PRESIDENT: Yes. A whole series of points were made
14 about this of course. One is -- we have the point which
15 we have raised with you that the structure is that it is
16 Yarcombe and what happens if Yarcombe becomes insolvent.
17 I do not want to take you out of order but there are
18 a number of points made by Mr. Bacon on the policy.

19 MR THOMPSON: My general response is that there was a degree
20 of vagueness about the criticism in Mr. Bacon's
21 submissions, or I would submit that there was some
22 vagueness, but that the core criticism appeared to be
23 the muddling up of the role of the insured and the
24 claimant.

25 What I have been seeking to explain is that under

1 this structure Yarcombe takes on direct liability for
2 the adverse costs, but on the basis that the claimant
3 and its representative will perform its side of the
4 bargain under the LFA and, for example, clause 3.1,
5 there is an obligation on the representative who is
6 defined at clause 14.28 as the solicitor specified in
7 the schedule. So that is, in practice, Weightmans. And
8 then there are obligations placed on the claimant, for
9 example, under clause 3.2 and 3.3, which is of course
10 UKTC.

11 So the amendments were intended to make it clear
12 that both Weightmans and, in particular, UKTC would
13 perform their part of the bargain to enable the insured
14 to perform its part of the bargain, for example, in
15 relation to offers at clause 3.13, and likewise at
16 clause 3.12 there is an obligation placed on UKTC.

17 THE PRESIDENT: I think the specific criticisms were, one
18 was: this only covers costs of Daimler and Iveco and not
19 of other parties who may be and it is said, we can
20 assume, on the basis of the other actions we have had,
21 joined as additional parties. That was one criticism.

22 Another -- a very specific criticism. That is on
23 the basis of the schedule at paragraph 7, the definition
24 "of other side".

25 There was a second criticism which was about

1 termination and you remember the authorities that we
2 were shown, that it is not restricted to fraudulent or
3 deliberate breach.

4 MR THOMPSON: Yes.

5 THE PRESIDENT: So those are two very specific criticisms.

6 MR THOMPSON: Yes. On the first point and it is also
7 a point that Mr. Bacon made by reference to the
8 definition of "defendants" in the LFA, we would say that
9 it is a misconceived objection in that this litigation
10 both in its expectation and execution has been --
11 I think in the LFA it is against one or more of the
12 defendants and then there was a list set out that we
13 have in fact brought an action against Daimler and Iveco
14 and unless and until that changes that is the scope of
15 the claim.

16 THE PRESIDENT: But it is likely to change because Daimler
17 and Iveco are likely to join the other OEMs who were
18 addressees of the decision for contribution, and we
19 cannot shut our eyes to the inevitable, and we have seen
20 it in the other actions. Of course they will, and at
21 that point under ordinary principles your client may be
22 at risk, certainly it is at risk as to their costs.

23 MR THOMPSON: Our general submission, both under the LFA and
24 under the ATE, is that at least as at now and as at the
25 date of the CPO the objectors have the standing of

1 objectors, and the respondents are jointly and severally
2 liable for the damages under the cartel.

3 THE PRESIDENT: Of course that is right. I simply cannot,
4 or do you say we should, I do not know, close our eyes
5 to the inevitable and what will happen? There is no
6 point authorising you if the moment the claim form is
7 served and defences put in we have contribution notices
8 being issued, as we have in all the other trucks claims,
9 and they come in and then we go through all this again
10 because we get a new policy and we do not know if you
11 will. We can consider today, it seems to me, and I do
12 not know what the view is of my colleagues, that where
13 that is such an inevitable development in the immediate
14 foreseeable future it is something we should consider
15 now.

16 MR THOMPSON: It may be there is an air of unreality on both
17 sides, but unless and until the Tribunal gives some
18 indication of how this case will be managed going
19 forward and what role the other parties will be
20 permitted to play and on what basis, it is very
21 difficult to --

22 THE PRESIDENT: We have a model because we have no less than
23 seven other trucks proceedings where we have faced these
24 points and ruled on them, and I think even given
25 a judgment on one aspect, possibly, of dealing with

1 precisely these points of what role the other OEMs
2 should play, and just because they are collective
3 proceedings which brings certain efficiencies, does not
4 change the nature of the contribution claims and their
5 potential interest.

6 MR THOMPSON: It may materially change the costs
7 implications. I mean one has seen in the case to date
8 that there are three players who, in legal terms, are
9 objectors and it appears that they have ignored that
10 fact and run up very significant costs, but there has
11 been no indication of the basis on which they are doing
12 that. It takes the point that Mr. Kirby made about
13 unpredictability to a whole new level, because not only
14 do we not know about the quantum, we have no idea of the
15 basis on which such costs might be recoverable.

16 THE PRESIDENT: That may be or may not be right for costs to
17 date, but we are looking ahead through to trial. Yes,
18 was there anything else you wanted to say about the
19 other side definition?

20 MR THOMPSON: I am afraid the second point that the Tribunal
21 put to me I have now forgotten what it was.

22 THE PRESIDENT: The second point is termination of cover.

23 MR THOMPSON: Yes. That does take me -- that takes me to
24 a point which Mr. Kirby to some extent has addressed
25 already. The point about termination of cover on the

1 basis of, or avoidance of cover on the basis of
2 dishonesty or fraud. There are two points here.

3 First of all, as I have indicated, the structure
4 here is based on a direct relationship between the
5 funder and the insurer, so that the avoidance is not of
6 the kind that was of concern, for example, in the Court
7 of Appeal in the *Premier Motorauctions* case or the
8 judge in the *Lewis* case whereby there would be
9 disputed evidence of fact and it would be almost
10 inevitable that one or other would be believed. There
11 was reference made to a judgment of Lord Justice Sedley
12 where he wondered why the insurance policy was ever
13 taken out because the claim would either succeed because
14 the witness was honest or the insurance would be useless
15 because the witness was dishonest. That is paragraph 21
16 of the Premier case.

17 Here this is a commercial relationship between
18 Yarcombe and the insurers and so the position in
19 relation to avoidance is completely different. It is
20 based on essentially non-performance by a solicitor's
21 firm, a special purpose vehicle set up under
22 a litigation funding agreement or by Yarcombe itself.
23 In my submission it is a quite different structure.

24 However, and given the broader point about the
25 issues that have been raised, and I think Mr. Bacon

1 recognised at the end of his submissions, my client
2 accepts that it would in principle be possible to give
3 additional reassurances to the respondents and objectors
4 either by imposing additional restrictions on the terms
5 on which the insurers could avoid liability or by giving
6 the respondents and objectors direct rights of
7 enforcement, possibly by assignment of the benefits of
8 the policies.

9 But we say these are the type of issues that the
10 courts have grappled with in contested security for
11 costs applications when there is a serious risk that
12 litigation will not be funded. We say this is simply
13 not that case. Here we have reputable witnesses,
14 reputable funders, reputable solicitors and a serious
15 risk that the purpose of this in fact is to impose
16 additional costs and burdens on UKTC and Calunius and
17 Yarcombe before the CPO has even been granted.

18 THE PRESIDENT: In terms of the rights of termination of the
19 insurance policy that should not be an additional cost
20 on Calunius or UKTC. It is just obtaining cover, if you
21 can, where the rights of termination in favour of the
22 insurers are less generous.

23 MR THOMPSON: Realistically, sir, that sort of protection is
24 a material protection and comes at a cost, so the
25 reality is that this is an exercise that would be bound

1 to add financial costs before this application has even
2 been certified and if it were to fail it would be
3 wasted.

4 THE PRESIDENT: If the chance of any non-fraudulent breach
5 is so small and any prospect of the insurer wishing to
6 terminate is so trivial and minimal, it should not cost
7 more to get cover that excludes that right, because they
8 are not giving up anything.

9 MR THOMPSON: I understand the point but I think equally,
10 neither you or I are in a position to judge that
11 question in terms of where the commercial reality of the
12 situation lies.

13 THE PRESIDENT: We have seen another policy where certain
14 changes have been made.

15 MR THOMPSON: Yes. It is not appropriate for me to give
16 evidence, but the information I have is that the costs
17 would be significant.

18 We say that there is an obvious risk that this is
19 simply another stalling tactic and that there is no
20 reason why an issue of this kind could not be revisited
21 at a later stage, either under rule 85 or 59 in the
22 context of an application for security for costs if the
23 Tribunal was, in reality, persuaded that there was
24 a material risk that the defendants or objectors were
25 insufficiently protected. It is not a basis --

1 THE PRESIDENT: It is not going to change. These are the
2 terms of the policy. We will never know whether the
3 insurers might be minded to terminate and revoke until
4 possibly several years hence, so it is not going to
5 change in three months time.

6 MR THOMPSON: I think the Tribunal probably has my
7 submissions on this and I am mindful of the time. I was
8 going to make submissions about the level of own costs
9 and adverse costs cover but this has obviously taken
10 a little bit longer.

11 THE PRESIDENT: Why do you not do that now so we can
12 conclude your submissions, yes.

13 MR THOMPSON: I think the general points that were made in
14 the joint funding skeleton argument come under two broad
15 headings. First of all, no provision for individual
16 claims and secondly, additional costs of twin
17 applications. I think I have impliedly responded to
18 both of them already. We would say at best they are
19 premature and, at least on our approach, which we say
20 reflects the approach of the Court of Appeal in
21 Merricks, and indeed, the approach of Dr. Lilico,
22 that it is appropriate at this moment to address the
23 issue on a collective basis. We say that there is
24 nothing wrong with the way we have approached the budget
25 in relation to that. That is addressed by Mr. Kaye in

1 his second witness statement at paragraph 23 as a matter
2 of how UKTC has set about it.

3 PROFESSOR WILKS: Mr. Thompson, before you go further with
4 the budget, could I just ask for some clarification.

5 MR THOMPSON: Yes.

6 PROFESSOR WILKS: The original budget which I think
7 was May 2018 is at tab 1, section 5.

8 MR THOMPSON: Yes.

9 PROFESSOR WILKS: It is a series of spreadsheets.

10 MR THOMPSON: Yes.

11 PROFESSOR WILKS: I would just be grateful if you could
12 clarify a couple of points. Particularly the overall
13 budget is £42.5 million but that is very heavily
14 weighted by, I think it was mentioned yesterday,
15 a contingent cost C. What is that?

16 MR THOMPSON: It is not strictly speaking the contingent
17 cost C.

18 PROFESSOR WILKS: No, sorry, additional liabilities, you are
19 right.

20 MR THOMPSON: Can I just take it in stages. First of all,
21 the right-hand column in the profit costs, that is
22 essentially Weightmans and therefore essentially at
23 Weightmans' risk as things stand.

24 PROFESSOR WILKS: Is that the anticipated extent of
25 Weightmans' liability?

1 MR THOMPSON: It is --

2 PROFESSOR WILKS: No, it would include a profit element.

3 MR THOMPSON: Indeed. Yes, so the column on the right is
4 the totality in relation to Weightmans if everything
5 goes well for the claim.

6 PROFESSOR WILKS: The column of profit costs.

7 MR THOMPSON: Yes. So that is not something which falls to
8 the funder because either it fails or it succeeds. If
9 it fails it is down to Weightmans; if it succeeds it is
10 down to the other side subject to the discretion of the
11 Tribunal.

12 The left-hand side is disbursements. The column at
13 the bottom or the line at the bottom you will see
14 a figure under "disbursements incurred", so that is the
15 ATE insurance premium that has already been paid.

16 PROFESSOR WILKS: The £7.9 million.

17 MR THOMPSON: No, to the left under "incurred".

18 PROFESSOR WILKS: I am sorry, yes.

19 MR THOMPSON: That is the insurance premium that has already
20 been incurred and we have seen that in the ATE contract.

21 The balance of the disbursements is the balance of
22 the ATE premiums including the premium that would be
23 received if there was success and also the professional
24 indemnity insurance for UKTC. So that is what those
25 figures are. Again, they are separately funded by

1 Calunius very largely as ATE premiums and so, therefore,
2 as it were, on the adverse cost side of the balance.

3 The rest which is the small amount or relatively
4 small amount under the incurred and the balance of the
5 disbursements, which broadly speaking comes to
6 approximately £10 million, is the reality of the figure
7 which is being covered by the £12 million own costs
8 covered by Calunius and Yarcombe at the moment.

9 PROFESSOR WILKS: The £1 million under additional
10 liabilities under the Weightmans' column, what would
11 that be?

12 MR THOMPSON: My surmise is that it is half of the totality
13 and so it looks like a success fee.

14 PROFESSOR WILKS: Success fee shown under costs?

15 MR THOMPSON: I think that is the way it is structured, that
16 the total of the budget includes the figures that will
17 appear in the event of a successful outcome.

18 PROFESSOR WILKS: Okay, thank you. I note that in Kaye 2,
19 which is at tab 48, Mr. Kaye does say he does not
20 consider it necessary to revise the budget at this
21 point. A year on the case is much clearer. We know
22 there is going to be delay. Was there no sense that it
23 might be revised?

24 MR THOMPSON: I think we are essentially in the area that
25 Mr. Kirby has addressed. It is very difficult to have

1 any sensible basis on which to do it. There are so many
2 contingencies and uncertainties that I suppose if we
3 were forced to do it we would do it but at the moment
4 that is the best we have come up with.

5 PROFESSOR WILKS: So that is still your working budget?

6 MR THOMPSON: Yes.

7 PROFESSOR WILKS: Okay, thank you.

8 MR THOMPSON: The other point was in relation to the
9 additional costs of twin applications where I think
10 I have addressed that already. It appears very much to
11 cut both ways and the respondents and objectors appear
12 to recognise that there would be economies, at least
13 potentially depending on how these cases were managed,
14 and certainly certain issues would be common to them and
15 if Therium and Calunius were both bearing those costs
16 that would be a lesser burden on each of them and indeed
17 on each of the claimants' own group of undertakings.

18 In terms of Mr. Bacon's broadbrush figures, it was
19 unclear, at least to me, whether he was saying that the
20 total adverse costs on his side was £60 or £65, or £120
21 or £130.

22 THE PRESIDENT: I think it was £60/£65.

23 MR THOMPSON: For the two actions.

24 THE PRESIDENT: For the two actions.

25 DR. BISHOP: Might I ask a question. Are you putting your

1 case as high as this: that Mr. Bacon's clients, should
2 they succeed in repelling the assault, would be better
3 off to have two assailants, both authorised on an opt in
4 basis, because then the pool of insurance available to
5 meet the costs of the successful defendant on this
6 hypothesis would be greater. Are you suggesting that
7 the objections that are made to the size of the
8 insurance and the pool to meet costs would be a lesser
9 objection if both of the applicants here were authorised
10 to proceed on an opt in basis?

11 MR THOMPSON: Again, there are obviously a lot of
12 uncertainties and contingencies here depending on how
13 the matter was structured and whether one or other was
14 undermined by the other. It is true that there are two
15 substantial funders here and there are potential
16 economies, but I am not putting it any higher than that
17 because I think that is the point that the other side
18 make and quite how it would play out I think is
19 otherwise too uncertain.

20 I think I have already addressed the point raised by
21 the Tribunal about the budget, and we would say that the
22 funding available for own costs is sufficient to meet
23 the part of the budget which is relevant for present
24 purposes, and the Tribunal will recall that the
25 structure of maximum funding has been changed since the

1 original, so that partly addresses the point, the
2 funding structure has been changed by Yarcombe and
3 Calunius, and the way it has been done is that whereas
4 effectively £600,000 plus £1.8, so £2.4 million was
5 available for ATE premiums, £4 million is now available
6 which will obviously buy additional insurance cover in
7 the market if needed.

8 THE PRESIDENT: The insurance you have, and I know this is
9 set out, the cover you have at the moment, the premium,
10 the total premium, is what?

11 MR THOMPSON: It is £600,000 up to the date of -- up to
12 today's date with a further £1.8 payable.

13 THE PRESIDENT: It is £2.4 in total assuming everything
14 goes ...

15 MR THOMPSON: Yes. That effectively underwrites the
16 £12 million of insurance which is available now and
17 ongoing.

18 THE PRESIDENT: You say the budget has now got £4 million in
19 it to cover ATE; is that right?

20 MR THOMPSON: If you want to look at Mr. Perrin's third
21 statement, paragraph 9.

22 THE PRESIDENT: Is it in this budget that we have at tab 5?

23 MR THOMPSON: This is Calunius's liability and exposure. So
24 that is explained by Mr. Perrin. This is, as it were,
25 the funding side of it.

1 THE PRESIDENT: The budget has the ATE premiums in it.

2 MR THOMPSON: Yes, it does in the way I was seeking to
3 explain just now, is that they are in the bottom line.

4 THE PRESIDENT: In the bottom line of £7.968, is that broken
5 down in any of the subsequent?

6 MR THOMPSON: That is what I was trying to explain and it
7 comes in terms of the premiums under the ATE figure
8 which is at tab 10.

9 THE PRESIDENT: That is the old one, but perhaps it has not
10 changed. That is the £600,000 that has been paid.

11 MR THOMPSON: Yes.

12 THE PRESIDENT: We understand that is the £600,000. The
13 remaining £1.8 is included in the £7.968 million,
14 estimated disbursements; is that right?

15 MR THOMPSON: Yes, and then there is the balance of £6.

16 THE PRESIDENT: The £6 is incurred. We can see that,
17 disbursements incurred, £600,000.

18 MR THOMPSON: £600,000, so the total is £8.4.

19 THE PRESIDENT: Sorry, where are you reading from?

20 MR THOMPSON: On page 189 there are three premiums, the
21 first is £600,000, the second is £1.8 million and the
22 third is £6 million.

23 THE PRESIDENT: I see, yes. So that is the £7.8.

24 MR THOMPSON: The first is payable immediately, the second
25 is payable when the CPO is made, I believe.

1 THE PRESIDENT: And the £6 million is payable --

2 MR THOMPSON: The £6.4, if a positive outcome is achieved at
3 trial. And then there is a lower premium payable if it
4 is achieved prior to trial.

5 THE PRESIDENT: Yes.

6 MR THOMPSON: So insofar as the budget is concerned that is
7 all in, so the £8.4 is all in. £600 is in the incurred
8 costs and the balance of --

9 THE PRESIDENT: But the £1.8. has to be paid.

10 MR THOMPSON: It has not been paid yet.

11 THE PRESIDENT: It would have to be paid.

12 MR THOMPSON: And the £6 million would have to be paid if
13 the case succeeds.

14 THE PRESIDENT: At that point you have damages recovery.

15 MR THOMPSON: So the budget at tab 5 assumes a successful
16 outcome.

17 THE PRESIDENT: Yes. That gives you your £12 million cover
18 for adverse costs; is that right?

19 MR THOMPSON: The incurring -- £600,000 now gives us
20 £12 million cover but if the CPO is made we will have to
21 come up with another £1.8.

22 THE PRESIDENT: Yes, I have it.

23 MR THOMPSON: And the success fee, if I can put it that way,
24 for the insurer is £6 million if the matter succeeds at
25 the end of trial.

1 THE PRESIDENT: Then Mr. Perrin talks about the possibility
2 of further cover.

3 MR THOMPSON: It is more than that. It is in the amended
4 opt out he explains at paragraph 9 of his witness
5 statement, tab 50.

6 THE PRESIDENT: This is in --

7 MR THOMPSON: Bundle 3, tab 50, you will see in the second
8 sentence:

9 "The £12 million of funding committed to the adverse
10 costs indemnity has now been split with explicit
11 provision of £4 million for ATE deposit premiums."

12 So that is a supplementary £1.6 million over the
13 existing ATE contract, and with an £8 million
14 contingency which can be applied to either own or
15 adverse costs. It is effectively giving a degree of
16 additional flexibility on both sides of the fence.

17 THE PRESIDENT: Yes, then the last sentence.

18 MR THOMPSON: So just as the second tranche of the
19 previously agreed insurer's premium has not been paid
20 out yet, there would be -- a further £1.6 is effectively
21 available and not yet spent by taking out additional ATE
22 cover, but Mr. Perrin gives assurance as to what Willis
23 Towers Watson have advised about what would be available
24 in the market for that level of additional premium. So
25 effectively there would be £20 million of adverse costs

1 cover and then Mr. Perrin also says --

2 THE PRESIDENT: Is the £1.6 million premium covered in your
3 funding arrangement with Yarcombe?

4 MR THOMPSON: Yes. If one looks at the amended LFA, the way
5 it is structured now appears at tab 51, page 1573, and
6 you can see on either side there was £12 million, you
7 can see in the red deleted wording, it was just
8 £12 million on both sides, and then in response to the
9 concerns expressed by the respondents and objectors,
10 Yarcombe responded or Calunius responded by committing
11 £12 million to the claimant's costs and £4 million for
12 the ATE cover, as against £2.4 that had previously been
13 committed, which increases the limited indemnity to an
14 anticipated £20 million. So that becomes the basis for
15 the limited indemnity in the main body of the contract.
16 Then £8 million is effectively held in reserve as
17 a contingent figure that can be used either for the
18 claimant's legal costs or for insurance policy premiums
19 as defined, which are primarily the ATE cover at least
20 and the funder's outlay as defined. So it is a flexible
21 pot of money that can be used, and in our submission
22 that is entirely appropriate given the submissions you
23 have heard about the uncertainties of the position at
24 the moment. That is the way it has been --

25 THE PRESIDENT: I am just trying to see where the -- you

1 have the £4 million in the maximum sum now, the
2 additional -- which includes the additional £1.6 to get
3 up to £20 million of cover on page 1573.

4 MR THOMPSON: Yes.

5 THE PRESIDENT: I am just trying to see where the
6 obligation, that is a schedule, definitions, the
7 obligation to pay that --

8 MR THOMPSON: The two obligations are at clause 2.2 and 2.3
9 on 1558.

10 THE PRESIDENT: Clause 2.2 is to pay the claimant's legal
11 costs in respect of legal costs, so that is the
12 £12 million, and clause 2.3 in respect -- pay the
13 adverse costs up to the limit of the indemnity on the
14 insurance policy.

15 MR THOMPSON: Yes.

16 THE PRESIDENT: But where is the obligation to pay the
17 premiums on a sum in respect of the premiums on the
18 insurance policy up to the maximum sum? Do you see the
19 question I am making?

20 Perhaps you can come back to it at 2.20.

21 MR THOMPSON: Yes.

22 THE PRESIDENT: It may well be that is the intention and it
23 has just not been very effectively drafted, but as it
24 reads at the moment £2.2 is not covering that
25 £4 million. It is covering the £12 million, I think.

1 MR THOMPSON: It may be that the definitions of limited
2 indemnity and maximum sum, so maximum sum, the second
3 bullet, means the maximum amount of the premiums on the
4 insurance policy which the funder agrees in this
5 agreement to pay.

6 THE PRESIDENT: Yes, it is within the maximum sum. I can
7 see that. But clause 2.2 is dealing with the first
8 bullet, that is dealing with clause 5(a). Clause 2.3 is
9 dealing with adverse costs up to the limit of indemnity,
10 but there does not seem an obligation at the moment to
11 fund that £4 million in addition to the £12 million, but
12 it may be that is what they intend because otherwise it
13 is not -- have a look at that.

14 MR THOMPSON: Can I take instructions on that. I do not
15 want to take any longer.

16 THE PRESIDENT: These points are quite important. We will
17 return at 2.15.

18 MR THOMPSON: I am grateful.

19 (1.21 pm)

20 (Luncheon Adjournment)

21 (2.18 pm)

22 THE PRESIDENT: Yes, Mr. Thompson.

23 MR THOMPSON: Yes, there are a number of puzzles and
24 conundrums which we have been trying to resolve as best
25 we can over the short break over lunch. So far as the

1 obligation to meet the premiums themselves, the point
2 that the President raised with me just before the break.
3 I think we had understood that effectively it was an
4 implied aspect of this, given the exposure of Yarcombe
5 under clause 2.3, but insofar as an express obligation
6 was appropriate, the wording that we came up with after
7 various combinations and permutations was an obligation
8 on the funder which could either be in clause 2.3 or
9 a separate obligation, that at the reasonable request of
10 the claimant, the funder agrees to enter into the
11 insurance policy, which includes both the existing and
12 future policies by definition, up to the maximum sum in
13 respect of deposit premiums specified in schedule 1.

14 So you will recall that the maximum sum has a number
15 of heads, one of which is deposit premiums, and rather
16 than naming a specific sum in the body, it seemed to us
17 appropriate to leave that to the sums specified in
18 schedule 1, so that would obviously leave open the
19 possibility that schedule 1 might in due course be
20 amended if the level of adverse costs cover needed to be
21 increased.

22 THE PRESIDENT: Yes. Pause just a moment. (Pause)

23 MR THOMPSON: I must say I think it reveals the fact that if
24 you have a large number of intelligent lawyers looking
25 at a commercial contract you come up with a number of

1 unexpected twists and turns, because I have not myself
2 seen this problem but I can see that there is not an
3 express obligation in relation to the premiums, or we
4 could not find one.

5 THE PRESIDENT: Yes. They are undertaking to pay adverse
6 costs up to, I think --

7 MR THOMPSON: It was £12 million, but the idea was to
8 enhance the protection but by doing that we then need to
9 have some meaning given to the --

10 THE PRESIDENT: All that is needed is to have a
11 clause 2.2(a) saying "In consideration," and so on, "the
12 funder agrees to pay premiums for the insurance policy
13 up to the maximum sum specified in paragraph 5 of the
14 schedule." Or "up to £4 million as specified in the
15 schedule."

16 MR THOMPSON: Yes, it would probably be cleaner to leave the
17 number in schedule 1 and then if there were any changes
18 in due course.

19 THE PRESIDENT: I think it may be just the way it has been
20 drafted.

21 MR THOMPSON: Yes.

22 THE PRESIDENT: Because that does appear to be the
23 commercial intention.

24 MR THOMPSON: Indeed, I think that is certainly the
25 commercial intention.

1 THE PRESIDENT: As far as you understand, is there any
2 difficulty if it had to be amended?

3 MR THOMPSON: No, I do not think so.

4 THE PRESIDENT: Yes.

5 MR THOMPSON: The second question which goes to the more
6 basic question about the relationship between Calunius
7 and Yarcombe. I think the spirit is willing but just in
8 relation, as in relation to Mr. Kirby, the flesh is
9 slightly weak in terms of being able to do this
10 immediately, because I think the undertaking would need
11 to be given probably by GP3, the relevant fund business
12 within the Calunius group, if I can put it that way.

13 THE PRESIDENT: Could it not be given -- I mean that is the
14 point. Calunius is the member of the Association of
15 Litigation Funders who are to observe the code, who are
16 members of the Association of Litigation Funders. It is
17 not clear from Mr. Perrin's witness statement that
18 Calunius GP3 is a member, and is there any difficulty,
19 and Mr. Perrin is chairman of Calunius and he knows his
20 board. We cannot expect him or we do not expect him to
21 say: yes, we can definitely do it, because he had to go
22 back to his board, but he no doubt knows his board well,
23 and if he is able to say, "Well, I can reasonably expect
24 that is likely to be forthcoming from Calunius," then in
25 two weeks it can be provided.

1 MR THOMPSON: Yes, I think the only issue, both for me
2 standing here and Mr. Perrin sitting there, is that
3 there is more than one stakeholder who he has to speak
4 to, and so each of us is slightly reluctant to enter
5 into an obligation to the Tribunal without having spoken
6 to the relevant stakeholders. Can I --

7 THE PRESIDENT: It is not an obligation but it would help
8 if -- there are two ways of doing it. One is say we do
9 not know, and you can either supply an undertaking and
10 we set a deadline of whatever seems reasonable, two
11 weeks or something.

12 MR THOMPSON: Yes.

13 THE PRESIDENT: You will supply it if you can or not.

14 MR THOMPSON: Yes.

15 THE PRESIDENT: Or you can go further and say you expect
16 that it is likely to be provided.

17 MR THOMPSON: Yes.

18 THE PRESIDENT: I do not know what you have instructions to
19 say.

20 MR THOMPSON: I do not think this is a submission which will
21 attract you but, in my submission, it does rather
22 illustrate the extraordinary nature of this exercise.
23 It may be that we are going to have to probe into the
24 structure of Calunius to decide whether or not Calunius
25 topco in conventional terms, or a Calunius intermediary,

1 is the appropriate body to give the undertaking and what
2 form of undertaking it gives when neither is actually
3 party to this litigation.

4 THE PRESIDENT: I think the appropriate body is the body
5 that -- I am looking at the code. The code sets out:

6 "Standards of practice and behaviour to be observed
7 by funders as defined below who are members of the
8 Association of Litigation Funders."

9 So it has a membership.

10 MR THOMPSON: Indeed, and Mr. Perrin is chair of the
11 association.

12 THE PRESIDENT: Exactly. And Mr. Perrin will know very well
13 which Calunius companies are members. We do know,
14 because he says so, that Calunius Capital LLP is
15 a member. We would expect the undertaking to come from
16 a member.

17 MR THOMPSON: Yes.

18 THE PRESIDENT: And that the undertaking will be to the
19 effect that Yarcombe will comply with the code, so the
20 terms that we have in mind are extremely simple. I do
21 not think it needs any prying into anything,
22 Mr. Thompson, and if we are told by Mr. Perrin that
23 Calunius GP3 is itself a member, which I don't think he
24 says in his witness statement, then Calunius GP3 can
25 give the undertaking. So it is very simple.

1 MR THOMPSON: I think the basic submission I have is that
2 paragraph 2.2 of the code is binding on Calunius as the
3 member, and Mr. Perrin as chairman of both Calunius and
4 of the code was committing to compliance by Calunius
5 with the code, but --

6 THE PRESIDENT: Calunius complies with the code, I know, but
7 Calunius is not a party to anything here.

8 MR THOMPSON: Yes, but the obligation under paragraph 2.2 is
9 not simply on Calunius, it is on -- it is on its
10 associated entities, so that is why we had thought this
11 was a hollow criticism but it is obviously a concern to
12 the Tribunal so we will seek to address it.

13 THE PRESIDENT: As I understand the code, in paragraph 1, it
14 binds the members. Members can be in two different
15 categories. They can either be a 2.1 or a 2.2.

16 MR THOMPSON: Yes.

17 THE PRESIDENT: But it only binds members, but I do not --
18 I cannot say any more.

19 What period -- is two weeks a satisfactory period?

20 MR THOMPSON: Just to be clear, I think it was put to me
21 that this was a classification of members. What it says
22 here is that the litigation funder acts as the exclusive
23 investment adviser to an entity or entities having
24 access to funds immediately within its or their control
25 including within a corporate parent or subsidiary, and

1 that the litigation funder here is Calunius and
2 Mr. Perrin gave evidence that it was the sole investment
3 adviser in his first witness statement. So we had
4 understood that it was within the scope of this aspect
5 of the code, but we can certainly provide more detail
6 and, as I understand it, what the Tribunal is actually
7 asking for is some form of undertaking from one of the
8 other entities, either GP3 or Yarcombe itself, and that
9 is something I cannot give now and I do not think
10 Mr. Perrin could give now.

11 THE PRESIDENT: No, I think what we are asking for, if
12 you -- I thought it was fairly simple. If we go to
13 Mr. Perrin's witness statement, I think his first
14 statement which is at tab 6, page 133, paragraph 9:

15 "Yarcombe is wholly controlled by GP3. I hereby
16 undertake that Calunius will use its best endeavours to
17 ensure that Yarcombe will comply with the code for the
18 duration of these proceedings."

19 The point that was being put to you is that we did
20 not think that was very satisfactory and what we would
21 expect is an undertaking, not by Mr. Perrin personally
22 but by Calunius, and the undertaking by Calunius to be
23 not that it will use its best endeavours to ensure that
24 Yarcombe but simply that it will ensure that Yarcombe,
25 because Yarcombe, as we understand it, is, through its

1 associated company GP3, under its control.

2 MR THOMPSON: With respect that is what I understood. That
3 is what I thought I just said to you: that beyond the
4 code you want an undertaking. The point I am making is
5 that paragraph 5, it says:

6 "Calunius acts as the sole investment adviser to the
7 three Calunius litigation risk funds."

8 In my submission therefore Calunius is the funder as
9 defined in paragraph 2 because you will see that
10 "a funder" is defined in two ways: either under
11 paragraph 2.1 or paragraph 2.2, and paragraph 2.2 is
12 "acts as the exclusive investment adviser" and then "to
13 an associated entity."

14 So our position is that Calunius is the funder and
15 is bound by the code in relation to this transaction.

16 As I understand it, the Tribunal wants an
17 undertaking from somebody other than Mr. Perrin, and the
18 point I am making is that does not arise under the code
19 but obviously if the Tribunal wants it then we will have
20 to go and find it.

21 THE PRESIDENT: You have heard what -- I think we made it
22 pretty clear.

23 MR THOMPSON: So far as objector's costs go, I would simply
24 add that we would say that this is not analogous to, for
25 example, the SARP case that Mr. Bacon referred to in

1 paragraph 39 which was a case where a supplier of oil
2 joined the upstream supplier on the basis that the
3 upstream supplier's oil had been defective. This is
4 a case where five addressees of a cartel are each
5 jointly and severally liable, and so the costs position
6 is not, in our submission, straightforward, that it can
7 simply be passed through or that it was necessary to
8 have everybody here. We would say that our claim was
9 properly made.

10 Obviously if, in due course, we are faced with five
11 defendants or quasi-defendants, we will add them in as
12 and when and at least so far as the insurance goes, we
13 do not think that that will cause any issues. The issue
14 for the insurers is the level of cover not the identity
15 of the defendants. So we do not anticipate that to be
16 a problem but we do not see any formal defect in the
17 agreements as they stand.

18 Then finally, perhaps most significantly, if there
19 is an issue about the liability or the rights of the
20 defendants and objectors as against Yarcombe under the
21 insurance policy, or UKTC under the litigation funding
22 agreements, we submit that the most elegant solution
23 would be an assignment of the benefits of Yarcombe and
24 UKTC under those agreements in relation to adverse costs
25 to the defendants, though obviously that has a technical

1 question because at the moment -- well there are not any
2 defendants but there are two respondents, and there may
3 in due course be five, given the indication of the
4 Tribunal, so the assignments would have to be drafted in
5 a way that they could take that into account, otherwise
6 the liabilities would be to Daimler and Iveco and then
7 there might be a question about how they were
8 transferred to the other defendants and respondents.

9 All of this, in my submission, illustrates the basic
10 point that these are a number of twists and turns and
11 complexities which might be appropriate if there was
12 serious reason to doubt the funding arrangements, but we
13 would say that there is not and that they should be
14 matters that could be addressed at a later stage, and in
15 particular if one or more of these respondents or
16 objectors makes an application for security for costs
17 and we then need to address the issue of whether or not
18 their interests are properly protected once this
19 litigation is up and running. Otherwise it has the
20 capacity simply to impose a hurdle in terms of costs and
21 delay with very obvious incentives for the respondents
22 and objectors to maximise those and to undermine the
23 viability of these, on their face, perfectly viable
24 claims.

25 So that is our basic position. I do not think --

1 I think I have covered everything one way or another but
2 obviously if there are any other questions I am happy to
3 answer them.

4 THE PRESIDENT: Thank you. Yes, Mr. Bacon.

5 Reply submissions by MR. BACON

6 MR BACON: I will try and be as quick as I can and I know
7 you are very patient to go beyond our agreed timetable.

8 THE PRESIDENT: We said we would give you -- you were
9 allowed an hour in the timetable.

10 MR BACON: Yes, thank you. File 2, the structure of the
11 submission in reply will be jurisdiction, RHA and then
12 the twists and turns of UKTC.

13 Jurisdiction. I am afraid I would like again, if
14 I may, to look at rule 78. The issue here, sir, is what
15 is the real interplay between 78(1) and 78(2)? That is
16 really what I am engaged in assisting you on. The case
17 I am having to meet is that (2) is just a selection of
18 potential factors, matters that can now be considered
19 but are not determinative ultimately of the decision
20 that may be made under rule 78(1), broadly speaking.

21 I just wanted to test that by way of example.
22 Because my submission is that rule 78(2) should be read
23 as meaning:

24 "In determining whether it is just and reasonable
25 for the applicant to act as the class representative the

1 Tribunal shall consider whether that person ..." (a)
2 (b), (c), (d), (e) that it shall, if satisfied
3 ultimately that those factors are met.

4 Is what is really being intended here because taking
5 for example, (2) (a):

6 "... would fairly and adequately act in the
7 interests of the class members."

8 A factor you shall consider.

9 Were it to be the Tribunal's collective view that
10 the particular proposals would not lead to that person
11 acting fairly and adequately in the interests of class
12 members one would be surprised if you would exercise
13 discretion under rule 78(1) to consider that it is just
14 and reasonable for that applicant to act. But there is
15 more in this than just a mere factor.

16 The tension between, if there is a tension, is
17 resolved by reading into rule 78(2):

18 "the requirement to be satisfied of these matters."

19 You take them into account. You must take them into
20 account, and you can consider other matters, but of all
21 the other matters you shall consider these, and you
22 should be satisfied that the arrangements overall would
23 meet these criteria, these gateway criterias, and then
24 under rule 78(1), only if the Tribunal considered in the
25 light of that satisfaction under (2) (a), (b), (c), (d),

1 (e) would you then proceed to approve or otherwise the
2 arrangements.

3 The same point can be made in relation to (2)(b)
4 whether the person does not have in relation to the
5 common issues for class members a material interest it
6 is in conflict with the interests of the class members.

7 Again, it would be unthinkable, one would have
8 thought, that if you were satisfied or not satisfied
9 that there did not exist, that there existed such
10 a conflict, that you would then -- I say you, the
11 Tribunal -- would then proceed to accept nevertheless it
12 would be just, and the same could be said of all of
13 these factors and it is only the sensible way to read,
14 I would submit, rule 78(2) and it applies equally to
15 (d), therefore, that (d) is no less significant than
16 (a).

17 There has to be satisfaction on the part of the
18 Tribunal that a person applying for the CPO will be able
19 to pay the defendant's recoverable costs if ordered to
20 do so. It is very clear. It is "will", not "might not"
21 or "potentially could" or "may just about be able to".
22 The only way of reading these provisions is, as
23 I submit, to be satisfied that they have been met.

24 So the "shall consider" is a drafting technique to
25 identify key provisions, key factors that must be

1 satisfied alongside any other matters that the Tribunal
2 considers applicable. The "shall" is considering those
3 matters, as is (e):

4 "Where an interim injunction is sought, will be able
5 to satisfy any undertaking as to the guarantees required
6 by the Tribunal."

7 They all are required.

8 Now, on the question of the correct test when
9 looking at (d), this is the relevance of the authorities
10 on security for costs, specifically. We have looked at
11 rule 59, I think Mr. Kirby took you to rule 59 but we
12 have not looked at rule 59(6). So rule 59 is security
13 for costs where it is said there would be a different
14 test applied and it is accepted that, as I understand
15 it, in the context of security the Tribunal would be
16 accustomed to looking at the CPR authorities and the
17 approach the Court of Appeal has taken in relation to
18 security and ATE and so on.

19 The point made against me is this is not a security
20 for costs application, which it is not. But it bears
21 remembering that in rule 59(6)(b) mirroring the
22 amendments that were made to the Civil Procedure Rules
23 to enable security for costs applications against
24 funders, the Tribunal rules permit an order to be made
25 against -- the defendants seeks security for costs

1 against someone other than the claimant, the conditions
2 are that -- so there are two scenarios provided for. (b)
3 is obviously the one which we would seek to draw to your
4 attention which is that where a person has contributed
5 or agreed to contribute to the claimant's costs in
6 return for a share of any money which can be recovered,
7 then you can apply for security against that person
8 without satisfying a whole series of other requirements
9 that are set out under rule 59 in conventional security
10 for costs applications. Simply the fact that there is
11 a person who has contributed or agreed to contribute
12 exposes them to an order for security as of right, so to
13 speak.

14 Now, that is important when it comes to interpreting
15 rule 78(2)(d), which is what I am seeking to do when
16 I opened my submissions, because it would be odd,
17 perhaps, for the test under rule 78(2)(d) in a pre-- in
18 a pre-CPO granting case. So in a case of this kind
19 where we cannot apply for security because there is no
20 CPO, for the test under rule 78(2)(d) to be at one
21 level, which does not enable us to draw on the ATE
22 cases, and the adequacy of ATE, and to be rather
23 laissez-faire about it and see where it ends up which is
24 Mr. Rhodri Thompson's point, but then immediately after
25 the CPO is granted we would, I am sure, had a different

1 test been applied, have immediately applied for security
2 and applied the test that we were inviting the court to
3 apply in the first place. That would be slightly odd,
4 I would suggest, and so that supports our submission
5 that when it comes to looking at rule 78(2)(d) by
6 analogy one is really asking oneself the question one
7 would ask under rule 59(6)(b), and in that obviously
8 there would be an entitlement to look at the form of
9 security being put up, the adequacy of the ATE insurance
10 being put up by the funder and so on.

11 I may say, given -- I do say the quite extraordinary
12 response we have had to our submissions on the Yarcombe
13 point, I might add that in December when we appeared
14 before you, we raised -- Perrin 1 was before the
15 Tribunal and I remember being on my feet saying that
16 there is an issue with this paragraph about Mr. Perrin
17 giving an undertaking, and the thing was swept off
18 because at that stage the agreement did not provide
19 properly for opt out. So for months, literally for
20 months, the other side, the UKTC, have been absolutely
21 aware of the real concerns that have been expressed
22 about these arrangements on their side, and it is
23 disconcerting and it may be slapdash, I do not know, but
24 to have, for what appears to be for the first time,
25 a realisation by those who represent UKTC of the

1 inadequacies of these arrangements is surprising to say
2 the least.

3 I park that for the moment because submissions will
4 be made about how we think this should be taken forward.

5 That is the submission on jurisdiction together with
6 one other point. I am not going to turn to the
7 authorities, but one of the points taken against me on
8 the security for costs application cases is that they
9 are all cases where the underlying facts concern
10 potential fraudulent claims or dishonesty, witnesses may
11 not give evidence on a truthful basis and so on, and
12 that, it is being said against me, is distinguished from
13 a case such as this where dishonesty is not likely to
14 arise and therefore the concerns the Court of Appeal has
15 had in the past about ATE clauses and exclusion clauses
16 simply does not engage.

17 That is not a fair reading of the authorities and
18 I would ask you to go back to *Premier Auctions*,
19 doubtless in your own time, because the applicability or
20 useability of an ATE policy as a form of security does
21 not depend upon the underlying facts. It is a relevant
22 factor but it is not decisive for one moment because not
23 all of the exclusion clauses will apply simply because
24 somebody has told mistruths in giving evidence. There
25 are non-cooperation clauses and all sorts that have all

1 been the subject of the same uncertainty that the Court
2 of Appeal expressed in relation to those other clauses.
3 So one has to look at the termination clauses as
4 a whole.

5 In the context of this particular case, on the UKTC
6 side of things, the insured UKTC has all sorts of
7 (inaudible) clauses, obligations to the legal
8 representatives which, who knows whether they are going
9 to comply. This is an offshore entity. We know very
10 little about it apart from it being controlled by
11 a company called GP3 which does not seem to have any
12 role at all in any of this.

13 We would like to lay down a marker that insofar as
14 the ATE policy seeks to exclude or limit liability on
15 the part of those responsible for insurers because it is
16 something that Yarcombe may not have said to them in the
17 course of placing the insurance, for example, or
18 whatever it may be, that we are not then the subject of
19 that exclusion. These are not just about witnesses
20 telling untruths.

21 The way to get round this, as I have said on more
22 than one occasion yesterday, is for Calunius, the
23 funder, (inaudible) UKTC for the moment, to provide
24 a straight deed. It happens a lot as I know, in
25 commercial litigation. It is very common in security

1 for costs applications of this kind, by analogy, for the
2 funder to put up a direct promise to the -- the insurers
3 to put up a direct promise to honour the terms of the
4 insurance. That they can do.

5 THE PRESIDENT: Sorry, the deed coming from the insurers not
6 from the funder.

7 MR BACON: The deed coming from the insurers.

8 THE PRESIDENT: Yes, not Calunius.

9 MR BACON: No, the insurers. So there is a complete waiver
10 of any of the exclusion clauses, limitation clauses
11 within the terms of the policy is one. The alternative
12 discussed by the Court of Appeal in
13 *Premier Auctions* is a deed provided by the insurer
14 removing any of these concerns. It is a straight form
15 of simple security which can be called upon by us in the
16 event that it is required. And you are right, the Court
17 of Appeal expressed some concern that that was not
18 something that was being offered and they did not
19 understand why in that particular case. We would
20 suggest that a similar sense of insecurity on our part
21 might well apply here.

22 That is the jurisdictional points.

23 So far as the RHA submissions are concerned, I do
24 not want to spend a long time on this but it is
25 important to put right some of the, and I do not mean

1 that with disrespect to my learned friend, when I say
2 "put right" it is just to reshape the evidence before
3 the Tribunal as to the litigation plan placed before the
4 Tribunal by RHA. It is in tab 24 of volume 1.

5 First of all, I was going to turn to the litigation
6 plan, tab 24, page 21, which is page 692 of the bundle,
7 internal page 21. This is on this point about whether
8 the pass on claims, and other claims, interests and
9 so on, individual claims, are part and parcel of what is
10 proposed in this collective action.

11 At page 692 above paragraph 67 is a heading "2015
12 guide (para 6.30, ninth bullet): where only part of the
13 claims is proposed to be covered by the CPO, if the
14 collective proceedings are decided in favour of the
15 class, what it is proposed should happen to the balance
16 of the claims."

17 That speaks of something about what is to follow in
18 paragraphs 67, 68 and 69:

19 "At the time of submitting the CPO Application [at
20 paragraph 68] and prior to pleadings, the proposed class
21 representative does not know whether the proposed
22 defendants will seek to argue that the proposed class
23 members passed on to their customers any of the
24 overcharge or other increased costs suffered by the
25 proposed class members as a result of the infringement.

1 Given that the proposed defendants would have the onus
2 of proving pass on and the proposed class representative
3 considers, based on advice from its legal advisors, that
4 the proposed defendants will have difficulty in
5 discharging that burden, it would seem premature to
6 address pass on from proposed class members to their
7 customers as part of this CPO application ... To the
8 extent that pass on from proposed class members to their
9 customers needs to be dealt with, the proposed class
10 representative envisages that this may best be dealt
11 with after a trial on the issue of the overcharge and
12 any other increased costs suffered by the proposed class
13 members as a result of the infringement."

14 In paragraph 69 the same message is given:

15 "... it will be necessary to deal with these areas
16 in due course with a view to calculating the loss
17 suffered by the proposed class members."

18 Again, the class representative considers it is
19 premature to deal with them in any detail.

20 Against that very clear statement, this is an
21 important document, of course, we take with some caution
22 the submission that was made by Mr. Kirby in answer to
23 your question: does your budget include these costs?
24 The answer was: yes. That is what Mr. Kirby said. But
25 that would be surprising in the light of the evidence

1 that has been given by RHA both in the litigation plan
2 but also in Mr.Meyerhoff's statement, which I will turn
3 to in a moment.

4 THE PRESIDENT: Except the concluding sentence of
5 paragraph 69. What they say is we have not dealt with
6 this in the application or in the expert report, which
7 has been served. It will be necessary to deal with them
8 in due course.

9 "To the extent that it is ultimately determined that
10 these issues cannot be dealt with on a common basis,
11 these issues would need to be dealt with individually
12 after the trial of the common issues."

13 MR BACON: Yes.

14 THE PRESIDENT: So it is not assuming that they cannot be
15 dealt with on a common basis. It is saying that has to
16 be worked out and only if they cannot be then they will
17 have to be dealt with individually. What they are
18 saying is: but we have not done it for this application.

19 MR BACON: Yes, I think the assumption reading -- it is
20 a matter for you, sir. We would suggest a fair reading
21 of paragraphs 66, 67, 68 and 69 is that they are
22 proceeding on the assumption that those are not, as at
23 that point, issues that are going to be included in the
24 CPO as common issues. The last paragraph --

25 THE PRESIDENT: We had a very direct answer from Mr. Kirby,

1 on instructions, that the budget has covered pass
2 through, and pass through involves potential disclosure.
3 Although how that is done in a collective action is yet
4 to be worked out, and certainly more argument and more
5 expert evidence for sure. But it covers that and
6 I assume when Mr. Kirby said that, we can accept it
7 because --

8 MR BACON: I raised the point -- absolutely respecting what
9 Mr. Kirby said in answer to your question. I just
10 wanted to place before you some material which was not
11 entirely consistent with the sharpness of the answer
12 that was given, with respect. As I say --

13 THE PRESIDENT: Mr. Kirby hears this, as do those
14 instructing him, and if there is any qualification
15 needed I expect the answer will be supplied.

16 MR BACON: The second witness statement of Mr. Meyerhoff
17 behind tab 59 --

18 THE PRESIDENT: Is it bundle 3.

19 MR BACON: It is bundle 3. Paragraph 9, page 1989.

20 First of all, to make the point, this paragraph
21 appears after Mr. Meyerhoff has explained how difficult
22 it is to give accurate budgets or even what he knows for
23 certain will be the subject of his proposed collective
24 order. Paragraph 9 responds to our joint funding
25 response which records the fact there is no provision

1 for pass on, interest and tax. He says:

2 "However, these issues were considered by the RHA
3 when drawing up the Cost Budget and Project Plan
4 I believe appropriate provision has been made for them
5 as part of the significant overall funding."

6 That obviously supports the answer that was given to
7 the Tribunal earlier which is why I bring it to your
8 attention, but when one turns to the rest of the
9 paragraph, 9.1(a):

10 "... the claim form made clear that the RHA reserved
11 the right to have these three issues dealt with on
12 a common basis and explained the reason why it did not
13 seem appropriate or necessary to seek to have them dealt
14 with as common issues from the outset of the proposed
15 collective proceedings."

16 Over the page at (b):

17 "As will be seen ..."

18 About four lines down from (b):

19 "As will be seen, it is proposed that the issue of
20 pass on will initially be dealt with on a sample [...] to
21 determine whether the respondents could satisfy the
22 high legal threshold as laid down by the Tribunal."

23 At the very most there is some form of budgeting or
24 some consideration of cost relating to these issues but
25 on a sample basis.

1 Lastly, at paragraph (d) just over the top of the
2 page, 1991:

3 "To the extent that the issues in relation to pass
4 on, interest and/or tax are not found to be susceptible
5 to be treated as common issues either as part of an
6 initial trial dealing with the overcharge or in a
7 subsequent common issues trial, they would need to be
8 dealt with on an individual basis."

9 On any view, as I understand it, that area of
10 potential exposure to costs has not been dealt with and
11 is not provided for in the budget, despite the fact, as
12 I say, one must be satisfied of the ability to pay our
13 costs and their own side's costs to trial, to the point
14 where damages are eventually secured.

15 Turning to the budget very quickly, I am sorry that
16 means going back to file 2. We are not really assisted
17 by the budget in any meaningful sense because it is --
18 I am sorry, it is file 1. Towards the back. It is
19 tab 24, right at the back of tab 24.

20 This is the cost budget which is required to be
21 submitted to the Tribunal as part of the CPO.

22 THE PRESIDENT: Is it page 696?

23 MR BACON: Page 696. This is not a conventional form of
24 setting out a budget, first of all. The Tribunal is
25 used to seeing different forms of budget, I know, but it

1 is not actually the most granular approach to telling us
2 how the costs are comprised. What it does at the first
3 bullet point is tell us what the overall funding
4 requirement is of £27 million. £4.23 million for ATE
5 premiums, and £27 for legal costs and disbursements,
6 with the legal costs and disbursements being broken down
7 into £13.6 million for lawyers' fees alone. Then
8 additional sums for experts and so on.

9 There is nothing there which tells us like the
10 budgets we have put together, some of them, identifying
11 the categories of work within the lawyers' fees budgets.
12 What you get is the stages over the page but again, they
13 are very generalised fees, "legal fees associated
14 £2.2 million", for example, at paragraph 1(f) of stage
15 1.

16 There is nothing here in this budget which is
17 providing specifically, sir, this is my point, for these
18 additional costs. It is very opaque.

19 THE PRESIDENT: Which additional costs?

20 MR BACON: The pass on, interest costs, individual costs
21 that may be required to be incurred and so on.

22 THE PRESIDENT: The budget would not be done by issues,
23 would it?

24 MR BACON: The budget would be prepared in the light of the
25 issues, so there would be an assumption saying somewhere

1 that --

2 THE PRESIDENT: It wouldn't say budget for limitation
3 argument, budget for pass on argument, budget for --

4 MR BACON: No, but you would tie the budget to the scope of
5 the proceedings that you are intending to pursue.

6 THE PRESIDENT: Yes.

7 MR BACON: It is not immediately obvious from any of this
8 that they are tying their budget to the full extent of
9 what would be required to take this case through
10 decisions on overcharge and down or upstream to
11 a damages award. That is not at all clear and, if
12 anything, it speaks of the former only as something
13 being budgeted when read against the litigation plan.

14 So we do say that this is --

15 THE PRESIDENT: The stages are described.

16 MR BACON: They are, but they are the stages in the context
17 of what they consider to be the shape of the litigation,
18 namely, taking this thing to a stage where a finding of
19 overcharge is made, and that is about it.

20 THE PRESIDENT: They say that they would think that it would
21 cover the whole thing but they mention there is
22 a possibility that there might need to be individual
23 issues afterwards.

24 MR BACON: But those individual issues -- it is not an
25 expertise that I profess to know a huge amount about,

1 but on any view, even for those who are inexperienced in
2 this area it would be, I would suggest, that the legal
3 costs incurred in taking the case from a finding of
4 overcharge through to the identification of actual loss
5 and causation, depending on the type of vehicle one is
6 concerned with, the place, circumstances, timing,
7 history, whatever it may be at the particular trial, it
8 is going to be extraordinarily complicated. Actually it
9 is likely to involve considerable cost compared to the
10 cost of the initial findings of the Tribunal, interim
11 charge.

12 THE PRESIDENT: You only get to that if you lose the initial
13 trial, will you not? There will not be any -- if you
14 have won on no overcharge there will not be an
15 individual --

16 MR BACON: Yes, but you are not certifying the CPO. Under
17 the rules we are required to budget the case from
18 beginning to end. Things might happen in a case.
19 People might lose or win as the case goes on.

20 THE PRESIDENT: Yes.

21 MR BACON: But you do not limit, therefore, the budget that
22 is required by the rules to the bit that you might think
23 you might win on early on.

24 THE PRESIDENT: No, I see that.

25 MR BACON: My point is that the additional cost of that

1 potentially vast upstream work is just not -- it does
2 not feature in the budget.

3 THE PRESIDENT: No, all I am saying is that if you have lost
4 at the main trial you will have to pay significant
5 costs, and they will receive a large amount of funds to
6 help them go through the later stages.

7 MR BACON: Yes, that may well be right, but one does not
8 budget the case, one does not put in place the CPO on
9 the premise that that might or might not happen.

10 THE PRESIDENT: We just have to make sure they have the
11 funding to deal with the costs they might incur. That
12 is the only thing, so that the class members, we in
13 looking after their interests can feel that there is an
14 arrangement in place that should enable this matter to
15 go through.

16 MR BACON: I think one has to be careful about -- in the
17 context of the submissions I am making on funding and on
18 the content of the funding and so on, the reference to
19 a potential costs order on success of that common issue,
20 that would not result -- I would certainly want to
21 reserve my position on this because, on the face of it,
22 it would not result in a costs award necessarily because
23 until the claimants have won, as defined by their
24 conditional fee agreements and their LFAs, certainly for
25 those acting under conditional fee agreements there is

1 no success. Success would be triggered on the recovery
2 of damages.

3 THE PRESIDENT: I have not seen that.

4 MR BACON: We saw the definition of success in the LFA.

5 THE PRESIDENT: In the LFA, yes.

6 MR BACON: The definition -- I would be very surprised,
7 well, I cannot speculate. We have not been given a copy
8 of the CFA, but on the face of it certainly --

9 THE PRESIDENT: That is the funder getting their return, not
10 about money going to the claimants. That is to do with
11 the funder's return. They will not get paid.

12 MR BACON: It might be to do with more than that, sir. I do
13 not know. One cannot speculate on definite success.

14 THE PRESIDENT: You showed it to us, the definition in the
15 LFA.

16 MR BACON: All I am saying, sir, is that on this question, I
17 would submit it would be unwise to respond to the
18 submission we make that the budget does not cover the
19 whole piece, simply because there might be a moment
20 during the course of the piece that they secure a costs
21 order. That presupposes --

22 THE PRESIDENT: Sorry, Mr. Bacon, we are at cross-purposes.
23 This budget is prepared on the basis that the common
24 issues will embrace everything. That is all that we
25 have been told, and you have queried it and there has

1 been no challenge to your query. So that is the basis
2 on which we must operate. You say, "Ah, but there is
3 another possibility which is that it will not all be in
4 the trial, that there might have to be individual
5 issues," and you point out that Mr. Meyerhoff has
6 acknowledged that there is that possibility, and it has
7 not been prepared on an alternative basis for that
8 contingency, which might mean less for trial because the
9 trial will not embrace pass on, lower cost for trial,
10 but further costs for another stage which might be
11 complicated.

12 MR BACON: Yes.

13 THE PRESIDENT: All I am saying is if one were in that
14 alternative scenario then that will mean that there has
15 been a major trial on common issues and your clients
16 have lost that trial on the common issues, because an
17 overcharge has been found such that we then have to
18 have, perhaps, a series of trials of individual issues.

19 I am saying if there was that alternative scenario,
20 then of course there are likely to be costs applications
21 following the main trial which will provide some other
22 funding.

23 MR BACON: I am not at all convinced, sir, that we could
24 accept the proposition that the success, as it might be
25 put, on the findings of a common issues trial on

1 overcharge would necessarily result in a costs order
2 against the defendants at that point. So much would
3 depend upon a number of factors which probably could not
4 even be addressed at that stage, offers have been made
5 in respect of damages, one cannot foresee what might
6 happen in terms of the ultimate awards. Until there is
7 a damages award it could be said there is no success.
8 There are all sorts of reasons --

9 THE PRESIDENT: I am sure you or whoever is at that point
10 addressing us will come up with all sorts of arguments
11 why we should not make a costs order. We had this
12 discussion with regard to the CPO application, that even
13 if this hearing and indeed a subsequent hearing on
14 certification of issues, even if your clients having
15 opposed authorisation fail on that and having, at
16 a further hearing, opposed certification, fail on that,
17 no doubt you will say the applicants should not have
18 their costs. All I am saying is we have to be realistic
19 as a tribunal and thinking and looking at budgets and so
20 on, and saying, what is likely to happen?

21 MR BACON: One would have to be very clear about the
22 certification in those circumstances that you would be
23 certifying on a particular basis, in terms of these
24 budgets so that the funding would have to be completely
25 reviewed at that stage, because our position is that the

1 funding that is being put forward to take this case from
2 beginning to end in the context of what, we would
3 submit, is required by the rules is insufficient,
4 because it fails to accommodate substantial legal costs
5 which will be incurred at some point in the event that
6 the claimants succeed in establishing overcharge. That
7 is how we put it.

8 THE PRESIDENT: Yes, I understand.

9 MR BACON: Whilst on that budget, I think I made this point
10 yesterday, so far as adverse costs are concerned, tying
11 these matters in so we do not have to do much jumping
12 around, RHA put the legal costs of their lawyers fees at
13 just under £14 million. But they are at £14 million.
14 We know that on the own side's costs the budgets which
15 UKTC put in for their own side's costs, which the
16 Tribunal was querying earlier, tab 5 of the bundle, has
17 profit costs of just under £12 million, so they are not
18 too dissimilar, and disbursements of £10 million, so
19 that is £10 plus the £12 is about £22 million, own
20 side's costs.

21 When one then comes to consider the provision of
22 £20 million or £12 million for the ATE companies, it
23 puts into stark contrast really what is being said.

24 THE PRESIDENT: Sorry, you said £10 million comes where?

25 MR BACON: When you are looking at tab 5, UKTC's budget, the

1 disbursements in that disbursement column come to just
2 over £10 million. There is a helpful reference you will
3 find --

4 THE PRESIDENT: No, that is right.

5 MR BACON: For your note is paragraph 85 of our skeleton in
6 due course. We have set out what the totals are at
7 paragraph 85 of our skeleton. It is a bit confusing, as
8 the Tribunal noted earlier, you have these totals of
9 £7.9. That £7.9 is not a total of all of the
10 disbursements, although in that column it is a separate
11 figure.

12 THE PRESIDENT: We will work it out and then you are saying
13 the profit costs is £11.3 million.

14 MR BACON: That is right. So you have an own side's costs
15 legal spend of £22 million on --

16 THE PRESIDENT: But that is of course on the CFA, yes.

17 MR BACON: Yes, but that is without additional liabilities.
18 So that is what they consider to be a reasonable charge
19 on a solicitor and client basis, I am not going to say
20 a recoverable sum, but ignoring additional liabilities,
21 using the error rates they use, using the deployment
22 resources they consider to be necessary, they are going
23 to be incurring something in the order of
24 £21/£22 million worth of legal fees.

25 THE PRESIDENT: Yes.

1 MR BACON: UKTC, similar. They have -- sorry, RHA similar,
2 I do apologise. RHA similar. £13.68, lawyers fees,
3 that compares to the £11/£12 million of UKTC, and the
4 balance of about £10 million for disbursements, because
5 there is £22 million in total for legal costs and
6 disbursements of which £13.68 million is lawyers' fees.
7 That is page 696 of the bundle. Experts alone is
8 £6.2 million, which is -- one might see if you compare
9 the £6.2 million to the experts' fees that UKTC intends
10 to incur, it is substantially higher.

11 Whichever -- the submissions on detail about the
12 budgets, it is all very fascinating and interesting but
13 everyone seems to accept it is quite complicated and you
14 cannot be too certain. But I seek to rise above it,
15 looking down from a helicopter view, from the Tribunal's
16 perspective you have one side saying it is about
17 £22 million, you have another side saying it is about
18 £22 million, and you have us saying £12 million is not
19 enough, neither is £20 for all of these defendants.
20 That is the simple submission.

21 I think it is best illustrated through the budgeting
22 approach that Herbert Smith took. It is the most,
23 I would have thought, uncontroversial of all, not that
24 any of them should be controversial, I might add, but
25 playing as I do, wearing a number of hats for different

1 firms, Mr. Farrell's witness statement at tab 41 of
2 file 2. He addressed this as a sort of lowest common
3 denominator approach which is a sensible way of
4 approaching it given the uncertainty that prevails
5 across this case at the moment about where it is going,
6 and it is paragraph 18 which really makes my point for
7 me, that he takes a figure, that even a figure of
8 £4 million is inadequate for each defendant group
9 because that is effectively what is being provided for
10 as a maximum by the £20 million that is being proposed
11 by --

12 THE PRESIDENT: Yes, I think -- I understand the point.

13 I think you did make that point.

14 MR BACON: I think I did.

15 THE PRESIDENT: That is not --

16 MR BACON: I am now replying to my learned friend's
17 submissions. I have possibly gone too far. On any view
18 even on -- they come along and say "Our costs are going
19 to be £22 million, both sides," but they say the five
20 defendants should be limited to an insurance policy
21 which will cover a fraction of what they know,
22 absolutely know to be our likely legal spend and that
23 would be wrong. There has to be a fairness about this,
24 and at the moment there is nothing fair or proportionate
25 or appropriate about the level of cover that is being

1 provided.

2 We would invite you, sir, in your judgment to direct
3 that they do -- both RHA and UKTC should be required
4 within a period of time to produce revised funding
5 agreements providing for a greater level of indemnity
6 than is presently provided for.

7 I did not take you to all of the other two estimates
8 and, as you say, I made points about them yesterday, but
9 any reading of them in due course, and doubtless you
10 will go back over them, but both of the other two
11 statements, they are all prepared and signed by
12 solicitors, they have been signed with statements of
13 truth. A lot of work has gone into actually producing
14 the budgets. In fact they are more detailed -- the
15 Travers Smith statement is actually more detailed than
16 the RHA litigation plan in terms of its granularity, and
17 what has and has not been considered and taken into
18 account.

19 Evidentially they do bear proper scrutiny, we would
20 submit.

21 THE PRESIDENT: Yes, you took us to them.

22 MR BACON: I think that is probably RHA -- the other point
23 about RHA, we have received this proposed amendments to
24 the funding agreement, the LFA, which we have
25 considered. It is the letter of 6 June. It might be

1 appropriate to have the LFA out, which is tab 32.
2 File 2, 32A. There is some tinkering going on which --
3 you will recall, I do not think there has been any
4 proposal made -- I know there has not been any proposal
5 made in respect of clause 9.8 which was a concern of the
6 Tribunal's and of others, raised in our skeleton
7 argument, you might recall, about the risk of
8 complications arising from and therefore termination
9 under clause 9.8 where one or more than one potential
10 claimant where there are two opt out claims assuming
11 there are, obviously contrary to our position, arise.
12 So the invitation from the Tribunal was that clause 9.8
13 needs be reconsidered.

14 THE PRESIDENT: The claimants are people who have entered
15 into the LMA.

16 MR BACON: Yes.

17 THE PRESIDENT: And they have undertaken in the LMA to be
18 part of the class.

19 MR BACON: The point here was that the claimants agreed with
20 Therium that in the event that the CPO was made they
21 should use their best endeavours to opt in to the
22 collective proceedings. The concern was what if there
23 are two collective proceedings, opt in and opt out.

24 THE PRESIDENT: But they have already agreed.

25 MR BACON: They have but I think the concern remains that

1 they are required to use their best endeavours to opt in
2 to the collective proceedings. If the Tribunal makes an
3 order in respect of UKTC and they decided actually the
4 UKTC opt in case looks more attractive, for whatever
5 reason it may be, there are complications that will
6 arise from a dispute between the claimants and Therium
7 as to whether or not there is a breach of the funding
8 agreement.

9 In other words, it is not conducive -- we do not say
10 there should be two CPOs as you know, but that needs to
11 be addressed.

12 So far as the proposals in the letter dealing with
13 the discretion under clauses 2.3 to 2.7, we remain
14 concerned about this proposal. I might add we have only
15 had obviously this morning to consider it -- over lunch
16 really effectively because I literally saw it for the
17 first time when we came in this morning.

18 What is being proposed here is in clause 2.3, 2.4
19 and 2.5, the words "and at Therium's sole discretion"
20 are deleted. We are on page 851. Therium shall
21 continue to have the exclusive right but no obligation
22 to fund tranche 2 or 3 or 4 or whatever it may be in
23 terms set out in this agreement.

24 So the clause contains and continues to contain the
25 exclusive right and no obligation within it. Then it is

1 sought to be addressed by amending clause 2.7 in what we
2 submit is a fairly clumsy way so that the discretion to
3 exercise or decline the options, as it is being
4 described in clauses 2.3 and 2.4 and so on, in
5 accordance with the provisions on termination.

6 It is very loose language and we would suggest that
7 better wording to achieve the objective should be found.
8 It is not for us to redraft their agreement, but there
9 is obviously a better way of dealing with this, not
10 least to redraft the agreement to fund in clause 2.1.

11 THE PRESIDENT: The intention is clear.

12 MR BACON: The intention we do not dispute. It is the way
13 of doing it.

14 THE PRESIDENT: It is we do not have to draft in --

15 MR BACON: In committee.

16 THE PRESIDENT: Or in the Tribunal here. They are making it
17 subject to the right under clause 16.3 and that deals
18 with the point that it is not a largely unfettered
19 discretion just on the basis of reasonableness but it is
20 tied to the QC's legal opinion of 51% prospects of
21 recovery.

22 MR BACON: Yes.

23 THE PRESIDENT: It addresses the concern even if it perhaps
24 could be drafted a bit better.

25 MR BACON: I think it can. Clauses 28 and 29 I think I have

1 already --

2 MR KIRBY: It should be clauses 27 and 28. It is just a ...

3 THE PRESIDENT: It should be clauses 27 and 28, yes.

4 MR BACON: Clause 19 I think does deal with the issue of

5 assignment within the group. Mr. Carpenter very

6 helpfully reminds me, built into the submission I was

7 making on the problems with clause 9.8 is the LMA. It

8 is file 2, tab 29. It is an agreement we have not

9 really looked at in great detail. It is clause 9.2.

10 THE PRESIDENT: Is this a reply point?

11 MR BACON: Yes, it is because it is dealing with the

12 amendments -- absolutely it is -- amendments to the LFA

13 in clause 9.8.

14 THE PRESIDENT: There is nothing about clause 9.8 there.

15 MR BACON: No. Mr. Kirby didn't choose to make any

16 submissions about amending clause 9.8.

17 THE PRESIDENT: That is why I am saying, why is it a reply?

18 It is not a reply to Mr. Kirby or to the letter.

19 MR BACON: His position was -- as you said to me, sir, was

20 that the claimant's case is that they are contractually

21 bound to opt in.

22 THE PRESIDENT: Yes.

23 MR BACON: Therefore the matter does not arise as an issue.

24 Page 778, clause 9.2, there is an entitlement on the

25 part of any claimant to terminate its relationship with

1 RHA on three months' notice.

2 THE PRESIDENT: Yes, I see.

3 MR BACON: The problem remains that there could be
4 a competing interest point between two different CPOs
5 leading to potential breaches of the funding agreement.

6 That, I think, deals with what I wanted to say in
7 relation to RHA.

8 There were some other points on the reference to
9 Mastercard and the £10 million budget and things.
10 You will recall that Mastercard did not even provide, so
11 on the other side of the argument, did not provide
12 a budget at all and so it was a very broadbrush
13 approach. We are in a different world here.

14 THE PRESIDENT: Yes.

15 MR BACON: We then turn to UKTC. I think I can be
16 relatively short on that because again, no disrespect to
17 my learned friend, Mr. Thompson, but on this side we
18 found his responses to the deep concerns that were
19 raised about the structure of the UKTC arrangements to
20 be most unsatisfactory.

21 As I said yesterday, there appears to be a very good
22 commercial reason as to why it is that they have put
23 this thing together in the way they have with an entity
24 offshore without assets providing the funding and being
25 the insured for the purposes of this CPO application.

1 There has to be a reason for that. That reason has not
2 been explained. The commercial sense of the arrangement
3 has not been explained.

4 When we come to look at the arrangements we remain
5 deeply concerned that, despite the opportunity overnight
6 and today to correct them, none of the concerns that
7 I raised have been answered actually. None of them.
8 Even through your own gentle nudging through questioning
9 with respect Mr. Thompson was unable to answer the
10 concerns that the Tribunal had which I think replicate
11 our own concerns, that we are facing a claimant that is
12 itself an SPV with no assets, UKTC. There is no
13 contractual obligation, and Mr. Thompson I think misses
14 this point completely. There is no contractual
15 obligation anywhere between UKTC and Yarcombe that UKTC
16 will call on Yarcombe to pay its costs order that is
17 being made against it by the Tribunal. There is no
18 enforceable contract at all between them at that level.

19 Yarcombe appears to be controlled by a company
20 called GP3 which we know nothing about. Regarding
21 Mr. Perrin's evidence, just turning to that witness
22 statement, the first witness statement of Mr. Perrin in
23 file 1, it is what the statement does not say that is
24 the concern, as much as what it says. Tab 6 of file 1.
25 Yarcombe is wholly controlled by GP3, paragraph 9.

1 These are points -- the point which I was going to make
2 was that there is no evidence here at all really as to
3 even ownership of Yarcombe. Its assets status is
4 obviously extraordinarily limited. There is no evidence
5 as to where it gets its funds from if called upon to
6 pay. It does not even appear to be controlled
7 ultimately. It says it is wholly controlled by GP3 so
8 Calunius has effectively put in place an arrangement
9 which immunises Calunius to any control or suggestion of
10 control over Yarcombe which is a concern, and the
11 undertaking --

12 THE PRESIDENT: Calunius might control GP3.

13 MR BACON: It might, I agree. I think that is a fair
14 observation to make, if I may say so. But when we are
15 talking about such substantial funds and such important
16 matters "mights" are a long way off what is required by
17 the Tribunal in terms of CPO applications I would
18 suggest. It is a wholly inadequate way of presenting
19 the funding for the CPO.

20 I do not need to say more about the undertaking. It
21 speaks for itself. It is extraordinary in fact. I made
22 this point in December, that is it really being said
23 that this pack of cards is stood up by an individual who
24 is chairing a company that appears now no longer to want
25 to continue funding cases in the United Kingdom or

1 anywhere else in the world for that matter? That is
2 a pack of cards which is very, very unstable, to say the
3 least and, as I say, my impression from the Tribunal's
4 questions is that you have that point fair and square.

5 The only answer to this, which is what I have been
6 applying my mind to, is to how you go about sorting this
7 out. The idea of this hearing is that we would be
8 presented with something that works and it is troubling
9 that it has been necessary for a hearing to take place
10 for these basic points to be articulated and to be
11 listened to by, with respect, those acting for Calunius
12 and UKTC. It does mean that we are behind times. It
13 means that there is going to have to be, if you are with
14 us, some direction that there needs to be a fundamental
15 review, a fundamental change to these funding
16 agreements.

17 You talked, sir, about undertakings being given by
18 Calunius. Undertakings are one thing. There needs to
19 be a direct obligation on the part of the funder,
20 Calunius, to fund the case and that obligation needs to
21 be enforceable directly by us. Anything falling short
22 of that, with respect, would be insufficient. Again,
23 a deed, something that is produced by Calunius providing
24 a deed of indemnity by it in respect of the funding that
25 is required and a deed indeed to UKTC would --

1 THE PRESIDENT: There is the insurance point. Leave that
2 aside for the moment. If Calunius undertakes to the
3 Tribunal that Yarcombe will comply with the code.

4 MR BACON: It is a very odd way of proceeding. A code is
5 a code.

6 THE PRESIDENT: Yes, but the industry has proceeded by
7 self-regulation successfully and thereby avoided
8 legislation and --

9 MR BACON: But a commercial agreement that props itself up
10 by reference to compliance with a code as opposed to
11 compliance with a contractual term which says "thou
12 shalt pay".

13 THE PRESIDENT: Yes, but wait a minute, Yarcombe has agreed
14 to pay.

15 MR BACON: Yes, that does not mean a great deal to us, I am
16 afraid. Yarcombe has agreed to pay. Yarcombe is an
17 offshore entity without any assets.

18 So next point would be: Calunius has to agree to
19 pay. In the Merricks case we have one of the world's
20 leading insurers/funders, Burford, agreeing to pay. It
21 is put up and down the country all the time. In this
22 particular case I would be most concerned about an
23 agreement which depends on compliance with a code as
24 being the core commercial ingredient to compliance at
25 the end of a case where doubtless everybody would have

1 fallen out with each other and money -- in the event
2 they have lost.

3 UKTC will be in obviously severe financial
4 difficulties and obviously will be insolvent. Yarcombe
5 will be similarly insolvent. Is there an expectation
6 really that we should have to rely upon an undertaking
7 given by Calunius that it will seek to ensure that
8 Yarcombe complies with the code? No. The only proper
9 answer to this -- it is a rhetorical question obviously,
10 sir -- is there has to be an obligation on the part of
11 Calunius to pay in the event that an order for costs is
12 made against UKTC. It is a simple triangular
13 arrangement.

14 MR THOMPSON: I think I do have to protest. These are not
15 really reply submissions at all. It is Mr. Bacon trying
16 to kick down the barn door. He still has not made his
17 submission that there is any inconsistency between this
18 arrangement and the code. He is basically saying the
19 code should be put in the bin and a contractual
20 arrangement be put in that he likes. That is a very
21 sweeping thing for him to ask the Tribunal to do.

22 THE PRESIDENT: It may be sweeping or not but I think they
23 are reply submissions because you referred to the code
24 and relied on it and indeed said it complies with it and
25 Mr. Bacon is responding to that.

1 MR THOMPSON: He has not said that it does not comply with
2 the code. He has just said, ignore that, do what
3 I want.

4 THE PRESIDENT: What I did want to ask you, Mr. Bacon, is
5 one thing about the code.

6 MR BACON: Yes.

7 THE PRESIDENT: If you turn it up. It is in a couple of
8 places but it is at the last tab of the second
9 authorities bundle.

10 MR BACON: Bundle 2, yes.

11 THE PRESIDENT: The funders are only people who are -- the
12 code only bites on funders who are members of course, as
13 I understand clause 1.

14 MR BACON: Yes.

15 THE PRESIDENT: If you are not a member you are not bound.

16 Paragraph 9.4:

17 "Must maintain all adequate financial resources to
18 meet the obligations of the funder and its subsidiaries
19 and fund all disputes.

20 Paragraph 9.4.1:

21 "Ensure the funders maintain the capacity to pay all
22 debts and cover aggregate funding liabilities under all
23 of their own affairs."

24 MR BACON: Yes.

25 THE PRESIDENT: What I wanted to ask you is this: associated

1 entity is?

2 MR BACON: It is defined in Paragraph 2.2.

3 THE PRESIDENT: Paragraph 2.2. A funder can have an

4 associated entity.

5 MR BACON: I think the example here, so this is where --

6 "acts as investment adviser" which obviously Yarcombe

7 does not do.

8 THE PRESIDENT: Indeed. Entity having access to funds.

9 MR BACON: It does not have that either. It is under the

10 control of GP3 which may be an associated entity.

11 THE PRESIDENT: That is what I wanted to ask you, yes. GP3

12 may be.

13 MR BACON: May be.

14 THE PRESIDENT: But Yarcombe is not. That is how I read it.

15 That is the point.

16 MR BACON: Yes. So far as Paragraph 9.4 is concerned, yes,

17 this tells us what funders should be doing from

18 a regulatory point of view but we are talking about what

19 contractually should be required.

20 THE PRESIDENT: No, we have that point, yes.

21 MR BACON: They are very different.

22 THE PRESIDENT: Yes, I understand that.

23 MR BACON: We would be concerned about any arrangement that

24 was dependent upon the code being the bedrock of the

25 commercial arrangements.

1 THE PRESIDENT: Yes. Anything else? We are running out of
2 time.

3 MR BACON: I think they are the key points. Like any
4 advocate there is always a temptation to make as many
5 points as one can but they are the key points, sir.
6 I will just turn round to check, but I think they are
7 probably -- we are getting nods which is always
8 encouraging. Probably because they do not want to put
9 their head above the parapet but I thank them for their
10 assistance.

11 Sir, unless you have any particular questions or
12 concerns those are our submissions in reply.

13 THE PRESIDENT: Thank you very much.

14 MR BACON: Thank you.

15 THE PRESIDENT: Thank you all for the care and time you have
16 put in to preparing for this.

17 (3.42 pm)

18 (The hearing concluded)

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