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IN THE COMPETITION

CaseNo: 1289/7/7/18

APPEAL
TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 4th - Wednesday 5th June 2024

Before:

The Honourable Mr Justice Roth
Dr William Bishop
Professor Stephen Wilks

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Road Haulage Association Limited

Proposed Class Representative

RHA Used Trucks Limited

Proposed Sub-Class Representative

V

MAN SE and Others

Defendants

A P P E A R A N C E S

James Flynn KC, David Went, Harriet Hartshorn and David Illingworth on behalf of Road Haulage Association Limited

David Scannell KC and Laurence Page on behalf of RHA Used Trucks Limited
Daniel Jowell KC and Tom Pascoe on behalf of MAN (First to Third Proposed Defendants)

James White on behalf of Iveco (Fourth to Seventh Proposed Defendants)

Meredith Pickford KC and Nikolaus Grubeck on behalf of DAF (Eighth to Tenth Proposed Defendants)

Jamie Carpenter KC on behalf of the Proposed Defendants

Mark Hoskins KC and Jacob Rabinowitz on behalf of Volvo Lastvagnar Aktiebolag (Objector).

Ben Rayment on behalf of Daimler AG (Objector)

Tuesday, 4 June 2024

1
2 (10.30 am)

3 (Proceedings delayed)

4 (10.43 am)

5 THE CHAIR: Good morning.

6 We start as always with a warning. These
7 proceedings are being live-streamed and an official
8 transcript of the proceedings is being made. It is
9 strictly prohibited for anyone to make any unauthorised
10 recording or take any visual image of the proceedings
11 and to do so is punishable as a contempt of court.

12 We thank the parties for your skeleton arguments and
13 we see from that that quite a lot of progress has been
14 made since the responses were filed to try and narrow
15 the issues, to address, on the part of the class
16 representative and the proposed sub-class
17 representative, some of the points raised by the
18 defendants. We are very grateful for that. No doubt it
19 is the result of a lot of work behind the scenes by the
20 large teams involved, and it means that this hearing
21 will be much more efficient and streamlined than would
22 otherwise be the case.

23 We did have two preliminary questions we wanted to
24 raise. The first is we have seen, of course, what has
25 been said about the new litigation funding agreements

1 for the RHA and for the proposed sub-class
2 representative. As you will know, there was a bill to
3 reverse the Supreme Court judgment in *Paccar* before
4 Parliament. That bill lapsed with the calling of the
5 general election. We obviously do not know whether it
6 will be reintroduced in the new Parliament by whatever
7 government we may then have, but it seems not unlikely
8 that it may be reintroduced, it is a very short bill,
9 I think two clauses, and it is not really controversial.

10 So we wondered if indeed it is reintroduced and
11 passed so that the percentage for the litigation funding
12 agreement is not caught by the legislation dealing with
13 damages-based agreements, do the class representative
14 and sub-class representative tend to revert with Therium
15 to the former funding arrangement they had originally,
16 or would now be open for the sub-class representative.

17 Mr Flynn, we are not asking you for an immediate
18 response to that.

19 MR FLYNN: I am grateful for that, my Lord.

20 THE CHAIR: Unless it is something that has already been
21 discussed and you know the answer straightaway.

22 MR FLYNN: I would clearly want to take -- even though this
23 hearing is not remote -- we are having that echo again.

24 I would clearly want to take instructions on that point.

25 THE CHAIR: Yes, and if you can let us know perhaps

1 tomorrow, that would be helpful.

2 MR FLYNN: Thank you.

3 THE CHAIR: Because that might change the arrangements you
4 have.

5 The second preliminary matter was we have seen the
6 costs budget and litigation plan for the proposed
7 sub-class representative. The CPO is of course sought
8 by the RHA, and so there is the question of the cost
9 budget and funding for the RHA.

10 Now, we had an original cost budget, and we looked
11 at that, if I say last time, that is quite a long time
12 ago now, I think it is from 2018 or even 2017. I do not
13 think, unless we missed it, we have got a revised cost
14 budget. It did seem to us that there probably ought to
15 be an updated cost budget. Clearly many costs may have
16 gone up, but equally the fact that certain matters are
17 now being dealt with by the sub-class representative may
18 mean that certain issues or areas that were covered by
19 the RHA cost budget now drop out, so there may be some
20 changes.

21 I do not think a revised cost budget has been
22 prepared and if not, we feel we ought to really see one
23 and look at that as against the level of funding, and it
24 is a question of when that might be produced, whether it
25 is in the next week or what the position is. Mr Flynn?

1 MR FLYNN: Sir, you are right that there is not one in the
2 many papers that are before you. I think the idea is
3 that we would need to know whether the Tribunal is
4 approving the arrangements that are being proposed, and
5 then, as you have said on many occasions, budgets move
6 along and, you know, it is not a science, and we will
7 happily provide a revised budget which as you say may
8 lead to some reallocation as between the RHA and the
9 sub-class representative, and that can be done. Perhaps
10 I will reserve giving you a time estimate for that
11 immediately, but there is no reason why that should take
12 an undue amount of time once everything else is in
13 place, as it were.

14 THE CHAIR: It is a little bit chicken and egg --

15 MR FLYNN: It is.

16 THE CHAIR: -- because we normally see the budget as part of
17 the approval, and I understand the view might have been
18 taken, well, that is all water under the bridge, that
19 has been done, and indeed we did, but we are only coming
20 to make, for reasons we all know, the CPO now, so we
21 probably ought to see it before actually making a CPO.

22 MR FLYNN: Quite.

23 THE CHAIR: We assume that whatever costs it showed are
24 covered by Therium's current funding arrangement.
25 Again, if you can take instructions, let us know

1 tomorrow with a time estimate, but we would hope it
2 would be no more than two weeks at the outside.

3 MR FLYNN: No, no, quite so.

4 THE CHAIR: We will come back to that.

5 Right, those are the preliminary points. I should
6 also just mention we did receive a very short witness
7 statement from -- we got it this morning, it may have
8 come in on Friday -- from Mr Fidler. Is it Fidler or
9 Fidler, how do I pronounce it?

10 MR SCANNELL: It is Fidler.

11 THE CHAIR: Fidler, from Mr Fidler's second witness
12 statement, so we have got that.

13 I think it is sensible, we thought, to deal with
14 matters in order by subject, by issues, rather than sort
15 of hearing everything from each of the defendant's
16 representatives and then going back, because some of the
17 issues we should be able to resolve in the course of the
18 hearing without needing a reasoned judgment, some are
19 quite small or confined, and on that basis we thought
20 probably today we would be taking basic points on
21 conflict and funding, and then the more detailed matters
22 regarding the wording of the CPO and the Rule 81 Notice
23 we will probably get to tomorrow, so that seemed to us
24 a sensible way of proceeding.

25 On conflict, therefore, as we understand it, from

1 what we have read, there is now no issue raised
2 regarding the arrangements for separate legal
3 representation, there is no issue raised regarding the
4 separate arrangement for a separate expert.

5 What we are dealing with are (a) the information
6 barrier or Chinese walls, if you like, within the RHA
7 through the new company; secondly, the question of the
8 allocation or division of issues between class
9 representative and sub-class representative, and
10 thirdly, funding arrangements with Therium, and we
11 include with that the question we will get to of the ATE
12 policy, the ATE insurance. Those seem to us sort of the
13 major issues that have been raised on the written
14 materials.

15 So if we deal with them, as it were, in that order.

16 So the first then is the RHA and the new company,
17 RHA Used Trucks Limited or RHA RUTL and again there has
18 been a lot of clarification and some amendments made,
19 and you will no doubt correct us if I have this wrong,
20 but as I understand it, there are now really two
21 outstanding points raised: one is if there is a change
22 in the team, this is with the class representative, that
23 is RHA, the team who will be dealing with this matter in
24 the RHA, that any new person coming into the team should
25 not be someone who was previously involved in the

1 litigation. That has been stated on behalf of the
2 sub-class representative. I think the points made in
3 the skeleton from MAN that they have not had the same
4 confirmation from the RHA. That, I think, is the first
5 point raised.

6 Submissions by MR FLYNN

7 MR FLYNN: Yes, my Lord.

8 If we are going straight into details then I can do
9 it that way.

10 I wonder if it might be sensible for you to hear on
11 the points that you have raised as between the division
12 of labour, I wonder if it might be sensible for you to
13 hear from the sub-class representative about how it is
14 actually structured.

15 THE CHAIR: Well, we will get to that. I just wanted to
16 deal with what, as I see it, are the two conflict points
17 raised specifically.

18 MR FLYNN: On your short point there I think it is correct
19 that in a witness statement from Mr Smith which was
20 lodged, I think, again on Friday, he gave the
21 confirmation that you have just mentioned.

22 MR JOWELL: Yes, sir, that is correct. That confirmation
23 has now been given in a witness statement from Mr Smith
24 and we are content with that, so there is just the one
25 remaining issue.

1 THE CHAIR: Yes, thank you very much.

2 MR FLYNN: We had taken the point and Mr Smith said that it
3 sort of followed from the undertakings that people were
4 giving within the RHA that they could not cross that
5 barrier, as it were, so we had not thought it needed
6 spelling out, but we were happy to spell it out and
7 Mr Jowell is now satisfied.

8 THE CHAIR: Yes, that is his third witness statement?

9 MR FLYNN: Yes.

10 THE CHAIR: Yes, thank you. Yes, that just came in. I have
11 not seen that.

12 MR FLYNN: No.

13 THE CHAIR: Are there any other points then raised before
14 I hear from Mr Scannell by -- I think it is Mr Jowell
15 who is leading on this -- regarding information barriers
16 or arrangements, it is essentially information barriers,
17 before we get to division of issues, as between the RHA
18 and the new company?

19 MR JOWELL: Yes, our only outstanding ask is that the two
20 representatives --

21 THE CHAIR: Sorry, just before you proceed, for the
22 transcript, can you identify yourself?

23 MR JOWELL: I am Mr Jowell for MAN.

24 THE CHAIR: Very good.

25

1 Submissions by MR JOWELL

2 MR JOWELL: Our outstanding request is that they should
3 undertake to update the Tribunal and the proposed
4 defendants if there are any additions to the respective
5 teams on either side of the information barrier, and the
6 reason that we request that is that it is necessary to
7 understand where those team members are potentially
8 working, and what their histories are, of other
9 involvement, and if I can -- perhaps I should expand on
10 that a little.

11 So the basic principles on conflict of interest are
12 well-established from the *Bolkiah* case. The RHA and
13 RUTL must establish that there is no risk of misuse of
14 confidential information between them, and that is
15 a heavy burden. The risk needs to be a real one, but it
16 does not have to be a substantial one. So there must be
17 absolutely no risk. They must be effectively watertight
18 information barriers.

19 Now, information barriers are acceptable in
20 principle, but the House of Lords made clear in the
21 *Bolkiah* case that in order to be effective, those
22 barriers need to be generally, at least, institutional
23 or, as they put it, part of the organisational structure
24 of the firm or entity, they cannot just be ad hoc and it
25 is not enough just to say: oh well, the individuals

1 concerned have given an undertaking not to discuss
2 matters, and that is why what one sees in the case law
3 consistently is generally a requirement for some form of
4 physical separation between the two teams, and one sees
5 that also in the two cases that are mentioned by my
6 learned friend in his skeleton, the *Young v Robson*
7 Rhodes case and also the *Koch* case in the
8 Court of Appeal.

9 In the former case -- and I can take you to it if it
10 is necessary -- but in the former case, the undertaking
11 obliged the relevant individuals not to work at any
12 premises in which any of the persons worked and not to
13 have any professional contact with them, and in the
14 other case, the Court of Appeal case, where the
15 solicitor moved to Richards Butler, the individual had
16 to promise not to discuss -- not just to not discuss the
17 litigation with the case handlers in the other team,
18 they had to promise not to discuss anything, to have no
19 communication at all with the case handlers on the other
20 team.

21 So the information barriers need to be quite strict
22 and our concern is that although we are satisfied at the
23 moment that there is a sufficient separation, it is fair
24 to say there is one individual who shares offices with
25 people in the other team, but we say, well, that is one

1 individual working part-time, they have separate offices
2 upstairs which they can use, and we are prepared to be
3 pragmatic about this and accept that, but if there were
4 to be a number of other individuals sharing the
5 Peterborough offices, then we would suggest that that
6 would not meet the *Bolkiah* test, potentially at least,
7 and so therefore --

8 THE CHAIR: It is not a matter for you to be satisfied of.

9 MR JOWELL: No, it is a matter --

10 THE CHAIR: It does not really bother you in the slightest;
11 it is a matter for the Tribunal.

12 MR JOWELL: It is a matter for the Tribunal, indeed, and
13 that is why we say --

14 THE CHAIR: It is not in your interests.

15 MR JOWELL: I am not sure we would accept that entirely, and
16 the Court of Appeal has accepted that there needs to be
17 such a separation.

18 THE CHAIR: Yes.

19 MR JOWELL: And we are entitled to insist on it, in my
20 respectful submission, and the Tribunal also must be
21 satisfied that there is a sufficient barrier there, and
22 so all we say is if there are to be -- if there are to
23 be new persons added, the Tribunal and we should be
24 notified of that fact in order that we can then verify,
25 as we have done to date with the existing individuals,

1 that there are sufficient institutional organisational
2 barriers in place to ensure that this is not a leaky
3 sieve, as it were. That is all we ask, and we do not
4 think it is a --

5 THE CHAIR: Yes. You accept that for the existing teams.
6 You are hanging back --

7 MR JOWELL: Yes, we are content now with the arrangements in
8 relation to the existing teams, but of course that can
9 all be undermined if half a dozen people enter who are
10 all in the Peterborough office and working closely on
11 lots of other matters with the other individuals in the
12 other team. So we say we need to know, and certainly
13 the Tribunal needs to know, if there are more
14 individuals added.

15 THE CHAIR: Yes. So Mr Flynn, and then Mr Scannell, if you
16 wish.

17 Submissions by MR FLYNN

18 MR FLYNN: As you said to my friend just now, sir, this
19 aspect of the conflict does not really concern the
20 proposed defendants. What we are on is certification
21 and the Tribunal being satisfied that the arrangements
22 in place are satisfactory. We would not envisage that
23 the defendants would have an ongoing policeman role in
24 relation to these matters; these are for the Tribunal.

25 If the Tribunal considers it necessary to be

1 informed, as it might be, for example, in the case of
2 confidentiality rings and people coming in and out, then
3 of course we will do that, but the essential question,
4 and the case law makes it clear, is are these measures
5 going to work, and given what you have seen and the
6 undertakings that have been given, the clear
7 understanding on the part of both teams, as it were,
8 that their respective roles and the importance of not
9 crossing these lines, my submission would be that you
10 can be so satisfied now and you know that anyone coming
11 on to either team will have to give the undertakings and
12 be trained in the role. You have seen that, and you
13 know that people will not be crossing the floor, as it
14 were, from one group to the other.

15 So in my submission you have the necessary
16 assurances. Nevertheless, should the Tribunal wish to
17 be kept up to date of any movement then of course that
18 is something which the RHA certainly, and I will not
19 speak for the PSCR, but would be prepared to give.

20 THE CHAIR: Yes, Mr Scannell, do you want to add anything?

21 Submissions by MR SCANNELL

22 MR SCANNELL: To begin with, could I just endorse what
23 Mr Flynn has said about the important distinction
24 between complaining about a conflict of interest on the
25 one hand and determining whether or not the statutory

1 requirements, the CPO requirements are met on the other.
2 That is a very important distinction which, with respect
3 to everybody who has argued about these issues in the
4 past, has not really been brought to the fore to any
5 great extent.

6 The Court of Appeal has made it very clear in the
7 past, not the Court of Appeal in this case, but in other
8 cases, they have made it very clear that third parties
9 have no place complaining about conflicts of interest
10 when none of the interests at stake are theirs.

11 We have put the *Sailmakers v Berthon Boat* case into
12 the joint authorities bundle, I do not think there is
13 any need to take that up, but it shows that the
14 Court of Appeal has emphasised that not even a judge can
15 complain about a conflict of interest when neither of
16 the parties whose interests are at stake actually makes
17 any complaint in relation to that, and the distinction
18 is not a purely academic one, it does actually matter,
19 because when it comes to deciding whether or not the CPO
20 requirements are met, this Tribunal obviously enjoys
21 a broad discretion and that a discretion that does not
22 apply when a court, for example, is determining on an
23 injunction application or similar that somebody whose
24 interests are at stake are actually -- is actually at
25 risk of having those interests trammelled.

1 With that context in mind, we have already explained
2 in evidence the arrangements which have been made in
3 relation to Ms Barsby who is the member of the sub-class
4 representative who works from the Peterborough office,
5 and I am grateful to Mr Jowell for clarifying that they
6 are content with the arrangements in that regard.

7 We do, subject to agreeing with Mr Flynn that the
8 OEMs should not, going forward, be in a policeman role
9 in relation to this, we do not have any particular
10 objection to letting the defendants know if there is
11 a change in the PSCR panel or team. Both of those are
12 explained in Mr Snowden's evidence.

13 THE CHAIR: Yes, thank you. We will just take a moment.

14 (Pause)

15 (11.07 am)

16 Ruling - redacted pending approval

17 (11.10 am)

18 MR FLYNN: Understood, my Lord. I am grateful, thank you.

19 THE CHAIR: Now, apart from those two points, is there any
20 other issue regarding information barriers?

21 MR JOWELL: No, sir, they have all now been resolved.

22 THE CHAIR: Mr Pickford?

23 MR PICKFORD: There is an issue about the information
24 barriers in relation to Therium, but that is a different
25 issue. I wanted to make sure that was clear.

1 THE CHAIR: No, no, we had not forgotten the funding. That
2 was, just to be clear, Mr Pickford for DAF who was
3 intervening to make that point.

4 MR PICKFORD: Thank you.

5 THE CHAIR: In that case, having looked at the material, we
6 are satisfied with the arrangements that have been put
7 in place for a new sub-class representative.

8 The next point I think is the question of the
9 allocation of the issues between the class
10 representative and sub-class representative and how that
11 could affect possibly settlement. We have this
12 statement of the allocation of issues in various places,
13 I think. I do not know which is the most convenient one
14 to turn to and who is going to deal with that. Is that
15 you, Mr Scannell?

16 Submissions by MR SCANNELL

17 MR SCANNELL: I will deal with it on the basis that what has
18 happened is that the used trucks sub-class common issues
19 have been carved out of the common issues generally
20 which were the issues the Tribunal dealt with before, so
21 it seems logical for me to --

22 THE CHAIR: Where should we go for the list?

23 MR SCANNELL: As you rightly say, it is all over the place,
24 these used truck sub-class common issues. Could I take
25 it from the litigation management agreement that the

1 used truck sub-class representative will be concluding
2 with its class members?

3 THE CHAIR: You can. That is the one thing we have not --
4 well, many things we have not got in hard copy. If you
5 can possibly take it from either a skeleton or a witness
6 statement or one of the responses.

7 MR SCANNELL: Could I take you through this on Opus so that
8 we can see it on the screens?

9 THE CHAIR: Yes. It is just something -- let me see where
10 I have -- if I look at the application, the joint
11 application, you can do it on Opus, I think it is on
12 core bundle 002. What will that be? Which is your
13 joint application following remittal. No, that is MAN's
14 response.

15 MR HOSKINS: I have it in the core bundle, tab 1, page 3.

16 THE CHAIR: Yes, exactly. That is it, yes, exactly.
17 {CO/1/3}.

18 Can we take it from --

19 MR SCANNELL: I think we can, but for the purposes of the
20 points I was going to make I do not think it really
21 matters where I take these from. I think the important
22 thing to begin with is that you can see the used truck
23 sub-class common issues and you can read that to
24 yourselves, because that was the first thing I was going
25 to ask you all to do.

1 THE CHAIR: Yes.

2 MR SCANNELL: If there is an Opus operator who can change
3 the look of the shared screens, just for my own purposes
4 I am taking this from {RM-E/12}. If we could scroll
5 down, please, to the bottom of -- it is probably page
6 {RM-E/12/15} and recital (D). So if we could scroll
7 down from there, please. Sorry, could we turn actually
8 to Opus page {RM-E/12/114}, and then (D) at the bottom
9 of that, and over the page to {RM-E/12/115}. Yes, thank
10 you.

11 So just so that we are clear, members of the
12 Tribunal, what I am looking at is the recitals to the
13 litigation management agreement that the used trucks
14 sub-class representative will be entering into with the
15 sub-class members, and it too sets out the used trucks
16 sub-class common issues.

17 As I understand it, there are two main objections or
18 observations that are made on the scope of these used
19 trucks issues. The first of those is that they include
20 leases of relevant trucks, not just purchases, and the
21 second follows on from that which is what should the
22 run-off period for used trucks leases be.

23 Those two are closely related because as we
24 understand Iveco's objection, for example, the reason
25 they would like leases not to be included in the used

1 trucks common issues is that if they were not included,
2 they would then be subject to a shorter run-off period
3 which applies to new trucks.

4 Now, as to whether the used trucks issue should
5 include leases, we say that there are two perfectly good
6 reasons why they should.

7 MR JOWELL: I am so sorry to interrupt, and forgive me for
8 doing so, but I do not know whether this is the point
9 that the Tribunal had in mind because I think this
10 question of the precise scope of the issues is certainly
11 not a point that we have raised in our skeleton
12 argument, and it may be a point I think that Iveco has
13 raised.

14 THE CHAIR: Yes, I think you are right, Mr Jowell. I think
15 the two points that I think that certainly I had
16 understood that you were raising on division of issues
17 was -- one was regarding interest.

18 MR JOWELL: Yes.

19 THE CHAIR: The other was regarding -- was it the impact on
20 new truck prices?

21 MR JOWELL: Yes. I mean, our point is a rather more general
22 one which is that there should be some ability of the
23 used truck representative to comment on those retained
24 issues that you have mentioned, but I think Iveco has
25 a different point which is this quite -- more specific

1 points about the specific -- and I felt that there was
2 probably a misconception.

3 MR SCANNELL: I have not forgotten Mr Jowell's submission at
4 all. I think, I believe the net position is this: Iveco
5 would like the used trucks issues to be narrower because
6 they do not want leases. Mr Jowell would like them to
7 be broader because the argument that comes from MAN is
8 that there are all sorts of other issues that should be
9 put into the used trucks issues because if they are not
10 put in, then there is a risk that there will not be
11 complete independence between the RHA and RHA Used
12 Trucks Limited.

13 MR JOWELL: Indeed, that is our point.

14 MR SCANNELL: So I will deal with both of them, and to be
15 fair I do not think that I should chop one out and not
16 deal with it.

17 THE CHAIR: Yes.

18 MR SCANNELL: I think the prayer was I was suggesting there
19 were two good reasons why the used trucks issue should
20 include leases. The first is a fairly obvious point
21 that trucks that have already been leased at least once
22 will logically not be new trucks; they will be used
23 trucks in a very literal sense.

24 The prices that are paid for leasing those used
25 trucks are more likely to be referable to used trucks

1 prices than to new trucks prices, so there is a pretty
2 obvious logic, we would say, in the used trucks
3 sub-class representative having carriage of the question
4 whether the cartel caused losses to lessees of used
5 trucks. That is the first point.

6 The second point is that the same or at least
7 a similar conflict arises as between new and used trucks
8 purchases; the same or a similar one arises in respect
9 of leases. So thinking about new trucks buyers and
10 lessees of those trucks, apart from the first lessee,
11 there is obviously a conflict because the buyer might
12 want to contend that they absorbed all of the overcharge
13 that was caused by the cartel and that they did not pass
14 it on to lessees from them, but a subsequent lessee may
15 well wish to contend that some of that overcharge was
16 passed on to them.

17 As between the first lessee and later lessees, and
18 I would just remind the Tribunal that the first lease
19 would be a new trucks issue, not a used trucks issue, so
20 as between the first lessee and subsequent lessees,
21 there is also a conflict because the first lessee might
22 say, well, although there was some supplier pass on from
23 the lessor to me, it was fully passed on to me, whereas
24 subsequent lessees might well wish to contend that the
25 overcharge was distributed by the lessor amongst all

1 lessees, the first, the second, the third, the fourth
2 and so on, and that is how they mitigated the losses
3 that were caused by the overcharge. So we say that the
4 same or at least a similar conflict arises for leases as
5 for purchases.

6 So for those reasons, we say that it is appropriate
7 that the issues that the Tribunal has just looked at
8 should include leases and not just purchases of used
9 trucks.

10 I am happy to pause at that point before I go on to
11 address what the run-off period for those claims should
12 be, if that would assist.

13 THE CHAIR: Can you remind us, when someone leases a truck,
14 for what sort of period are they leased?

15 MR SCANNELL: They could be leased for any period of time.

16 We have characterised, and the experts do as well, very
17 short leases as spot leases or spot hires as they are
18 often called, and the experts to date have reserved
19 judgment as to whether or not spot leases have
20 characteristics which are akin to other forms of leases
21 or whether they have characteristics all of their own.
22 Apart from that, spot leases, leases could be of any
23 duration, so they could be one year or more.

24 The important point is that these are non-cash
25 transactions, non-cash price transactions, in the sense

1 that the consideration that is payable for the lease is
2 not really referable to the price of a new truck. You
3 are told how much it will cost to lease this truck, and
4 that will not be -- nowhere on the contract will the
5 price of the truck appear. So there is a difference
6 there between that and a cash price contract where, for
7 example, you are buying outright and you can see what
8 the price is, or it is a hire purchase agreement where
9 again you can see what the cash price of the truck is.

10 THE CHAIR: How are spot leases dealt with under this
11 division?

12 MR SCANNELL: It might strike the Tribunal as slightly
13 counterintuitive, in fact, because as the definition
14 that you have before you shows, all spot hires are
15 included in the definition of the used truck sub-class
16 common issues even if it is the very first time that
17 that truck was let out or hired out.

18 There is a particular reason for that, and that is
19 that, as I have mentioned the experts, and in particular
20 Mr Wilkinson, when he considered spot hires, considered
21 that it was too early to say whether or not there were
22 special characteristics of spot hires which
23 distinguished them from other leases and that he would
24 prefer to see what comes out on disclosure before
25 forming a definitive view as to whether they should be

1 new trucks issues or used trucks issues, and that is
2 also the position that was taken by Dr Davis initially
3 in his expert report.

4 THE CHAIR: Yes, because one can see that although if there
5 is a long lease of a year or two years, then the first
6 long lease is a new truck, a subsequent long lease is
7 effectively the used truck.

8 MR SCANNELL: Yes.

9 THE CHAIR: But if it is spot hire and they are renting
10 trucks for a day or few days, then someone renting it
11 next week, you are not really going to get that same
12 sort of conflict in any likely sense, are you?

13 MR SCANNELL: Not obviously so, indeed, and I think that
14 where the experts are at the moment, or at least where
15 Dr Davis got to and where Mr Wilkinson presently is, is
16 that he would prefer not to be too dogmatic about that
17 issue at this very early stage. He would like to see
18 what comes through on disclosure to see whether it is
19 fair to characterise these one way or the other.
20 Pro tem, they are included, as the panel can see, in the
21 definition of the used trucks sub-class common issues.

22 So the way it is put is that the first lease of
23 a truck is not included unless it is a spot hire. So
24 thinking about that, spot hires are included even if it
25 is the first lease. Otherwise in respect of leases the

1 principle is that the first lease is a new trucks issue
2 and subsequent leases are a used trucks issue.

3 THE CHAIR: Yes, so all spot hires are treated as used at
4 the moment --

5 MR SCANNELL: Correct.

6 THE CHAIR: -- but that can be adjusted depending on how the
7 evidence comes out.

8 MR SCANNELL: Yes.

9 THE CHAIR: Yes.

10 On that issue is it Mr White who is dealing with
11 that?

12 Submissions by MR WHITE

13 MR WHITE: Yes, sir. Our point does not go to the substance
14 of whether -- what particular leases might be included
15 within which sub-class, our point is quite a discrete
16 one as to what the appropriate run-off period or the
17 long stop end date of the claim period should be. So it
18 is more a point that goes to the language that is used
19 in the CPO as opposed to the division of issues between
20 the sub-classes.

21 So if I perhaps summarise what we are getting at in
22 our skeleton --

23 THE CHAIR: Well, in that case, if you are dealing with that
24 point, rather than what is in which sub-class then it is
25 something we can postpone until tomorrow, I think.

1 MR WHITE: Yes.

2 THE CHAIR: Right.

3 So then the point, if you then turn to the points
4 that were raised by MAN, Mr Scannell.

5 Submissions by MR SCANNELL

6 MR SCANNELL: Yes, so as we understand it, MAN's point is
7 that additional matters should also be included in the
8 used trucks sub-class common issues such as the impact
9 of the cartel on UK list prices and the impact of the
10 cartel on EEA gross list prices, and that is at
11 paragraph 19 of its response to the application.

12 We say that there is not a sound basis for that
13 contention. It would, for a start, be wildly
14 disproportionate and duplicative for the RHA and RUTL to
15 make separate submissions on all of the matters MAN
16 would like to include in the used trucks sub-class
17 common issues. It also represents a misinterpretation
18 of what the Court of Appeal actually said.

19 So the Court of Appeal did not say that there should
20 be two claims, one brought by the new trucks group and
21 one brought by the used trucks group with each of them
22 pursuing all of the common issues separately. It held
23 that the RHA should remain the class representative for
24 all of the common issues. The only caveat to that is in
25 respect of resale pass-on. Now, MAN could have argued

1 before this Tribunal, and before the Court of Appeal
2 possibly, that other conflicts arose in other areas, but
3 it did not do that and it is now too late to make that
4 contention, but in any event, there is no conflict in
5 any event between these other issues, the effect of the
6 cartel on EEA gross list prices, the effect of the
7 cartel on UK list prices. The interests of the RHA and
8 RHA Used Trucks Limited are in alignment on those
9 points. The output of the RHA's expert, Dr Davis, on
10 those points will be inputs into some of the regressions
11 and calculations that the used trucks expert uses.

12 But it is important, I think, for the Tribunal to
13 appreciate that the Court of Appeal did not
14 conceptualise the one area of conflict that it dealt
15 with, resale pass-on, as a kind of thread in the fabric
16 of the litigation that could be pulled to unravel it
17 into two entirely separate claims.

18 So it is not available to the defendants now to
19 say: oh, there is some sort of penumbra of issues around
20 the conflict issues and they too might involve some
21 element of rubbing up against each other as between the
22 used trucks group and the new trucks group. That is not
23 what the Court of Appeal was saying or intending at all.
24 It simply said that there was one conflict issue and
25 that had to be resolved.

1 It is not right either to suggest, as MAN does, that
2 the used trucks representative will not be able to
3 advise on settlement, for example, just because the used
4 trucks representative has not had carriage of each and
5 every one of the common issues in the case. Of course
6 it can.

7 In assessing any settlement offer, the used trucks
8 representative will be able to take account both of the
9 used trucks sub-class common issues on which it will
10 have represented the used trucks class, and the general
11 common issues on which the RHA will have represented the
12 used trucks class, because the RHA is the representative
13 for used trucks class members as well as new trucks
14 class members in respect of all issues except for the
15 issues that we are now considering, and that is a very
16 important point to bear in mind.

17 So we say that there is no justification for
18 extending the scope of the used trucks sub-class issues
19 beyond the list that the Tribunal has before it.

20 THE CHAIR: Yes, I think there was -- the other area

21 I think -- was it interest? It was also said that --

22 MR SCANNELL: Yes. Well, again, interest is rather
23 a discrete area because where the Tribunal came out on
24 interest in its 2022 judgment was that it is too early
25 to say whether that should be certified as a common

1 issue, that really what would have to happen is we will
2 have to see where we stand after disclosure in relation
3 to interest and the matter can then be revisited on that
4 basis.

5 But again, as things stand in the proceedings, it
6 would be premature and query wrong to expand the used
7 trucks sub-class common issues to include interest.

8 THE CHAIR: Yes, thank you.

9 So, Mr Jowell.

10 Submissions by MR JOWELL

11 MR JOWELL: Yes. The issue here is that the way that the
12 new claim is structured is that the used truck proposed
13 representative has got a remit that is extremely narrow,
14 it relates only to used truck sub-class common issues
15 and anything else and everything else is for the RHA,
16 and we say that that hermetic sealing, as it were, of
17 all other issues from its representative is problematic,
18 and it is problematic in particular because of the
19 interrelationship between the issues and because of the
20 need for independence in relation to settlement.

21 Now, if I may just expand on the question of
22 settlement first, so the judgment of the Court of Appeal
23 notes at paragraph 88 that one aspect of the funding
24 arrangements that the RHA will need to satisfy is that
25 they do not unreasonably interfere with ordinary

1 independent decision-making in the litigation including
2 as to settlement.

3 Now, the comments in paragraph 88 relate to funding,
4 but I suggest that the Court of Appeal is implicitly
5 recognising and requiring that there must be a practical
6 ability on the part of each of the representatives of
7 the two sub-classes to make independent decisions in
8 relation to settlement, and we are glad to see that each
9 of the RHA and the PSCR recognise that, at least as
10 a matter of form.

11 So Mr Scannell makes the point that part of its role
12 is indeed to advise the sub-class on offers of
13 settlement, whether those are global in nature or indeed
14 in relation just to used trucks.

15 The problem is the interrelationship between that
16 properly conceived role of being able to advise on
17 settlement, including in relation to just the used
18 trucks and this very, very narrow remit that it is
19 given, because as matters stand, it has relinquished any
20 control or ability to comment on the other issues where
21 both used and new truck buyers have an interest, even if
22 that interest is more or less aligned. So it is
23 effectively relinquishing any ability at the moment even
24 to comment on matters relating to list prices and
25 matters relating to interest, and yet both of those

1 issues are potentially highly relevant to used truck
2 buyers as a class because the list prices may well be
3 a stepping stone to a calculation of used truck prices,
4 and similarly interest, of course, will go towards the
5 calculation of damages.

6 This does, in our submission, raise two
7 difficulties: first, it may be that even though the two
8 classes are generally aligned on these issues, it is
9 nevertheless the case that the used truck buyers may
10 have a distinct interest or approach, at least insofar
11 as that has some knock-on effect on their own issues,
12 and so it should have a voice on those issues, it should
13 have the ability to comment.

14 We are not suggesting, for the avoidance of doubt,
15 that they should make duplicative submissions, of course
16 not, but they should, we say, be entitled to comment
17 and, if necessary, take issue with specific points in
18 relation to, say, how the RHA's expert intends to deal
19 with those points, if they disagree or if it is in their
20 interests to do so, and secondly, we say --

21 THE CHAIR: Just to understand that: they both want the
22 overcharge, which is what the new truck price is
23 concerned with, to be as high as possible, do they not?

24 MR JOWELL: In principle, that is absolutely right.

25 THE CHAIR: Not just in principle; in every respect.

1 MR JOWELL: Yes, except for this: that it may be, for
2 example, that there is a calculation, something goes
3 into the calculation of used truck prices, where it
4 suits them to emphasise a particular parameter in
5 a particular way that may be to their advantage but not
6 to their new truck buyer's advantage.

7 THE CHAIR: Can you give an example?

8 MR JOWELL: Well, it is difficult to conceive of an example
9 on my feet, but the way these calculations --

10 THE CHAIR: The reason I am asking is I find it very
11 difficult to understand.

12 DR BISHOP: You can imagine that the equations given by the
13 different witnesses in faithful reporting of different
14 equations they have run would note that some variable,
15 let us say a trend line, a simple trend line or
16 something to do with economic conditions, turned out to
17 be more favourable to the used and omitting that
18 variable was less favourable to them and the two experts
19 might have different views, I suppose, on which was the
20 preferred specification of the equation. I suppose that
21 is the sort of thing that --

22 MR JOWELL: That is precisely the sort of thing and I am
23 very grateful for the observation. The second issue is
24 this: when it comes to settlement, suppose, for example,
25 that the PSCR receives an offer for settlement for used

1 trucks. Can it really properly assess such an offer in
2 circumstances where it has no remit to assess those
3 issues that go to the calculation of used truck damages,
4 certain essential components, and suppose that the RHA
5 on the other hand decides that it is going to settle for
6 new truck buyers, well, where will that leave PSCR? We
7 simply do not know. We have got these issues, interest,
8 and we have got the issue of the list price. Those are
9 hanging. Does the RHA then continue in its role but
10 purely representing used truck buyers on those remaining
11 issues that still are relevant to the used truck buyers?
12 There just simply does not seem to be anything in the
13 documents that we have seen that caters for that
14 situation. So how, in those circumstances, where the
15 new truck buyers settle, how are the used trucks going
16 to continue their claim when they do not have any remit
17 over these essential issues? The documents simply do
18 not seem to make provision for that eventuality and we
19 say it is important that they do have a genuine ability
20 separately to settle the two claims against them, and
21 the way in which these issues have been completely
22 hermetically sealed off from the used truck
23 representative therefore presents a difficulty here,
24 a real difficulty, that needs to be addressed.

25 It is interesting to note that in the skeleton

1 arguments there seems to be a difference between the
2 RHA's approach in their response. Their response in
3 their skeleton, I believe, said: ah, there is no problem
4 here, they can comment, the used truck expert can
5 comment, whereas the used truck representative seems to
6 think that they cannot, and to be fair, the documents
7 suggest that they cannot because they simply seem to
8 have no remit to do so as things stand.

9 So we say there does need to be an adjustment there
10 so that they can genuinely consider settlement
11 separately.

12 Those are our submissions.

13 THE CHAIR: The settlement point is partly a practical
14 problem, is it not, rather than saying what issues they
15 deal with? You raised the question what happens if the
16 RHA settles for -- RHA is representing the whole class,
17 but it settles only for new truck purchases, how do the
18 used truck purchases go ahead if they have not got an
19 expert.

20 MR JOWELL: It is indeed a practical problem, but it is one
21 that arises specifically from the hermetic sealing of
22 these issues entirely from the used truck
23 representative.

24 THE CHAIR: Yes. Now the other OEMs, can we just be clear
25 who is supporting the MAN submissions on this? Who is

1 adopting those submissions? DAF?

2 MR PICKFORD: We are adopting them.

3 THE CHAIR: You are adopting them, and Volvo, Mr Hoskins?

4 MR HOSKINS: We are not formally adopting them, given that

5 we are just objectors, we are here in case necessary,

6 but we are not -- you understand there are costs

7 implications for us if we get involved.

8 THE CHAIR: Yes, there are, and Iveco?

9 MR WHITE: Yes, we adopt them.

10 THE CHAIR: Yes. Thank you.

11 MR RAYMENT: Daimler, sir. We are in the same position as

12 Volvo/Renault as objectors.

13 THE CHAIR: Yes, Mr Scannell, would you like to respond?

14 MR SCANNELL: Yes, I am very happy to respond on all of

15 those points, but Mr Flynn has asked me if he could say

16 a few words first, and I am happy to give way.

17 THE CHAIR: Yes, I was going to ask, Mr Flynn, whichever of

18 you wants to go first.

19 Submissions by MR FLYNN

20 MR FLYNN: We do not mind either, sir. Mr Jowell has

21 already pointed to paragraphs 14 and 15 I think it is of

22 our skeleton.

23 THE CHAIR: Yes.

24 MR FLYNN: Part of this is terminological. I mean, these

25 issues are not hermetically sealed in the sense that

1 Dr Davis is going to look at new truck pricing and
2 Mr Wilkinson cannot possibly have a view on it. The
3 idea is that Dr Davis leads on these issues, which is
4 what the Tribunal envisaged and what the Court of Appeal
5 specifically envisaged when it says the RHA remains the
6 overall class representative in relation to all other
7 common issues such as whether there is an overcharge for
8 new trucks, but that does not mean in our submission
9 that Mr Wilkinson is in some way gagged or cannot have
10 a view on it insofar as these issues have a bearing on
11 the used truck case, but Mr Jowell disclaims any desire
12 to see these exercises duplicated, rightly so. They
13 will be led on those points, interest and new truck
14 pricing by Dr Davis, but to the extent that Mr Wilkinson
15 has a view that something else needs to be done in
16 relation to establishing the used truck claim then
17 nobody is saying he cannot do that. He is an
18 independent expert, and he has his job to do.

19 In relation to settlement, you describe that as
20 something of a practical problem. It is obviously
21 a contingency. I mean, who knows whether there will be
22 any offers and on what sort of basis, but if it were to
23 happen that there was an acceptable settlement offer for
24 the new truck sub-class, I think I should call them, and
25 the RHA or the new truck sub-class dropped out of the

1 proceedings, then it would be a matter for the Tribunal
2 to determine how the remaining proceedings should be
3 conducted.

4 I mean, that is just, I would say, a sort of
5 incident of litigation.

6 THE CHAIR: As I understand it, the RHA remains, it is the
7 class representative.

8 MR FLYNN: Which is why I said the new truck class, exactly,
9 so the RHA --

10 THE CHAIR: For those common issues that apply to all
11 members equally such as overcharge, it is the class
12 representative.

13 MR FLYNN: It is.

14 THE CHAIR: So it would, it seems to me, be obliged to
15 continue to remain in the case on the question of new
16 truck prices unless it was somehow to come to some
17 arrangement that that is taken over by the sub-class
18 representative, but it would be the issue over which you
19 had carriage and conduct and responsibility, which your
20 expert has dealt with for all class members including
21 the members of the sub-class.

22 MR FLYNN: Absolutely right. Just envisaging a situation in
23 which the new class -- new truck sub-class has in some
24 way dropped out of the picture, as you are quite right,
25 the RHA remains the class representative and what has

1 been done, has been done, including the work of
2 Dr Davis.

3 THE CHAIR: Yes, and it has funding and it has
4 responsibilities to all the class members, including,
5 for those issues, the used class members.

6 MR FLYNN: Absolutely, and it stands by them, which is why
7 we are here today. I mean, the RHA remains committed to
8 providing redress for the haulier class, both new and
9 used, and did not drop the used class as my friends may
10 have been secretly hoping. We are here to defend their
11 interests to the end of the road, if I can put it that
12 way.

13 THE CHAIR: Yes.

14 Submissions in reply by MR SCANNELL

15 MR SCANNELL: Mr Flynn has dealt admirably with all of the
16 points that I was going to cover and I am not going to
17 duplicate what he has just said, but could I just repeat
18 the final point: the chairman is absolutely spot on in
19 relation to what would happen in the circumstance that
20 Mr Jowell described where the new truck sub-class
21 settles. The position then is that the RHA is the class
22 representative for new trucks and used trucks. New
23 trucks has fallen away but it remains the class
24 representative for used trucks on all issues apart from
25 the used truck sub-class common issues.

1 So the chairman is absolutely right: the strict
2 position in those circumstances is that the RHA would
3 have to remain in the proceedings because it is still
4 responsible for all of the common issues in the case on
5 behalf of the used trucks claimants.

6 So the used trucks sub-class representative would
7 not have to do what Mr Jowell suggests in his skeleton
8 argument which is to start from scratch and build up the
9 entire evidence base in support of its case, both
10 factual and economic. That is simply a red herring.

11 THE CHAIR: Thank you. We will just take a moment to
12 consider that. (Pause)

13 (11.53 am)

14 Ruling - redacted pending approval

15 (11.56 am)

16 MR FLYNN: Precisely, sir. We said in our skeleton -- we
17 did not use the word "hermetic", but these issues are
18 not sealed and there is no reason why Mr Wilkinson
19 should not comment, indeed he should, and --

20 THE CHAIR: It may well be ultimately for Mr Davis to put
21 forward his view on the totality of the new price -- the
22 new truck price.

23 MR FLYNN: He takes the lead on that.

24 THE CHAIR: He will be the sole expert on that that the
25 Tribunal will hear and serving report.

1 Submissions by MR JOWELL

2 MR JOWELL: May I just clarify one thing: when you say

3 Mr Wilkinson may comment, we are assuming that those
4 would be public comments, not --

5 THE CHAIR: No, they need not be public comments; they are
6 all class members and they can cooperate.

7 MR JOWELL: The difficulty is of one expert having
8 communications with another expert in relation to
9 matters where they are adverse, potentially adverse at
10 least, otherwise -- which is why the issue arises,
11 without that being --

12 THE CHAIR: The whole point is this is an issue which they
13 are not adverse and just as if one party in litigation
14 may have two experts occasionally allowed, they can
15 cooperate. It does not have to be public.

16 The only expert the Tribunal will hear on this issue
17 is Mr Davis.

18 MR JOWELL: Well, two points on that, if I may.

19 First, as Professor Bishop observed, there is the
20 potential for a conflict as between the experts for
21 their class on specific issues. If there is not, then
22 it is potentially problematic for two independent
23 experts to have communications on matters which are not
24 known to the other parties to the litigation, unless --
25 I mean, in general the information on which an expert is

1 opining should be known to the other parties, and if
2 that includes communications with other experts, that
3 may be something that ought to be known to everyone.

4 DR BISHOP: Your side of this argument would like to treat
5 the used -- the expert estimating used car prices and
6 shares of things, you would like to treat him as
7 a completely independent witness, cross-examine him
8 against the witness for the RHA and that sort of thing.
9 In other words, he would be quite useful to you for
10 litigation reasons, would he not?

11 MR JOWELL: Potentially, yes. If he takes a view that is
12 adverse, then that should be known to us, and we are
13 entitled to see that.

14 DR BISHOP: You do have your own witness, you know. I mean,
15 you want to have two witnesses, I suppose, an
16 independent witness who might be useful to you.
17 Tactical considerations are of course very much to the
18 fore of the mind of advisers in matters like this. This
19 Tribunal, as I understand it, has to make sure that
20 there is fairness to all the reasonable interests. The
21 Court of Appeal has said we need a Chinese wall of some
22 sort. Leaving the RHA as the main class representative,
23 there is a knock-on effect on there where witnesses are
24 concerned, I would have thought.

25 MR JOWELL: I think --

1 DR BISHOP: We do not want, and we have been told by the
2 Court of Appeal, do not get these things overcomplicated
3 in making the best the enemy of the good. It is very
4 important here that we have -- serious points are
5 allowed to be heard, but spinning these out forever with
6 huge numbers of reports at immense cost is not a good
7 thing.

8 MR JOWELL: No, very well. Our approach is simply one also
9 of fairness which is -- because part of fairness is
10 transparency, and if there is a disagreement between the
11 two experts, one for used and one for new, we say as
12 defendants we should know about that, and that fairness
13 demands that that should be something that is not behind
14 a veil of secrecy, of privilege, that is something that
15 is transparent. That is all we are saying. (Pause)

16 (12.02 pm)

17 Ruling - redacted pending approval

18 (12.04 pm)

19 THE CHAIR: I did want to raise one other thing about the
20 issues that fall as used truck sub-class common issues,
21 and that is about the fuel costs and whether the
22 infringement had an impact on other costs borne by the
23 sub-class members.

24 Just for clarification -- and I have to say I have
25 not read in detail Mr Wilkinson's report -- it is not

1 immediately apparent why that is actually a distinct
2 issue as between new trucks and used trucks that it
3 needs to be, as it were, dealt with separately, and
4 perhaps someone can explain that.

5 So this is not -- because that is not a pass-on
6 issue at all, but it is something quite separate.

7 MR SCANNELL: Yes, I may revert on this, but my
8 understanding is that the additional costs, fuel costs,
9 for example, will be an extension to the regressions
10 that are used for determining the overcharge on used
11 trucks, so it is not going to be dealt with as
12 a separate head, it is going to be factored into the
13 regressions that Mr Wilkinson uses to determine the
14 overcharge on used trucks.

15 THE CHAIR: Yes, because the way it is put, there does seem
16 to -- and I am looking -- the document is not up
17 anymore, but I am looking at it in your application,
18 your joint application at page 004 and 005.

19 For the common issues for the RHA, it is whether and
20 to what extent the cartel otherwise had an impact on
21 costs, eg fuel costs borne by new trucks sub-class
22 members, either purchasing or leasing, and then as
23 a used truck common issue it is said as a distinct issue
24 whether and to what extent the cartel had an impact on
25 prices paid by -- sorry, whether and to what extent the

1 cartel otherwise had an impact on costs borne by used
2 truck sub-class members, and this is presumably about
3 the fuel efficiency introduction?

4 MR SCANNELL: Yes. Again, my understanding is that this
5 will not be an entirely separate issue, it is simply an
6 input, a necessary input, to the regressions that are
7 used in determining the overcharge and also in
8 determining the losses that are caused by the delays in
9 implementing successive Euro emissions standards under
10 a total cost of ownership structure.

11 THE CHAIR: Yes. Presumably that is a view of the experts
12 that that should be done separately for new and used?

13 MR SCANNELL: Yes. Thank you.

14 THE CHAIR: Yes. I see, thank you.

15 I think it is time to take a break, perhaps it is
16 past the time to take a break, for the benefit of the
17 transcriber, so we will come back in ten minutes.

18 (12.08 pm)

19 (A short break)

20 (12.23 pm)

21 THE CHAIR: Yes, Mr Scannell.

22 MR SCANNELL: Sir, could I clarify my answer to your last
23 question, which was a question as to whether what one
24 sees at {CO/1/3} (v) is really a conflict issue and the
25 extent to which the cartel had an impact of costs borne

1 by used trucks.

2 THE CHAIR: Yes.

3 MR SCANNELL: It has been clarified to me that although that
4 has an input into the regressions, as I explained, it
5 also plays a role in working out the separate head of
6 loss which is the loss that is caused by the delays
7 themselves such that better trucks are not available
8 when they should be available.

9 As to the extra costs that are borne by used trucks'
10 hauliers, you are quite right that that is not really
11 a conflict issue in the true sense. Mr Davis and
12 Mr Wilkinson I believe both came to the view without
13 sort of waiving privilege in respect of anything
14 relating to this that although strictly speaking
15 Mr Davis could have worked out what those extra costs
16 were for used trucks and then passed that along to
17 Mr Wilkinson and then Mr Wilkinson plugs it in, it would
18 actually be more efficient and sensible for Mr Wilkinson
19 to do those calculations, not least because the used
20 trucks price will be one of the inputs in working out
21 what those extra costs actually are and also because it
22 is anticipated that disclosure from the used trucks
23 sub-class members will be relevant to that, and so it is
24 far more straightforward for Mr Wilkinson to deal with
25 it rather than Dr Davis.

1 THE CHAIR: Yes.

2 MR SCANNELL: So far as extra costs for new trucks go, that
3 is of course Dr Davis.

4 THE CHAIR: Yes, but one would hope they use the same sort
5 of methodology for calculating this, otherwise things
6 will get very confusing.

7 MR SCANNELL: Yes, I quite see your point in relation to
8 that. Unfortunately I cannot at this point in time say
9 that that will definitely be the case. I imagine that
10 it will be.

11 THE CHAIR: Well, that is also an area -- because it is not
12 as -- as you rightly point out, it is not an area of
13 conflict.

14 MR SCANNELL: Yes, one would not expect there to be any
15 conflict in relation to that. It is really just
16 a question of who carries the load in relation to that
17 and the fact that it is obviously more sensible and
18 logical for Mr Wilkinson to have carriage of it than
19 Dr Davis so far as used trucks are concerned.

20 THE CHAIR: But it is also then an area where they could, it
21 seems to me -- I have not spoken to my colleagues,
22 obviously -- can cooperate on what is a sensible way of
23 calculating the effect of fuel efficiency, delays of the
24 newer models, on costs.

25 MR SCANNELL: Yes, what I can say in relation to that is of

1 course in Dr Davis' original report, when the working
2 hypothesis was that Dr Davis was dealing with absolutely
3 all of the issues, the methodology that Dr Davis had for
4 calculating this particular species of loss is
5 essentially the same as the total cost of ownership
6 method that Mr Wilkinson is proposing to use in his
7 expert methodology report. So I do not apprehend that
8 there is going to be any divergence of approach between
9 Dr Davis and Mr Wilkinson.

10 THE CHAIR: Well, it is something that the Tribunal might
11 want to revisit at a case management conference.

12 MR SCANNELL: Absolutely, and of course the Tribunal will
13 have ongoing case management responsibility in relation
14 to all of these things and I do not --

15 THE CHAIR: I think we would deprecate a different
16 methodology --

17 MR SCANNELL: Yes, that is understandable.

18 THE CHAIR: -- being used in different parts of the claimed
19 class on something where there is no conflict between
20 them.

21 MR SCANNELL: Yes.

22 THE CHAIR: Thank you.

23 MR SCANNELL: Thank you.

24 THE CHAIR: I think rather than dealing now with the main
25 funding issue, we can, before lunch, usefully look at

1 ATE insurance where some points have been raised by MAN,
2 but before getting to those I think can either Mr Flynn,
3 Mr Scannell, or both of you, explain where we are on ATE
4 insurance and what the arrangements now are.

5 Submissions by MR FLYNN

6 MR FLYNN: As best I understand them, sir, and nice though
7 it would be to say everything has been signed up as of
8 today, when dealing with six separate insurers in
9 relation to an unusual situation and the need for all of
10 them to be happy with everything as it is revised,
11 discussions have taken longer than would be desirable,
12 but are, I can definitely say active, and should be
13 capable of resolution shortly. I think if I use any
14 more precise language than that I am likely to be
15 faulted, but essentially the structure is agreed. There
16 are some outstanding comments on the terms of the
17 endorsement, but I am told that those are not expected
18 to cause any undue difficulty in agreement and once that
19 happens -- and that could be in the next day or so --
20 then everything should fall into place.

21 Obviously it has a knock-on effect on the priorities
22 agreement as well, which is why all these parts, these
23 moving parts, are sort of interlocking, but broadly
24 speaking, the message I had been given is that the
25 insurers are getting comfortable with the proposals.

1 They have, necessarily and not surprisingly, queries on
2 the wording, but four out of six insurers have
3 substantively approved the endorsement and we are still
4 waiting for two more to say that they are happy with the
5 terms.

6 So that is being actively progressed by the brokers
7 and the solicitors as we speak. So I cannot say it is
8 all done and dusted, but I am told that it is nearly
9 there.

10 THE CHAIR: Yes. How are we going to deal with that then,
11 because we need to be satisfied, do we not, that there
12 are measures in place that will cover adverse costs?

13 MR FLYNN: You do, you do.

14 THE CHAIR: Basically you are saying you are very
15 optimistic, you are almost there, you believe it will
16 come about, but we are not quite there yet.

17 MR FLYNN: Not today, yes.

18 THE CHAIR: Yes.

19 MR FLYNN: So that is something I fully accept, and as you
20 know we were in discussion with the Tribunal about the
21 hearing date at an earlier stage, partly caused by the
22 change in proposal for funding, but that has a knock-on
23 effect on everything else, and all I can say is no
24 effort has been spared and I just regret that it has not
25 been possible to bring it to a successful conclusion

1 today, but I fully accept that that is a matter on which
2 the Tribunal will need to be satisfied and so I think
3 the best I can say is that we will be writing to the
4 Tribunal as soon as possible after the hearing when all
5 the agreements are in place and signed up.

6 THE CHAIR: Because we cannot really make a CPO until we
7 have --

8 MR FLYNN: You cannot. I fully accept that. You need to be
9 satisfied on that point.

10 THE CHAIR: Equally the defendants, subject to any redacted
11 provisions about, if there are any, grounds of
12 confidentiality, are entitled to see the policy, make
13 sure that it is adequate in terms of exclusions or
14 whatever, termination provisions, etc.

15 MR FLYNN: They are entitled to comment to the extent that
16 it goes to certification issues. That, I am afraid,
17 will have to be done, and as I say, I regret that we
18 were not able to bring it all together by the time of
19 the hearing.

20 THE CHAIR: Yes. So what is your proposal? Is it that we
21 should do what we can and then the rest should be done
22 on the papers?

23 MR FLYNN: I believe so, sir. I think the sensible thing
24 would be to hear what objections there are, see which of
25 those remain current, which of the current ones resound,

1 as it were, with the Tribunal, so that we can address
2 those if necessary with the insurers, and then we will
3 have to write afterwards and the Tribunal will have to
4 give directions for dealing with the documents as signed
5 up.

6 THE CHAIR: Yes, I see.

7 MR FLYNN: I mean, it is true that if we are going into
8 a second day there may be some standard progress that
9 I can report even tomorrow morning, as I say these
10 discussions are live, are active, are happening at the
11 moment and have been over the preceding weeks, so it may
12 be that there will be a turn of the ratchet even
13 tomorrow, but my general proposal will be that unless it
14 is sort of brought home, as it were, we will have to
15 leave that aspect of the CPO consideration for the
16 Tribunal through probably a written procedure. I cannot
17 imagine that a further hearing is going to be needed on
18 this.

19 THE CHAIR: One can have a short online hearing, if
20 necessary, perhaps.

21 MR FLYNN: Yes.

22 THE CHAIR: If you say there is reasonable grounds to think
23 things will change by tomorrow, we can obviously put
24 this back until tomorrow, but the tenor of what you are
25 saying is this has been going on some weeks and there is

1 no sort of expectation that things will change
2 overnight.

3 MR FLYNN: There is no certainty that things will change
4 overnight, no, I cannot say that, I cannot say that.

5 THE CHAIR: Yes.

6 We should probably then -- yes, Mr Flynn?

7 MR FLYNN: Sorry, I was just going to say, just to make
8 clear, I think the correspondence reflects that, these
9 are points of not necessarily detail but points of
10 mechanics that are being discussed. It does not affect
11 exclusions or the scope of the cover. It is really how
12 one caters for the existence of the sub-class structure
13 that is naturally unfamiliar to the insurers as it is
14 unprecedented, and they want to know what they are
15 letting themselves in for, as it were.

16 THE CHAIR: It may not bear on what appear to be the main
17 grounds of objection that are being raised, which
18 I think we should proceed to hear.

19 MR FLYNN: Yes.

20 THE CHAIR: Then probably subject to what the defendants say
21 we will have to consider the -- they will have a chance
22 to consider the policy when all six insurers have
23 agreed --

24 MR FLYNN: Yes.

25 THE CHAIR: -- and whether we need a short online hearing or

1 it can be dealt with on the papers or indeed whether
2 they have any issues, we can take it as it comes.
3 I think that seems sensible.

4 In that case it may be appropriate to hear Mr Jowell
5 on the grounds of concern they have even on the way it
6 is proposed to be dealt with now.

7 Yes.

8 Submissions by MR JOWELL

9 MR JOWELL: I am grateful, and we of course entirely agree
10 that one cannot determine whether it is just and
11 reasonable for a class representative to be a class
12 representative if they do not have any actual ability to
13 pay the defendants recoverable costs if ordered to do
14 so.

15 THE CHAIR: Yes.

16 MR JOWELL: In relation to the draft policy, we say that
17 there are two remarkable features of this policy that
18 either individually or collectively render it unsuitable
19 because it ties together the fortunes of these two
20 adverse classes in an extraordinary and unacceptable
21 way.

22 The first aspect which is the less problematic of
23 the two but nevertheless somewhat problematic, is the
24 common indemnity limit. So the level of after the event
25 insurance of the used truck class will be eroded by

1 costs orders against the new trucks class and vice
2 versa.

3 So the outcome is that if one representative makes
4 ill-advised or unnecessary applications or unduly
5 resists applications made against it and there are
6 therefore costs orders made against them, the other
7 representative has less ATE available, and we say simply
8 that these are intended to be separate representatives
9 with separate interests and they should have separate
10 indemnity limits.

11 But the second aspect, as I said, is even more
12 troubling, and that arises from the effect of
13 clauses 3.2.3 and 3.3 of the priorities agreement.

14 The effect of -- perhaps we should see them or at
15 least one of them. They are in {RM-C/7/64} if we can
16 have it up on the screen. I do not know if it is
17 possible to have it up on the screen.

18 You see 3.2.3, this is the distribution of new claim
19 proceeds, so this is what comes out if there is an award
20 for new trucks and how the proceeds will be distributed,
21 and we see -- in 3.2.1 we see various distributions to
22 the funders, and then:

23 "Thirdly, to reimburse the insurer for the New
24 Trucks' Proportionate Share of all Adverse Costs it has
25 paid out pursuant to the terms of the Policy."

1 And adverse costs are defined in the policy, and
2 they include adverse costs of both new and -- in respect
3 of both the new representative and the used
4 representative, and if one goes over the page, please,
5 to page {RM-C/7/65}, and if we could focus on 3.3.3 at
6 the bottom of the page, we see the equivalent in
7 relation to the distribution of used claim proceeds and
8 there you see that if there is an award to the used
9 truck purchasers we see that third in the order of
10 priorities is to reimburse the insurer for their share
11 of all adverse costs it has paid out pursuant to the
12 terms of the policy.

13 So the collective effect of this is that the ATE
14 insurer will be entitled to claim back all adverse costs
15 awards, so that means any adverse costs against
16 whichever class representative they have been made
17 against, and to claim those back from either any new
18 truck claim proceedings or from any used truck claim
19 proceedings.

20 THE CHAIR: Just so I understand this -- sorry to interrupt
21 you -- it says the "Proportionate Share":

22 "... reimburse the Insurer for the Used Trucks'
23 Proportionate Share..."

24 So are you relying on the paragraph below, to the
25 extent it is insufficient, is that the point?

1 MR JOWELL: Yes, yes, I believe that is correct, yes.

2 THE CHAIR: Because a proportionate share suggests it
3 actually is proportionate between them.

4 MR JOWELL: Yes, I am, but my understanding is that they
5 have the ability -- the effect of this is the insurer
6 has a right to claim out of proceeds that would
7 otherwise go to new truck class or corresponding to the
8 used truck class, any payments the insurer has made or
9 is liable to make under the policy in respect of either
10 class and vice versa.

11 Forgive me, my learned junior has pointed out that
12 it is not the proportionate share -- the proportionate
13 share is a proportionate share of damages, not of costs.
14 So it is --

15 THE CHAIR: Sorry:

16 "... reimburse the Insurer for the Used Trucks'
17 Proportionate Share of all Adverse Costs ..."

18 MR JOWELL: So the effect is that if there are no
19 proceeds -- if there are insufficient proceeds of the
20 used truck you get it out of the new truck, if there are
21 insufficient from the new truck, you get it from the
22 used truck.

23 THE CHAIR: Well, that is only because of the paragraph
24 below.

25 MR JOWELL: Yes, that is correct.

1 THE CHAIR: "To the extent that [they] are insufficient ..."

2 Is that right?

3 MR JOWELL: Can I suggest that Mr Carpenter KC who is
4 a costs expert and who originally made this point in his
5 response, if he could -- he would be technically better
6 able to explain it than I am.

7 THE CHAIR: Whoever is able to explain it is welcome to
8 stand up and address us.

9 Submissions by MR CARPENTER

10 MR CARPENTER: As the person who I think started this here
11 running in my response, it is perhaps only fair that
12 I try and catch it now.

13 THE CHAIR: Can you just identify yourself.

14 MR CARPENTER: Yes, Jamie Carpenter on behalf of all of the
15 proposed defendants in relation to common funding
16 issues.

17 THE CHAIR: Yes.

18 MR CARPENTER: It is simply this, sir: the proportionate
19 share that is referred to in the priorities agreement is
20 the proportion that each category of damages represents
21 to the whole of the damages. So if the new claim
22 proceeds are double the used claim proceeds then the
23 proportionate share is two-thirds to one-third, and so
24 the effect of those two clauses in the priorities
25 agreement is that any adverse costs paid out by the

1 insurer, and that does not distinguish between adverse
2 costs that relate to one or other of the class
3 representatives, they are an undifferentiated pot of
4 everything the ATE insurer has paid out. If there are
5 damages of both kinds, it will take its adverse costs
6 out of each pot in the proportions that they bear to the
7 total damages.

8 So in the example I gave it will take two-thirds of
9 the adverse costs from the new proceeds and it will take
10 one-third of the adverse costs from the used proceeds
11 regardless of whether it was one class representative or
12 the other that caused the adverse costs to be paid out,
13 and in --

14 THE CHAIR: The share of the adverse costs reflects the
15 share of the damages recovered, not the share of
16 responsibility for incurring those costs?

17 MR CARPENTER: Yes, and in the most extreme scenario, which
18 is the one of greatest concern, where one sub-class's
19 claim fails entirely and the other succeeds, and suppose
20 therefore that the failure of that one claim carries
21 with it a liability for costs in relation to that claim,
22 the ATE insurer will be able to make itself whole in
23 relation to that outlay out of the damages that are
24 recovered by the successful class.

25 So effectively each sub-class is the ATE insurer for

1 the other sub-class insofar as they cannot both succeed.

2 DR BISHOP: Yes, understood.

3 Submissions by MR JOWELL

4 MR JOWELL: I am very grateful. Now --

5 THE CHAIR: So your concern here is about really a conflicts
6 point. It is not that you will not get your costs.

7 MR JOWELL: Oh no.

8 THE CHAIR: You will.

9 MR JOWELL: Yes.

10 THE CHAIR: So it is about saying that it creates
11 a potential conflict.

12 MR JOWELL: Yes, and one can well see how this -- now, one
13 can well see how this arrangement might suit the
14 insurers, because it means that the insurers get to
15 cover any ATE outlay for each of used and new trucks
16 from a wider net, out of both the new claim proceeds and
17 from any used truck claim proceeds. It is only if both
18 new and used truck claims fail that insurers are truly
19 at risk of being out of pocket for those adverse costs.

20 We say it is much harder to see why this arrangement
21 is in the genuine interests of class members. Why, for
22 example, would new truck claimants wish to agree to
23 subsidise in advance the ATE of used truck claimants and
24 vice versa?

25 DR BISHOP: Mr Jowell, Mr Carpenter's explanation, his last

1 words were the most useful words, in many ways, it was
2 a very clear explanation. He said, look, each here --
3 each side here, the used guys and the new guys, winds up
4 with insurance against costs. It does not mean that
5 they do not recover more in his example, the extreme
6 case, where one side loses totally but the other side
7 wins, they get some insurance for their costs, but they
8 do not share in the benefits of the -- they do not share
9 in the winnings which are going to be much larger than
10 the costs.

11 What is the problem in all kinds of businesses and
12 householders and everybody, people take out insurance.
13 Your point seems to be that insurance blunts the
14 incentives a little bit because it protects you, and
15 that is true, it is true of all insurance, but does that
16 mean that all incentive is gone or that it is somehow
17 crucially no longer the incentive of people to hope to
18 win and get more damages? Is that what you are saying?

19 MR JOWELL: We say it undermines the independence of the two
20 classes, and we say first of all it is very difficult --
21 if you were a new truck purchaser, why would you be
22 agreeing in advance to subsidise the used truck claim in
23 effect?

24 DR BISHOP: What you are doing is you are getting insurance
25 against having to pay someone else's very large costs on

1 litigation, something you want to do. These two sides
2 of this bargain are very convenient mutual insurers.
3 I mean, it would be very difficult to go to Lloyd's and
4 get such a policy.

5 MR JOWELL: No, but the issue is this: if you are a new
6 truck purchaser, suppose you are just a new truck
7 purchaser and the used truck claim fails, under this
8 arrangement you will receive less in the way of damages
9 at the end of the day.

10 DR BISHOP: Yes, that is absolutely true.

11 MR JOWELL: The question is why would you -- if you are
12 genuinely acting in the interests of new truck
13 claimants, why have they agreed to this?

14 DR BISHOP: Because anyone facing a huge risk like the costs
15 of having to compensate someone else for litigation
16 costs would quite like to have -- or would find some
17 attraction in having an insurance policy, provided you
18 do not have to pay too much for it.

19 Now, you still have an interest in the damages, you
20 still want to win the case, because damages are worth
21 a lot of money, but if you lose the case, the costs can
22 be horrendous. So you might want insurance, and here it
23 is extremely convenient to have a potential coinsurer
24 who faces most of the same costs, and with someone
25 writing an insurance contract who understands all the

1 things on both sides.

2 I mean, the argument you are making seems to be that
3 any diminution of the gains that you face blunts the
4 incentives too much, but that is an old argument, it
5 goes back at least 150 years to *Marshall*, and is in
6 a great many circumstances simply not true because
7 people do buy insurance against the really bad downside.

8 MR JOWELL: People do buy insurance, of course, and there is
9 no reason, I entirely agree, why a new truck purchaser
10 would not wish to seek insurance for their adverse
11 costs. What we are questioning is why would a new truck
12 purchaser wish to agree in advance to pay the adverse
13 costs of a used truck buyer?

14 DR BISHOP: Let me put the point a slightly different way
15 and then I will stop because I should not go on too much
16 about this. Imagine there was a company out there which
17 independently went around insuring adverse costs for
18 large fees, and it was offering contracts to the used
19 side of this bargain and the new side as well, and
20 citing quite large fees to do that, and the two
21 discovered that actually, you know: we can insure one
22 another to some extent here at least for these costs
23 that may -- where one side may get quite a lot and the
24 other be left with adverse costs, and we can do that
25 more cheaply than this third party insurer. Why

1 would you prevent them from doing that?

2 MR JOWELL: Well, of course everyone wants cheaper
3 insurance, but I do not know of any arrangement I can
4 think of where two adverse parties -- and these are
5 adverse parties, the new truck buyers and the used truck
6 buyers -- agree that their damages will be diminished by
7 the costs awarded against their adversary. That seems
8 to me that is what is extraordinary about this
9 arrangement.

10 DR BISHOP: Yes, I understand.

11 MR JOWELL: These are adversaries, the new truck purchasers
12 and the used truck purchasers, they have diametrically
13 opposite --

14 DR BISHOP: On some issues.

15 MR JOWELL: -- on the critical issue that enables the used
16 truck purchasers to obtain damages, which is the pass-on
17 level, and they are diametrically opposed and yet here
18 we see them agreeing in advance to insure -- to pay the
19 costs that their adversary will have incurred to the
20 defendants and that we say --

21 THE CHAIR: What is the basis of your objection, that this
22 is somehow unfair?

23 MR JOWELL: We say it undermines the independence that the
24 Court of Appeal has sought to preserve.

25 THE CHAIR: You may say it is unfair, potentially, but that,

1 as Dr Bishop points out, rather begs the question of
2 what might be the premiums of two separate policies if
3 they were available at all, but why does it undermine
4 the independence of the class representative?

5 MR JOWELL: Because it gives them effectively skin in the
6 game in relation to the outcome of the other's claim.
7 If you are insuring your adversary you are effectively
8 insuring in advance the costs that your adversary stands
9 to spend, you are undermining --

10 THE CHAIR: Are you saying that will effect the way you run
11 the litigation?

12 MR JOWELL: It undermines the independence and certainly
13 when it comes to settlement, say, how can the new truck
14 claim really settle independently if it knows that it
15 stands to have to pay the adverse costs awarded in
16 favour of the defendants against the used truck claim?

17 DR BISHOP: Mr Jowell, you are a member of a barrister's
18 chambers, I believe. Every barrister's chambers are
19 coinsurers of costs. They have a levy that meets the
20 costs, somebody who is unsuccessful in some year really
21 benefits from the fact that there is some hugely
22 successful KCs like yourself out there earning quite
23 a lot and this cost sharing is actually in some sense
24 coinsurance because if you gain more from successfully
25 attracting more clients and winning more cases, you wind

1 up basically subsidising your less successful
2 cooperators, sometimes cooperators, sometimes rivals,
3 within your own chambers.

4 This sort of thing happens all the time, coopetition
5 of co-insurance, and you seem not to be recognising it,
6 but it is part of your everyday business as a barrister,
7 and all these other chaps in the room.

8 MR JOWELL: Although I may be in an adversarial relationship
9 in the courtroom with other barristers in my chambers,
10 I am not in a commercially adversarial relationship,
11 I am not in litigation personally against other members
12 of my chambers, and if I were, I certainly would not
13 agree to reimburse their costs in advance. If I was
14 suing someone else I would never agree in advance to
15 agree that my damages should be abated by any costs
16 award in my favour, for example.

17 So that is the difficulty, and we say that this is
18 a very surprising agreement to have been reached --

19 THE CHAIR: You say it undermines the independent
20 decision-making of the --

21 MR JOWELL: Yes.

22 THE CHAIR: Of whom? You say the sub-class representative
23 is going to take different decisions because it knows
24 that if its proceeds are -- that it recovers for the
25 sub-class are insufficient and it has adverse costs it

1 can -- the insurer can recover the adverse costs from
2 the new truck class members?

3 MR JOWELL: Well, suppose they simply had a direct
4 agreement. We, the new truck claimants, will insure any
5 costs award against you, the used truck claimants and
6 vice versa. That is effectively what is being done here
7 and we say that is objectionable in relation to two
8 adverse parties who are meant to be acting
9 independently.

10 THE CHAIR: They are suing the same defendants.

11 MR JOWELL: Yes.

12 THE CHAIR: They have clearly a lot of common issues across
13 both sub-classes, which is why they are sub-classes in
14 the same action, so there may be, for example, costs
15 regarding the price of new trucks which are run by the
16 RHA for the benefit of everyone. If there are adverse
17 costs on that, those issues against the RHA, and the new
18 truck proceeds are insufficient, the used truck proceeds
19 can be used towards those costs, which are costs for
20 everyone, there is nothing wrong with that.

21 MR JOWELL: No, I accept that there would be no objection on
22 those issues in which there is a common interest. What
23 I find is --

24 THE CHAIR: So it is only those costs on the sub-issues?

25 MR JOWELL: Yes, it is on those issues where they are

1 adverse to each other and I find it a remarkable
2 arrangement that adverse parties in litigation should
3 agree to bear the other party's -- their adversary's
4 costs in advance.

5 THE CHAIR: Would it be remarkable if the only alternative
6 was a vastly more expensive separate ATE policy for the
7 used truck class members?

8 MR JOWELL: It would have to be established that it would be
9 vastly more expensive for both.

10 THE CHAIR: But if it were, then would this not be
11 a sensible arrangement?

12 MR JOWELL: If it were for both then potentially one can see
13 that it would be defensible, but if it were only for
14 used trucks, then that would not be in the interests of
15 new truck purchasers.

16 The Court of Appeal has given a direction that the
17 Tribunal must ensure that there is true independence
18 here between what are adversarial parties, and this is
19 not the conduct of any adversaries I have ever seen.

20 THE CHAIR: Well, it has given direction on representation
21 and funding; it has not said anything about insurance.

22 MR JOWELL: No.

23 THE CHAIR: So I do not think the Court of Appeal helps us.

24 Given the uncertainties of recovery, what recovery
25 might take place and where, and the difficulties, as we

1 have just heard, of getting insurance, I mean, to get
2 six insurers to agree, if this is, as it were, the best
3 deal on the table, one can see why everyone would sign
4 up for it.

5 MR JOWELL: If it is the best deal on the table for both
6 classes --

7 THE CHAIR: Yes.

8 MR JOWELL: -- and that needs to be considered independently
9 by both classes, not as a collective, because that is
10 what the judgment of the Court of Appeal does require,
11 in our submission. They should be independently
12 represented, and genuinely so, not by way of a facade.

13 So we do say that this is a remarkable feature,
14 arrangements to have with your adversary, and we invite
15 the Tribunal to adjust it accordingly.

16 THE CHAIR: Yes. Well, Mr Flynn, we have an eye on the
17 time. I take it these two points which are the only
18 points raised, continue under the arrangements that you
19 said may be completed shortly, so it is appropriate to
20 address them now, they are not going to change, as
21 I understand it.

22 MR FLYNN: Not as far as I am aware, my Lord.

23 THE CHAIR: No, so then they are, as it were, live issues.

24 The question is whether you want to reply very
25 shortly now in ten minutes or you want to take a bit

1 longer in which case we can deal with it just after
2 2.00.

3 Submissions in reply by MR FLYNN

4 MR FLYNN: I was only going to reply shortly in view of the
5 discussion that the Tribunal has had with my learned
6 friend. Firstly, I think it is obvious that separate
7 insurance would be more expensive. One only has to look
8 at this clause and the protection that it gives the
9 insurer to suggest that separate policies would be more
10 expensive and I do not think it is appropriate if that
11 is being suggested that we have to provide evidence to
12 the Tribunal of attempts to find different forms of
13 insurance.

14 These are being independently considered in that
15 each of the sub-class representatives will have to sign
16 up for the insurance, and broadly, I think as your
17 discussion established, this is not a point which in any
18 way financially affects the defendants at all. They are
19 covered. This is another, if I may say so, purist
20 suggestion from Mr Jowell in line with his submissions
21 on confidentiality and other matters which do not have
22 much eye to the practical realities of this litigation
23 in which one has an overall class and sub-classes in
24 relation to one particular issue and large numbers of
25 common issues both of which they are affected by.

1 So this is a sort of purist line saying that they
2 should be treated as if they were two separate claims to
3 litigants at each other's throats, and that is not
4 practically the situation. I think it is a wedge that
5 is being attempted to drive between the sub-classes and
6 one, in my submission, that is completely unnecessary
7 when, for reasons that Dr Bishop has explained, one can
8 see why an arrangement of this kind would suit both
9 parties when one considers what they are faced with and
10 you only have to look around this courtroom to see what
11 that is, then getting appropriate insurance at the best
12 available terms is what any well-advised litigant,
13 sub-class rep or otherwise, should be doing, and to the
14 argument that this is unusual, we are in an unusual
15 case, and I probably do not need to say more than that
16 at this stage.

17 THE CHAIR: Your client in its capacity on behalf of the new
18 truck purchasers, are they satisfied that this is in
19 their interests to take out insurance on these terms?

20 MR FLYNN: Yes, they are. Yes, they are.

21 THE CHAIR: Mr Scannell, is there anything you want to add?

22
23 Submissions in reply by MR SCANNELL

24 MR SCANNELL: Only two factual points which may assist in
25 light of the last point that you made. The used truck

1 sub-class representative is separately represented and
2 separately advised in relation to entry into the ATE
3 insurance policy and is forming its own view
4 independently of the RHA as to whether it is desirable.

5 THE CHAIR: When you say separately advised, advised by ...?

6 MR SCANNELL: By its own legal representative.

7 THE CHAIR: Lawyers?

8 MR SCANNELL: Of course, and has formed the view that it is
9 in its interests to conclude an ATE insurance policy of
10 this sort. I am told that the cost of separate policies
11 would be astronomical.

12 THE CHAIR: Yes, not surprised.

13 Further submissions by MR JOWELL

14 MR JOWELL: Sir, if I may, we have heard some evidence given
15 from the Bar as to the cost of these policies to each of
16 the class representatives. I do not make any formal
17 points, but we do say it is improper, but simply that
18 that should be in a witness statement, if it is indeed
19 the case that, for example, for the new truck purchasers
20 that they cannot buy independently insurance on better
21 terms, then there really should be a witness statement
22 to say that in my respectful submission, and of course
23 since they do not have any ATE insurance as things
24 stand, we do not think that should delay matters.

25 THE CHAIR: We will rise until 2.15.

1 (1.08 pm)

2 (The short adjournment)

3 (2.22 pm)

4 Ruling - redacted pending approval

5 (2.32 pm)

6 THE CHAIR: I think we turn then to the question of funding.

7 Submissions by MR PICKFORD

8 MR PICKFORD: Thank you, Mr Chairman, members of the

9 Tribunal. It is Mr Pickford for DAF.

10 In a nutshell, our concern is that the funding
11 proposal now put forward by the RHA and RUTL, if I can
12 call them, that does not comply with the
13 Court of Appeal's judgment.

14 Now, to pick up on a point that was discussed this
15 morning, we say we have a real and legitimate interest
16 in this point. We wish to ensure that there is no
17 prejudice to the interests of the used truck sub-class
18 on the issue of resale pass-on because our interests are
19 likely to be heavily aligned with the used truck
20 sub-class on the essential point that is within their
21 purview. The Court of Appeal evidently considered we
22 had standing in this matter and we think that answers
23 the point that was raised against us this morning.

24 So Therium has arranged for funding for the RHA and
25 RUTL to be provided through two investment vehicles that

1 are both part of Therium. There is Therium RHA IC and
2 that is to fund the RHA's claim, and then there is
3 Therium Atlas and that is to fund RUTL's claim pursuing
4 certain issues on behalf of the used truck class.

5 Now, that division of itself does not mean anything,
6 and I do not understand that my learned friends say it
7 does. I might have multiple funds in my personal
8 pension, but I control them all, and I will care
9 ultimately about the returns to the total pension pot.

10 So what matters is not the mere use by Therium of
11 two nominally separate funds to finance the claims; what
12 will matter is the particular institutional arrangements
13 that Therium puts in place and whether they properly
14 give effect to the need for separate funding capable of
15 addressing any conflict of interest as stipulated by the
16 Court of Appeal, and I am going to address in that
17 connection four issues.

18 The first issue is what did the Court of Appeal
19 actually require of the RHA? I can do that briefly but
20 I would like to touch on it.

21 Second issue is what are the problems in principle
22 in relation to Therium's involvement as a funder of both
23 claims.

24 The third issue is what is the law on addressing
25 these types of problems, again, I can deal with that

1 relatively briefly but I am going to touch on it to some
2 extent.

3 Then the fourth and final issue which brings those
4 points together is what measures have been put in place
5 to address the prima facie problems and are they good
6 enough?

7 So turning then to issue one, I think the Tribunal
8 should be familiar with the fact that the
9 Court of Appeal's order requires separate funding for
10 the two sub-classes in relation to the issue of resale
11 pass-on. What does that mean? Well, they obviously did
12 not order that for sake of appearance or form, they
13 ordered it to solve a real concern, so it must mean that
14 it is actually a meaningfully separate funding. If we
15 could go, please, to the judgment which is to be found
16 at {RM-B/4/25} and pick up paragraph 88, and if I could
17 ask the Tribunal please to read to itself paragraph 88,
18 in particular focusing really on about line 6 downwards
19 beginning:

20 "I also consider that a different funder ..."

21 (Pause)

22 So the points I make in connection with that
23 paragraph are as follows: one can see that the
24 Court of Appeal thought that there was a real potential
25 conflict in relation to funding. Indeed, in

1 contradistinction to the approach to the RHA itself
2 where it was clear that a Chinese wall would be
3 sufficient, it thought that having different funders was
4 either necessary or at the very least the safest way of
5 ensuring the avoidance of the conflict, and the test,
6 effectively articulated in this paragraph, is that the
7 RHA will have to satisfy the CAT, the Tribunal, that the
8 funding arrangements in place do not interfere
9 unreasonably with ordinary, independent decision-making
10 in the litigation including as to settlement.

11 Now, what we say that must necessarily imply is that
12 the particular people involved in that decision-making
13 at the funder cannot have a real risk of conflict which
14 means that their interests are not properly aligned with
15 the interests of the sub-class that they are involved in
16 funding and taking decisions about, and secondly, that
17 the arrangements that are put in place must ensure that
18 there is no risk that their decision-making is informed
19 or influenced by confidential information belonging to
20 the other sub-class.

21 So those are the principles that in my submission
22 the Tribunal should apply.

23 So if I could then turn to the second issue which is
24 what we say the problems are in principle. So there are
25 two essential problems that we say arise from Therium's

1 involvement in these proceedings as a single funder.
2 One concerns flows of information and the other concerns
3 the financial incentives that are in conflict with one
4 or other sub-class, so I will just deal briefly with
5 each of those in turn.

6 The information flows problem is essentially this:
7 it is all very well having information barriers in place
8 within the RHA itself to ensure that one side does not
9 get any advantageous insight into the affairs of the
10 other, but if the information barriers in the litigation
11 are to be effective, it is imperative that they are not
12 undermined by information that can potentially flow to
13 or via the single funder. So essentially the same
14 problem that arises within the RHA also arises within
15 the funder.

16 Those taking decisions in respect of one sub-class
17 must not be influenced by information belonging to the
18 other sub-class.

19 THE CHAIR: Of course the funder is taking far fewer
20 decisions about the litigation. I mean, it is not
21 conducting the litigation.

22 MR PICKFORD: It is, of course, that is right, sir, but as
23 I will come on to explain, there are critical respects
24 in which under the arrangements as they are currently
25 proposed the funder has the potential for very

1 significant influence and it is in relation to those
2 issues where this particular point is going to bite.
3 I would like to develop that, if I may, in due course,
4 but I recognise the point but I say it does not go away
5 in relation to the funder for the reasons which I will
6 come on to develop.

7 So that is the information flows, and then the
8 second issue which is related but it can be thought of,
9 I think, conceptually as a distinct one, is the risk of
10 conflict between the financial incentives of Therium as
11 a whole and each of the sub-classes whose claims it is
12 funding.

13 Now, we are all now, I think, familiar in this room
14 with the essential point that those who purchase new
15 trucks would like the Tribunal to determine that there
16 was either no or very minimal resale pass-on in relation
17 to the prices of used trucks.

18 By contrast, those who purchased used trucks need
19 the Tribunal to determine that there is at least some
20 resale pass-on and ideally from their perspective, high
21 retail pass-on because otherwise they do not have
22 a claim.

23 Now, under a simple arrangement where there were
24 a single funder and a damages-based agreement, as was
25 originally the case here, the funder would have a clear

1 incentive in those circumstances to want to promote the
2 interests, we say, of one class over another, and let me
3 explain why that is so and then I can develop the point
4 in relation to the arrangements that we now see.

5 So let us suppose for sake of illustration there are
6 200,000 new trucks and there are 150,000 used trucks in
7 the claim. For every £1,000 reduction in resale
8 pass-on, the used trucks claim loses 150 million, that
9 is 150,000 times £1,000 per truck.

10 On the other side of the equation, the new trucks
11 claim gains 200 million because that is 200,000 trucks
12 times £1,000 per truck, so that represents overall for
13 the class as a whole a £50 million gain.

14 Now, were recovery based on a damages-based
15 agreement as it was previously from the point of view of
16 the funder, it is easy to see why they would favour
17 recovery on new trucks in my example at the expense of
18 recovery on used trucks.

19 Now, pausing there, there must be a real possibility
20 that Therium will seek to readopt a damages-based
21 agreement. Mr Flynn has certainly left that open this
22 morning, and we will discover tomorrow whether it is
23 still open, but obviously as matters stand, Therium does
24 not have a damages-based agreement in place, and so the
25 question is does that cure the problem, and we say it

1 does not at all, and that requires us to look at the
2 current arrangements.

3 If I could ask, please, the Tribunal to turn up --
4 I think it is in exhibit NAP2 to third Purslow. It is
5 to be found at {RM-E/5/9} and I am looking at
6 paragraph 2.1.

7 THE CHAIR: This document is what, specifically?

8 MR PICKFORD: So this document is the litigation -- this is
9 the revised litigation funding arrangement. In this
10 case it is the RHA's litigation funding arrangement.
11 The RHA's litigation funding arrangement and RUTL's
12 litigation funding agreement are in essentially
13 identical terms obviously subject to mutatis mutandis,
14 as it were.

15 So 2.1 is the essential clause by which the funder
16 gets a return and I am going to turn to the schedules in
17 a moment because they are important, but essentially
18 what it provides for is that firstly they get their
19 money back, that is the reasonable costs sum, so that is
20 essentially what has already been incepted, and then
21 they also get a contingency fee which is a function of
22 their outlay, and one can see how that adds up in terms
23 of real numbers if one goes on to page -- external
24 page -- I think it is 27 in this document {RM-E/5/27},
25 yes, it is the last page, the last schedule, and what

1 that shows is a series of tranches of funds that are
2 incepted one at a time and the contingency fee multiple
3 that applies in relation to them.

4 Sir, I see that you might not have the same document
5 that I am looking at because --

6 THE CHAIR: We have got the wrong page, I think.

7 MR PICKFORD: It is the final page of exhibit NAP2, and
8 I believe it is at {RM-E/5/27}.

9 THE CHAIR: Yes, now we have got it.

10 MR PICKFORD: So what this table shows is a series of
11 tranches of committed funds and then the contingency fee
12 multiple that applies to each of them. It is 4.5 in
13 each case.

14 If you add all the funds up, you can take it from me
15 that is £27 million on the maths, and the total sum that
16 would be received by Therium under this agreement is
17 £148,500,000 if all of the tranches are incepted. So it
18 has invested 27 million and if the agreement goes to
19 plan it gets back nearly 150 million.

20 Now, just in passing, because this may be relevant
21 to something that crops up tomorrow so we might as well
22 address it when we are on this page, this arrangement
23 may actually give a funder a perverse incentive to avoid
24 settlement until all tranches are incepted because
25 delaying in that way seems to substantially increase

1 their total returns. I mention that merely in passing
2 because it is not part of the submissions I need to make
3 for my point today.

4 Then for the RUTL claim we have equivalent
5 provisions, I think it is probably convenient if
6 I simply give the Tribunal the references, they work in
7 the same way. So the relevant clause is 2.1 again of
8 that agreement and it can be found at {RM-E/12/20} and
9 the relevant schedule can be found at {RM-E/12/38}.

10 The only difference between the two is that the
11 total outlay under the RUTL claim is 6 million, so if
12 you apply the total multiplier to that in terms of
13 getting back the reasonable costs sum and then
14 additionally the contingency fees, that leads to
15 33 million that stands to be returned.

16 So those are, in both cases, very substantial
17 amounts of money that Therium stands to make in relation
18 to its agreement to fund the claim, so assuming it is
19 not merely issuing a licence to itself to print money --

20 THE CHAIR: Well, that is if the claim succeeds.

21 MR PICKFORD: If the claim succeeds, yes, so there must be
22 a real possibility that it is not going to achieve those
23 returns because you do not generally get back 450%
24 profit if it is a sure thing. So there must be
25 a possibility that those returns are anticipating that

1 one or other of the claims may not generate sufficient
2 proceeds to cover Therium's full return. It might be
3 the case that the Tribunal imposes a cap on the amount
4 of damages that Therium can recover if it thinks at the
5 end of the proceedings that it will be wrong for the
6 vast majority of the funds to go back to Therium. So
7 what are the implications from that funding arrangement,
8 we say, for Therium's incentives?

9 In my submission, they are likely to lie, as in the
10 damages-based agreement, but for subtly different
11 reasons, in maximising recovery on the RHA new truck
12 claim, because it stands to make back in relation to
13 that claim nearly £150 million as against a little over
14 the maximum of 30 million that it can make back on the
15 other claim, and so in a situation where there is
16 a divergence between the two claims and they are pitted
17 against one another, as they will be on the issue of
18 resale pass-on, Therium will see that its bread is
19 buttered in terms of favouring the RHA claim rather than
20 the RUTL claim because it stands to make a lot more
21 money on it.

22 Now, that takes me to a point that, sir, you put to
23 me which is, well, how would this actually arise in
24 practice given the kinds of decisions that are being
25 made? Well, there are essentially two means by which we

1 say Therium could give effect to its clear incentives to
2 prefer one claim over another, and those are in relation
3 to applying pressure to settle one claim or another or
4 being willing to settle one claim or another, so
5 settlement is one issue, and the other is when deciding
6 to exercise its rights, which it does have, not to fund
7 the next step in litigation.

8 So those are the two levers, and they may arise in
9 combination, that we say Therium will be able to use
10 unless constrained, and obviously I am going to come on
11 to what the limits that have allegedly been put in place
12 are, but those are the problems in principle, and it is
13 important to set those out in principle so that we can
14 then see whether the arrangements in place actually meet
15 those problems.

16 If I could then turn briefly to my third of my four
17 points which concerns the law. Mr Jowell this morning
18 made submissions by reference to the *Prince Jefri*
19 *Bolkiah* case, so I think I do not need to go to that.
20 What I would like to do is just briefly pick up the
21 Court of Appeal's decision in *Koch Shipping*, he did
22 refer to it, but I think there are some useful points
23 that we can look at in slightly more detail there from
24 my perspective. So that is to be found in bundle
25 {RMJA/4/1}, joint authorities, and it begins obviously

1 at page 1 of that tab.

2 It is a decision of the Court of Appeal. It
3 concerned the move of two solicitors to Richards Butler,
4 and one of those solicitors held information
5 confidential to *Koch* that was pertaining to an ongoing
6 arbitration, and Richards Butler was on the other side
7 of that arbitration, so there was clearly a situation of
8 potential professional -- or indeed significant
9 professional conflict, but there is no suggestion that
10 the solicitor had any personal incentive to disclose the
11 information in terms of her own financial interests.

12 Now, Mr Jowell summarised some of the extensive
13 undertakings that were given by the firm and the
14 individuals concerned. There are relatively lengthy
15 paragraphs on them. For the Tribunal's note, they are
16 to be found at paragraphs 35 and 36 in particular of the
17 authority, but I think I can also just summarise them as
18 well because it takes some time to go through them.

19 Essentially the undertakings were such that movers
20 would not involve themselves in the arbitration at all
21 or indeed engage with anyone who was involved, and that
22 went so far as entering the same office space as those
23 dealing with the arbitration. So they were extensive
24 undertakings that completely ring-fenced in particular
25 the partner with the confidential information.

1 Now, the discussion of the legal principles -- so
2 those are the facts. The principles that I want to draw
3 from this case, that begins at paragraph 20. That is on
4 external page 4 {RMJA/4/4}, and in particular I think we
5 can pick it up at paragraph 24 where the court
6 summarises the relevant principles in relation to
7 avoiding a conflict and protecting the confidential
8 information {RMJA/4/6}, and the particular ones that
9 I am going to pick out are (3):

10 "The duty to preserve confidentiality is
11 unqualified. It is a duty to keep the information
12 confidential, not merely to take all reasonable steps to
13 do so."

14 And then about halfway down we have (6) that:

15 "The court should intervene unless it is satisfied
16 that there is no risk of disclosure. The risk must be
17 a real one, and not merely fanciful or theoretical, but
18 it need not be substantial."

19 And then (8):

20 "In considering whether the solicitors have shown
21 that there is no risk of disclosure, the starting point
22 must be that, unless special measures are taken,
23 information moves within a firm."

24 Then if we go to paragraph 25 {RMJA/4/6}, the point
25 is made that each case turns on its own facts and we

1 certainly agree with that.

2 Then finally in this authority if we could go,
3 please, to paragraph 31 which is on external page
4 {RMJA/4/9}, and there it is cited with approval the case
5 of *Newman v Phillips Fox* which in turn cites with
6 approval D&J Constructions and what was said in that
7 case by Mr Justice Bryson --

8 THE CHAIR: These were Australian cases, right?

9 MR PICKFORD: That is correct, yes. What was said there is
10 that:

11 "Enforcement by the court would be extremely
12 difficult and it is not realistic to place reliance on
13 such arrangements ..."

14 This is in relation to Chinese
15 walls:"... arrangements in relation to people with
16 opportunities for daily contact over long periods, as
17 wordless communication can take place inadvertently and
18 without explicit expression, by attitudes, facial
19 expression or even by avoiding people one is accustomed
20 to see..."

21 Etc. Those comments have been many times since
22 quoted with approval.

23 Now, obviously we have got Chinese walls in this
24 case and it is no part of my submission that we cannot
25 have Chinese walls. The reason for drawing the

1 attention of the Tribunal to this is to show in general
2 the degree of importance that will be attached to making
3 sure that those Chinese walls are really effective.

4 So what I draw from this case and also the Prince
5 Jefri *Bolkiah* case that Mr Jowell referred to is in
6 particular it is not sufficient in the context of
7 someone who holds confidential information simply to
8 tell them that they cannot disclose it or for them to
9 agree not to do so; what you need is real, practical
10 measures that will be effective in stopping the risk of
11 disclosure, so merely contracting to do so is not good
12 enough, so that is the first point.

13 The second point is this: the core issue in both of
14 the cases is the effectiveness of information barriers,
15 but I say that a fortiori they also apply to avoiding
16 situations where someone not only holds confidential
17 information but also has substantive conflicting
18 incentives, because the authorities are concerned with
19 the situation essentially where someone might
20 inadvertently disclose something to another party in
21 litigation.

22 If instead someone has a concrete incentive to act
23 according to their own interests, which may be contrary
24 to the interests of the third party with whose interests
25 they are supposed to be aligned, it is all the more

1 important to make sure that the arrangements in place
2 are effective in preventing that, and it is not going to
3 be good enough simply to tell the person with the
4 conflicting incentive that they should not act on it or
5 for them to agree to do so. There need to be practical
6 arrangements that actually remove the problem so it
7 becomes merely fanciful.

8 So those are the first three points, and then as
9 I said my fourth point is to draw those strands together
10 in relation to analysing Therium's actual arrangements
11 that it has put in place allegedly to guard against the
12 problems.

13 So in relation to confidential information flows,
14 the first of the two points that I have addressed, in
15 its reply evidence Therium has exhibited an information
16 barrier between the two teams responsible for
17 decision-making for the two claims, and then there is
18 also a third team called the reporting team. The
19 barrier is to be found at {RM-E/4} and for my purposes
20 we begin on page {RM-E/4/2}. Does the Tribunal have
21 that? I know that -- I am using the electronic bundle
22 here.

23 THE CHAIR: Yes.

24 MR PICKFORD: Thank you.

25 So in my submission there are four problems with

1 this information barrier.

2 THE CHAIR: This is the policy --

3 MR PICKFORD: That is the policy, yes.

4 THE CHAIR: -- of 2019.

5 MR PICKFORD: So what --

6 THE CHAIR: Not the actual --

7 MR PICKFORD: -- we have is a combination of a policy from
8 2019 and then, in conjunction with that, if one then
9 goes on to page {RM-E/4/4}, we then have the RHA
10 information barrier itself, so one has to read, in my
11 submission, the two documents together. They have been
12 given to us together as between them sufficiently
13 addressing information flows and so I am going to take
14 them together.

15 The first point that I wanted to draw attention to
16 is on page {RM-E/4/2}, so this is the 2019 staff policy,
17 and it says there at paragraph (b) that:

18 "Where possible, we will ensure that no member of
19 the restricted group is managed or supervised in
20 relation to that matter by someone from outside the
21 restricted group."

22 That is obviously highly important that the lines of
23 management are separate between the respective groups,
24 otherwise the barrier could evidently break down. If an
25 employee needs advice from their line manager and their

1 line manager is not within the barrier, then you have
2 a problem, and Therium obviously recognised this because
3 it is in their 2019 policy, and they provide for it but
4 then we say that provision is undermined by the fact
5 that it says only "where possible". So if that is what
6 is being relied on in our case, that it is only "where
7 possible", that would seem to allow Therium, still
8 acting in accordance with its policy, to decide that it
9 is not possible, and --

10 THE CHAIR: That is why I say -- sorry to interrupt you,
11 Mr Pickford -- this is a policy, a general policy. The
12 question is how it is implemented in this particular
13 case which may be the other document, so presumably that
14 will enable us to see whether that has been done or not
15 in this case.

16 MR PICKFORD: I am going to come on to that. It is not 100%
17 clear to us whether it has or it has not. It seems --
18 there are certain inferences that we can draw, but my
19 starting point is insofar as the RHA is telling us:
20 well, do not worry, we have got the policy, I am
21 pointing out to the Tribunal, well, the policy itself
22 does not get us home because the policy actually has an
23 exception in it, so they seem to consider that they
24 could still act in accordance with the policy and not
25 give effect to the important principle in relation to

1 management.

2 Just to draw that strand to a close, as Mr Jowell
3 referred to and as Lord Millett emphasised in the
4 *Bolkiah* case, the obligation to preserve confidentiality
5 is not merely to take all reasonable steps to do so; it
6 is a duty to keep information confidential.

7 The second point is we say that insufficient
8 consideration has been given in relation to the RHA
9 information barrier in conjunction with the policy to
10 establishing working arrangements which ensure
11 separation between the RHA and RUTL teams.

12 The case law that I showed you made clear that
13 strict measures would be required. We are not led to
14 believe in anything that I have seen in these documents
15 that there will, for example, be any physical separation
16 of the relevant teams, indeed, we know that Therium is
17 a small company. It may well be that they all work next
18 to each other in the same offices, for all we know. We
19 are not told anything about those kind of working
20 arrangements or interactions, and so the second point is
21 that the measures as proposed we say are insufficiently
22 comprehensive. Obviously, I cannot prove the negative
23 to you very quickly by reading through them, but in my
24 submission, those arrangements are not there.

25 The third point is this: if we go to the specific

1 information barrier for this case, the RHA information
2 barrier, we see at paragraph 4 that there is a category
3 of reporting information that is created which is:

4 "... either New Trucks Confidential Information or
5 Used Trucks Confidential Information which is the
6 minimum information required to be created or provided
7 solely for the purpose of facilitating Therium's
8 compliance with its regulatory and reporting
9 obligations."

10 That is found on page {RM-E/4/4} of the document.
11 Now, we say there is an insufficient explanation in this
12 document or in the information barrier policy generally
13 of what reporting information will actually constitute
14 and to whom the reporting information that initially
15 resides in the reporting team may be provided onwards.

16 As one example, can it be provided to investors who
17 will be investing in one or both of the relevant Therium
18 funds, and if one investor gets to see the information
19 of both sides, will it be able to take that into account
20 in its own decision-making? So we say there is a lack
21 of clarity in relation to this issue about reporting
22 information.

23 Then the fourth point on information flows is one
24 that is related to the next point I am going to make
25 about conflicts which is both the policy and the

1 particular RHA barrier are silent as to the role,
2 responsibilities and incentives of Therium's key
3 internal decision-makers, including their senior
4 leadership insofar as they are within the information
5 barriers.

6 So if we go to paragraph 5, just below "Reporting
7 Information" that we were previously looking at
8 {RM-E/4/4}, what we see in relation to the three groups
9 that are established for information, the new trucks,
10 the used trucks and the reporting group, is that
11 Neil Purslow will be part of the new trucks restricted
12 group, that is with Charlie Temperley, and John Byrne
13 will be part of the used trucks restricted group with
14 Fred Bowman and Chris Wilkins.

15 We know that John Byrne is the CEO of Therium and
16 Neil Purslow is the chief investment officer of Therium,
17 and inevitably both of those people will have
18 responsibilities in relation to Therium as a whole.

19 The question is how are those responsibilities in
20 relation to Therium as a whole to be reconciled with
21 their particular obligations in relation to their
22 particular groups that they are effectively assisting
23 and advising and taking decisions in relation to.

24 So that is what I say on the information barriers
25 and flows of information.

1 I then come to what really is, we say, the crux of
2 the problem in this case which is financial incentives
3 and whether the prima facie financial incentives which
4 I showed you that Therium has are quite likely to favour
5 new trucks' recovery at the expense of used trucks'
6 recovery, whether the arrangements that they have put in
7 place sufficiently address those incentives to prevent
8 them from being acted on.

9 Now, DAF in its response to the applications queried
10 of the RHA and Therium implicitly whether the returns
11 from the two funds ultimately became pooled such that
12 Therium as a whole had an incentive to maximise its
13 total returns in the way that I described in my example,
14 and the RHA and Therium have declined to say that that
15 does not happen, so I think we can presume that the
16 answer is yes, Therium does have an incentive, as indeed
17 one would imagine, to maximise its total returns.

18 We also queried whether the key personnel involved
19 in advising on each of the claims, in particular,
20 John Byrne and Neil Purslow, had personal financial
21 incentives or obligations in relation to maximising
22 Therium's overall returns, and again, the RHA and
23 Therium have declined to say. So we can again presume
24 that the answer is yes, they do have personal financial
25 incentives or obligations in relation to maximising

1 Therium's overall returns, again, as one would imagine
2 given their senior roles within the company.

3 Indeed, we made the same query in respect of other
4 employees and we got the same absence of answer, so we
5 say we can draw the same inference in relation to those
6 as well.

7 Now, the RHA's only real attempt to answer all of
8 these points is to be found in Mr Purslow's second
9 witness statement at paragraph 18, and that is to be
10 found at {RM-C/8} and I am going to pick it up on page
11 {RM-C/8/4} which is paragraph 18.

12 If I could ask, please, the Tribunal to read
13 paragraph 18, including its subparagraphs, through to
14 the end, because this is the essence of what we are told
15 by the RHA will offer sufficient protection, and in
16 particular, it is really the very end of paragraph 18.6
17 that I say contains the essence of their answer.

18 (Pause)

19 Has the Tribunal had an opportunity to read that?

20 THE CHAIR: Just one moment.

21 MR PICKFORD: Of course. (Pause)

22 THE CHAIR: Yes, thank you.

23 MR PICKFORD: Thank you. So I have two points to make in
24 relation to these protections. One is a preliminary
25 point which leads to something of a puzzle, and the

1 other is really the crux of the difference between us
2 and the RHA.

3 So the first point is this: there is reliance placed
4 on these paragraphs on the fact that there is going to
5 be separate teams with information barriers between the
6 teams and I have shown you the information barriers
7 document, and we saw in that document at paragraph 5(a)
8 that there were two people inside the information ring
9 for the RHA, that was Neil Purslow and
10 Charlie Temperley. Now, Mr Purslow explains in
11 paragraph 18.3 of his statement {RM-C/8/4} that he is
12 the relevant manager and he supports the investment
13 manager, so by process of elimination the investment
14 manager must be Charlie Temperley. Then he also says
15 that the investment manager advises the relevant
16 vehicle, so that means that Charlie Temperley's job is
17 to advise Therium RHA IC and that has an investment
18 committee which makes recommendations to its board and
19 then it is the board that ultimately exercises the
20 relevant rights. That is the institutional structure
21 that has been explained to us, and yet puzzlingly, no
22 one on the investment committee or the board is within
23 either the information ring or bound by its obligations,
24 because there are only two people in the ring and they
25 have already been accounted for: they are the line

1 manager and the investment manager. So that is the
2 first puzzle, and indeed, we are not told who is on the
3 committees or the boards to see for ourselves that there
4 is in fact true and full separation between them.

5 So we say that that is inadequate and the same
6 problem arises in relation to Therium Atlas, I have just
7 taken Therium RHA as an example. So that is the first
8 point.

9 Then the second point which is really the crux of
10 the matter is this: what the RHA tells us, both in their
11 skeleton and also in Mr Purslow's evidence, is he says:
12 well, there is nothing to worry about because the
13 conflict has been addressed because there is a contract
14 in place, look at clause 16.3 of the LFAs which sets out
15 the circumstances in which Therium can terminate, and it
16 says: well, given that we have prescribed contractually
17 for the circumstances in which Therium can decide not to
18 advance the next tranche, we have dealt with the
19 conflicts problem because supposedly, they say, Therium
20 can only take account of the -- in relation to, for
21 instance, the used truck claim, the merits of the used
22 truck claim. So that is what I want to examine because
23 we say that is fundamentally wrong if you actually look
24 at the relevant clause.

25 I realise it takes a little while to get there, but

1 it is important, sir, because this clause is really the
2 crux of the protection that has been put in place.

3 DR BISHOP: 18.5 specifically, or which clause?

4 MR PICKFORD: So there is a reference in 18.6 to clause 16.3
5 of the financing agreement, and I would like to go to
6 clause 16.3 and look at how that works to see whether it
7 does give the protection that is placed on it, because
8 very heavy weight is ultimately placed on the alleged
9 restraints on Therium's ability to decide when it will
10 or when it will not advance monies.

11 So that is found back in the LFA. In relation to
12 the used trucks, that is at {RM-E/12/33}.

13 THE CHAIR: We are what, 16.3?

14 MR PICKFORD: 16.3 on page 33. If I could ask the Tribunal,
15 please, to read that paragraph. (Pause)

16 Is it convenient for me to continue?

17 THE CHAIR: Yes, yes.

18 MR PICKFORD: Thank you. So the clause starts off simply
19 enough. Therium apparently has a right to terminate in
20 two circumstances, and termination here operates in
21 conjunction with clause 2 which you saw some of earlier
22 on which is Therium's entitlement to extend each tranche
23 of funding, so basically the way it works, or is
24 intended to work, is that it has a power to advance
25 a further tranche of funding unless it decides to

1 terminate the agreement, and there are two bases on
2 which it may exercise the right. One is if it is no
3 longer satisfied as to the merits and the second, if it
4 is no longer satisfied as to commercial viability.

5 Now, the merits clause is relatively clear: the
6 right to terminate is exercisable and only exercisable
7 if a KC advises the prospects of securing recovery are
8 51% or less. The commercial viability clause which is
9 actually probably the most important one in this context
10 applies what seems to be a kind of Wednesbury
11 unreasonableness standard to what I understand to be
12 very much a commercial decision and a judgment call
13 about whether there is likely to be a reasonable return.

14 So just in passing, I struggle to see how
15 a barrister can actually answer that question of law
16 because the question is -- or rather answer it as
17 a question of law, it does not really seem to be
18 a question of law, but putting that to one side, the way
19 in which the clause works is that then gives an option,
20 a power, to Therium to decide whether or not it wants to
21 exercise its rights to terminate if the barrister
22 answers the question in the way where he says: no, I do
23 not think that -- in the way it is framed, a reasonable
24 privately-paying litigant seeking total returns that
25 Therium is seeking would continue the litigation and if

1 he says he does not think that is the case then Therium
2 is then given the option to terminate.

3 Now, the difficulty with that clause in my
4 submission is twofold. Firstly, what Therium have told
5 us, what Mr Purslow tells us and what Therium tells us
6 in their skeleton argument is: do not worry, the
7 contract requires that Therium itself must exercise its
8 judgment only in accordance with the used truck claim if
9 it is considering -- if the relevant vehicle is Therium
10 Atlas, but that is not what clause 16.3 actually says.
11 What 16.3 says is -- effectively it works as
12 a threshold, gating provision. So it provides the
13 circumstances where Therium is given the power to
14 exercise its discretion, but that mechanism works by
15 taking the words at the beginning where it says:

16 "... Therium reasonably believes that the Claim is
17 no longer commercially viable..."

18 And then defining them later on in the clause and it
19 defines them as nothing to do with Therium's belief. It
20 defines them as a KC having provided the answer "yes" to
21 a version of that question about commercial viability
22 based on a supposed reasonable privately paying
23 claimant.

24 So Therium's own belief does not come into the
25 threshold aspect of this clause. That depends on the

1 KC's view about the reasonable claimant, and then once
2 that has then been met, that threshold that enables
3 Therium to exercise its discretion, there is no
4 constraint that is imposed on Therium's own discretion.
5 It can do whatever it wants to at that stage because the
6 words "Therium reasonably believes that the claim is no
7 longer commercially viable" is fully defined by
8 reference to the KC's view later on.

9 DR BISHOP: Let me see if I have understood. Are you saying
10 that the KC comes back with the reply: yes, this is not
11 a commercially sensible piece of litigation to continue
12 with --

13 MR PICKFORD: Yes.

14 DR BISHOP: -- given the probability of losing and winning
15 and so on, and the costs and the likely recovery.

16 MR PICKFORD: Yes.

17 DR BISHOP: So then Therium still has the option, it does
18 not have to terminate at that point, it might not do,
19 still has the option to continue even though the
20 barrister -- and it might indeed do that, why it would
21 be so solicitous of the recovery of the used trucks I am
22 not sure, but it only applies if in the professional
23 opinion of the KC the matter is unviable as a piece
24 of -- is not commercially attractive as a piece of
25 litigation.

1 MR PICKFORD: Ah, well there is the rub, because it is
2 defined as commercially unviable in a particular way,
3 and it is commercially unviable in this sense, and this
4 is very important so I am very glad, Dr Bishop, you
5 asked the question: it is commercially unviable in this
6 sense, that the KC believes that Therium effectively is
7 unlikely to earn the full 5.5 times multiple that is
8 getting back its reasonable costs sum plus the
9 contingency fee because the key bit in the provision is
10 whether the King's Counsel states that:

11 "... no reasonable privately paying litigant who,
12 with the objective of achieving to Therium payment from
13 the Used Claim Proceeds of at least the Reasonable Costs
14 Sum plus the Contingency Fee and having proper regard to
15 the commercial viability..."

16 Etc.

17 So that is triggered as soon as the KC thinks that
18 it does not seem that it is likely in his view that
19 Therium is going to get back the full 5.5 times, but of
20 course they have just set that -- that is in the
21 agreement. For all we know, Therium might be quite
22 happy with just five times return. So rather than
23 getting 150 million back, it gets something like about
24 130 million back.

25 As soon as the, what we say are very extreme returns

1 that are provided for in the agreement as basically the
2 benchmark, as soon as we are below that, all discretion
3 then reverts to Therium to decide what it wants to do.

4 There are a whole host of scenarios, as I explained
5 in my earlier submissions, when Therium might not get
6 back the 150 million. It might be that it looks like
7 recovery is going to be perhaps more than 150 million
8 but relatively modest, and the KC takes the view: well,
9 there has got to be a risk that the Tribunal is not
10 going to give you 150 million, it is not going to let
11 you take 90% of the proceeds here, you are not going to
12 be able to walk away with that, so the KC takes the view
13 that there is a risk that they are only going to get
14 back 130 million.

15 Now, whether in those circumstances Therium decides
16 to continue with the particular litigation either in
17 relation to the RHA claim or the used trucks claim, the
18 RUTL claim, is then entirely within its discretion.

19 So my point --

20 MR SCANNELL: I am sorry to interrupt, but just in case
21 there is some confusion about this, it is very important
22 to understand that in clause 16.3 "Therium" means
23 Therium Atlas; it does not mean Therium. So there is no
24 possibility of the KC's opinion being all about whether
25 or not Therium will get £150 million back.

1 MR PICKFORD: My learned friend is entirely correct. The
2 Therium referred to here is Therium Atlas. In my
3 submission that makes no difference to the point that
4 I am making because the point that I am making is this:
5 let us consider in practical terms Mr Byrne. Mr Byrne
6 is the CEO of Therium. I have explained to the Tribunal
7 why we have every reason to believe that Mr Byrne is
8 going to be interested in the returns to the Therium
9 entity as a whole. For all we know, that is basically
10 what his pay packet is based on. He is also the person
11 who advises the Therium Atlas vehicle in relation to
12 whether it should exercise its rights under the
13 agreement, and we saw that explained in Mr Purslow's
14 witness statement in the passages that I asked the
15 Tribunal to read.

16 Now, from Mr Byrne's point of view, he, no doubt
17 because he only has one brain, will be thinking, well,
18 you know, I would quite like to maximise the recovery
19 for Therium as a whole, and yet also here he has an
20 advisory role into what Therium Atlas, ie the used
21 trucks claim, should do, and he has that discretion as
22 soon as the chance of recovery falls below getting the
23 full 5.5 times ratio back.

24 THE CHAIR: Why does it say "at least"?

25 MR PICKFORD: Sorry, I do not understand.

1 THE CHAIR: So why does it say "at least"?

2 MR PICKFORD: Sorry, it is the objective of achieving to
3 Therium of at least the reasonable costs sum plus the
4 contingency fee. It says "at least", it is the fifth
5 line up.

6 THE CHAIR: Yes. I thought on what you have shown us they
7 will never recover more than the reasonable costs sum
8 plus the contingency fee. Is that not what you have
9 been telling us?

10 MR PICKFORD: That is my understanding.

11 THE CHAIR: So what is the point of "at least"?

12 MR PICKFORD: I am not sure, sir, but it is not really for
13 me -- it is not my agreement, so --

14 THE CHAIR: But your point -- the way you have been making
15 your submissions is it is the maximum --

16 MR PICKFORD: Nothing depends in my submission on the words
17 "at least", so if we pretend for the time being that
18 that is struck through in this --

19 THE CHAIR: As I understood it, perhaps I misunderstood it,
20 your point was that if a KC says you are not going to
21 get the full whack that you can get, that means it is no
22 longer commercially viable.

23 MR PICKFORD: Yes.

24 THE CHAIR: The fact that you can get somewhat less than
25 that, which might be a reasonable return, but that is

1 not what commercially viable means.

2 MR PICKFORD: That is correct.

3 THE CHAIR: Well, that is inconsistent, is it not, with
4 saying at least the reasonable costs sum?

5 MR PICKFORD: I do not think my submission is made worse by
6 the fact that the King's Counsel is charged with
7 considering whether they are going to get at least the
8 returns.

9 Now, I agree with the point that you make, sir, that
10 it does not seem to make a lot of sense to have the
11 words "at least" here if the return appears to be the --

12 THE CHAIR: The maximum you would ever get.

13 MR PICKFORD: -- the maximum. But even if I have
14 misunderstood the rest of the agreement and even if it
15 is possible that there is some other way of getting
16 a higher sum, it does not undermine my submission at
17 all. In fact it makes my submission all the stronger
18 because what it means is that the King's Counsel can
19 basically trigger this clause if he does not think they
20 are going to get something greater than, something at
21 least the reasonable costs sum plus the contingency fee.
22 I mean, it would be a particularly peculiar clause
23 I have to say if that "at least" actually means anything
24 because how on earth is he supposed to judge where the
25 level comes?

1 It has been pointed out to me helpfully by Mr Jowell
2 that the agreement could be amended, potentially,
3 perhaps if they need to get additional funding, we do
4 not know that that would not lead to a change in the
5 sums, but I do not think any of that really matters
6 because none of it changes the essence of my submission
7 which is this clause -- this is the crux of the
8 purported protection which says: do not worry, Therium
9 always has to reasonably believe that the claim is
10 commercially viable, but when you examine it what it
11 actually means is that a KC has allowed Therium to
12 exercise its discretion as soon as the view of the KC is
13 that they are not going to get the full 4.5 plus 1
14 recovery of their reasonable costs sum plus the
15 contingency fee multiples.

16 PROFESSOR WILKS: Thank you, Mr Pickford. Can I just to
17 follow up one other area, I was interested in your
18 interpretation of Therium's incentives which runs
19 through your whole presentation.

20 MR PICKFORD: Yes.

21 PROFESSOR WILKS: I wonder if we could call up the
22 priorities agreement on Opus. So the litigation
23 funding, the priorities agreement is an annex. If you
24 could find that, could I turn to paragraph 3.4.

25 MR HOSKINS: It is the one at bundle C, tab 7, page 60.

1 PROFESSOR WILKS: Well, it is a draft litigation agreement
2 and it is a priorities --

3 MR HOSKINS: I am looking at a current agreement, whether it
4 is the right one --

5 PROFESSOR WILKS: They are all much the same, actually.

6 MR HOSKINS: You can give that one a go.

7 PROFESSOR WILKS: Have you got the bundle?

8 MR JOWELL: What are the initial words of the clause?

9 PROFESSOR WILKS: Common costs entitlements.

10 MR HOSKINS: There is a version of that, it is {RM-C/7/66}.

11 PROFESSOR WILKS: So paragraph 3.4.

12 Right, there is a clause here in the priorities
13 agreement which is entitled:

14 "Common Costs Entitlements Top Up."

15 MR PICKFORD: Yes.

16 PROFESSOR WILKS: As I read this, what it says is if the
17 used class damages are insufficient to meet contingency
18 fees they will be topped up from the new class and vice
19 versa. If new class damages are too low, which is
20 unlikely, the used trucks claim would top that up.

21 That is how I read that. Do you read it the same
22 way? Common costs are not costs. Common costs are
23 contingency fees, as I read it.

24 MR PICKFORD: Probably, sir, but I have not -- this was not
25 drawn to my attention by the RHA, so I would have to

1 reflect on it because there are many -- I am very happy
2 to --

3 PROFESSOR WILKS: Let me give you something a little bit
4 more to reflect on which is if this is indeed as I read
5 it, then it means if there is a shortfall on either side
6 of the sub-groups, Therium will not be disadvantaged
7 because it can make up the shortfall from the other
8 side, and that would very much alter its incentive
9 structures. It really does not matter whether used
10 trucks do well or whether new trucks do well because
11 this cross-subsidy will kick in and there will not be
12 a loss.

13 MR PICKFORD: In my submission, I am not concerned with
14 losses per se, I am concerned --

15 PROFESSOR WILKS: All right, a less generous level of
16 damages.

17 MR PICKFORD: Well, my point -- and I may have gone over it
18 too fast before, but my point in relation to the
19 arrangements as they currently are where we just have
20 a defined return of the reasonable costs sum plus the
21 contingency fee, is that even with that kind of
22 structure of funding there is a substantial incentive on
23 Therium to favour new truck recovery because the amounts
24 that it stands to gain on that are so much bigger.

25 PROFESSOR WILKS: The differential is bigger?

1 MR PICKFORD: The differential is huge because there is
2 nearly 150 million at stake in that claim.

3 PROFESSOR WILKS: All right.

4 MR PICKFORD: And there is only 30 million at stake in
5 relation to the RUTL claim in terms of the maximum that
6 it is going to get or 33 million.

7 So my point is irrespective, in my respectful
8 submission, of paragraph 3.4 of this document, if there
9 comes a conflict --

10 PROFESSOR WILKS: It does not affect the differential?

11 MR PICKFORD: Yes.

12 PROFESSOR WILKS: But it does affect an incentive structure
13 to some extent?

14 MR PICKFORD: So that may well be true, yes. I would have
15 to consider that to work out exactly how it affected it,
16 but I do not think it ultimately fundamentally changes
17 my point in relation to --

18 PROFESSOR WILKS: Thank you.

19 MR PICKFORD: Thank you.

20 So that was the first -- I said there were two
21 problems with 16.3.

22 THE CHAIR: Yes. Would that be a good moment?

23 MR PICKFORD: That would be an excellent moment, sir.

24 THE CHAIR: I am grateful. We will come back at 3.50.

25 (3.40 pm)

1 (A short break)

2 (3.54 pm)

3 THE CHAIR: Yes, Mr Pickford.

4 MR PICKFORD: So we were just dealing with the first of my
5 two points in relation to why clause 16.3 does not work
6 and I was addressing a question from Professor Wilks,
7 about paragraphs 3.4 of the priorities agreement, and
8 I said I will consider it further and I have done and
9 I have two further short points to add to the one that
10 I gave before.

11 PROFESSOR WILKS: Fire away.

12 MR PICKFORD: The first one I will not repeat. The second
13 answer is that of course this is only concerned with the
14 common costs entitlements, so it is not all of the
15 entitlements to reimbursement, it is just the common
16 costs which are the costs that are shared as between the
17 two pieces of litigation.

18 PROFESSOR WILKS: Well, then it cites sub-clauses 3.3.1 and
19 3.3.3 which are the contingency fees payable to Therium.
20 So I think "common costs" actually is a misleading
21 phrase. I think it actually means contingency fees, but
22 we can look at this at our leisure.

23 MR PICKFORD: Okay, and then so finally, third point, is
24 that it is not going to apply when -- if the Tribunal
25 imposed a cap, which is one of the scenarios that

1 I suggested, says it is not going to be more than 70%
2 recovery on either of these claims because we just think
3 too much is going to go to Therium out of the total pot,
4 then there is going to be a shortfall on both of them,
5 so there is not going to be something that you can then
6 bring from the other claim in order to make up the
7 shortfall, so that is --

8 THE CHAIR: When would we do that?

9 MR PICKFORD: So in my submission, sir, the Tribunal has the
10 power under Rule 93(2) read together with 93(3)(c), when
11 it is making an order in relation to damages in an
12 opt-in claim as well as an opt-out claim, to place
13 restrictions in relation to how those damages are -- who
14 they are paid out to and how they are paid out.

15 THE CHAIR: This is in giving a judgment?

16 MR PICKFORD: This is in giving judgment, yes.

17 THE CHAIR: Not on settlement.

18 MR PICKFORD: Not on settlement, no, that is correct, sir.

19 The only thing that I would say in relation to that, of
20 course, is that in a settlement scenario, parties will
21 naturally take account of what they anticipate they
22 might get out of a court and the risks that they face in
23 relation to court, so there is a degree to which the
24 court's power to do something finally on judgment may
25 have some influence in relation to what happens in

1 settlement, but you are quite right, this is not a power
2 that the Tribunal has in settlement of an opt-in claim.

3 So I turn then -- and I am very near the end of my
4 submissions -- I turn then to the second problem that
5 I say exists with relying on 16.3, which is this: it is
6 just a contract, even if it worked in a better way than
7 it currently does, so putting aside the criticisms that
8 I have made of it, it would only be at best a contract,
9 and what it is trying to do, however, is, in practical
10 terms, potentially to stop someone like Mr Byrne who has
11 his own perfectly understandable strong personal
12 incentives and no doubt obligations to think about
13 Therium as a whole from in any way following that part
14 of his brain that thinks about those obligations to
15 Therium as a whole when he is advising in relation to
16 Therium Atlas, and we say it is a little bit like -- it
17 is not on all fours, but it is a little bit like in the
18 *Koch* case, the solicitor who had the confidential
19 information, rather than being put behind a strong
20 information barrier, she is given the role in relation
21 to conducting the arbitration but told: what you must
22 not do is use any of the confidential information that
23 you found before, but as long as that is the case, then,
24 you know, you promise to do that, then everything is
25 fine. No one would think that that was a sensible

1 arrangement.

2 Similarly, if a judge was deciding a contract case
3 in which the judge had a personal interest, no one would
4 say: well, it is good enough for the judge just to
5 decide it by reference to the contract, they know what
6 their duties are, they will just apply the contract. No
7 one expected the judge to decide that case at all
8 because they had a personal interest in it.

9 Similarly, a solicitor who has a personal interest
10 in relation to a case where they are advising their
11 client, would you not expect them to act in relation to
12 that at all. You would not just impose a contract on
13 them saying they promised not to take account of their
14 own incentives.

15 So we say it is equally not going to work in this
16 case in relation to any employee or director of Therium
17 who simultaneously is charged with doing something on
18 behalf of, say, just the used trucks claim who also has
19 incentives and obligations to think about Therium more
20 widely for the reasons I explained where Therium's
21 overall incentives lie.

22 So that is why we say the contractual solution is
23 not an adequate answer. The proposed arrangements do
24 interfere unreasonably with the ordinary independent
25 decision-making in the litigation, we say including as

1 to settlement because of the leverage that the Therium
2 funds will be able to apply in relation to issues such
3 as settlement through whether they want to continue to
4 fund the claim.

5 THE CHAIR: The leverage is through 16.3?

6 MR PICKFORD: Yes, exactly.

7 Sir, those are my submissions on that issue.

8 Whilst I am on my feet, could I just flag a point
9 which may arise tomorrow, just very, very quickly, just
10 so that it is on everyone's radar. In all of the
11 extremely hard work that all the sides have engaged in
12 to narrow the issues, and that is generally been very
13 successful as the Tribunal noted, there is one point
14 that has arisen through that dialogue where our
15 understanding of the RHA's proposals has in fact changed
16 in the light of information that we have only recently
17 been provided with. It is a discrete point, but it is
18 an important point, I am not seeking to develop it now,
19 I am simply going to tell the Tribunal what it is so
20 that everyone is aware that we may have to address this
21 if only briefly tomorrow.

22 The point in a nutshell is this: we had understood
23 that in accordance with the requirements of the
24 Court of Appeal that all class members be given a new
25 opportunity to opt in afresh because initially they

1 opted in effectively under a false pretext because they
2 thought that the arrangements were X and now they are
3 not, they are new arrangements, that they be given an
4 entirely fresh opportunity to opt in and there has been
5 clarificatory correspondence between the parties about
6 that issue, and until very recently our understanding
7 was that anyone who was going to opt into the claim now
8 had an entirely free hand in relation to that decision.

9 What we have only just now understood from that
10 continuing correspondence is that those opting in do not
11 have the freedom that we thought they had; they can
12 choose whether they opt in or not to the new claim, but
13 according to the RHA they remain bound by all of the
14 previous obligations that they were under when they
15 previously opted in.

16 So, for instance, in relation to the LFA they are
17 still said to be bound by that; there is a litigation
18 management agreement, they are still said to be bound by
19 that. Apparently this arises under the deed of
20 adherence. We do not have the deed of adherence, we
21 have asked for it, and so we are going to get that
22 hopefully overnight, and we can, if necessary, address
23 this point tomorrow.

24 It is a point that ultimately goes to the notice
25 that the Tribunal is going to issue because it is about

1 what that notice effectively says and whether it allows
2 those that are opting in an entirely free choice, ie you
3 either opt in, or, if you do not opt in, you are treated
4 as free to go and do your own thing and you are not
5 bound by previous agreements, or whether they are in
6 fact bound by a whole suite of previous agreements which
7 is what we now understand RHA intend to be the case.

8 THE CHAIR: I will not ask you to expand on that now. I am
9 not sure I have understood the point, but as long as the
10 RHA understands it, and if they do not, they can ask
11 you, and we can deal with it tomorrow.

12 MR PICKFORD: Thank you.

13 THE CHAIR: But you have put down a marker. Whether it is
14 a clear marker, I am not sure.

15 MR PICKFORD: There is correspondence that I think
16 accompanies it, so hopefully the correspondence will be
17 much more clear than I have been.

18 THE CHAIR: Mr Flynn, I do not want to you address the
19 point, but do you understand the point being made?

20 MR FLYNN: I think I understand half of it and I understand
21 there are letters which no doubt I shall be looking at
22 later on.

23 THE CHAIR: Well, (inaudible) that tomorrow. I do not want
24 to get diverted into something which is quite different
25 from --

1 MR PICKFORD: No, quite. I simply wanted to lay down
2 a marker, that is all.

3 Unless I can be of any further assistance, those are
4 my submissions on behalf of DAF.

5 THE CHAIR: Thank you very much.

6 Again, just to be clear, I know that you are
7 instructed for DAF. Those submissions are adopted, are
8 they, by MAN; is that right?

9 MR JOWELL: They are.

10 THE CHAIR: And Iveco?

11 MR WHITE: Yes.

12 THE CHAIR: What is the position of Volvo?

13 MR HOSKINS: No formal acceptance. We are keeping our head
14 down.

15 THE CHAIR: Right, Daimler, you are keeping your head down,
16 Mr Rayment?

17 MR RAYMENT: Yes, we are too.

18 THE CHAIR: Right. Thank you very much.

19 I think we can sit until 4.30, Mr Flynn.

20 MR FLYNN: Very well, sir.

21 THE CHAIR: I think -- is it you and then Mr Scannell
22 replying?

23 MR FLYNN: I think that will probably be convenient if that
24 is acceptable to the Tribunal.

25 THE CHAIR: Yes.

1 MR FLYNN: I am assuming that there is nothing further on
2 this issue from the joint funding response,
3 Mr Carpenter's side of the deal?

4 THE CHAIR: I think Mr Carpenter is dealing with distinct
5 points.

6 MR CARPENTER: This is not a point for me, sir.

7 THE CHAIR: Yes, there is nothing from him on it.

8 Submissions in reply by MR FLYNN

9 MR FLYNN: So members of the Tribunal, first of all perhaps
10 we could just stand back a little.

11 Therium stepped in to fund both sides of the debate,
12 as it were, when a third party funder dropped out. They
13 volunteered for this role and they must have thought
14 that it was a worthwhile one and that it was something
15 that they were prepared to invest in, and a lot of what
16 Mr Pickford has had to say seems to be about how that
17 must be a bad idea and not really what they mean.

18 So perhaps I should say on the record Therium have
19 taken quite extensive and rather unusual steps to
20 structure these investments with the strictures of the
21 Tribunal and the Court of Appeal clearly in mind, and
22 they have taken special arrangements which are designed
23 to ensure that the two vehicles, as it were, RHA IC and
24 Atlas, are indeed kept separate with strong information
25 barriers that they fully intend to observe, and they

1 have gone to the lengths of ensuring that the normal, as
2 it were, investment hierarchy is not followed in this
3 case so that Mr Byrne and Mr Purslow are separated and
4 deal with the merits and viability of the funds, the
5 claims, for which they respectively have responsibility,
6 and it is those that they have to maximise in the course
7 of the litigation.

8 So the test that I think we are looking at I think
9 Mr Pickford is accepting that separate funding as
10 opposed to distinct funders is theoretically possible
11 and the question is has this been done adequately in
12 practice.

13 My first submission is that I think one has to
14 assume in all the circumstances that the Therium people
15 mean what they say.

16 The test, the Court of Appeal's judgment adopts, the
17 phrase that Lord Justice Green used in argument, that
18 has been quoted more than once, the test is whether the
19 funding arrangements will interfere with the ordinary,
20 independent decision-making in the litigation, and, as
21 you pointed out to my learned friend, sir, the decisions
22 on the litigation are not really there for the funder to
23 take. The funder is there to fund the litigation, the
24 litigation is conducted by the solicitors to the RHA and
25 the sub-class representative.

1 The question is whether the funder's decisions are
2 affected by flows of confidential information relating
3 to one or other of those groups, and in my submission,
4 there is an adequate -- more than adequate provision to
5 avoid that risk.

6 Now, Mr Pickford seeks to say that there are
7 conflicting incentives because everyone at Therium wants
8 to maximise Therium's returns overall, and he says that
9 they know nothing about the working arrangements.

10 Once again, this is not dissimilar from the position
11 being advanced by Mr Jowell earlier. One could imagine
12 a perfect system in which no one ever spoke to any of
13 their colleagues, went to their Christmas party, worked
14 in different offices, you know, were in sound-proof
15 rooms when they were on video conferences and so forth.
16 That perfect world does not exist in -- I am not giving
17 evidence -- but in most sets of chambers, shall we say,
18 and conventions are observed which allow the proprieties
19 to be guaranteed.

20 So we could spend a lot of time going through or
21 going over again the evidence and so forth that
22 Mr Pickford has taken you to, but in my submission,
23 Therium have gone to considerable lengths to ensure that
24 their funds are not trampling on each other's toes and
25 are not taking a sort of comparative view of the overall

1 merits in the interests of the Therium business.

2 They have set out to fund the two sides of this
3 debate and they have done so in good faith and with, in
4 my submission, appropriate protections, and ultimately
5 the decision, the big decision that they can take, is
6 not to fund the litigation in the future. That is what
7 you have spent a lot of time on clause 16.3 of the
8 Atlas LFA. What that is effectively saying is that is
9 really a brake on Therium suddenly waking up one morning
10 and deciding that the case is not attractive anymore and
11 saying: oh well, we do not think it is a commercial
12 runner, these used truck claims, and before they can
13 just decide to do what Mr Pickford thinks they should be
14 doing and putting all their eggs in the new truck
15 basket, they actually have to go and get an opinion
16 which says this case is not a commercial runner.

17 I can accept that one might find better wording for
18 the contract, but we are not in a contractual dispute at
19 the moment. The point we are on is an attempt to
20 satisfy the Tribunal that appropriate arrangements have
21 been put in place to keep the pots, the funds, separate
22 and not influencing each other, and 16.3 is a somewhat
23 in terrorem provision that stops Therium taking -- and
24 I think this is fairly standard in such agreements -- it
25 stops them taking an arbitrary decision to kind of dump

1 the case in the middle of the road, and that is really
2 what it is there for. We are not in a Commercial Court
3 dispute as to whether or not they were entitled to do
4 that, we are looking at it from the point of view of the
5 structure to enable the Tribunal to take a decision on
6 certification.

7 It is, of course, quite normal for litigation
8 funders to be able to say that they are not prepared to
9 continue with the case, and the option at that point, if
10 that point arises, is of course for the party affected
11 to seek alternative funding which may well be out there
12 in the market.

13 THE CHAIR: I think Mr Pickford's point is not that there
14 should not be that sort of protection against arbitrary
15 termination and I think everyone recognises there
16 should, but that the way that this clause is drafted,
17 the protection on one of your alternatives is not very
18 high, leaves rather a lot to the discretion of the
19 Therium individuals. The less it leaves to their
20 discretion, the less significant is whatever personal
21 incentives they might have.

22 I think that is the point he was making, as
23 I understood it, that when one looks at 16.3 it is
24 not -- the KC opinion on the second of the two grounds
25 is not -- the threshold is quite low. That is what

1 I understood his point to be.

2 MR FLYNN: But nevertheless, the point of the clause is to
3 place some limitation on the ability of the funder
4 simply to say: our sense is this is not a commercial --
5 this is not --

6 THE CHAIR: Yes, he clearly places some limitation; I think
7 he is saying it is not a very high limitation and
8 therefore an appropriately broader sphere is left to the
9 discretion of the funder.

10 MR FLYNN: The point I am making to the Tribunal is that
11 Therium have stepped in to do this funding. It is
12 not -- this is not looking at the single funding of
13 a case. We are in a situation where Therium have
14 decided for, no doubt good commercial reasons, that they
15 will fund this case. So the -- I do not think it is
16 particularly relevant that the get-out clause, if I can
17 put it that way, seems to give them a lot of discretion.

18 DR BISHOP: Mr Flynn, can I ask you a question?

19 MR FLYNN: Yes, of course.

20 DR BISHOP: Is it the RHA's contention that Therium, for the
21 used truck part of the case, was a last ditch funder,
22 that no other funder would be interested?

23 MR FLYNN: No, it is not.

24 DR BISHOP: It is not?

25 MR FLYNN: No, that is not our contention, and there is some

1 evidence I think from the sub-class representative about
2 efforts that were made to get third party funding.

3 No, my point rather is that in circumstances where
4 this hearing was coming fast upon us and what was
5 thought to be the funding opportunity for the sub-class
6 representative fell away, Therium stepped in, not as
7 a last ditch, but as a -- they filled the gap and they
8 have seen an opportunity for them to get involved in
9 this case, and they know the unusual features of it with
10 the conflict of interest and they have taken -- in my
11 submission they have taken appropriate measures to
12 respond to that particular situation, but I am not
13 saying they are the only show in town or it is all one
14 could get; it is what happened in the circumstances, and
15 in my submission, the structure put in place meets the
16 criteria which flow from the Court of Appeal's judgment,
17 and essentially these two funds will be run separately
18 and with an eye to maximising the returns on the merits
19 of the respective claims. Information will not be
20 shared and the overall returns for Therium will of
21 course depend on adding one to the other.

22 Mr Pickford seems to be advising them that they
23 should not have taken on the used class at all and that
24 it is a really bad deal for them, but that is not the
25 way that Therium are looking at it.

1 I think it is also overstated to rely on the
2 conflict cases relating to solicitors when what one is
3 talking about is not the parties making the decisions on
4 how to conduct the litigation, but the funder who has
5 a very different role, a very different set of
6 obligations and protections, and I see the time and
7 I want to leave Mr Scannell a moment or two if he wants
8 it, and I think it is worth pointing out that in common
9 with a lot of litigation funders in the market, the
10 staff of Therium, and in particular those whose names
11 you have been given in argument today, are all
12 solicitors or former solicitors. They are well aware --
13 because litigation funding is a pretty specialised
14 business, they are well aware of the obligations on
15 professionals to keep confidential information and not
16 leak it in any form or by hints.

17 So in my submission overall, the barriers in place
18 are strong and they should work and really nothing that
19 Mr Pickford has said casts any doubt on that.

20 THE CHAIR: Yes, I do not think Mr Purslow in this witness
21 statement says what his previous occupation was. This
22 is his second witness statement. I imagine the previous
23 one we had last time, I suppose.

24 MR FLYNN: Well, I think, sir --

25 THE CHAIR: I do not know if he --

1 MR FLYNN: He may have given statements also in the funding
2 cases which are separate.

3 THE CHAIR: Of course *Paccar* started here, did it not?

4 MR FLYNN: *Paccar* started here.

5 THE CHAIR: (inaudible) some way, but there may well be
6 a witness statement from him in *Paccar*.

7 MR FLYNN: It started here, and it is not over yet.

8 THE CHAIR: But just on the point you make that many of them
9 are former solicitors --

10 MR FLYNN: I am not sure that you have that in evidence or
11 at least not in this round.

12 THE CHAIR: I do not know if you can check, or somebody can
13 check overnight, whether it is in evidence in a previous
14 round?

15 MR FLYNN: Yes, I can see what has previously been said.
16 Obviously, there are some names who have not been before
17 the Tribunal before because now there are more Therium
18 people involved in this project, as it were.

19 THE CHAIR: Yes.

20 MR FLYNN: But I had been given to understand that they are
21 in fact all former practicing solicitors. I will
22 confirm that or say I wish I had not said it tomorrow
23 morning.

24 PROFESSOR WILKS: Mr Flynn, would you like, before you
25 finish, to say something about lines of reporting? This

1 point about the CEO/managing director necessarily
2 looking at both sides of the fence.

3 MR FLYNN: The managing director clearly has an overall
4 responsibility for Therium, but insofar as they have him
5 as a defined role in relation to one of these funds, his
6 obligation there is to maximise Therium's return on that
7 fund. Their obligations -- and I have not got details
8 of their -- Mr Pickford would like details of their
9 remuneration package and their working arrangements,
10 I have not got those. I say that the structure put in
11 place defines what they are intended to achieve for
12 Therium, and, you know, they have divided themselves,
13 Mr Byrne, Mr Purslow have agreed to take on specific
14 responsibilities in relation to these two investments,
15 if I can call them that.

16 THE CHAIR: Following up Professor Wilks' point, these
17 companies have got the -- they are two Therium corporate
18 entities, are they not, the funders?

19 MR FLYNN: I think that is right. I think no doubt for
20 complicated tax reasons each project is a separately
21 incorporated company, often in Jersey.

22 THE CHAIR: That is my understanding. Mr Purslow says --
23 I am reading from 18.4 of his witness statement:

24 "... separate Investment Committees ... relevant
25 sub-adviser ... based on ... [they] will make

1 recommendations to the Board of the investing entity ...
2 for the Board of the investing entity to action...
3 separation of personnel not only at the level of TCML,
4 but also at Investment ... and Board level..."

5 We do not know much about the boards of these two
6 investment vehicles, do we?

7 MR FLYNN: I do not know that there is much detail there.
8 I mean, each of them being a company, I think has to
9 have a board.

10 THE CHAIR: The position is taken, as I understand it, by
11 the board who will owe duties as directors to that
12 company.

13 MR FLYNN: To that company, precisely.

14 THE CHAIR: But at the moment we really do not have any
15 information of who is on the boards of these two
16 companies which might be helpful.

17 MR FLYNN: I do not have standing here, but I dare say that
18 is something that could be provided if of interest to
19 the Tribunal.

20 THE CHAIR: Well, I think it would help to understand --
21 I mean 18.4 summarises the structure of decision-making,
22 separation of personnel at investment board level.

23 Speaking for myself, I would find it helpful to know
24 who are on the boards of these two investment companies
25 albeit they are subsidiaries of Therium, I assume, and

1 I do not know if that is in any of the other
2 documentation.

3 MR FLYNN: I am not aware that it is, sir, but I hesitate to
4 be definitive about it.

5 THE CHAIR: That is very easy to find out.

6 MR FLYNN: It is something we can look into overnight.

7 THE CHAIR: You can let us know tomorrow, let the defendants
8 know before. I presume that can be found out tonight,
9 and they can be informed of who are on the boards and
10 who they are. That would be helpful.

11 MR FLYNN: I will make the enquiries and will report back.

12 THE CHAIR: Yes, we will pick this up tomorrow at 10.30 and
13 then we can hear from Mr Scannell as well.

14 MR FLYNN: Very well.

15 THE CHAIR: Just to be sure, in terms of other matters we
16 have to deal with, we know there is the CPO, there is
17 the Rule 81 Notice including the point about the run-off
18 period for these trucks and a few aspects, but it rather
19 seems to us we are not in any danger of not completing
20 tomorrow. Is that the view at the Bar? We are on time?

21 MR FLYNN: It is the view at this end of the run.

22 THE CHAIR: There is no need to sit earlier than 10.30?

23 MR FLYNN: No, if there is one thing we can agree on,
24 I think it is that. It may be the only thing.

25 THE CHAIR: It is always good to end on a note of agreement,

1 so we shall say 10.30 tomorrow.

2 MR SCANNELL: Sir, just before we finish, just on the timing
3 point I am going to throw a spanner into the works in
4 relation to timing, but it is simply an offer on my
5 part, and if anybody disagrees with it then no doubt
6 they will stand up and disagree with it, but I am
7 conscious of the fact that when it comes to certifying
8 a claim, the Tribunal has said on a number of occasions
9 that that is something it must do on its own motion
10 irrespective of the objections which have come through
11 from the defendants.

12 There is an expert methodology report, there is
13 a used trucks claim form. I think all of the other
14 documents the Tribunal has been across and there was an
15 indication earlier today that you have also seen the
16 expert methodology report.

17 My offer to the Tribunal is simply to show you the
18 claim form and to show you the expert methodology report
19 so that you are satisfied that those documents are in
20 order.

21 THE CHAIR: We have the expert methodology, Mr Wilkinson's
22 report.

23 MR SCANNELL: You do.

24 PROFESSOR WILKS: We have all that.

25 THE CHAIR: We will --

1 MR SCANNELL: As long as the Tribunal is satisfied, then
2 I am satisfied.

3 THE CHAIR: Yes, what you are saying is that if we have
4 major queries to raise with you that might take more
5 time.

6 MR SCANNELL: Indeed.

7 THE CHAIR: Yes. At the moment I do not think that has
8 arisen. We have looked at the report, so I think we
9 need not be concerned about that.

10 MR SCANNELL: I am very grateful for that indication.

11 THE CHAIR: But you are quite right to draw that to our
12 attention. I think we can still say 10.30 tomorrow.

13 (4.31 pm)

14 (The hearing adjourned until 10.30 am on
15 Wednesday, 5 June 2024)

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