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IN THE COMPETITION

CaseNo: 1289/7/7/18

APPEAL
TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Thursday 18th July 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

Jamie Flynn KC, David Went and David Illingworth on behalf of Road Haulage Association Limited

David Scannell KC and Laurence Page on behalf of RHA Used Trucks Limited

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)

Thursday, 18 July 2024

(10.30 am)

(Proceedings delayed)

(10.46 am)

THE CHAIRMAN: Good morning. I start as usual with the warning that these proceedings are live-streamed, as are all proceedings in this tribunal. An official transcript and recording is being made of the proceedings, but it is strictly prohibited for anyone to take any unauthorised image or make any unauthorised recording of the proceedings and, if that is done, it constitutes a contempt of court and is punishable as such. I also say that we will as usual take a short break mid-morning for the benefit of the transcriber.

Case Management Conference

THE CHAIRMAN: Thank you, all, for the material that you have given us. I think we will deal with the various matters, starting with the ATE insurance, which was something that was held over from the last CMC in early June. We have received, really just now, a fifth witness statement of Mr Meyerhoff -- I hope the defendants have seen that -- explaining the position on the ATE insurance, and we really wanted to know whether there are then any outstanding issues on the insurance.

Mr Flynn, do you want to just explain the position?

1 MR FLYNN: Well, the position as per the witness statement,
2 as I understand it this morning, sir, is that everyone
3 signed with the exception of one insurer. There are no
4 objections of principle from that insurer, so their
5 signature is expected imminently. As usual, they
6 carried out a scrupulous review of every revision of the
7 documents and they have their procedures to follow.
8 Unfortunately they might not be the same as ours, but
9 the last signature is expected imminently and, as far as
10 we are aware, there are no objections of principle from
11 the OEMs; merely complaints, with which we can
12 sympathise, as to the delay in execution.

13 THE CHAIRMAN: Yes. The tribunal can be informed when it is
14 signed --

15 MR FLYNN: Yes.

16 THE CHAIRMAN: -- so that the CPO would not be issued until
17 it is actually signed.

18 MR FLYNN: Understood, as we discussed last time.

19 THE CHAIRMAN: Could I ask other counsel, just for the
20 benefit of the transcriber, to identify yourself and
21 whom you represent?

22 MR PASCOE: Sir, Mr Pascoe for MAN and ATE is in our bucket.
23 The starting point, as I think Mr Flynn fairly accepted
24 in the last hearing, is unless and until there is an
25 executed ATE policy, certification cannot be granted.

1 In a sense we are in the same position that we were in
2 in June. There is no signed ATE policy and therefore no
3 certification order can, as at this date, be made.

4 I suppose the question for today is whether we
5 should have an opportunity to see the final signed
6 version as and when it lands. We submit that we clearly
7 should. I am not sure Mr Flynn is disputing that.

8 THE CHAIRMAN: Well, I think it can be if it is subject to
9 any redactions such as the premium. You have seen,
10 I think, the form of policy that has been placed before
11 the insurer and which, as I understand, all but one have
12 signed.

13 MR PASCOE: Well, what we have seen is a rolling series of
14 drafts which on each occasion has been presented as
15 a final version --

16 THE CHAIRMAN: Which is the last one you have seen?

17 MR PASCOE: The last one we saw I think was circulated last
18 night with some additional text insisted upon by one of
19 the underwriters, QBE, with certain carve-outs to
20 reflect their regulatory permissions --

21 THE CHAIRMAN: This is because of the Brexit point, is it?

22 MR PASCOE: I believe so. QBE is apparently the underwriter
23 who has not signed, yes. All we say is we have faced
24 a series of false dawns where policies have been
25 presented as final versions, insurers have then,

1 Mr Flynn says, scrupulously reviewed them and come back
2 with some changes, so with respect we cannot take at
3 face value the proposition that this really is the final
4 version. Frankly, it is not in the RHA's gift to say it
5 is because these changes have been insisted upon by the
6 insurers. So we would simply ask for an opportunity to
7 see the final version and have a modest amount of time
8 to set out our position on it. It may well be a nil
9 return. We do not know.

10 THE CHAIRMAN: Yes, but the others -- the other underwriters
11 have signed, I think.

12 MR PASCOE: Well, I have not seen the witness statement
13 other than on a phone, but I understand --

14 THE CHAIRMAN: I thought they had signed -- that was the
15 previous witness statement I thought they said they had
16 signed -- it was only QBE -- but maybe I have
17 misremembered the position. I may be confusing the
18 witness statement with the skeleton argument, but ... It
19 is about endorsement 13.

20 I think the position is they have all agreed to it
21 subject to everybody else agreeing to it.

22 MR PASCOE: Exactly. That is the position we have been
23 presented with on multiple occasions, only for tweaks
24 and changes to be made to a yet final version. That is
25 why we ask to see what is the final version with the ink

1 on the lines.

2 THE CHAIRMAN: If we dealt with it this way, that when it is
3 finalised, it is provided to the defendants, as have
4 been the drafts, we give them a short time to comment if
5 they wish to raise any objection, and if no objection is
6 raised, then that is settled(?). Would that be
7 satisfactory, Mr Flynn?

8 MR FLYNN: Well, sir, yes. I am in your hands.

9 We cannot, as we have said -- we would want all
10 signatures in place before you can take your decision.
11 No objections in principle have been raised to the text
12 that is due to be signed, but let them see it and
13 we will deal with anything.

14 THE CHAIRMAN: It is clear that formally we cannot issue
15 a CPO until it is signed.

16 MR FLYNN: No.

17 THE CHAIRMAN: From what Mr Meyerhoff actually quotes from
18 an email which I think is exhibited -- but he in any
19 event quotes from it -- it is going to be signed, as you
20 said, imminently, so one takes it in the next week or so
21 and -

22 MR FLYNN: I agree.

23 THE CHAIRMAN: -- that you then provide it and we allow
24 a period of -- I would have thought a short period if it
25 is not going to differ from the previous one other than

1 the carve-out that was explained in Mr Meyerhoff's
2 fourth witness statement on 28 June, so that has been
3 clear for a while.

4 MR FLYNN: Exactly.

5 THE CHAIRMAN: Three days to consider it and make any
6 submissions.

7 MR PASCOE: Sir, might we ask for five working days just in
8 case it comes close to the vacation period? I would
9 make the point that the RHA has had several months to
10 get this in place.

11 THE CHAIRMAN: But it is not in their gift. They have been
12 dealing with a whole group of insurers to get the sort
13 of cover and it is not straightforward. We will say
14 four days, four working days. That should enable
15 anything to be resolved and I would hope can be dealt
16 with. If there really are issues, there can be a short
17 virtual hearing before the end of term.

18 MR FLYNN: Yes.

19 THE CHAIRMAN: I would have thought that is unnecessary.

20 MR FLYNN: There should not be any issues if there is no
21 change to the current position, which has been well
22 known for a useful period of time.

23 THE CHAIRMAN: So the terms are that you supply a copy to
24 the tribunal and the -- how are the OEMs described --
25 the "proposed defendants", I think, with any -- there

1 are some redactions, are there, in what you supply or
2 not? Have there been redactions? Sometimes the premium
3 is redacted. I do not know if the premium is in the
4 policy though.

5 MR FLYNN: In fact, no. I believe they are clear.

6 THE CHAIRMAN: As to the proposed defendants, they have four
7 working days to raise any objection. That gives an
8 incentive for you with your insurers to get the thing
9 done as quickly as possible.

10 MR FLYNN: I am grateful for the incentive. Thank you, sir.

11 MR PASCOE: Thank you, sir.

12 MR HOSKINS: Technically I think it is proposed defendants
13 and objectors because we are --

14 THE CHAIRMAN: Proposed defendants and objectors. Thank
15 you, Mr Hoskins, we are not seeking to exclude you.

16 Right, that is the insurers.

17 Can we then turn to the revised cost budget which we
18 asked for because we did not have one on the last
19 occasion and obviously things have moved on
20 significantly since the original cost budget, as
21 Professor Wilks pointed out. We now have a revised cost
22 budget and details of the revised funding. Can I --
23 Mr Flynn, can you help me? This is funding, as
24 I understand it, for the proposed class representative
25 on its revised budget of 37.9 million. Can you explain

1 how the balance of costs, the costs yet to be incurred,
2 of 12.5 million are being met? There is 12.5 million
3 estimated as costs through to trial. That comes out of
4 the balance of the existing funding plus the additional
5 funding of 10.9 million.

6 MR FLYNN: Plus the upsize, as it seems to be called, yes.

7 THE CHAIRMAN: That is separate or additional to, is it, as
8 I understand it or we understand it, the budget from the
9 separate funder for the sub-class representative?

10 MR FLYNN: That is correct.

11 THE CHAIRMAN: So the sub-class representative has a budget
12 of I think 5.9 million net of VAT, and it has been
13 established it does not have to pay VAT and it has got
14 6 million funding. So total funding on, as it were, the
15 claimant's side will be about 18.5 million.

16 MR FLYNN: That is correct, a correct understanding.

17 THE CHAIRMAN: That was our understanding.

18 Is it suggested and was it DAF who raised this point
19 that that is -- that we should say that that is not
20 adequate?

21 MR PICKFORD: I am not sure whether it was us who actually
22 dealt with this before, but certainly I am hoping to
23 address some of these issues at this hearing.

24 Sorry, Mr Pickford for DAF.

25 We do say that. The context in which we say that

1 that further sum seems to us to be unlikely to be
2 sufficient is not because we have any particular
3 personal interest in whether they can continue to fund
4 the claim other than if one takes a realistic assessment
5 of the total costs that are likely to be incurred by the
6 funder in relation to this claim and then one compares
7 those to realistic proceeds that might be got in damages
8 from the claim -- we will come on to make the
9 submission, but it was something I anticipated doing
10 somewhat later -- that there is not a sufficient balance
11 in favour of this litigation being worthwhile. That is
12 the point we would take in relation to it. I can
13 develop the reason why we say we think it is an
14 unrealistic future budget further now, if that would be
15 helpful.

16 THE CHAIRMAN: Well, our concern on the last occasion was to
17 get an updated budget and to make sure that there was
18 funding to cover it.

19 MR PICKFORD: Yes.

20 THE CHAIRMAN: If I understood the skeleton argument that
21 you put in, where you dealt with this, you say, and you
22 refer to funding, and I think you say an unrealistic
23 future cost budget and the costs must be -- the true
24 costs estimate must be well in excess ... and you raised
25 the point that therefore there may not be sufficient

1 funding in place. That is quite separate from any
2 argument about not being worthwhile.

3 MR PICKFORD: That is fair, sir, we do. I think the high
4 point of my submission is then where that flows through
5 into, but it is true that we also make the discrete
6 point that, even of itself, that simply taken in
7 conjunction with a number of other indicia that we say
8 are relevant here, ultimately the proposed class
9 representative is not someone who should be authorised.
10 There are a whole set of reasons for that and one of
11 them is that we say even their cost budget is not
12 realistic.

13 THE CHAIRMAN: Yes. We will perhaps address that now.

14 MR PICKFORD: Okay. If I can begin then, we need to take
15 one step back to explain why we say it is not realistic,
16 and that is to look at the discrepancy between their
17 original budget and what they have in fact spent. This
18 is probably most conveniently addressed in our skeleton
19 argument, if I could ask the tribunal to turn that up.
20 The bundle reference is {RM2X/10/11}.

21 THE CHAIRMAN: Yes. It is paragraph 33.

22 MR PICKFORD: Exactly. I am just waiting for it to come up
23 on my screen. Has it come up on anyone else's?

24 THE CHAIRMAN: I think we have them in hard copy.

25 MR PICKFORD: I am very grateful.

1 THE CHAIRMAN: Yes, it should be there. The tab reference?

2 MR PICKFORD: So the tab is tab 10. It is {RM2-X/10/11}.

3 In order to develop my submissions, I am going to need

4 it to come up on screen.

5 MR FLYNN: If I may, sir, I think this is in the

6 confidential bundle and Opus do not have access to that.

7 (Pause)

8 THE CHAIRMAN: It is page 12 at paragraph 33. You want it

9 up on -- I do not have -- we have them --

10 MR FLYNN: Sorry, sir, I repeat an observation I made while

11 you were conferring. Opus do not have access to the

12 confidential bundle because of the --

13 THE CHAIRMAN: What, not at all?

14 MR FLYNN: I believe not, and that arrangement I think has

15 been in place from the beginning. So you have it on

16 your Opus system but it cannot be displayed in court, so

17 on the live stream.

18 THE CHAIRMAN: Well, not on the live stream, but I thought

19 usually the arrangement is Opus have it as a separate

20 bundle but it will not be opened when -- in court.

21 I think, Mr Pickford, because your skeleton has

22 a section with some redactions, albeit not on this

23 topic, it is not -- it is in a confidential bundle.

24 MR PICKFORD: Yes.

25 THE CHAIRMAN: There may be a non-confidential version of

1 it -- there should be. It may be we can open that one
2 on Opus.

3 MR PICKFORD: There is.

4 MR FLYNN: I am told to correct myself, that Opus can find
5 it and drag it up but it will not come up automatically.
6 So manually it can be done but automatically it cannot.

7 THE CHAIRMAN: We have all got it in hard copy. Do you need
8 it on screen?

9 MR PICKFORD: Well, I have not got it in hard copy
10 unfortunately, so that is why I was hoping to be able to
11 see it or at least --

12 THE CHAIRMAN: Can someone give you a hard copy?

13 MR PICKFORD: I am sure someone can help me out.

14 THE CHAIRMAN: It is your own skeleton.

15 MR PICKFORD: It is my own skeleton. The --

16 MR SCANNELL: I understood there is a non-confidential
17 version of my learned friend's skeleton argument.

18 THE CHAIRMAN: Perhaps you would prefer that.

19 MR SCANNELL: It is {RM2-CO/45}.

20 MR PICKFORD: Thank you. It is page 12, {RM2-CO/45/12}.

21 THE CHAIRMAN: It is up now, so there you are. You have it
22 now.

23 MR PICKFORD: Just before we go on to that, can I just deal
24 with the logistics of the issue about confidential
25 documents because, whilst it is not necessarily critical

1 here, it is going to be critical to my submissions today
2 that I can refer to documents in the confidential
3 bundle and that the tribunal can see them and that I can
4 see them. That will be essential.

5 THE CHAIRMAN: Well, I think, when we come to the point
6 about the alleged conflict in the funding arrangements,
7 we will go into closed session --

8 MR PICKFORD: I understand.

9 THE CHAIRMAN: -- but on this point we do not need to.

10 MR PICKFORD: Thank you.

11 THE CHAIRMAN: So you have got your paragraph 33.

12 MR PICKFORD: Yes, if we begin at paragraph 32, the "Cost
13 overspend to date", what we explain, going on to
14 paragraph 33, is that, if you strip out the ATE premiums
15 from both the original budget and the new budget, the
16 original budget came to 8.8 million. One has to do some
17 calculations for that. It is all set out in the
18 footnote. I do not know that any of these numbers are
19 going to be disputed so I am proposing to go through
20 this bit relatively swiftly.

21 So we had originally 8.8 to get to certification and
22 now we are told that the like-for-like budget is
23 18.8 million, and that excludes ATE premia, appeal costs
24 and remitted matters costs. It is also despite
25 pre-action costs being less than were budgeted for. One

1 can see those figures. If it is helpful, we can go to
2 the Backhouse Jones letter that sets out those figures,
3 albeit one still has to do a bit of maths.

4 THE CHAIRMAN: Well, you have summarised it.

5 MR PICKFORD: So we have summarised it. The net effect of
6 that is that there has been -- to this stage so far and
7 excluding all of those matters such as the appeal,
8 et cetera, there has been a £10 million overspend
9 already as against the original budget. That overspend
10 is, we say, fairly startling --

11 THE CHAIRMAN: But you say it excludes remitted matters.

12 MR PICKFORD: Yes.

13 THE CHAIRMAN: So are you saying this is spend up to but not
14 beyond the judgment last time?

15 MR PICKFORD: That is our understanding. If it would be
16 helpful, we can go to Backhouse Jones' letter. That is
17 where we have taken these figures from. Obviously they
18 are not my figures so I am at a slight disability in
19 explaining them.

20 THE CHAIRMAN: Yes. Well, perhaps we should.

21 MR PICKFORD: The reference for that is {RM2-CO/23/1}. So
22 we have a table that is set out there that shows the
23 total spend amounting to approximately £25 million.

24 THE CHAIRMAN: This is a letter of 27 June?

25 MR PICKFORD: It is a letter of 27 June 2024.

1 THE CHAIRMAN: Yes.

2 MR PICKFORD: They purport to set out an explanation of the
3 money that they have spent so far. They say in (b):

4 "The RHA has incurred [approximately] £25,000,000 in
5 relation to the proceedings. It has recovered ...
6 1.3 million in adverse costs.

7 "Although not requested, a high-level breakdown of
8 the different areas of spend is as follows."

9 Then they set out various areas of spend. My point
10 is that, if you strip out the ATE premia and the
11 remitted matters costs and the Court of Appeal costs,
12 one still gets to --

13 THE CHAIRMAN: And the Supreme Court costs?

14 MR PICKFORD: Yes -- one still gets to a figure which is
15 10 million more than they originally anticipated that
16 they would spend --

17 THE CHAIRMAN: Yes.

18 MR PICKFORD: -- which is a fairly substantial overspend, it
19 is more than 100%, but there is no explanation as to how
20 that came to be. So the best that we have is that we
21 have other workstreams that, in sum, total to
22 £11 million. Certainly it seems to be in there that
23 there is the massive overspend, but --

24 THE CHAIRMAN: Well, it must be in there because otherwise
25 it is about 7.5, is it not?

1 MR PICKFORD: Yes, exactly. So it is in there, but what
2 within that led to the extraordinary overspend as
3 against -- they thought that that should be about
4 1 million and it turned out that it was about
5 11 million. They have not explained how that came
6 about.

7 THE CHAIRMAN: Yes.

8 MR PICKFORD: Yet they -- so that is the background. The
9 background is that, so far, their budgeting has been
10 terrible -- I mean, objectively.

11 PROFESSOR WILKS: Mr Pickford, if I could come in on that,
12 this is all retrospective and of course the case,
13 I think, has astonished many people by how it has
14 developed.

15 Could we address actually the cost budget? Do you
16 have that available? I think it is tab 3 and tab 4 in
17 my bundle.

18 MR PICKFORD: We will have to go to it electronically.

19 Sorry, I am working electronically.

20 PROFESSOR WILKS: What we really want to know is, given that
21 we have -- you know, looking forward, not backwards --
22 and of course this is taken -- this case which started
23 in -- was it 2019 or something? -- it was never
24 envisaged that progress to the grant of CPO would be so
25 long delayed and extended.

1 MR PICKFORD: That is true, but --

2 PROFESSOR WILKS: So, as I say, we are now looking -- you
3 may say they misestimated earlier, but what we need to
4 know is, looking at the budget now and looking at the
5 funding, where do you say this is unrealistic?

6 MR PICKFORD: If I can answer that in two stages. The
7 reason why I am taking you to the background is because,
8 in my submission, it is relevant to the weight that one
9 can give to insurances that -- "Well, our budget is
10 going to be entirely fine going forwards". I have made
11 the point, I do not need to make it further, but in my
12 submission it is relevant background that the tribunal
13 should take account of.

14 PROFESSOR WILKS: Yes, I understand that.

15 MR PICKFORD: The second point is that those additions, like
16 in relation to appeals and remitted matters, they are
17 excluded from those costs, so it is like for like.

18 PROFESSOR WILKS: Yes, I understand that. Yes, we have seen
19 that.

20 MR PICKFORD: So then, to answer directly the tribunal's
21 question, what we have then is apparently a future spend
22 of a further roughly 12.5 million.

23 PROFESSOR WILKS: Yes.

24 MR PICKFORD: That is for the RHA.

25 THE CHAIRMAN: 6 million for the other(?) sector?

1 MR PICKFORD: That is correct, yes, but just focusing for
2 the time being on the RHA, taking it one step at a time.
3 So in terms of the total costs of the litigation, that
4 suggests that the RHA are saying that we are roughly
5 two-thirds of the way through this process. They have
6 spent 25, they think there is --

7 THE CHAIRMAN: I do not think they are saying that. They
8 are saying, as you pointed out, that the stage up to CPO
9 proved much more expensive than envisaged. That is now
10 a closed chapter, almost. We are now looking ahead and
11 we are looking at what now one hopes will be the more
12 usual run-up to trial, without all the idiosyncrasies of
13 certification, what it is likely to cost, broken down by
14 stages, like any other cost budgeting exercise before
15 the court, and then they tell us that they have got the
16 funding for it. You are saying that this budget is
17 unrealistic and I appreciate what you say, that their
18 estimation has not proved very reliable, but you need to
19 tell us what is wrong with this.

20 MR PICKFORD: Sir, I am making my submission only at a macro
21 level. I am saying that, if one just stands back and
22 thinks what we have done so far in these proceedings to
23 get to basically the point of certification and the
24 costs that have been incurred and then we think about
25 the future and what we still have to do -- and that is

1 disclosure, amendments to pleadings in the light of
2 disclosure, fact witness evidence, substantive expert
3 reports, responsive expert reports, dealing with data
4 issues, the trial and ultimately also addressing pass-on
5 and interest, of course, which are not even part of
6 these proceedings but they are necessary steps that will
7 have to be grappled with in order for the class members
8 to receive damages -- I am simply making the macro point
9 that, if you think about all those further steps, it
10 seems unrealistic that that is going to be 12.5 million
11 when it has taken us 25 million to get here.

12 THE CHAIRMAN: Well, it is not just 12.5 million because
13 there is also the sub-class representative with their
14 expert, things like pass-on, with 6 million.

15 MR PICKFORD: For the RHA. But yes, sir, I am happy to
16 adjust the figures accordingly.

17 THE CHAIRMAN: Well, yes, give us a breakdown as well. We
18 need to understand what -- if we look at that budget,
19 what you say is so clear that it can be said that we
20 should not accept it as realistic ... so unreasonable.

21 MR PICKFORD: I am not taking that kind of granular
22 approach, sir, because it is not really possible for me
23 to do that.

24 THE CHAIRMAN: We cannot do it at a macro level because they
25 have explained how they have built up that figure, and

1 if you say that, well, 2 million for the RHA's own
2 expert is a gross underestimate, you must develop that
3 submission for us and -- we have the benefit of someone
4 who was an expert witness himself for many years on the
5 tribunal -- it does not seem a gross underestimate. If
6 you say that 3 million for disclosure is a hopelessly
7 low figure, well, you must explain why.

8 MR PICKFORD: Sir, I am not proposing to do that. I had
9 a broad brush point. If the tribunal is unimpressed by
10 my broad brush point, then so be it, but I do not
11 consider it would be helpful for me to seek to go into
12 that kind of granular detail. There is not the evidence
13 that enables me to do that.

14 THE CHAIRMAN: Yes. Just pause a moment. (Pause)

15 Well, we think we have exhausted that point. We do
16 not think that -- as the tribunal has said a number of
17 times at the certification stage -- a budget which
18 appears reasonable -- and the tribunal is not in
19 a position to do a granular investigation of quite how
20 a budget in its various elements is made up -- unless it
21 appears to be wholly unrealistic, we do not take that
22 view with a budget of some 12.5 million going forward
23 for the RHA when one considers also that there is now
24 a sub-class representative with a budget of 6 million,
25 and we note that there is now, before the tribunal,

1 evidence to show that the funding for the RHA has been
2 increased with additional funding of about 10.9 million
3 so as to cover this budget. We feel therefore that
4 aspect of the assessment of certification is satisfied.

5 MR PICKFORD: Very good, sir.

6 THE CHAIRMAN: Can we move then to the question of the PCMs
7 who signed up to the proposed proceedings and now have
8 a choice whether to opt in or not? That is something
9 that we raised I think last time, which is addressed by
10 Mr Meyerhoff in his fourth witness statement by
11 reference to the litigation management agreement which
12 those PCMs signed. This is of course something that
13 only affects those who signed that agreement and who are
14 now registered with the RHA. There may of course be
15 other proposed class members who may choose to opt in
16 once a CPO is made and advertised. They are not
17 affected by this matter at all.

18 MR FLYNN: Exactly.

19 THE CHAIRMAN: I think Mr Flynn in the first instance, if
20 you can explain what is proposed so that we are sure
21 that we fully understand it. We have Mr Meyerhoff's
22 witness statement which is in our hard copy of the
23 non-confidential bundle. It is at tab 5, {RM2-CO/5/1}.
24 I think Opus have helpfully brought it up. If we go to
25 page 18 in that witness statement -- oh, have I got the

1 right one? I am so sorry, it is differently paginated
2 in here for some reason. It is page 3 of the witness
3 statement, {RM2-CO/5/3}. That is it. Paragraph 12
4 onwards.

5 MR FLYNN: Yes, so there is the description of what will
6 happen when people who do opt in sign up to the new LMA
7 and similar provisions for the used trucks sub-class,
8 and those new agreements will substitute for the old
9 ones. The question I think that was of interest to the
10 tribunal is what happens to people who are currently
11 signed up but do not then opt in under the new
12 dispensation, if I can put it that way.

13 THE CHAIRMAN: Yes.

14 MR FLYNN: The consequences of that are then explained by
15 Mr Meyerhoff in paragraph 13. If we go over the page,
16 {RM2-CO/5/4}, so you have the detail. We explain this
17 also of course in our skeleton. I am looking at
18 paragraph 33, and the key points I think are made there.

19 So we say that the claimants have a free choice as
20 to whether to opt in, those we are concerned with.
21 There will be a waiver which will permit termination of
22 the LMA by an individual claimant which will make them
23 liable only for their proportionate share of the
24 High Court proceedings' costs, but otherwise those who
25 signed up will remain subject to the LMA, the LFA and

1 the priorities agreement in full, so that we can deal
2 with the High Court proceedings even in relation to
3 those who are party to the High Court proceedings but
4 are not opting into the collective proceedings.

5 Then there is provision for waiver after the end of
6 the opt-in period of clause 13.1 of the LMA on three
7 months' notice.

8 THE CHAIRMAN: That -- just to be clear, because your
9 solicitors wrote a letter I think on 14 July, so after
10 this witness statement which is 28 June -- and I do not
11 have Opus references but we have it in a confidential
12 bundle -- because in a previous -- in the first
13 paragraph it names the investor or funder --

14 MR FLYNN: Yes.

15 THE CHAIRMAN: -- whose name is confidential. But
16 paragraph 3, which I think is not a confidential
17 paragraph, deals with this point.

18 MR FLYNN: Yes.

19 THE CHAIRMAN: If you have that letter -- and I will read
20 the paragraph out:

21 "We confirm that both ..."

22 Just one moment. I do not think the --

23 MR FLYNN: Those names are not confidential.

24 THE CHAIRMAN: They are not confidential, are they?

25 "We confirm that both Therium Litigation Funding IC

1 and Therium RHA IC intend to waive clauses 9.8 and 13.1
2 of the LFA for the purposes of enabling operators to
3 choose freely whether they wish to opt in to the
4 collective proceedings claims. The RHA does not
5 anticipate waiving any other clauses of the LFA [as
6 read]."

7 My question is about 13.1 because that letter sort
8 of says, "We are going to waive it", Mr Meyerhoff's
9 earlier witness statement says, "It will be waived after
10 the end of the opt-in period if a party who has not
11 opted in chooses to terminate", so there is a slight
12 sort of qualified waiver, whereas paragraph 3 that
13 I just read out is just put in brackets, 13.1 together
14 with 9.8. Do you see the point I am raising?

15 MR FLYNN: Yes.

16 THE CHAIRMAN: There seems ...

17 MR FLYNN: You are saying there is a slight inconsistency
18 between paragraph --

19 THE CHAIRMAN: 3 -- well, I am saying is the position as in
20 Mr Meyerhoff's witness statement or has it moved on?
21 That might be one reading of that paragraph 3. It is in
22 particular Mr Meyerhoff's paragraph 24, which is where
23 he says, several lines down in paragraph 24,
24 {RM2-CO/5/6}:

25 " ... would waive clause 13.1 of the RHA LFA from

1 the point of termination."

2 I just wanted to have clarification.

3 MR FLYNN: So that is -- I think that is once the opt-in
4 period has closed, then anyone who wishes to give notice
5 under the LFA, that clause will be possibly waived.

6 THE CHAIRMAN: That is what this witness statement says, but
7 the letter does not include that qualification so that
8 is what I was just seeking to have clarified.

9 MR FLYNN: The witness statement is the correct position, as
10 I understand it.

11 THE CHAIRMAN: Right. That is what --

12 MR FLYNN: I think it is better because we go by evidence as
13 well --

14 THE CHAIRMAN: Yes, right.

15 MR FLYNN: So those, in outline, are the arrangements that
16 are proposed in relation to those currently signed up
17 who decide not to continue with the proceedings.

18 THE CHAIRMAN: Yes, but they would be settling the
19 High Court proceedings presumably and therefore the
20 settlement would -- as Mr Meyerhoff explains in I think
21 paragraph 23, the damages -- any damages recovered would
22 go into the waterfall if they settle before they
23 terminate the LMA.

24 MR FLYNN: That is correct.

25 THE CHAIRMAN: It appeared from indeed the document that

1 Mr Pickford took us to, showing the spend to date, but
2 can I ask you? The High Court proceedings brought on
3 behalf of these PCMs, funding for that came from the
4 commercial funder; is that right?

5 MR FLYNN: Yes, it did.

6 THE CHAIRMAN: That was my assumption.

7 MR FLYNN: Yes, it did. It is all to do with advancing and
8 protecting the claim as defined in the agreements, which
9 is by these collective proceedings or otherwise.

10 THE CHAIRMAN: Thank you. Yes, thank you very much.

11 MR FLYNN: Thank you.

12 THE CHAIRMAN: Mr Pickford, I think you are objecting on
13 behalf of DAF; is that right?

14 MR PICKFORD: That is correct, sir. So it is important to
15 take just one step back here to consider the points that
16 we raised about this last time. So at the first hearing
17 we noted and indeed the tribunal noted itself concerns
18 about the RHA's apparent unwillingness to release PCMs
19 from certain obligations that they had agreed to under
20 the previous arrangements if they chose not to opt in to
21 the recast proposals. Without going into the
22 technicalities of the particular clauses, the basic
23 problem with the scheme that was being offered, that
24 neither we nor it appeared the tribunal were happy with,
25 was this: potential class members who had signed up but

1 never given their informed consent, for the reasons that
2 we are all well aware of, were being offered the
3 following choice: opt in and accept the new
4 arrangements -- fine, if they want to opt in, that is
5 one thing -- or give up their claim altogether -- well,
6 that is obviously not very attractive -- or, if they
7 wanted to pursue their claim in a different manner from
8 the class action, for instance by settling it, then all
9 of the proceedings that they would get from that -- all
10 the proceeds, rather, that they would get from that
11 would be held on trust for the funder in any event.

12 So those arrangements were described by the tribunal
13 last time as a "pretty unattractive choice" and
14 "oppressive", and we agreed with that assessment because
15 there is no true freedom in that scenario. There is no
16 possibility for someone that previously signed up when
17 they had signed up, without getting their informed
18 consent to do so, to say, "Actually, I have had enough
19 of this. I am just going to take my claim. I am going
20 to pay whatever percentage it is of the High Court
21 costs, whatever, and I would just like to settle
22 directly now with one of the OEMs". That option is not
23 a realistic option because all that money just gets
24 channeled back into the collective proceedings, so that
25 is a pointless route for them to take.

1 So if you are faced with those options, where going
2 on your own is totally pointless because all your money
3 gets channeled back into the waterfall or your only
4 other option is to give up, then it is Hobson's choice.
5 Ultimately the only choice that they were being offered
6 at that point was to opt back in.

7 Now, that does not give effect to the requirements
8 of the Court of Appeal that all class members be given
9 a fresh opportunity where they want to be bound by the
10 obligations. Now, that was where we were and the
11 question is: how have matters changed since? In my
12 submission --

13 THE CHAIRMAN: You refer to the Court of Appeal. Is that in
14 the order?

15 MR PICKFORD: So it is actually in probably paragraph 88
16 that I think we see that most clearly.

17 THE CHAIRMAN: Paragraph 88 is about the structure to avoid
18 conflicts.

19 MR PICKFORD: Can you just bear with me? I am going to get
20 the reference. (Pause)

21 I beg your pardon, it was a bad reference when
22 I said "88". It is actually 94. The reference for that
23 is {RM-B/4/26}. If one goes to the end of paragraph 94,
24 one sees the sentence:

25 "That obvious conflict requires to be addressed at

1 the start of the proceedings when PCMs opt in, rather
2 than at an indeterminate point in the future; and it
3 requires the RHA to put in place separate representation
4 and a Chinese Wall of the kind I have described, and
5 then to obtain the informed consent of the PCMs to the
6 RHA acting for them under that arrangement."

7 Of course earlier we had also -- the Court of Appeal
8 had made it clear that it did not just extend that far.
9 It also extended to separate funding.

10 THE CHAIRMAN: Yes.

11 MR PICKFORD: So that is the basic requirement. They need
12 to be able to give a fresh choice, giving informed
13 consent to actually opt in to the proceedings, and if
14 not, they should be entitled to do with their claim what
15 they want. If they want to settle their claim
16 themselves, they should be entitled to do that.

17 THE CHAIRMAN: But the claim they are settling is the
18 High Court claim --

19 MR PICKFORD: Yes.

20 THE CHAIRMAN: -- brought with commercial funding --

21 MR PICKFORD: Yes.

22 THE CHAIRMAN: -- so obviously the funder should get
23 remunerated.

24 MR PICKFORD: Something.

25 THE CHAIRMAN: Yes.

1 MR PICKFORD: But the question is whether it should get
2 everything in -- whether all of the proceeds should
3 simply go into the waterfall to be held on trust for the
4 funder until -- because otherwise that is not a free
5 choice.

6 THE CHAIRMAN: They all signed up to an agreement that, if
7 they settle the High Court proceedings, that is what
8 will happen.

9 MR PICKFORD: They did, sir, but the whole point is that
10 they signed up when they had not given their informed
11 consent to the agreements they were signing up to. At
12 the time they originally signed up, they did not
13 understand about the conflict. That had not been
14 presented to them. They also signed up, if I may say
15 so, when the funding arrangements were wholly different
16 to the funding arrangements that are now in place. They
17 also signed up -- I would have to get the reference --
18 but they signed up -- initially they were being told
19 that more than 91% of any damages would come back to
20 them because there were different funding arrangements
21 and now there is no guarantee that they will get any
22 damages.

23 So we say -- and I had understood in fact that this
24 point was something that the tribunal agreed with at the
25 last hearing -- that they need to be given a genuine

1 free choice. That is not to say a free ride; that is
2 that costs that have been incurred in order to get to
3 where we are should be entirely ignored, but they should
4 be given the opportunity to decide realistically now
5 whether they want to sign up to all of the obligations
6 that go with the collective proceedings -- that is
7 option one -- or whether at this stage they want to say,
8 "No, we do not actually like what we have seen, we are
9 not happy with those arrangements for whatever reason
10 and we would now like to exercise our rights to do what
11 we are entitled with our own claim".

12 THE CHAIRMAN: But is the contract void that they signed?
13 (overspeaking - inaudible).

14 MR PICKFORD: No, that is not part of my case.

15 THE CHAIRMAN: But they have all signed contractual
16 obligations.

17 MR PICKFORD: Yes, but --

18 THE CHAIRMAN: How are we in a position to just brush them
19 aside?

20 MR PICKFORD: Well, because we say the Court of Appeal has
21 required, in paragraph 94, for the arrangements to be
22 revisited and --

23 THE CHAIRMAN: I do not think they were addressed at all
24 about the litigation management agreement and what the
25 obligations are.

1 MR PICKFORD: No --

2 THE CHAIRMAN: I do not read that as -- and there is nothing
3 in the order of the Court of Appeal that we are indeed
4 entitled to set aside contracts that have been signed by
5 commercial parties. That is what you are asking us to
6 do, are you not?

7 MR PICKFORD: We are asking -- no, I do not think that is
8 what I am asking. Ultimately what the tribunal has to
9 do is to certify the proposals that are advanced by the
10 RHA and RUTL. Those proposals require to be modified as
11 a result of the Court of Appeal's judgment and order.
12 One of the means by which they require to be modified is
13 in relation to the funding arrangements.

14 Now, when we were concerned with that, there were
15 certain contracts that were entered into in relation to
16 funding and my submission to you is not that this
17 tribunal has power to override those contracts and to
18 set them aside, it is that the tribunal has a power to
19 say to the RHA, "If you want us to certify your
20 arrangements, then you need to provide arrangements
21 which satisfy us that you are suitable to be authorised
22 and that the claim is suitable to be authorised". That
23 potentially requires them, amongst other things, to
24 satisfy the requirements that were set out by the Court
25 of Appeal.

1 So it is entirely analogous to that in relation to
2 funding. That also lies within the power of this
3 tribunal to say to the RHA, "We do not think that these
4 arrangements that are now being advanced are fair and we
5 do not think that these arrangements properly give
6 effect to the free choice that the Court of Appeal
7 required be given to those that did not originally give
8 their informed consent and therefore it is up to you
9 what you do with your contract, but if you want us to
10 authorise you and to certify this claim, you are going
11 to need to provide a new form. You are going to need to
12 waive certain things", just as we are talking about
13 waiving 13.1. We are within that territory already. It
14 is just the mechanism by which it operates.

15 THE CHAIRMAN: So the contract has to be sort of rewritten
16 to provide for costs and uplift and payment out of
17 damages for the funder of a certain amount?

18 MR PICKFORD: This needs to be considered, yes. Indeed,
19 sir, I had -- can I ask my learned junior to seek to
20 find it? -- but I had understood at the last hearing --
21 there was discussion at the end when there was an
22 interchange about what would be an appropriate price for
23 remunerating the funder in that context because I think
24 initially it was suggested that, well, at the very least
25 they should pay the costs of the High Court, and then

1 I think Mr Flynn came back and said that actually it is
2 potentially more than that because they have more
3 benefits than just the High Court claim. I had
4 understood that the RHA were going to go away and think
5 about that issue. But the way that they have come back
6 in relation to that issue is essentially to re-present
7 the same arrangements that were previously criticised by
8 this tribunal, which is not to offer a genuine way out
9 for someone that has decided that they do not want to
10 opt in again -- because otherwise, sir, just to come
11 back to my fundamental point, if you have three choices,
12 the choices are give up altogether, settle and give all
13 of your proceeds to the funder in any event or opt in,
14 there is only one realistic choice. That is opt in.

15 THE CHAIRMAN: Do all the proceeds go to the funder? They
16 go into the pot.

17 MR PICKFORD: Well, they go to the pot, but that is the
18 waterfall pursuant to which the priority claim on the
19 first roughly £300 million goes to the funder. Then we
20 have got the insurers, we have got the lawyers who need
21 to get back any conditional fees. Everyone gets
22 priority ahead of the class. That is not an arrangement
23 that any single person who originally signed up to this
24 claim signed up to. That was not the deal. The
25 original deal was that it was going to be a cut of

1 damages, it was going to be damages-based, and they were
2 told in the documentation that they originally saw, "On
3 a conservative basis you will get back over 91% of your
4 claim yourself", and that is not the deal that they are
5 now being offered. The reference for 91% is
6 bundle {C/24/4}, for what it is worth -- sorry, 22,
7 {C/22/4}. So that was the original deal and what they
8 are now being offered is nothing like that and --

9 THE CHAIRMAN: That is because of PACCAR because the damages
10 in PACCAR could not work.

11 MR PICKFORD: Yes, but that is part of the relevant factual
12 and legal matrix within which we are now operating. The
13 deal has fundamentally changed and the Court of Appeal,
14 in paragraph 94, in my submission, made it clear that
15 they need to be given a genuine choice as to whether
16 they want to opt in -- give their informed consent to
17 that -- and it is illusory, informed consent, if the
18 only realistic option you are being given is just to opt
19 back in because the alternatives are not real
20 alternatives because you are not being given your
21 property right back. So that is the central concern.

22 To be very clear, in my submission, that does not
23 require the tribunal to overwrite the contract.
24 Obviously that is not within the tribunal's gift. That
25 is within the RHA's gift and the RHA needs to make

1 proposals to the tribunal where it agrees to waive
2 provisions so that the proposals that it makes are
3 appropriate ones that give effect to the requirements on
4 it, including those of the Court of Appeal.

5 Just for your note -- we do not need to go to it --
6 but the discussion on the transcript about the share of
7 High Court costs was at --

8 THE CHAIRMAN: We remember that --

9 MR PICKFORD: Thank you.

10 THE CHAIRMAN: -- because that was our discussion, but we
11 did not have -- I mean, we were raising a concern that
12 we did not have extended submissions on it.

13 MR PICKFORD: No.

14 THE CHAIRMAN: It would be quite a complicated arrangement
15 because I think you recognise that they have had the
16 benefit of funding and simply to just pay a share of the
17 costs would not be remunerating the funder for the risk
18 it took in paying those costs.

19 MR PICKFORD: Well, we made a proposal. It is not our
20 proposal obviously to make, but we made a proposal that,
21 if the RHA want to adopt, they could. It is as
22 follows --

23 THE CHAIRMAN: Is that your footnote?

24 MR PICKFORD: That is our footnote ...

25 THE CHAIRMAN: Footnote 38, {RM2-CO/45/12}.

1 MR PICKFORD: That sounds about right. You obviously have
2 the reference if you have the footnote number.

3 THE CHAIRMAN: Paragraph 47 as well?

4 MR PICKFORD: Yes. So what we say --

5 THE CHAIRMAN: Yes, paying a share of costs.

6 MR PICKFORD: Yes, up till now --

7 THE CHAIRMAN: Well, they have had the benefit of being in
8 effectively the application up till now.

9 MR PICKFORD: I am sorry, I did not hear.

10 THE CHAIRMAN: They have had the benefit of being in the
11 application up till now and the bargaining position or
12 the settlement has been obviously enhanced by the fact
13 that we are now on the verge of certification --

14 MR PICKFORD: Yes.

15 THE CHAIRMAN: -- but that is just costs.

16 MR PICKFORD: Yes. Well --

17 THE CHAIRMAN: No funder, commercial funder, agrees to pay
18 the costs just on the basis, "We will get the costs
19 back".

20 MR PICKFORD: No.

21 THE CHAIRMAN: They agree to pay the costs on the basis
22 that, "We will be remunerated if damages are being
23 obtained by a benefit on our expenditure".

24 MR PICKFORD: Yes, I agree that that is not something that
25 the funder will find as attractive as those class

1 members staying in the class. Of course it will not be
2 because, under my proposal, they do not get to earn the
3 return, they do not get to earn the profit. But, in my
4 submission, that is justified in these circumstances
5 because there was an error by the RHA in relation to
6 obtaining informed consent from those that it signed up,
7 and that has some quite fundamental repercussions
8 potentially because it means that, as at now, they have
9 got to revisit that issue and they have got to let
10 people have another go.

11 Now, my submission is, well, they are not going to
12 let them have another go entirely free-riding on the
13 costs that have already been incurred, but neither, if
14 they never originally signed up giving their informed
15 consent, as the Court of Appeal tells us that they did
16 not, should they be held to the original bargain. They
17 now should choose whether they want to accept in fact
18 the new bargain -- because the original bargain is not
19 even on the table anymore -- or to walk away. If they
20 walk away, in my submission, the fair approach is that
21 they should pay back a proportionate share of the
22 High Court costs and they should pay back
23 a proportionate share of the costs that they could have
24 anticipated would be incurred on their behalf in getting
25 to this particular position; that is a share of the

1 budgeted costs in the materials that they would have
2 been able to read when they originally signed up.

3 Now, that is our proposal. We are putting it out
4 there. Obviously it is not for us ultimately to choose
5 the terms, it is for the RHA to choose the terms and for
6 the tribunal to decide whether it thinks those terms are
7 sufficient to discharge the obligations on it and the
8 RHA or not, but, in my submission, the terms need to be
9 along those lines for that test to be properly met.

10 THE CHAIRMAN: Yes.

11 MR PICKFORD: Yes. Just one other point: the returns that
12 the funder has contracted for are very substantial, very
13 substantial indeed, and those are not riskless. I mean,
14 if they are to obtain for their outlay returns in the
15 order of £300 million, then there may be some potential
16 class members in relation to whom that deal does not go
17 quite as planned. We say that this is precisely one of
18 those circumstances. They need to take on the chin the
19 fact that there was a mistake here by the RHA and that
20 should not be revisited -- that should not be visited
21 upon the class members by giving them Hobson's choice.

22 THE CHAIRMAN: What, the mistake being not to have
23 anticipated PACCAR?

24 MR PICKFORD: No, the core mistake -- the mistake that has
25 actually taken us to where we are here today is the

1 mistake in relation to conflicts.

2 THE CHAIRMAN: But the reason the funding has been -- the
3 model has been changed to this waterfall of taking a --
4 departing from a percentage of damages, which was how
5 the 91% or 90% was calculated -- the reason for that
6 change is PACCAR, is it not?

7 MR PICKFORD: That is right and that is another mistake.
8 I mean, in terms of the order of -- the reason -- the
9 mistake that we are here for is the conflicts mistake.
10 It is also appropriate to take account of, in my
11 submission, the PACCAR mistake.

12 THE CHAIRMAN: Well, that is a mistake made by everyone
13 except a majority of the Supreme Court.

14 MR PICKFORD: Well, and DAF.

15 THE CHAIRMAN: Yes, and DAF. But certainly made by us and
16 the Court of Appeal.

17 MR PICKFORD: Yes. My point is that courts and appeal
18 courts are allowed to differ with one another. That is
19 perfectly acceptable. It happens the whole time in this
20 difficult and complex area. The funder takes the risk
21 in relation to that. It takes the risk -- it puts up
22 a substantial amount of money and it wants to get back
23 an enormous amount of money. If things do not work out
24 exactly right because the law is not as it thought it
25 was or because there was a mistake made by someone --

1 I am not saying it is a culpable mistake. It does not
2 matter. The thing is the law is not as they all thought
3 it was -- then the question is: who should that problem
4 be visited on? Should it be visited on the class
5 member? -- no, the Court of Appeal makes that very clear
6 that they should be given a free choice to opt in again
7 properly, an informed choice -- or should it be visited
8 on the funder who is the party who says, "I am
9 underwriting this risk and I would like a very big
10 return to do so"? That is the choice.

11 THE CHAIRMAN: Yes.

12 DR BISHOP: Mr Pickford, can I ask a question, please? It
13 is normal in commercial matters involving a number of
14 parties for the parties to make an agreement that in
15 effect says, "We are going to proceed with this, we are
16 all going to contribute and we are going to agree no
17 separate settlement. We do not want the other side to
18 pick us off -- pick off one or two people and make the
19 litigation unfundable". Now, you are saying, are you
20 not, that an agreement at the beginning, which people
21 made, of that character, the character I have just
22 explained, should be overridden when there are various
23 changes that were not really foreseeable down the road,
24 with the possible effect of running a coach and horses
25 through the whole system in which we fund these

1 collective actions. I understand, I suppose -- can you
2 confirm this? -- that your client would find it
3 attractive to be able to go and pick off some of the
4 larger members who have opted in, who were signed up
5 originally, and perhaps undermine all the rest of the
6 litigation; is that correct?

7 MR PICKFORD: I would have to think, sir, about whether it
8 is appropriate to give a response to that. I will have
9 to take instructions on that issue, but that is
10 a somewhat sensitive issue so I will take instructions.

11 DR BISHOP: I ask because one of the responsibilities of
12 this tribunal is to think about how the whole system
13 works. It is a really complicated system, but I am
14 quite sensitive to small changes that can have large
15 consequences. We may be here in a situation where what
16 looks like a relatively small change could have quite
17 a large consequence to the way this entire regime
18 functions.

19 MR PICKFORD: Sir, I can certainly answer the general
20 question, the policy question. I will need to take
21 instructions about the specifics. My answer to the
22 policy question is this: the reason why we are in the
23 situation that we are in here is because of very
24 particular circumstances that, to my knowledge, have
25 only arisen in this case, and that is that there was

1 a conflict, it was not adequately addressed at the
2 outset, that was a problem and we now need to find the
3 remedy and we need to see effectively who is going to
4 pay the price for that. Is it the class members, who
5 are to be treated as if there is only one choice so they
6 are just going to have to sign up anyway, or is it the
7 funder who should be treated to pay that price? In my
8 submission, that issue only arises because of our rather
9 unique facts. I am not aware of any other case where
10 this point has arisen because what it requires is us to
11 revisit certification because of a lack of informed
12 consent when someone originally signed up.

13 THE CHAIRMAN: But you make the point that that applies, and
14 perhaps one might think to a potential class member with
15 more force to the fact that they were previously told,
16 "It is a damages-based agreement whereby you should get
17 over 90%", and now that has been completely reshaped as
18 a result of PACCAR. So that is not a particular
19 circumstance of this case, albeit that PACCAR was an
20 appeal in this case, but that affects a large number of
21 cases.

22 MR PICKFORD: Well, the PACCAR point does but --

23 THE CHAIRMAN: It is a very significant point, is it not?
24 From the point of view of someone deciding whether to go
25 in to the class, what am I likely to get at the end of

1 the day? Perhaps something that weighs with them rather
2 more than theoretical debates about conflict. They want
3 to know, "How much money am I likely to get? How much
4 are the lawyers and the funders going to take out?".

5 MR PICKFORD: My answer to that is twofold. I make two
6 points. The first is that there is a specific legal
7 route by which it is occurring here which I am not --
8 it has not been established that that same route is
9 going to be opened up in relation to all claims where
10 PACCAR is relevant -- that is the first point -- and the
11 specific -- the legal reason why it is raised here in
12 these proceedings is the requirement of the Court of
13 Appeal.

14 In my submission, I am not aware that there is that
15 route to re-opening things as a result of PACCAR, but
16 let us just assume that there is. Let us take
17 a hypothetical case where someone comes along and says,
18 "Well, I did not give my informed consent and the reason
19 I did not is because the funding arrangements have
20 totally changed", well, the same question applies. Who
21 should that problem be visited on? Maybe they really do
22 not like the new funding arrangements, it is not what
23 they signed up to, it is not what they say, it is not
24 what they were being told and they would like to have
25 a second view on whether they still want to continue.

1 In my submission, the tribunal should permit that.

2 It does not have to decide that point of course to
3 decide this issue. It only has to decide it on the
4 basis of the conflicts issue. But my submission is
5 there is nothing fundamentally wrong as a matter of
6 public policy with the tribunal saying, "Well, in those
7 circumstances, yes, I am afraid it is the funder who
8 entered into the unlawful agreements. The funder is
9 going to take that risk on the chin", and that is part
10 of why it gets potentially the very substantial rewards
11 that it contracts for. It cannot be a given that it
12 always wins. It cannot be a given that it puts in its
13 50 million and it gets out many hundreds. There may be
14 some occasions when it is a bad deal.

15 THE CHAIRMAN: That is clear, the case may fail, but we are
16 talking about the situation where actually money is paid
17 to class members so the case has not failed.

18 MR PICKFORD: Well, there are a number of legal risks that
19 are involved for funders in these proceedings and it is
20 not just the substantive ones.

21 THE CHAIRMAN: We need to take our break. Is there anything
22 else you want to say on -- we understand the point you
23 are making -- that you are making very clearly.

24 MR PICKFORD: I do not think on this issue, save for just
25 taking instructions on the issue -- I was asked

1 a question about what does DAF want to achieve.
2 Obviously what DAF wants to achieve is ultimately
3 privileged information, so I need to check what is
4 appropriate, if anything, for me to say about that.

5 THE CHAIRMAN: Do you want to do that while we take
6 a ten-minute break?

7 MR PICKFORD: Of course.

8 THE CHAIRMAN: We will be back in ten minutes.

9 (12.03 pm)

10 (A short break)

11 (12.19 pm)

12 THE CHAIRMAN: Yes, Mr Pickford.

13 MR PICKFORD: Thank you, sir. So the question I was asked
14 by Dr Bishop was about, well, what is my client seeking
15 to achieve here, and subject to this being a limited
16 waiver purely for the purposes of trying to assist the
17 tribunal, I am not waiving privilege more generally, as
18 long as that is very clear.

19 We would like to settle. We would like to settle
20 with any claimant, big or small. This claim is
21 basically a small claimant's claim. There are big
22 claimants' claims and those are being pursued in various
23 different proceedings. It is open, it is on the record,
24 that DAF has been settling in these claims. That is not
25 in order to scupper any collective action regimes; it is

1 because that is the responsible, sensible thing to do --
2 if you want to deal with claims efficiently, you seek to
3 settle them.

4 So the difficulty we are faced with here -- and this
5 is not the reason for my submission but I am going to
6 explain, as I have been asked to explain DAF's
7 perspective, why we take the position we do -- is that
8 collective proceedings under the kinds of damages
9 arrangements that are currently in place are very
10 difficult both for defendants and class members alike
11 because the incentives of the funder, because it gets
12 back a multiple of the total funds that are outlaid, are
13 to allow the claim to continue to the end so that the
14 maximum amount is spent and the maximum returns are
15 obtained. That is a factor which makes settling very
16 difficult.

17 Now, to be clear, that is a separate point. It is
18 not my answer to why I am right about what one does when
19 one needs to revisit an aspect of the means by which
20 class members opted in, but it is the context which
21 explains why, in our view, we see this claim as
22 problematic in terms of one that is capable of being
23 settled unless we are able to take the opportunities
24 that arise. This is an opportunity and we are not shy
25 about saying we would like to settle, purely because

1 that is what responsible defendants do.

2 THE CHAIRMAN: Yes, thank you.

3 MR PICKFORD: Just to conclude that point, I should then add
4 that of course we accept that, once people have opted in
5 again and given their informed consent to do so, then
6 they will be tied in. We are not seeking the ability to
7 settle generally throughout these proceedings. We are
8 saying that we are entitled to do so now because of
9 these very specific circumstances. Unless I can be of
10 further assistance on this point?

11 THE CHAIRMAN: Thank you.

12 I do not know if it is Mr Flynn or Mr Scannell.
13 Mr Flynn.

14 MR FLYNN: Yes, sir. Mr Scannell will follow if he has
15 anything additional to say.

16 Shortly, the Court of Appeal was dealing with the
17 conflict issue, as we have called it, and suggested that
18 there needed to be informed consent of claimants to
19 address that issue. By way of reminder, the tribunal
20 had reached that conclusion itself as well -- in fact,
21 before we went on appeal, the tribunal was saying that
22 there needed to be sufficient information in the Rule 81
23 Notice to put the claimants on notice and so there was
24 going to be a re-opting-in process, if I can put it that
25 way, even before we went to the Court of Appeal.

1 In my submission and without repeating matters that
2 are clear to the tribunal, the procedure that we have
3 set out, which does involve amending the contractual
4 arrangements by waiver and is summarised in
5 paragraphs 33 and 34 of our skeleton, does enable a free
6 choice for claimants. It is not a Hobson's choice.
7 They are able to decide that they do not want to have
8 anything more to do with these proceedings and that it
9 will not be the RHA that will be dealing with any claim
10 they may have afterwards or indeed it will not be the
11 funder that is funding it. That is what those new
12 arrangements will permit.

13 Briefly to the suggestion that actually those who
14 signed up signed up on a false premise because of the
15 then contractual arrangements in relation to funding,
16 whatever the merits of that suggestion, Mr Pickford has
17 been bandying some amounts around in relation to
18 possible returns to the funder which we do not accept
19 are correct or are on premises that -- you know,
20 hypotheses that may well not be realistic and are in
21 fact inconsistent with numbers in his own skeleton. We
22 may come to that later.

23 Overall, in fact, despite the change of arrangements
24 because of the PACCAR ruling, the funder's maximum
25 potential recovery in this case under the new

1 arrangements is not actually wildly different -- which
2 it seemed to be being suggested it would be -- it is not
3 wildly different from what would have happened under the
4 original arrangements. So we do not accept the factual
5 premise of that point either, even if it were relevant
6 to the issue before the tribunal, which, in my
7 submission, it is not.

8 I do not think I can comment further on the way any
9 of this might operate on DAF's incentives. The costs in
10 these proceedings have been extremely high for reasons
11 that we all know.

12 THE CHAIRMAN: Yes.

13 MR FLYNN: That is partly because we are facing five
14 extremely well resourced and aggressive proposed
15 defendants and objectors, to give them their title.

16 THE CHAIRMAN: I think it goes really to what Mr Meyerhoff
17 says in -- the real point in his fourth witness
18 statement at paragraph 23. I do not have the Opus
19 reference but happily it has been found, I think.
20 Paragraph 23.

21 MR PICKFORD: It is {RM2-CO/5/6}.

22 MR FLYNN: Which is up on screen for anyone who wishes.

23 THE CHAIRMAN: Where he says:

24 "... as that PCM ..."

25 That is to say a PCM who does not opt in.

1 "... has the ongoing benefit of remaining a party to
2 the protective High Court proceedings, preserving their
3 cause of action against the OEMs, it would be
4 appropriate for any monies they obtain via an
5 independent settlement with the OEMs to also be run
6 through the 'waterfall' pursuant to clause 13.1 ..."

7 That is the critical point I think on which
8 Mr Pickford focuses. He says it would not be
9 appropriate because it emasculates -- not a word he
10 used, but I think summarising what he was saying -- the
11 option of opting -- of not opting in.

12 MR FLYNN: As the next paragraph goes on to explain, with
13 one bound the PCM is free and can terminate.

14 THE CHAIRMAN: You say from the point of termination it will
15 waive clause 13.1, so after three months, at that
16 point --

17 MR FLYNN: -- they are not locked in anymore.

18 THE CHAIRMAN: You accept that then -- just to understand
19 how that works, if they therefore are in the
20 proceedings, then they give ... this is a PCM --
21 I am not entirely clear. This is a PCM who does not opt
22 in --

23 MR FLYNN: -- and does not wish to retain the benefit
24 described in paragraph 23.

25 THE CHAIRMAN: If they do not continue the High Court

1 proceedings, then what are they settling?

2 "... a PCM who does not wish to continue
3 with the High Court proceedings is free to reach
4 a settlement ..."

5 But the settlement -- it is not obviously
6 a settlement of collective proceedings, they are not in
7 that, and it is not a settlement of High Court
8 proceedings because --

9 MR FLYNN: One assumes it has the consequence that that PCM,
10 who is no longer proposing to be a class member -- but
11 that entity will no longer be a claimant in the
12 High Court pursuant to some arrangement with DAF.

13 THE CHAIRMAN: I am just trying to understand what actually
14 is being envisaged. So there is an opt-in period until
15 the end of December. They do not opt in. You say or
16 Mr Meyerhoff says at paragraph 22:

17 "A PCM who chose to continue with the High Court
18 proceedings would need to remain bound ... in full
19 (subject to [all the provisions] ...) ..."

20 Then, by contrast -- paragraph 24 is a contrast with
21 paragraph 22. That is clear:

22 "... chose not to continue with the High Court
23 proceedings ..."

24 So if it chose not to continue with the High Court
25 proceedings, I do not understand how it settles. What

1 is it settling? What is the settlement? It has got no
2 other claim. It cannot start a new claim because it is
3 out of time. That is why you started the High Court
4 proceedings, sensibly, (inaudible).

5 MR FLYNN: I think one has to assume at that point that that
6 entity, as it says, is free to reach a settlement with
7 the OEM --

8 THE CHAIRMAN: Yes, but a settlement of what?

9 MR FLYNN: Well, an arrangement with the OEM. It must ...

10 THE CHAIRMAN: But what is it settling?

11 MR FLYNN: I may be being at cross-purposes but the claims
12 it has at the moment is -- this entity, PCM, has
13 a High Court claim.

14 THE CHAIRMAN: Yes.

15 MR FLYNN: It tells by termination of the agreements that it
16 no longer wishes to be party to that and that,
17 presumably -- unless they just said, "Cannot be bothered
18 with it", that could be as a result of reaching
19 a deal -- maybe calling it a "settlement" you think is
20 not strictly accurate in that context -- but a deal with
21 one or more of the OEMs. So that is a possibility for
22 them at that point.

23 THE CHAIRMAN: Is this --

24 MR FLYNN: Sorry, I was merely going to say, at that
25 point -- and there is a High Court claim in their

1 name -- they are able to pursue it under their own steam
2 should they wish because they are no longer ...

3 THE CHAIRMAN: Yes. So is Mr Meyerhoff saying -- and
4 presumably your solicitors are in the tribunal today --

5 MR FLYNN: Indeed.

6 THE CHAIRMAN: Is he saying that, after the opt-in period
7 ends, if you have not opted in, then you can say, "We
8 want to fight on our claim in the High Court" -- and if
9 they are going to fight on, then we are in paragraph 22
10 territory and the LMA applies in full -- or they can
11 say, "We are now reaching a deal with any of the
12 defendants in the High Court, therefore we want to drop
13 out of the High Court proceedings", and clause 13.1 --
14 there is this three-month period for notice, but if it
15 is after those three months, clause 13.1 is waived
16 completely, so it will not apply to their settlement of
17 those High Court proceedings, if they settle it there
18 and then. Is that what is being said?

19 MR FLYNN: That is my understanding, sir, yes.

20 DR BISHOP: That is an important clarification.

21 THE CHAIRMAN: It is a fairly striking position. I think it
22 is very important you clarify that because that might,
23 subject to the fair point there is a delay, meet
24 effectively the objection because it would mean that,
25 subject to them giving notice, three months' notice, at

1 that point DAF could make its individual settlement and
2 they could be told, "Well, if you do not opt in and you
3 terminate the LMA after three months, you can do --
4 reach a settlement and the damages you recover under
5 that settlement will not be subject to the waterfall".

6 MR FLYNN: Effectively that is why we did not understand the
7 objection to the proposal.

8 THE CHAIRMAN: Well, I think -- I have to say I was not
9 clear on reading those paragraphs. I think it is very
10 important you clarify that because it is of enormous
11 consequence potentially for the proceedings. As I say,
12 your solicitors are present, hearing this.

13 MR FLYNN: Yes. Very well, sir.

14 THE CHAIRMAN: Presumably that is -- the 13.1, it is also,
15 is it, the -- just a moment. (Pause)

16 Presumably also this has been agreed by Therium
17 because Therium is of course party to the LFA.

18 MR FLYNN: Yes, that is correct, sir. I will double-check
19 that, but these arrangements have been thoroughly
20 discussed. Obviously the counterpart to that -- a point
21 no doubt we are coming on to -- is the undertaking that
22 we sought and which the OEMs are unwilling to give in
23 relation to --

24 THE CHAIRMAN: Well, that is a separate -- yes.

25 MR FLYNN: It is not entirely separate. It is, I accept,

1 a -- it is not part of the arrangements that we had.

2 THE CHAIRMAN: I mean, I think even in the undertaking that
3 you sought -- I will remind myself of the terms of the
4 undertaking you sought -- it was only during the opt-in
5 period -- the undertaking was only during the opt-in
6 period and in fact --

7 MR FLYNN: Yes.

8 THE CHAIRMAN: -- given what Mr Pickford said, in the opt-in
9 period -- yes, I see. But is this conditional on that
10 undertaking, so it is not -- I mean, are these proposed
11 amendments -- it is not what Mr Meyerhoff says -- are
12 they conditional on that undertaking being given or ...?

13 MR FLYNN: No, they are not.

14 THE CHAIRMAN: They are not?

15 MR FLYNN: No, they are not. We say they do add to the
16 reasonableness of requiring the no contact.

17 THE CHAIRMAN: Yes. Well, we have not heard you on the
18 undertaking. I can tell you that we are, from what we
19 have seen and considered, not minded to impose that
20 requirement. So for the purpose of this argument,
21 assume that there will be -- even if we could make it
22 a requirement, that we will not do so, so you will not
23 get that undertaking and so this should be addressed on
24 that basis. So they could write to the claimant,
25 saying, "Well, if you do not opt in and then give notice

1 afterwards to terminate the LMA, after three months we
2 will propose to settle with you on this basis".

3 MR FLYNN: We understand that, sir. We cannot make them
4 interconditional, so ...

5 THE CHAIRMAN: Yes.

6 MR FLYNN: I should also allow Mr Scannell to explain.

7 THE CHAIRMAN: Yes. As long as we have understood the
8 position properly. So just to be quite clear, in
9 paragraph 24, {RM2-CO/5/6}:

10 "A PCM who chose not to continue with the High Court
11 proceedings would be able to exercise their right to
12 terminate ... on three months' written notice ..."

13 So that is not to continue on the basis that they
14 are now settling the proceedings and do not wish to take
15 any further steps in the proceedings. That is what is
16 meant.

17 MR FLYNN: I am sorry, sir, I think I missed the start of
18 your --

19 THE CHAIRMAN: What is stated at the beginning of
20 paragraph 24:

21 "A PCM who chose not to continue with the High Court
22 proceedings would be able to exercise their right to
23 terminate ..."

24 That includes a PCM who says, "I want to reach
25 a settlement with, say, DAF and therefore --

1 a settlement of my High Court claim and therefore I will
2 not be continuing with those proceedings and therefore
3 terminate, give notice -- three months' notice
4 terminating the LMA".

5 MR FLYNN: That, I think, is correct, sir -- not that we
6 would necessarily be told what the reason for the
7 exercise of choice would be. Given the indication you
8 have made in relation to the undertaking, this is
9 a point which I should like to discuss further with the
10 clients and so --

11 THE CHAIRMAN: Well, it is very important we understand what
12 you are prepared -- because there is nothing --

13 MR FLYNN: I fully accept that.

14 THE CHAIRMAN: -- either here or --

15 MR FLYNN: No, I fully accept that.

16 THE CHAIRMAN: -- that says it is conditional and it rather
17 affects the position.

18 MR FLYNN: Yes.

19 THE CHAIRMAN: Perhaps we can come back to it then after
20 lunch. You can address us on the undertaking, but our
21 starting point is that, even if we have case management
22 powers to require that, it would be a very exceptional
23 thing to do.

24 MR FLYNN: In, I would suggest, very exceptional
25 circumstances and hardly something that would be

1 routinely granted. I mean, it is in the -- I do not
2 need to rehearse the context, but the circumstances are
3 fairly extraordinary in this case.

4 THE CHAIRMAN: Being what -- what is so extraordinary on
5 that point?

6 MR FLYNN: The fact that when the -- going to the length of
7 time between the original arrangements being put in
8 place and where we are today, addressing a conflict
9 issue from the -- determined by the Court of Appeal and
10 the requirements on claimants to have the ability to
11 decide whether or not to come into these arrangements
12 afresh is not something which is regularly going to
13 arise in the tribunal's practice, in my submission.

14 THE CHAIRMAN: By "afresh", you mean claimants who have
15 signed up before?

16 MR FLYNN: Yes.

17 THE CHAIRMAN: So if the undertaking is expressed more
18 broadly, "shall not approach PCMs" -- but do
19 I understand you to be saying PCMs who have signed an
20 agreement with the RHA or PCMs who are claimants in that
21 High Court, which I think is the same? There are the
22 PCMs who have signed agreements, about 18,000-odd,
23 I think, but once the CPO is made, you will be
24 advertising it again and there may be other people who
25 then sign it and who have no prior agreement with you.

1 MR FLYNN: There may -- there may indeed -- but we
2 nevertheless hope, through our efforts, the cost of some
3 of which has been the subject of criticism, to have
4 signed up a large proportion of the addressable market.
5 So that I think is a relevant issue. The people who
6 have signed up are, one hopes, a significant proportion
7 of those who will or could decide to continue with the
8 claim once the CPO is granted.

9 THE CHAIRMAN: Yes, but your undertaking covers not only
10 them but others.

11 MR FLYNN: It does.

12 THE CHAIRMAN: There is no exceptional circumstance for the
13 others, is there?

14 MR FLYNN: No, there is not. But taking that in the
15 balance, it is true that with those others, yes, they
16 have no existing relationship with the RHA and the
17 efforts it has made to preserve their claims, of course.

18 THE CHAIRMAN: Yes, and they are not claimants in the
19 High Court because they have not surfaced.

20 MR FLYNN: No.

21 THE CHAIRMAN: So there are no exceptional circumstances for
22 them. They are like any opt-in class.

23 MR FLYNN: Well, save that, of course, one can watch the
24 course of these proceedings and think that they are
25 doing a good job or they are not doing a very good job

1 and, "I will decide whether or not to opt in when there
2 is something to opt in to". There may, as we have
3 always said, be a significant number of possibly
4 significant players who are taking that position.

5 THE CHAIRMAN: Yes, but there is no reason why defendants
6 should not be able to approach them and say, "Do not opt
7 in. We are ready to give you so much money now".

8 MR FLYNN: I can see they do not have the offsetting
9 arrangements with the RHA.

10 THE CHAIRMAN: So I think it, on any view, would be limited.

11 Mr Scannell, is there anything you would like to add
12 then?

13 MR SCANNELL: David Scannell for RHA Used Trucks Limited,
14 the proposed sub-class representative.

15 The PSCR's submissions in respect of the waiver
16 issue are set out in our skeleton argument and in short
17 we endorse the submissions made by Mr Flynn and propose
18 to take the same approach in respect of used trucks
19 sub-class members who signed up to the High Court
20 proceedings.

21 The PSCR solicitors, Tyr, have confirmed in
22 correspondence with the tribunal that neither clause 9.9
23 nor clause 13.1 will be voluntarily enforced against
24 claimants who opted in before but do not opt in now, so
25 our position is the same as Mr Flynn outlined for the

1 RHA.

2 If I can just summarise --

3 THE CHAIRMAN: Sorry to interrupt you, but 9.9 we
4 understand. 13.1, is it on the same basis?

5 MR SCANNELL: Yes, it is the RHA -- it is the RUTL
6 equivalent to 13.1 of the RHA's LFA.

7 THE CHAIRMAN: Yes, and the fact -- the confirmation that
8 they will not enforce it, is it also on the conditional
9 basis of whether the sub-class members continue the
10 High Court proceedings --

11 MR SCANNELL: Yes, it is on the same basis as you heard from
12 Mr Flynn.

13 THE CHAIRMAN: An identical basis, yes. Thank you.

14 MR SCANNELL: If I can just very briefly summarise my
15 understanding of what exactly all of that entails, in
16 particular because there is some uncertainty as to what
17 Mr Meyerhoff means in his fourth witness statement.

18 The starting point is that this point of course that
19 we are discussing in the round, it does not apply to all
20 claimants. It only applies to a subset of the
21 claimants. That subset of claimants is a subset who
22 signed up to the High Court proceedings. Now, they have
23 concluded contracts in that context under which they
24 have agreed that if, for example, they settle and
25 receive monies from the OEMs, those monies will be put

1 through the waterfall, as my learned friend Mr Pickford
2 describes it. Prima facie those contractual
3 arrangements must stand. That is the prima facie
4 position. It is obviously legally heretical to say that
5 those contracts can simply be ignored.

6 Now, as a result of the waivers, all that is
7 happening, as I understand it, is this: that if those
8 claimants -- that subset of claimants -- decide not to
9 opt in to these proceedings and if they settle their
10 High Court proceedings, then they can keep their
11 settlement monies if they terminate the agreement under
12 which they agreed that those settlement monies would be
13 put through a waterfall. That is how I read
14 paragraph 24 of the fourth Meyerhoff. The only
15 qualification to that is that those claimants would have
16 to pay a sum, which is probably going to be a de minimis
17 sum, which represents their proportion of the costs of
18 the High Court proceedings up to the point of
19 termination.

20 Now, I would suggest that those arrangements are
21 perfectly fine and that they do not restrict to any
22 greater degree than is reasonable, given that they
23 signed those contracts in the context of the High Court
24 proceedings, their freedom to opt in to these
25 proceedings.

1 If I could just clarify one final point. In the
2 letter that Tyr wrote to the tribunal, Tyr made it clear
3 that the waivers I have just been discussing with the
4 tribunal are waivers which are given by RUTL and by
5 Therium Atlas.

6 THE CHAIRMAN: Yes.

7 MR SCANNELL: Thank you.

8 THE CHAIRMAN: Well, Mr Pickford, does that not really
9 address -- as explained, set down very clearly -- the
10 principal objection?

11 MR PICKFORD: I have to take instructions on that, sir.

12 I do not know whether it does actually. I can give you
13 my initial reactions. But the explanation that we have
14 now been given as to what is proposed was not how we
15 read Meyerhoff. It is not how the tribunal read
16 Meyerhoff. It is not really consistent with
17 paragraph 23 because it is very unclear what
18 paragraph 23 means.

19 THE CHAIRMAN: Well, you have my sympathy on that because,
20 as you know, it is not how I understood it, but we now
21 have a clear explanation.

22 MR PICKFORD: Well, I think I will need to take instructions
23 and come back on it, but in this final five minutes what
24 I can say is --

25 THE CHAIRMAN: Well, if you prefer -- I do not want to force

1 you to speak now if you would rather take
2 instructions -- we can come back at 5 to. That would
3 be satisfactory.

4 MR PICKFORD: Well, that might be preferable on that issue,
5 yes, certainly.

6 THE CHAIRMAN: Well, that is the issue that we are
7 addressing and seeking to resolve.

8 MR PICKFORD: Very good. You do not want to hear from me
9 yet on the undertaking point?

10 THE CHAIRMAN: No, we want to hear more from Mr Flynn on the
11 undertaking point.

12 MR PICKFORD: I understand. Okay.

13 THE CHAIRMAN: But it has been made clear that this is not
14 contingent on the undertaking and we have indicated an
15 albeit very preliminary view on the undertaking.

16 I think we recognise that, on any view, any undertaking
17 would be limited to the subset, as Mr Scannell has put
18 it, of PCMs who have signed agreements and are named in
19 the High Court proceedings.

20 We will come back at 5 to 2.

21 MR PICKFORD: Thank you, sir.

22 (12.58 pm)

23 (The short adjournment)

24 (1.55 pm)

25 THE CHAIRMAN: Yes, Mr Flynn.

1 MR FLYNN: Sir, I think we were coming then to the
2 undertaking. I think that was --

3 THE CHAIRMAN: I think Mr Pickford actually was taking
4 instructions.

5 MR FLYNN: Well, in that case I will allow --

6 THE CHAIRMAN: He was going to come back.

7 MR FLYNN: I will let him speak.

8 MR PICKFORD: Thank you, sir.

9 So our position is that, given the submissions that
10 Mr Flynn made just before the short adjournment, that
11 very substantially moves this matter on. There are some
12 qualifications and some loose ends that I need to make
13 submissions on, but, subject to our understanding of
14 what is now being proposed being correct, then a free
15 choice is going to be offered seemingly to class
16 members.

17 The points are these: firstly, this is critical, how
18 this is going to function, and therefore we are going to
19 need -- should the tribunal ultimately make an order
20 certifying against the other submissions I am going to
21 be making, it will need to be, I think, best for there
22 to be a recital in the order that makes clear the basis
23 on which the RHA is now proposing to operate the LMA and
24 the LFA and the clauses that it is prepared to waive
25 because otherwise there is room for doubt.

1 The second point is that this will need to flow
2 through into the Rule 81 Notice. Obviously the
3 Rule 81 Notice currently, as it stands, does not reflect
4 this particular arrangement.

5 The third point is -- I am going to now set out in
6 a few sentences what I understand we would be permitted
7 to do and what class -- potential class members would be
8 permitted to do under these arrangements. So subject to
9 issues about the undertakings -- I am just going to put
10 that to one side -- assuming that we were able to make
11 an offer to a class member, we would be able to say
12 that, "Here is the offer that we would be willing to
13 make to settle your claim, and the way in which it will
14 work is we will enter into a binding contract whereby,
15 in the future, once you have gone through the various
16 procedural steps that the RHA would like you to go
17 through, and that involves waiting until the opt-in
18 period has finished and then whatever other procedural
19 steps are required, we will then pay you, once the claim
20 is just yours and only yours, the amount that we have
21 agreed". At that point, because we are paying those
22 sums, in the future, under the arrangements, as Mr Flynn
23 explained them, pursuant to paragraph 24, apparently,
24 where they are no longer going to have to pay those sums
25 into the waterfall, the only cost of that from the point

1 of view of the class member is the proportionate
2 contribution to the High Court costs. That is our
3 understanding of the arrangements that would be open to
4 us under the proposals that Mr Flynn made. If that is
5 correct, then, in essence, subject to some further
6 contractual points, that works.

7 The contractual points are these: what paragraph 24
8 talks about is waiving clause 13.1 of the RHA LFA. That
9 is the provision about holding monies on trust. But we
10 say, in fact, if this is to be effective in the way that
11 Mr Flynn indicated it is intended to be effective, there
12 are a series of other clauses that would also need to be
13 waived. So, for example --

14 THE CHAIRMAN: Just a moment. Yes.

15 MR PICKFORD: Actually I am going to make a prior
16 submission. I have two points. The first of those is
17 that by far the simplest way of dealing with this would
18 be to basically waive everything apart from specific
19 things that need to be saved. However, if they are
20 going to do it in terms of waiving specific provisions,
21 then we are going to have to go through and identify
22 provisions that would need to be waived in order for
23 this thing to get off the ground. So the LMA, if we
24 want to bring it up --

25 THE CHAIRMAN: So if we start with the LFA, where the 13.1

1 is --

2 MR PICKFORD: Yes. We can go that way round. I was

3 proposing to start with the LMA because it is the LMA

4 that requires the claimant to still be bound by the LFA

5 so it seemed sort of logical to start at the top of the

6 tree and work down, but I am happy, sir, if you prefer,

7 to start with the LFA.

8 THE CHAIRMAN: It is just because we have 9.8 and 13.1,

9 which are the LFA.

10 MR PICKFORD: That is fine. Let us start with the LFA.

11 Thank you.

12 THE CHAIRMAN: We have got that in -- we have got what is

13 called a "confidential bundle".

14 MR PICKFORD: Yes, so it is the latest version.

15 THE CHAIRMAN: It is under tab 8, I think. I do not know

16 what the Opus number is.

17 MR PICKFORD: I think it is tab 7 of the confidential

18 bundle.

19 THE CHAIRMAN: We seem to have differently tabbed

20 confidential bundles.

21 MR PICKFORD: So I am looking at the RHA LFA, {RM2-X/7/1}.

22 DR BISHOP: In my bundle it is behind tab 8.

23 THE CHAIRMAN: Yes, it is. Yes, we have it.

24 MR PICKFORD: I am grateful.

25 MR FLYNN: It is 11.2 of the core bundle.

1 MR PICKFORD: It is in the confidential bundle. It is at
2 RM-X, tab 7 --

3 THE CHAIRMAN: We have it, but it is not confidential
4 itself?

5 MR PICKFORD: It is not confidential. But the advantage of
6 the one in the confidential bundle is that is the latest
7 one and there have been a number of iterations. So if
8 we start then on page 10, {RM2-X/7/10} --

9 THE CHAIRMAN: Of the document?

10 MR PICKFORD: Of the document -- we should find there, if
11 your version is the same as mine, clause 2.1, which is
12 the "Agreement to Fund".

13 THE CHAIRMAN: We have it on page 8.

14 MR PICKFORD: Very good. It is 2.1 that I am focused on,
15 clause 2.1.

16 THE CHAIRMAN: Yes.

17 MR PICKFORD: That provides that the funding is in return
18 for the claimants' agreement to pay where there is
19 recovery, so it is important that that clause is
20 waived --

21 THE CHAIRMAN: 2.1A?

22 MR PICKFORD: Yes, 2.1A.

23 THE CHAIRMAN: Well, look, I think these are complicated
24 provisions. It is not appropriate, I think, to go
25 through the agreements and you say of a number of other

1 clauses. If it is made clear that they will waive the
2 obligation to pay the damages into -- or make clear that
3 they are free to retain the damages subject to deduction
4 of a proportionate part of the costs and that then the
5 relevant clauses in these two agreements are waived
6 accordingly, one can then spend time finding the
7 clauses.

8 MR PICKFORD: That is --

9 THE CHAIRMAN: That is what you --

10 MR PICKFORD: That is the heart of it. That is the nub of
11 it. I am not going to go through the clauses, but just
12 so I am being totally transparent, there are other
13 clauses which do not go to that issue but do still need
14 to be addressed; as examples, irrevocably instructing
15 the solicitors and counsel, et cetera, which is
16 something which is a step -- that will need to be
17 waived, obviously, because the whole point is that at
18 that point they depart from the proceedings and they are
19 not going to be doing that anymore; various
20 confidentiality obligations, for instance, they are
21 obliged under the agreement to tell the RHA about the
22 terms of any settlement they enter into. Well, there is
23 no reason why that should happen if what they are doing
24 is departing from the proceedings.

25 THE CHAIRMAN: Well, except they are settling the High Court

1 proceedings, which --

2 MR PICKFORD: Yes, but at this stage they will not have

3 opted in either.

4 THE CHAIRMAN: But these are the -- the RHA has been

5 orchestrating the High Court proceedings.

6 MR PICKFORD: Yes.

7 THE CHAIRMAN: If you bring High Court proceedings for ten

8 parties -- the solicitors are representing ten parties

9 and one of them settles, you say, "We want to know the

10 terms of the settlement as your solicitors". Because we

11 are doing this for these ten people, why is that

12 oppressive or restrict their right to -- we are only

13 concerned with their freedom to opt in to the collective

14 action.

15 MR PICKFORD: Well, in my submission, it would be an unusual

16 restriction on someone's freedom in respect of their

17 outside options if they decide to exercise their outside

18 option, wholly without any constraints, to have to

19 explain the terms of the agreement that they entered

20 into when exercising their outside option.

21 THE CHAIRMAN: Well, it might or might not, but if they have

22 signed up to that, I do not see how it restricts

23 their -- we are only concerned with, given the free

24 choice of opting in or not, whether it was a perfect

25 arrangement that, if 100 people get together, instruct

1 the same solicitors to start High Court proceedings,
2 naming the 100, and say to the solicitors, "We agree
3 that if any of us settle those proceedings, without the
4 benefit of certain economies of scale through doing it
5 together, we will let you know of the terms of the
6 settlement" -- forget about any collective action. They
7 just do that. There are 100 people suing together and
8 they make that arrangement with their solicitors. You
9 might think it is wise or not, but I do not see how
10 a court would interfere with that.

11 MR PICKFORD: You have my first response to that. May

12 I just take instructions, please, sir --

13 THE CHAIRMAN: Yes.

14 MR PICKFORD: -- because I may be able to cut this short.

15 (Pause)

16 Sir, I think I translate the expression that we are
17 not going to die in a ditch about this particular point
18 if --

19 THE CHAIRMAN: I think the only point -- and it is a point
20 you made forcefully and effectively -- is that the -- it
21 is the fact that if you offer them and agree to pay
22 damages, they will not get the damages for an indefinite
23 period of time because it gets paid into the common pot
24 and what is to be made clear is that the obligation to
25 put those damages into the common pot will not be

1 enforced.

2 MR PICKFORD: Yes.

3 THE CHAIRMAN: That is made clear. The fact that there are
4 other constraints imposed, that is a degree of
5 micro-management where they have signed up to this --
6 and they are commercial parties after all. It is not
7 for us, I think, to get involved with, even though
8 certain things have changed. But it is because certain
9 things have changed that that primary obligation is
10 being waived.

11 MR PICKFORD: Sir, we are content as long as the core part
12 of this proposal is as we understand it.

13 THE CHAIRMAN: Yes, the point being that you can make that
14 sort of offer and that it has to be -- you suggested be
15 put in a recital and that there should be indication in
16 the Rule 81 Notice indicating that.

17 MR PICKFORD: So it is very clear to everyone.

18 THE CHAIRMAN: Yes.

19 Mr Flynn.

20 MR FLYNN: Sir, from our perspective, the approach that we
21 have suggested -- and I apologise if it was not clear
22 before -- is that set out in paragraphs 33 and 34 of our
23 skeleton. We have endeavoured to reflect that in the
24 Rule 81 Notice, but in the light of observations we are
25 clearly going to have to go back to that. What

1 Mr Pickford has made clear, if I can just sort of merge
2 this with the discussion of the undertaking, is that
3 they do indeed -- as we say in paragraphs 35 and 36 of
4 the skeleton, they do indeed want to pick people off
5 ahead of the -- during the opt-in period, shall we say,
6 or before the closing of the opt-in period.

7 While I was not going to press you on the
8 undertaking, given the indications that we had before
9 the adjournment, it makes it all the more crucial that
10 the timings set out in paragraph 33 are observed so that
11 people cannot be picked off during the existence of the
12 opt-in period, during which it would be a breach, as it
13 is today, for anyone who signed the LMA to settle their
14 claims without -- well, to do that, and we are also
15 I think entitled to be informed of any such settlement.

16 So we assume that there are none for the moment
17 because that would be something that would have to be
18 run through the waterfall and it is important in
19 protecting, we would say, these proceedings and the
20 interests of the class as a whole over possibly
21 low-hanging fruit at one end of the spectrum -- it is
22 important that that protection be maintained. In short,
23 that is our position, without descending into -- at this
24 stage, as you say, it may not be very fruitful to go
25 through the provisions.

1 THE CHAIRMAN: Yes, but just to be clear, you set out in 33
2 what the position is for claimants and you have said
3 that is not tied to or conditional on the undertaking or
4 order -- well, it cannot be an undertaking or order in
5 terms of the undertaking.

6 MR FLYNN: Yes.

7 THE CHAIRMAN: If that is so, can there be any objection, if
8 that is the position, to people being told that that is
9 the position in the Rule 81 Notice?

10 MR FLYNN: Being told that ...?

11 THE CHAIRMAN: That the position is as set out --

12 MR FLYNN: No, not at all. Not at all.

13 THE CHAIRMAN: No, so the rule -- to make that point, if we
14 go to the latest form of Rule 81 Notice, which is in the
15 non-confidential bundle, of course, and it is under our
16 tab 6 -- may I just interpose to say that, in future,
17 when we get bundles, if there are documents on Opus, it
18 is of great assistance if we get Opus page numbers and
19 not other page numbers because it means -- it helps that
20 we are all, as it were, literally on the same page.

21 But we have got this as exhibit SCM-4 and the Opus
22 operative has helpfully found it, {RM2-CO/6/1}. If we
23 go within that document to -- it is quite a way into it.
24 I do not know what Opus page it is. It is page 19
25 within the document itself. Maybe it is

1 {RM2-CO/6/19} -- that is called "How To Opt In ...",
2 "Not previously registered or signed up?". That is
3 fine. Then we go to the next page, {RM2-CO/6/20},
4 "Previously registered and signed up?":

5 "Even if you have previously ... you will need to
6 confirm ..."

7 Yes.

8 Then about the third paragraph it says:

9 "If you do not wish to be part of the RHA's
10 collective claim, you do not need to take any further
11 steps: unless you take steps to opt in again, you will
12 not be included ..."

13 Then it says:

14 "Please also note -- as part of the contractual
15 documents you signed up to when signing up ... you
16 agreed to opt in ... However, the RHA recognises that
17 the issues relating to the conflict between new and used
18 trucks was not explained to you when you originally
19 signed up. As such, if you do not wish to opt in, the
20 RHA will waive the obligations within the contractual
21 documents requiring you to opt in and will not enforce
22 those obligations against you."

23 That is dealing with the waiver at clause 9.8, but
24 there would now need to be an additional sentence or
25 two, saying, "Further, if you terminate the contract

1 with the RHA -- give notice to terminate the contract
2 with the RHA after 31 December 2024 and reach
3 a settlement discontinuing the High Court proceedings,
4 you will not have to pay out of any damages more than
5 your proportionate share of the costs of those
6 proceedings", something like that.

7 MR FLYNN: Yes.

8 THE CHAIRMAN: That would go in as an additional sentence,
9 and that is just reflecting what is in paragraph 33 in
10 short and layman's terms, so --

11 MR FLYNN: Yes.

12 THE CHAIRMAN: -- is there any objection to that?

13 MR FLYNN: No, sir.

14 MR PICKFORD: Sir, there is no objection to that per se at
15 all, but can I just make the point that there are
16 obviously other aspects of the Rule 81 Notice that will
17 need to be covered? For example, a very big one is if
18 one goes back to page 7, {RM2-CO/6/7}, which is a table
19 which says "Summary of Your Legal Rights and Options" --

20 THE CHAIRMAN: Yes.

21 MR PICKFORD: -- we are assuming that the person reading
22 this has already got to page 7.

23 THE CHAIRMAN: Right, yes.

24 MR PICKFORD: Does the tribunal have that?

25 THE CHAIRMAN: Yes. Of course this is to all potential

1 class members.

2 MR PICKFORD: Yes.

3 THE CHAIRMAN: It is like -- unless you are already within
4 an existing claim, that is --

5 MR PICKFORD: I think this will need to be made clearer, so,
6 in my submission -- what it says is, "Summary of Your
7 Legal Rights and Options", and there are two basic
8 options, "Opt In" or "Do Nothing: Get Nothing".

9 THE CHAIRMAN: No, well, it does not say that. It says
10 unless you are already within an existing claim or have
11 commenced --

12 MR PICKFORD: Sir --

13 THE CHAIRMAN: These are people who are within the existing
14 claim, are they not?

15 MR PICKFORD: Sir, that will need to be made much clearer.
16 It does say exactly what I said it says on the left-hand
17 column. It says "Opt In" or "Do Nothing: Get Nothing".
18 Some of the people reading this are not lawyers and if
19 a layperson read that their options are either opt in or
20 do nothing, get nothing, they would get the very, very
21 strong impression that there was no option to get any
22 money unless they opted in, and that is not what
23 Mr Flynn is now telling this tribunal.

24 So I am not suggesting that we deal with the
25 drafting on the hoof. What I am saying is there are

1 a number of provisions in the Rule 81 Notice that will
2 need to be looked at to make sure that the drafting is
3 fair.

4 THE CHAIRMAN: All right. The basic point is that it -- and
5 there can be a cross-reference to, you know, "See
6 section 29 below", whatever, but that will -- that is
7 the additional point that comes in for "Previously
8 registered and signed up?", {RM2-CO/6/20} -- that is
9 where it has got to be explained and it might be
10 reflected in earlier shorthand tables.

11 MR PICKFORD: Yes.

12 THE CHAIRMAN: So that is all right. That is the first
13 point.

14 The other point is, yes, you say DAF would like to
15 approach people and say, "This is what the RHA has
16 agreed can happen and we will offer you so much if you
17 go down that route". Some people may say "Yes" and some
18 people may say "No", but on what basis does -- if that
19 is the route that is available, why should they not be
20 able to make that offer to restrict them, to prevent
21 them --

22 MR FLYNN: It is an issue of when, sir, and that is why

23 I have said why the --

24 THE CHAIRMAN: Well, it informs people's choices for opting
25 in.

1 MR FLYNN: We probably cannot prevent DAF from making an
2 offer to the world. I think what we can do is follow
3 the timing sequence set out in our explanation of these
4 proposals, which means that claimants are bound by the
5 agreements until the end of the opt-in period and then
6 have the right to terminate when they have made their
7 choices.

8 THE CHAIRMAN: We have accepted, as you heard by a response
9 to Mr Pickford's submissions, that whatever the LMA may
10 say about them having to inform solicitors of an
11 offer -- I do not know what it says exactly -- or of
12 a settlement and so on, those will remain. So if you
13 wanted to contact that potential class member and say,
14 "No, this is not in your interests", you can do so, and
15 both sides, as it were, can communicate and then they
16 make their decision. But to prevent DAF or anyone else
17 communicating with a potential class member during the
18 opt-in period when they are deciding whether or not to
19 opt-in is something --

20 MR FLYNN: We cannot prevent them and we do not seek to
21 prevent them from making an offer to the world or indeed
22 approaching people; what we do seek to prevent, as the
23 sequence suggests in our paragraph 33, that those offers
24 would be accepted before the end of the opt-in period.
25 That is all the more so in circumstances where, as you

1 have -- as we I think agreed, there will not be any form
2 of undertaking, so DAF are free to go and approach
3 people, but they ...

4 THE CHAIRMAN: Yes. The approach as outlined is, "We are
5 willing to settle your claim. Once your procedural --
6 we will enter a contract with you in future once the
7 procedural steps are taken to terminate the LMA".

8 MR FLYNN: Yes -- no, that --

9 THE CHAIRMAN: So they can make that offer.

10 MR FLYNN: They can make that offer, yes.

11 THE CHAIRMAN: In the knowledge of that offer, the
12 individual will decide whether they want to opt in or
13 not. That is how it stands, I think.

14 MR FLYNN: I think that is right.

15 THE CHAIRMAN: As I say, if under the LMA, because it is an
16 offer to settle the High Court proceedings, there is
17 provision that the claimants in the High Court must
18 inform their solicitors of the receipt of any offer,
19 that stands, so you will know about these offers --

20 MR FLYNN: Yes.

21 THE CHAIRMAN: -- and can, as I say, encourage them not to
22 accept them if you think it is not in their interests.

23 MR FLYNN: Yes. No, absolutely, sir. Understood.

24 THE CHAIRMAN: Yes, on that basis, there will be then
25 appropriate recitals in the order just to avoid future

1 argument about these points. All we would say is the
2 notice will need some amendment and we would invite you
3 initially to propose a revised form of notice, circulate
4 that and no doubt the defendants may have comments and
5 we can then settle that, as it were, offline --

6 MR FLYNN: Yes. Indeed, sir.

7 THE CHAIRMAN: -- and determinedly, and that can be done
8 over the next week or so while the ATE matter is being
9 resolved.

10 MR FLYNN: Yes. Thank you, sir. I think that is ...

11 MR PICKFORD: Sir, so just two final points then on that.
12 Firstly, with that process very much in mind, to make
13 sure that there is clarity here, what I was proposing
14 was that we would be able to enter into a contract to
15 settle in the future because otherwise what we would be
16 asking the potential class members to do is vastly too
17 risky for them, because if it is just, "We might
18 possibly give them some money in the future but we will
19 let you know once you have decided whether you are
20 opting in and you have decided to terminate your
21 involvement in the High Court proceedings", then they
22 are obviously at considerable risk, so we would have to
23 be able to bind ourselves to be able to promise to
24 ultimately give them the money. It is just we are not
25 going to do that -- those steps are not going to take

1 place until they have taken the steps that they need to
2 take to absolve themselves of the commitments that they
3 have under the waterfall.

4 THE CHAIRMAN: Well, is it not -- are you not saying that
5 you are going to make a binding offer but they do not
6 have to accept it until after -- so you will not
7 withdraw your offer, but they do not have to accept it.

8 MR PICKFORD: I think that is probably fair, but we would
9 certainly need to be -- I mean, we would need to be
10 bound. It is not really what I envisaged, that there
11 would not be an agreement in that regard, but -- I think
12 I will need to take instructions again if it is
13 different from -- if we are not allowed to do what
14 I came back to the tribunal to say that we would like to
15 do because I do not yet have instructions that that
16 modification works for us.

17 THE CHAIRMAN: Well, you said you would make an offer to the
18 class members to settle and that you will enter into
19 a contract of settlement in future once you have been
20 through the procedural steps of terminating the LMA.
21 That is what I understood you to say.

22 MR PICKFORD: Yes.

23 THE CHAIRMAN: Yes. So it is not there is a settlement with
24 payment at a future date -- it may be a legalistic
25 distinction -- but there is an offer to settle which

1 will not be withdrawn; in other words, a binding offer.

2 MR PICKFORD: Sir, may I take instructions --

3 THE CHAIRMAN: Yes.

4 MR PICKFORD: -- because I am aware that this is obviously
5 a point of considerable importance and we are in the
6 tribunal now, so this will avoid us potentially coming
7 back with further arguments before the tribunal. I am
8 not asking the tribunal to rise. I simply need to turn
9 around.

10 THE CHAIRMAN: Yes. (Pause)

11 MR PICKFORD: Sir, our position is that there is not
12 a prohibition in the LMA on entering into contracts, it
13 is just what you do with the proceeds from those
14 contracts, and we should be entitled to enter into
15 contracts with class members if they want to enter into
16 contracts with us.

17 THE CHAIRMAN: But without -- but you equally want
18 dispensation from the consequences in the LMA.

19 MR PICKFORD: Yes. So having said that, although as
20 a matter of principle my submission is that that freedom
21 should be preserved, from a point of view of
22 pragmatism -- I hear where the tribunal currently is --
23 we are willing to not push that point any further.

24 THE CHAIRMAN: Yes. I take it then that that is acceptable?

25 MR FLYNN: I think so, sir. I mean, there are some tweaks

1 or maybe more than tweaks --

2 THE CHAIRMAN: Yes, I think tweaks in particular --

3 MR FLYNN: -- to the Rule 81.

4 THE CHAIRMAN: -- to the Rule 81 Notice, but I think the

5 critical bit is in section 29 and then there might be

6 some point Mr Pickford makes -- maybe there would have

7 to be some clarification earlier that, "If you signed

8 up, see section 29 because you will have certain

9 rights", or whatever.

10 MR FLYNN: I think there were some parts earlier --

11 THE CHAIRMAN: That is a drafting question, and obviously,

12 drafting it, one bears in mind, as you have in the way

13 it is framed, that it is to be read by non-lawyers.

14 MR FLYNN: Quite.

15 THE CHAIRMAN: Right.

16 MR FLYNN: Quite so, sir.

17 THE CHAIRMAN: I think we move on to the question of the

18 undertaking, do we not? There is no more on this point,

19 is there, Mr Pickford?

20 MR PICKFORD: No.

21 THE CHAIRMAN: I take it we want to hear from Mr Flynn.

22 MR FLYNN: I was saying a short while ago, sir, that I am

23 not going to press you on the undertaking for the -- it

24 was not a quid pro quo and could not have been for the

25 arrangements that we were suggesting. The appropriate

1 protection, we say, for the class as a whole is in the
2 provisions, as we have just been discussing, the waiver,
3 and that will come out through the -- in the
4 Rule 81 Notice, so --

5 THE CHAIRMAN: I think it would be, as I have indicated, an
6 extreme step to seek -- even if one assumes we have that
7 case management power -- to control how defendants
8 communicate with potential class members before they are
9 actually within the class of represented persons.

10 MR FLYNN: Well, I understand the difficulties and, not
11 least because of the time but not only because of that,
12 I shall not -- I am not pressing it any further.

13 THE CHAIRMAN: Yes. Well, very well. So that falls away.

14 Before we turn to the alleged conflict and the
15 funding, there is an outstanding matter we are aware of
16 of how we deal with the leases of used trucks in the
17 class definition, where Mr Wilkinson has put in two very
18 short reports and we have had written submissions on
19 that from Iveco in particular.

20 We have got those submissions. We understand the
21 point. We had left, at the last CMC, this question on
22 the basis that we would receive further written
23 submissions and a chance for the OEMs to comment on what
24 Mr Wilkinson said. We do not think we need further oral
25 submissions on that. We will give that ruling in

1 writing together with the outstanding ruling on the
2 dissolved companies.

3 MR WHITE: I am grateful, sir.

4 THE CHAIRMAN: So I think we then move to what I believe is
5 the remaining issue for today -- no, there are two
6 issues. One is that I think DAF submits that, in the
7 light of the revised funding agreement -- is that right,
8 Mr Pickford? -- that we should just refuse
9 certification. Is that what I understood you to be
10 suggesting earlier?

11 MR PICKFORD: Sir, my submission is a slightly fuller one,
12 and that is, in the light of all considerations which we
13 say militate against certification, including problems
14 with the conflicts and the transparency that we had in
15 relation to those arrangements --

16 THE CHAIRMAN: So is it sensible to address the funding
17 conflict first --

18 MR PICKFORD: The funding -- yes. Yes.

19 THE CHAIRMAN: -- and then to come back to this point?

20 MR PICKFORD: Yes, exactly. I think where we get to on that
21 point is prior and --

22 THE CHAIRMAN: Yes, very well. So we will then deal with
23 the funding conflict as alleged in the new arrangements
24 and, as I understand Mr Flynn, because of the
25 confidentiality matters raised in particular by Therium,

1 to have a proper submission on that, reference will be
2 made to arrangements that are confidential.

3 MR FLYNN: Yes.

4 THE CHAIRMAN: We will give a ruling on this, not today but
5 in writing, and that will be a public document which can
6 have certain redactions and, in the usual way, when we
7 have prepared that ruling, it will be sent to the
8 parties and you can indicate what you think needs to be
9 redacted. That will ultimately be a decision for the
10 tribunal. I can say that names of individuals and the
11 name of the third party investor can be redacted, but
12 whether further redactions are appropriate I think can
13 be addressed at that point, not today.

14 When you see how it is expressed in the ruling -- of
15 course I do not know how it will be expressed now, so,
16 to deal with this sensibly, the appropriate course is
17 that we go into closed session. I understand it is now
18 accepted that it can be the outer confidentiality ring;
19 is that correct?

20 MR FLYNN: That is correct.

21 THE CHAIRMAN: That is on the basis that the name of the
22 investor -- the name of the investor is anonymised and
23 we can refer to it as "X".

24 MR FLYNN: "X".

25 THE CHAIRMAN: But on that basis, that is what we should

1 then do, so I would ask that all those who are not in
2 the outer confidentiality ring, please leave the
3 courtroom. The live stream will be turned off. We will
4 rise for just three minutes so those arrangements can be
5 put in place.

6 (2.43 pm)

7 (The hearing continued in private)

8 (A Short Break)

9 (4.13 pm)

10 THE CHAIRMAN: We did want to ask you two things in
11 particular, Mr Flynn. The first is: can you give us an
12 update on the number of new trucks and used trucks in
13 the -- of the registered potential class members?

14 MR FLYNN: Yes, I can. I have some here. So the latest, as
15 far as I am aware, new, 157,399, used, 91,121, and
16 leased, 54,440. What we cannot do is break down -- on
17 current information is break down leased as to -- and
18 apportion them between new and used. But if you put 50%
19 of that leased number into each of the new and used
20 categories, you get to 184,619 new and 118,341 used. So
21 those are the numbers.

22 THE CHAIRMAN: Thank you.

23 MR FLYNN: I was obviously going to make the point, for what
24 it is worth, that Mr Pickford's spreadsheet is highly
25 sensitive to the numbers, as Professor Wilks has already

1 pointed out.

2 THE CHAIRMAN: The second thing we wanted to ask you is
3 that, if you could look at Mr Purslow's second witness
4 statement, which is the evidence we had last time --

5 MR FLYNN: Yes.

6 THE CHAIRMAN: -- at paragraph 18.4, {RM-C/8/4}, on which
7 basis we were asked -- this is in the old -- if you have
8 the core bundle from last time -- if not, that can be on
9 Opus because it is non-confidential and it is now on
10 Opus.

11 That explains Therium's proposal through different
12 investment vehicles. If you look at the last three
13 lines on that page:

14 "As a result of the funding of the PSCR being
15 provided by a separate investing entity to that of the
16 RHA, there will be a complete separation of personnel,
17 not only at the level of TCML, but also at Investment
18 Committee and Board level ..."

19 Well, Mr Flynn, we have to say that does not appear
20 to have been a correct statement because, as we know and
21 is graphically illustrated in your chart, prior to the
22 resignation of two individuals there was an overlap at
23 investment committee level and indeed there is still an
24 overlap which is being addressed through the information
25 barrier for Mr X. So there is now a separation, but

1 there was not at the time that statement was made.

2 MR FLYNN: Well, sir, I am aware that the tribunal has been
3 disappointed by this evidence and I am not going to try
4 to deconstruct it now. All I can say is that
5 arrangements were always intended under which that
6 separation would be in place and I regret that you are
7 led to conclude that that was an incorrect statement
8 when made.

9 THE CHAIRMAN: Yes. I appreciate it is not your client that
10 made the statement, but it has been furnished through
11 your client and, as I say, we are very concerned about
12 that.

13 MR FLYNN: Yes.

14 THE CHAIRMAN: It is right I should mention it, so if there
15 is anything you want to say about that, please do so.

16 MR FLYNN: Well, I can only say that of course the
17 tribunal's disappointment at the previous hearing was
18 obviously relayed and we have endeavoured to be
19 scrupulously -- as best we can -- scrupulously open with
20 the information that follows. We do not think it would
21 be appropriate to take the next step that Mr Pickford
22 was advocating and saying that that makes the RHA an
23 unsuitable class representative.

24 THE CHAIRMAN: No, well, I am not saying that. I am just --
25 and it is a criticism not of your client but of Therium.

1 MR FLYNN: Well, it has been made and it is a serious
2 criticism in open court which I ...

3 THE CHAIRMAN: Just a moment. (Pause)

4 Yes, thank you. As I have just said, we are
5 concerned that we were not given a full and frank
6 picture of the arrangements within Therium in the
7 evidence previously before the tribunal. However,
8 notwithstanding that failing and subject to receiving
9 copies of the undertakings to be provided by Mr X and
10 Mr Y, as referred to in paragraph 24.2 of Mr Purslow's
11 fourth witness statement, for reasons that we will set
12 out in writing and taking a realistic view in all the
13 circumstances, we are satisfied that the funding
14 arrangements now proposed are adequate to address
15 potential conflicts in relation to funding.

16 MR FLYNN: I am grateful, sir.

17 THE CHAIRMAN: So, Mr Pickford, that leaves your final point
18 that you say we should refuse to certify.

19 MR PICKFORD: Sir, I do not need to pursue that point in the
20 light of where we have got to today. We do have
21 a genuine concern that these proceedings will be very
22 difficult to settle because ultimately the returns that
23 are potentially to be made there are for the funder and
24 there will be very little left for the class, but I am
25 not going to seek to persuade the tribunal that that is

1 a basis not to certify today.

2 THE CHAIRMAN: Yes, thank you. I think that is realistic
3 and I can only comment that it is, it seems to me, one
4 of the unfortunate consequences of where all these
5 arrangements have been left in the light of PACCAR. Of
6 course, as many will know, there was a legislative
7 proposal to reverse that judgment and we wait to see
8 what will happen under the new Government.

9 MR FLYNN: Sir, might I just say, so that we can possibly
10 end on one slightly happy note, we understand that the
11 last insurer signed on the dotted line this afternoon.

12 THE CHAIRMAN: Excellent. Well, that is one matter that is
13 happily completely resolved.

14 We are left, I think, with a few things. One is
15 that you will supply us with copies of the undertakings.

16 MR FLYNN: Yes.

17 THE CHAIRMAN: Secondly, that you will prepare a revised
18 draft of the Rule 81 Notice. Are there other points we
19 ought to pick up?

20 PROFESSOR WILKS: There is one minor point. I think it is
21 paragraph 12 of the notice. It asks the question that
22 the chair stressed earlier, that the applicants will be
23 interested in how much money they might beget and
24 I think you put in an estimate that you thought damages
25 might settle in excess of 2 billion. Where did that

1 number come from?

2 MR FLYNN: I cannot tell you that, sir, standing here.

3 I can ask and see if we can get to anyone. It will
4 be a ...

5 PROFESSOR WILKS: I just reflect that it is one of the more
6 encouraging and important paragraphs so it would be
7 interesting to see how the estimate has been arrived at.

8 MR FLYNN: Yes. Well, we take note --

9 PROFESSOR WILKS: Let me know.

10 MR FLYNN: -- of your observations.

11 THE CHAIRMAN: If you can let us know and, subject to that,
12 we might consider whether that should be qualified in
13 some way.

14 MR FLYNN: Yes. Point taken.

15 THE CHAIRMAN: Very well. We shall produce a written ruling
16 and we expect to have that with you before the end of
17 term.

18 MR FLYNN: I am grateful, sir. Thank you.

19 (4.24 pm)

20 (The hearing concluded)

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