IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1339/7/7/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 30th April 2024

Before:

Hodge Malek KC
Eamonn Doran
William Bishop

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Mark McLaren Class Representative Limited

Class Representative

v

MOL (Europe Africa) Limited and Others

Defendants

A P P E A R AN C E S

Nicholas Gibson & Sarah O'Keeffe (On behalf of Mark McLaren Class Representative Limited)

Robert Marven KC (on behalf of Woodsford Group Limited, Litica Ltd and Lakehouse Risk Services Limited)

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Tuesday, 30 April 2024

Proceedings

(10.40 am)

THE CHAIRMAN: This is the stakeholder application following on from the hearing we had in December 2023 whereby this Tribunal approved the settlement between the claimant and the twelfth defendant, which is reported at [2023] CAT 75. The matter is being live streamed so I would like to remind everyone that no recording is allowed to be taken of this. There will be a transcript in due course and there will be a written judgment on the application, which will be available. It is a contempt of court to broadcast contrary to this direction that I have given.

Thank you very much.

Submissions by MR GIBSON

MR GIBSON: Thank you, sir. I appear, as you know, for the Class Representative along with Ms O'Keeffe. Mr Marven, on the far side, appears for the interested parties.

Thank you very much.

So this, as you say, sir, is the Class Representative's application for an order that would allow a proportion of the 1.12 million damages sum, as defined in the settlement, be paid to the classes representative in respect of the costs, fees and/or disbursements incurred by the Class Representative.

Sorry, is there is a bit of feedback? Or is everybody else --

In connection with these collective proceedings. Of course, whilst the Class Representative will invite the Tribunal to make the order in the form sought we are, of course, acutely mindful of the directions that the Tribunal made at the hearing in December in respect of the need to approach the matter on a fair and even-handed basis, warts and all, I think.

THE CHAIRMAN: I think so. That is how I expect it to be done and I am sure it would have been done that way anyway, even if I had not said that.

MR GIBSON: We certainly took the need to provide a balanced account into account in preparing the materials. But it was a welcome reminder.

THE CHAIRMAN: The problem you have is that -- I am not saying it is a problem -- but we have a, sort of, supervisory jurisdiction on all of this and it is very important we make decisions on costs, rather than the parties, because there is an inherent conflict of interest. We are here to make sure that the class representatives are protected, that represented parties are protected but, at the same time, recognising that for these claims to go ahead, lawyers have to be paid and funders have to get a return on any investment. Because if people are not going to get paid at all, then they are going to be reluctant to fund in proceedings or even participate in them. So I understand that.

MR GIBSON: Yes. Absolutely, sir. You will apprehend that we will take a brief moment to look at some of the authorities on that, but we are absolutely ad idem. Indeed --

THE CHAIRMAN: The other point I wanted to raise, you have dealt with the duty and I am happy with that and I have explained our position. But the other point is that in relation to the £100,000, which was specifically allocated for the purposes of the settlement process, it may be that you will want the Tribunal to approve the payment out of part of the 280,000, in any event, to cover any excess costs over and above the 100,000 that was taken to deal with the application. I fully recognise that that 100,000 is just an estimate.

They are saying we agree to pay that amount for that, but it is a necessary part of getting the approval that people get paid and if in fact it is more than that, in principle -- at least for my part, I have no objection -- to any excess out of the -- is eaten up by some part of the 280.

If that is attractive to you, obviously you can come back to us in writing and I can deal with it in writing. In principle, as long as the sum is reasonable and you explain how you get to that sum, then you can have that approval and that can be sorted out now. So if you spent 150,000, then we will give an approval for the extra 50,000. If it is a lot more than that, I will have to think about whether or not it is reasonable. But I can see the amount of work that was required, particularly given that it is the first application before the Tribunal. Everyone is trying to find their feet and there is a lot of research that was done and a lot was put into it. I can see at the end of the day 100,000 was not really going to be enough to cover that.

MR GIBSON: Well, it is a very welcome indication, sir. We will take you up on your offer to deal with that in writing, because I apprehend we would need to go back to the time sheets and work out precisely --

THE CHAIRMAN: Yes. Exactly. What I am saying is if it is up to 150,000 then it is absolutely fine. If it is going to be more than that, I am going to have to deal with it in a bit more detail.

MR GIBSON: That is entirely understood.

THE CHAIRMAN: But my gut feeling is that 150,000 was probably the right amount for whatever it was and I am sure that the estimate of 100,000 was done in good faith. When you agree these things, you never know what is actually entailed.

MR GIBSON: Absolutely. I mean, I will attempt to persuade you sir, and the Tribunal, that the entirety of the 280,000 would be appropriate to deal with in the manner of recovered costs. But I would propose to deal with that last, if I may.

THE CHAIRMAN: Yes. That's fine.

MR GIBSON: So in terms of structure for the substantive submissions for today, I propose to start briefly by just touching on the context and some of the key dicta in relation to the statutory purposes of the regime, by way of context for the specific

applications that we make.

The second area of submissions will be concerned with what we call the damages sum, namely the 1.12 million specifically allocated under the settlement agreement by way of damages. I propose to take that in two parts, first looking at the legal basis for the Tribunal's power to make the order sought and on that, over the past few days since filing our skeleton I have been giving further anxious consideration, mindful of the Tribunal's direction to provide a balanced assessment, as to exactly where the strongest basis lies and where the basis may be less strong.

The second part of the damages sum submissions will be in relation to the exercise of your discretion, both in relation to timing and in relation to quantum.

The third main area will be to touch on the second of the two sums in question, the proceedings cost sum as we have called it, the 280,000 to which you referred a moment ago, sir.

THE CHAIRMAN: Yes.

MR GIBSON: Before addressing you on the substance, I think we can hopefully take this quite quickly. There is the matter of confidentiality that you will see dealt with in the papers. We did touch on that at the December hearing where you, sir, spoke to my then leader, Ms Ford and I think you agreed the following. I just wanted to check we are all on the same page.

THE CHAIRMAN: Well, we are. Yes.

MR GIBSON: Yes. So I think the proposal was that in the normal way, if and to the extent we have to refer to confidential material, which has helpfully been marked in red, we should do so by reading it rather than reading it out loud. I for my part have sought in my preparation for these submissions to limit the things that I would actually need to -- I think maybe just one occasion, so hopefully that won't trouble the Tribunal too much.

THE CHAIRMAN: I am very happy with that. We are likely to give a written ruling on this and we will send that out to you in draft. So if there is any particular passages which are confidential, then we can have two versions of the ruling.

MR GIBSON: Excellent. That was going to be my next point, just to deal with the judgment. That sounds entirely sensible.

THE CHAIRMAN: Yes.

MR GIBSON: Obviously Mr Marven would obviously want to have a view on that as well, given that it is to some extent his client's confidential material. But having spoken to him in advance, I don't apprehend there will be any difference between us in relation to that.

THE CHAIRMAN: Is that right?

MR MARVEN: There is no difference between us on that.

THE CHAIRMAN: Fine.

MR GIBSON: So turning to the substance, then, as I said, I would like to start by just reminding myself -- if not all of ourselves -- of the statutory objectives of the collective proceedings regime. In particular, the role which stakeholder investment plays in supporting those objectives. I apprehend that most of the points I make will be quite familiar, so I will propose to take them quite quickly and not turn up the authorities unless the Tribunal be assisted by my doing so.

THE CHAIRMAN: Yes.

MR GIBSON: The first point which is dealt with by the Court of Appeal in Le Patourel --

THE CHAIRMAN: Tell us where you are in the skeleton and then --

MR GIBSON: Sorry. Forgive me, sir. I will turn up my skeleton. I think the skeleton is at tab 39 of the bundle today.

THE CHAIRMAN: Fine. Okay.

MR GIBSON: I will turn up my copy and I can take you through that at the same time.

THE CHAIRMAN: We have dealt with 7. We have dealt with 8.

MR GIBSON: Yes. In fact, in the skeleton I dealt with policy a little bit later -- or we dealt with policy a little bit later -- when we were talking about the exercise of discretion.

THE CHAIRMAN: Yes.

MR GIBSON: I think it came up, if I have the reference for you. So paragraph 29.

THE CHAIRMAN: Okay. That's fine.

MR GIBSON: You have the references there about the collective regime's principal object being to facilitate access to justice for those, in particular consumers who would otherwise not be able to access legal redress. That is paragraph 29 of Le Patourel. Then the related point to which Le Patourel was largely drawing on is the Supreme Court's observations in Mastercard v Merricks judgment where they make the point, and we quote from paragraph 73:

That were class members to try and pursue claims individually, they would face or may face “insuperable funding obstacles on their own, litigating for small sums for which the cost of recovery would be disproportionately large."

So I think we are all very familiar with that conundrum. The way of unlocking that conundrum is to harness the potential of third-party investment. The profit incentive to put an investment into litigation, principally through funders but, of course, we are representing here today all the stakeholders who have taken a risk in investing in the litigation. So both the funder and the ATE insurers, through the funder, and of course the lawyers themselves. So we all recognise that we all have an interest in --

THE CHAIRMAN: Well, we have the ATE insurers, yes?

MR GIBSON: Yes.

THE CHAIRMAN: We have the funders.

MR GIBSON: Yes.

THE CHAIRMAN: And we have the legal team.

MR GIBSON: Indeed.

THE CHAIRMAN: The legal team, they are on partial CFAs, aren't they?

MR GIBSON: They are on discounted CFAs.

THE CHAIRMAN: Discounted CFAs. Yes.

MR GIBSON: For my part, I am also on a discounted CFA but the way that the timing of the application worked with my happy arrival in the case was such that actually my fees had not been included in the funding notices that had gone at that stage.

THE CHAIRMAN: Yes.

MR GIBSON: But I too have an interest, insofar as any future settlement will largely be guided by this. So we approach this on the fact that as you quite rightly highlighted, there is a potential conflict of interest. Ms Hollway quite rightly points out the professional duties on all of us, such that we have been astute to avoid that interest polluting our approach and that is one of the reasons why we were so fastidious in our preparation of the application in trying to present things in a balanced way.

THE CHAIRMAN: Yes. It is absolutely critical because, you know, as long as the Tribunal know where the conflict lies, so you disclose it on the table, you are on a discounted CFA so you have an interest, and that you complied with your duties it is absolutely fine. With the lawyers in your team, including solicitors of the calibre that we have here, I have no concern about whether or not you are complying with your duties. It goes without saying.

MR GIBSON: We are very grateful for that indication and we have done our best to comply with that and will continue to do so.

So that is the position. The need in order to unlock the conundrum of the individuals not being able to fund cases individually and the size and scale of these cases requiring, therefore, significant funding and significant investment by stakeholders that

it has been recognised in the system that one takes the investment in order to overcome that difficulty. There is an assessment, a balanced assessment, I respectfully say, of the benefits and risks of this use of third-party investment in two Court of Appeal judgments that we refer to in our skeleton. The first at paragraph 30(1) is the Gutmann judgment Lord Justice Green's judgment for the Court of Appeal in that case. Paragraph 83, with his characteristic clarity, puts the point this way:

"There are conflicting considerations at play" – and being consistent with our warts and all approach, we want to emphasise both of these – "on the one hand, to enable mass consumer actions to be viable at all will invariably necessitate the assistance of third-party funders and the CAT must, therefore, recognise that litigation funding is a business and funders will legitimately seek a return upon their investment."

That is a point that we will talk in more detail about in the course of my submissions today.

"On the other hand, providing the balanced assessment, as I say, there is a risk that the system perversely incentivises the incurring or claiming of disproportionately high costs."

Then they go on to talk about a further risk, highlighted in the Canadian literature about the timing and the amount of settlement which I think is more relevant to the hearing we had in December about the actual settlement itself. I think the first risk about the incurring or claiming of disproportionately high costs is the one that is more relevant for today's purposes in terms of actually the balance of risks and how we go about finding the appropriate point to calibrate that.

The second Court of Appeal judgment where this discussion to balance is discussed is in the O'Higgins v Barclays case at paragraph 129 which we deal with at paragraph 30(2) of our skeleton. There, the court made the point that:

"Third-party funders and legal representatives who act as the motor force behind claims for profit are integral to the viability of many claims. Insofar as this creates a risk of abuse or misuse, the CAT can exercise control through cost control and other case management measures."

Of course, sir, you quite rightly flagged the general supervisory responsibility of the Tribunal in these proceedings. That obviously gels very well with the sentiment expressed by the Court of Appeal there. You will have seen further examples that we take from Tribunal judgments in the remainder of paragraph 30, but I don't propose to go through each one, you will be relieved to know.

In my submission, there are four clear points to be taken from the appellate authorities and the others we cite in our skeleton.

The first is the collective proceedings system is crucial in facilitating access to justice for individuals who would otherwise be unable to secure compensation.

The second point is that the collective proceedings system depends for its viability on third-party investment.

The third is that third-party investors legitimately seek a return on that investment and the fourth is that insofar as the involvement of third-party investors creates a risk of abuse or misuse, that can and should be controlled by the Tribunal's active case management of these cases.

So that was just by way of brief introduction because those will be the light motif, I think. We will come back when we are looking at the interpretation of the legislation against the backdrop of those objectives.

So I now propose to take the Tribunal to the legal basis for the order sought by this application. The Tribunal will have seen at tab 2 of the bundle, page 14, the draft order itself. If you turn to the second page on page --

THE CHAIRMAN: Well, let's look at the draft order, shall we?

MR GIBSON: Indeed. Yes. Absolutely. So tab 2 of the bundle, sir.

THE CHAIRMAN: What you will have to do is explain and take us through, you know, the money flows and what it actually represents.

MR GIBSON: Yes. Indeed, sir.

THE CHAIRMAN: We are going to have to have a look at that.

MR GIBSON: No. Absolutely. I think the way I was proposing to take my submissions -- I am very happy to take it however you would find most helpful -- was to deal with the legal basis first, so looking at --

THE CHAIRMAN: Yes. The way you are doing it is absolutely fine. You know I will always have some questions as we go along.

MR GIBSON: I look forward to your questions, sir.

THE CHAIRMAN: That's fine.

MR GIBSON: We will get to the money flow, certainly.

THE CHAIRMAN: No. But we will get to that, as long as you know that is what I want to understand. Exactly how much you are being asked to be paid, where is it going and on what basis. So what is it all for.

MR GIBSON: Yes.

THE CHAIRMAN: Then we can make an informed decision.

MR GIBSON: Absolutely, sir.

THE CHAIRMAN: Thanks very much.

MR GIBSON: So the legal basis that was set out on the second page of the draft order, the second recital on that page. You see:

"And upon the Class Representative making a related application dated 18 October 2023, pursuant to..."

There we list out the rules that we thought appropriate in making that application.

What I have done, with my learned junior's assistance in the preparation for this

hearing, is go through --

THE CHAIRMAN: You are very lucky to have a junior.

MR GIBSON: I am extremely lucky to have a junior. Particularly a junior of the calibre of Ms O'Keeffe, who is prone to blushing when I point out how brilliant she is, but it should be on the record that I am very fortunate.

So in terms of the basis we set out there. You will see, sir, that we start with rule 53 and then 98 and 104 listed just purely in numerical order. We read those in conjunction with 74, 93 and 94. I propose to take them in a slightly different order. I do so mindful of recent Tribunal authority, in particular the case of Gutmann v Apple last month [2024] CAT 18. I am also mindful of the importance of considering matters in a fair and even-handed manner and, therefore, I propose to work through the relevant rules in the following order.

THE CHAIRMAN: Have we got the rules in the bundle?

MR GIBSON: We do have the rules in the bundle, sir. In the authorities bundle, at tab 2.

THE CHAIRMAN: In the authorities bundle?

MR GIBSON: My copy is marked "related costs application" with authorities bundle on the front.

THE CHAIRMAN: Oh, yes. This one. I have not looked at the authorities.

MR GIBSON: That is what I am here for, sir.

THE CHAIRMAN: The ones you have taken me to are all familiar friends and I have looked at them recently in another context. But, yes.

MR GIBSON: I am sure you have, sir. Perhaps even yesterday.

THE CHAIRMAN: Yes. Exactly, and preparing for today on that. You have the whole of this morning on this and then I will be giving the judgment on the other one at 2.00 today.

MR GIBSON: Okay.

THE CHAIRMAN: That means that you won't get your ruling today. It is just that is how it works out, unfortunately. I have other things tomorrow.

MR GIBSON: Right. I will have to move quickly then.

THE CHAIRMAN: Yes. But all I am saying is normally I like to deal with it, there and then, on the day. I just don't think we have enough time to deal with it. We do need to spend the whole of this morning. Even if it goes up to 1.30, whatever it takes, to take us through it.

MR GIBSON: I will try and take it as quick as possible. I had prepared to go slightly into the afternoon, because I thought we had a full day's listing. I will do my best to truncate --

THE CHAIRMAN: I have no problem if you come back at -- let's say we finish at 1.00 and you come back at 3.30 to finish off and then we just carry on until it is finished. Because we are very flexible here. As long as we finish by 5.30 or 6.00, it is fine if we go on to the afternoon. So don't feel any time pressure. You have raised some very interesting points of principle.

MR GIBSON: The main reason we wanted to take our time was mindful of the need to present both sides --

THE CHAIRMAN: No. It is fine. It is absolutely fine. I think if we finish by lunchtime, we finish by lunchtime. If we don't, we will finish it today by just sitting late if necessary.

MR GIBSON: I hope we don't trespass too much on your evenings.

THE CHAIRMAN: No. It doesn't matter. It is absolutely fine.

MR GIBSON: So, yes. I propose to take the rules in this order. I will turn them up as we get to them but for the moment, just to give you the list. Rule 104(2).

THE CHAIRMAN: Yes.

MR GIBSON: Rule 98(1). Rule 93, looking particularly at 93(1) and 93(4). Rules 94

and 97 together: you will probably appreciate, they are to some degree analogues for each other, depending on whether there has been a CPO. Rule 53.

I will also in the course of looking at the rules themselves, where appropriate, consider the primary legislative basis for those rules as well.

THE CHAIRMAN: And does the guide have anything that is useful?

MR GIBSON: The guide, I think, is very limited --

THE CHAIRMAN: It is, isn't it?

MR GIBSON: -- on these points. What I will do is when we have the indulgence of a lunch break, I can double check that. I think when I looked at it, I didn't find much inspiration from that.

THE CHAIRMAN: No.

MR GIBSON: So turning to rule 104(2) then, which is at page 31 of the bundle behind tab 2. The Tribunal will see that on its face, rule 104(2) provides wide power that the Tribunal may at its discretion, subject to rules 48 and 49, which relate to rule 45 settlement offers so they don't apply to collective proceedings at all, that is by virtue of rule 74(3)(c), so just taking you back to the wording:

"The Tribunal may at its discretion at any stage of the proceedings make any order it thinks fit in relation to the payment of costs in respect of the whole or part of the proceedings."

On its face, therefore, it may seem that provides you with ample latitude to do what we ask you to do today. However, on further reflection and looking at the relevant definitions and associated case law, we think it is very doubtful that rule 104(2) provides the Tribunal with the power to make an order for payment of all of the stakeholder entitlements that are sought today. I put the emphasis on the word "all" and I will explain that in a moment. Rule 104(1), as you will appreciate, defines what the word "costs" means for the purposes of the rules in the following terms:

"For the purposes of these rules, costs mean costs and expenses recoverable before the senior courts of England and Wales, the Court of Session or the Court of Judicature of Northern Ireland as appropriate."

It is not in the bundle, but you will be unsurprised to learn that in the first CMC in this case, on 19 March 2021 at paragraph 1, it was decided these proceedings to be treated as proceedings in England and Wales. So the appropriate analogy here is with the recoverability of costs before the senior courts of England and Wales.

Lord Justice Popplewell explained with his characteristic clarity in Rowe v Ingenious Media and I can turn it up if it is helpful. In fact, it probably would be worth turning this one up. Tab 10 of the bundle. If you go to page 323.

THE CHAIRMAN: Yes.

MR GIBSON: This was a case in a different context but nonetheless there is a helpful discussion of the costs of funding litigation generally from paragraph 45 through to paragraph 53. But I would like to put emphasis for present purposes, at least, on what is said at paragraph 46 where the point is made that costs -- in paragraph 45, he contrasts costs of conducting the litigation with the expenses or losses incurred by reason of funding those costs as to which the law draws a distinction. That will be significant to come back to later, in my submissions. The point for present purposes is that in considering the costs or expenses or losses incurred by reason of funding those costs, it is clear from paragraph 46 that those will not be recoverable.

So, therefore, reading the definition at rule 104(1) in light of that point, that is indeed consistent with what the Tribunal said in Merricks v Mastercard, to which we will turn later. It is clear that not all of the costs that we are seeking by way of stakeholder entitlements would be costs that would fall within that rubric. So just to remind you, sir, in various places in the application I can take you to if it is helpful we list out the different types of stakeholder entitlements that are sought today.

One category is the outlay put in by the funder, so it is defined as the funder's outlay or the funder's appeal outlay. That comprises to some part legal costs but goes wider to include, for example, the payment of the upfront ATE insurance premium. It will include the payments to the class representative for his time spent conducting his role in those matters. The latter two are not costs that would be recoverable in proceedings.

More particularly, the funder's fee, the adverse costs fee and the funder's appeal fee which are all the return that the funder gets on the investment, those would obviously all fall outside the reasons outlined in Ingenious outside the scope of the definition of costs under rule 104(1).

Likewise, the ATE insurers' deferred and contingent premium, that too falls outside. The solicitors' and counsel's conditional fees and success fees come in two parts. For reasons I will come on to look at in a moment, conditional fees are actually treated as costs. That is the uplift from the discounted up to the ordinary fee level, however the success portion, the uplift purely for success over and above the ordinary fee level, that is not recoverable as cost.

So what one sees is a mixed bag of what we are asking for. So having regard to the limited definition of costs under rule 104(1), this power, we accept, is not going to take us to where we need to be in terms of giving you the ability to grant the order.

THE CHAIRMAN: Where do I have the breakdown of the amounts that you are talking about here, that are referenced to all the individual elements?

MR GIBSON: I can take you to a couple of places. Would you like me to do that for you now or just --

THE CHAIRMAN: Do it now, just so I have it in mind.

MR GIBSON: Yes. So if we go to the bundle for this hearing. Mr McLaren's third witness statement, which appears at tab 3.

THE CHAIRMAN: Yes.

MR GIBSON: He provides an outline which is then filled out in more detail in the witness statements of Ms Hollway and Mr Friel. So if you turn to page 24.

THE CHAIRMAN: Yes.

MR GIBSON: You will see under the heading "costs, fees and disbursements sought" from paragraph 37 onwards, there is an explanation of the different categories. He makes the point in paragraph 37 that under the agreements, the relevant returns, the costs, fees and disbursements have been triggered as a result of the successful conclusion of a settlement with CSAV. Under the agreements, technically the Class Representative owes the full amount triggered by success. However, at paragraph 38, he explains how he has reached a pragmatic and sensible agreement with the stakeholders who in the current circumstances consider it appropriate to limit the amount that they actually seek from him and, therefore, that he seeks from this Tribunal to a proportion of those costs which is referable to the proportion, the settlement with CSAV, represented of the total claim. So you will remember there was -- I am sorry.

THE CHAIRMAN: Wait. Wait. Is that an agreement that binds the future? Let's say, for example, you go to trial and you lose against all the other defendants. Are you saying that the funder will then say "I'm going to try and recover a bit more of my 24.5 million" or whatever the figure is, and take that out of the balance of what is left of the damages that are being held?

MR GIBSON: It is a very fair question, sir, and I'm afraid I have not asked that question and it is not in the evidence. So can I take instructions on that and come back to you later in the course of proceedings?

THE CHAIRMAN: Yes. Of course. It is one thing to say this is a sensible arrangement and that you are asking me to approve it on that basis. But if I am told

actually that at the end of the day what is envisaged is that they are going to grab the whole lot later, you know, that does not sound too good, to be honest.

MR GIBSON: Well, you raise a fair question. I will give you one point of reassurance. Obviously, any time they come to grab any money or ask for any money, they will have to come again to this Tribunal to ask the question. So in the event that they came back and said please, sir, may we have some more, they would have to explain the basis for asking more and justify it on those terms. It may be most convenient to actually consider the merits of that application in the circumstances that arise at that time. For the moment, sir, all they are seeking is the 1.7 proportion of those sums, referable to the 1.7.

THE CHAIRMAN: But it is important that I know whether there is that reservation or possibility.

MR GIBSON: I don't disagree with you, sir. I will find that out for you.

THE CHAIRMAN: Let me just write this down. **(Pause)**

If you don't get the answer today, you can write in with the answer tomorrow.

MR GIBSON: Yes, sir.

THE CHAIRMAN: It is not a problem. I don't need it for today, but I do need the answer.

MR GIBSON: We will ensure you have the answer.

THE CHAIRMAN: Yes. That's fine. It is probably better that I get the answer by way of a letter, so it is clearly on the record exactly what the position is.

MR GIBSON: Very good, sir.

THE CHAIRMAN: I will ask for a letter on it.

MR GIBSON: So subject to getting that clarification for you, see paragraph 38, that there is that agreement in relation to the restriction on the claim. Mr McLaren then sets out under the underlined headings the different categories of fees sought that I

was just taking, sir, the Tribunal through.

The first category is the outlay. As I explained, that is the actual investment, the monies put into the claim by the funder -- Woodsford, in this case -- as at the date of this statement. The funder's outlay is explained there. The total, you will see, is just over 3.5 million. The funder's appeal outlay was a specific figure, 104,000 in change, relating to the appeal against the certification judgment.

There is an explanation there and we will come on to explore this in more detail, in due course. But you will see that there is an explanation that the funder's outlay, there is credit given for that part of the outlay that has been recovered to date through the mechanism of recovered costs. Basically, that is where there is a recovery from inter partes costs from the other side. That is then rooted back through the stakeholder entitlements mechanism, through the stakeholder account, such that it is offset against the amounts that have already been committed by Woodsford.

So they are not seeking the full amount of their outlay. They are seeking their outlay minus that which they have already recovered by way of inter partes costs.

THE CHAIRMAN: And we have this issue about the 280,000, haven't we?

MR GIBSON: Which I have well in mind.

THE CHAIRMAN: Yes. Because the 100 plus whatever other figure we may agree in relation to the settlement approval process is fine. Because the 100 was specifically designated for that and insofar as the 280,000 has been paid by the twelfth defendant, it makes a lot of sense that that can be dealt with. Part of that can be used to top up whatever the figure is in relation to the approval of the settlement and that the issue that we have left open is: are you to allocate the 280,000 specifically to the 1 point -- whatever it is.

MR GIBSON: 1.12.

THE CHAIRMAN: 1.12 per cent.

MR GIBSON: Oh, sorry. The 1.7 per cent. Sorry.

THE CHAIRMAN: The 1.7 per cent?

MR GIBSON: Yes, sir.

THE CHAIRMAN: Portion representing the claim against the twelfth defendant or was that sum going into the general pot and so instead of getting their portion, 100 per cent credit for the full amount coming in, they are only getting credit for 1.7 per cent of whatever comes in. That is the bit that, as you know, I raised with your leader last time round.

MR GIBSON: Yes.

THE CHAIRMAN: That is something that we will address later on today.

MR GIBSON: I know.

THE CHAIRMAN: And we will see where we are on that.

MR GIBSON: Yes. I will explain in more detail. It will become apparent when I go through the detail of that. The way in which the 280,000 was calculated had its own separate form of allocation. It is a one fifth, 20 per cent allocation, from the total costs on the basis that it is one of the five defendant groups. So there is a slightly different logic to how that is being done. But I propose to take you through that, step by step, in due course.

THE CHAIRMAN: Yes, take us through it later. But we are just looking at what costs, what is actually being claimed to be paid out and to what extent what is being asked falls within rule 104(2). That is what we are trying to get to.

MR GIBSON: Rule 104(2) at the moment. As I said, I won't spoil the story when we get to 280,000. I will deal with that in due course. I can feel myself bubbling up wanting to talk about that, but I should restrain myself, focus on the matter at hand.

One sees the funder's outlay, as I say, is a mixed bag of payments for legal costs and payments for other matters that would not fall within the scope of section 104(2). Then

you have under the second heading funder's fee, adverse cost fee and funder's appeal fee.

THE CHAIRMAN: On the funder's outlay and appeal outlay, how much of that falls within section 104(2)?

MR GIBSON: The precise amount, we don't have the precise breakdown. But we accept that it does not all fall within that. So there will be a proportion referable to the legal costs, the Class Representative's legal costs that the funder provided, and indeed to the extent that any adverse costs were paid, I have not been involved in the case throughout so I am not aware of any adverse cost judgments being made against us. But if they were, those would also have been funded by the funder. Those would all be inter partes costs and, therefore, would fall within the scope of 104(2). As I said, there will be other things that fall within the outlay. For example, as I said a moment ago, the payment of the upfront premium for ATE insurance. Obviously this class representative crucially needs to actually run the litigation but is not a cost that is one that could be recovered as a Senior Courts Act section 51 type of cost.

So I am not sure how easy it would be to actually provide the exact breakdown, but in any event the total we have there, as I say, is a mixed bag of both.

THE CHAIRMAN: Yes.

MR GIBSON: Looking at funder's fee, adverse cost fee and funder's appeal fee, the next category. In contrast to the outlay which is actually the investment put in by the funder, this is the return on that investment. We can go through the detail if we have time, under the revised LFA and, indeed, Mr Friel sets out very helpfully how all these different costs are calculated in there and where they come up in the LFA. We can look at that in a moment, if that is helpful.

But those three fees are fees that represent a return for the funder. The largest being the funder's fee and we can talk about how that is calculated. But, as I say, all those

are elements of return so they would fall outside rule 104(2) as well.

The next category, turning over the page, at paragraph 45 is the ATE insurance deferred and contingent premium. That, again, is explained in more detail in Mr Friel's witness statement. This is the contingent element dependent on a successful outcome to which the insurers are entitled under their agreements. That is, again, a cost that would fall outside rule 104(2).

Then you have under paragraphs 47 through to 50, you have Scott+Scott as the solicitors' fees and then counsel's fees. We have already touched on that, sir. The distinction between conditional fees, namely the difference between basic charges calculated at lawyers' ordinary rate, and the discounted charges payable in the event of no success. I have made the point that those costs are recoverable against the other side and one sees that from the judgment Gloucestershire County Council v Evans, which is in the bundle --

THE CHAIRMAN: They are recoverable --

MR GIBSON: They are.

THE CHAIRMAN: -- up to the amount of the base fees, or whatever you want to call it.

MR GIBSON: They are, indeed. So the fees they have charged in any event would have been charged in the normal way. We are talking about the recalibration up to the ordinary level, in the event of success, which is treated as being normal costs. As I say, Gloucestershire County Council v Evans, the Court of Appeal judgment which appears at tab 4A of the bundle, I don't propose to turn that up unless it is helpful.

THE CHAIRMAN: Just give me the paragraph of the judgment.

MR GIBSON: Paragraphs 22 to 25, 37 and 39 deal with that point.

THE CHAIRMAN: Yes.

MR GIBSON: And to the extent you wanted the comfort that the position remained,

that is a 2006 judgment. You will appreciate -- and others in the room have much more knowledge about this than I do -- but in 2013, there were changes under the LASPO legislation. There is a case, the Winros Partnership case from 2022, which is at tab 10A of the bundle. At paragraph 22 of that case, there is reference back to Gloucestershire County Council. So I think we can take comfort the position remains the same and has not been affected by the 2013 legislation.

So that disposes of that element of the legal fees but, of course, then you have the uplift, the success element. That, we accept, does fall outside the scope of recoverable costs and so that too would not be covered by a rule 104(2) order.

That is what I was going to say in relation to rule 104(2), to accept basically that it provides a limited power but does not go as far as we would need for the purposes of the order we seek today.

THE CHAIRMAN: But what I don't have is a breakdown of what the figures are that --

MR GIBSON: Would or would not be covered.

THE CHAIRMAN: Were not covered. So when you write the letter, if you can give the figures showing what is clearly within 104(2) and what isn't, then that would be helpful by reference to the figures in this paragraph.

MR GIBSON: I hope it will be possible to do that fairly quickly. Sometimes passing --

THE CHAIRMAN: Now, these things can sometimes take a lot longer. You may have to give an estimate, because I don't want you to spend too much time and money to get down to the bottom of the last farthing.

MR GIBSON: What I will do, over the lunch adjournment I will give you an indication as to whether we think it is going to be something that can be easily done or not.

THE CHAIRMAN: Yes.

MR GIBSON: So that brings us to rule 98(1). This, as you will remember I am sure, is the provision in relation to the payment of costs specifically in the context of

collective proceedings, it being the last rule in part 5 which obviously deals with collective proceedings.

As with rule 104(2), rule 98(1) provides a power that reads in general terms, and it may be convenient again to go back to the rules behind tab 2 of the bundle. So it is at page 29, behind tab 2 of the authorities bundle.

THE CHAIRMAN: Yes.

MR GIBSON: That provides, as I say, a power in general terms that subject to paragraph 2, costs may be awarded to or against the class representative and then there is a reservation there:

"But may not be awarded to or against the represented person if he is not the class representative, save that..."

Now, fortunately none of the savings under subparagraphs (a) or (b) and, indeed, subparagraph 2 need detain us because those qualifications and exceptions derive from parts of the rule making power that go to the circumstances in which the costs may or may not be awarded against a class member or represented person.

So we do not need to worry ourselves with the qualifications and exceptions for present purposes. What we are looking at is whether that on its face, general power, takes us any further than rule 104(2). However, as with rule 104(2), it is unlikely it goes wide enough to cover payment of all the stakeholder entitlements because it uses the same word "costs" as was used under rule 104(2) and you will recall that the definition under rule 104(1) of costs -- and I just turn over to page 31, you can remind yourself -- applies for the purpose of these rules generally.

THE CHAIRMAN: Yes. I think you are right on that.

MR GIBSON: The only qualification looking at things in the round and trying to give the Tribunal as global a view as possible, there is a possible argument for a wider use of the power here. But I don't think it gets us -- ultimately, when you look at it, I don't

think it actually works. But I can run you through it, if you would like me to, briefly.

THE CHAIRMAN: No.

MR GIBSON: I will dispense with that part of my submissions then.

THE CHAIRMAN: Okay.

MR GIBSON: So then that too, both 104(2) and 98(1), take us essentially to the same place, namely it is called a limited power for part of the fees, costs and fees and disbursements sought, but not everything. That takes us then to rule 93 and there are two provisions in rule 93 that I think we should consider.

Rule 93(1) and rule 93(4). Taking those in turn, rule 93(1) -- and this is at page 22 of the bundle -- provides as follows:

"Where the Tribunal makes an award of damages in opt out collective proceedings, it shall make an order providing for the damages to be paid on behalf of the represented persons to, A, the class representative or, B, such other person other than the represented person as the Tribunal thinks fit."

For completeness, before we go on to think about what that actually means, it is convenient just to turn up briefly the --

THE CHAIRMAN: Here the Tribunal has not made an award of damages, has it?

MR GIBSON: You are absolutely right, sir. I am going to come on to talk about the scope of this power in the present circumstances, in light of the Gutmann v Apple judgment. Taking things rather ploddingly, to make sure that we cover everything thoroughly. But I am sorry if the pace is somewhat slower than you might like.

Page 5 of the bundle, we see the primary statutory basis for that power under section 47C(3).

THE CHAIRMAN: Wait. 47?

MR GIBSON: 47C(3) on page 5, behind tab 1 of the bundle.

THE CHAIRMAN: Yes.

MR GIBSON: This is the section of the 1998 Act which is expressed in almost identical terms, save that the word "must" is used instead of the word "shall" and "representative" is used instead of the word "class representative". So I don't think anything turns on either of those differences.

So you have the power from the primary statute reflected in the rules. In the recent Gutmann v Apple judgment, the Tribunal reasoned that this provision -- namely, section 47C(3):

"Plainly contemplates that the Tribunal can order the payment of damages to such other person as it sees fit and we see no reason why this power could not extend to litigation funders in appropriate circumstances."

That is paragraph 31 of the recent Gutmann v Apple judgment. There is also a reference to a similar sentiment in paragraphs 34 and 35.

Now, this was one limb of the Tribunal's reasoning in support of the wider conclusion that there is a power for this Tribunal at the conclusion of proceedings to make an order that a funder's fee be paid out of damages awarded to the class. Taking an even-handed approach, there is obviously the point you have just referred me to, sir, about the scope of rule 93 relative to what we are looking at here in collective settlements. I am going to come on to look at that in a moment.

The point that I want to address first is whether, taking an even-handed approach to these submissions, one can be confident that the Tribunal's conclusion about reliance on this provision in subsection (3)(b) of 47C goes as far as the Tribunal in Gutmann v Apple thought it did.

The arguments against that conclusion would be as follows. In Bennion I don't propose to turn it up but we do have it in the back of the authorities bundle, if it would assist and you may wish to refer to it in the course of preparing your judgment, section 21.1 states that:

"An act or unlegislative instrument is to be read as a whole."

To the extent it is relevant as well, section 16.6 also refers to:

"The format or layout of an Act being relevant, provided due account is taken of the fact that it is designed merely for ease of reference."

But the central point here is the need to read a statute as a whole and not take phrases in isolation. It is not going to come as any great news to any of us in the room. But reading rule 93 in its entirety, it is relevant to look at the remainder of rule 93, just hopping back, apologies to make you jump around, sir, to page 23. You will see that there is provision at subparagraph (3) of rule 93 there is a requirement that an order made under rule 93(1) may specify, (b), the date by which of class representative or persons specified in accordance with paragraph 1(b), so that's a reference back to the provision relied upon by the Tribunal in Gutmann v Apple, shall notify the Tribunal of any undistributed damages which have not been claimed.

It is also relevant to note that both section 47C(3) and 93(1) are not actually providing a power, they are imposing a duty to make an order.

Taking those two factors into account, Class Representative's warts and all view of these things is that it is more likely that the power relied upon under 93(1)(b) is to be exercised for the purpose of effecting distribution of damages to the class, i.e. a transfer to facilitate payment for the benefit of class members, rather than a transfer for the benefit of the other person, the recipient of that payment, in their own right.

On that basis, the other person which the rules appear to envisage is not a stakeholder receiving a share of damages as a reward for a risky investment in the proceedings, but rather a claims administrator with the skills, resources and expertise to conduct the distribution process, rather than necessarily assuming that the class representative is the best person to carry out that specialist task, albeit that obviously the class representative retains the important obligation to oversee what is going on, along with

the Tribunal exercising its supervisory responsibilities.

So that puts a different complexion on it from the one that the Tribunal, with great respect to the Tribunal in Gutmann v Apple, assumed. In addition to the fact that the reading of the rule as a whole seems to lead more naturally to that conclusion, the other factor to take into account is that the reading that I have just suggested is also consistent with the way that the Court of Appeal described the effect of section 47C(3), albeit without particularly detailed consideration of the issue so I don't suggest it is a fully argued point. But in Le Patourel paragraph 33, at tab 13 -- we don't have to turn it up, but I can read the relevant passages to you.

THE CHAIRMAN: Yes.

MR GIBSON: It is at page 399 to 400 of the bundle, the authorities bundle, as and when you would like to look at it. They make the point, by reference to section 47C(3), that:

"Where the court makes an award of damages, it is under a duty 'must' to impose an order the damages are paid either to the representative or to a third party authorised by the CAT."

That concept of authorisation is an odder one if you are making a payment to someone to use in their own right. It seems to me more apposite to someone who is being given a task to undertake. In any event, it continues:

"The Act does not indicate, however, how once the money is in the hands of the representative or authorised third person, the damages are thereafter in practical terms to be distributed to the class. In Merricks, all members of the court [the Supreme Court, of course] emphasised that the latter distribution stage was different from the earlier award of damages stage."

Further, in Le Patourel, paragraphs 41 and 42, they touch on rule 93(1) specifically and they say that addresses the start of the distribution process and replicates the

effect of section 47C(3) and (4) of the 1988 Act, requiring:

"An award of damages to be paid to the representative or an authorised third person."

THE CHAIRMAN: What paragraph is that?

MR GIBSON: That is paragraphs 41 to 42, at page 403 of the bundle.

So what I take from that -- again, adopting a warts and all approach to this -- to assist the Tribunal in reaching the correct view of the rules. We think that the Tribunal in Gutmann v Apple -- so we note they have granted permission to the Court of Appeal following that judgment, because it was the first occasion on which the general points they were considering had been decided. At paragraph 6, they specifically deal with this particular point. With my warts and all hat on -- and with due respect, as I say, to the learned members of that Tribunal -- it seems likely to the Class Representative at least that the Court of Appeal may take a different view as to the relevance of section 47C(3) and rule 93(1) from that suggested by the Tribunal in Gutmann v Apple. But I should make clear, again, that I say this strictly without prejudice to the wider question of whether the Tribunal in that case was --

THE CHAIRMAN: And what stage was Apple considering?

MR GIBSON: What they were looking at was the certification stage. There was a complaint made that the way in which the waterfall operated into the funding agreement in that case was contrary to public policy and gave rise to a concern about whether there should be certification at all. In that case, in the terms of the waterfall -- I think in all cases, but maybe just in one case, I would have to check -- there was provision to allow the funder to take a share of the damages before distribution. So that was baked in, if you like, to the waterfall.

THE CHAIRMAN: Yes.

MR GIBSON: So it is different from this case, where there is nothing baked in. We are coming and asking the Tribunal to allow that. It was within the terms of the funding

agreement. Other people will correct me if I have misrepresented it, but that is my understanding. So it arose at that stage in relation to that wording. The point then arose: is there even power for the Tribunal to do that if that is what the agreement purports to ask them to do? They concluded that there is power, in the way that I described in my skeleton, there is power to make an award to defray from damages before distribution at the conclusion of proceedings because that is the thought experiment they were being asked to consider.

So the general conclusion they reached -- that there is power to defray from damages in that way and not just for damages -- is one that we endorse, as we must, in this application. In fact, we say the power goes further than what they were specifically considering. They weren't excluding any further use of the power, but they were focused very much on what happens at the conclusion of proceedings, because that is the thought experiment that was necessary by reference to the application, the complaint that was being made.

THE CHAIRMAN: But what the difference is is that there, they are looking at the conclusion proceedings and out of damages awarded by the Tribunal. Here, you have damages or a payment, let's say, which has not been awarded by the Tribunal so that is the first distinction. Then the second distinction is the timing issue. One of the considerations that we are going to have to look at is that none of us know what the shape of the case is going to be. We don't know what degree of overall success is going to be achieved in this case. Ordinarily, one would want to deal with issues like this in one go, knowing what the result is. That is one of the considerations that is crossing my mind as we go through this. It is not whether I think it is appropriate, that is a different issue. It is a question of when is the best time to deal with this issue and I don't have a feel yet as to what is likely to happen if at the end of the day, there is success against certain defendants and not against others, or no success at all, and

is there going to be ever a possibility of individual persons coming forward and saying, "I can prove, at least in respect of me, that my vehicle was carried on a vessel that was being organised and shipped through the twelfth defendant and so insofar as you failed against other people, at the very least I should get my shilling's worth out of what is being awarded."

I just don't know how it is going to pan out later on. It is those uncertainties that we are going to have to bear in mind when we decide whether you are right or wrong about the power that we can do it now, whether this is something that we are certainly more comfortable as a Tribunal not having the full picture and seeing how it is developed, doing it later rather than now.

But you understand that.

MR GIBSON: I do, sir.

THE CHAIRMAN: I pointed that out to your leader last time.

MR GIBSON: Absolutely. You did and we took that on board and we address it briefly --

THE CHAIRMAN: I know you address it.

MR GIBSON: Yes. We will take you through that in stages.

THE CHAIRMAN: Yes.

MR GIBSON: Obviously, on the warts and all approach, that is obviously an important consideration to bear in mind. I will attempt to give you the comfort that there are very strong reasons why one can and should do it at this stage, but I will come to that when I turn to the exercise of your discretion, if I may.

So that concludes what I wanted to say in relation to rule 93(1) but I wanted to just emphasise that whilst we criticise or cast some doubt on that aspect of the basis for the judgment in Gutmann v Apple, we do think it is correct in the outcome and we will explain why we say that in due course.

THE CHAIRMAN: When is Sony likely to be decided, do we know?

MR GIBSON: The Sony appeal?

THE CHAIRMAN: Yes.

MR GIBSON: I don't have -- again, I can see if there is any intel we can offer you on that, but I don't have any information myself.

THE CHAIRMAN: Yes. I just don't know. Yes. Okay.

MR GIBSON: I think I will press on. Unless --

MR MARVEN: I can say something about the Sony appeal, if that would be helpful.

THE CHAIRMAN: Yes. Of course you can. Yes.

MR MARVEN: I am told that the Court of Appeal has written to the parties suggesting the appeal be stayed, pending the outcome of the draft legislation in respect of the PACCAR decision.

THE CHAIRMAN: Okay. Well --

MR GIBSON: One can see the good sense of the use of court time on that issue being reserved. I am grateful to my learned friend for that explanation.

THE CHAIRMAN: We will just have a, sort of, ten-minute break for now for the shorthand writer. Yes.

(11.42 am)

(A short adjournment)

(12.00 pm)

THE CHAIRMAN: Yes, Mr Gibson.

Submissions by MR GIBSON, continued

MR GIBSON: Thank you, sir. So you will recall that I had dealt, I think sufficiently, with rule 93(1). I was going to go now to rule 93(4). As I am sure the Tribunal is well aware, it is -- just if you want to turn it up -- it is in the authorities bundle, tab 2, page 23.

THE CHAIRMAN: Yes. Let me just get my notebook out.

MR GIBSON: Absolutely. **(Pause)**

THE CHAIRMAN: What page of the bundle?

MR GIBSON: Page 23, tab 2.

THE CHAIRMAN: 23. Yes. All right. We are going to look at 93(4) now. Yes.

MR GIBSON: So this provides:

"Where the Tribunal is notified that there are undistributed damages and in accordance with paragraph 3(b) [and we touched on that before the break] it may make an order directing that all or part of any undistributed damages is paid to the class representative in respect of all or part of any costs, fees or disbursements incurred by the class representative in connection with the collective proceedings."

I won't turn it up, but just for your note. Section 47C(6) is framed in similar terms but structured somewhat differently. That refers to:

"In a case [just for your note, that is in the authorities bundle, tab 1 at page 5] within subsection 5, the Tribunal may order that all or part of any damages not claimed [which is their way of describing undistributed damages] by the represented persons within a specified period is instead to be paid to the representative in respect of all or part of the costs or expenses incurred by the representative in connection with the proceedings."

The reference "instead" there is because the default under the legislation is for it to be paid to the charity, but you may apply for payment for undistributed damages in favour of the funder, effectively. The stakeholders, effectively, through that mechanism. So that is the way the legislation and the rule look at the situation in respect of awards, damages awards, and undistributed damages after the process of distribution.

A couple of points on that. The first is that it was established long ago in Merricks v Mastercard in 2017, in tab 5 of the bundle, paragraphs 109 to 117, that contrary to the contention put forward by the defendant, the phrase "costs or

expenses" in the legislation, because that is the formulation used, section 46C(6) does encompass payments to funders. So the formulation there is not limited in the way that we discussed in relation to 104(2), which is narrowly limited to costs recoverable under the Senior Courts Act. It was accepted in Merricks that this formulation in the legislation, costs or expenses, and the way it has been described in the rule is costs, fees or disbursements. That formulation was broad enough to encompass payments in favour of stakeholders, be it funder's fees, ATE insurers and the like.

I can take the Tribunal to that, if that would be helpful. Yes? So if we turn up tab 5 and go to paragraph 109 on page 137.

THE CHAIRMAN: Yes.

MR GIBSON: You will see Mr Williams acting for the defendant, Mastercard, had submitted that the term "costs or expenses" in section 47C(6) and just to give you a ready way of looking at that, if you turn back a page to paragraph 105, you will see they quote in full subparagraphs 5 and 6. You can see there that the crucial phrase at the bottom of the page is:

"A payment to the representative in respect of all or part of the costs or expenses incurred by the representative in connection with the proceedings."

That is the wording that was subject to analysis in this part of the judgment. So flipping back to paragraph 109, the submission was made that that phrase "costs or expenses" should be read as effectively referring to inter partes costs under section 51 of the Senior Courts Act. You see at the bottom of page 137 over to 138.

Then there is a discussion at paragraphs 110 through to 114 and 115 about the way in which that phrase is being looked at in other case law. At paragraph 115 on page 140 of the bundle, the Tribunal makes the observation that section 47C introduced new and distinct provisions concerning the cost of collective proceedings and they declined to give the words used there a special meaning, by which there was

a shorthand for the Senior Courts Act meaning.

Instead, they came to the conclusion that in the ordinary sense, if a third party agrees -- this is paragraph 115, middle of the paragraph -- if a third party agrees to provide substantial monies in order to fund litigation, the payment which has to be made to that third party in consideration of this commitment, whether out of the damages recovered or otherwise, is a cost or expense incurred in connection with the proceedings.

Then at paragraph 117, they contrast the position under rule 104(1), which you have already touched on, with the way in which the rule under 93(4) was derived from this primary statutory basis. Paragraph 117.

THE CHAIRMAN: So what they are saying is there is a real distinction between 104 --

MR GIBSON: Yes.

THE CHAIRMAN: -- and this provision, which is effectively much wider and can cover, effectively, the position of the funder and the ATE insurers.

MR GIBSON: Yes. The Mastercard v Merricks case establishes that the meaning of the phrase -- costs, fees or disbursements within rule 93(4) -- is different from the meaning of the word "costs" in isolation elsewhere in the rules. So where you see "costs" on its own, then you apply the rule 104(1) definition which is limited to inter partes costs. Where you see a different formulation, in this case "costs, fees and disbursements", you have to give it a little bit more thought. In this case, they showed the first port of call in deciding what to do is to look back at the primary legislation and ask yourself what was actually going on here. They make the point that given that the legislation is designed within the collective proceedings regime to set out the possibility of third-party funding, it makes sense for the power to award costs, to be broad enough to actually make good on that policy objective.

So that, the Merricks case, establishes that rule 93(4) allows for the payment to

stakeholders from undistributed damages, i.e. after the distribution stage, Gutmann v Apple takes matters one step further concluding there is a power to make a payment from damages before distribution, albeit that the Tribunal was there in that case, as we have already touched on, only considering whether this could happen at the conclusion of proceedings as part of the waterfall specified in the funding arrangement in that case.

Just for your note, the Gutmann v Apple case is at tab 21 and it is paragraphs 16 to 19 and 35 that I think are particularly helpful in just clarifying that point.

THE CHAIRMAN: Tab 21, yes?

MR GIBSON: Tab 21. That's right.

So in reaching this conclusion, the Tribunal looked at various different aspects of the rules and the statutory regime, including the one that we have touched on: section 47C(3)(b), it is analogue 93(1), which I have said is probably not the firmest basis for them to have relied upon. They also place reliance on section 47C(6) and rule 93(4), which we have just looked at, and the Court of Appeal judgment in Le Patourel at paragraph 99.

Now, Le Patourel paragraph 99 I am going to come on and look at a little bit later in my submissions. For the moment, I would like to focus on section 47C(6) and its analogue, rule 97(3), and to ask ourselves the question with our warts and all hat on whether they provide a legal basis for going one step further still.

Now, you will recall in the Gutmann v Apple case, they were looking --

THE CHAIRMAN: Are you asking us to go one step further? Because you are asking us to do it out of damages, not awarded by the Tribunal.

MR GIBSON: I am going to come on to talk about exactly how far the scope of the phrase "awarded by the Tribunal goes".

THE CHAIRMAN: That is one qualification. The other qualification is the timing issue.

MR GIBSON: Indeed. Indeed.

THE CHAIRMAN: For me, I am obviously not out to, sort of, cut the legs of funders because I know how important they are and they have to make a rate of return and they have a portfolio. So some cases they win, some cases they lose, sometimes it is somewhere in between. But when they decide on what the appropriate rate of return is, they have to look at it on a portfolio basis. I understand that. But it is the timing issue because, at the end of the day, if it is appropriate they have a share I would much rather, as I said before at the last hearing, determine that further down the line because I still don't have a crystal ball as to where we are going to be at the end of the day. But you will come to this point later.

MR GIBSON: I will. I think it is important to distinguish, as I'm sure you will appreciate, there are two points where timing comes up. At the moment we are looking at whether you have the power to do it at this stage and --

THE CHAIRMAN: Yes. Of course.

MR GIBSON: -- then we are looking at whether, even if you have the power, you actually want to use it in that way.

THE CHAIRMAN: Yes. Yes. I know. You are very logical and you have done that in your skeleton argument.

MR GIBSON: I am sorry to be so laborious.

THE CHAIRMAN: No. No. You are entitled right.

MR GIBSON: So in Gutmann v Apple, they concluded that there was a legal basis for them making this payment to stakeholder entitlements before rather than after distribution and, as we have just touched on, what I am now looking at is whether the power goes further, whether it allows you to make a payment at this stage when damages are paid by way of settlement rather than award at trial and while they are continuing against the non-settling defendants, rather than at the conclusion of the

case against all defendants.

Now, the arguments in favour of that broader reading of the power are as follows. Essentially, based on the fact that the terms of section 47C(6) and rule 93(4) do not preclude that interpretation. That was a point that was made by the Tribunal in Gutmann v Apple. They made the point, it was a strong point they made, they said we don't see anything impeding us taking that view.

THE CHAIRMAN: Let's have a look at the paragraph in Gutmann.

MR GIBSON: Absolutely. So if you turn up tab 21 of the bundle.

THE CHAIRMAN: Yes.

MR GIBSON: Then it is around about -- it starts about paragraph 22 where they start this part of the analysis. Sorry. Forgive me: paragraph 20 is where they start, on page 800 of the bundle.

THE CHAIRMAN: Yes.

MR GIBSON: They deal first, at paragraph 20 and 21, with paragraph 104 and they conclude it is not broad enough to cover a payment of a fee to a funder. To the extent they are referring there to the return, the upside, we would agree. Obviously as I touched on, there may be some parts of the stakeholder entitlements that are referable to costs where they would be able to use that power.

They then touch on rule 78 and they make the point that the class representative is required to manage these proceedings and has powers to do so and they ask themselves whether that power should be limited by restricting the way in which they can enter into their agreements with the funder. That is obviously -- the reason why they looked at it through that prism is quite understandable, given the way that the point arose in that case. It was at the certification stage, look again what the class representative should or should not be able to do. So perhaps that naturally lent itself to them as a way into the material, rule 78.

They then come on in looking at paragraph 24, they touch on 47C(6) which is what we are looking at now. They also look at rule 93. Let me find the exact provision. Yes. My learned junior makes the point that paragraph 23, they make the point, they ask themselves whether there is anything that would suggest that the powers under rule 78 should be curtailed beyond the requirement of acting fairly in the interest to the class and they say there is no reason for reaching a conclusion that it did.

I had, in fact, another point in mind as well. I am just going to -- forgive me while I remind myself of how we put it in our skeleton. **(Pause).**

Yes. There was paragraph 31. They asked themselves:

"If legislature had intended that the cost or funder's fee could not be paid out of damages, there is no reason why it would not have stated this. Moreover..."

Then they rely on section 47C(3)(b) which for reasons we have already touched on, we don't think is the strongest basis for them to rely upon. But in that first sentence at paragraph 31, they make the point there is nothing excluding the interpretation -- the breadth of the power that they saw. The same reasoning would apply to what we are seeking here. There is nothing expressly excluding that. There is nothing expressly excluding the position in our case, namely the payment could be made before distribution and while the case continues.

My learned junior also reminds me, paragraph 35, they make a similar point in the middle of that paragraph:

"There is no express provision under the Act, or the Tribunal rules, which prevents this."

So to give you the references now that I have actually collated them sensibly, paragraph 23 makes the point by reference to rule 78. Paragraphs 31 and 35 make the point by reference to the provisions we are looking at now.

This argument in favour of the breadth of the power being sufficient would also rely on

construing phrases such as the award of damages, which you see in rule 93(1) broadly enough to include an award of damages by the Tribunal after settlement. So it depends really on exactly what breadth you give to the word "award" and "damages". We would submit it can fairly be argued that an interpretation which sees award of damages as sufficiently broad to encompass an award after a settlement, an approval if you like under the collective settlement approval regime, does not offend the natural meaning of the word "award" or "damages".

That is the argument in favour of use of that power. Taking the warts and all approach though, we think about the counter argument, whether one can construe section 47C(6) and rule 93(4) in such broad terms we think the counter argument would likely run as follows.

Firstly, we keep in mind the point already noted from Bennion about looking at the structure of the statute and the rules and we take the additional point from Bennion, section 21.4, that the general gives way to the specific. It is in the bundle at tab 25, page 672 of Bennion, page 898 of the bundle. They make the point that:

"Acts often contain general provisions which when read literally cover a situation for which specific provision is made elsewhere in the Act. The principle mentioned above gives a rule of thumb for dealing with such a situation. It is presumed the general words are intended to give way to the particular. This is because the more detailed a provision is, the more likely it is to have been tailored to fit the precise circumstances of a case falling within it."

Against that backdrop, we think it is relevant to consider where rule 93 sits relative to the parts of the rules specifically dealing with collective settlements. Rule 93 sits in the last part, the section of part 5 headed "collective proceedings". Rule 75 to 93. But there is then a separate section which follows immediately afterwards, dealing specifically with collective settlements. Rules 94 to 97.

So we say that if you apply that rule in Bennion, the specific provisions in relation to collective settlements, rules 94 to 97, suggest that rule 93 was intending to deal with a situation other than collective settlements. So that would lend itself more to, I think, the interpretation of award of damages that you, sir, instinctively reached for. Namely, that the rule 93 provision is related to an award following trial. Again, this is very much with our warts and all approach to this in mind.

We say that that division within the rules between the rules dealing with collective proceedings generally up to rule 93 and collective settlements specifically, rules 94 to 97, is also reflected in the way that the statute is set up. So section 47B and 47C deal with collective proceedings generally but it is sections 49A and 49B that deal with collective settlement specifically.

It is also consistent with the way that the rule making powers are set up and those rule making powers are in the Enterprise Act in schedule 4, part 2 of schedule 4. Paragraph 15B of schedule 4, and I will give you the reference, we don't need to turn it up but it is in the authorities bundle, tab 1B, pages 7.11 to 7.12. That paragraph 15B is the rule making power in respect of collective proceedings under section 47B and that is dealt with separately from the rule making power in respect of proceedings in respect of collective settlements under sections 49A and 49B. That rule making power is in schedule 4 at paragraph 15C. The reference for that is authorities bundle, tab 1B, page 7.12.

So taking an even-handed approach to all of this, and I appreciate this is all very laborious but we want to make sure we flush everything out, we see this bifurcated structure within the rules, within the statutes and within the rule making power in the other statute, strongly suggests that rule 93 was intended to deal with something other than collective settlements and the obvious alternative being awards at trial.

That view is also supported by the different language used in schedule 4 -- it is

schedule 4 of the Enterprise Act 2002 -- to describe the sums in question. They contrast paragraph 15B, concerned with section 47B collective proceedings, requires provision in the rule for an award of damages and that is paragraph 15B(2)(h). Contrast that with rule 15C concerned, as we said, with collective settlements which requires provision for a compensation award. That is at paragraph 15C(2)(h).

So you see, there is a bifurcation structure, there is a different use of language and all of those, taking an even-handed view of matters, we think makes it difficult to endorse rule 93(4) as providing a clear and unequivocal basis for the exercise of the power sought by this application. It is not to say it is irrelevant, for reasons I will come on to look at in a moment. It is important to keep that in mind. But as to whether it provides you the power that we want you to use today, we think on balance, whilst there are arguments going the other way, probably not.

THE CHAIRMAN: Yes. Look, from my point of view, I don't think rule 93 applies to collective settlements. The reasons you have given are pretty clear. I don't need to reinvent the wheel. The structure of the Act is pretty clear. We have a separate regime for collective settlements which starts at rule 94.

So let's concentrate --

MR GIBSON: Indeed. That is what I am going to go to now and look at rules 94 to 97, in particular rule 94 and 97.

THE CHAIRMAN: Yes.

MR GIBSON: These obviously are provisions, as we have said, that clearly do relate to collective settlements. In particular, as I have said, rules 94 and 97 provide various rules that are of relevance for us to look at here.

We are going to start, if we turn up -- going back to tab 2 -- rule 94 is at page 23 and goes through the -- it is a nice long rule, it goes all the way through to 25.

THE CHAIRMAN: It is a long rule. Yes. It is a very long rule.

MR GIBSON: It is. To be fair, it is doing a lot of work. It is setting up the entire structure for the hearing that we had in December and obviously goes through in some detail all the boxes that must be ticked.

THE CHAIRMAN: I will be going through it in some detail again this afternoon.

MR GIBSON: I am sure you will, sir. I am sure you will.

Well, we don't need to go to the whole of the detail, fortunately, for now. There are three provisions that I wanted to highlight for present purposes.

On page 23, rule 94(4)(b). That is dealing with the elements that the application for a collective settlement approval order should include. At (b), they shall include the terms of the proposed collective settlement, including any related provisions as to the payments of costs, fees and disbursements. So that is one point. Put a bookmark in that. Then over the page on page 24, at subparagraph 8, this is the power that you exercised in December as requested by my client and CSAV at the hearing of the application:

"The Tribunal may make a collective settlement approval order where it is satisfied that the terms of the collective settlement are just and reasonable."

Then immediately after that, subparagraph 9 and in particular subparagraph 9A:

"In determining whether the terms are just and reasonable, the Tribunal should take account of all the relevant circumstances, including the amount and terms of the settlement, including any related provisions as to the payment of costs, fees and disbursements."

THE CHAIRMAN: The odd thing is that whilst you have that provision in 9A, the amount and terms of the settlement and the related provisions as to the payment of costs, fees and disbursements, you are not normally being asked to deal with what actual sum should be paid out at the stage of the approval.

MR GIBSON: Yes. I think it depends on how they structure things.

THE CHAIRMAN: It may be a fact when you look at the whole structure. But then you are still reserving the position as a Tribunal to say: we will be looking at this at a later stage and whatever we say at this stage is not going to be binding on us as to whether or not we accept certain fees and whatever should be paid at all. In particular, in what sum.

MR GIBSON: Yes, indeed.

THE CHAIRMAN: That is why we have the separate process.

MR GIBSON: Absolutely. You are right, there is the question of the latitude that you have and how you want to exercise that latitude. The question we are presently concerned with, obviously, is the extent to which these provisions are imbued with sufficient power for you to do what we ask you today. Whether or not you actually choose to do that.

Just for completeness, and again for your note, if you flick forward to rule 97, pages 27 to 28, you will see there are provisions in materially the same form as the provisions I have just taken you to in rule 94. The distinction, as you will appreciate, between 94 and 97 is that 94 is dealing with a situation where an opt out CPO has been made and 95 deals with an opt in and then 96 and 97 deal with situations where a CPO has not been made. 96 requires that you have a collective settlement order made first and then 97 is the situation making a collective settlement approval order, having done that.

THE CHAIRMAN: Yes. So we are not in that box.

MR GIBSON: We are not in that box. But just to make sure that everything reads clearly together, I just wanted to flag to you that 97(2)(b) is the analogue for 94(4)(b).

THE CHAIRMAN: Yes. Yes.

MR GIBSON: And 97(6) is the analogue for 94(8) and 97(7)(a) is an analogue for 94(9)(a). The only difference being, for reasons that I can't immediately work out, not

that I suggest they matter greatly for present circumstances, 97(7)(a) is expressed in permissive terms: the Tribunal may take account. Whereas 94(9)(a) is expressed in mandatory terms: the Tribunal shall take into account. As I said, I don't think anything turns on that for today's purposes.

THE CHAIRMAN: No.

MR GIBSON: But I just wanted you to be aware of these subtle distinctions.

THE CHAIRMAN: I had not picked that one up, actually. But yes.

MR GIBSON: Might I add value, sir.

THE CHAIRMAN: Yes. You add value. Yes.

MR GIBSON: So, those are the rules. I touched briefly on the statutory context for those rules, just so we see where they sit. They are derived from the broader provisions of section 49A and that is at tab 1A, page 7.4. Those broader provisions set out the parameters for the process to be adopted in collective settlements after a CPO. But they did not descend into the detail provided in rule 94. So 49A(3) simply states that the representative and the defendant must provide agreed details of the claims to be settled by the proposed collective settlement and the proposed terms of that settlement. You do not have the detail you find under the rules that we just touched on. Subsection 5 of section 49A, at page 7.4, provides the Tribunal can order: "Approving a collective proposed settlement only if satisfied that its terms are just and reasonable."

But there is then no particularisation of the terms, of how to assess those terms in the way that they are under the rules. 49B makes analogous provision in relation to the situations dealt with by rule 97, but I won't trouble the Tribunal with that now.

The specific rule making power for those rules is to be found in schedule 4 of the 2002 Act. Again, just for your note, you may want to look at paragraph 9.2 that appears at tab 1B, page 7.8 of the bundle, which provides that:

"In this schedule [namely the schedule dealing with rule making power and generally procedure in the Tribunal] where a paragraph is capable of applying to proceedings relating to the approval of a collective settlement under section 49A or 49B of the 1998 Act any reference in that paragraph to proceedings includes a reference to those proceedings."

So it is intended to cover collective settlement proceedings. Then we have touched on 15C(1), the Tribunal rules may make provision in relation to collective settlements under section 49A and 49B and pursuant to paragraph 15C(2), those rules must in particular make provision as to the following matters, including (e) the fares which the Tribunal must take into account in deciding whether to approve a proposed collective settlement.

So that is why the rules provide more detail than the operative provisions in section 49A, because that rule making power requires it.

So you have a situation where unlike in the situation we looked at previously in relation to section 47C, the statutory rules are almost exactly reflected in the Tribunal rules. In this situation, you have a much broader rubric under the primary statute which is then given much fuller detail under the rules themselves.

The question is whether this scheme that I have outlined incorporates power for the Tribunal to permit defrayment of stakeholder entitlements from damages paid pursuant to the collective settlement. In particular, whether there is power to do so before distribution and while the case continues against the non-settling defendants.

In favour of there being such a power, I would make four points. The first is to note that the term "costs, fees and disbursements" is to be interpreted consistently throughout the rules and, therefore, rules 94 and 97 in respect of collective settlement envisage payments to stakeholders as part of the settlement process. I will just flesh that out a little bit.

So the starting point is to go back to Bennion. Again, if the Tribunal wants to turn it up, it is at tab 25 of the authorities bundle. Section 21.3 of Bennion at page 892 of the bundle, 666 in the original text, says:

"There is a presumption that where the same words are used more than once in an Act, they have the same meaning."

We have already discussed and we took the Tribunal to the judgment in Merricks v Mastercard which established that the phrase "costs, fees and disbursements" for the purposes of rule 93(4) was apt to include payments to stakeholders and given that the same phrase, costs fees and disbursements, is used in rule 94, we submit there is a strong argument -- I would go so far as to say a very strong argument -- that the use of the phrase in rules 94(4)(b) and 94(4)(a) and the analogous provisions in 97 are intended to carry the same meaning.

So when there is a requirement to set out any related provisions as to the payment of costs, fees and disbursements in 94(4)(b), that is a reference to setting out any provisions in relation to payments of the type that we are now before the Tribunal seeking payment of, including stakeholder entitlements.

That, therefore, implies that the regime envisages that payments to stakeholders can and should form part of the settlement process. That's not a complete answer to the question we are addressing now, but it shows that the regime that is specifically focused on collective settlements envisages and encompasses payments of the type we are now asking you to consider. That does not address the timing point but it does give you comfort that notwithstanding any specific reference to the power to distribute out in the same way as 93(4), it is part of the understanding of the scheme.

The second point to note -- sir, are you happy with that point?

THE CHAIRMAN: Yes.

MR GIBSON: The second point to note is that the statutory scheme for collective

settlements is also consistent with payments to stakeholders being made while proceedings continue against non-settling defendants. The starting point here, under this second point, is to not the statutory scheme rightly anticipates that not all defendants will settle at the same time or, indeed, at all. So starting with the rules, because they are in front of us, if you look at rule 94(3)(b) in defining who is responsible for making the application for a collective settlement approval order, it should be made by the class representative, A, or, B, the defendant in the collective proceedings. Or if there is more than one defendant, such of them as wish to be bound by the proposed collective settlement.

You see that wording almost precisely replicated in the primary statute, section 49A(4). I won't turn it up but it is at tab 1A, page 7.4, for your note.

So the statutory scheme for collective settlement therefore applies in situations where only some defendant settlement, i.e. a partial settlement situation, and the proceedings continue against others. Therefore, the first point I just made, i.e. the fact that the scheme envisages payments to stakeholders as part of the settlement process, applies equally to partial settlements where the litigation continues. Again, it is not a complete answer to our point, but it is another contextual factor in support of the scheme envisaging the type of application that we are currently seeking now.

The third observation I would make is there is nothing in the language of rule 94 or, indeed, rule 97 which precludes the possibility of making a payment from damages before distribution and at the point where the partial settlement occurs, even if the proceedings continue. Now, on this point, we touched a moment ago on the reasoning in Gutmann v Apple where they made the point that payments prior to distribution were -- sorry, they decided payments were possible prior to distribution. In that case, they did so in circumstances where the only express reference in rule 93(4) was the distributions from undistributed damages. They made the fair point that it does not

say only undistributed damages, there is nothing expressly excluding the possibility of doing something wider. We would say you could reasonably argue that if that conclusion followed in relation to 93(4), where there is an express reference to undisputed damages, it should follow with even greater force here and more naturally because there is nothing here that gives any indication that there would be any limitation on it. There is no inclusion of the word "undistributed damages" anywhere in rule 94 at all that could be said to imply any limitation on when defrayment could occur. That is the third point he wanted to make.

The fourth point is that against the backdrop of what we would say a fairly loose canvas for you to work with, we say there are clear policy reasons for concluding that payment to stakeholders at this stage would be consistent with the statutory purpose of the scheme. These are points which are deployed in my skeleton in reference to the timing of payment, in relation to the exercise of discretion. But they are also obviously relevant here in thinking about what the legislative draftsperson was actually intending, whether they were intending to limit your power in this way.

So I think these are points I would like to deploy now and we will come back and think about them again when we talk about discretion.

THE CHAIRMAN: So what paragraph are we in the skeleton?

MR GIBSON: In the context of the skeleton, we were looking at paragraphs 37 onwards.

THE CHAIRMAN: Yes.

MR GIBSON: But I think, in fact, for present purposes I am really focusing on the third point I make there at paragraph 39.

THE CHAIRMAN: 39. Yes.

MR GIBSON: So this is a point. Mr Friel puts the point, I think, very, very clearly and forcefully. One needs to bear in mind -- starting point, obviously, is to remind ourselves

that in order for consumer actions to be viable at all, you need to have third-party funders and they will legitimately seek a return upon their investment. Now, that is the Gutmann judgment we touched on in opening, paragraph 83.

THE CHAIRMAN: Yes.

MR GIBSON: We also have the judgment in Gutmann v Apple, paragraph 35, tab 21, page 805. They said this, which again I would endorse:

"Self-evidently, a funder must be paying for the risk it takes."

I think that is very much the point you made this morning, sir:

"If a reasonable return is dependent upon the happenstance of whether there are sufficient unclaimed damages, that has the potential to increase the risk for funders and consequently the cost of litigation funding."

That was talking about one particular variable that can increase risk and, therefore, increase cost. We are looking here at another one.

THE CHAIRMAN: When you look at it, if for example there is an award at the end of this case against the other 11 defendants and the claims come in and there is a very substantial unclaimed balance, then it may be easier for the funder to persuade the Tribunal to take, let's say, a more generous view as to the position -- or sympathetic view -- as to the position of the funder when they were making an application saying we want some money out of this.

If, on the other hand, you look at it and the ultimate result is that there is a relatively small award of damages and that there is the claims coming in and those claims eat up a substantial amount, if not all the amount, of damages that have been awarded for one reason or another, then you may take a different view. But the Tribunal is in a better position to determine that at the end of the day when you know what is claimed and what is not claimed and how much is left and how much fat there is and all that sort of stuff, than when you were at an earlier stage. I can see why you say we have

power that obviously we are going to have to look at views both ways on that. But it does not mean that at this stage it is the best time to determine that. We will be coming to that later.

MR GIBSON: I hesitate to vex you by making the point I made earlier. Obviously, there are two stages, when you think about this. I think the points you are adumbrating now are ones that I would like to deal with when we come to think about discretion.

THE CHAIRMAN: Yes.

MR GIBSON: Because I think the question about whether as a matter of policy you should have the latitude to do this, I think the point in relation to the importance of having flexibility to make sure that investments are not discouraged by a decision, I think, goes very much in favour of making sure that you do have the possibility of doing this.

THE CHAIRMAN: Yes.

MR GIBSON: As to whether you want to actually exercise it on any given occasion, I would submit those same policy reasons very forcefully suggest you should, but I will address that separately, so as we don't, if you like, confuse the two issues. At the moment I am very much seeking to persuade you that reading the rules and particularly in light of the statutory purpose, they should have that breadth. Then we will come on to think about whether I can persuade you that you should be exercising them with that breadth.

So the point I was making, this was a point in favour of the rules under 94 that we have touched on read together and consistent with the statutory purpose being sufficiently broad to give you the power you want.

The fourth point I want to make is that in order to avoid discouraging investment, it is important that the rules allow the latitude to allow payment in the circumstances we touch on here. The point that Mr Friel makes is -- and it is one that I will come on to

talk in more detail -- there is a real risk of delay in payment being a strong reason for not wanting to make an investment in the first place.

The need to actually ensure you have a timely return on investment is critical to any form of investment and, you know, think about -- it is important to think about it in those terms. It is a form of investment and an investor will be considering the attractiveness of this form of investment as against other forms of investment and, in the circumstances, they will all be looking at not just how much they get back, but how soon they get it back. Because the annualised return is the relevant metric for these purposes. But I will flesh that out in more detail.

THE CHAIRMAN: There is a very interesting chicken and egg point there, because if the funder thought that you can get your outlay as you go along and get paid out at an earlier stage, then he may factor that into the pricing and how he does that. If, on the other hand, he takes the view actually this is going to be determined at the very end, he knows he is looking for a longer time period and he will factor that in as to how he is going to structure and price whatever the arrangements are.

MR GIBSON: Yes. I think you are right. That will be a factor.

THE CHAIRMAN: That is probably why the funders may want some clarity on this issue, to know are we in that ballpark at all.

MR GIBSON: Yes. When I come on to talk to you about the policy reasons why you should exercise it now, I will be making the point that if you took the decision to leave it until the end, that would have the effect of increasing risk making the return less attractive and inevitably, as in the nature of all forms of investment, the costs of people wanting to get funding would go up.

THE CHAIRMAN: But if you are a funder, you want some clarity as to what the rules of the game are when you are making your pricing and structure decisions. If there is this possibility, they would probably want to know if there is then this possibility or not

when they factor things in. There is no such possibility, they are going to factor in saying, well, we recognise on all these cases that this isn't going to be determined until the end of the proceedings and obviously that takes some time.

MR GIBSON: Yes. I mean, I think clarity either way is going to be desirable.

THE CHAIRMAN: That's what I am saying. It is a matter of policy, whether you are right, whether you are wrong. From the funder's point of view they may just want to know what the answer is, as a matter of principle.

MR GIBSON: I think they would like to know what the answer is. But I think they would also like the answer to be one that makes most sense from a business point of view. Not because purely for them, but also for the system as a whole, because if we make it a riskier investment, the costs go up and then it affects the calibration of the balance between the return to stakeholders and against a return to class members. But I will come on to look at that in more detail, if I may.

The point I wanted to make for the present purposes is that there are strong policy reasons against the backdrop of the first three points that I made about you having a fair -- on this positive view of the world -- there being a fairly blank canvas for you to work with. You should be sketching towards the outer edges of it, because policy reasons militate in that direction.

So you should be looking for a system which gives the maximum latitude in terms of striking the right balance between incentivising investment and calibrating the risks of that investment so that funding costs are managed appropriately. But I will come on to look at the delay point in more detail. But it does come up here as well.

The arguments against the power, the arguments against rule 94 providing you with the power that we are looking for today, taking a fair and even-handed approach I think one must concede that the points I have made whilst we consider them to be powerful points do not provide a decisive answer to that question. There are two points that I

would like to make going the other way. I say I would like to make, I feel it is appropriate for me to make.

The first point is that the only express power under rule 94 -- and similarly under rule 97 -- is to make a collective settlement approval order. That collective settlement approval order is that the terms of the collective settlement are just and reasonable. So by contrast with rule 93(4) where there is a specific power to direct that all or part of the damages sum is paid under the settlement to the class representative in respect of all or part of any costs, fees and disbursements occurred in connection with the collective proceedings, there is no explicit rule to that effect under rule 94.

Secondly, and relatedly, in order to fall within the scope of the express role under 94(8), it could be said that you would need to show the requests we are making here for the payment, costs, fees and disbursements, constitutes a term of the settlement. Because that is what you have the power to approve: terms of settlement.

THE CHAIRMAN: But then if there is no power that is derived from section 94, or rule 94, the question is where is the power?

MR GIBSON: Well, two answers to that. One, rule 53. Two, we are not saying that it does not exist here. I am giving you the balanced view of things. I think the points I have made about why rule 94 should be the source of the power are all good ones. The points I am making against it would perhaps be good if you weren't persuaded by rule 53. But if we leave rule 53 out of the equation so that rule 94 was the sole possibility, then I would submit that actually you should be very reluctant to endorse a system which has basically written out this possibility. The necessary implication rules about reading in necessary rules would tend to support the view that rule 94 should encompass this power.

So I am, sort of, at risk of perhaps being too warts and all in the way that I am looking at things.

THE CHAIRMAN: No.

MR GIBSON: In looking at the express power under rule 94(8), you are looking to endorse things that constitute terms of the proposed collective settlement. Now, rule 94(4)(b) gives a little bit more latitude because it talks about terms including any related provisions. It can fairly be said that you could made the argument that what we are dealing with here is a related provision. The argument against would be that the word "includes" or "including" suggests a related provision has to be one of the terms but that would be quite a strict interpretation of that.

It might also be pointed out that a settling defendant would be unwilling to include as a term of the settlement a requirement that stakeholders be paid out of damages agreed by way of settlement, because to do so would arguably risk the approval of the settlement which is in the settling defendant's interest in order to benefit the representative in adhering to the representative's obligations to stakeholders, i.e. to make this application and to get the return, which is none of the settling defendant's concern.

I am not saying it is against their interest: on the contrary. I mean, it is certainly in the defendant's interest to have settlements that work and if the price for a settlement working is that the return should be part of that, it is not inconsistent. But it is none of their concern, so it is a question of whether in expecting this sort of thing to be a term of the settlement is necessarily one that naturally sits within the regime.

So those are the points that might be said against it. I think looking at the matter globally, which I think is a useful term that the Tribunal suggested we should be using when we are looking at these things in an even-handed way, I think it is fair to say the position is not clear cut. The points I have made in favour of interpreting rule 94, I think, actually are forceful ones. The objections just noted about whether this application is properly one in respect of the terms of the settlement could be met by

taking a more generous view of the words "any related provisions" under rule 94(4)(b) in that this application clearly is related to the settlement for two reasons at least.

Firstly, absent a settlement which constitutes the success that triggers the Class Representative's obligation to make this application -- and I will take you very briefly to the revised litigation funding agreement so you can see that -- if there weren't such a settlement, there would be no need for this application so, in that sense, it is very strongly related.

The second point, before I go to the litigation funding agreement, is that the settlement agreement itself does quite properly make express and candid reference to the Class Representative's obligations to make this application and they were triggered by the settlement. Indeed, it expressly refers to rule 94(9)(a) within the settlement agreement.

So those are two points about related - and I would just like to take you to the relevant agreements to make good on each of them. The litigation funding agreement is in the application bundle for this application, behind the witness statement of Mark McLaren at tab 4. If you turn to page 46 of the core bundle for this hearing. This is the provision in relation to stakeholder entitlements and at 10.1 it starts:

"If [10.1.1] the class representative makes an application for collective settlement approval order..."

As we did last year in October and was heard in December. Then it continues, after the other subparagraph:

"The Class Representative will, unless otherwise agreed by all stakeholders, simultaneously apply for an order that its costs, fees and disbursements incurred in connection with the action... will be paid from any proceeds prior to the distribution of any proceeds to the class members."

So you see there, that is the reason why the --

THE CHAIRMAN: You say you are contractually obliged to make this application.

MR GIBSON: I do. But the point I am really making is we are looking at the word "related" under the rule and asking ourselves whether, reading that provision under rule 94(4)(b) reading the power under 94(8) in light of that provision suggests that the power to approve terms includes terms related to the settlement and, therefore, includes an application like this which is clearly related because if you did not have a settlement, you would not trigger this obligation and, therefore, it would not arise. To that extent, we say it very clearly is related.

The other agreement that shows the degree of relationship is the settlement agreement itself and for this, I am going to turn -- if I can find where I put my bundles -- the settlement hearing bundle. I hope the suggestion that you should have available the settlement hearing bundles percolated through to the Tribunal, otherwise this bit is going to be a bit tricky.

THE CHAIRMAN: Yes.

MR GIBSON: I will give you a moment to finish that note. **(Pause)**

THE CHAIRMAN: Yes.

MR GIBSON: So if you turn up the collective settlement hearing bundle, volume 1. You may recall behind tab 2, behind the witness statement of Mark McLaren in the same tab, there is the settlement agreement itself. At page --

THE CHAIRMAN: You want to get it from the other bundle?

MR GIBSON: Yes, so the collective settlement hearing bundle, volume 1. It came in two volumes. Did you say you do have that, sir?

THE CHAIRMAN: Yes, I have them. I am just going to get my marked-up version. Okay. Yes.

MR GIBSON: So if you turn up page 47 of that bundle.

THE CHAIRMAN: Yes.

MR GIBSON: It is a short point. Sorry to inconvenience the Tribunal by having referred back to a previous bundle.

THE CHAIRMAN: Yes.

MR GIBSON: So clause 6.1, it reads:

"For the purposes of satisfying rule 94(9)(a) of the Tribunal rules, insofar as it concerns provisions of the settlement which relate to costs, fees and disbursements, McLaren shall file a separate application relating to costs, fees and disbursements, the cost application, which shall include any proposal in relation to stakeholder proceeds as defined at clause 1.42 of the litigation funding agreement."

And so on. So that, we say, is a second linkage point showing the relationship between the settlement and this present application.

THE CHAIRMAN: Yes. But recognising that when I made the order in December, I expressly reserved the situation that I am not determining any entitlement to distribution --

MR GIBSON: Absolutely, sir.

THE CHAIRMAN: -- in respect of costs and expenses.

MR GIBSON: I think you made that pellucidly clear. We submit that the power to make an order under 94(8) to approve a collective settlement order, we would say necessarily allows you great latitude in relation to that respect. So it is perfectly possible for you to order approval of the settlement, subject to the related costs application being dealt with separately. Indeed, you will note that we very deliberately made the two applications separately. We suggested they could have been heard at the same time, but they were separate applications because we wanted the Tribunal to have that flexibility in how you dealt with it.

THE CHAIRMAN: Yes. Also, when you are dealing with these types of matters, there may be things which is not necessarily appropriate for the other side to be privy to.

Also, certain things may have to be in private when you deal with that.

MR GIBSON: Quite so.

THE CHAIRMAN: It makes a lot of sense to keep the two things separate, at least for those two purposes.

MR GIBSON: Yes. We hoped that that was the correct approach, and we hope it would be convenient to deal with it in that way. But that, if you like, is a slightly separate point from the question specifically before us now, which is whether the power you have under rule 94.8 is sufficiently broad to encompass what we invite you to do here. Taking, as I said, an even-handed view, we think that there are arguments going both ways. We would say that this does give you sufficient power, albeit that we say that rule 53 will give you the power as well. But we recognise that it is not as clear cut as it might be. There are arguments that go the other way.

I am conscious of the time.

THE CHAIRMAN: Do you want to go another topic? That's fine.

MR GIBSON: Well, I am about to move on to the last topic under legal basis to rule 53.

THE CHAIRMAN: How long is that going to take? If it is going to take more than five minutes --

MR GIBSON: It is going to take more than five minutes.

THE CHAIRMAN: So what we will do is we will adjourn to not before 3.15. Because I don't know how long the judgment is going to take. If the judgment takes an hour, then the transcribers will need to have a break then anyway. So 3.15, we will just carry on doing this until we finish. I think we have enough -- you are not going to be more than two and a half hours, are you, from there?

MR GIBSON: I wouldn't have thought so, sir. No.

THE CHAIRMAN: No. That's fine. As long as you finish roughly by 5.30, it is fine.

MR GIBSON: Yes. I do want to leave, in case Mr Marven wants to add anything to what I have said, I want to leave him an opportunity to do that.

THE CHAIRMAN: Yes. But he won't be very long, will he?

MR MARVEN: Yes. I do want to say something, sir. But I shall try and be as economical as I can.

THE CHAIRMAN: Yes. Of course you can. When we get to, let's say, 4.30 we will take a view as to how much time we have left and then we will split it between you and your learned friend. Yes. Okay.

MR GIBSON: Yes. The only other thing, I apprehend we probably will be on hand eating our lunch here. So if judgment were much quicker and you wanted us to come back earlier, we --

THE CHAIRMAN: Oh, yes. If you are on hand, then we can start earlier. It is just that there will have to be at least a short gap between the two hearings.

MR GIBSON: Absolutely. Absolutely. I am just offering the flexibility.

THE CHAIRMAN: That is very kind of you.

MR GIBSON: We can come through mid-sandwich.

THE CHAIRMAN: Mr Gibson, for what it is worth, the way you are presenting is very helpful for me.

MR GIBSON: I am glad it has not been too vexing, going through blow by blow. We will get there.

THE CHAIRMAN: No. For people like me, it is interesting. Don't worry. Okay. We will rise.

(1.00 pm)

(The short adjournment)

(3.33 pm)

THE CHAIRMAN: Mr Gibson.

MR GIBSON: Sir, fresh from your delivering judgment, here we are again.

THE CHAIRMAN: I would not describe it as fresh, but if you are just saying "have I just given judgment" the answer is yes.

MR GIBSON: Two for two.

THE CHAIRMAN: Okay.

MR GIBSON: So I was discussing the illegal basis and moving on to the last element of that, rule 53. I am going to try and take this --

THE CHAIRMAN: Let's get rule 53 up again.

MR GIBSON: Yes.

THE CHAIRMAN: So that is in --

MR GIBSON: Authorities bundle tab 2, page 14.

THE CHAIRMAN: Let's just get my mind back. Let's just have a quick look at rule 53 and start up again. **(Pause)**

MR GIBSON: Page 9 to 10.

THE CHAIRMAN: Right. Rule 53, yes.

MR GIBSON: Yes. So rule 53 sits, as you will know, within the case management section of part 4.

THE CHAIRMAN: Yes.

MR GIBSON: Claims in relation to section 47A of the 1998 Act. It applies to part 5 by virtue of rule 74 and I don't think there is any controversy or need to turn that up. Rule 74 is the dealing power that reads in most of part 4 into part 5, including this rule. Rule 53 itself, rule 53(1), is expressed in very broad terms indeed, as you can read there:

"The Tribunal may at any time, on the request of a party or of its own initiative... give such directions as are provided for in paragraph 2."

Which we are going to come on to.

THE CHAIRMAN: Yes.

MR GIBSON: Or such other directions as it thinks fit to secure that the proceedings are dealt with justly and at proportionate cost.

In relation to 53(2), the relevant one for our purposes is at (n), about halfway down the page. It is more specific but still broad:

"The Tribunal may give directions, (n), for the award of costs or expenses including any allowances payable to persons in connection with their attendance before the Tribunal."

Obviously that rider is not relevant, but the phrasing "costs or expenses" is. It is a power to state the obvious specifically related to the award of costs or expenses so we don't have to go through the circumlocutions that we were discussing in relation to the power of rule 94(8), which is in relation to the endorsement of terms, and asking ourselves whether we can read costs or expenses into that. This is explicitly in relation to costs and expenses, and it is a power exercisable at any time, which goes to the question as to whether we have the power to deal with things now, before distribution and while the case continues. In principle, it is broad enough for that.

The question is whether the phrase "award of costs or expenses" is sufficiently broad to constitute the payment of stakeholder entitlements. Now, crucially, unlike rules 104(2) and 98(1), 53(2)(n) does not refer only to costs which obviously are defined by rule 104(1). Rather it covers costs or expenses.

Just for the Tribunal's note, this reflects the language used in the relevant rule making power which we have referred to intermittently, this schedule 4 of the 2002 Act at paragraph 17.1(h):

"The Tribunal rules may make provision (h) for the award of costs or expenses."

Then the same rider as you see under rule 53(2)(n).

So the query then for these purposes is how to interpret the phrase "or expenses".

Does this encompass the award of stakeholder entitlements, as we are inviting this Tribunal to make today. The arguments against the power being that broad would likely be as follows. We would refer, again, to Bennion, 21.3, that was the rule about the same words bearing the same meaning. The flip side of that rule is that different words when they are used in an Act are presumed to have different meanings, so the argument would go that because the term in rule 53(2)(n) uses the word "expenses" and that is different from the term used in rule 93(4), which is "fees and disbursements" and because the Tribunal in Merricks has established the term in rule 93(4), referring to costs, fees and disbursements, encompasses payments to stakeholders, then it follows that the term "expenses" in rule 53(2)(n) must mean something different and thus it does not encompass payments to stakeholders. That is the way the argument would go, looking at it with my slightly schizophrenic warts and all hat on.

However, I would respectfully submit that that argument is misconceived for at least five reasons. The first is that an expense can mean something different from a fee, but it does not necessarily therefore follow that the power to award an expense does not encompass the payment of a stakeholder entitlement. There is nothing necessarily inconsistent about the concept of an expense and a fee and, on the contrary, I would say there is a strong argument for looking at the two ways of describing the same payment in some circumstances, just viewed from different perspectives: from the perspectives of the payor and the payee, respectively.

So one person's expense is another person's fee. The payor's expense is the payee's fee and that would be a perfectly respectable way of looking at things, even if you were just looking at the language. However, if there is any doubt about that, my other reasons don't rely purely on that, we can go further.

The second point, I think, is a stronger one. While the Tribunal rules might use different phrases -- costs or expenses versus costs, fees and disbursements -- the

competition statutes from which those rules derive do not differ. So we are looking here at rule 93(4) which provides a power -- we are comparing, we are comparing the wording of rule 93(4) which provides the power to order payment for stakeholder entitlements from undistributed damages. That is definitely what that means, because the Tribunal in Merricks has confirmed that.

THE CHAIRMAN: Yes.

MR GIBSON: That power uses the phrase "costs, fees and disbursements". However, the primary statutory source for that power, you will recall, is section 47C(6) and the phrase used in that section is not costs fees or disbursements, it is costs or expenses.

So the statutory power that gives the source for the rule that appears to be using a different phrase uses precisely the same phrase as the phrase we see here in 53(2)(n). So we are looking at 53(2)(n), wide and general power to order costs or expenses and, as I say, that uses the same phrase as the underlying primary source for rule 93(4). Further, the statutory source of the rule making power for which 53(2)(n) is derived, which I just touched upon a moment ago, that is paragraph 17.1(h) of schedule 4 of the 2002 Act, also uses the phrase "costs or expenses". So, if you like, you have the trifecta, costs or expenses comes up in both the primary statutory sources for those two rules and the rule we are relying on. The only, sort of, fly in the ointment is the costs, fees or disbursements --

THE CHAIRMAN: Can we just look at schedule 4, so I can --

MR GIBSON: Absolutely. So it is behind tab 1B of the authorities bundle.

THE CHAIRMAN: Yes.

MR GIBSON: The Enterprise Act. You have the B numbers; turn to B7.13.

THE CHAIRMAN: Yes.

MR GIBSON: 7.13, you will see from the top of the page, is part of schedule 4 to the

2002 Act.

THE CHAIRMAN: Yes.

MR GIBSON: It starts a few pages earlier. It is part 2, it starts on page 7.8. It is the provisions in relation to Tribunal rules.

THE CHAIRMAN: Yes.

MR GIBSON: This part of the schedule is given effect by section 15.5 of the Act.

THE CHAIRMAN: Yes.

MR GIBSON: You don't need to turn it up. So when you turn through to 7.13, it is provider for the rule making power in relation to the conduct of the hearing. 17.1: "The Tribunal rules may make provision... [down to almost the bottom of the page, (h)] for the award of costs or expenses."

THE CHAIRMAN: What page are we now?

MR GIBSON: I am sorry: 7.13. B7.13.

THE CHAIRMAN: Yes. We are looking at paragraph 17, aren't we?

MR GIBSON: We are, indeed. 17.1, if you look down towards the bottom, it is 17.1(h). Do you have that, sir?

THE CHAIRMAN: Yes, let me just make that --

MR GIBSON: Absolutely. I am sorry, I am going rather fast, sir, because I apprehend that I don't want to run out of time today. Apologies. Do tell me to go more slowly if I'm going too fast.

THE CHAIRMAN: Look, as long as we finish no later than 5.30, you are okay.

MR GIBSON: That is one of the reasons I am speaking as quickly as I am.

THE CHAIRMAN: Yes. Mr Marven will have things to say as well.

MR GIBSON: Well, indeed he will, which is why I want to make sure I give him an opportunity.

THE CHAIRMAN: Mr Marven, you represent the funders, don't you?

MR MARVEN: The funders and the insurers.

THE CHAIRMAN: Let me note that down then: and the insurers.

MR GIBSON: It is my fault. I rather lazily called them the interested parties. I should have made clear it is Woodsford, Lakehouse and Litica. Is that right? Have I got those names correct?

MR MARVEN: The precise detail is at paragraph 1 of my skeleton on page 709 of the bundle, so you have it for reference as to who I represent.

MR GIBSON: I think it is tab 38.

THE CHAIRMAN: Yes. Let me just look at that. **(Pause).**

MR GIBSON: Would you like me to carry on with my point?

THE CHAIRMAN: I just want to satisfy myself, wait a second. **(Pause)**

Just give me a couple of minutes. I have not read this and I do want to read it.

MR GIBSON: My learned friend's skeleton?

THE CHAIRMAN: Yes. I have not read it before. Let me read it now. **(Pause)**

Sorry, Mr Marven. It slipped the system. I did not get this. I am just going to read it now though.

MR MARVEN: I am very grateful.

THE CHAIRMAN: And I will read it again, before I give the ruling. **(Pause)**

Commendably clear. Thank you very much. I have read that now. I have read the underlying evidence, so it is not all unfamiliar. I do want an answer before I give a ruling on that question I raised this morning about whether or not there is a reservation further down the line.

MR MARVEN: Yes. Do you want me to answer that now, or --

THE CHAIRMAN: You can answer it, but I want it in writing anyway.

MR MARVEN: I mean, the answer is that -- I will address why there isn't an impediment -- but, just to be clear, neither the funder, Woodsford, nor the insurers

are waiving any future rights. This is simply the application we are making now. We characterise it as -- the figure that we are seeking now on the basis of the application that the Class Representative is making. But I will be very clear: we are not waiving our right to come back for more.

THE CHAIRMAN: No. No. That may be a factor --

MR MARVEN: But I will deal with that.

THE CHAIRMAN: You will. That may be a factor on whether or not we accede to the application. But you are perfectly entitled to have that reservation, but it may have consequences.

Yes. Carry on. Thank you.

MR GIBSON: So I was just making the second point in favour of rule 53 having the breadth of power that we say it does against my own straw man, if you like, about whether or not the different words in 53 and 93(4) meant that we couldn't do that.

THE CHAIRMAN: Yes.

MR GIBSON: The second point which as I said is stronger than the first is simply that whatever the difference in wording within the rules, the similarity of the wording or exactly the same wording in the underlying statute is a very important factor.

THE CHAIRMAN: Yes. I can see that.

MR GIBSON: The third point I would like to make is just, very briefly, I won't turn it up, but you will remember when we looked at Rowe v Ingenious, we looked at Lord Justice Popplewell's judgment much earlier. In introducing that topic, he started by distinguishing at paragraph 45 of that judgment -- that is tab 10, page 323 of the authorities bundle -- by referring to the distinction drawn in law between, on the one hand, "costs" of conducting litigation and expenses or losses incurred by reason of funding those costs.

So it is entirely in keeping with the way in which Lord Justice Popplewell expressed

things to be talking expenses.

THE CHAIRMAN: He may not have been looking at our particular scenario.

MR GIBSON: He was not.

THE CHAIRMAN: Yes.

MR GIBSON: I make that simply because --

THE CHAIRMAN: I know the passage you mean. Yes.

MR GIBSON: Absolutely. I mean, obviously the second point I have made is far stronger, but I am just making the point that the language used to express expenses to cover this is entirely consonant with the language which was used by the Court of Appeal in that case.

The fourth point, I don't need to reiterate at any length. I am going to come on to look at the policy reasons in a moment, in relation to discretion. But this is another point where given the latitude, this is an area where I would invite the Tribunal to treat the policy reasons as being a further point in favour of taking the interpretation that I have invited you to do.

The fifth, and I am going to touch on this in a little bit more detail, is what the Court of Appeal said in Le Patourel at paragraph 99. It is probably convenient to turn that up in the authorities bundle at tab 13.

THE CHAIRMAN: Yes.

MR GIBSON: I am looking particularly at paragraph 99, which is at page 420.

THE CHAIRMAN: Yes.

MR GIBSON: Now, this is a point we obviously see immediately from the opening line is made obiter, so just to be full and frank about that, this is where we are for the sake of completeness. This is what Lord Justice Green said in relation to a point that had arisen during the hearing. It is an important point because it went to the question, essentially, of what one does in a case like in Le Patourel where one can foresee the

possibility of almost or complete perfect distribution of damages. Why? Because there is an account relationship between the putative defendant and the putative class members. In this case they weren't putative, they were actual class members, the actual defendant. Such that if an award was made, it would be possible to credit the accounts of all the class members without them having to really do anything at all. So you have a situation where the technology in the situation allows for a very strong possibility of perfect compensation.

In those circumstances, the likelihood is that you would have no undistributed damages and then, if you like, it crystalises the question that the Tribunal has to think about, or as a matter of policy one has to think about, in whether or not it would be an acceptable outcome to have a situation where the class members got 100 per cent compensation which left nothing for the stakeholders. What would that do to the system if stakeholders did not receive any return on their investment, as a result of the way that the facts of the case come out?

That is the kind of case which you would think you would naturally want to encourage maximum likelihood of investment, so that it can get off the ground. Because the kind of case that results in close to 100 per cent return to class members is precisely the kind of case that this regime is really wanting to try and support. So you have a, sort of, irony, if you like that the very case that you really want to support is the type of case where there is the least possibility, if the funder or the stakeholders were required to wait at the back of the queue, they could potentially get nothing.

I am going to come back to that point. I just wanted to flag, that is the context for it.

THE CHAIRMAN: But when you have a damages award, given it all depends on case to case, the take-up rates will change. One would hope in most cases there is going to be a significant difference between the take-up by the class members and the amount of damages awarded, such that there would be sufficient in there to pay the

funders a reasonable rate of return, bearing in mind the portfolio point I made earlier.

MR GIBSON: I mean, I think -- sorry, I was not sure whether you were finished your point, sir.

THE CHAIRMAN: I have made the point.

MR GIBSON: I am going to come on to look at it in more detail. But I don't think there is any -- it would be a safe assumption particularly in cases now and in the future where the technology is improving. There will, of course, be some cases where you can't guarantee a high take-up rate, but the account credit situation that you have in Le Patourel, if you like, is not going to be an unusual one. It really depends on whether you are dealing with --

THE CHAIRMAN: The account credit is different because that is a different mechanism where, in effect, you are going to get a pay out to everyone.

MR GIBSON: Yes. There may be other cases. Any case where you are dealing with the direct purchaser claim, that may be a type of direct purchaser who has an account relationship with the defendant.

THE CHAIRMAN: Yes.

MR GIBSON: There may be other cases where you get higher degree of take-up, as the technology improves and, you know, the mass communication allowing people more effectively and more easily on their phone just to click a button to make a claim. The inherent likelihood and --

THE CHAIRMAN: You are right that people may be more inclined if it is all on their mobile phone and very easy just to click and get it. I can see that.

MR GIBSON: So the cases where you get a greater degree of take-up, whether it is because it is an account credit or whether it is because the technology is improving, are the very cases where this regime should be trying to target the funding to get those cases off the ground, to make sure that they are funded, that they happen, that they

result in a pay out to those consumers because the take-up would be greater, the achievement of justice would be most --

THE CHAIRMAN: It is great because more people are being compensated fully.

MR GIBSON: Precisely.

THE CHAIRMAN: Or almost fully.

MR GIBSON: But you won't get those cases off the ground if they turn out to be the least attractive cases, because there is no provision for funders.

THE CHAIRMAN: So what happens is that the ones with the lowest take-up, there is unlikely to be much of a haircut, if any, of their damages when it comes out to pay out. But the ones where there is a big take-up which would, in fact, eat up the whole of the damages, then that is where there is going to have to be a haircut if funders are going to be properly reimbursed.

MR GIBSON: Yes. I think the point that we think is very important here -- and I am conscious of the need to speak fairly and balanced -- but I think it is an important feature of the system that the type of cases where you get a high take-up are the type of cases where you want to get most funding -- you want to encourage funding, because they have achieved the objectives.

THE CHAIRMAN: Yes. More people get compensated. Yes. Exactly.

MR GIBSON: So, if you like, that's a good place to be conducting the thought experiment about what you should do in those situations. I will come on to look at the authorities in more detail, but there is nothing inherently unattractive about grasping the nettle, as it were, and accepting that the price of a system which achieves justice for these often millions of individual consumers is that they don't get full compensation. So the question about timing, which you are understandably preoccupied by and we are going to come on to talk about, is perhaps if you like secondary to the real question: what is a fair price to expect the class to pay in order to get some justice? I am coming

on to flesh out those points a little bit later. It seems to me the quantum question, if the Tribunal is satisfied looking at the CSAV settlement as a whole, the proportion that is being taken or being asked to be taken by the stakeholders is an acceptable amount, having regard to the total quantum that is going to be available. Obviously, undistributed at the moment, because it is being held over for the reasons that Claire Ducksbury very cogently put forward about not wanting to trouble the class twice. Waiting to see what the total we have is.

That total will remain there for the class. That is not going to be touched. The amount that is being asked for by the stakeholders now, I respectfully submit the key question for you is: is the amount that the stakeholder is asking for, £400,000 odd, a reasonable proportion of what would remain the damages sum at the end? I will come on to talk about this. I will go through the figures, because I am conscious that is a really important point that you flag. But it is around about 35, 37 per cent.

THE CHAIRMAN: But they are saying today that they want to have a second bite of the cherry. So they will take whatever they can take now, but then they say we reserve the right to come back later and claim even more.

MR GIBSON: It is not for me to speak for them.

THE CHAIRMAN: No.

MR GIBSON: But it is not a surprising proposition that a commercial entity does not want to fetter themselves until they know what the situation is. They will take a view at that point as to the likelihood of persuading this Tribunal to give them more, at that time. I know you said that it might be a factor that affects you in this situation.

THE CHAIRMAN: Because I may say, just speaking out loud, I may say, look, it is not really great to have two bites of the cherry in respect of the same sums of money. I might as well just consider all at the end, all in one go. This is just, let's say, a snack and there is a bigger meal to be taken at the end of the day. It may be I will say forget

about the snack: we will deal with it when you have the meal.

MR GIBSON: Well, I will finish this point and then I will come on to talk about the snack versus the meal.

THE CHAIRMAN: Okay.

MR GIBSON: What I really wanted to do, because I was talking about Le Patourel, I wanted to give the context for it.

THE CHAIRMAN: This is an important case, it is your right to --

MR GIBSON: It is an important case.

THE CHAIRMAN: Yes.

MR GIBSON: This overall -- what we are dealing with today, whilst it might seem relatively small in terms of snacks and small amounts of money in the overall scheme of things -- it is a critically important point to this regime. I am going to come on to explain --

THE CHAIRMAN: I understand that you say you have an important point of principle here and I agree with you, that there is an important point of principle. If I, at the end of the day, feel sufficiently comfortable that I have got to the bottom of it, then it will be dealt with fully in the judgment.

MR GIBSON: I am sure it will, sir.

THE CHAIRMAN: You have given us a lot of assistance. You still are and that is very much appreciated.

MR GIBSON: I will finish the assistance on legal basis.

THE CHAIRMAN: Yes.

MR GIBSON: Then I sense there is nettles that need to be grasped in what remains of the afternoon.

THE CHAIRMAN: Yes. They are not necessarily stinging nettles, but yes.

MR GIBSON: So the point, this is my last point in relation to 53 and I was talking

about Le Patourel.

THE CHAIRMAN: Yes.

MR GIBSON: I was just making the point that he was doing this in the context of the account credit situation. He refers in the second and third sentences of paragraph 99 to the fact that: Some people have raised concern about the only occasion in which part 5 refers to a power to order stakeholder and payment of stakeholder entitlements expressly is in rule 93(4). However, he says (and this is consistent with what we have said earlier about rule 94 and otherwise) he is comfortable this does not create any difficulty, because a narrow reading of the scheme would defeat the purpose of opt out proceedings which routinely require third-party funding.

So he is thereby acknowledging the link -- that I don't think there has been any suggestion is not an appropriate link -- the obvious and important link between facilitating the payment of a return to stakeholders and incentivising investment by stakeholders in collective proceedings, which is obviously critical to the regime.

THE CHAIRMAN: It would be helpful in future to have an express rule that deals with all of this.

MR GIBSON: That would be a question for the rule making committee. But I know there is a project underway to refresh the rules. This, I think, would be an appropriate candidate for that.

THE CHAIRMAN: No. It clearly is. This is something that we will be looking at.

MR GIBSON: Yes. It may be --

THE CHAIRMAN: We are looking at it.

MR GIBSON: It may be the whole of this debate becomes academic once you have clarified matters on that.

THE CHAIRMAN: I think what the utility of the points you are making and Mr Marven are making is that there is this public interest and we need to bear in mind that you

need clarity and you need to have provisions which allow the funders to get their rate of return. There shouldn't be too many barriers to that. At the same time, there needs to be checks and controls which we already have those. You probably need a clear rule that deals with what we are discussing today.

MR GIBSON: Yes. I mean --

THE CHAIRMAN: Yes.

MR GIBSON: Sorry to cut you off, sir. That is topical because what Lord Justice Green does in his judgment in the sixth and seventh sentences is he identifies what he thinks the two alternative sources of power for the Tribunal to make orders in relation to the payment to funders, otherwise than just out of undistributed damages. He says, sixth sentence:

"There is a wide discretion to make any case management order it sees fit and it is within its power to ensure that funders and representatives are paid."

Now, that is --

THE CHAIRMAN: He seems to like rule 53 as the route.

MR GIBSON: That seems to me to be a clear reference to rule 53, you are way ahead of me.

THE CHAIRMAN: Yes.

MR GIBSON: Albeit, without specifically stating the numbering of the rule. In the next sentence, he says:

"There is a broad discretion to make orders to costs under rule 98 which applies to the collective action regime."

Now, we have looked at 98 and I think he is correct to the extent that you can order a proportion of the costs, the ones that we recovered in any event, but it does not -- in my respectful submission -- perhaps Lord Justice Green had not reflected fully on the early implications of the definition in rule 104(1). But 53, I am 100 per cent ad idem

with him on.

THE CHAIRMAN: But if you are home on rule 53, you don't need rule 98, do you?

MR GIBSON: We don't need rule 98, no. No. We don't need rule 98 and, indeed, we don't need any of the other rules. If I am correct about rule 53, that is one route straight through all of this.

He posited, on the basis of those rules, an instance of how a "sequential order" could be structured. You see that in the eighth sentence: one, award of damages, two, costs be defrayed from the award for the payment of stakeholders, three, residue then distributed to the class. So I think this, my final point in support of why rule 53 does the job, is that there is appellant support for the use of rule 53 to ensure that funders and representatives are paid and for doing so prior to distribution of damages.

So in my respectful submission, I think the Tribunal in Gutmann v Apple was perhaps too ready to dismiss the possibility of reliance on Le Patourel, paragraph 99. They were in response to submissions from Apple perhaps focused more on the express reference to rule 98 and gave rather less attention to the implicit reference to rule 53. I think that the reasons just explained, 53 would perhaps provide a safer route to the destination that they arrived at. We agree with their destination, we just think the emphasis perhaps in that judgment could have been slightly different. No doubt, that will be something that the Court of Appeal considers in due course.

THE CHAIRMAN: Yes. So the Court of Appeal, they will be considering Apple, won't they?

MR GIBSON: I think so. Yes. Subject to whether there is any implication -- no, they definitely will. Yes. They will. Yes.

THE CHAIRMAN: They have permission, haven't they?

MR GIBSON: The court granted -- yes. The Tribunal granted permission afterwards, on the basis that it was a novel point or in relation to the three points that were raised

in that hearing.

THE CHAIRMAN: So no doubt it will go to the Court of Appeal and Lord Justice Green will know what he means in paragraph 99.

MR GIBSON: I am sure he will.

THE CHAIRMAN: Yes.

MR GIBSON: So to recap then, in relation to the power, having considered the question globally and critically and consistent with the Tribunal's directions, the class representative's position is that there clearly is a proper legal basis for the Tribunal to grant the order sought, i.e. an order permitting defrayment from damages, stakeholder entitlements, which the class representative is obliged to pay in return for the investment by those stakeholders in the proceedings.

There is two alternatives. There is the rule 53 alternative, reading the term expenses as including the payment of stakeholder returns, consistently as I said with the primary statute and with the appellate authority that I have referred the Tribunal to. Read in conjunction with rule 74, to confirm the application of part 5 to this conversation, and in conjunction with rule 93(4) and the relevant statute to which that relates, which confirms the system recognises the desirability and, indeed, the necessity of rewarding stakeholders for their risk taking in investing. And in conjunction with rule 94 and 97, whether or not they have an independent power in their own right, because they confer the expectation that returns to stakeholders will form part of the settlement process.

THE CHAIRMAN: So when we step back, the problem with rule 98 is that it just talks about costs.

MR GIBSON: 104(2) and 98(1) both just talk about costs.

THE CHAIRMAN: Rule 94(4)(b) does not really decide the issue at all.

MR GIBSON: Rule 94 globally does not decide the issue -- well, 94(8) provides a power, a power to endorse a collective settlement. It is a question of whether you

think that power is broad enough to encompass the endorsement of related provisions in relation to fund --

THE CHAIRMAN: Exactly. Again, that is not necessarily the clearest route. But the clearest route is 53, particularly given that the wording of costs or expenses and given what the Court of Appeal said at paragraph 99. So that is the, sort of, clearest route that has the least problems.

MR GIBSON: I would say the safest approach, if I were drafting this judgment, would be to say: 53 is our primary route, but 94 may also be a route. Because I think 94 does have merit, but it is not as clean a kill because it is not a direct costs power. It is a power that has to have costs read into it. Whereas 53 is a direct costs power that has to have settlement read into it. I think the 53 reading is definitely the easier.

THE CHAIRMAN: And also you have the "or expenses" point, haven't you?

MR GIBSON: Or expenses. Indeed, you do.

THE CHAIRMAN: Yes.

MR GIBSON: When I say "cost power", I am using that loosely to refer --

THE CHAIRMAN: Yes. I agree.

MR GIBSON: In a nutshell, yes, sir. You summarised the position. If only I had done that as quickly as you have.

THE CHAIRMAN: No, it is not -- you don't need to try and flatter me. The fact is that as a Tribunal, you are looking for sometimes the simplest and most straightforward route and you have given me a lot of thought for what the rule should be saying, from a policy perspective. You can be sure that whatever you said today is going to be taken into account and when it comes to looking at the updated rules, which should be done this year. We are part way through that process now.

MR GIBSON: If there is anything we can do to assist in that process, of course, we would be delighted. But for present purposes, obviously, those are submissions in this

particular application.

THE CHAIRMAN: There will be consultation and the views of all interested persons on the draft, they go out for consultation. You know, it would be very welcome on these types of points. The more heads put together, the better the result is going to be.

Okay.

MR GIBSON: Absolutely. I agree. More heads are definitely better than one.

So that is the legal power part of my submissions.

THE CHAIRMAN: Yes.

MR GIBSON: I have two topics I want to cover, and I am conscious of the time. So the next one is exercise of discretion.

THE CHAIRMAN: Yes. That is --

MR GIBSON: The last one is proceedings costs sum. The exercise of discretion, I was going to deal with three points. Two go to timing, one goes to quantum.

The two in relation to timing, the first one is in relation to the proviso that the Tribunal placed on the damages sum being held in escrow until final determination of the funding matters. You will recall that the Sony position was not settled, whether that was going to go to appeal, and then there was also, more importantly, the funding issue in this case. There was a question about how that was going to be resolved in light of Sony, whether or not the non-settling defendants were going to take a point in relation to that. They ultimately did not and that Tribunal handed down judgment on the funding matters, a ruling on the funding matters, in this case on 7 February 2024, CAT 10, determining the matters in the Class Representative's favour. The non-settling defendants raised no objection, subject to reserving the right to ask the Tribunal to revisit the suitability of the revised LFA in future, including if Sony successfully appealed. Well, obviously, we now know that Sony has been put on ice.

THE CHAIRMAN: Exactly. So they want their cake and eat it, don't they?

MR GIBSON: They are reserving their position.

THE CHAIRMAN: Well -- [overspeaking].

MR GIBSON: Which is fair enough, in the circumstances.

THE CHAIRMAN: Yes.

MR GIBSON: Our position -- and it may be that I don't need to trouble you with my further submissions on this -- you will see in our written submissions we take the position that the funding matters clearly are finally determined because in this case, a decision was made and it has not been appealed. So they have been finally determined within the normal meaning of those words.

In our written submissions, we ask ourselves with our warts and all hat on whether the fact that Sony has been appealed alters that question and come to the clear view that it doesn't.

There was also the point that the Tribunal raised with Ms Abram in December. Ms Abram was suggesting that if everything fell apart because of funding further down the line, her client would pop up and say at that point that somehow there was some failure of basis in the settlement agreement that had fallen apart. With respect to her, I think that is wrong as a matter of law.

The Supreme Court in Gallagher the judicial review case against the CMA, makes that absolutely clear. I can just give you the references for that, rather than --

THE CHAIRMAN: You should do, yes.

MR GIBSON: So in the Gallagher case, do you remember, that was the case where there was the tobacco investigation and the OFT got itself tied in knots, gave reassurance to one person that had done an early resolution procedure, not others. Three people. Then a lot of other people appealed it successfully, so the whole decision fell apart. The person that had got an early resolution with a caveat in it was

able to claim back their costs and the other people who had had early resolutions with the OFT that had not had that reservation complained that was unfair.

It went all the way up. They attempted to appeal late and were told no, you can't appeal late, because -- and I'm going to come on to paragraph 13 -- because the principle of finality in settlement means that you take your bet and you make a settlement and you remove risk. You say that the desirability of settlement is that you remove the uncertainty of litigation, but that can cut both ways. It may turn out, if other people carry on litigating, they get to a better result than you won. They could come to a worse result. What you can't do is look further ahead and go, "I wish I had done that". You made your decision.

THE CHAIRMAN: But what happens when you enter an arrangement, but subject to a reservation of rights?

MR GIBSON: The reservation of rights, you will remember, sir, is in relation to the defendants, the non-settling defendants. They reserve their rights. That is not Ms Abram's case.

THE CHAIRMAN: Okay.

MR GIBSON: Ms Abram is representing the settled defendant.

THE CHAIRMAN: Okay. So D12 --

MR GIBSON: D12.

THE CHAIRMAN: -- had no reservation?

MR GIBSON: No reservation. D12 was settled.

THE CHAIRMAN: They have done the --

MR GIBSON: They have achieved finality. So when Ms Abram stood up and was purporting to say that she would stand up and start talking about the failure of basis, I don't think -- with the greatest of respect to her -- that is going to cut any ice whatsoever. As I said, I will take you to the judgment very quickly.

THE CHAIRMAN: Very. I understand if you are saying that D12 has got no reservation, then paragraph 13 of --

MR GIBSON: Of the Gallagher judgment at tab 6.

THE CHAIRMAN: Yes.

MR GIBSON: Paragraph 13 and paragraph 53.

THE CHAIRMAN: Okay. Don't take me to those.

MR GIBSON: Fine. So that, therefore, disposes of the first of the discretionary matters. We say that the funding matters have been finally determined, so that removes one fetter to your action. The question then is the one that we have been dancing around now and we must confront head on, which is the question of timing. Whether, assuming you have the power to do this, which I think we have addressed ad nauseam, whether you should exercise your discretion to make a payment to stakeholders now while the litigation continues and prior to distribution.

Now, the arguments against that are the ones that you have already touched on with me, namely that a request for what might be described as early payment to stakeholders, on this view of the world, makes it more difficult to strike the appropriate balance between the interests of stakeholders and the interests of class members. Historically, one might have taken some comfort from the fact that experience in foreign jurisdictions suggests that uptake can sometimes be relatively low and low uptake, as you said to me a moment ago, sir, makes it more likely that those who participate in the distribution will obtain full compensation while leaving sufficient funds for stakeholders to be paid out in full.

THE CHAIRMAN: Yes.

MR GIBSON: So low uptake has the happy coincidence that there is no tension, or it reduces the possibility of tension. But it also is a rather, as I think Ms Hollway put it in her statement, a rather pessimistic view of the world when interests trying to achieve

a system which achieves as close to perfect compensation as you can.

I think that is the benchmark against which one should be testing what we want to achieve in policy terms.

The perceived risk of tension between the interests of stakeholders and class members, and I say perceived risk because I am going to come on to talk about how it can actually be resolved or how there should not really be a risk of tension, is greater where distribution is more effective or where uptake among class members is higher for some reason. We touched on those. You can have the possibility of a more efficient means of distribution, modern technology, or you can have a situation where you have an account relationship.

But it is important to recognise the class representatives acting in the best interests of the class will seek to maximise the uptake, so the technology is giving them the power to do that and they -- Mr McLaren is candid about this and quite properly he says in his second witness statement, which is in the settlement bundle, volume 1, tab 2, page 30 at paragraph 33 -- Mr McLaren says his objective is to secure as much pay out to the class as he can. He wants to give meaningful compensation to the class and that is confirmed by Ms Hollway in her fifth statement in this application bundle, paragraph 76 of her fifth statement.

Now, on the view of the world that one should wait, the argument against it, one would say it is preferable to wait until after distribution or at least closer to distribution because then it is clearer how much is available to allocate to class members or as between stakeholders and class members before making a decision in respect of that allocation question.

One can see why the Tribunal might think that that is the safer approach to take: the wait and see approach. However, we say that there are a series of arguments, I am going to identify five, going the other way in support of making a payment to

stakeholders at this stage of the proceedings.

The first is that it is incorrect, in our submission, to start from a premise there is anything intrinsically wrong with an outcome whereby class members receive less than full compensation for the harm done. The first point to remember -- and it may be an obvious one, but it bears emphasis -- claimants generally will not receive compensation in full for harm done to them. If nothing else, even if they were to get perfect compensation in terms of the damages they received, they are very likely to have to offset part of a shortfall in the costs of litigating because it is a truism that one almost never receives anything like full payment of costs in the English court system.

This is recognised candidly in Lord Justice Popplewell's judgment in Rowe v Ingenious Media, the case we referred to earlier, at paragraph 46 at tab 10 of the bundle, page 322. He made the observation that:

"On assessment of costs on the standard basis, a claimant can typically expect to receive only 70 per cent of recoverable costs at most."

That is obviously familiar to all of us who have litigated in this jurisdiction. He says:

"With the claimant left to bear the balance."

He makes that point that, therefore, even if they got 100 per cent of the damages they were asking for, there would be a deduction for the amount that they had to bear of their own costs. Of course, in addition to that, that is the recoverable costs. There is also certain costs and in particular the cost of funding litigation, not necessarily in collective proceedings but generally --

THE CHAIRMAN: Yes.

MR GIBSON: -- that are irrecoverable. So, as I say, even if you get perfect compensation for the substantive legal wrong, you are very often, almost certainly, going to end up with a situation where there is a deduction from that. Because that is the way in which the balance of justice falls in this jurisdiction.

If anything, the specific context of the collective proceedings regime confirms that one should not assume each class member must be fully compensated. What do I mean by that? Well, the starting point here is to remember that the introduction of the aggregated damages regime constitutes a radical departure from normal principles of compensation and can result in situations where you have a payment of damages to no loss members of the class. That is a point that is being made, for example, in our own case in the Court of Appeal, the Mark McLaren case which is at tab 16 of the bundle at paragraph 35. I think it is at page 596. There is an observation that:

In a situation where no loss members of the class are paid some amount of money, even though they didn't actually suffer any loss, in such a case defendants themselves would not overpay in the aggregate sense. Though still the aggregate damages would be equal to what the class as a whole had suffered, but by flattening out the sums distributed to everyone in the class, you will have a situation where some class members receive more than they are entitled to, but the corollary of that is that other class members will receive less than they are entitled to.

So the aggregate damages approach, the radical departure that one sees under this regime -- which is integral to making it all work, by taking a practical and pragmatic approach to justice in these cases -- means that you will not see perfect compensation. So that's the second reason, particular to this regime, why one does not need to start from the assumption that class members can and should receive 100 per cent compensation.

As with individual claims, the interests of justice and proportionality in collective proceedings may be best served by class members not receiving 100 per cent of the incurred losses. That is the first point.

The second reason why we say that it is appropriate to seek payment now and the wait and see approach is not the way to go is that it is a false dichotomy to compare

the possibility of partial compensation for the class with full compensation.

The correct alternative scenario may well be no compensation because what we are talking about here is not just looking at the situation in a given case and asking ourselves what is the fair split in relation to this particular case? We have to think about the implications of this decision for the regime as a whole.

Sir, we had an interesting discussion earlier about the implications if you arrive at a decision that gives certainty but, if you like, the wrong way, as we would put it. So it gives certainty that the funders are going to have to wait at the back of the queue, wait until the end of the case.

If that is the certainty they get, as you quite rightly noted, they will take a view that it has become much riskier. Now, that does just mean that the costs might go up. It might mean that they decide not to fund at all. But either way, it has very serious implications for the regime.

I want to take you to a couple of points in the evidence --

THE CHAIRMAN: What you may never get is absolute certainty. Because the first issue is whether or not in principle we can make an award at this stage. If we decide you can't, well, that's it: you can't. If we decide that we have jurisdiction, but it is a discretionary one to be exercised in accordance with various factors which we can set out, they still won't know in fact whether or not they are going to be able to get it on the facts of any individual case until further down the line. So there is only a limited amount of certainty you will get, either way.

MR GIBSON: That's true, sir. Although depending on how you frame your judgment in relation to the exercise of your discretion, may give a greater or lesser degree of certainty --

THE CHAIRMAN: Yes. Yes.

MR GIBSON: -- as to how it is going to be applied in other cases. I am sure you will

reserve your right to decide different cases in different ways. But the way in which you describe the policy objectives, the way in which you describe how you arrived at the decision in this particular case, will be scrutinised, no doubt, very carefully and may give more or less comfort as to how things are going to shake down in other cases in future.

What I am hoping to give you is the ammunition to give you the confidence that wait and see is not the safer option, but with respect the much more dangerous option in terms of the implications for the regime.

I don't say that lightly, because it sounds like I am, sort of, exaggerating the position. But it is a very real problem that could eventuate with the jurisdiction.

I would like to illustrate that. I would like to just take you to a couple of paragraphs of Ms Hollway's witness statement at tab 5 of the bundle where she explains --

THE CHAIRMAN: I am still making notes on the last point.

MR GIBSON: I do apologise. I do apologise, sir.

THE CHAIRMAN: No. You are quicker than me: that's fine.

Yes. I can put the authorities away now, can I?

MR GIBSON: I am sure --

THE CHAIRMAN: Are you going to come back to the authorities or are we finished with the authorities?

MR GIBSON: I am sure I will be jumping around to the authorities, if you have room on your desk to --

THE CHAIRMAN: I will leave it there. So we have the hearing bundle. Yes.

MR GIBSON: The hearing bundle, tab 5. Now, Ms Hollway, as you will probably be tired of me telling you, is obviously the partner with conduct of this matter at Scott+Scott.

THE CHAIRMAN: Yes.

MR GIBSON: A very experienced litigator with experience in this field. She, along with her team, worked between 2018 and 2020 looking for and then negotiating a deal with a funder. She starts that story at around page 70 of the bundle, paragraph 80, describing the context in which funding was sought. She describes from paragraphs 18 to 22, she reminds us that the market conditions were difficult at that time because there had not yet been a case that had successfully been taken -- in fact, I don't think at that point there had even been a case certified. So there was a degree of uncertainty as to how the regime was going to shape up. Indeed, the first case, Merricks, had had a very inauspicious start to the regime by being knocked back by the then President of the Tribunal.

If we take-up the story at page 72 at paragraph 23, it is probably worth reading that in its entirety.

THE CHAIRMAN: Yes. Okay. We will read it to ourselves.

MR GIBSON: Yes. **(Pause)**

THE CHAIRMAN: Yes.

MR GIBSON: So it is the very last phrase there that is particularly important to recognise. We have a case here, the McLaren case, I forget the exact quantum, I think it is about £150 million.

THE CHAIRMAN: Yes.

MR GIBSON: By any stretch of the imagination, that's a sizable number of class members, it is a sizable claim. Even that, even a claim of that size, is difficult to fund. The funders were only willing to consider funding a collective action if -- forgive me. Paragraph 29, my learned junior helpfully points out there was 100 to 150 million, the last line over the page on --

THE CHAIRMAN: Yes, I can see that.

MR GIBSON: So that's the scale we are talking about. So that is the scale of funding,

that is the scale of the case. Even with that type of return, it is very difficult to get funding. That is calibrating everything without the knowledge that they are going to have to wait until the end for certain. That was in a situation where people weren't quite sure yet how things were going to shake down. So a situation where they might have been able to take slightly more of a risk, because they could go either way.

Once there has been certainty that actually they are going to have to wait for the back of the queue, the cost of funding goes up. It becomes even more difficult to get funding, even for a case that is running to 100 to 150 million. That is a lot of consumers, and we say there should be a serious concern if impediments are created to that sort of scale of case, obtaining funding in a way that should be, we should say, straightforward.

Then there is an observation, I think it is worth flagging, in the recent case, the Gutmann v Apple case, where at paragraph 7 the Tribunal made a point particularly relevant to this and I have the right reference.

THE CHAIRMAN: Okay.

MR GIBSON: Sorry to jump around.

THE CHAIRMAN: Which tab is that?

MR GIBSON: Tab 21, page 794.

THE CHAIRMAN: Yes.

MR GIBSON: So just the first sentence then:

"The courts have observed that class actions necessarily require third-party funding and the placing of unnecessary hurdles in the way of parties obtaining funding may undermine the ability of meritorious claims to be brought and/or increase the cost of funding."

So I don't suggest for one moment this Tribunal does not appreciate that, but that is completely consonant with the point I have just made about the consequences of

increasing the risk profile of an investment, making it so unattractive you may end up with either no one willing to fund it or the people that are willing to fund it charging a price that is unaffordable and it would require certain claims -- it would require the quantum of the claim to be even greater. Pushing, if you like, the class of claims and the type of claims that can't get funding, pushing the size of that grouping even wider. It is already set at, we think, quite a high bar. If 100 to £150 million case is on the borderline of funding -- and you will remember that there was, to go back to Ms Hollway's statement and I am sorry to make the Tribunal jump around -- but she talks about funder A which is the first funder which they sought to get funding from. That is at paragraph 29 of her witness statement.

You will see the conclusion that that funder reached, at the bottom of the page, is at page 74 of the bundle behind tab 5. That funder informed us that it decided that the claim did not meet its economic criteria for investment. I note at that stage the estimated claim value was in the region of 100 million to 150 million. That is when they came to talk to Woodsford, and Woodsford fortunately -- perhaps because it is a very experienced funder -- managed to work out it could do the sums. But that was, if you like, after a lot of effort and we have seen one funder looked at it and could not do it and then Ms Hollway has made the point that generally, in the market, it is very much on the borderline.

That was the second point I wanted to make. The comparison here is not between full compensation or some compensation, it is potentially between some compensation or no compensation. So the price of getting some money is that you don't get some money, if I can put it in rather simplistic terms.

THE CHAIRMAN: Yes.

MR GIBSON: The third point in relation to why we say a payment now is appropriate and, indeed, necessary is that it is vitally important to keep in mind that stakeholder

investment is just that: it is an investment. As the Court of Appeal in Gutmann rightly noted at paragraph 83, litigation funding is a business and funders will legitimately seek a return upon their investment. That is authorities bundle, tab 15, page 564.

THE CHAIRMAN: What paragraph?

MR GIBSON: Paragraph 83, sir.

THE CHAIRMAN: I have read that a couple of times. Yes.

MR GIBSON: Yes. It is an important paragraph and, I think, makes the point very neatly. As we say, there are downside risks of getting litigation funding which we will come on to talk about when we are talking about the quantum. But in terms of the timing, we say that it is clear that if you are looking at an investment, you must take time into account to ensure the attractiveness of it. So the returns on commercial investment are calculated by reference to the time horizon over which a return is realised. You have duration risk as a critical factor and Mr Friel gives a very good explanation of this. I won't take you to it now, but I will give you the references. Mr Friel's statement, paragraph 36(a) and then in the confidential part at paragraph 45(d) -- and obviously I make that reference without sacrificing the confidentiality.

THE CHAIRMAN: No. I understand that. Yes.

MR GIBSON: He explains the factors that stakeholders take into account and funders in particular when deciding whether to make an investment. He explains duration risk as essentially being: The longer it takes a funder to receive a return on its investment, the lower the annualised return becomes and the less economically viable the investment.

So time dilutes the value of the investment. So a decision by this Tribunal now that the funder can wait, on a wait and see basis, while it may commend itself to the cautious approach to wanting to see how things work out and, therefore, may seem

a safe option, it could be very dangerous. I am not trying to be scaremongering; I am being realistic. It could be very dangerous if it diminishes the value of the investment and, therefore, makes the investment less attractive.

Similarly, there is a point about time value of money, which Mr Friel touches on at paragraph 36(c) of his statement, tab 8, page 119, which is basically that a regime offers no scope for a funder to recover where a delay in the case means that it loses opportunities to put money to other use. Unsurprisingly, but it is also a pragmatic fact of life for a commercial operator, but that is something they will take into account. That is the third point about the time horizon being critical, when you are thinking about an investment.

The fourth point is if stakeholders can only be paid from undistributed sums after distribution, it is highly likely to lead to perverse incentives damaging to the regime because -- and this is a point I touched on briefly before -- it would essentially encourage stakeholders to look to back cases that only have a low possibility of distribution. That is obviously not what the regime wants to do. We want to encourage people to back all cases but particularly cases which have a high possibility of distribution, because those are the cases that have a higher uptake and are likely to result in greater compensation for the victims of widespread wrongdoing and to achieve the statutory objective of achieving access to justice for those people.

So we say that the perverse incentive that I have just described can be avoided by considering the pertinent question for the Tribunal is to work out what quantum is appropriate from the sum that has been allocated now. That is something that I think you can reasonably do now, because you know what the CSAV sum available is and you can work out what is a fair proportion of that.

That should not change further down the line. The thought experiment you go through now should be by reference to the money that is on the table now. That should not

change. The overall allocation to class members as against the allocation to stakeholders can be expressed in proportionate relative terms now and that decision can be taken now and then the timing point, if you like, becomes less pressing, if at all.

THE CHAIRMAN: But what Mr Marven is saying is that whatever we do there is only provisional in the sense that he will cash that, but he reserves the right to claim more later.

MR GIBSON: Yes. But I don't think that, with the greatest of respect, should cause the Tribunal any difficulty because when Mr Marven comes back, or if I come back to make the application in accordance with the Class Representatives' obligations, we will then be making and presenting arguments to you that you can accept or dismiss on their merits at that point in time. I am sure you will be astute to remind us of the conversations we are having now and the reservations you had, and I anticipate, given what you have said, sir, and assuming that your wing members agree with your disposition, we will be facing an uphill struggle.

Now, it is a matter for us to consider whether we can come up with some -- if that is what we decide and we are obliged to do it.

THE CHAIRMAN: I may have retired by then. You are looking at these cases, they take snakes and ladders. You could still be arguing this when I retire.

MR GIBSON: Well, sir, in fact you say that -- you say that with a degree of mirth, but that is exactly the point we have to keep in mind. If we wait until the snakes and ladders have finished, the ping pong up and down, the appellate ping pong, if we can call it that, if the funders and stakeholders are expected to wait that time, that only accentuates the point I made about the problem of duration risk and the time value of money.

If they are asked to wait until the end, it is going to be a much less attractive asset

class. I should also -- the funders we have here are specialists in litigation funding. But they get their money from somewhere. Now, I am not talking specifically about Woodsford, but funders in general. They create funds with people investing into them. The people that choose to invest in a litigation fund are comparing that asset class with other asset classes and if the asset class of litigation funding, or this particular aspect of litigation funding, ceases to be an attractive investment it will become more and more difficult to attract money into it.

As we know, given that we are in competitional world, it is a market economy and supply and demand, you have to make it as attractive as we can. I don't put that too lightly, in fact.

THE CHAIRMAN: How are we on timing?

MR GIBSON: I have finished, I think, what I wanted to say in relation to the timing point. I wanted to say a bit about quantum, which I think, sort of, follows from what I am saying now. I wanted to say something about the proceedings cost sum. I think I probably will need another 45 minutes, but that does rather cut into --

THE CHAIRMAN: No. You are not going to get -- Mr Marven, how long do you think you will be?

MR MARVEN: Sorry, if I just -- **(Pause)**

I would like to have 45 minutes, but I know that is going to be --

THE CHAIRMAN: So you will have from 4.55 to 5.30.

MR MARVEN: I will make it work.

THE CHAIRMAN: Yes. That's fine.

MR MARVEN: I might go at some pace.

THE CHAIRMAN: That's all right. Now I have read your skeleton, a lot of the points you make have already been made anyway.

MR MARVEN: I recognise that.

THE CHAIRMAN: And the underlying evidence --

MR MARVEN: But there are points, sir, that you have raised that I do need to deal with.

THE CHAIRMAN: You can deal with that, of course. You will have your 35 minutes. Thank you.

MR GIBSON: Do I have 20 minutes?

THE CHAIRMAN: Yes, you have 20. Well, you have 15 minutes.

MR GIBSON: 15 minutes. Well, I better go very quickly then. So on quantum, well, we recognise that you need to be astute to avoid the system becoming a cash cow. We don't seek to diminish that for one moment. But this, I would say, is the central question: if you are comfortable about the quantum that we are asking for today, then the timing of the payment, we say, is of less if any relevance. Because if it is the right amount in terms of getting the balance between stakeholders and class members, then it is the right amount today and it should be the right amount whenever we look at the question.

I would say there are four points that you can and should take comfort from in relation to the amount of stakeholder return sought in this case. I am going to take these quite quickly, so I can talk about the proceeding cost sum in a moment.

The first is that there have been robust safeguards throughout this process to protect against the risk of perverse incentives. I won't take you to it now, but Gutmann v Apple, paragraphs 8 to 12, sets out what they consider to be the safeguards generally in this regime and in our skeleton, paragraph 50, subparagraph 2, (a) to (d), we explain how those safeguards have all been met in this case. That is the first point: safeguards.

The second point is that the return to stakeholders fairly reflects the level of risk associated with their investment, particularly in the period 2019 to 2020 when the

stakeholders committed to this case. You will remember, I touched on this already, that was a time of considerable uncertainty given that there had not been a successful certification, let alone an award of damages or settlement following trial, and you had the question of risk of carriage disputes that compounded the market view this was a high risk investment. That remains the market view, but it was particularly acute before the Supreme Court judgment in Merricks gave a degree more confidence. Then obviously you will have seen everything pick up with quite some pace. No doubt the Tribunal is most acutely aware of this.

THE CHAIRMAN: Then you have PACCAR. Then you have PACCAR in the Supreme Court.

MR GIBSON: You have PACCAR in the Supreme Court and they are trying to unwind that. So there is risk going up and down and it has complications.

THE CHAIRMAN: Yes.

MR GIBSON: Then you made the point, sir, about the fact there is a portfolio investment and it has to be averaged. So those are points about the compensation, the return, fairly reflecting the risks involved in this type of investment. That is the second point.

The third point is that the stakeholders were -- just on that second point, sorry, Friel paragraphs 46 to 50 explains that more eloquently than I can in this time available.

THE CHAIRMAN: Yes.

MR GIBSON: The third point, stakeholders were selected through a competitive process. You see the references in our skeleton to that at around -- well, I can turn up the references for you in a moment.

The fourth point is that the returns due to the stakeholders under the relevant agreements are all reflective of market rates. I am just going to give you some references. So Hollway 5, paragraph 64 deals with that in some terms. Then Friel,

paragraphs 55 to 56, there is a comparison of publicly available information regarding other returns to funders for collective proceedings funded in a relevant period between 2015 and 2019. You see that the expected returns in this case are comparable to the expected returns in those cases. So that gives you a degree of comfort that it was calibrated appropriately.

It is also relevant to note the amount of return on the investment in this claim in the UK is comparable to the returns that could be obtained in Australia. The reason why that is an important point to keep in mind is that the UK regime is much less well established and, therefore, inherently more risky, particularly in the period in question: 2018 to 2020. So the logical expectation would be that stakeholders in this jurisdiction might have demanded a higher return because it is a higher risk jurisdiction. Not the same as a lower risk jurisdiction like Australia and yet it was the same. That is another point of comfort.

Taking an even-handed approach, Mr Friel quite rightly points out there is a question about whether certain fees should have been included, for example the funder's appeal fee and stakeholder returns referable to the certification process. Those both being processes in which CSAV took a pretty passive role, didn't participate in the appeal and sat on the sidelines during certification. However, Mr Friel explains at paragraph 43 the reasons which we submit are sound for including a proportion of those fees in the sum sought by this application, given that CSAV was a cartelist with joint and several liability, it still disputed liability and refused to pay compensation to the class at the time of certification and at the time of the appeal. It would have benefited had the appealing defendants or the challenger defendants been successful in resisting the CPO or on appeal.

I am going to talk a little bit more about the actual cost, the sums involved, in relation to the proceeding costs sum. But in explaining that, I want you to keep that in mind in

thinking about the quantum of the damages sum as well. The amount that is sought from the damages sum. Because we say, bearing in mind the factors that I have just outlined and the overall structure of the system, the contract in question, we submit that the proportion being sought is entirely reasonable and an appropriate balance to strike in terms of incentivising investment whilst also ensuring there is enough left in the pot to give to class members at the end of the process.

Returning then to the proceedings costs sum. In accordance with the Tribunal's directions, we had spent some time in our skeleton setting out the difference between what the Class Representative is proposing -- which, to be clear, is to treat £280,000, the proceedings costs sum, as recovered costs -- as against the alternative of treating effectively, as I understand it, that sum as being part of the damages available for distribution to the class. I understood that to be the alternative scenario that the Tribunal had in mind. We talk about the difference of that and then we talk about the relative merits of each approach.

In relation to the differences, I think the key point to appreciate in looking at this is the point we make in our skeleton by reference to the Banque Keyser Ullmann case, which is at tab 4, pages 92 to 94, in the report page 880 --

THE CHAIRMAN: Where is that?

MR GIBSON: It is in tab 4 of the bundle.

THE CHAIRMAN: That was a long time ago, wasn't it?

MR GIBSON: It was a long time ago, but it establishes the principle that has not changed since, which is that the cause of action for a claim for costs is separate from and additional to the primary claim for damages in the proceedings in which the costs were incurred. So looking at that in the context of the present situation, the primary claim in the collective proceedings is the claim made by the Class Representative on behalf of class members by aggregating those class members' entitlements in respect

of their causes of action. My learned junior points out there is a recent Court of Appeal case in Capital FM v Marino. We can send through the references for that, to give you the reassurance this is still good law.

THE CHAIRMAN: Does that refer back to Banque Keyser Ullman?

MR GIBSON: Yes, it does. So we will give you the references for that. We can include that in the letter that is getting ever longer, but I am sure you will enjoy digesting.

THE CHAIRMAN: People seem to expect that just because you are in a case you will remember things. But I have not a huge -- it only came back --

MR GIBSON: I did see your name, sir.

THE CHAIRMAN: Yes. It only came back when I saw it. If you had asked me have I done a case where that is dealt with yesterday, I might have said I can't remember anything.

MR GIBSON: I didn't want to be impish though. Yes. I was going to extend you the indulgence of not suggesting you would have remembered it. But I was not going to draw attention.

THE CHAIRMAN: Yes. I don't. Yes.

MR GIBSON: You have said it has jogged your memory now.

THE CHAIRMAN: I remember it now.

MR GIBSON: It has jogged your memory.

THE CHAIRMAN: It is a trigger when you hear about it again. It comes back again.

MR GIBSON: Yes. So that establishes the principle. We say that in this claim, the primary claim is obviously the aggregated --

THE CHAIRMAN: What is the reference with Capital FM? What is --

MR GIBSON: We will send that through to you. It is a Court of Appeal case.

THE CHAIRMAN: Well, you can put it in the letter, because I am getting this letter

anyway.

MR GIBSON: Exactly. Exactly so.

THE CHAIRMAN: Yes.

MR GIBSON: So the primary claim is the aggregation of the individual class members' entitlements of their courses of action. That is fundamentally conceptually distinct from a claim for costs, which is a cause of action that accrues to the class representative itself by virtue of the representative having incurred costs to pursue those aggregated claims at no risk or cost to the class members.

Of course, in the particular circumstances of a funded case, you have a distinction to bear in mind between the repayment of a stakeholder's investment -- i.e. the funding of own costs and any adverse costs -- and those come back via payments on an inter partes cost basis from the defendants. Those costs are referable to the class representative's own cause of action because they are costs. As against payment of a return to the stakeholder on success in litigation, which is not recoverable by inter partes costs but is paid from damages awarded to the class members. That, therefore, is where the balancing act comes in.

So you need to think about, when you are thinking about what a stakeholder entitlement relates to, does it relate to a cost? In which case, it is primarily a question as between the funder or the stakeholder and the class representative, because it is the class representative's cause of action and their costs and how they deal with that. There is a strong moral and legal right, we say, for the funder who has actually contributed the costs of that process that they should have 100 per cent recovery from what comes back on an inter partes basis. Nothing to do with the class members.

Contrast that with the return which cannot be recovered on an inter partes costs basis, therefore has to come from damages. Therefore, one has to think about the appropriate balance.

So I think it is really important to have those conceptual points in mind when you come on to think about the proceedings costs sum.

In practice, and this is the point that I was hoping to have a bit more time and I will try and do it as quickly as I may, the way in which costs and damages payments are treated under the relevant agreements, you asked me to address you on this and I am going to try and take it as quickly as I can, is really important. Now, this is set out in Friel 1 at paragraph 31, I think, is the reference I have. Let me just check that is good. **(Pause).**

Friel is very clear in setting out the different types of cost -- this is at tab 8 of the bundle -- sets out all the different types of costs that have been claimed in this case, so it starts at paragraph 20. A very helpful table that sets out all the figures. From this, you see -- if you are with me, sir -- at page 112 of the bundle.

THE CHAIRMAN: Yes. I have it.

MR GIBSON: You can see that the money that the funder has paid out to date, what is called the funder's outlay and the funder's appeal outlay, totals a funder's outlay of 3.58 million, a funder's appeal outlay of 104,000. It comes to a total of just shy of 3.7. But from that, one deducts the recovered costs that have been recovered to date of 800 and then, in addition, we have the additional 100 that you allowed the previous hearing, the application costs sum. That is a further 900,000 off. That gives a net figure of about 3.7 minus 900, about 2.8. Depending on what you decide in relation to the proceeding cost sum, if whatever we are allowed from that will be deducted further from that and obviously you have given the indication that the application cost sum could be higher too, depending on what we put in in the ever-lengthening letter. You gave an indication of an extra 50 would be acceptable.

THE CHAIRMAN: Well, up to -- depending what the actual figure is.

MR GIBSON: Absolutely. We are not going to claim for more. If it turns out it is less

than 50, but I apprehend that it is probably likely to be at least 50 more. Anyway, the point being there, that is the money that the funder has expended on the case so far, that they have invested so far. That is their investment.

A large proportion of that is costs, as in inter partes costs. So costs that were incurred paying the legal fees. Some of it, as we discussed before, will be the amount paid for the ATE premium so that would fall outside the recoverable costs but, nonetheless, part of the outlay and other things. I think what we are proposing to do is provide you a breakdown of exactly how that --

THE CHAIRMAN: That is what I have asked for, yes.

MR GIBSON: Yes. Indeed. So what you see is that when during the case to date the Class Representative has received payments of recovered costs, i.e. payment cost incurred by the Class Representative and recovered from the defendants in a total amount of 809,000 and that is from winning the CPO, winning the appeal and the like. Those costs have been passed -- when they were recovered, they were paid as stakeholder entitlements into the stakeholder's account and one sees the operation of those definitions in clause 149 and 150.1 of the revised litigation funding agreement at tab 4, page 39 of the bundle.

Once they had been paid into the stakeholder's account, then some magic happens behind the scenes in the priorities agreement and I won't take that up or tell you about that, because it is confidential. But you had copies of that, I understand, previously and we can --

THE CHAIRMAN: I have looked at it. Yes.

MR GIBSON: Yes. So what happens then is the amount owed to reimburse the funder's outlay is then reduced accordingly. So you see 100 per cent credit against the amount sought by way of funder's outlay, which is one of the constituent elements of the stakeholder entitlement. 100 per cent credit against any sums that were paid

by way of costs.

Now, rightly, there has never been any suggestion the class members could or should have any interest in the recovered costs because those are costs referable to costs incurred by the Class Representative, pursuant to his cause of action to recover costs. They are not part of the costs that actually are claimable by the class, as a matter of principle. They relate to the costs claim, not the primary substantive claim.

THE CHAIRMAN: But are they still subject to the jurisdiction and the approval of the Tribunal?

MR GIBSON: The jurisdiction of the Tribunal, yes. For reasons I will come on to, that really comes to bite if you think there is a reasonable basis for assuming there is something abusive about the way that the allocation has been --

THE CHAIRMAN: But the prudent thing is if you are going to be out of any sums recovered, be paying lawyers or anything --

MR GIBSON: I missed that, sorry?

THE CHAIRMAN: The prudent thing is if you are going to be paying these costs out of any recoveries, you need to come back to the Tribunal to bless what you are doing.

MR GIBSON: Well, I mean, that is what we are doing.

THE CHAIRMAN: Exactly.

MR GIBSON: Yes. That is because this all falls within the rubric of the settlement process.

THE CHAIRMAN: Exactly. That is what needs to be done. Yes.

MR GIBSON: I mean, there is a nice question about whether we were being, if you like, overly --

THE CHAIRMAN: Look, you only have one minute. You are going to have to quickly address this whole thing about what we do with the 280 and whether the 280 goes into the general pot and then hence the share in relation to these proceedings gets diluted

or not.

MR GIBSON: Well, we say --

THE CHAIRMAN: I have one question on that, which is that is there any possibility that if, for example, your claim against everyone else fails that it will be possible to identify those class members who actually would have, on their own, had a case against the twelfth defendant, i.e. are you able to match claimants and their vehicles with the particular transport or is it just too difficult, you just don't have the data?

MR GIBSON: Well, I am not sure we have the data, but it is certainly not, as I understand it, the way the litigation plan foresees.

THE CHAIRMAN: Oh, I know the litigation plan is different. But I just wanted to see if there is a nightmare scenario, something goes wrong and everyone starts falling out amongst themselves and scrambling for whatever they can get, is there any way of ascertaining or is it known which class member's vehicles will have been shipped by which shipper?

MR GIBSON: I think that is probably best addressed in the ever-lengthening letter.

THE CHAIRMAN: Just add it to the letter. It is absolutely fine.

MR GIBSON: In terms of what you should actually do with the 280, I think the merits to the approach that we maintain --

THE CHAIRMAN: You have done it in your skeleton, haven't you?

MR GIBSON: I was going to say.

THE CHAIRMAN: Don't worry. Let's hear from Mr Marven now.

MR GIBSON: Okay.

THE CHAIRMAN: You have been very helpful. You have a detailed skeleton. Obviously, I will read it again and the transcript. I will read all the statements again before we give a decision. I will obviously read your letter.

MR GIBSON: Yes, sir.

THE CHAIRMAN: Thank you very much.

Mr Marven.

Submissions by MR MARVEN

MR MARVEN: I am grateful. I am sorry to cut my learned friend off while he is still in his prime --

THE CHAIRMAN: No. That's fine. You have an absolute right.

MR MARVEN: Well, obviously, I do adopt a great deal of what is said and I just want to make a few points on behalf --

THE CHAIRMAN: Yes. Of course.

MR MARVEN: Or the two categories of stakeholder: the funder and the insurer. It is not strictly right to say there is only one insurer. But on behalf of those categories.

THE CHAIRMAN: Yes.

MR MARVEN: The first point is to stress that although the Tribunal has rightly appreciated it is not the hugest amount of money that is in issue here. This is, to us, an important point of principle, whether it is, as a general matter, permissible and right that the stakeholder should be paid out where there is a recovery or whether as a general matter it would be better to wait until the end of the claim.

We submit that the former is right, where the contractual arrangement is that the class representative has entered into provide that. You are right, sir, to have said each application turns on its own facts.

THE CHAIRMAN: Yes.

MR MARVEN: But there are some general points of principle that I would briefly set out that we say supports that and, again, to the extent that general principles apply, although they would apply to particular facts, they are by their nature going to apply to applications generally.

THE CHAIRMAN: Mr Marven, what would be helpful is that you -- you don't need to do it now -- but you put on a piece of paper what you say should be the general guiding principles that we should apply in determining the exercise of our discretion, if we have it.

MR MARVEN: Yes.

THE CHAIRMAN: I give you liberty to file up to five pages on that, because you have so little time to do it.

MR MARVEN: Well, I am grateful.

THE CHAIRMAN: But for us, this is what you are looking for, which is guidance as to what the applicable principles should be. It would certainly help me if you could outline it.

MR MARVEN: I will certainly take that helpful indication up. I do just want to say something, because otherwise when I go to the evidence, I won't --

THE CHAIRMAN: No. No. Of course. But given that you know what I am looking for and that if it takes you a week to do it, that is absolutely fine. As long as you do it within a week.

MR MARVEN: Of course. Of course, I will.

THE CHAIRMAN: Thanks very much.

MR MARVEN: The principle, the starting point, of course, of my submission is that of course the Tribunal has a supervisory jurisdiction which, of course (several inaudible words) perspective. But the starting point, we submit, is the agreement that the Class Representative has entered into and that really cuts in at two points. One is at the point where the funding and other arrangements, such as insurance, are entered into and the second point at which it cuts in is where there is a settlement. So we say the starting point to the Tribunal, unless there is something that the Tribunal sees that it feels ought to be pulled out, is that the Tribunal ought as a general matter to endorse

both the funding and the settlement arrangements that the Class Representative has entered into, which would be on advice of those who have professional duties to the Class Representative.

I will come back to the evidence in this case as to the context, the market context, in which the funding arrangements were entered into.

In this application, the Tribunal has a wealth of evidence before it. That is no doubt reflecting the particular feature that I can't quite now say this is the first collective settlement (several inaudible words) but one of the very first that is sought. Also, this is a long-haul application in that this is only a settlement in respect of 1.7 per cent of the market. I would suggest that is why the Tribunal has before it --

THE CHAIRMAN: And the other aspect is that there is no request for an approval of a distribution plan.

MR MARVEN: Yes.

THE CHAIRMAN: And the other one that I have dealt with earlier on this afternoon, I don't know if you were here.

MR MARVEN: I listened in.

THE CHAIRMAN: You will see that I pointed out what the differences are between this case and that case. So it is a valid distinction that there is no distribution plan in this case, whereas in the other case I had to confront that because they were looking for something different to what was being looked at on this case, at this stage.

MR MARVEN: Yes. Indeed. I mean, I see that as an aspect of the fact that this is only a settlement in respect of 1.7 per cent.

THE CHAIRMAN: I think that is why it has come this way. Yes.

MR MARVEN: But, yes. I mean, no doubt because of the novelty of this application, there is a wealth of evidence before the Tribunal that I hope is found to be helpful. But our submission, as a general principle, is that the starting point for a Tribunal ought to

be to give effect to the contractual arrangements which on advice, et cetera, et cetera, the Class Representative has entered into. That leads me to a point that I know has interested this Tribunal, which is would it not be better to wait. Why now?

My first answer to that is that this is a situation in which, as I will come back to, the funding arrangements, the insurance arrangement, the arrangement with the lawyers that the Class Representative has entered into -- and I don't understand this to be subject to any dispute -- it entitles those stakeholders. So the stakeholders I represent but also the lawyers whom I don't represent, to payment of that or repayment now.

In my submission, the starting point should be that the Tribunal gives effect to that agreement and potentially, if that is what is agreed and it is negotiated and priced on that basis, but that is not given effect to as a general proposition at the end of the day. That does risk having a chilling effect on the market, not merely that it might become a bit more expensive but the funding and other support might not be available at all.

So that is my overall submission on why now. I will come to the detail of the evidence.

THE CHAIRMAN: Yes. Sure.

MR MARVEN: But my submission is: because that is what has been agreed. I don't say that with disrespect to the supervisory jurisdiction. But unless the Tribunal thinks that something has happened that needs to be called out -- and I will come on to address that and say why I say that isn't the case when I look at the evidence -- that is the starting point.

THE CHAIRMAN: Yes. But --

MR MARVEN: Sorry. Sorry. I am running over you, sir. I didn't mean to do that.

THE CHAIRMAN: Don't worry. Mr Marven, the fact is that I don't want it to be thought that just because you can put something in a contractual arrangement that it has to be dealt with now. I will be dealing with it now. I can see I should give some respect to it and take that into account. But it is not, in my view, an overriding consideration given

the supervisory jurisdiction of this court. But it is a factor. I am not saying it isn't a factor. But it is not an overriding factor and there is no presumption either way. I would like to deal with each one as they come.

MR MARVEN: Well, sir, of course each is to be dealt with on its --

THE CHAIRMAN: I am not disagreeing with you, but I am not agreeing with you. It is a bit more nuanced than what you have said.

MR MARVEN: Well, I have made the submission.

THE CHAIRMAN: I agree.

MR MARVEN: I do say that it -- I mean, obviously we are not neutral as to the outcome.

THE CHAIRMAN: No. No. Of course you are not.

MR MARVEN: I do say it would be helpful as a general matter to have some guiding principles as to the way in which the Tribunal approaches applications such as this.

THE CHAIRMAN: I agree.

MR MARVEN: Otherwise, I mean, it gives -- I don't need to rehearse this -- lack of certainty, risk of potentially inconsistent decisions, et cetera. My submission is the starting point is the contracts.

THE CHAIRMAN: If I can just, although I gave you a week, I have another two week hearing starting on Monday. So I have the whole of Friday free to look at this and other things and so if you get it to me by 10 o'clock on Friday, then it is going to be considered this week. If it arrives next week, it may be delayed a bit.

MR MARVEN: I hear that. I will do my best. I hear that.

Can I move on to what I say is a separated but related point, that I think you put as two bites of the cherry. I wouldn't want it to be understood or perceived that the stakeholders were potentially reserving the right to have two goes when really they are only entitled to one.

The position is that in agreement with the Class Representative, the stakeholders are not seeking to enforce in full at this point the contractual rights which they have already. But my submission is that is not of itself an argument for denying entirely effect to the part of those contractual rights, in agreement with the Class Representative they are seeking to enforce now.

We could, in theory, have come to court and asked for more. We could have come to court and asked for everything on the contracts. We have not done that.

THE CHAIRMAN: Well, because you know what the reaction would be.

MR MARVEN: Well --

THE CHAIRMAN: It is obvious. You are an experienced litigator.

MR MARVEN: We have not done that, but that is not in and of itself a reason.

THE CHAIRMAN: No.

MR MARVEN: It is not, as my learned friend has already said, the case that if we seek to enforce further our contractual rights. So when you say, as you have, we are reserving our position, we are not seeking to do anything the contract does not entitle us to do. What we are doing is not seeking everything that we are entitled to contractually now.

Of course, that again will be subject to this Tribunal's supervisory jurisdiction.

THE CHAIRMAN: Yes. Later on. Yes.

MR MARVEN: In my submission, therefore, the Tribunal does not need to be concerned on this application with what further applications might be made in the future, because they will all be subject to the supervisory jurisdiction that the Tribunal has.

In my submission, the right question is what is the fair return for the funders to have now at this stage. I will develop an argument as to what I would characterise as a very fair application for the sums sought in that application is the right amount now.

In my submission, that is the right way to approach this. What is it right that the stakeholder should recover at this stage, rather than looking to what might happen further in the litigation. But if I can just qualify that with one point. If one does look ahead, and let's suppose the situation that you put to my learned friend that there is failure against all the other defendants and so one is simply left with this pot, the Tribunal would still have to grasp the nettle, if I can put it like that, how much from this pot are the stakeholders entitled to.

THE CHAIRMAN: Yes.

MR MARVEN: Because what you would really have is damages that would be a small, small fraction of what if all the claims succeeded the claimants would have recovered. So unless it was positive that the stakeholders might not get anything back, the Tribunal is still going to have to grapple with the question how much of the available funds are for the stakeholders and how much are for the claimants.

THE CHAIRMAN: And that is not necessarily in terms of entitlement, given the discretion that we have.

MR MARVEN: Well --

THE CHAIRMAN: You may have a contractual entitlement.

MR MARVEN: Yes.

THE CHAIRMAN: Whether you get it or not, it depends on the discretion of the Tribunal.

MR MARVEN: Absolutely it depends on the discretion of the Tribunal. My submission -- and, forgive me, with my limited time I don't want to repeat myself -- is that the starting point is if it looks like a fair contract, there is no reason to call it out. That is where the Tribunal, the starting point or presumption would be, that the Tribunal would give effect to that. I have said that once already, so I won't say it again.

So payment now before distribution.

THE CHAIRMAN: Yes.

MR MARVEN: I have made the points about the contracts. I also say that it follows from first principles that where there is recovery, there would generally be payment to stakeholders.

Timing is an important and perhaps crucial issue to the stakeholders and I do just want to show the court, firstly, the challenges that there were in this case in obtaining funding and, secondly, the rigor with which it was all negotiated. Thirdly, the basis on which certain arrangements were reached. I am going to refer, and I notice, sir, you have been good enough to indicate you have seen these already and my learned friend has referred --

THE CHAIRMAN: Well, it is important to give me references, so when I come down to writing this up, I need to focus on the particular references.

MR MARVEN: So I will do that. I will do it to a significant extent just by reference.

THE CHAIRMAN: Yes. Give me the references.

MR MARVEN: So the first statement I wanted to refer to is the statement of Belinda Hollway. It is statement number 5, but the one on this application. That is at tab 5.

THE CHAIRMAN: Yes.

MR MARVEN: In particular, pages 72 to 75 and, really, paragraphs 23 and then 28 to 32. I won't go to it all now, but can I just ask the Tribunal to turn up tab 5 and page 72?

THE CHAIRMAN: Yes. Obviously, 23 I have read.

MR MARVEN: 23. Yes. I mean, I did want to emphasise that. That is precisely the paragraph I just wanted to emphasise.

THE CHAIRMAN: Yes. It is important. Yes.

MR MARVEN: There was a risk that there might not be any funding at all. Then the other paragraphs that I won't read to the Tribunal now explain that funders were looked

at, some funders were not fit for purpose, some funders did not want it. It was down to the wire and it is the view of the maker of that statement, Belinda Hollway, that there was not better funding on offer.

The statement I don't think you have seen specifically today from the broker, Mr Jonathan Simon. That is at tab 18. In particular, page 557, paragraphs 12 to 15. Again, I will summarise this rather than ask you to turn it up now, but I would ask the Tribunal to turn it up before giving judgment.

THE CHAIRMAN: Yes.

MR MARVEN: He explains they went to the market, contacted initially with ten insurers, A listed insurers. Reduced it to five, looked at nonbinding heads of terms and ended up with the insurers that you have. Again, a competitive process.

All this is in the context -- and, again, just as is said in Belinda Hollway's statement -- that the CAT proceedings because this is a developing jurisdiction were regarded as costly and novel and obviously, therefore, carrying risks with them in circumstances where at the time, except the Court of Appeal in Merricks, no certification had been made. Carriage disputes, et cetera. That is all in Belinda Hollway's statement.

THE CHAIRMAN: Yes.

MR MARVEN: The other statement I just want to go to is that of Mr Steven Friel of Woodsford. So this is more to do with the funding. That is at tab 8. In particular, paragraphs 34 onwards. Can I just turn that up?

THE CHAIRMAN: What page?

MR MARVEN: So in particular at paragraphs 34 to 36. It is page 118. In fact, it starts at 117. I just want, in terms of timing, I just wanted to emphasise. If I can invite the Tribunal when it is convenient to read really from paragraph 34 to paragraph 37, or paragraphs 33 to 37, which deal with the calculation of the funder's fee.

THE CHAIRMAN: Yes.

MR MARVEN: Also, paragraph 45 and in particular 45(d) on page 126. I won't say any more about that. That is in the confidential part of the evidence.

Also, page 136, paragraph 60.

Just finally, on paragraph -- I will come back to one or two of these points -- on paragraph 138, paragraph 60(g). Can I actually -- at the risk of doing this in reverse order -- just start with page 138, paragraph 60(g).

THE CHAIRMAN: Yes.

MR MARVEN: Where he says:

"In the most developed class action regime in the world that is underpinned by third-party funding, Australia, costs such as funder's fees are regularly paid out of proceeds before distribution to a class. The fact that the Australian class action regime is successful is seen by the statistics from the report of Professor Morabito. Evidence is that allowing stakeholders' fees to be paid from proceeds before distribution supports a functioning class action regime that provides broad access to justice."

THE CHAIRMAN: And do we know -- what is the position in Canada? Do we know what that is?

MR MARVEN: I don't think it is specifically addressed in the statement.

THE CHAIRMAN: No. It isn't. No.

MR MARVEN: I am told it is the same. That is what I am told: it is the same.

THE CHAIRMAN: If there is any literature that actually says that, just append it to whatever your submissions are. At least I can note that as well.

MR MARVEN: Well, sir, I am very grateful for that opportunity, and I will certainly, happily, take you up on that invitation, sir. I will try to get that back to you, as soon as I can.

MR GIBSON: You may have seen -- sorry to interrupt.

MR MARVEN: No. No. Not at all.

MR GIBSON: In Canada, we do include in the authorities bundle two articles towards the back.

THE CHAIRMAN: Oh, yes.

MR GIBSON: They do deal with a number of jurisdictions in which Canada is one of them. One of the articles is quite out of date now but the other one is more recent.

THE CHAIRMAN: Well, I am sure Mr Marven can cover that in his note.

MR MARVEN: Yes. I am happy to do that. Of course, the point is made at page 119, paragraph 37, that clause 11.1 that you have already seen requires the class representative to make this application and the funder's fee was calculated on that basis.

So that is the basis on which the funding was calculated. It is a matter of importance to the funder when pricing the risk of delay that a funder can proceed on the basis that when there is a recovery from any defendant, it will be entitled to repayment or at least to an extent.

I do want to stress that the amount sought in the context of what has been spent on this dispute already is not excessive. It is modest.

I am sorry to jump around the evidence. Can I go to tab 5, pages 82 to 83, which I think you have seen already. This is from pages 82 and 83, from the statement of Ms Hollway again.

On page 82, you see the amount that has been outlaid already. So the outlay of the funder in round terms is 3.5 million. You did ask and this isn't a figure of the evidence, but I have taken an instruction on it, you did ask how much of that has been paid out in respect of what one would call court costs, if I can use that as a shorthand.

THE CHAIRMAN: Yes.

MR MARVEN: The answer is approximately 2.7 million is in respect of court costs.

So that is leaving aside things that could not be recoverable as costs.

One might take off that the 1,189,000 recovered cost, but just to stress that figure comprises the 809,000 recovered inter partes already and also the 380,000 -- because this is how the figure is made up -- the 380,000 that the Tribunal knows about. So that is on the premise that the 280 is included in that figure.

So that would take us down to 2.7 million. That would take us down, in terms of the excess that is yet to be paid, still over 1.5 million. Actually, it is important in this context, I stress, that in terms of what is recoverable as costs it exceeds what the funder has paid because the funder, of course, has only funded the discounted level of fees for solicitors and barristers. Whereas, as my learned friend explained, it is up to the 100 per cent figure that is recoverable inter partes.

We know what those figures are, just going back a page. We know what the unfunded costs which are recoverable inter partes are because it is at paragraph 53 for the solicitors' fees and paragraph 57 for the barristers' fees.

In short, the difference between the discounted charges that the funder has paid and the 100 per cent normal charges which were recoverable inter partes is about 2 million for the solicitors and 194,000 for the barristers.

So against that, the funders have agreed with the Class Representative (inaudible) now and you have seen the figures already, about 410,000. So it does not even touch the sides of what has been invested. So that is why I say, I submit, it is a reasonable and modest figure.

I did want to say something about the jurisdiction. In a sense, as long as the Tribunal is satisfied it has jurisdiction, it may not matter. It may not be of primary importance precisely where that jurisdiction is. But I adopt everything my learned friend has said about this.

THE CHAIRMAN: I think he has dealt with jurisdiction in a lot of detail.

MR MARVEN: He did. Rule 53 clearly covers everything.

THE CHAIRMAN: Yes.

MR MARVEN: I did just want to say that my submission is there is really no doubt that rule 94 gives this Tribunal jurisdiction. It would be very surprising if it did not, because that is clearly the rule that deals with supervision of settlements.

I just wanted to say, that would be the conclusion I would suggest the Tribunal would want to reach, because in terms of application of rule 94, it is not a question of timing. If rule 94 does not give you jurisdiction now, it does not give you jurisdiction ever. Even if all 12 defendants are settled and I was here before you today in that situation, once one recognises that rule 94 explicitly envisages partial settlement, if it does not give you jurisdiction now it does not ever give you jurisdiction. That would be a surprising outcome.

THE CHAIRMAN: Well, unless you can get it from rule 53.

MR MARVEN: Yes. Well, 53 is a general rule and I am sure I can get it.

THE CHAIRMAN: In which case, there is no lacuna because you are saying, well, it is covered by 53. So we may be going round in a circle.

MR MARVEN: Yes. 53 is obviously there, as rules often are, to make sure that there are no gaps and to give a very broad power in a case that the rule making committee has not thought of a particular situation.

But I do say there is no difficulty with rule 94. Just one further point on that, that is against the context, of course, that it is not so much the Tribunal having a right to make an award, it is the Tribunal having the jurisdiction to make an award of a payment to stakeholders.

THE CHAIRMAN: I understand that. Yes.

MR MARVEN: It is a question of the Tribunal having the jurisdiction to supervise it and in court proceedings, as you will know, there is no such jurisdiction to supervise.

That does not mean funders and insurers don't get paid their fee and their premium, because there is a contract.

So that is why I say it is the conclusion the Tribunal would want to reach, that it had ample jurisdiction. Because lack of jurisdiction does not do away with the stakeholders' contractual rights. It does away with the Tribunal's rights. If it is said: well, this is out of scope. Then it does not do away with the contractual rights, it does away with the Tribunal's jurisdiction to supervise those rights which, I am sure, is not a conclusion anyone on the Tribunal would want to reach.

So there is ample jurisdiction there. Sir, can I just turn my back on the court?

THE CHAIRMAN: Of course. Yes. **(Pause)**

MR MARVEN: Sir, I have done it in five minutes less than I thought I was going to need.

THE CHAIRMAN: No. That is very helpful.

MR MARVEN: I hope that is -- unless there is anything you want to ask me, those are my submissions. But we will put that note in.

THE CHAIRMAN: I think that what would be helpful is that any further points or whatever either side wants to make, as long as it arrives by 10 o'clock on Friday, will be considered.

MR GIBSON: Sorry to stand up. I am in some difficulty with that, because I am preparing for a hearing on Friday.

THE CHAIRMAN: But Mr Marven will cover.

MR GIBSON: No. No. Absolutely. To the extent that the Class Representative would like to make any additional submissions, it may be that we hope that you will consider them after your two-week trial, if that is possible.

THE CHAIRMAN: Okay. All that means is you are going to wait longer. That is absolutely fine. So if you need more time, we will know by 10 o'clock on Friday. When

is the stop date for you?

MR GIBSON: Once I am clear, I have a hearing that is on Friday and Tuesday. Book ending the bank holiday weekend, rather uncomfortably. After that, this will be the primary focus.

THE CHAIRMAN: Okay. That's fine. So you will have until Thursday of next week.

MR MARVEN: I will get it in by Friday.

THE CHAIRMAN: Yes.

MR GIBSON: It may be that we can do something. I just wanted to at least have the latitude to --

THE CHAIRMAN: Of course you can. But you have a very experienced junior who can help you, if need be. But you have made your submissions in full and I do want Mr Marven to have further opportunity, because I have asked him to do something specific. The points I have asked your team to do specifically, that can be done between your solicitors and the junior.

MR GIBSON: Absolutely.

THE CHAIRMAN: Yes.

MR GIBSON: Can I make one observation that my learned junior pointed out to me, I forgot to mention earlier. It is a point that did not make it into our skeleton, despite having been included in the draft. Mr McLaren in his witness statement, third witness statement, paragraph 31 -- if I have the reference correct -- makes the point that there is a distinction between --

THE CHAIRMAN: Give me the reference. McLaren third, paragraph, what?

MR GIBSON: Paragraph 31, page 23.

THE CHAIRMAN: So the bundle tab, which number?

MR GIBSON: Sorry. Tab 3 of the bundle.

THE CHAIRMAN: Yes.

MR GIBSON: Page 23.

THE CHAIRMAN: Yes.

MR GIBSON: McLaren 3, paragraph 31.

THE CHAIRMAN: Yes.

MR GIBSON: He points out the clause, the operation of clause 11 of the revised litigation funding agreement provides that the funders' fee will be lower in the event that they are paid out prior to distribution. That is just one --

THE CHAIRMAN: I remember that point from last time. I looked at that last time.

MR GIBSON: Yes. I think it is an important point. It is like the flip side. We say that it is important that they are paid out earlier and they recognise the value of that too then. They are prepared to take a discount that reflects the benefit to them of that happening. I think it is an important point to keep in mind. It is not that they are asking for the same thing regardless, there is a recognition there is a commercial value in that.

The other point that I didn't take the Tribunal through is I would ask you to read Hollway 4, which is the witness statement for the collective settlement, in the collective settlement bundle volume 1, tab 3, pages 75 to 77, at paragraphs 55 to 56 of Hollway 4. Ms Hollway sets out --

THE CHAIRMAN: What paragraphs?

MR GIBSON: 55 to 66.

THE CHAIRMAN: Yes.

MR GIBSON: She sets out in meticulous detail -- sorry, that is page 73 to 77, not 75 to 77 -- how the proceedings cost sum, that £280,000, was calculated. What you will see from that is that it was calculated having regard to the proportion of the overall cost that was then, at the time it was calculated, then being incurred, taking a one fifth proportion --

THE CHAIRMAN: Oh, I know how that was done. Don't worry.

MR GIBSON: Perfect. Excellent. But those details, I think, are quite instructive.

THE CHAIRMAN: Okay. All right. So we will reserve our judgment on this. We will put in something on the costs of the collective settlement application that we have, in view of the fact that it had gone over 100,000. I presume that when we are dealing with at this point is the costs of and up to the date that you got the ruling last time. So if up to the date of the ruling the costs were, let's say, 150 -- and I think that is reasonable -- then you will get 150 and that 50 can be taken out now from the 280.

MR GIBSON: So that is clear. To what extent are the costs of preparing for this application, given its importance to the regime and the fact we have done it -- tried to do it on an even-handed basis? Would that be something that in addition could be taken out of that amount, as an additional sum?

THE CHAIRMAN: No. I think I would have to take a view on that when it comes later. So if you can --

MR GIBSON: Shall we set that out in our letter as well?

THE CHAIRMAN: Put it in the letter, yes, as well.

MR GIBSON: Okay.

THE CHAIRMAN: Then I can take a view.

MR GIBSON: I am grateful, sir.

THE CHAIRMAN: I was not really focusing on that.

MR GIBSON: No. No. I appreciate that. It just occurred to us.

THE CHAIRMAN: Yes. Okay. That's fine.

Right. We are allowed to go now, are we? We have done our bit?

MR GIBSON: Yes, sir. We are very grateful to you for sitting late and accommodating particularly our rapid-fire submissions towards the end there.

THE CHAIRMAN: No. It is our pleasure. Thank you very much.

(The hearing adjourned)

(5.32 pm)