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4 record.

5 **IN THE COMPETITION**
6 **APPEAL**
7 **TRIBUNAL**

Case No: 1339/7/7/20

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10 Salisbury Square House
11 8 Salisbury Square
12 London EC4Y 8AP

Thursday 5th December 2024

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16 Before:
17 Hodge Malek KC
18 Bill Bishop
19 Eamonn Doran
20 (Sitting as a Tribunal in England and Wales)

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23 **Mark McLaren Class Representative Limited**

Class Representative

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27
28 **V**

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30 **MOL (Europe Africa) Limited and Others**

Defendants

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36 **A P P E A R A N C E S**

37
38 Sarah Ford KC, Nicholas Gibson, Sarah O'Keeffe on behalf of the Class Representative
39 (Instructed by Scott+Scott)

40
41 Hanif Mussa KC, Anneliese Blackwood and Julianne Kerr Morrison on behalf of the Fourth Defendant
42 (Instructed by Cleary Gottlieb Steen & Hamilton)

43
44 Josh Holmes KC, Laura Elizabeth John on behalf of the Sixth to Eleventh Defendants
45 (Instructed by Baker Botts)

46
47 Robert Marven KC on behalf of the Interested Parties

48
49 Brendan McGurk KC and Natalie Nguyen on behalf of the First to Third and Fifth Defendants
50 (Instructed by Arnold & Porter and Steptoe International)

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(10.30 am)

Settlement hearing

THE CHAIR: Some of you are joining us via livestream on our website so I must start therefore with the customary warning. An official recording is being made and an authorised transcript will be produced, but it's strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of proceedings and breach of that provision is punishable by contempt of court.

MS FORD: Sir, I appear with Mr Gibson and Ms O'Keeffe for the Class Representative.

THE CHAIR: Good.

MS FORD: Mr Mussa KC appears with Ms Blackwood and Ms Kerr Morrison for K Line. Mr Holmes KC I understand has been temporarily detained in the Court of Appeal but will be appearing with Ms John for WWL/EUKOR; and then Mr McGurk KC and Ms Nguyen are appearing for the Non-Settling Defendants, and Mr Marven KC is here for the Interested Parties. I hope I have not left anybody out.

THE CHAIR: Okay. You have the short straw.

MS FORD: In terms of actually --

THE CHAIR: You are the one starting, and you'll end up receiving all the questions of the Tribunal, like last time.

MS FORD: I think that may be the case. As the Class Representative, we felt maybe that was our job.

THE CHAIR: No, that's absolutely fine.

I have read the applications, I have not read necessarily all the evidence, the stuff that came in in the last day or so, so you will probably have to take me to that.

We will start off by figuring out what are the issues for today and then if anyone wants

1 to add to the issues then we can add to the issues, and we'll see if we've missed
2 anything. The first one -- and it is similar to what we did last time -- the first one:

3 Is the settlement sum in each case within a reasonable range such that in broad terms
4 we should approve it, subject to looking at the detailed provisions of the settlements?

5 2. What is the split between damages and costs and is the Tribunal satisfied in each
6 case there's been a proper apportionment between the two?

7 3. Is it appropriate to make a barring order in this case and, if so, on what terms?

8 4. Should there be distribution now of the damages sum, or should that be delayed to
9 a later stage?

10 5. Should the settlement agreements include in each case a non-cooperation clause?
11 Is that just in one?

12 MS FORD: It's just in K Line.

13 THE CHAIR: Just in K Line. So should the K Line settlement agreement include
14 a non-cooperation clause?

15 6. What is the impact of the lack of a distribution plan?

16 And, Ms Ford, that's something I want to work out with you what that entails.

17 7. Are the provisions in relation to costs suitable and should the allocation of costs
18 between stakeholders and the payment out to them be permitted now and, if so, in
19 what sum?

20 Now who is here for the Non-Settling Defendants? Can they --

21 MR MCGURK: Mr McGurk for MOL and NYK.

22 THE CHAIR: Okay. Are there issues I have missed which you want to address me
23 on today?

24 MR MCGURK: No, we were proposing just to make some short observations about
25 the terms of the barring provision, first of all; then, secondly, to make some further
26 observations on the non-cooperation clause 8.1 in the K Line settlement.

1 THE CHAIR: Okay. Is it your intention that once you've done that bit, you sort of
2 disappear, or do you want to stay for the day? I am really relaxed which way because
3 if you are staying for the day, then we will just go through things in order; if you want
4 to disappear at some stage, then we can deal with that relatively early in the course of
5 proceedings.

6 MR McGURK: I would be delighted if it were convenient to the Tribunal to make my
7 submissions, you gave me half an hour very generously.

8 THE CHAIR: Yes, exactly.

9 MR McGURK: Ms Nguyen behind me will be able to field anything else.

10 THE CHAIR: Yes, that's absolutely fine.

11 MR McGURK: If the Tribunal wouldn't mind, I would be grateful to be excused if you
12 were minded to deal with these issues early.

13 THE CHAIR: Have you lodged a skeleton argument or not?

14 MR McGURK: We put in a note in last week.

15 THE CHAIR: A note, okay.

16 MR McGURK: I assume our permission to attend to make observations today was
17 granted on the basis of that note.

18 THE CHAIR: Okay. I need to remind myself of that note, let's get that. That's at the
19 end of one of the bundles, isn't it? Is it the end of the authorities bundle? No. So
20 where is it?

21 MS FORD: There should be a hearing bundle.

22 THE CHAIR: I have the hearing bundle.

23 MS FORD: Tab 38.

24 THE CHAIR: Tab 38. Yes, near the end of that bundle. Yes, okay. I am just going
25 to quickly read it now. I did read it when it came, but that's some time ago.

26 MR McGURK: Thank you very much. (Pause)

1 THE CHAIR: The barring provision is not in issue, then, and it's just this
2 non-cooperation clause. Ms Ford, for your purposes, I have looked at the
3 non-cooperation clause, but my preliminary view was that as between normal settling
4 parties, it's probably not over the line, okay? But is it really something that it should
5 be part of a settlement which this Tribunal is going to endorse in circumstances where
6 there are ongoing proceedings? So, if the job of the Tribunal is to get to the bottom of
7 this and come to the right result, there shouldn't be any hindrance in getting the
8 evidence which is needed before the Tribunal.

9 I know all the arguments about no property in a witness and all that, so they would be
10 entitled to go for those people. But to have a provision in there that's telling
11 someone: do not cooperate with another party, is not great.

12 On the other hand, you may say, "Look, Mr Malek, it doesn't really matter on the facts
13 of this case because they're able, they know what the contact details are of the
14 experts", et cetera. But I just feel very uncomfortable as a Tribunal approving
15 a settlement containing a non-cooperation clause. That's where I am.

16 You may be able to take instructions on it or not because at the end of the day, you
17 may say it's redundant now because of the way things have panned out. But I do feel
18 unhappy, at least at this stage, in approving a settlement which has that clause in it.

19 I am not bothered about 8.2 or whatever. I think 8.1 is the one that is an issue; and
20 you may need to take instructions on that, or you may want to roll the dice and argue,
21 and we can go through it. But I am very familiar with the general principles of evidence
22 and how it should work. As I said, if it was just a private settlement between the
23 parties, it may not be beyond the line. I am not saying it isn't beyond the line, it may
24 not be. But if you can see another context; for example, if there was a criminal
25 investigation, having a clause like that would certainly be contrary to public policy.

26 But in the context of competition proceedings where the proceedings are still pending

1 before the Tribunal, I want whoever decides this case to be in the best possible
2 position in the light of all the evidence around to come to the right determination. My
3 position at the moment, subject to what you say and getting instructions, is I am
4 unlikely to approve a settlement with that provision in there.

5 MS FORD: Sir, I am grateful for that indication. I do have some submissions to
6 make --

7 THE CHAIR: You can make your submissions, but I suggest at some stage when we
8 have the morning break or whatever, you take instructions and decide whether or not
9 you really want to push this in the light of what I have just said because obviously
10 I have discussed it with the other members of the panel. No one on the panel is
11 comfortable about agreeing this and at the end of the day, what I want to do, and we
12 may not be able to achieve it, is to leave today knowing that we have something that
13 has been approved by the Tribunal.

14 It may not be perfect from your point of view, but we would have achieved something.
15 I know what the time pressures are, you have the trial being in January. And in
16 principle, when I look at the global figures and the risks in this case, I am not anti this
17 general settlement with the sums we are talking about.

18 But there are aspects which we're going to have to talk about today and work those
19 out so we get a settlement we are all comfortable with; both your side and the
20 Defendants are comfortable with it and then you can all move on and concentrate on
21 the battle that may take place in January.

22 MS FORD: Sir, Mr McLaren is sitting behind me. He has heard what you have said,
23 sir, and I have instructions by means of Post-It note that he is content to drop the
24 non-cooperation clause having heard what the Tribunal has said.

25 THE CHAIR: Mr McLaren is a sensible guy, and that's absolutely fine. At least we've
26 dealt with that. Are you needed for anything else now?

1 MR McGURK: No, I am extremely grateful for the indications and how this has panned
2 out. It saves me making my submissions in the event Ms Ford did want to roll the dice,
3 so I only have one topic left, sir.

4 THE CHAIR: Which is what?

5 MR McGURK: The barring provision.

6 THE CHAIR: Isn't that agreed, or is there an issue --

7 MR McGURK: We've just been talking about the non-cooperation clause 8.1. The
8 barring provision is a slightly different mechanism.

9 THE CHAIR: I understand the barring provision, but I thought -- is that not agreed?

10 MS FORD: We'd understood it was agreed, yes.

11 THE CHAIR: I had understood it was agreed. What's not agreed?

12 MR McGURK: It's not that it's something not agreed, it's agreed in principle. We
13 wanted to just draw the tribunal's attention to the different bases of settlement and
14 explain to the Tribunal how this has already impacted on the main proceedings. If it's
15 convenient, I can take you through it, it won't take me more than about five minutes.

16 THE CHAIR: Okay. Do you have any problem with that?

17 MS FORD: Sir, I have no objection to Mr McGurk addressing the point. I anticipate
18 he may wish to update the Tribunal on the progress of the PTR yesterday where this
19 did come up.

20 THE CHAIR: Ms Ford, do you want to do that now?

21 MS FORD: I am very happy for Mr McGurk to do it now if he likes to. I may have
22 misunderstood what he was proposing to address.

23 THE CHAIR: Okay, let's look at the barring provision and then we'll come to where
24 we are on this.

25 MS FORD: The barring provision, if we take it from the first in time, which is the WWL
26 settlement.

1 THE CHAIR: You want the WWL settlement, okay. Let's get it from there.

2 MS FORD: I believe they are the same in both. It's tab 7, page 62 is the --

3 THE CHAIR: Just for clarity, for the reasons I have given now, we have determined
4 issue 5, so when the ruling comes out, I will just have a very short paragraph on that.
5 We've determined issue 5 and we are now looking at issue 3, and we are going to look
6 at the barring provision, yes.

7 MS FORD: So this is the -- clause 3 is the barring provision in total.

8 THE CHAIR: It's the same as last time, isn't it, the final version?

9 MS FORD: It is. It's essentially the version which was --

10 THE CHAIR: Yes, I am familiar with that, that's fine.

11 MS FORD: The Tribunal will recall it was approved last time on the basis of
12 a compromise given that an argument was raised about whether the Tribunal actually
13 had jurisdiction to include it.

14 THE CHAIR: Yes.

15 MS FORD: The compromise was that we would then agree to remove the settled
16 share of liability from the Class Representative's claim.

17 THE CHAIR: Exactly, yes.

18 MS FORD: We have duly amended to do that in clause 7. We've undertaken to do
19 that in relation to these proposed settlements as well, so this is in exactly the same
20 form.

21 Yesterday at the PTR, there was a discussion of when in terms of timing the Tribunal
22 would consider relative shares and the accommodation that was reached was that
23 rather than introduce it into the trial pending for January at this really quite late stage,
24 because there was an application to amend the non-settling defendants' case in order
25 to address it, the Tribunal has indicated it would be preferable to treat it as
26 a consequential matter following their determination of the aggregate sum of

1 damages.

2 THE CHAIR: That makes a lot of sense, of course.

3 MS FORD: I had understood the position to be that both parties were content with
4 where the Tribunal had come out on that.

5 THE CHAIR: One would hope so. But let's find out, shall we?

6 MR McGURK: Yes. As I indicated, we are perfectly content in principle. I just wanted
7 to deal in the first instance with the fact that the two settlements are dealing with share
8 of liability in slightly different ways.

9 THE CHAIR: Yes.

10 MR McGURK: As you will have seen, the K Line settlement is based on share of
11 liability determined by reference to capacity of vehicles.

12 THE CHAIR: Yes.

13 MR McGURK: Whereas in the WWL settlement, the base point share of liability is to
14 be determined by number of vehicles.

15 THE CHAIR: Yes, there are two different ways of doing it, and that has not been finally
16 determined by the Tribunal.

17 MR McGURK: No, it hasn't. The reason I raise this is that -- and apropos of your
18 points about the trial Tribunal being put in the full picture when it comes to determining
19 all of this -- we don't want the trial Tribunal when it comes to deal with this at the
20 consequential hearings, and in light of the evidence which is now going to be put in,
21 to have the misconception that the settling parties were all agreed as to the correct
22 basis for determining parties' share of liability.

23 So, when this falls to be determined at a consequential hearing, we consider we
24 should be able to at least show the Tribunal the competing bases upon which each of
25 these parties settled out. Because of course there were compromises between the
26 experts and the Class Representative, they don't reflect the experts on the defendants'

1 side's view as to the share of liability. To that extent, and I say this non-tendentiously,
2 the basis for determining the share of liability in each was rather self-serving.

3 So, we just don't want the Tribunal thinking everybody was agreed that there was one
4 uniform methodology which applies here as opposed to it being more clearly in the
5 picture there were very different approaches reflecting the very different interests
6 which were sought to be negotiated between the CR and K Line, on the one hand, and
7 the CR and WWL, on the other. So I just wanted to lay that marker down.

8 In relation to the barring provision itself, we did bring an application on 2 December.
9 It was opposed yesterday, including on the astonishing basis that it was brought late,
10 even though we only got the applications on 27 November. As Ms Ford has rightly
11 indicated, the position we've landed at is that we will put in evidence which will include
12 expert economic evidence to deal with the question of market shares for when this
13 question falls to be determined down the track. We are very happy for her to put in
14 responsive evidence, and the Tribunal can determine it on that basis.

15 But there is no in-principle objection to the terms of the barring provision, so long as
16 all of that can take place. The nuts and bolts of the consequential is to be worked
17 out, but if that's agreed, then I can say no more about it.

18 THE CHAIR: Okay, let's make sure it's agreed.

19 Ms Ford, is that agreed? Basically, he wants to reserve his position, and I can
20 understand why he wants to reserve his position: he doesn't want to get caught at the
21 other end.

22 MS FORD: Sir, yes. That's our understanding of where we landed yesterday, so we
23 have no objection to that. Indeed, the submissions Mr McGurk wishes to make about
24 the basis on which the market shares are determined are ones which can then be
25 addressed to the trial Tribunal at the appropriate juncture.

26 THE CHAIR: If we can have an exchange of letters between the two solicitors or

1 whatever acknowledging that, then that will be fine. Can you all draft a letter, I will
2 look at it later on today, and then they can reply to it. So, by the time we finish this
3 issue, you've laid down your marker, they can lay down their position, I can then deal
4 with the barring provision finally at end of the day.

5 But at the moment, I am not going to change the wording of clause 3, which seemed
6 perfectly fine to me. But I think it's useful for me to see where both sides are going to
7 have this: what are you reserving and what are they reserving, so we can make sure
8 it doesn't fundamentally undermine what's in here.

9 I just want to get the exchange of letters, so if you do your draft letter as soon as
10 possible, certainly by lunchtime, then the CR can look at it and then if they want to
11 reply, they can reply. And then at the end of the day -- because this could take a whole
12 day -- I can look at that.

13 All right, so the barring order is going to be as it is and it's basically for the same
14 reasons as last time. This is a very sensible compromise which avoids an
15 unnecessary block on any settlement going ahead, and we all want to encourage
16 settlements insofar as we can.

17 So, thank you very much, you can go now.

18 MR McGURK: If you don't mind me taking my leave.

19 THE CHAIR: You go, then there will more room in the front row if anyone else wants
20 to come. That's absolutely fine.

21 MR McGURK: Thank you very much.

22 THE CHAIR: Right. We've done issue 3, so we can put that away.

23 Ms Ford, you don't need to give a speech and all that because I've read your skeleton,
24 and I think we understand where we are on this. But I have a few sort of questions as
25 to where things are, and the first question is: how guaranteed is the Guaranteed
26 Damages Sum and the Immediate Damages Sum in the event that this settlement is

1 approved? Let me explain what I mean by that.

2 The guaranteed and the Immediate Damages Sum, what it looks like on its face is that
3 whatever happens, up to that, that sum which is being paid is either going to be
4 distributed to Class Members, or it is to go to cy-près or a charity approved by the
5 Tribunal, and that is sacrosanct.

6 Does that mean that when you say in your submissions that the outlay or the liability
7 to stakeholders is £45 million and if we approve, for example, this settlement, that
8 further down the line when it comes to distribution, no one is going to turn round and
9 say, "Look, Mr Malek, you say you have those sums for distribution, here's the
10 distribution plan, but we have a claim against the Class Representative and we want
11 more money and we want to take money out of that pool". So that is the first possible
12 nibble on the pool which I am a bit concerned about.

13 The second possible nibble is in relation to the costs of distribution. My own view is
14 looking at this and using my experience, which may be limited, it's going to cost at
15 least £2 million to do the distribution. When I look at the number of claimants, the
16 complexities, what needs to be done, what I want to be done before the distribution
17 plan is done and the monitoring of that, I can see easily you are going to need
18 £2 million and it may be more.

19 Now on the table, you have half a million each from each group of Defendants here.
20 That only gives you £1 million. So, what is going to happen if the costs of distribution
21 are £2.5 million? Where is that extra £1.5 million going to come from? Is it going to
22 come out of the Guaranteed Damages Sum or the Immediate Damages Sum; or is it
23 going to come out from somewhere else, in which case I need to know?

24 So, it's those two questions which are on our mind at this stage in relation to the
25 Guaranteed Damages Sum.

26 MS FORD: Sir, to take those in turn, and again I am working from the terms of the

1 WWL settlement, but I think the same applies to the K Line.

2 THE CHAIR: Okay. So what we are addressing now -- let me just get my notes -- if
3 we call it the Guaranteed Damages Sum or the intermediate damages sum. The
4 question is: is it subject to nibbles, yes?

5 MS FORD: Yes. The first question is, if what has been termed the Guaranteed
6 Damages Sum is subject to nibbles, and the answer to that is: no, it's not.

7 THE CHAIR: So, you are saying in no circumstances will stakeholders make a claim
8 to that sum?

9 MS FORD: Sir, yes.

10 THE CHAIR: Even if it means someone is going to lose a few bob on the side?

11 MS FORD: I can show you the relevant provisions that make that express --

12 THE CHAIR: Okay, we can look at that, I think we should look at that, then, to make
13 sure I am happy with that. That is the first nibble and obviously there's the second
14 nibble I'm a bit concerned about. But on the first nibble, okay. Which settlement do
15 you want to show me?

16 MS FORD: Just for convenience, the WWL one, but I don't think they are different in
17 principle.

18 THE CHAIR: Okay, let's have a look.

19 MS FORD: Page 63.

20 THE CHAIR: Yes.

21 MS FORD: Tab 7, page 63, "Distribution of Deferred Damages Sum", 4.3.

22 THE CHAIR: Yes, I have marked that.

23 MS FORD: So, this is essentially recording the acknowledgment that Mr McLaren
24 intends to distribute the entirety of the Immediate Damages Sum to the Represented
25 Persons either directly or by way of charity approved by the Tribunal. None of the
26 Immediate Damages Sum will therefore be available for reversion to the WWL/EUKOR

1 Defendants."

2 THE CHAIR: That bit I understand. But what I am uncomfortable about is this
3 wording -- Ms Ford, let me explain what the problem is.

4 What I am looking for, and you may say, "Look, you've already got it in the agreement
5 or not, or we may have to deal with it by a side letter". When I look at the draft order,
6 it doesn't actually say that the Immediate Damages Sum, or whatever we call it in the
7 other one, is going to Class Members or to a charity. It just says this is what he intends
8 to do.

9 People intend many things. It doesn't mean they are going to do it. I think you
10 understand what my concern is about this wording. So if we are going to make an
11 order, the order itself, and probably the wording of this clause, will need to be revised
12 by way of a side letter or something like that to say: it's not that he intends, it's that
13 sum will either go and be paid out to the Represented Persons, or it will go to cy-près
14 or a charity approved by the Tribunal.

15 Now is there a clause which actually says that?

16 MS FORD: Ms O'Keeffe has drawn my attention to the fact that it may be slightly
17 clearer on the form of the K Line wording, but I can confirm that's absolutely the
18 intention. So insofar as the wording is not favourable to the intention --

19 THE CHAIR: The thing is, we intend many things in life, and if we can just make it the
20 way I think that is what it should be. It's not a question of intention, it's a question of
21 the order, in that it will go to the Represented Persons, or in default it will go to cy-près
22 charity approved by the Tribunal. Then when you draft the order, you make sure the
23 order reflects that, so there is going to be liberty to apply, et cetera, to come back to
24 us to approve that.

25 So, clause 4.3, we will amend, and if someone can work on the amendments as we
26 are going through today so at the relevant time we will have a letter or whatever

1 between the parties saying, "We refer to the agreement", like we did last time.

2 MS FORD: Yes, so Mr McLaren has suggested to change the word "intend" to "will",
3 obviously subject to the other parties who are counter signatories to the agreement.
4 That seems to be a fairly --

5 THE CHAIR: I am happy with "will". Any dissent? I can't imagine there is any dissent.
6 Okay, so amend from "intends" to "will".

7 Then when it comes to the order, if we can specifically say in the order that's what's
8 going to happen with the relevant liberty to apply. So that deals with that bit.
9 Then the bit about -- do we need then -- is there an express provision which says the
10 stakeholders won't take a chunk out of it?

11 MS FORD: I don't think there is one expressly saying they will not. There's a provision
12 that a CFD shortfall may be taken out of the non-guaranteed pot --

13 THE CHAIR: I understand that bit as well. Where is that bit?

14 MS FORD: -- so one might implicitly read -- that's 4.11, and that's expressly at the
15 conclusion of the distribution process and subject to approval by the Tribunal.

16 THE CHAIR: You see, when I looked at it, the problem I found is that that is what
17 you've agreed as a matter between you lot, the point about the funder. What about
18 the other stakeholders?

19 MS FORD: The funder is represented --

20 THE CHAIR: Yes, I know he is here. But what we don't have is something in writing
21 that the stakeholders will not nibble at either the Immediate Damages Sum or the
22 Guaranteed Damages Sum. I think it would be helpful to have that somewhere that
23 the stakeholders will not be nibbling at those amounts.

24 MS FORD: Sir, I think it's fair to say that we have no objection to that in the sense
25 that's absolutely the intention in any event. I am happy to hear Mr Marven specifically
26 as to those parties.

1 THE CHAIR: Are you happy to address me on that now? You should know what your
2 position is by now, unless you have to speak to someone.

3 MR MARVEN: I would want to take some instructions before I commit to anything.

4 THE CHAIR: Yes, so you are not quite sure. Okay, that's fine. No, I understand that.
5 Ms Ford, you heard Mr Marven. He needs to take instructions on that, and the fact he
6 needs to take instructions means there is a slight ambiguity here which needs to be
7 resolved. One would hope he can take instructions at the short break, so by later on
8 this morning, we'll know the stakeholders will not be making any claim either to the
9 Guaranteed Damages Sum or the Immediate Damages Sum in respect of these. So,
10 we need to get that one resolved, don't we, really?

11 MS FORD: Yes, absolutely. Certainly, that's our understanding of the position in any
12 event.

13 THE CHAIR: Sometimes when you look at something, you understand something,
14 and you know what it means. But then later on people fall out, and there is a dispute,
15 and they say, "Well, look, we are not bound by this", and then you get a problem.
16 None of us want this problem, so if we can get clarity today, then at least I can go back
17 and say at least I know there is no claim or potential claim against these pots. So,
18 I will note that down.

19 Mr Marven, when you say -- but don't you just represent the funders? You don't
20 represent the --

21 MR MARVEN: The funders and insurers.

22 THE CHAIR: But you don't represent the lawyers, obviously, so I need to get
23 something from them as well.

24 MR MARVEN: That's right.

25 THE CHAIR: It's not just the ATE insurers and the funders. But if you are going to
26 say you are not going to nibble at it, then I think we need to have something from the

1 lawyers as well.

2 MR MARVEN: Yes, I don't represent them.

3 THE CHAIR: Yes, exactly, we will need that. So, you are only representing insurers
4 and funders, yes. Is that going to be -- are you happy with that? So, the solicitors will
5 have to write in as well and confirm that their position is the same.

6 MS FORD: Sir, we are content with that.

7 THE CHAIR: I will note that down, yes. That's Scott+Scott, isn't it?

8 MS FORD: Yes.

9 THE CHAIR: Yes, okay.

10 So that deals with the first big concern I had and subject to getting further instructions
11 from Mr Marven. But if that's resolved, then that takes it off the table. But on the
12 distribution costs nibble, where are we on that?

13 MS FORD: The distribution costs if the present contributions were exceeded --

14 THE CHAIR: Yes, I think they will be. I think they are just not, you know ...

15 MS FORD: There is a sort of progression of sources, if you like, which will cover
16 distribution costs.

17 THE CHAIR: Yes.

18 MS FORD: The first would be the express contributions we've had as a consequence
19 of the proposed settlements, that's number 1.

20 THE CHAIR: That's the £1 million, yes?

21 MS FORD: That's £1 million in total, yes.

22 THE CHAIR: £1 million from the Settling Defendants, I have that bit. I am just
23 concerned that we don't have any provision for what is likely to be a significantly higher
24 bill. I may be wrong about this, it may be I have exaggerated the costs of getting the
25 distribution done properly. But I do think £1 million doesn't sound likely to cover even
26 50 per cent.

1 MS FORD: The second source is that there remains roughly 50 per cent of the claim
2 unsettled. I think it's a very rough 50, I am not sure I have exactly the right percentage,
3 but currently there are outstanding --

4 THE CHAIR: Something like 47 per cent.

5 MS FORD: I think it is, yes.

6 THE CHAIR: But look, what I have to foresee is there's a number of possibilities, and
7 that's why I am not convinced now whether or not I can even conclude that these
8 proceedings are successful for anyone yet. Because if it goes to trial and you lose at
9 trial, either you get nothing or the Tribunal says: when you say it's like £8.61 on
10 average based on the loss of £250 million based on 25 million vehicles, we actually
11 like the expert who says it's three and four pence per car, so it's like only -- it may be,
12 you know, £2 a car or something, £2 a vehicle, then the case may not be a great
13 success.

14 I don't know whether or not there are any sorts of part 36 offers and stuff like that. So,
15 this case, although everyone has done really well to get to this stage and to settle this,
16 quite frankly I don't know if it's going to be a great success at the end of the day, and
17 you can measure success in a number of different ways. You can say you've
18 succeeded because you've won and you've got some money, and you've got this
19 money, but then you can say if hardly any Class Members claim and they only get
20 three and four pence each, is it really a success?

21 I am not sure where we are going to be, and I know what you are saying. You are
22 saying, "Look, Mr Malek, don't worry, there's another source of the shortfall. If we win
23 against the other Defendants, that's a source". That's true, that is another source, but
24 it's only a potential source. And when I look at the merits of this case, I may have my
25 own views about the merits, but I don't want to say too much expressly because you
26 have a trial against the other people in January.

1 So, I don't want anyone to say, "Look, Malek has said this is where he thinks the
2 prospects are". I will give a rough indication where I am, but I am not going to give
3 any conclusive view as to where I think it's going to come out.

4 But although I don't expect it's going to come out at three or four pence, I am not
5 saying for one moment it's going to be three or four pence, but it may well be less than
6 the figure you are claiming, and it may be significantly more than what the Defendants
7 say it's going to be, I don't know. But all I am saying is let's be conservative. I will put
8 that down as a second possible source, but I am going to put a question mark by it,
9 okay? So potential from Non-Settling Defendants at trial if successful.

10 Yes, okay, that's the second. What's the third?

11 MS FORD: The third to fifth are then in the order of settlement -- timing of settlement.
12 The Tribunal will recall that in order to try and incentivise settlement, we've had first in
13 first out.

14 THE CHAIR: I have that one, second in and second out.

15 MS FORD: Yes, exactly. So on that basis, then, number 3 would be the K Line
16 Additional Damages Sum because they are the third in, next out.

17 THE CHAIR: Why would that cover the distribution costs?

18 MS FORD: Well, it's an unallocated pot of damages; essentially, it's a non-guaranteed
19 pot of damages.

20 THE CHAIR: But are they going to say that -- will they say that isn't damages or not?
21 I can see that if the Tribunal says each person's loss -- let's say for argument's sake
22 £4.50 per vehicle -- and they are ordered to pay the equivalent of £4.50 per vehicle.
23 But will that order itself have a specific amount saying not only do you have to pay
24 £4.50 per vehicle, but you also have to pay the distribution costs? I am not sure if
25 that's right. Does it necessarily come out of the K Line Additional Damages Sum?

26 MS FORD: I am just checking whether or not --

1 THE CHAIR: Let's have a look. Let's just get to the bottom of that one.

2 MS FORD: Whether there's specific mention of distribution costs.

3 THE CHAIR: I did not see a reference to the distribution costs coming out at that
4 stage.

5 MS FORD: Sir, I am told that the general provisions in 4.11 and 4.13 -- I am still
6 referring to the WWL provisions, but I think again we're talking about the same
7 wording -- are referring to the possibility of using the Deferred Damages Sum to meet
8 the entirety of McLaren's costs, fees and disbursements.

9 Then if we go over to 13, there's the priority arrangement to say McLaren will only seek
10 payments on the Deferred Damages Sum to compensate the Represented Persons
11 and/or to pay for McLaren's costs, fees and disbursements and then in the order it
12 occurs once the entirety of the funds received for Non-Settling Defendants and any
13 other --

14 THE CHAIR: If you say the distribution costs are part of your cost fees and
15 disbursements, they could be covered by the sum you've allocated for costs, fees and
16 disbursements under the settlement agreement.

17 MS FORD: Yes.

18 THE CHAIR: But what I was worried about was that people were going to say: well,
19 no, we want to take that sum out now, so that sum has gone and disappeared, and all
20 spent up, and there's -- where's that money going to come from?

21 MS FORD: Yes. 4.13 does include in the last line, it says.

22 "... (other than any contribution to distribution costs made by the Non-Settling
23 Defendants)."

24 So, in setting out the priority that will be drawn on it's including within that distribution
25 costs.

26 THE CHAIR: I am not sure ... because there could be all sorts of arguments as to

1 whether you get to that next level because they will say that level only kicks in if the
2 claims of the Class Members -- the valid claims of Class Members hit the ceiling of the
3 Guaranteed Damages Sum. And you may have a scenario whereby you have
4 a dispute with the Settling Defendants -- let's just posit a situation.
5 Let's say at the moment, you say let's just use as a working assumption the
6 £250 million and it gives you £8.61 on average per vehicle, and that sort of guides the
7 situation. You then get no judgment at all, okay, so there is -- this case doesn't go to
8 judgment, so you've got no determination by the court as to what the loss is for the
9 class, let alone each individual claimant.
10 Are we going to be faced with an argument by these Defendants to say, "Look, you
11 want to put in £8.61 per vehicle on average, we don't agree with that". Their actual
12 loss is much less than that, so you should not be trying to put through all these claims
13 at that level, you will be over-compensating people. If you are over-compensating
14 people, we have an interest in it because you've hit the Deferred Damages Sum, so
15 we dispute that it's kicked in.
16 Another scenario is it does go to trial. The judge says, "I think that the figure instead
17 of being £8.61 is £4.50". He says it's £4.50 and if you operate £4.50, you don't get
18 through the ceiling. But on the other hand, you want to distribute more to Class
19 Members or to give it to charity, but you can't because then they'll say you haven't hit
20 the ceiling because you are trying to put in at a value higher than the value given by
21 the Tribunal.
22 MS FORD: Sir, the answer to that, in my submission, is clause 4.5 --
23 THE CHAIR: Okay.
24 MS FORD: -- which is specifically providing that Mr McLaren will in due course make
25 an application seeking the tribunal's approval to distribute the damages sum --
26 THE CHAIR: I understand that bit, but what I am saying is you have a distribution

1 plan, and in your distribution plan you want to give a figure for each member who
2 claims at a figure higher than the Settling Defendants who'll say: no, that's
3 over-compensating, we've got an interest here. We want to argue before the Tribunal
4 that this distribution plan should be rejected at those figures either because the
5 Tribunal has never decided what the appropriate figure is; or because in the other
6 cases, they've given a figure which indicates that the figure should be lower than the
7 £4.50, whatever it's going to be.

8 MS FORD: Sir, yes. The Tribunal will have the opportunity to scrutinise that
9 submission and decide whether it's content with it or not. In my submission, that ability
10 of the Tribunal to act as the overseer will ensure that that sort of argument is
11 considered and treated appropriately.

12 THE CHAIR: Okay. So, there could be a big dispute at the distribution stage, couldn't
13 there? You know, they are not going to dispute if you don't hit the ceiling the
14 Guaranteed Damages Sum or the Immediate Damages Sum, you have a free kick
15 there. But once the figures reach the ceiling of that first level, they will then say: we've
16 got an interest, we want to put in our own submissions, our own expert evidence as to
17 what the actual loss is. We've got our own experts, one will say, "I have Mr Majumdar",
18 the other chap Mr -- is it Mr De Coninck, they have him, and they will want to turn up
19 and say, "You need to figure out what it is."

20 MS FORD: Sir, there is a question of principle about the distribution stage, what
21 legitimate interests Defendants would have in turning up and disputing distribution on
22 the basis of their own monetary interest. I don't purport to offer an answer to that, but
23 the Tribunal may adjudicate at that point.

24 THE CHAIR: No, but I am saying they may want -- they will obviously tell us later on,
25 but they may want to come in and say: we are reserving the right to argue that because
26 we say we've got an interest because our interest is engaged once we get to the next

1 level.

2 MS FORD: Well --

3 THE CHAIR: I'm sure they won't say anything in relation to the Guaranteed Damages
4 Sum or the Immediate Damages Sum because they know that has gone and they are
5 never going to see it again. But when it comes to the next level -- you are all friendly
6 now because you are settling, but when it goes on to the next level and you are not
7 settling, different people will have different interests at that stage, then they can pop
8 up and say whatever they want to say.

9 On one view, you may say they are being Luddites, they are saying no, we are only
10 protecting our own financial interest.

11 MS FORD: Sir, it will be a policy question for the Tribunal as to what extent the
12 financial interest of that nature is to be heard and to be relevant in the context of
13 approving a distribution plan. That's obviously a stage which this regime has yet to
14 get to. I don't know if my learned friends have any perspective on their side --

15 THE CHAIR: Okay. You sit down, let's see if they have any perspective on this little
16 point. Who is volunteering on behalf of the Defendants?

17 MR MUSSA: May I just take instructions.

18 THE CHAIR: Of course you can, yes. (Pause).

19 MR MUSSA: I have sought instructions. Our position on behalf of K Line is obviously
20 we can't exclude at this stage, were a distribution plan to be put together, that we
21 would want to consider it. But my submission is that the non-guaranteed proportion
22 of the damages in the K Line settlement is £1.75 million.

23 THE CHAIR: K Line, yes.

24 MR MUSSA: out of £7 million, so it's a very small portion. We've agreed in this
25 settlement agreement that there is an order of use of that sum, the £1.75. So, in the
26 first place, it's to be used for distribution of damages, and of course the Class

1 Representative will put together their distribution plan for the approval of the Tribunal.
2 In the event that the sums are not depleted through that means at a second stage, it
3 can then be called upon for any shortfall in the CFD, and it's only after those two stages
4 that there is a possibility of a sum reverting to my clients.
5 THE CHAIR: Correct.
6 MR MUSSA: The interest we would have in taking points about a distribution plan on
7 the basis of those contractual provisions would be relatively limited, sir. Because not
8 only would one have to jump the hoop of the sums not being required for the purposes
9 of damages, one would also have to then jump the hoop on sums not being required
10 for the purposes of any CFD shortfall before there would be a possibility of reversion
11 to my clients.
12 But as I say, we don't have a distribution plan at present --
13 THE CHAIR: I know.
14 MR MUSSA: -- so we are not able to comment upon that, what our position would be
15 on that specifically.
16 THE CHAIR: I know. But the long and the short of it is, you are saying look at the
17 reality. I understand the reality point, but you are still reserving your position.
18 MR MUSSA: Not reserving our position --
19 THE CHAIR: It's not a problem. I am just trying to figure out at the moment the
20 distribution costs point and where that shortfall, if there is a shortfall -- and I think there
21 will be a shortfall if the trial doesn't go well -- where that's going to come from, and
22 I just want to see where that comes out. One of the possible sources is the Additional
23 Damages Sum, that's all.
24 Yes, okay. Thanks, yes.
25 MS JOHN: Obviously I am in the territory of crystal ball gazing, which is always very
26 difficult.

1 THE CHAIR: I know, but that's what we're going to do before we approve --

2 MS JOHN: -- (inaudible due to overspeaking) WWL, all I can do today is to say we
3 will take a view as and when we see a distribution plan and an application from the
4 Class Representative. Of course, I can't exclude the possibility today that there may
5 be things we want to say about it. I may have a tweak to the settlement agreement
6 which may possibly assuage the Tribunal's concern on this point, if I may suggest it.

7 THE CHAIR: What's your tweak? Let's have a look at it.

8 MS JOHN: Clause 4.11 of the WWL settlement. I am instructed that we would be
9 content in line 4 after the word "disbursements" -- so we have, "the entirety of
10 McLaren's costs, fees and disbursements". We would be content to include "(including
11 distribution costs)".

12 THE CHAIR: That's really helpful.

13 MS JOHN: So that would make clear that the £3.25 million for costs, fees and
14 disbursements is also available to meet a potential shortfall in distribution costs.
15 If that were acceptable to the Class Representative, I wonder whether that might cut
16 through the difficulty.

17 THE CHAIR: That's really at least helpful in respect of that source. I am sure you can
18 agree that.

19 MS FORD: No objection.

20 THE CHAIR: So, the exchange of letters can cover that one as well, okay? Can we
21 just see if that is going to be replicated in the other settlement, let's have a look at this.
22 Can you just show me where I put "including distribution costs", what line in
23 paragraph 4.11?

24 MS JOHN: It's on page 64, clause 4.11, line 4. We have at the start the word
25 "disbursements", so following on from the previous line, "Costs, fees and
26 disbursements (including distribution costs)".

1 THE CHAIR: But there's a difference between the CFD Shortfall Amount--. Are you
2 having it there before that?

3 MS JOHN: Yes.

4 THE CHAIR: "Disbursements -- we don't need in brackets -- including" --

5 MS JOHN: "... including distribution costs". So, we are simply making clear the CFD
6 Shortfall Amount would include a shortfall in distribution costs.

7 THE CHAIR: Yes, okay. Let me just ...

8 Okay, let's look at the other agreement. K Line, show me.

9 MR MUSSA: Perhaps I can show it to you, sir. It's in the K Line application bundle,
10 page 48, where you will find the equivalent provision which is actually contained in
11 clause 4.10.

12 THE CHAIR: 48, so let's put K Line, paragraph 4.10.

13 MR MUSSA: You will see four lines down, you have the --

14 THE CHAIR: 48 as above. Yes, give me the reference. So 4.10, yes.

15 MR MUSSA: So, the word --

16 THE CHAIR: After "disbursements", line 4, yes, "including distribution costs", yes.

17 MR MUSSA: Yes.

18 THE CHAIR: Thank you very much. That's agreed, yes, both sides?

19 MR MUSSA: I understand it's agreed.

20 THE CHAIR: Good, well done. So that's the next possible source to cover that, yes.
21 Is another possible source, if need be, the part of the settlement dealing with the costs,
22 fees and disbursements or not?

23 MS FORD: Mr Gibson makes a point that the current provision for costs is intended
24 by definition to be paid away now to meet costs.

25 THE CHAIR: That may or may not happen. At the moment -- you heard what I said
26 last time when that application was made. You've also heard what I've said today:

1 I am not satisfied at this stage that you can call these proceedings a success in the
2 light of the settlements, and the time for assessing success and how much people
3 should be getting is going to be, in my view, once you've either settled with the
4 remaining Defendants, or you've discontinued against the remaining Defendants, or
5 the Tribunal has issued a judgment.

6 But you can hear it from me now: despite all the arguments -- and you can be sure
7 I have read all the arguments, I understand what they are -- it's unlikely today you are
8 going to get an order for an immediate payment out, okay? It's unlikely today. If there
9 is any specific sum that may be needed for certain purposes like last time, I am happy
10 to release that.

11 So, if you say: I need X hundred thousand to pay for the costs of these applications,
12 then of course, as with last time, that is not going to be particularly controversial. But
13 if you are going to say: I want X million to pay funders now, then it's going to be a real
14 problem. It's not that I am against funders -- you heard what I said last time in the
15 judgment on funders, I fully appreciate their important role and, at the end of the day,
16 of course I want the funders to be paid if it's appropriate. But it's got to be done on
17 a properly informed basis where I fully understand where we are, and we are not at
18 the point where I feel comfortable to do that exercise.

19 Now if you say, "Look, Malek, we want to push it today", then what you'll find is we
20 probably won't have enough time to resolve the settlements today, and I don't have
21 another spare day for a long time because I have other cases to deal with. But it's
22 going to be difficult to get that through today. But by saying that, I am not undermining
23 the importance of funders and an appreciation of all the points Mr Marven made last
24 time. And when you read the judgment we gave last time, you'll see it does reflect the
25 importance of the funders and the need to come up with a fair return for the funders.
26 That will include a number of things I need to be satisfied with, including rates of return.

1 I want to go and look at it in a properly detailed, deep way and not in a superficial way.
2 And that's all that can be done in a hearing like this when you need a decision,
3 because you have this trial to prepare, and you need to know effectively today or very
4 soon whether you are in trial mode or settlement mode.

5 But I am just trying to be realistic, you know what I'd like. I've put it on the table, and
6 you answer me in whichever way. Mr Marven is perfectly entitled to say, "Mr Malek,
7 I don't agree with that, I want to push it again like last time, even though I think
8 probably Mr Malek is going to come back with the same decision he did last time". But
9 his points are good points, by and large, and a lot of the policy points he is making are
10 good, I am not undermining any of that.

11 But I am really uncomfortable in making a decision like that until I know what the
12 ultimate result is. And this case, I don't have a distribution plan, unlike Gutmann.
13 I don't really have much of an idea what the take-up is going to be, and I have made
14 it clear in Gutmann what I expect to have by way of empirical evidence on likely take-
15 up and stuff.

16 We are not in a position to do that. There are so many different permutations moving,
17 the wheels could go in this direction or that direction which means at least for now,
18 I am not comfortable in ordering a substantial payout. But, of course, I am willing to
19 approve payment out of specific sums like last time for specific purposes, as long as
20 it doesn't undermine my desire to look at this in real detail once the dust has settled
21 as against the other remaining Defendants. Because then we can have a proper,
22 detailed analysis and proper, detailed submissions by Mr Marven, because to resolve
23 those issues on my estimate would take a few days. This is not something you can
24 resolve in a sudden death hearing like this.

25 MS FORD: Sir, I think I probably will need to take instructions on where to leave the
26 point in light of your indication. But one point you have just touched on is the query

1 | you raised in your letter which we've produced two witness statements to seek to
2 | address, and it might assist if we take you to what you do have.

3 | THE CHAIR: Yes, of course. But we are still talking about distribution costs, I have
4 | an order of things.

5 | MS FORD: Right, well --

6 | THE CHAIR: We'll come to your bit in a minute, yes. But on the distribution costs,
7 | what I am saying is that if I don't order payment out now, the ability for that sum, those
8 | costs, fees and disbursements to be available to meet distribution costs, should not
9 | be taken off the table. I don't know if that needs any change of wording or anything
10 | like that and whether you need to take instructions, then that's absolutely fine.

11 | What I am going to put down is ...

12 | MS FORD: I wonder if, while you are writing, I might take instructions on that particular
13 | point.

14 | THE CHAIR: Yes, okay. What I am asking for is there should be a provision which
15 | makes it clear that the CFD Sum may be used at the direction of the Tribunal to meet
16 | distribution costs insofar as they are not picked up any other way. (Pause)

17 | MS FORD: This is a matter I think we would benefit from a period of time to be able
18 | to talk it through in greater detail, rather than take instructions --

19 | THE CHAIR: We'll have a break now, then you can talk that through with a few other
20 | things.

21 | Yes, that's all right. We'll have a break now. Everyone is going to have to take
22 | instructions, so we'll come back at 11.55. That gives everyone time to get instructions,
23 | start talking about these draft letters, Mr Marven to take instructions on his points.
24 | Then we'll see where we are, okay?

25 | Thank you very much.

26 | (11.38 am)

1 (A short break)

2 (11.55 am)

3 THE CHAIR: How are we doing?

4 MS FORD: On the question of using the costs, fees and disbursements sum to meet

5 any shortfall in distribution costs; first of all, as we've been canvassing with the

6 Tribunal, there is a waterfall, so those costs will first be met by the £1 million which

7 has been covered under these two agreements.

8 THE CHAIR: Yes.

9 MS FORD: They will then be met by the K Line Additional Damages Sum,

10 £1.75 million.

11 THE CHAIR: Yes.

12 MS FORD: Followed by the WWL Deferred Damages Sum, £3.25 million; followed by

13 the CSAV settlement sum. So, there is substantially more available than £2 million.

14 However --

15 THE CHAIR: Just to go back on that, I just want to -- I hope you don't mind me cutting

16 you off, but on that point, the scenario may be that we have more claims than -- well,

17 the level of take up and the level of damages is higher, and that Additional Damages

18 Sum is needed to pay out to Class Members. That's the scenario I am really -- you

19 know that.

20 MS FORD: Yes, absolutely. We appreciate the Tribunal's concern, I just wanted to

21 be absolutely clear that there is a waterfall which determines priority.

22 THE CHAIR: There's a waterfall and that's a good point, subject to that glitch in the

23 wording which has now been sorted out. The waterfall I am happy with, yes, okay.

24 MS FORD: At the end of that waterfall, we are content that the costs, fees and

25 disbursements sum would be available to meet distribution costs not covered by the

26 waterfall.

1 THE CHAIR: Do we need to put some wording in there? I think we probably do, don't
2 we?

3 MS FORD: I anticipate we can --

4 THE CHAIR: Can people be working on that when we have the letters at the end of
5 the day. I know you are meant to be serving your skeletons and everything like that
6 today, so it's not going to help you if at the end of today you don't know whether you
7 are in and out. And I am off to Singapore on Monday, so I need to get this done, if we
8 can, today.

9 If I can just say at this stage, you have been very helpful, Ms Ford, and we've made
10 a lot of progress on the things which have concerned me when I looked at this initially.
11 I am just going to note this down, yes.

12 That will be in a letter and that will modify the agreement, and you'll figure out where
13 those modifications are, hopefully over the luncheon adjournment. Okay, what else
14 do you want to show me, or can I go on to my next bit?

15 MS FORD: The next question the Tribunal had was in relation to the costs, fees and
16 disbursements sum generally.

17 THE CHAIR: That's a big topic, yes.

18 MS FORD: It's a big topic. We have heard what the Tribunal has said on that.

19 THE CHAIR: Yes.

20 MS FORD: In particular, we have heard the Tribunal indicating that if there are
21 particular sums which in principle ought to be recoverable now, that is something the
22 Tribunal might be open to considering.

23 THE CHAIR: Like last time, yes.

24 MS FORD: In this case, Mr Friel's evidence in his second statement is that the actual
25 costs which have been spent to date --

26 THE CHAIR: Is £8 million.

1 MS FORD: -- is £8 million. There is no element of profit in those sums whatsoever.
2 That's not in any way a benefit or recovery to stakeholders, it is the costs which have
3 in fact been incurred. So, we would ask the Tribunal to consider that sum as the sum
4 which is available now because it is costs which essentially we have already paid in
5 trying to get the matter this far.

6 THE CHAIR: But when you look at where that money will actually go, let's say I order
7 £8 million, where is that £8 million going to go?

8 MS FORD: My understanding is it will be paid towards the costs we've actually
9 incurred. We can look at Mr Friel's statement as to where they have been incurred.

10 THE CHAIR: No, I understand where they have been incurred, okay? But isn't there
11 a priority agreement --

12 MS FORD: My learned junior is just checking whether there are any matters I need to
13 be aware of before I make a submission on that.

14 THE CHAIR: I think you need to be careful because when I looked at the way the
15 application was put and the material before me, I didn't get the impression that if those
16 sums were released, they go simply to pay/reimburse costs as opposed to going to
17 the funders for other things -- just try and find out what the position is.

18 MS FORD: I am told that these sums will go to compensating the funders for their
19 outlay, so it's not in any way a profit element, it is the outlay that has been made. I
20 think it's a matter --

21 THE CHAIR: I am not saying anything on that because I have made my position clear:
22 the present view of the Tribunal, subject to hearing anything else today, is that that
23 sum is not going to be touched today, and I have said if there are specific sums which
24 are needed such as last time, which is the costs of this application, that will be dealt
25 with, and no doubt you have a good prospect of getting that. If you want it for anything
26 else, it may be a much bigger argument.

1 But what I don't think we are going to be in a position today, if you want to have a result
2 today on everything else, is a ruling that that sum, that CFD Sum, can be accessed
3 until after the conclusion of all the proceedings, subject to liberty to apply.

4 I am not shutting the door completely on this, but I am saying, as of today, I am not
5 comfortable; and if I am not comfortable, I will probably need a few days' argument to
6 work out what should happen. I would much rather have that once we know the
7 ultimate result and we have a proper distribution plan and I know where the pounds,
8 shillings and pence should go. But I'm almost certainly not today going to allow
9 a payment out of anything like that, but on a future occasion you can apply, and we
10 can argue it.

11 But we are not going to be able to finish it today, it's just too complicated with too little
12 information. I need a lot more information before I can make such an important
13 decision. You have also this argument in principle whether the funders should be paid
14 out prior to distribution. I know what the agreements say, but we all know that it's
15 a controversial issue as to whether or not funders should be paid out prior to
16 distribution to Class Members. It's a controversial point, and it's a point that can be
17 argued both ways. There are perception issues as well, I'm just putting it on the table
18 for you.

19 Mr McLaren, you represent the Class Members. If the Class Members hear: "oh,
20 I read in the newspaper yesterday that £8 million has gone to pay for the fees, costs
21 and disbursements for everyone, when are we going to get some money? I thought
22 we've lodged our interest on the website", a particular company may say: "we've got
23 thousands of cars. Are you saying you are going to pay off these people before you're
24 even talking about what we are going to get?"

25 There are these sorts of issues. They're there, we can't pretend they're not there.

26 Mr McLaren, he's an intelligent guy, he knows that's going to be an issue, and he

1 doesn't want, if I was him, the responsibility of him paying out to everyone else before
2 Class Members. He wants us to make that decision because then he can say that's
3 what the Tribunal did.

4 But I am not happy to allow that to happen today. I may change my mind and once
5 we've had the trial and we know where we are, it's so much easier. But to do it now
6 is just fraught with problems. I've just put it on the table for you, I am totally frank with
7 you where we are. If you want some sort of erudite ruling with all the detail considering
8 all the authorities, you can have that, of course you can. I am perfectly capable of
9 doing that. But the result is likely to be exactly the same.

10 But I am not shutting the door completely because I am saying there's liberty to apply
11 and all that sort of stuff, and you've seen the decision I gave last time and the indication
12 as to where I feel we are. I may be a lot happier if I had the result of the trial or where
13 we are with the other Defendants, because it could be that you are going to have
14 a mother of all victories and it will be a great result and then everyone is going to be
15 happy, we are going to get lots of people making claims.

16 That to me would be a great success and that would make me very happy. But there
17 are other possibilities, and it may be somewhere between a mother of all victories to
18 complete catastrophe. It may be somewhere in between. Where it is between will
19 dictate where we go on these issues.

20 So, I think that's where we are, but Mr Marven has had the break to take instructions
21 on this, so let's ask him as to where he is on this and we will come back. Mr Marven,
22 you know I am not shutting the door on this.

23 MR MARVEN: No, I understand that.

24 THE CHAIR: I am not against the funders, because I know how important the funders
25 are, and I said that in our last decision.

26 MR MARVEN: It's our position that it's appropriate there's an immediate payment.

1 THE CHAIR: I know that's your position, of course.

2 MR MARVEN: I put it in my submissions that as a general principle, once there is
3 a recovery, there should be a payment out to stakeholders. You posit a trial shortly,
4 but of course that may be subject to an appeal, et cetera.

5 THE CHAIR: You never know, I agree.

6 MR MARVEN: One of the incentives for everyone in settling, including the
7 stakeholders in supporting it, is an immediate payment out, so that does remain my
8 position.

9 Is there anything else you want to hear from me at this stage?

10 THE CHAIR: But look, we are going to have to resolve this, whether or not this
11 settlement is going ahead today or not, okay? Your points, and to get full argument
12 and get to a position where you are going to get where you want to be, I don't think
13 that is going to happen today. Let's just be realistic. This is not a thing you can deal
14 with in five minutes. If you want to have a proper application which is going to be
15 considered, it's not today, and that's why I said you can have liberty to apply. But
16 I really do think everyone needs to know today whether or not they have a settlement.
17 Tomorrow is the day for the skeleton argument and if they don't know where they are
18 today, they could be in real difficulty because if the settlement is disapproved, then
19 they know they have a trial to prepare.

20 If it's approved, then they know there's no trial to prepare and there is going to be
21 enormous costs that will be incurred on everyone in this room if you've got a trial to be
22 prepared. You do need an answer today, so it's up to you as to whether you want to
23 push it. Of course you can push it, I am never going to stop anyone from saying what
24 they want to say.

25 But you know what my concerns are, and you saw what I said in the judgment before,
26 and I am not convinced at this stage that we've got to a position whereby I know

1 whether or not these proceedings are a success. And this type of application needs
2 a lot of consideration. I gave a lot of consideration to your last application, I gave you
3 a detailed ruling on that, and we dealt with quite a few issues of principle in there
4 which, by and large, are actually favourable for you, so you have that benefit from last
5 time round.

6 But it's up to you. If you want to make your submissions, you can make them now if
7 that's --

8 MR MARVEN: (inaudible), thank you.

9 Firstly, we say this is significantly different from last time. Firstly, the evidence is that
10 the level and the proportion of settlement is of a different order of magnitude. This
11 isn't just peripheral to the main fight, this a very substantial settlement. And taking the
12 two together, therefore, it represents a very substantial measure of success in these
13 proceedings.

14 Secondly, of course, the procedural position is different. Last time, as your judgment
15 said, there had already been an approval application and effectively there was
16 a distinct follow-on costs application. Here, there are simply two applications for
17 approvals of a settlement; and as part of that application, it's been agreed that it is
18 appropriate for there to be payment out to the stakeholders.

19 You've seen in the evidence, we have said a great deal has been spent, nothing has
20 come back, the risks continue, and duration risk is a significant factor. Therefore, in
21 my submission, it is appropriate that an immediate payment out to the stakeholders is
22 included as part of the application to resolve this dispute.

23 I won't belabour the point because obviously my clients have their own interest, but
24 everybody else has considered this, and you've seen it in the statements why it's
25 considered appropriate to have a separate sum for stakeholders, et cetera.

26 THE CHAIR: I understand, I have read that. At the end of the day, though, whatever

1 Lawrence or anyone else says, it's our responsibility, and we are the ones to form
2 a view. Although Lawrence says it's all fine, we've already identified a number of
3 issues which are fairly fundamental which need to be sorted out. That's why you come
4 to us as a Tribunal.

5 So, the mere fact that anyone has expressed views that this is all fine is helpful
6 because of course I take that into consideration. But at the end of the day, it's our
7 responsibility to get it right and if there are holes, and I think we have identified some
8 holes which are being addressed today, then they have to be picked up. The fact that
9 other people haven't picked up these holes is an indication that the tree needs to be
10 shaken. That's what we are doing.

11 MR MARVEN: Of course, that is your prerogative and I entirely respect that --

12 THE CHAIR: But I do respect the views which have been expressed by Friel and
13 Lawrence, et cetera, of course I do. But on issues like this, it's basically down to us
14 as to at what stage do we deal with the costs, fees and disbursements. And the
15 amounts involved at this stage are very large for costs, fees and disbursements, and
16 they are very large relative to what may actually be paid out to Class Members.
17 Because at the moment, we do not know what is going to be paid out to Class
18 Members, yes.

19 MR MARVEN: Sorry, yes. Firstly, I accept the stakeholders' sums are significant, but
20 that's because a lot has been spent on this litigation. As a proportion of the overall
21 settlement, the amount which will go to stakeholders, as we say in our evidence, is
22 less than the median would seem to be in jurisdictions which have a more developed
23 class action jurisdiction than we do.

24 So, I mean -- sorry, you've seen the figures in the evidence, I know it's 36 per cent of
25 the WWL settlement sum, and it's 43 per cent of the K Line settlement sum. Even
26 taking as the total settlement sum of the lower figure after the distribution costs have

1 | been deducted, if I added those into the total value of the settlement, those
2 | percentages would be slightly lower.

3 | We've also -- I am sure you've seen it -- put in evidence, for example, the Australian
4 | Galactic Seven case which endorses payments pre-distribution to stakeholders as
5 | being the correct general principle.

6 | THE CHAIR: Yes. Well, it may or may not be. I think that payment pre-distribution in
7 | my view is fact-specific and there is no absolute bar to payment pre-distribution. I think
8 | we got to that stage last time. So, on that point of principle, I fully accept we have
9 | jurisdiction to order payment pre-distribution, but how I exercise that, or how we
10 | exercise it in any particular case, is up to our discretion.

11 | Of course, I know you want to get your return as soon as you can, I understand that.

12 | MR MARVEN: Not now, it may not be early next year --

13 | THE CHAIR: You have a fear, and you may or may not be right, but you have a fear
14 | that you get judgment, let's say in March or whatever it is -- that may be a bit optimistic,
15 | let's say we get judgment in May -- and then you say, "I am stuck now because we've
16 | had this trial now and they want to go to the Court of Appeal" and then you say, "When
17 | is that going to be heard?"

18 | MR MARVEN: Quite.

19 | THE CHAIR: Then you say, "We'll go to the Supreme Court". But obviously, you can
20 | come back and say, "Look, you made this decision because you said let's wait to see
21 | what happens in the trial". You can say, "We've had the trial now" and there is
22 | a distribution plan now, then that's fine. Because I very much doubt that if the Tribunal
23 | gives judgment that the Class Representatives at that stage will hold back on coming
24 | to the Tribunal with a proper distribution plan. At the moment, I have looked at what
25 | has been said on distribution and I am not saying it's not a proper distribution plan, but
26 | it's something that needs a lot more work on it and we need more information on it.

1 So, we are nowhere near what is or should be a distribution plan.

2 We're still fairly early on, but I can envisage a situation where we have a hearing, we
3 look at the distribution plan and you say, "Look, Malek, you saw me last time, we now
4 want some money. You've got the distribution plan, and we've got empirical evidence
5 as to what the likely take up is, can we have some money?" I can see you would be
6 in a much stronger position than you are today.

7 I am not unsympathetic to the position of the funders. As you say, I support the whole
8 concept of funders and what they are doing to the market and the industry. I fully
9 appreciate they are very important in this modern day and age, but I am not happy
10 about doing it today. I am going to give you liberty to apply, and you can come back.
11 You know what we said last time, and you can exercise your judgment in advising your
12 clients as to (a) when you want to apply and (b) how much you are going to ask for
13 and for what purpose.

14 That is all you are going to get from us today, and that is better than it could have been
15 because we have three options, don't we? We can either say, yes, you have it today,
16 you go back happy; or I say I am going to give a ruling now that you are not getting
17 anything until right at the end of the case and you are going to be after the distribution
18 to members, in which case you will go back home and say, "Look, I've had a bad day".
19 Or you can say, "I have come up with something that leaves open the possibilities with
20 a liberty to apply", and you say "Well, it's fine, we can live with that".

21 But you are going to have to take instructions over the lunch adjournment --

22 MR MARVEN: I think I am, yes.

23 THE CHAIR: -- and see where we are. We do have other things on the agenda to
24 deal with, as you know. But it's always a great pleasure to hear from you. You are
25 always very precise and clear, and that certainly makes my job a lot easier than it
26 would otherwise be, and your skeleton was very helpful.

1 MR MARVEN: If I take -- can I reserve -- I think it's probably best if I have a discussion
2 with those instructing me.

3 THE CHAIR: Yes, you take -- and we can move on to other things on the agenda.

4 MR MARVEN: And if I can come back --

5 THE CHAIR: Yes, of course you can.

6 MR MARVEN: It's best I take instructions, but if I can come back after lunch that might
7 be more efficient --

8 THE CHAIR: Yes, that's absolutely fine.

9 Okay. So, having dealt with that, I want to ask you a question about costs, fees and
10 disbursements, namely what happens if, let's say, you either don't get any further
11 money in the pot or there's a judgment with more money in the pot, as another
12 alternative, and you say: look, Malek, I now want you to approve the payment out of
13 costs, fees and disbursements?

14 Because generally the Tribunal, unless you tell me I have it wrong, we have power
15 over what happens to this money and as to that money, it is under the supervision of
16 the Tribunal and that that money cannot be paid to anyone unless we say it can be,
17 yes? Assume that is the premise.

18 Let's say at the end of case you say: "look, Malek, the situation is where we are", and
19 it can be a number of situations to meltdown to great victory or somewhere in between,
20 and I look at this and say: "well, looking at these figures --", and let's say the pot is
21 £20 million in cost, fees and disbursements, and I say, "actually given the results of all
22 this, I have looked at everyone's figures, I have looked at the rates of return, I think
23 that actually you should be paid out, lets say, £17 million, okay, for everything", and
24 that the cost, fees and disbursements amount that has been pulled in under -- let's say
25 settlements is "20 million and so there is a "3 million excess, okay. What happens to
26 that "3 million excess?

1 Now the possibilities are, one, it goes back to the people who paid it because the court
2 hasn't approved that money to be paid out or, two, it goes back into the sums payable
3 to the Class Members or, in default of Class Members, it goes into a charity to be
4 approved by the Tribunal. Because I am concerned that by just making a blanket
5 order now you are locking that money in, in circumstances where the Tribunal is not
6 satisfied as to the overall success of the case and the Tribunal wants to have the ability
7 to be flexible as to what happens to that sum.

8 So, you understand the scenario and I would like to hear where you are on that
9 scenario. So, we get the situation you are at, the court, I have been through it, and
10 I have said, okay, this can go to funders, this can go to other stakeholders, this is
11 where we are, there's £3 million change. What happens to that £3 million change?

12 MS FORD: So, my understanding is that there is a provision for a reverter or what
13 equates to a reverter within both these agreements, but that's confined to the sums
14 that are the Deferred Damages Sum or the --

15 THE CHAIR: Exactly. I understand that. That's why I posed the question.

16 MS FORD: And therefore, if sums that are presently identified as CFD Sums were not
17 to be paid out, there –

18 THE CHAIR: I.e., not approved.

19 MS FORD: Not approved, there is no present provision under these agreements for
20 those sums to go back to those who paid them. So, certainly on the face of the
21 agreements as presently drafted, the reverter does not apply to those sums.

22 THE CHAIR: I am not going to impose a reverter because that means you are going
23 to get less – potentially a smaller pool, unless someone persuades me otherwise.

24 MS FORD: We do not seek to do so.

25 THE CHAIR: No. But the other possibility is that it goes into the pot for Class Members
26 or distribution costs, but I think we've already covered that, okay, that's already

1 covered now.

2 MS FORD: It's accepted.

3 THE CHAIR: Or it goes to whatever the charity is that has been referred to in
4 Mr McLaren's evidence. That's the other possibility.

5 MS FORD: Yes.

6 THE CHAIR: But what I am unkeen about is to have it all left open now, that if there
7 is a gap that there is no mechanism for dealing with that gap. So, I don't know whether
8 that's another thing for you thinking about getting instructions on, but I will want that
9 gap to be resolved. There are some very simple mechanisms that can be put in, either
10 in the order or in the settlement agreement or both, and your side is quite good at
11 coming up with wording, that can cater for that possibility.

12 But, of course, you are going to have to speak to Mr McLaren and Scott+Scott, and
13 see what they say and then discuss it with anyone else who is interested, so that when
14 we come back at two we can deal with that element, okay.

15 MS FORD: Yes, I can take instructions.

16 THE CHAIR: Now let's look at where we are on the list. So, on the subject of those
17 points, let's look at issue one: is the settlement sum in each case within a reasonable
18 range such that, in broad terms, we should approve it, subject to looking at the detailed
19 provisions of the settlement?

20 At the moment you can be satisfied that I am satisfied and that we are all satisfied on
21 1, subject to the points we've already dealt with today. So, I will put to – subject to
22 outstanding points and letters, okay.

23 What is the split between damages and costs, and is the Tribunal satisfied in each
24 case there has been a proper apportionment between the two?

25 Well, I think on that one, that is going to be dealt with by whatever – if we can agree
26 a mechanism, then – because I am not satisfied at the moment, there is a proper

1 apportionment between the two. I can explain why, but the cost figures and the
2 percentages are relatively high, and they are much higher than under the CSAV
3 settlement. I am not saying they are wrong, I am not saying they are right, but they
4 are much higher. But if we have the mechanism that we've just discussed, it is not
5 a problem. So, I will put: subject to a mechanism for excess over approved, then no
6 issue, okay.

7 Is it appropriate to make a barring order? We've dealt with that, so I can tick that,
8 subject to seeing the letters that are being drafted at the moment.

9 Should there be a distribution out of the damages sum or should that be delayed to
10 a later stage?

11 Well, in a way we've dealt with that already because you are not in a position to do
12 any distribution, we've got no proper distribution plan, you sensibly want to wait until
13 the result of the trial, and that is absolutely fine, so I can tick that one.

14 Should the K Line settlement include a cap in each case, a non-cooperation clause?

15 The answer is, removed already. I will put in principle no, okay.

16 What is the impact of the lack of a distribution plan?

17 Well, I think one of the impacts is that it makes it very hard to approve payments out
18 and that it's very hard to know what the likely distribution – the likely take-up is going
19 to be and the amount that each person is going to have. So, I think it creates a number
20 of uncertainties, but I think the things that we have been dealing with this morning deal
21 with those uncertainties so everything can be managed within a sensible revised
22 settlement agreement or revised order.

23 Are the provisions in relation to costs suitable and should the allocation of costs
24 between stakeholders and the payment out to them be permitted now?

25 And I am saying no, but liberty to apply, as per the discussion with Mr Marven, but we
26 have to see where he is because he may want to roll the dice and then see where we

1 are on that. But I am not encouraging him, I am not discouraging him, he is free to do
2 what he wants to on that.

3 Then let's have a look at the test. Shall we go through rule 94.

4 MS FORD: Yes. In the authorities bundle?

5 THE CHAIR: Yes.

6 MS FORD: Tab 10.

7 THE CHAIR: Tab 10, thank you very much.

8 MS FORD: Page 296.

9 THE CHAIR: You have complied with 4, haven't you?

10 MS FORD: Yes.

11 THE CHAIR: 8 we will come back to, once we've figured out the outstanding moving
12 parts.

13 Then I don't think there is anything else -- I think we've covered all the main things,
14 unless, Ms Ford, you want to say anything else. What I suggest we do is you get all
15 your instructions, and we come back at two. If everything is fine, then you will have to
16 give me a few minutes and then I can work out what I am going to say for the ruling.
17 But on the ruling, it's going to be rough and ready for today. I will tidy it up once the
18 transcript comes back. But what I currently intend to do is to skip the first half, which
19 is set out the background, et cetera, and the law, because I think you know what the
20 law is anyway, and then go straight into the tribunal's analysis of the seven issues and
21 deal with the specific things I am meant to deal with as I go along. I think your skeleton
22 is actually quite helpful in pointing to where each one is satisfied.

23 So hopefully I will be able to give a ruling this afternoon, unless I sort of chicken out
24 and I don't do it, but I think the likelihood is that you deserve a ruling today, for the
25 reasons that I have said already, that you just don't have time. History keeps repeating
26 itself, that I get these applications shortly before something very expensive is going to

1 occur and a decision has to be made, but that's the scheme of things. People don't
2 really think about settling until it is quite late in the day. But it does mean that things
3 like Mr Marven's application really cannot be fully argued and developed with
4 a properly reasoned decision as to why I would refuse that application today, if
5 pushed. But, of course, if it is pushed today, then I am going to have to try and see if
6 I can cover everything, but it may be a late night for all of us but we will see where we
7 are when he comes back at two.

8 I am not saying I am not going to deal with it. I am always happy to deal with whatever
9 is thrown at me, just as you are happy to deal with whatever is thrown at you. So, we
10 will come back at two, see where we are. If there are any letters coming through, can
11 you just do it all in one go.

12 MS FORD: Yes.

13 THE CHAIR: So, try and get all the letters through. If you say: look, Malek, I need
14 a bit more time because we are still working on the letters or we are still working on
15 the wording, then don't come back at two, just ask for a bit more time, because I do
16 want -- I can't give a ruling unless all these bits that I have raised today are covered.
17 All right. So, we will rise. But thanks very much for all your help today as ever, and
18 the same with everyone.

19 (12.35 pm)

20 (The luncheon adjournment)

21 (2.53 pm)

22 MS FORD: Sir, we are grateful to the Tribunal for your patience while we've been
23 trying to sort things out.

24 THE CHAIR: That's all right.

25 MS FORD: Before I start handing up sheets of paper, may I make one clarification
26 concerning the contents of Mr Lawrence's report. The Tribunal was obviously

1 summarising at a very high level when you referred to it before the lunch adjournment,
2 but we are just concerned to ensure that anyone watching who's not had the
3 opportunity to read the full contents of his report were not to be left with the impression
4 he had said it's all fine. Obviously as the Tribunal is well aware --

5 THE CHAIR: Let me just make it clear: Mr Lawrence is well known to the Tribunal.
6 He is a professional, he has done a good job. Insofar as we've identified things which
7 need to be clarified, that's for us and that's fine. Of course he has not said it's all
8 one-sided, he has tried to balance the good elements and the bad elements, and we
9 as a Tribunal are aiming to get the best out of it. He is looking at something which is
10 presented to him to say: is it fair and reasonable in your view, and he comes to his
11 view. That isn't binding on us, but of course we -- we have utmost respect for
12 Mr Lawrence, he's a good guy, and he knows what he's doing.

13 MS FORD: Sir, I am grateful for that. The nuance in particular we had in mind is he
14 did of course draw the tribunal's attention to both the distribution costs issue and the
15 policy issues relating to the payment of CFD Sums at this stage of the proceedings.

16 THE CHAIR: Yes, exactly. But what he didn't do, because he couldn't, is come up
17 with what the solution should be.

18 MS FORD: Absolutely, and he fairly recognised that it's a policy issue for the Tribunal.

19 THE CHAIR: Yes, exactly.

20 MS FORD: We just wanted to make clear some of these matters -- there was
21 a concern that the contents of his report might not have been fully appreciated to those
22 who had not had the opportunity --

23 THE CHAIR: You are right because you are saying that some people may see the
24 transcript of this and get the wrong impression, that's fine.

25 So, you've got something to hand up anyway.

26 MS FORD: We have a number of sheets of paper. The first is the agreements which

1 have been reached as between the class rep and WWL, and the class rep and K Line
2 concerning the amendments to their respective settlement agreements.

3 THE CHAIR: Let's get this document and the settlement agreements up at the same
4 time so I can just go through it. No, you have actually set out the clause --

5 MS FORD: We have tried to make it a stand-alone document.

6 THE CHAIR: Yes. I am happy with 2, so I can tick that one. Okay. Paragraph 3, yes.
7 (Pause). Yes. On 4, okay, "Shall be applied as directed by the Tribunal". In the
8 absence of agreement, I don't want it to be argued later that actually you can't direct it
9 to be paid to charity if there's a --

10 MS FORD: Yes. To be clear, certainly our understanding of the position is it's not
11 intended to fetter the Tribunal in any way, it's actually intended to give the Tribunal the
12 maximum discretion. So, it could go to charity or it could direct that it be part of the
13 unattributed damages to go to the class, or --

14 THE CHAIR: Yes, exactly. There are a lot of things it could go to.

15 MS FORD: Indeed.

16 THE CHAIR: Okay. I am going to put in in brackets at the end of that:
17 "Including being applied to the benefit of Class Members or charity."
18 So, in case I am not around, whoever looks at this will realise that that is what I have
19 had in mind as possibilities.

20 MS FORD: So, no objection to that all, apart from Ms O'Keeffe points out there is
21 a defined term "Represented Persons" within the agreement, so may be rather than
22 Class Members, it would be "Represented Persons".

23 THE CHAIR: That's a good idea. Is it "Represented Persons" you put?

24 MS FORD: Yes. If you look at 2, there is a capitalised "Represented Persons" in the
25 wording there already.

26 THE CHAIR: Yes, okay. So, we'll do the same amendment on the other sheet. How

1 are you going to sort of memorialise all this? Are you just going to produce a new
2 settlement agreement, or are you going to provide an addendum? How are you going
3 to do it?

4 MS FORD: I think what was envisaged was provided the Tribunal were content with
5 the wording, we would essentially produce an addendum and just sign it.

6 THE CHAIR: I think that's easier.

7 MS FORD: Yes.

8 THE CHAIR: Okay. Just a query: when it comes to distribution, is the intention to
9 make a distinction between the monies being paid by a particular Defendant -- I mean,
10 to correlate the amount paid by a particular defendant and individual Class Members?
11 I got the impression last time there isn't an intention to do that.

12 MS FORD: There is no present intention to do anything like that, no.

13 THE CHAIR: So, we are not going to have a situation that there are going to be like
14 an element of sub classes. Let's say this case goes to trial and you have a car crash,
15 okay, and there's no more money coming in. We are not going to have a scenario that
16 Mr McLaren is going to say, "No, we have a distribution plan but the distribution plan,
17 we are now going to do it by way of Defendants, so the pot K Line is paying is only
18 going to be paid to certain Class Members who can show it's K Line".

19 MS FORD: No.

20 THE CHAIR: That's something I don't want, I just want to make sure -- we don't need
21 to put it in an order, but I think that would be wholly unmanageable and very difficult
22 to do.

23 MS FORD: There's no intention of doing that.

24 THE CHAIR: That's fine. We have that on the transcript, so that's fine.

25 MS FORD: The next piece of paper is the Tribunal requested an exchange of letters
26 between the Non-Settling Defendants and the Class Representative concerning the

1 terms of the barring order.

2 THE CHAIR: Let's have a look at that. I think it's quite important to get this one right.

3 MS FORD: The first letter is the one from Arnold & Porter on behalf of --

4 THE CHAIR: Yes, let me just read that. (Pause)

5 Is Arnold & Porter happy with the caveat you have put in?

6 MS FORD: We have not had a response from them. To be fair, I think they've been --

7 THE CHAIR: If someone is standing up, that's fine.

8 MS NGUYEN: It might be helpful, sir. I appear on behalf of the Non-Settling

9 Defendants, and I can confirm we are happy with the points in paragraphs 1.3 and 1.4

10 of that letter.

11 THE CHAIR: Okay. So, if you can put that in a letter, okay.

12 MS NGUYEN: Of course, yes.

13 THE CHAIR: It's all clear there for posterity. That's very helpful, thanks very much.

14 MS FORD: Then the final document to hand up is the letter which is the undertaking

15 in respect of the Guaranteed and Immediate Damages Sums. (Handed)

16 THE CHAIR: We are amending clause 4.3, aren't we? So -- yes, okay.

17 MS FORD: Yes, 4.3 has been amended.

18 THE CHAIR: Yes, that's really helpful. Ms Nguyen, thanks very much for --

19 MS FORD: May I make clear -- sorry, one further point to make on this. This is in the

20 form that will be signed by Scott+Scott and all the counsel team acting on behalf of

21 the Class Representative, and Mr Marven does have a submission to make on behalf

22 of his clients.

23 THE CHAIR: Okay, Mr Marven, let's hear what your submission is.

24 MR MARVEN: Yes. Briefly, my clients are not, at the moment at least, in a position

25 to confirm that they are prepared to sign this. There is a concern, which I hope the

26 Tribunal will understand, this has all come fairly suddenly.

1 THE CHAIR: Of course, it has, and you needed to take instructions.

2 MR MARVEN: But there is a concern that on the basis everything is going to be looked
3 at in the round, if for the sake of argument after trial the claims are dismissed, it may
4 be more appropriate to use some of the guaranteed sums, for example, for adverse
5 costs, and that may have knock-on consequences as to what my clients would seek
6 to recover from the pot.

7 So, I am afraid at the moment at least, we are not in a position to confirm that we are
8 prepared to sign this.

9 THE CHAIR: Okay. So, we have no settlement at the moment as of now, so we'll
10 have to see if Mr Marven can get instructions because he says he hasn't had time,
11 and we'll see where we are.

12 MS FORD: Sir, yes. Certainly for our part, we would ask for the tribunal's indulgence
13 to try and allow Mr Marven to get the instructions.

14 THE CHAIR: Yes, exactly. No, I understand his point. He needs to get instructions --

15 MR MARVEN: It's not -- sorry. Of course, if it's a question of timing, I don't want to
16 give the Tribunal the false impression that if you give me 20 minutes, I am going to
17 come back and say it's signed. I have expressed a concern I have as to why it would
18 be more appropriate to deal with it in the round at the end, and if the Tribunal has any
19 comment or observation it would like to make on that submission, my clients are
20 listening, albeit virtually.

21 THE CHAIR: Yes, but look, the thing is, if things aren't clarified now, you get problems
22 further down the line. And as part of this whole settlement, I need to know whether it's
23 fair and reasonable; and in determining whether it's fair and reasonable, I need to
24 know what is going to happen to the damages sums. If the damages sums are at risk
25 of haircuts by virtue of claims by the stakeholders who say that the total outstanding
26 is £45 million, then that puts a completely different complexion on what I am being

1 asked to approve.

2 I don't like the concept of having two bites at the cherry. You are trying to get the
3 benefit of having the split between damages and costs, but at the same time, you are
4 saying we want to get that benefit, but we also want to reserve the right further down
5 the line to bite out from the damages sum.

6 That's just not going to be acceptable. But if you want to run that, that's fine, but then
7 we have a problem and that will have to be resolved one way or another.

8 MR MARVEN: Yes.

9 THE CHAIR: And time is very short, that's the problem.

10 MR MARVEN: We are not, I would submit, trying to get two bites of the cherry
11 because, in the light of the indication the Tribunal gave before, we're not going to get
12 the first bite.

13 THE CHAIR: Yes.

14 MR MARVEN: So, it seems to us, consistent with that, that they should all essentially
15 be on hold, but no doubt --

16 THE CHAIR: Yes, but I can't leave it on hold because that would mean I will have no
17 clue at all as to what is in the pots because you are leaving the situation that the pot
18 is a disappearing pot, or potentially a disappearing pot, because you can come back
19 later when it comes to distribution and say, "Actually, we want to take this guaranteed
20 sum", which is part of the attraction of approving a settlement at the levels it is.

21 If the settlement -- there is a big haircut on this settlement already relative to the
22 potential amount of damages that can be awarded. That is something clearly your
23 clients were happy with at the time you no doubt approved as funders what the
24 arrangements are. But if you are saying, "We want to have the right to take a further
25 lump out of it and potentially disappear", it's not a satisfactory situation.

26 So, I think you are going to have to -- your clients are going to have to come off the

1 fence on this and if they are not going to come off the fence, then we are probably not
2 going to have a settlement that's agreed. And that is -- you know, we all want some
3 sort of settlement. Your clients are probably going to be the biggest beneficiary of the
4 settlement from what I can see, and you now face a prospect of not having
5 a settlement at all.

6 MR MARVEN: Well, I shall take the Tribunal's -- if I may say one thing, obviously any
7 application we did make for any payment of anything would be subject to the
8 Tribunal's --

9 THE CHAIR: I know but --

10 MR MARVEN: -- one application we did make subject to the tribunal's protection at
11 a later date.

12 THE CHAIR: -- but I am not happy with that because, look, we are talking about the
13 Guaranteed Damages Sum and the Immediate Damages Sum, okay. That's what we
14 are really concerned about. And that in order to approve this settlement I need to
15 know that at the very least, given the haircuts from the figures that potentially you could
16 be awarded at trial, that that sum is either going to Class Members or it's going to
17 a charity approved by us. If I don't have that, then this settlement is like a three-legged
18 chair, well, a three-legged something or other that is just not going to work.

19 MR MARVEN: I will then need an opportunity to take further instructions.

20 THE CHAIR: Yes, I think you do. We'll see where we are. Look, I am not trying to
21 push you around. I am just trying to get this done. And it's in your clients' interests,
22 probably more than anyone else, that we do get this done. I know it's not your fault
23 because you are limited by the instructions you get, but I will retire for another sort of
24 half an hour until 3.45 to see where we are, because if I am going to grant a settlement
25 I have to have time to give the reasons why I am doing it today; but if I am not going
26 to grant it, then we can all go home and we know where we are.

1 So, I will rise. Thank you.

2 (3.13 pm)

3 (A short break)

4 (3.49 pm)

5 THE CHAIR: Yes, Mr Marven.

6 MR MARVEN: Sir, we will sign.

7 THE CHAIR: That's fine. I didn't want to put pressure on you, but this is a settlement

8 I think we all want, really, and I know your clients are worried that at the end you might

9 get short changed or something. I don't want that either because I am not stupid,

10 I know that if your clients are short changed at the end of the day and can't make

11 a profit across their books, you are going to be out of the market. And I don't want

12 your clients out of the market, I would prefer to have them in the market.

13 MR MARVEN: I am sure they are pleased to hear that. To be clear, I am speaking

14 on behalf of the insurers as well, they are attending --

15 THE CHAIR: Yes, that's very helpful. If you can put that in a letter or something.

16 MR MARVEN: We are going to sign the letter --

17 THE CHAIR: You will sign that letter anyway.

18 MR MARVEN: Just a small matter of housekeeping. There needs to be a slight

19 change in the engrossment to the way the insurers are described and who is agent for

20 whom. I am speaking for all the insurers, and I have instructions to say we will sign,

21 but that won't be controversial, that's just a slight change to the way they're described

22 and who is agent for whom, and so on.

23 THE CHAIR: That's all right. When we come to the mechanism for liberty to apply in

24 respect of costs, fees and disbursements -- I know I am looking at you, but this

25 concerns everyone. If it's something simple and straightforward, like the costs of the

26 application, then as long as I have a sort of summary assessment of costs type

1 | schedule, then I can look at it, assess it there and then -- there may be a haircut, I don't
2 | know -- and then you know you can take that sum.

3 | But I think it's probably reasonable in all the circumstances that when we talk about
4 | that schedule, it includes your costs as well because of the contribution you've given
5 | today, and the necessity for you to come to court today to deal with this.

6 | MR MARVEN: I am very grateful.

7 | THE CHAIR: So, when we get the schedule, if it can have the costs of Scott+Scott
8 | and your costs separately, then I can assess each bill separately and we can do it that
9 | way. Thank you very much.

10 | MS FORD: One very small typo I should just draw to the Tribunal's attention.

11 | THE CHAIR: A short typo, okay.

12 | MS FORD: Clause 3.1, which is the undertaking. It currently says --

13 | THE CHAIR: Wait. 3.1 of the undertaking, yes.

14 | MS FORD: It currently says in the second line, "Entitlement to payment from costs,
15 | fees and disbursements", and it should say "entitlement to payment of".

16 | THE CHAIR: That's fine. You make whatever changes you need because at the end
17 | of the day, you will submit it and if there is a problem, I will come back to you. At the
18 | end of today, we are going to have to go through the order, okay.

19 |

20 | (Ruling given but reserved for approval)

21 | THE CHAIR: That's all I can do in a day. There is probably a lot more to say, but
22 | that's all I can do in a day.

23 | MS FORD: I am grateful to the Tribunal for that. Does the Tribunal want to deal with
24 | the terms of the order now?

25 | THE CHAIR: I do.

26 | MS FORD: Notice, so the WWL order is behind --

1 THE CHAIR: Have you got a draft amended version, or not yet?

2 MS FORD: I am afraid we have not got that far.

3 THE CHAIR: Don't worry, that's fine. So, let's deal with the -- shall we deal with K Line

4 first.

5 MS FORD: K Line first.

6 THE CHAIR: Yes.

7 MS FORD: The draft order in K Line is tab 10.

8 THE CHAIR: Let me just get the order. What page is it?

9 MS FORD: Page 127, tab 10.

10 THE CHAIR: Yes.

11 MS FORD: It's already --

12 THE CHAIR: I am just looking at the appearances. You are going to have to change

13 that and ... Mr Marven's side seems to have been omitted, that needs to be in there

14 as well. You don't need to finally draft it, but just to get that highlighted that needs to

15 be done.

16 Then you need to add in references to the amendments to the settlement agreements

17 and the correspondence that we've had on the barring provision and the undertakings

18 letter, whatever, whatever you call it, so that is fine.

19 MS FORD: In the recitals to the order?

20 THE CHAIR: In the recitals, yes, get all that in the recitals. We are still looking at the

21 recitals.

22 Then let's go through the operative provisions and then when we say ... You see,

23 number 1, there is going to have to be a caveat to that, isn't there, to reflect the

24 amendment?

25 MS FORD: Yes, the terms of the settlement agreement as amended, pursuant to the

26 amendment --

1 THE CHAIR: Yes, as long as you do it. I trust you to get this right. You know what's
2 needed on that one. Yes, the damages sum. Nothing on two. Nothing on three, yes?
3 MS FORD: Agreed.
4 THE CHAIR: Does four need to be tweaked a bit to reflect the changes from today?
5 MS FORD: I think that may need to be revisited to reflect where we have now got to
6 on clause 4.
7 THE CHAIR: I think it does.
8 MS FORD: Yes.
9 THE CHAIR: So, you can amend that.
10 Yes, next one. Well, the stay is fine.
11 MS FORD: The stay should be fine. Opting in, opting out, hopefully --
12 THE CHAIR: That's fine.
13 MS FORD: There is a draft notice and perhaps we can come to that.
14 THE CHAIR: Yes.
15 MS FORD: So, the provision in respect of costs --
16 THE CHAIR: That needs to change.
17 MS FORD: Well, paragraph 8 says the payment. Paragraph 9 currently provides that
18 the cost payment shall be held in escrow. So perhaps that could then be amended to
19 reflect that any excess -- essentially the wording that has been proposed --
20 THE CHAIR: Yes.
21 MS FORD: -- in respect of the excess sums.
22 MR MARVEN: Sorry, liberty to apply, I think, if I understand the Tribunal, it's not quite
23 covered by the general liberty to apply, but I understand the Tribunal to want a liberty
24 to apply for the stakeholders in respect of costs, disbursements and ...
25 THE CHAIR: Yes, but doesn't everyone? It's not just -- it's all stakeholders.
26 MR MARVEN: Yes, yes. Sorry, I just rise to note (inaudible) because I don't think the

1 general liberty to apply in terms of enforcing the order at paragraph 11 is quite the
2 same.

3 THE CHAIR: No, I don't think it is. I think you are entirely right that we should have
4 a liberty to apply there along the lines I have already indicated in the ruling.

5 MS FORD: But in respect of costs specifically or?

6 THE CHAIR: But you know the points we've made about the costs, there's additional
7 wording, isn't there, that we need to put in about that if -- insofar as it's a sum that has
8 not been approved and is still available, that goes to Class Members or to charity.
9 That will need to be inserted.

10 MS FORD: Yes, so that would be additional wording we are envisaging putting in at
11 the end of paragraph 9, saying --

12 THE CHAIR: That's fine, you know what's needed and you can amend it, so that's fine
13 on that, okay.

14 "As between Class Representative and ... no order for costs in respect of that
15 application."

16 But I have already decided that your side and Mr Marven's side, the other
17 stakeholders, have liberty to apply in respect of the costs of this application to be taken
18 out of this sum, and so just get some wording. You've got liberty to apply in writing,
19 but both parties have to provide like a summary assessment calculation, and it will be
20 dealt with by the Tribunal on paper.

21 Anything else? If someone thinks of something, you can factor it in. If there is
22 a disagreement between anyone on the wording of the order, then just send me the
23 wording of the order with different colours, saying one party wants this, the other party
24 wants that, then I know whose it is and it's much quicker for me to approve it.

25 Okay, so that's that one, but we need to look at the other one now.

26 MS FORD: Yes. Tab 2 in the WWL bundle.

1 THE CHAIR: Yes, well, the same thing.

2 MS FORD: Yes, I think, broadly, one would expect the amendments to be the same.

3 THE CHAIR: Well, obviously 3 is going to be amended, yes, because we are going to
4 have -- or somewhere else we are going -- I think it's just the same sort of
5 amendments.

6 MS FORD: Yes.

7 THE CHAIR: Though I do think that this -- I am just looking at ... That's there, that's
8 fine.

9 But when we've got this bit about paragraph 9, it's the same issue as before: it's not
10 that -- that sum is not going to be held in accordance with the arrangements described
11 in that paragraph because we've amended that.

12 MS FORD: Yes, so that's again the one that would say -- include the wording that the
13 Tribunal has the discretion as to how to apply that, including for damages or --

14 THE CHAIR: But there's going to be some inconsistency between what we've ordered
15 and what's in Belinda Hollway's statement, isn't there?

16 MS FORD: Yes, well, we can take out the "in accordance with the arrangements"
17 wording.

18 THE CHAIR: Yes, I think we need to take that out. It's the same with the other one.
19 I do not want a reference to that witness statement because we've worked out exactly
20 what's meant to happen now.

21 MS FORD: Yes, we'll just refer to it being held in escrow and then include the wording
22 that the Tribunal has the discretion --

23 THE CHAIR: Correct.

24 MS FORD: -- when applying it.

25 THE CHAIR: Yes, everyone understands that none of this money is going to go to
26 anyone, unless it is approved by the Tribunal.

1 MS FORD: Yes.

2 THE CHAIR: The Tribunal will decide what's fair and reasonable as to what everyone
3 gets out of it, if we need to resolve that issue, and that any excess goes to the Class
4 Members or to charity, or whatever other direction the Tribunal approves. As long as
5 that's in there, that's fine.

6 MS FORD: Yes, so there is a typo in paragraph 12. We think it should be giving liberty
7 to apply to the Class Representative and "any Represented Person", which is the
8 version in K Line's.

9 THE CHAIR: Yes, that's fine, you can do that. That's fine.

10 I'm afraid to say I will want the order drawn up and made tomorrow. So that may mean
11 you've got a bit of work to do, and there is so many people to liaise with, but I want to
12 be in a position that I approve this tomorrow and then the order is made, you've got
13 certainty, and I can go away and think about other things apart from this case. Okay.
14 All right.

15 You did get the short straw, Ms Ford, today again, but it's been very helpful, you
16 answering all the questions, and we've come to a position where I think everyone's
17 interests are being met.

18 Does anyone else want to say anything? No.

19 Thank you very much.

20 **(4.52 pm)**

21 **(The hearing concluded)**

22

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26